12-1-2017

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Link to publisher version (DOI)
https://doi.org/10.15779/Z388S4JP42

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“locked together / in this small hated space”: Recognizing and Addressing Intimate Partner Violence Between Incarcerated Women

Emma Mclean-Riggs*

Intimate partner violence between incarcerated women has been largely invisible in legal scholarship and advocacy work. This Note attempts to assess the incidence and quality of intimate partner violence between incarcerated women from the incomplete and occasionally biased available data and then examines potential methods for reducing such violence. Considering several of the legal strategies that address intimate partner violence, this Note concludes that while facilitating women’s escape from their abusive partners and civil protection orders may be effective strategies for intervening in violence between incarcerated women, mandatory reporting structures and no-drop prosecution policies are ill-suited to the prison context.
1998: Get another new girlfriend who occasionally beats you up.
Be happy when she calls you her wife.
Go to the hole together.
Leave her for someone else who doesn’t beat you up.
Get out of the hole.
Get back with your wife.
Go to the hole again.
Graduate from a community college with honors.
[...]

2001: Get another girlfriend who is known for beating the hell out of her girlfriends.
Convince yourself that she’ll never beat you up.
End up being choked on your cell room floor when you’ve just gotten out of the shower.
Worry about your grandma’s health.
Wonder what your grandma will think if you end up a naked, dead lesbian in prison.
Hope that doesn’t happen.
[...]

—How to Survive in Prison, Yvette M. Lousill

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1. Yvette Lousill, How to Survive in Prison, ADOPT AN INMATE, https://adoptaninmate.org/2015/07/16/yvette-m-louisell-how-to-survive-in-prison [https://perma.cc/P394-B27B]. At age 17, Yvette Lousill was sentenced to life in prison without the possibility of parole.
INTRODUCTION

Intimate partner violence between incarcerated women has been largely invisible in scholarship and advocacy work. Due to the intersection of racism, homophobia, classism, and institutionalism in prisons, intimate partner violence (IPV) between incarcerated women is either entirely unseen, mocked as laughable cat fighting, or used as titillating entertainment. This Note argues that the failure to see IPV in women’s prisons and to employ the legal tools used to address IPV outside of prisons has left these vulnerable survivors without adequate tools to reduce violence in their relationships. Part I attempts to extricate the frequency and dynamics of abuse between incarcerated women from the incomplete and largely biased available data, beginning with a brief survey of the demographics of women’s prisons. Part I then describes the sexual and romantic relationships between incarcerated women in prison and violence within those relationships.

Part II proposes ways in which systems and reforms that have worked to address IPV outside of prison over the last thirty years could be adapted to the prison context. Part II first argues that decriminalizing sex between inmates is a necessary step toward any effective reduction of IPV in prison. Part II then examines three different approaches that have effectively combatted IPV outside of prison: facilitating survivors’ escapes from abusive partners; providing survivors with civil protection orders; and requiring mandatory arrest, prosecution, and injury documentation by medical staff. This Note argues that both facilitated escape and civil protection orders can be adapted to the prison context and would be effective in reducing IPV between inmates. The last Section discusses mandatory reporting and prosecution as tools borrowed from the domestic violence movement that are ill-suited to the prison context and argues that they should not be employed.

I. SEEING INTIMATE PARTNER VIOLENCE IN WOMEN’S PRISONS

A. Brief Survey of the Demographics of Women’s Prisons

Women are the fastest-growing incarcerated population in the United States, increasing at a rate 50 percent higher than that of men.2 There are approximately 105,000 women incarcerated in the United States.3 These women

are disproportionately women of color. Black women in particular are more likely to be incarcerated than any other racial group. Women are more likely than men to be imprisoned for nonviolent crimes, mainly drug crimes and property crimes, and more likely to have shorter sentences. More than half of women prisoners have children under the age of eighteen.

These statistics indicate that when discussing incarcerated women in relationships with incarcerated women, one is likely discussing a white or Black woman, incarcerated in a rural state (e.g., Oklahoma, Idaho, or Kentucky), serving a relatively short sentence for a nonviolent crime, and separated from her minor children. I mention these statuses because their particular combination and interaction will profoundly shape an incarcerated woman’s life and identity. The demographic and behavioral patterns that the next Section identifies will be highly sensitive to a variety of variables, for which there is insufficient data and research. However, there is no essential woman who engages in sex with women in prison. Each woman’s gender, race, and life experience of incarceration, sex and desire, class, religion, and disability will shape her experience of prison, and of whether and how she engages sexually and romantically with other incarcerated women. Understanding these differences is key to understanding how best to support incarcerated women in ending violence in their relationships.

widely by state, ranging from 142 per 100,000 women in Oklahoma to 12 per 100,000 in Rhode Island. See SENTENCING PROJECT, supra note 2, at 3.

4. Approximately 53,000, or 51 percent, of women prisoners are women of color. CARSON, supra note 3.

5. The reader will notice that I use “Black” instead of “black” but use “white” instead of “White.” I am following Kimberlé Crenshaw’s capitalization, in acknowledgement that Black people in the United States constitute a social group with common experiences, while white people in United States, although they have racial privilege, do not have a distinct culture. Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1244 n.6 (1993).

6. Approximately 50 percent of women incarcerated offenders are serving time for either a drug or property offense, and 35 percent are serving time for a violent crime. CARSON, supra note 3; see also SENTENCING PROJECT, supra note 2 (discussing sentence length).


8. See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex, 1989 U. CHI. LEGAL F. 139 (1989) (coining the term intersectionality to describe an analysis that accounts for how social statuses intersect and affect an individual’s experience of each status).

9. As described in the next Section, there is a dearth of research on incarcerated women’s relationships with other women that prevents sophisticated and sensitive empirical analysis.

10. This point is essentially an adaption of Kimberlé Crenshaw’s framework for theorizing violence against women of color, in which intersectionality is used to explain the interaction between many different combinations of axes of marginalization. See Crenshaw, supra note 5, at 1244 (“[M]any of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexual factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.”).
B. Sexual and Romantic Relationships in Women’s Prisons

The frequency of romantic relationships between inmates is a well-documented feature of women’s prisons. Between 1950 and 2000, various investigations and sociological studies report that between 30 percent and 95 percent of incarcerated women engaged in sex with another woman while incarcerated. Observers report that the vast majority of these sexual contacts took place within a romantic dyad. Women who engaged in these relationships (hereinafter referred to as queer women) did not necessarily identify as lesbians or as bisexual. However, approximately 4 percent of former state prisoners in 2008 identified as other than heterosexual.

Despite this frequency, most observers report that same-sex sexual and romantic contact in prison has been and continues to be heavily institutionally penalized. Almost all women’s prisons prohibit sexual contact between inmates,

11. This Note will not distinguish between prisons and jails unless a cited study does. Although differences in the institutional structures of prisons and jails are highly relevant to incarcerated women and their violent and non-violent relationships within them, they are beyond the scope of this Note. Identification and analysis of these differences would likely be difficult, given the well-documented paucity of prison ethnography in the United States. Loïc Wacquant, The Curious Eclipse of Prison Ethnography in the Age of Mass Incarceration, 3 ETHNOGRAPHY 371, 385 (2002) (describing the recent dearth of ethnographic prison studies).

12. Regina Kunzel, Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality 116 (2008); Barbara Owen, In the Mix: Struggle and Survival in a Women’s Prison 138 (1998). Although transgender women certainly engage in romantic and sexual relationships with other women in prison, these relationships occur in the vastly different social context of the men’s prison, which requires its own nuanced analysis and approach. This Note does not attempt that analysis here. Similarly, this Note does not specifically address the dynamics of transgender men’s relationships with women or other men in women’s prisons due to a lack of existing scholarship and space, but recognizes that not all of the people who experience women’s prisons are women and that some of these people are likely represented in the sociological studies on which it relies.


14. This Note uses the word “queer” to refer to women who have sex or romantic relationships with women. This is intended to respect the wide variety of personal identities present in this population. Research indicates that most of the women engaging in same-sex romantic relationships in prison identify as straight, rather than as lesbian or as bisexual. Some of the people incarcerated in women’s facilities identify as transgender men, men, or genderqueer. I make this choice in recognition both of the word’s previous use as a slur against lesbians, gay men, bisexuals engaged in homosexual behavior, and transgender people and of its reclamation as an identity term and in-group term of address. For a review of the history and usage of the word queer from the perspective of a young woman who identifies as queer and writes for a popular lesbian, gay, bisexual, and transgender website, see Cara, More Than Words: Queer Part 1, AUTOSTRADDLE (Jan. 9, 2013, 9:00 AM), http://www.autostraddle.com/more-than-words-queer-part-1-the-early-years-153356 [https://perma.cc/UA6S-G6GV]; Cara, More Than Words: Queer Part 2, AUTOSTRADDLE (Feb. 5, 2013, 3:16 PM), http://www.autostraddle.com/more-than-words-queer-part-2-growing-pains-155616 [https://perma.cc/JQS3-KXMP]. See also Riki Wilchins, Queer Theory, Gender Theory: An Instant Primer (2011) (providing an introduction to queer theory).


and many discourage women from forming close personal relationships that may become sexual. In some facilities, women are forcibly separated if they make any public display of affection, including hugging or holding hands. In others, women engaging in physical contact can lose their jobs within the facility or receive punitive work assignments. Sometimes, women caught engaging in sexual contact with other inmates are placed in solitary confinement (the Hole) or are denied parole because engaging in “sex play” is thought to indicate that they are “not ready to be trusted to mingle with others in [the] community.”

Despite the prohibition against same-sex relationships between incarcerated women, observers report that such relationships are generally socially acceptable and sometimes even socially preferred in women’s prisons. In the early 1970s, Ward and Kassebaum observed in one California women’s prison that incarcerated women who chose not to engage in same-sex romance or sexual behavior “must learn to live in a society dominated by homosexual ideology and behavior.” Modern observers echo this claim, finding that even those inmates who refrain from same-sex romantic or sexual behavior accept it as a reality of prison life. The fact that same-sex relationships are more acceptable inside of prison than outside it does not mean that queer women, especially those who are gender non-conforming, do not experience homophobia at the hands of other inmates. In most studies, a significant proportion of inmates express extreme disapproval of same-sex relationships and sexual contact.

Although recent research documents both the prohibition against same-sex relationships and the commonness of these relationships in women’s prisons, most of the research qualitatively describing these relationships is outdated, addressing relationships as they were during the 1950s–1980s. Due in part to sociologists’ increasing difficulty in gaining extended and relatively unfettered—or, at a minimum, some—access to prisons and to decreasing interest in the “sexual deviance” of same-sex contact in prisons as lesbians and bisexual women gained political acceptance, there is almost no current research...

Below, this Note reviews the available literature describing same-sex relationships in women’s prisons. However, before this summary, a caution and some hypotheses regarding this data. Knowing that the behavior of incarcerated queer women partly reflects, to some extent, the behavior of queer women outside of prison, the lack of data on incarcerated queer women is particularly glaring.\footnote{Kunzel, supra note 12, at 120 (describing how butch/femme dynamics emerged simultaneously in women’s prisons and lesbian communities outside of prison).}

Given the changes in lesbian, gay, bisexual, and transgender communities over the last thirty-five years, one might expect queer women to interact very differently in 2016 than in 1980. The rise and fall of the AIDS epidemic, the emergence of queer theory and fluidity in gender identification and performance, the increasing social acceptance of queer people, the rise of the transgender rights movement, and the legalization of same-sex marriage can be expected to have had significant impacts on same-sex relationships in women’s prisons.\footnote{Deborah Gould, Moving Politics (2009) (chronicling the AIDS epidemic of the 1980s and early 1990s and the LGBTQ social movement that emerged in response to it). See generally Paisley Currah, et al., Transgender Rights (2006) (describing the emergence of the transgender rights movement); Tom Smith, Nat’hui. Opinion Research Ctr. at the Univ. of Chicago, Public Attitudes Toward Homosexuality 1 (2011), http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sep2011.pdf [https://perma.cc/MM5M-W884] (finding that the proportion of Americans who believe sexual relationships between two adults of the same sex are “always wrong” fell by nearly half between 1973 and 2010, while the proportion who believe such relationships are “not wrong at all” quadrupled in the same time period); William Turner, A Genealogy of Queer Theory (2000) (discussing the emergence of queer theory and how it has been influenced by and altered gay and lesbian studies). See also Obergefell, 135 S. Ct. at 2584; Eric Lichtblau & Richard Fausset, U.S. Warns North Carolina That Transgender Bill Violates Civil Rights Laws, N.Y. Times (May 4, 2016), http://www.nytimes.com/2016/05/05/us/north-carolina-transgender-bathroom-bill.html [https://perma.cc/WRU3-65CV] (providing an example of the growing mainstream acceptance of the civil rights of transgender people in the United States).}

Outside of these intracommunity changes, other structural changes, including the rising incarceration rate, privatization of prisons, and continued criminalization of people of color, especially African Americans, have probably had a significant effect on prison social structures.\footnote{See generally Michelle Alexander, The New Jim Crow (2012) (chronicling the rise of mass incarceration in the United States and its effects on the Black community). See also John Whitehead, Jailing Americans for Profit: The Rise of the Prison Industrial Complex, HUFFINGTON POST (Jun. 10, 2012), http://www.huffingtonpost.com/john-w-whitehead/prison-privatization_b_1414467.html [https://perma.cc/56VS-KM7Y].
the space in between butch women and femmes. However, the increasing visibility of transgender men means that some women who might have identified or been described as butches or studs will now be described as or identify as transgender men. The rising incarceration rate and the privatization of prisons may result in the breakdown of the prison family system due to comparatively short drug-crime sentences and frequent prison transfers. These are only conjectures, supported by little to no data, and the reader may well contest them. This Note presents them less as empirical claims and more as a preliminary interrogation of this outdated, largely ethnographic work.

Gender is a major organizing force in women’s prisons as it is in men’s prisons. Women inmates have performed working-class, gendered presentations and relationship dynamics since these eroticized forms of gender play emerged in working-class lesbian communities outside of prison in the 1930s. Masculine-of-center (MOC) inmates, depending on their age, race, and status within the prison, are referred to as studs, stud-broads, butches, and little boys. These women may cut their hair short, masculinize their prison uniforms, wear men’s underwear, and interact with other inmates as social men. MOC inmates may also use a masculine derivative of their given name or a masculine nickname as a gender identifier. For example, an inmate from Tulsa named


33. OWEN, supra note 12, at 138; MCCORKE, supra note 23, at 143.

34. See generally KENNEDY & DAVIS, supra note 30 (describing the emergence and development of butch/femme bar culture in Buffalo, New York, from 1930 to 1960).

35. “Stud,” while originally a word used by both white and African American masculine women, is increasingly used only by and for African American women. See STUD/BUTCH, LESBIAN IDENTITY (Nov. 5, 2009), http://lesbianidentity.blogspot.com/2009/11/stud-butch.html [https://perma.cc/8JL5-CZHS].
“Allison” might become “Al” or “Tulsa.”36 Both white and Black feminine queer women are referred to as femmes and tend to use their given names.37 Although the majority of sources agree that most prisons contain about twice as many femmes as butches, these women have not been well studied, in significant part because they have been understood to perform gender correctly or “naturally.”38 Some researchers have noted that femmes perform “exaggerated” femininity, both in conforming their appearance to feminine ideals and in performing domestic labor for butch partners.39

These gender presentations are not static or universally cohesive. A particular woman may move from femme to MOC and back again, depending on who her sexual partner(s) and community members are.40 Women, and particularly MOC women, who identify as lesbians outside of prison are more likely to adopt an enduring gender performance.41 Butch and femme or stud and femme are usually correlated with sexual roles, in which the butch or stud typically is the “aggressive” or penetrative partner and the femme is the receptive partner. An aggressive femme, or “mermaid,” is a woman who dresses in a masculine manner and prefers to be the penetrative partner, but who keeps some feminine gender markers: for example, she continues to wear earrings or keep her hair long.42

The subcultures surrounding same-sex relationships differ significantly from those in men’s prisons.43 Dyadic romantic relationships are relatively common in women’s prisons.44 These dyadic relations, especially those consisting of women who identify themselves as lesbians outside of prison, can be enduring and highly stable.45 Usually formed around a dyad, women in prison organize into family structures called “state families” by inmates and “pseudo-families” by social scientists. In these structures, women adopt family relations

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36. This Note refers to women who adopt masculine gender identities and presentations as “masculine of center.” This term was coined by B. Cole, of the Brown Boi Project, and encompasses a wide range of identities including butch, stud, agress/AG, dom, macha, tom-boi, and transmasculine. It is intended to avoid the imposition of historically specific and contextual identities while capturing the social status common to women, or people perceived to be women, who present in a masculine manner. Kunzel, supra note 12, at 123; About Us, Brown Boi Project, http://www.brownboi项目.org/about-us [https://perma.cc/DY9S-PCP7]; Frequently Asked Questions, ButchVoices (June 13, 2011) http://www.butchvoices.com/faqs [https://perma.cc/57BB-Q8TB].

37. Kunzel, supra note 12, at 123.
38. Id. at 126.
39. Id.
40. Id. at 132–33.
41. Id.
42. Owen, supra note 12, at 143.
44. Ferraro & Moe, supra note 15, at 89.
such as mother, father, son, daughter, sister, or brother, depending on their
gendered identities.46 Like those outside of prison, these family relations shift
over time, and may dissolve quickly or remain stable for long periods and
withstand intense disruption, including changes in the incarceration status of
their members.47

C. Violent and Coercive Relationships in Women’s Prisons

Large-scale reliable data on intimate partner violence in women’s prisons
has not been collected because prison officials and researchers often do not
recognize inmate couples as in “real relationships” and data on relationships is
difficult to collect within prisons. As previously discussed, prisons have become
less and less accessible to social scientists. The controversial nature of same-sex
relationships and relationships between inmates and prisons’ sensitivity to bad
publicity about abuse within their facilities after the passage of the Prison Rape
Elimination Act make access for the purpose of studying prison sex even more
difficult.48 Even once a researcher successfully embeds in a prison, the
prohibition against intimate relationships between inmates makes asking direct
questions about IPV and soliciting candid answers difficult.49 Prison staff and
researchers, likely considering these relationships a temporary product of the
prison environment and subscribing to the widespread belief that women cannot
be violent toward other women or that such violence is not severe enough to
merit concern, may not capture such violence in their data collection.50

The limited ethnographic data on exploitative and violent relationships
between imprisoned women should be approached with caution given
ethnographers’ and subjects’ perceptions of the validity of same-sex
relationships between women, and ethnographers’ focus on the eroticized play
between MOC and femme inmates.51 These sociologists described same-sex
behavior as an importation of sex roles from the nuclear family into the prison,
casting prison couples and street families as “a reassuring mirror of gender
normativity and an assertion of dominant gender norms under difficult
conditions.”52 This lens, which disregarded studies indicating that the most
accurate predictor of same-sex behavior in prison was same-sex behavior out of
prison, positioned prison relationships as artificial responses to the prison

46. McCorkel, supra note 23, at 134; Owen, supra note 12, at 138.
47. McCorkel, supra note 23, at 134; Owen, supra note 12, at 138.
48. See generally James Robertson, Sex in Jails and Prisons, in Sex, Sexuality, and
(In)Justice 367 (Henry Fradella & Jennifer Sumner eds., 2016) (discussing the content and history of
the Prison Rape Elimination Act of 2003).
49. McCorkel, supra note 23, at 134.
50. See Betsi Little & Cheryl Terrance, Perceptions of Domestic Violence in Lesbian
Relationships: Stereotypes and Gender Role Expectations, 57 J. of Homosexuality 429 (2010)
(finding that people are likely to disregard violence between women but are less likely to do so when
the perpetrator is masculine).
51. See Kunzel, supra note 12, at 126.
52. Id. at 129.
environment rather than as relationships like those women formed on the outside.53

Alongside this strain of scholarship ran voyeuristic fascination with the sexual and gender deviance of MOC prisoners.54 Staff and scholars chronicled masculine-of-center women’s dress, mannerisms, and behaviors in terms perhaps more suited to pulp novels than academic studies or institutional reports.55 For example, one prison investigator wrote of one 1970s butch: “[e]very time you see Rusty . . . she just got a haircut. Her mannish-cut red hair is constantly slicked down as tight as she can get it, and she smells of barbershop perfume. . . . [She is] a handsome woman and would be even handsomer as a man.”56 This characterization reflects continued popular fascination with the prison bull dyke and eroticization of her relationship to incarcerated femmes, presumed by default to have been heterosexual outside of prison.57 A focus on eroticized sexual deviance may obscure healthy romantic relationships, patterns of power and control, and incidences of IPV within prisons, just as it did in early studies of queer communities outside of prison.58

Significant ethnographic work describes women who enter into sexual and romantic relationships out of material necessity. One might expect higher levels of violence in this kind of relationship, and ethnographic data appears to support this conjecture. In her groundbreaking ethnography of a women’s prison, Barbara Owen identifies three kinds of exploitative relationships between women.59 Per Owen, “emotionally exploitative relationships” are those in which a woman forms a relationship with another woman who has money or access to goods for the purpose of material gain.60 This category seems most poised to capture the dynamics of power and control considered IPV outside of the prison context. Owen’s interviewees described this dynamic in others but did not describe themselves as participating in such arrangements.61 Although Owen does not pursue exactly how relationships work within her identified power

53. Id. at 130.
54. Id. at 125.
55. Id.; see also Jordan Blair Woods, LGBT Identity and Crime, 105 CALIF. L. REV. 667 (2017) (tracing a similar intellectual genealogy of abusive scholarly representations of queer identity culminating in a scholarly “flattening” of the landscape used to theorize LGBT identity in the context of criminal law).
56. Id.
57. Id. at 132.
59. Owen, supra note 12, at 149.
60. Id. at 149–50.
61. Id.
dynamic, it seems plausible that the power dynamics of these relationships could result in the economically advantaged partner abusing her partner, or in the economically disadvantaged partner using power and control tactics to extract resources from her partner. However, given the interviewees’ reluctance to identify themselves as participating in these dynamics, it is possible that the dynamic is partly an invention of other inmates—perhaps to explain same-sex relationships.

Ethnographers provide more anecdotes of violence by MOC inmates against their femme partners. Ward and Kassebaum report that MOC women often exerted a great deal of control over their femme partners, quoting one incarcerated butch woman as saying, in reference to her femme partner: “I don’t like her showing any independence—when I tell her to do something, I expect her to do it . . . it’s almost exactly the way a man feels toward a woman.”62 Almost thirty years later, Mary Bosworth reports a similar gendered violence. One of her interviewees described a relationship between a MOC lesbian and a femme on her floor: “Physically, and mentally, [femmes] take it that their girlfriend is like a man, and they deal with it like a man. . . . [O]n our landing one time[,] she really thought that she was the man. She was beating up the girl [femme] in her room.”63 This is the only anecdote regarding IPV that Bosworth captures.

However, the emerging consensus among scholars and activists working with IPV between queer women who are not incarcerated is that IPV is more legible to a heterosexual gaze rather than more frequent.64 Therefore, this data should be approached cautiously. Additionally, the fascination with MOC women and femmes’ eroticized power play and the powerful, homophobic image of the bull dyke might further distort this data.65

63. Bosworth, supra note 19, at 151.
64. See John Hamel, Gender-Inclusive Treatment of Intimate Partner Abuse: Evidence-Based Approaches 58 (2014) (discussing the conflicting results of two studies examining if MOC women are more likely to abuse their feminine-of-center partners rather than vice versa); Adam Messinger, LGBTQ Intimate Partner Violence: Lessons for Policy, Practice, and Research 110 (2017) (discussing the conflicting results of studies investigating the role of gender expression in IPV between same-sex couples); Elaine Leeder, Treatment of Battering in Couples: Heterosexual, Lesbian, and Gay, in Treating Abuse in Families: A Feminist and Community Approach (Elaine Leeder ed., 1994) (finding that masculine women are no more likely to batter their partners than feminine women); Carolyn Wysginter, Power and Control: Domestic and Intimate-Partner Violence in LGBTQ Relationships, Media Diversified (Mar. 6, 2015), https://mediadiversified.org/2015/03/06/power-and-control-domestic-and-intimate-partner-violence-in-lgbtq-relationships [https://perma.cc/94RG-RGVE] (describing the author’s conversation with a leader in the LGBTQ anti-violence movement about, among other things, the fact that MOC women are abused by feminine of center women).
There is some large-scale, reliable data on the rates of physical and sexual assault in prison, which may capture some of the events more accurately termed IPV. Compared to men’s prisons, women’s prisons reported physical violence levels are quite low. In one study, only 11 percent of women reported being involved in a fight, hit, or punched while incarcerated. The same study reported that the majority of women (57 percent) said that jail was as safe or safer than their outside homes. While this study may speak more to the epidemic levels of violence against women outside prison walls than their safety within them, it undoubtedly suffers from survey design and reporting problems common to studies attempting to capture rates of violence, particularly IPV and familial violence, outside of prison.

Rates of sexual assault between incarcerated people in women’s prisons are dramatically lower than those found in male facilities. In one 1999 study, 3 percent of incarcerated women reported knowledge of an inmate being subjected to sexual assault at the hands of another incarcerated person, compared to 40 percent of men in a 1995 study. Some evidence suggests that most sexual assault between incarcerated women is gang rape: multiple perpetrators assaulting a single survivor, rather than a single offender targeting a single survivor. However, this could be a reporting effect: gang rape looks more like the paradigmatic “stranger rape” than rapes between women who are dating or sleeping with each other and thus may be more easily recognized by survivors, staff, and researchers as rape. Notably, incarcerated women experience much higher rates of sexual assault at the hands of (male) guards than incarcerated men do. Male guards commonly observe women showering, changing clothes, and using the toilet. This normalization of scrutiny places incarcerated women in a very vulnerable situation.

Male guards commonly subject incarcerated women to sexual harassment, unwanted touching, and rape. Some of the most successful challenges to prison (describing prosecutors’ use of the aggressive, violent, and butch dyke stereotype to advocate for the death penalty for masculine lesbians of color).

67. Id.
68. For example, it is unclear whether the rates might have changed had the surveyors asked about slapping or hair pulling, stereotypically female forms of physical violence.
70. Kunselman et al., supra note 69; KUNZEL, supra note 12, at 135.
conditions and violence against women in prison have been made in this area.74 There is some evidence that guards are particularly likely to assault incarcerated African American women and MOC people.75 An African American MOC woman, Chicago, describes this racialized, sexualized violence: “[Staff] just look at you like ogh, you are black and, I don’t want to look at a nigger . . . . Or they will tell you to get up on the wall and be rough with you and kick open your legs open with their knees. Like they did me . . . . They said, ‘You fucking nigger, I ought to body slam you.’”76 Another interviewee reports that male guards are “nit-picky with the homosexual women” because “it is like a slap to their ego that you are with another woman.”77 Women who openly identify as lesbians report that staff scrutinize their interactions with other women more closely and look for reasons to penalize them for sexual contact.78

Although the data describing the prevalence and demographics of IPV between incarcerated women is sparse, it is plentiful compared to the data on the dynamics of IPV within these relationships. There are no available statistics on levels of physical and sexual violence within relationships or abusive women’s tactics of control, and only anecdotal ethnographic work. That anecdotal work vaguely references “hitting” or “beating up” incarcerated women—a far cry from the particularized data available regarding IPV outside of prison.79

Violence between incarcerated women desperately needs further study. Even the slim existing data indicates that IPV occurs within women’s prisons, although the particulars of frequency, risk factors, demographic distribution, and violence type remain murky. Available data only implies this violence because it fits imperfectly into the categories of analysis applied to it: deviant, consensual relationships; desexualized emotional bonds; titillating stranger rape; and criminal female aggression. In recognizing this violence as IPV occurring within romantic and sexual relationships and involving ongoing patterns of power and control, one can both capture its magnitude and successfully intervene on behalf of women who experience that violence.

74. E.g., Women Prisoners of D.C. Dep’t of Corr. v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996) (a prominent example of this litigation); Buchanan, supra note 73.

75. Lesbian women incarcerated in state prisons reported twice the rate of sexual assault by male staff as straight women did. Eight percent of lesbian women reported being assaulted by staff, compared to 4 percent of straight women. Bosworth, supra note 19, at 150.

76. OWEN, supra note 12, at 157.

77. Id. at 165.

78. One incarcerated gay woman reports: “What’s crazy is [that] they [staff] think I’m just after everything that moves. I made a point to out myself when I first came in here and talk about my girlfriend who I’ve been living with for the last five years, but it doesn’t seem to matter. I feel like I get scrutinized more than the others[,] and I’ve been called on the floor several times for what they say is ‘instigating.’ . . . I definitely think [staff] have issue about gay women. Like they think we’re all out to turn out a bunch of straight women.” McCORKEL, supra note 23, at 139.

79. KUNZEL, supra note 12, at 124 (quoting Ward and Kassebaum); Bosworth, supra note 19, at 151.
II. ADDRESSING INTIMATE PARTNER VIOLENCE IN WOMEN’S PRISONS

In the previous Section, this Note began the project of “seeing” intimate partner violence between incarcerated women, attempting to extract useable data regarding the frequency and dynamics of IPV between incarcerated women from incomplete and often homophobic literature. Drawing on the tools advocates use to combat IPV outside of prison, this Section considers ways to address IPV within prison to assist incarcerated women in obtaining safety.80

This Section first argues for the decriminalization of sex between inmates as a first and necessary step toward addressing IPV. Not only has criminalizing sex in prison proven ineffective and lost much of its moralistic underpinning with queer people’s political and social gains, but it also likely depresses reporting of IPV and prevents institutions from addressing IPV directly. The Section then examines two of advocates’ most powerful tools to address IPV outside of prison—facilitated escape and civil protection orders—and explores how each could be applied to the prison context. Finally, the Section closes by discussing no-drop prosecution and mandatory reporting as examples of tools derived from the domestic violence movement that should not be applied to the prison context because of the history of queer relationships in prisons, the existing coercive pressure of the state in incarcerated peoples’ lives, and the likelihood that such tools would depress reporting.

A. The Only Place to Start: Decriminalizing Sex in Prison

Given the historical characterization of lesbian and bisexual women as deviants, the failure of the domestic violence movement to grapple with violence between women, and the dismissal of relationships between incarcerated women as adaptations to an artificial social structure, it is unsurprising that the major solution to violence between incarcerated women is the attempt to prevent such relationships.81 Both federal and state prisons prohibit sexual contact between inmates, and many facilities prohibit other physical expressions of affection such

80. Treating incarcerated women who batter their intimate partners is an equally worthwhile project that could probably draw lessons from batterer’s treatment (particularly treatment developed by queer communities). Such an analysis is not attempted here.

81. The reader will notice that this Section does not deal extensively with criminal prosecution as a remedy for intimate partner violence against incarcerated women, despite the potential for criminal charges. This Note does not recommend increased prosecution or more severe penalties out of the belief that further punitive state intervention in the lives of incarcerated women, who are largely low-income women of color, will likely raise the levels of intimate and structural violence in their communities. For greater discussion of the negative effect of state intervention “on behalf” of vulnerable women, see LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2011); BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); Miriam Ruttenberg, Note, A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Policy, 2 Am. U. J. GENDER & L. 171 (1994).
as hugging.82 Violations of such rules continue to carry extremely harsh
sanctions, including solitary confinement, time in “the Hole” (administrative
segregation), appearance before a disciplinary committee, punitive work
assignments, and revocation of parole.83

Prison officials and scholars articulate numerous reasons for these rules,
including public health concerns, increased fighting, and resource constraints.84
One of the primary reasons given for prohibiting sexual contact between
incarcerated women is the risk that these relationships could be “exploitative.”85
Some scholars and observers argue that the prison environment is inherently
coercive, and thus there is a much higher risk of exploitation and abuse within
prisons than outside of them. Others appear highly concerned that women will
be “turned gay” by “true homosexuals” in prison.86 Those primarily concerned
with exploitation argue that prison guards cannot be expected to identify which
relationships are coercive because they do not have sufficient training or time to
evaluate relationships and the level of consent in a given situation.”87 Banning
sexual conduct altogether allows guards to respond to all incidents of sexual
conduct, eliminating the need for women who experience violence to report
abuse that may be occurring without the knowledge of prison guards.

If banning consensual sex in prisons actually prevented women from
having relationships or sexual contact with each other, it might be perfectly
reasonable. However, as Part I describes, women in prison continue to have sex
and romantic relationships despite these bans. Rather, banning consensual sex in
prisons suppresses reporting of violence within those relationships and creates a
platform for bias against incarcerated people who guards perceive as gay or
lesbian. Due to the lack of reliable data on relationships between incarcerated
women, most of the relevant scholarship comes from men’s prisons.88 That
literature indicates that survivors of same-sex sexual assault hesitate to report
assault, partly out of fear of being subject to disciplinary action if they are found
to have “consented” to the assault.89 This is especially true for men who appear
feminine: guards often assume that transgender women and men who are or are
presumed gay will consent to any man and therefore cannot be raped.90 We might

82. Kunzel, supra note 12, at 115; Joanna Saul, Of Sexual Bondage: The “Legitimate
Penological Interest” in Restricting Sexual Expression in Women’s Prisons, 15 Mich. J. Gender & L.
349, 361 (2009).
83. Kunzel, supra note 12, at 115–16.
84. Saul, supra note 82, at 366.
85. Id. at 353.
86. See, e.g., id. at 366; Kunzel, supra note 12, at 115–16.
87. Saul, supra note 82, at 366.
88. Supra Part I.B.
89. Buchanan, supra note 43, at 33–35; Sandesh Sivakumaran, Male/Male Rape and the
90. Buchanan, supra note 43, at 33 (finding that male guards in male prisons often assume that
transgender women or men perceived as gay will consent to any man and thus cannot be raped). This
mirrors the erroneous and damaging assumption that female sex workers cannot be raped by someone
expect this to also be true of MOC people and out lesbians incarcerated in women’s facilities.

To begin to address IPV in women’s prisons, prisons must decriminalize romantic and sexual conduct between inmates. Just as the criminalization of gay and lesbian relationships outside of prison walls failed to stop such relationships from occurring, the criminalization of relationships between incarcerated women has clearly failed to stop incarcerated women from dating, having sex with, and falling in love with each other. Rather than adopting the ostrich-like strategy of pretending not to see these relationships, prisons should drop all regulations penalizing consensual sexual behavior between incarcerated adults and instead directly regulate the issues that these policies are intended to address: violence and coercion between incarcerated women.

Without decriminalizing sexual intimacy in prisons, prison officials cannot expect survivors of IPV and sexual assault to report their abuse to prison guards. The potential costs of being disbelieved are simply too high. Nor can prisons intervene in violent dynamics if they refuse to recognize them in the first place. The question of whether incarcerated women should be permitted to have sex is as irrelevant to reducing sexual assault and IPV in prison as the question of whether teenagers should have sex is to reducing teen pregnancy. And, in the post-Obergefell era, there is no longer a credible moral interest in regulating intimacy between incarcerated women simply because it occurs between two women. As the Supreme Court has emphasized throughout its jurisprudence on the Eighth Amendment and prison rape, prisons are no place for quibbling over lofty ideological concepts. By its nature, a prison requires pragmatic, flexible judgment calls. If this is the correct approach, the decriminalization of consensual prison sex is a long-overdue, pragmatic adaptation to the realities of a “total institution.”

who has paid them for sexual service, which results in underreporting of sexual assault and rape against sex workers and the failure of state systems to appropriately respond to this violence. See SARAH KINGSTON, PROSTITUTION IN THE COMMUNITY: ATTITUDES, ACTION, AND RESISTANCE 63 (2013) (reviewing literature describing the dangerous stereotype that sex workers cannot be raped); JUHU THUKRAL & MELISSA DITMORE, URBAN JUSTICE CENTER, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 8 (2003) (finding that sexual violence against sex workers is rarely reported and rarely prosecuted); see also HANNAH HUSSEY, CTR. FOR AM. PROGRESS, BEYOND 4 WA LLS AND A ROOF: ADDRESSING HOMELESSNESS AMONG TRANSGENDER YOUTH 10 (2015) (finding that violence against sex workers who are transgender women is more severe than violence against sex workers that are cisgender women); Deborah Cohan et al., Sex Worker Health: San Francisco Style, 82 SEXUALLY TRANSMITTED INFECTIONS 418, 420 (2006) (finding that trans women doing sex work were subject to significantly higher rates of work violence, customer violence, and police violence than cisgender women). Many thanks to Professor Nancy Lemon for identifying this discursive parallel.

92. LaMarca v. Turner, 995 F.2d 1526, 1538 (1993); see also Robertson, supra note 43, at 453–54 (discussing federal courts’ high level of deference to prison staff in prison rape cases).
93. Sociologist Erving Goffman defines a total institution as “a place of residence and work where a large number of like-situated individuals cut off from the wider society for an appreciable period of time together lead an enclosed formally administered round of life.” ERVING GOFFMAN, ASYLUMS:
B. From the Domestic Violence Toolbox: Facilitated Escape and Civil Protection Orders

1. Facilitated Escape

Leaving an abusive partner is both dangerous and difficult. The post-separation period, in which a survivor has expressed their intent to separate from their abuser or physically remove themselves from their abuser’s control, is a period of high risk of death or serious injury for the survivor.\(^{94}\) The process of leaving often occurs over a period of years and includes multiple attempts, heightening the risk of intimate partner assault or homicide. Survivors report that having no habitable place inaccessible to their partner is a significant barrier to leaving violent relationships.\(^{95}\)

In response to this basic problem, survivors of IPV and their advocates have focused on facilitated escape since the establishment of grassroots shelters and safe houses in the 1960s and 1970s.\(^{96}\) Assisting those who have experienced IPV to flee their abusers, primarily through the provision of emergency shelter, appears to have been an extremely effective tool in ending violence in survivors’ lives.\(^{97}\) In one study, 95 percent of women who accessed shelter found it helpful and, in another, 72 percent of women said that shelter had been very effective in reducing the violence against them.\(^{98}\) The four aspects of emergency shelters that appear to account for this benefit are the provision of a safe place inaccessible to the abuser, the emotional support, housing assistance, and counseling that a shelter provides.\(^{99}\)

Beyond providing and funding emergency shelters, advocates for survivors of IPV have passed many legal reforms facilitating physical escape from an abusive partner. Advocates have created provisions across different areas of law


\(^{96}\) J. Marriage & Fam. 311, 312 (1991); Michael J. Straube & Linda S. Barbour, The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment, 45 J. Marriage & Fam. 785, 785 (1983) (finding that economic dependence on an abusive partner is a major factor in a woman’s decision to stay with that partner).


\(^{99}\) Id.
that make it easier for people who have experienced IPV to move away from their abuser. For instance, current provisions allow survivors to break leases without penalty, relocate with their children, and request that their employer move them to a different location within the company. These provisions tend to be highly localized and passed at the state, county, or even municipal level.

For incarcerated women, the strategy of physical escape may seem unusable. After all, to be incarcerated is by definition to be confined and prevented from leaving one’s current location. Feminist legal reforms have adopted facilitated escape as more of a framework than a particular organizational model as they have created housing provisions, employment regulations, and custody loopholes. The possibilities of this strategy for protecting incarcerated women from their abusive partners emerge from this framework. This Section suggests three changes to prison practice to support incarcerated women in escaping their violent partners: consideration of a survivor’s IPV experience during her parole assessment, transfer of one party to a different facility, and transfer of one party within the facility.

Prisons are psychologically damaging for most inmates. However, they are particularly damaging for women who have experienced IPV. Recovery from IPV can be significantly more difficult while imprisoned, especially if a woman is incarcerated in a prison which, like many, has no or very limited support for survivors of IPV. A woman who has experienced IPV before or while being incarcerated should be entitled to bring this experience before the parole board and have it considered as a factor weighing in favor of her release. In four states—California, Missouri, South Carolina, and Kentucky—evidence that a woman was subjected to domestic violence at the time of her crime is admissible either as a mitigating factor in her parole consideration or as a basis on which to

105. CRAIG HANEY, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATION FOR POST-PRISON ADJUSTMENT 81–84 (2001) (finding that psychological consequences of incarceration include dependence on institutional structure; hypervigilance, interpersonal distrust and suspicion; emotional overcontrol; alienation; psychological distancing; social withdrawal and isolation; the incorporation of exploitative norms of prison culture; a diminished sense of self-worth; and posttraumatic stress reactions).
bring an early application for parole. However, no state currently permits an incarcerated person to use as mitigating evidence her experience of violence while in prison. If prisons are truly intended to prepare prisoners to “successfully reenter society,” parole boards should recognize the importance of recovery from IPV to women, their families, and the community as a whole and attempt to facilitate that recovery by granting parole.

Even if parole is not feasible, either as a political matter or in an individual case, women should be able to physically separate from their abusive partners within the prison system. The most appropriate option in some cases may be to transfer one partner to another facility. Although comprehensive statistics on the transfers between prisons nationwide are unavailable, transfers between facilities, between public and private prisons, and even between states appear quite common. The most common reason for interstate transfer is prison overcrowding, followed by reduction of safety risks to the transferred person or others. Since transfers are already common within the prison system, using them to reduce IPV between prisoners would not impose unduly burdensome administrative costs.

However, instead of transferring the person in need of protection, which appears to be the most common procedure, institutions should transfer the perpetrator of the violence. Transferring the perpetrator will function both as a consequence for abusive behavior and protection for survivors of IPV from the adverse consequences that often accompany prison transfer. However, this should be a presumption rather than a rule. The wishes of the survivor should be primary, as she will understand her situation most fully and as there are situations in which transferring the survivor will function better to meet her needs (for example, transferring her to a facility closer to her family or where there is more

107. CAL. PENAL CODE § 4801 (West 2016) (compelling parole boards to give “great weight” to information that the incarcerated person was subject to intimate partner battering at the time of the crime); KY. REV. STAT. ANN. § 439.3402 (West 2016) (allowing an incarcerated person to apply for parole early upon a showing before the circuit court that she was a survivor of domestic violence); MONT. CODE ANN. § 217.692 (West 2016) (allowing an incarcerated person to be considered for parole if she can show evidence of being a survivor of continual domestic violence); S.C. CODE ANN. § 16-25-90 (West 2016) (allowing an incarcerated person to apply for parole after one-fourth of her sentence if she can show sustained abuse at the hands of a family member).


109. U.S. DEP’T OF JUSTICE, supra note 32, at 2 (finding that forty-six out of forty-eight responding states were engaged in prisoner transfer); O’Connell, supra note 32; CAL. DEP’T OF CORRECTIONS & REHABILITATION, supra note 32.

110. Id. at 12 (stating that inmates “who may be in danger within” the sending prison are other transferred).

111. These adverse consequences can include long and uncomfortable journeys by bus, placement farther away from family and friends, and the loss of programming and possessions. O’Connell, supra note 32. We might expect these consequences to be more pronounced for women prisoners, who tend to be incarcerated farther away from their communities. ANGELA HATTERY & EARL SMITH, AFRICAN AMERICAN FAMILIES 267 (2007).
supportive programming available). Prisons and prisoners’ advocates must be careful to avoid replicating the mistakes of the movement in men’s prisons toward using maximum-security confinement as a common response to rape allegations. The documented, severe psychiatric harms associated with solitary confinement should weigh strongly against subjecting any person to such conditions, especially for inmates already experiencing the psychological stressors caused by IPV.

Prisons should examine how they might facilitate women escaping violent relationships within the facility, with a focus on making avoiding contact with the abuser a practical option. This might involve moving women between housing units, reassigning them or their abusive partner to another job, or excluding the offending partner from shared programming, or some combination of these responses. Since each prison has different internal structures, each response would need to be individually tailored to the institution and the roles of the survivor and perpetrator. The core of such a model is twofold: (1) keeping the two individuals separated without exception to avoid the opportunity for retaliation, and (2) ensuring that the survivor does not feel penalized for reporting. Response measures perceived as punitive could have a pronounced

113. The reader will notice that these policy suggestions stem largely from a particular set of values that prioritizes individual battered women’s autonomy and deeply doubts statist intervention. In lieu of an explanation of this choice of values, see Leigh Goodmark’s Autonomy Feminism, which outlines the theoretical framework employed here. That framework posits the fundamental harm of domestic violence as the removal of the abused woman’s autonomy, and its primary remedy as a restoration of that autonomy. Leigh Goodmark, Autonomy Feminist: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases, 37 FLA. ST. U. L. REV. 1, 45–47 (2009); see also KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE MOVEMENT AGAINST SEXUAL VIOLENCE (2008) (arguing that as the social welfare state has increased its regulation and control over its clients, availability of services for women who have been subjected to intimate partner violence has become increasingly linked to their status as victims, and proposing a new model centered on social disadvantage rather than individual victimhood); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2012) (tracing the development of and arguing against a domestic violence response system which denies abused women subjected to abuse autonomy and agency, substituting state priorities for their goals).

114. Solitary confinement is also imposed on people incarcerated in men’s prisons who are considered to be at a high risk for sexual assault, a category consisting predominately of transgender women and gay or effeminate men. Gabrial Arkles, Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 537 (2009).


116. The most useful models are likely employers, which have been attempting to develop similar accommodation models in compliance with legislation protecting survivors of IPV in the employment context. See Jennifer Swanberg et al., State Employment Protection Statutes for Victims of Domestic Violence, 27 J. INTERPERSONAL VIOLENCE 587 (2012) (surveying state-level employment protections for victims of domestic violence).
deterrent effect given the long history of punishing incarcerated women for engaging in sexual and romantic relationships.117

2. Civil Protection Orders

Civil protection orders are one of the most widely used and effective tools survivors use to end violence in their lives.118 A protection order is a court order that imposes restrictions on a perpetrator’s conduct.119 Civil protective orders are available in every state and the District of Columbia.120 They can be obtained through an independent proceeding or as part of a variety of other proceedings, including divorce, custody, and dependency proceedings.121 Independent protection-order proceedings are generally designed for a pro se litigant, and most petitioners appear unrepresented.122 Jurisdictions differ in the details, such as what abuse is sufficient to sustain a protective order and what remedies an order offers.123 For example, in Alaska, the violence must be perpetrated by a “household member” to sustain a protective order, while in California, violence perpetrated by a “current or former spouse, boyfriend/girlfriend, someone [a survivor has] a child in common with, someone [a survivor] lived with, or someone [the survivor] is related to through blood or marriage” is sufficient.124 All states consider physical violence sufficient grounds for a protection order.125 One-third of states consider various kinds of coercive behavior, false imprisonment, and interference with liberty sufficient grounds, and another one-third credit psychological, emotional, or economic abuse.126 The range of

117. See infra Part I.B.
120. Margaret E. Johnson, Redefining Harm, Reimaging Remedies, and Reclaiming Domestic Violence Law, 42 U.C. DAVIS L. REV. 1107, 1111 (2009).
121. Id.
123. Johnson, supra note 120, at 1131.
124. See ALASKA STAT. ANN. § 18.66.990 (West 2016); CAL. FAM. CODE § 6211 (West 2016).
125. This includes battery, assault, bodily injury, threat of bodily injury, or placing a person in fear of imminent bodily injury. Johnson, supra note 120, at 1131.
126. Id. at 1133.
possible remedies is similarly broad. However, the actual availability of these remedies may vary considerably within jurisdictions, depending on the political climate of the court, the training available to judges, and other extra-legislative factors.

Although civil protection orders do not specify that incarcerated people cannot obtain them, incarcerated people have no access to the forms and hearings necessary to obtain a protection order. Prisons are not required to transport incarcerated people to civil hearings—not even high-stakes family law proceedings, such as those determining child custody. This overwhelming lack of access means that incarcerated people are effectively deprived of one of the most effective tools developed by the domestic violence movement. Civil protection orders are one of the only tools available to survivors of IPV that do not rely upon the force of the criminal justice system, which incarcerated people might be leery of, or the premise that the relationship must end to end the violence within it.

However, the fact that civil protection orders have gone unused in the prison context does not mean they should continue to be. Civil protection orders are perhaps uniquely suited to the context of a total institution. Since the carceral state is already engaged in micromonitoring prisoners’ lives, it would be much easier to enforce the terms of a particular order in prison than in the world outside of prison. Aside from the obvious advantage of being able to monitor compliance with a no-contact order (and employing another strategy, such as transfer, if there is a violation), the increased ability to enforce a protection order also allows for protection orders to do more than separate the parties. An order

127. They may include an order that the respondent not continue to abuse and threaten the petitioner; an order that the respondent stay away from the petitioner, her children, her home, and other places she frequents; an order to vacate a shared dwelling; mandated counseling or violence intervention programs; restitution for medical costs; custody and child support orders; use or ownership of personal property; mandated surrender of firearms; and mandated payment of court fees. Id.

128. Goldfarb, supra note 122.

129. I am not aware of any jurisdiction that specifically bans currently or formerly incarcerated people from seeking restraining orders.

130. I am not aware of any jurisdiction that transports incarcerated people to court for the purpose of obtaining a restraining order. A parent’s right to attend a civil hearing regarding their child varies depending on the state and the proceeding. For example, in California, a parent has no right to be transported to court for a hearing regarding her child unless it is a hearing that seeks to terminate her parental rights, and even then, the right may be considered less important than competing interests, such as time limits on the disposition of particular kinds of cases. See CAL. PENAL CODE § 2625(d) (West 2006); D.E. v. Superior Court, 111 Cal. App. 4th 502, 513 (Cal. Ct. App. 2003).

131. See Goodmark, supra note 81 (providing a comprehensive discussion of the problematic aspects of the domestic violence movement’s dependence on the criminal justice system to respond to IPV).

132. Goldfarb, supra note 122, at 1516.

133. Another way in which protection orders are suited to a total institution is the ease of serving perpetrators with restraining orders. In-person service of the orders is often extremely difficult for people whose abusers are not incarcerated. Locating an incarcerated perpetrator would be much easier than locating her unincarcerated counterpart. Service would not impose prohibitive administrative costs, as corrections officers frequently serve legal papers, including protective orders, to incarcerated people.
could prevent a woman’s intimate partner from beating her, yelling at her, or threatening her, without prohibiting contact. This kind of system might address some of the concerns about forcing women out of relationships they would prefer to maintain.

Providing access to civil protection orders does raise concerns of cost constraints. Undoubtedly, transporting incarcerated people to court in order to apply for civil protection orders would be prohibitively expensive, especially given the time-intensive process that generally takes a number of hours over several court days. However, alternative programs, designed for parents, survivors who work low-wage jobs and are unable to obtain multiple days off, and survivors who are afraid to share geographic space with their abusers, could be adapted to the prison context.

For example, the Gateway Center in Multnomah County, a collaboration between Multnomah County Court and several nonprofits, has developed a video-conferencing model for issuing protection orders. People who have experienced abuse can come to the Gateway Center, located in a low-income neighborhood across the city from the County courthouse, fill out an application for a temporary order that is faxed to the court with the assistance of on-site staff, and appear before a Family Court judge via video-link. The judge generally takes video-link clients at the beginning of their domestic violence calendar and spends no more than half an hour addressing them. The judge then faxes the completed orders back to the Gateway Center, which distributes them to the petitioners to serve. Survivors can then return their served papers to the Gateway Center and attend their permanent order hearing via video-link.

This model would not be prohibitively expensive to implement in prisons, given a minimally funded program and the cooperation of local courts. I propose


134. A series of escalating penalties for each violation of an order seems most likely to facilitate this kind of approach. For example, prohibited third-party threats, such as a perpetrator asking a friend outside of prison to contact the survivor and tell her that if she speaks to other women she will be beaten, might result in the perpetrator’s phone privileges being taken away for a month, while a direct threat might result in transfer. This kind of escalating penalty is very difficult outside of prison, where by the time police are notified of, find credible, and respond to a violation of the order, it is likely to have resulted in serious consequences for the survivor, her children, or others.

135. Goodmark, supra note 113, at 26–27; see also GOODMARK, supra note 81.

136. Goldfarb, supra note 122, at 1515.


138. Mclean-Riggs, supra note 137.

139. Id.

140. Id.

141. Id.
that the program require one or two additional part-time staff members to make copies, fax documents, and organize logistics, aside from existing correctional staff. These roles may even be suitable for volunteers, perhaps through the local bar association. The relatively small expenses associated with a civil protection order program in prisons, including the purchase and maintenance of the necessary equipment, would be offset by the reduction in violence such a program can be expected to produce. As discussed above, civil protection orders effectively reduce physical violence in intimate partner dyads, and thus reduce medical costs and institutional disruption associated with IPV. Of course, civil protection order programs would also serve the central goal: ending violence in the lives of vulnerable incarcerated women.

C. Inappropriate Tools: No-Drop Prosecutions and Mandatory Reporting of Intimate Partner Violence

In the 1970s and 1980s, feminist activists responded to police indifference to women who called emergency services for help stopping their abusive partners by advocating for mandatory arrest policies. These state laws mandate that when police officers are called to a domestic violence incident and have probable cause to make an arrest, they must do so, regardless of their opinion of the case or the survivor. Twenty states and the District of Columbia have mandatory arrest policies, and the remaining states have a policy that at least encourages arrest in domestic-violence misdemeanor cases. Activists also worked to pass “no-drop policies,” which prevent prosecutors from declining to bring criminal charges in cases where the survivor of violence declines to participate. There are two kinds of no-drop policies: “hard” no-drop policies, in which survivors are required to testify in prosecutions through subpoena (and arrest if necessary), and “soft” no-drop policies, in which survivors are encouraged but not required to participate. These policies have been highly controversial within the domestic violence movement.

142. See supra Part II.A (discussing prison guards’ perceptions of how conflicted intimate relationships between inmates disrupt prison life and make enforcing prison regulations more difficult); DEP’T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 30 (2003) (estimating that approximately 4.1 billion dollars were spent on direct medical and mental health care related to IPV in the United States in 1995).


144. Goodmark, supra note 135, at 6.

145. Id. at 10.

146. Id. at 11–12.

147. Id. at 13.

Beginning in the early 1990s, activists began to advocate for mandatory reporting of domestic violence injuries by emergency room physicians and medical staff. Most states, with the exception of Kansas, New Hampshire, New Mexico, and Wyoming, require emergency room staff to report certain kinds of wounds—usually those caused by a knife or gun—to law enforcement. However, only a few states specifically mention domestic violence in their reporting requirements. These laws generally require physicians to report to law enforcement when they “have[] reasonable cause to suspect that an adult has suffered abuse.” Like mandatory arrest and no-drop policies, mandatory reporting for healthcare staff is subject to debate among advocates for survivors of IPV and medical professionals.


151. These states include California, Kentucky, New Mexico, New Hampshire, and Rhode Island. McFarlane, supra note 149, at 14; see also DURBOROW ET AL., supra note 150 (providing a full account of required reporting by state).

152. This specific language is found in KY. REV. STAT. § 209.030 (West 2005).

153. See generally Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 HARV. L. REV. 550 (1999) (arguing that mandatory interventions do not serve the best interests of battered women because they replicate the dynamics of abusive relationships, fail to nurture women’s strengths, and disempower women); Karen Oehme & Nat Stern, The Case for Mandatory Training on Screening for Domestic Violence in the Wake of the Affordable Care Act, 17 U. PA. J. L. & SOC. CHANGE 1, 5, 23–25 (2014) (providing a review of current debates regarding medical staff and mandatory reporting); Jean Ramsay et al., Should Health Professionals Screen Women for Domestic Violence? Systematic Review, 325 BRITISH MED. J. 7359 (2002) (evaluating evidence of the effectiveness of screening for domestic violence in the healthcare setting and the perceptions of women and physicians on such screening, and concluding that the value of screening is ambiguous); Jane K. Stoever, Mirandizing Family Justice, 39 HARV. J.L. & GENDER 189 (2016) (arguing that mandatory reporting by medical staff disempowers and damages populations of survivors already vulnerable to coercive state intervention); Karen P. West, et al., The Mandatory Reporting of Adult Victims of Violence: Perspectives From the Field, 90 KY. L.J. 1071 (2002) (finding that while most healthcare professionals interviewed were opposed to mandatory reporting laws, most survivors of domestic violence interviewed were in favor of such laws). The American Medical Association, while supporting mandatory reporting protocols for child abuse and elder abuse, has opposed mandatory reporting laws for non-elder adult survivors of domestic violence because such laws “violate basic tenets of medical ethics” unless they are carefully designed and tightly controlled. AM MED. ASS’N, CSAPH REP. 2, I-09, H-515.965, FAMILY AND INTIMATE PARTNER VIOLENCE (2009); see also Lawrence R. Faulkner, Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist...
In some ways, the reaction of prison guards to IPV between inmates is similar to the reaction of police officers to domestic violence against women in the 1970s and 1980s. Some argue that in this context, mandatory reporting policies were necessary to prompt even the most modest state intervention. Just as many police officers considered IPV to be a domestic dispute outside the reach of criminal law, many prison guards consider IPV between women to be laughable cat fighting. These parallel circumstances seem to indicate that the mandatory reporting policies that worked outside of prison could work within it. However, this hypothesis makes three unfounded assumptions. First, it assumes that the primary, overriding goal is to reduce instances of IPV and that this goal is more important than the means used to achieve it. This approach conflicts with the domestic violence movement’s approach to its work. At the very least, the movement has held that empowering women to assert their agency and personhood in their own lives is inseparable from ending IPV. Second, the idea that mandatory reporting should work in prisons because it has worked outside them assumes that mandatory reporting has in fact reduced IPV in most contexts. This is a highly contested claim and should not be assumed. Third, this claim assumes that the prison and nonprison contexts are interchangeable. The falsity of this last assumption, and the harmful effects that could stem from it, should caution strongly against experimenting with mandatory reporting of IPV in prisons.

Whatever their benefits outside of prison, no-drop prosecution policies and mandatory reporting by guards or medical staff are inappropriate in the prison context. Because of these policies’ high potential to disempower and endanger already vulnerable women and their likely effect on reporting rates, they should not be pursued. As discussed above, incarcerated queer women have historically been subject to intense state surveillance and violence. They already have so little control over their bodies, day-to-day lives, and long-term futures that being dragged into an unwanted prosecution would likely exacerbate existing feelings of vulnerability and powerlessness.

Response to the Abuse of Older Adults, 16 Fam. L.Q. 1, 69 (1982) (arguing that mandating reporting of elder abuse is ineffective and disempowers older adults).

154. See Kunzel, supra note 12, at 126.
156. See Goodmark, supra note 155, at 136–59; Ferraro, supra note 155, at 4.
157. See supra text accompanying note 153.
158. See supra Parts II.B, C.
159. See Goodmark, supra note 81, at 126 (describing the disempowerment of women forced to participate in prosecutions against their will).
By advocating against implementation of no-drop prosecution policies in the prison context, this Note does not imply that survivors who wish to bring charges against their abuser should be prevented from doing so, although it questions the efficacy of state intervention and incarceration in ending violence in women’s lives. Imprisoned people are already set apart from the rest of society, dehumanized by the law and popular culture, and deprived of many state protections and benefits available to unincarcerated people.¹⁶⁰ Depriving all incarcerated women of an option provided, at the discretion of the state, to some unincarcerated women does not remedy the myriad problems associated with the domestic violence movement’s alliance with the carceral state.¹⁶¹ Categorically preventing incarcerated women from participating in prosecuting their abusers simply reinforces the dehumanization of incarcerated people and deprives individual women of a tool that may be effective in their individual case. Whatever the merits of prosecutions in which the survivor participates willingly, no-drop policies are inappropriate in the prison context.

Incarcerated women who experience IPV contend with a much more dangerous environment than unincarcerated women who experience IPV because they are unable to leave the shared living space and access many of the support structures available to unincarcerated women.¹⁶² Incarcerated women are usually repetitively exposed to their abuser and their abuser’s associates, putting them at immense risk. They cannot call a shelter or a crisis line, stay with a friend, leave town for a few days, change their contact information, or take many of the other basic steps that women outside prison can take to protect themselves.¹⁶³ In this high-risk context, it is important to permit women, as the


¹⁶² For specific examples, see CAL. CODE. REGS. tit. 15, §§ 3269(g) (2017) (mandating that inmates accept housing assignments or be subject to prison disciplinary procedures), 3020(a) (prohibiting inmates from establishing or participating in inmate groups without specific approval from the prison), 3266 (prohibiting inmates from initiating any personal conduct with the public, except as specifically authorized), 3220(f) (mandating that inmates participate only in games and sports specifically authorized by the prison), 3041.3(h) (banning inmates from using personal computers), and 3007 (banning inmates from sexual conduct).

best predictors of their own risk levels, to decide when reporting and seeking help are safe for them.\textsuperscript{164} Mandatory reporting of IPV in prisons is also likely to depress already low reporting of IPV. The history of state repression and violence, so deeply ingrained in prison queer cultures, likely already represses reporting of IPV, and mandatory reporting would likely exacerbate this repressive effect.\textsuperscript{165} Incarcerated queer women are likely afraid of state intervention in their relationship, and for good reason. Add other marginalized statuses, such as Blackness or gender nonconformity, and women are highly likely to be afraid for their own safety at the hands of prisons, as well as the safety of a lover or community member they report as a perpetrator of IPV.\textsuperscript{166} Mandatory reporting by medical staff is particularly worrying; if women know that medical staff must report their abuse to someone who will initiate an investigative process, they may refrain from seeking needed medical care.\textsuperscript{167} Especially in an environment like prison, where women have a highly limited ability to access basic over-the-counter medical treatment (e.g., ibuprofen or bandages), institutions should be very reluctant to disincentivize seeking medical treatment.\textsuperscript{168} Mandatory reporting procedures and no-drop policies are also ill-suited to the prison context due to the unique efficiency concerns surrounding people who are already being punished by the state. Bringing criminal charges against a woman who is already serving life in prison or who is not expected to live long enough to be released, against the wishes of her survivor, is an extraordinary waste of prosecutorial and investigative time.\textsuperscript{169} The symbolic value of such a prosecution is outweighed by the resources involved and the potential trauma and danger to the complaining witness.

\textsuperscript{164} Considerable empirical evidence indicates that women experiencing intimate partner violence predict their risk of exposure to violence accurately. However, some evidence also indicates that while women’s fear accurately predicts their risk levels, the absence of fear does not accurately predict the absence of risk. See Lauren Bennett Cattaneo et al., \textit{Intimate Partner Violence Victims’ Accuracy in Assessing their Risk of Re-Abuse}, 22 J. FAM. VIOLENCE 429, 437 (2007) (finding that survivors who described themselves as at a high risk of violence were accurate in that description); Jacquelyn C. Campbell et al., \textit{The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide}, 24 J. INTERPERSONAL VIOLENCE 653, 670 (2009) (finding that while survivor fear predicts continued violence, survivors’ lack of fear does not predict the absence of violence).

\textsuperscript{165} See supra Part I.

\textsuperscript{166} Hooks, supra note 81; Mogul, supra note 65.

\textsuperscript{167} See Pamela Sankar et al., \textit{Patient Perspectives on Medical Confidentiality: A Review of the Literature}, 18 J. GEN. INTERNAL MED. 659 (2003) (examining peer-reviewed studies on patients’ views and conduct and finding that a portion of patients will delay or avoid seeking medical care if they are concerned their information will not remain confidential).

\textsuperscript{168} See supra note 161 and accompanying text.

\textsuperscript{169} More than 5,300 women prisoners were serving life without the possibility of parole in 2013, and approximately two-thirds of all prisoners serving life without parole were people of color. Ashley Nellis, \textit{Sentencing Project, Life Goes On: The Historic Rise in Life Sentences in America} 8, 11 (2013), \url{http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf} [https://perma.cc/TXF3-RDD5].
When an abusive woman is serving a sentence that spans less than the duration of her life and her survivor wishes to bring charges, it is worth considering sentences that do not involve solitary confinement or increased incarceration.\textsuperscript{170} Solitary confinement, even for relatively short periods, is an inappropriate form of punishment because of its severe psychological and physical effects.\textsuperscript{171} To increase a perpetrator’s term of incarceration does not heal her survivor’s wounds or those of the community. In fact, it may further endanger the survivor given the potential that the survivor and perpetrator are housed in the same facility. Additionally, a longer incarceration term may in fact further facilitate the perpetrator’s abusive behavior, giving her continued access to vulnerable, marginalized women with limited ability to flee the relationship.

To summarize, access to medical staff who can report IPV and to prosecutors who can bring charges against perpetrators are not, in and of themselves, harmful to incarcerated survivors. In fact, they are likely helpful.\textsuperscript{172} However, these kinds of reforms, intended to give women access to the power of the state, are categorically different from mandatory reporting policies and no-drop prosecutions. These tools, which strip survivors of their control of the process, are not workable responses to violence between incarcerated women due to the unique realities of the prison context, including exacerbated safety risks to survivors, low rates of reporting, and the long history of state repression and violence against incarcerated queer women.

CONCLUSION

Advocates wishing to reduce sexual and intimate partner violence in prison do not have to reinvent the wheel. There are strategies that advocates for survivors of intimate partner violence have been using for decades that could and

\textsuperscript{170} Alternative sentences could include batterer’s treatment, community service, loss of privileges, or transfer to another facility. These potential sentences function better than continued incarceration to serve the goals of reparation and rehabilitation. This Note does not discuss retribution as a legitimate punishment goal and rejects the premise that suffering harm will “pay” for committing it. Many thanks to Professor Nancy Lemon for suggesting many of these alternative sentences.

\textsuperscript{171} For a review of the effects of solitary confinement, and arguments against its use, see LISA GUENTHER, SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES (2013); LOMA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON (2004); HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT (Jean Casella et al. eds., 2016).

\textsuperscript{172} See Cris M. Sullivan & Leslie A. Hagen, Survivors’ Opinions About Mandatory Reporting of Domestic Violence and Sexual Assault by Medical Professionals, 20 AFFILIA 346 (2005) (finding that although the majority of survivors surveyed opposed mandatory reporting by medical professionals, the vast majority supported increased training for doctors and explicit screening for intimate partner violence during appointments). Some studies have found that prosecution deters perpetrators from future abuse. See ANNETTE JOLIN ET AL., U.S. DEP’T OF JUSTICE, BEYOND ARREST: THE PORTLAND, OREGON DOMESTIC VIOLENCE EXPERIMENT (1999); Angela R. Gover et al., Combatting Domestic Violence: Findings from an Evaluation of a Local Domestic Violence Court, 3 CRIMINOLOGY & PUB. POL’Y. 109, 127 (2003); John Wooldredge & Amy Thistlethwaite, Court Dispositions and Rearrest for Intimate Assault, 51 CRIME & DELINQ. 75 (2005) (finding that filing charges against abusers can reduce recidivism rates).
should be applied to prisons. However, in order to use these tools, we must see the problem for what it is and abandon the homophobic, racist lens that casts relationships between incarcerated women as pseudoheterosexual playacting, sexual criminal deviance, or purely economic exchanges. Once these relationships are seen as real relationships with a full spectrum of potential dynamics, including coercive and violent ones, the possibility of effective intervention emerges.

The unique dynamics of prisons shape the contours of what is possible and likely to be effective. It is difficult to imagine any effective intervention while relationships between incarcerated women remain secret—how can one change a thing while denying it exists? The dynamics of prison—the overbearing and violent presence of the state, the history of violence against queer women, and the vulnerability of the populations incarcerated within it—mean that some established tools for addressing intimate partner violence, like mandatory reporting, mandatory arrest, and no-drop prosecution policies, are unlikely to work. However, some tools may, with slight alterations, allow incarcerated women to leave their abusive partners or end the abuse within those relationships. Facilitated escape and civil protection orders seem both the most likely to increase women’s autonomy and safety in prison and the most practicable in our current legal system.

It is vital that we bring the domestic violence revolution inside the gates of prisons, not just because people do not cease to deserve safety and support when they are incarcerated, but also because it is necessary to the goal of a world without intimate partner violence. The feminist movement and its daughter movements have always understood that change happens from the bottom up. When the process of creating safety for the most vulnerable is understood, so will the process of creating safety for all.