

BEYOND NON-VIOLENT OFFENSES: CRIMINAL JUSTICE REFORM AND INTIMATE PARTNER VIOLENCE IN THE AGE OF PROGRESSIVE PROSECUTION

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Intimate partner violence is routinely left out of the public discourse about criminal justice reform. The criminal legal system all too often fails to effectively protect victims from intimate partner violence, although it continues to impose deleterious collateral consequences on defendants. In this Article, we review the platforms and policy agendas of four high-profile, self-identified progressive prosecutors, and discuss follow-up interviews conducted to better understand how these offices are approaching reform to traditional approaches to handling intimate partner violence cases. The reform agenda ushered in by the new wave of progressive prosecutors reflects increasing recognition of the complexities these issues raise, but has not yet translated into a clear departure from the status quo. At the same time, several concrete approaches have emerged to address longstanding issues, including increasing use of restorative justice, refusal to cooperate with immigration agencies, primary caregiver diversion programs, and renewed commitment to provide direct support to victims. No single policy will resolve the longstanding crises of domestic violence in our society, and there are still major empirical data gaps on these issues. However, as criminal justice reform movements—from progressive prosecution to abolition—gain traction, we argue that it is imperative that they squarely address domestic violence as a priority. The Article seeks to start a conversation acknowledging the reality of this crisis, mapping the limitations of existing frameworks, taking stock of emerging practices in the context of self-identified progressive prosecutors' offices, and elevating key questions for future inquiry.

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** Emily Postman is a third-year student at Stanford Law School. We are indebted to each of the offices and experts who thoughtfully and candidly shared their experiences and insights with us, as well as to the innumerable organizers, activists, and thinkers who have been pushing this conversation forward for decades. Tremendous thanks to Ari Pomerantz, who provided critical research assistance and insight into movement history. Finally, we are endlessly grateful to our brilliant editorial team, particularly Shawn Musgrave, who provided invaluable feedback and support through the process.

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This Article aims to highlight the severe limitations in the ways the criminal legal system serves victims of domestic violence, to discuss the possibilities and constraints of emerging reforms at the district attorney level, and to articulate questions that can help reimagine structures that could more fully meet all parties' needs. In Part I, we examine the way misdemeanor crimes of domestic violence have been incorporated into the criminal legal system and discuss the limitations of our current frameworks. Part II provides an overview of emerging practices in four of the larger U.S. progressive prosecutor offices, based on their stated policies around this topic and qualitative interviews with the offices. In Part III, we offer more questions than answers, offering brief concluding reflections and posing a set of questions which we hope will help propel new research and carry the conversation forward.

INTRODUCTION: A PERSISTENT PROBLEM

Since the 1970s, domestic violence (“DV”)¹ advocates have pushed hard to bring violence in the home fully within the ambit of the criminal legal system, in order to both change cultural norms around domestic violence and provide more concrete protections for victims.² This advocacy is credited with creating a “lasting, paradigmatic change in our culture’s response to domestic and sexual assault.”³ At the same time, efforts to increase policing, charging, and sentencing for intimate partner violence (“IPV”) gained traction in the emergence of the “tough on crime” era.⁴

1. In this paper, we use domestic violence (“DV”) and intimate partner violence (“IPV”) interchangeably. For the purposes of this paper, they both refer to violence perpetrated by one individual against another within the confines of an intimate relationship or family unit.

2. See Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J. L. & GENDER 53, 61-62 (2017), <https://perma.cc/DC5R-L3LR>; Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. ISSUES IN NURSING (2002), <https://perma.cc/KH8M-HXK2>.

3. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 184 (2019).

4. Goodmark, *supra* note 2; Erez, *supra* note 2.

Yet the problem has not gone away.

Although macro rates of intimate partner violence have dropped since the 1990s, they remain alarmingly high. The Centers for Disease Control's most recent study estimates that one in three women will still experience some form of physical violence by an intimate partner in their lifetime.⁵ One in five women will experience severe violence (e.g., beating, burning, strangling) in her lifetime,⁶ as will one in seven men.⁷ These numbers are even more dramatic for trans and non-binary individuals, over fifty percent of whom reported incidence of intimate partner violence in a recent survey.⁸ People with disabilities also experience higher rates of domestic violence.⁹

There are major data gaps on these issues, and the data that do exist often underrepresent the severity of the issue because, as we discuss below, many victims never engage the criminal justice system.¹⁰ Even for victims who are able and interested in accessing the criminal legal system, the data on outcomes and recidivism are mixed. In fact, "evidence that criminalizing intimate partner violence has had a deterrent effect is inconclusive."¹¹ While first-time arrests have been shown to reduce recurrence of domestic violence to some degree, arrests have diminishing returns on repeat offenses, because "the majority of arrested abusers who are high risk will re-abuse regardless of prosecution."¹² Some studies show marginal decreases in re-offenses, while others show no measurable change in behavior at all.¹³

In part, the criminal legal system's incomplete success on these issues can be traced to blind spots within both the advocacy community and the criminal regime for which they advocated. From its inception, the domestic violence movement has been led by and focused on white, middle-class, cis-gendered

5. SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCI-JO KRESNOW & JIERU CHEN, CDC, NAT'L CTR. FOR INJ. PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE 8, 20 (2015), <https://perma.cc/ZM5V-3TQE>.

6. *Id.* at 20. The study defined "severe physical violence" as "hit with a fist or something hard, kicked, hurt by pulling hair, slammed against something, tried to hurt by choking or suffocating, beaten, burned on purpose, used a knife or gun." *Id.*

7. *Id.* at 9, 22.

8. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 68 (Dec. 2016), <https://perma.cc/UZ32-764H>.

9. NAT'L DOMESTIC VIOLENCE HOTLINE, *Abuse in Disability Communities*, <https://perma.cc/7EEQ-F3H8> (last visited Dec. 16, 2020).

10. Enrique Gracia, *Unreported Cases of Domestic Violence Against Women: Towards an Epidemiology of Social Silence, Tolerance, and Inhibition*, 58 J. EPIDEMIOLOGY & COMMUNITY HEALTH 536 (2004).

11. LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE* 24 (2018).

12. ANDREW R. KLEIN, U.S. DEP'T OF JUST., SPECIAL REPORT: PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 47 (2009), <https://perma.cc/93GP-25LP>.

13. *Id.* at 46-47.

women.¹⁴ Consequently, many of the legal reforms designed to address violence in the home have been effectively “color-blind,” and frequently ill-suited to address the intersectional realities victims face across vectors of immigration, race, gender identity and class. For example, the criminal legal system often does not account for the domestic violence survivor whose partner is undocumented—she may want a restraining order or some other law enforcement intervention, but if she is not prepared to risk immigration exposure to herself or her partner, she may never seek one.¹⁵ Women of color have good reason to be wary of calling the police, both in terms of interaction with law enforcement and in terms of the collateral consequences initiating criminal proceedings can impose on their families.¹⁶ A recent post by the #metoo movement, led by Tarana Burke, explained:

As survivors, we are often directed to rely on law enforcement, but unfortunately, we are all too familiar with how this system fails us, especially those of us who are Black survivors. We also know that sexual violence is the second highest form of police violence in the nation, following excessive force.¹⁷

Trans and non-binary individuals also experience high levels of mistreatment and abuse in interactions with law enforcement, and are significantly less likely to call the police.¹⁸

Popular narratives are quick to disparage low-income women who do not leave abusive partners as complicit in the cycle of poverty. But a growing body of research has shown that, absent more robust social safety nets, the decision to leave an abusive partner may impose complex and sometimes untenable economic trade-offs.¹⁹ For instance, in some communities, calling the police to

14. Roberta K. Lee, Vetta L. Sanders Thompson & Mindy B. Mechanic, *Intimate Partner Violence and Women of Color: A Call for Innovations*, 92 AM. J. PUB. HEALTH 530, 530 (2002); Natalie J. Sokoloff & Ida DuPont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 41-44 (2005).

15. Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (June 3, 2018), <https://perma.cc/WW2A-UQE2>; Jasmine Garsd, *Deportation Fears Present New Challenges for Domestic Violence Victims*, N.Y. PUB. RADIO-WNYC (Mar. 20, 2017), <https://perma.cc/U33L-W2HJ>; Lauren Young, *Local Undocumented Immigrants Fear Deportation When Reporting Abuse, Says Immigration Attorney*, METROWEST DAILY NEWS (Nov. 24, 2019), <https://perma.cc/6ZLH-32VX>.

16. Don Terry, *Eavesdropping Laws Mean That Turning On an Audio Recorder Could Send You to Prison*, N.Y. TIMES (Jan. 22, 2011), <https://perma.cc/9ZC6-KAX9>; Tasasha Henderson, *“Who Do You Report to When Your Rapist is the Police?”*, SALON (Oct. 22, 2014), <https://perma.cc/4TBE-EY6M>.

17. MeTooMVMT (@metoomvmt), INSTAGRAM (June 3, 2020), <https://perma.cc/L2C9-X7V5>.

18. JAMES ET AL., *supra* note 8, at 14 (57% of respondents said they would feel uncomfortable asking the police for help if they needed it).

19. Margo Lindauer, *“Please Stop Telling Her to Leave.” Where is the Money: Reclaiming Economic Power to Address Domestic Violence*, 39 SEATTLE U. L. REV. 1263,

report domestic violence can trigger eviction.²⁰ In this light, it is perhaps unsurprising that most domestic violence cases go unreported.²¹ Victim advocate Hema Sarang-Sieminski explains, “Survivors have always known the criminal justice system cannot, and was in fact never designed to, meet their most fundamental human needs.”²²

By failing to account for the specificity of victim’s identities, experiences, and needs, we have created a system which is ill-equipped to meet most victims’ needs. While the “tough on crime” policies DV advocates sought to enact have often been justified in the name of both prototypical and specific (and usually white) victims of high-profile violent crimes, historically there has been very little empirical research into the actual needs and desires of victims writ large.²³ Victim experiences unsettle the assumption that these policies are naturally aligned with victims’ interests.²⁴ In 2018, the Alliance for Safety and Justice commissioned the first ever survey of crime survivors, which challenged the notion that most victims want to put their offenders behind bars.²⁵ Indeed, seventy-five percent of crime victims surveyed believed that prison would be more likely to make people commit crimes than rehabilitate them.²⁶ These voices have been largely left out of both mainstream victim advocacy efforts and criminal justice reform movements, which have focused heavily on diverting and decriminalizing non-violent, drug-related offenses in the years since *The New Jim Crow*.²⁷

The recent wave of progressive prosecution is, in many ways, a product of a criminal justice reform movement heavily focused on non-violent offenses. Organizing efforts around high profile police brutality cases have brought heightened attention to the role of district attorneys in the criminal justice system.²⁸ The movement has been further animated since the 2016 election of President Donald Trump. Voters have begun electing reform-minded prosecutors on pledges to resist skyrocketing rates of incarceration from inside the system,

1263-64 (2016).

20. See, e.g., Nora Caplan-Bricker, *In Cities with “Nuisance Laws,” Victims of Domestic Violence Face Eviction for Calling 911*, SLATE (Apr. 7, 2017), <https://perma.cc/2MBT-Q6YH>.

21. Gracia, *supra* note 10.

22. Email from Hema Sarang-Sieminski, Policy Dir., Jane Doe Inc. (Apr. 2, 2020) (on file with authors).

23. Cf. Julie Carr Smyth, *Black Victims Underrepresented in Named Violent Crime Laws*, ASSOCIATED PRESS (Dec. 3, 2019), <https://perma.cc/7NJA-AGUZ>.

24. See generally Goodmark, *supra* note 2.

25. See ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON JUSTICE AND SAFETY (2018), <https://perma.cc/MT83-9QVW>.

26. *Id.* at 5.

27. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 60 (rev. ed. 2012) (calling the War on Drugs “the single most important cause of the explosion in incarceration rates in the United States”).

28. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019), 6-7, <https://perma.cc/CJ8M-ESX7>.

often by focusing on shifting prosecutorial resources away from non-violent crime.²⁹ Often, these reform platforms do not extend to domestic violence cases, which are neither classified as “serious” enough to be prioritized along with other violent crimes, nor minor enough to be systematically decriminalized. At the same time, some reform policies that *have* extended to domestic violence cases—such as bail reform efforts instituted in Chicago—have been successful at decreasing incarceration, but have been critiqued for instituting reform “at the expense of the victims.”³⁰

These tensions are real, and there are no easy answers, but it is increasingly evident that existing protocols do not work well for victims of intimate partner violence. As new research corroborates and builds on decades of grassroots advocacy to unsettle the assumption that victims are inherently opposed to criminal justice reforms, both victim advocates and criminal justice reformers have begun to recognize that we cannot afford to exempt these issues from system reform.³¹ Hema Sarang-Sieminski, policy director of Jane Doe Inc., a major domestic violence coalition in Massachusetts, voices a growing recognition that domestic violence advocacy needs to reach beyond the status quo: “it is time for our greater [domestic violence/sexual assault] advocacy community to use our decades of experience and survivor-led wisdom to step into the complex spaces of demanding alternative forms of accountability, well-being, and safety for all survivors.”³²

While these conversations have been long neglected, they have begun to gain traction in recent years. The 2019 publication of Danielle Sered’s *Until We Reckon* brought more attention to these questions, and elevated some of the longstanding grassroots work³³ which has, to date, received minimal attention in both mainstream domestic violence and criminal justice reform spaces.³⁴ Nine years after the publication of *The New Jim Crow*, Michelle Alexander applauded and echoed Sered’s analysis: “if we are ever to end mass incarceration and

29. See, e.g., Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://perma.cc/3ARA-JL99>.

30. David Jackson & Madeline Buckley, *Domestic Violence Victims Face Risk of Being Attacked Again Following Cook County Reforms, a Tribune Investigation Found*, CHI. TRIB. (May 2, 2019), <https://perma.cc/3B5L-9ESX>.

31. Grassroots efforts led by women of color have been organizing at the intersection of IPV and criminalization since the early 2000s. See Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219, 224-25 (2018), <https://perma.cc/7896-HNNZ>; Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control*, 9 J. SCHOLARLY PERSP. 21, 26-28 (2013), <https://perma.cc/5PFT-8P2A>.

32. Email from Hema Sarang-Sieminski, *supra* note 22.

33. See generally SERED, *supra* note 3.

34. Cf. INCITE!, *Dangerous Intersections*, <https://perma.cc/5M4N-RTV2> (last visited Dec. 16, 2020).

provide survivors what they truly want and need to heal,” she wrote in a 2019 New York Times Editorial, “[w]e must face violent crime honestly and courageously.”³⁵ Preeminent prison abolition scholar and NYU professor Ruth Wilson Gilmore argues that transformative system change depends in part on our collective ability to address domestic violence: “anti-domestic violence people were central to the formation of abolition as a movement.”³⁶ In other words, the fates of the domestic violence movement and the criminal justice reform movement are necessarily intertwined. Fraught as these conversations are, we posit that they are necessary to both movements.

Our goal is neither to fully explicate all of the issues victims face within the criminal legal system, nor to propose airtight solutions. Instead, we hope to help move a difficult but necessary conversation forward by looking squarely at the possibilities and limitations of criminal justice reforms for victims of domestic violence, specifically in the context of prosecutors’ offices. There are certainly robust conversations to be had to orient our justice system around victims’ voices, identified safety needs, and rehabilitation efforts.

I. PROGRESSIVE PROSECUTORS ON DOMESTIC VIOLENCE: A BRIEF SURVEY

New wave district attorneys’ offices are approaching domestic violence in distinct ways, but most are, at best, in the early stages of program development and implementation. At this point, many of these offices have not instituted concrete changes in how they approach the issue. The most consistent departure from the status quo was an increasing cultural and philosophical recognition of the intersectional complexities these issues raise. At the same time, concrete policy changes were less common, although several promising initiatives have emerged.

A. Methodology

We reviewed platforms and policies at four of the largest self-identified progressive prosecutors’ offices and interviewed staff. This analysis thus does not represent a complete review of all reform-minded offices, but instead aims to surface a conversation about how some of the largest offices are—and are not—addressing victims’ needs.

The four offices we investigated were Kim Foxx (Chicago), Larry Krasner (Philadelphia), Rachael Rollins (Boston), and Chesa Boudin (San Francisco).

Kim Foxx was elected in 2016 in the wake of the public outcry and organizing efforts surrounding the police shooting of 17-year-old Laquan

35. Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://perma.cc/7XHY-VUWZ>.

36. Haymarket Books, *COVID-19, Decarceration & Abolition: An Evening with Ruth Wilson Gilmore*, YOUTUBE (Apr. 28, 2020), <https://perma.cc/4D44-JPQJ>.

McDonald. Foxx campaigned on a platform of police accountability, addressing racial disparities in the criminal justice system, and investing in diversion programs.³⁷ Unlike many of her contemporaries, Foxx has always focused squarely on combating violent crime in Chicago—and largely on gun violence. Though Foxx’s official title is Cook County State’s Attorney, her role is consistent with that of other cities’ district attorneys. The title is different in name but not scope.

Larry Krasner was one of the first district attorneys elected on a progressive platform in the wake of the 2016 election, and his office has been credited with pioneering the idea that prosecutors have a role to play in reducing mass incarceration.³⁸ An infamous internal memo from Krasner introduced broad-based plea and sentence reductions for a wide range of charges, but notably did not extend to domestic violence.³⁹

Rachael Rollins was elected as Suffolk County District Attorney in Boston after an unexpected primary victory in 2018, winning 80 percent of the vote in the general election.⁴⁰ Like many of her contemporaries, DA Rollins’ platform was heavily focused on reducing mass incarceration.⁴¹ To this effect, her office released “The Rachael Rollins Policy Memo” shortly after she took office in 2019.⁴²

Chesa Boudin, a public defender who defeated the incumbent San Francisco District Attorney in November 2019, is one of the most recent additions to the ranks of progressive prosecutors.⁴³ Like his contemporaries, Boudin’s campaign focused heavily on ending mass incarceration and addressing racial disparities in the criminal justice system.⁴⁴

37. Steve Schmaeke, *Kim Foxx Promises ‘New Path’ of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016), <https://perma.cc/2FFA-37Z3>; David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017), <https://perma.cc/Y522-VYAE>.

38. LARRY KRASNER FOR PHILA. DIST. ATT’Y, *On the Issues*, <https://perma.cc/GM6X-2XD4> (last visited Dec. 17, 2020).

39. Larry Krasner, PHILA. DIST. ATTORNEY’S OFF., *New Policies Announced February 15, 2018* (Mar. 13, 2018) [hereinafter Krasner Memo], <https://perma.cc/5VVB-FDKA>; Jim Saksa, *Philly DA Announces Changes to ‘End Mass Incarceration’ Through Lighter Sentences*, WHY? (Mar. 15, 2018), <https://perma.cc/8YAY-MX83>.

40. SEC’Y OF THE COMMONWEALTH OF MASS., *2018 District Attorney General Election Results: Suffolk District*, <https://perma.cc/MJ5L-DJ93>.

41. RACHAEL ROLLINS FOR DIST. ATT’Y, *Policy*, <https://perma.cc/5J4P-QPSW> (last visited Feb. 2, 2021); Zaid Jilani, *Underdog Criminal Justice Reformer Rachael Rollins Wins District Attorney Primary in Boston’s Suffolk County*, INTERCEPT (Sept. 7, 2018), <https://perma.cc/SV5E-RWDJ>.

42. SUFFOLK CTY. DIST. ATTORNEY’S OFF., *Rachael Rollins Policy Memo* (Mar. 2019) [hereinafter Rollins Policy Memo], <https://perma.cc/5R4Y-MQAU>.

43. Evan Sernoffsky, *Chesa Boudin, Reformer Public Defender, Wins Election as San Francisco’s New DA* (Nov. 9, 2019), S.F. CHRON., <https://perma.cc/DY2K-F42N>.

44. CHESA BOUDIN FOR DIST. ATT’Y 2019, *A Roadmap for Reform*, <https://perma.cc/42Q4-QNHU> (last visited Dec. 17, 2020).

What follows is a synthesis of these offices' approaches to domestic violence cases, and in particular to policies and practices promulgated by each office at specific junctures in case progression. The methodology utilized to gather data regarding policies in district attorneys' offices specific to misdemeanor crimes of domestic violence was nimble. Each office is staffed and structured differently, and different offices approved different levels of staff to speak with us. Different offices have differing levels of transparency around this issue. Each office has differing amounts of published policy, and each policy document reflected widely varying degrees of specificity. Unsurprisingly, many offices are reluctant to make blanket proclamations about procedure as decisions about how to approach cases vary due to a multitude of individual factors.⁴⁵

For each of the above offices, we reviewed published materials and reached out multiple times to request interviews with staff. We spoke with staff in three of the offices (Krasner, Rollins, and Boudin), including follow-up conversations over both phone and email. It became particularly difficult to reach staff as the trifecta crises around police brutality, COVID-19, and the global recession took hold.⁴⁶

This paper does not attempt to evaluate the efficacy of these largely nascent programs in terms of their implementation; we recognize the policies and documents these offices have produced provide limited information about enforcement and impact. Instead, our goal is to surface conceptual policy approaches to addressing domestic violence in the context of the stated decarceral goals of these progressive prosecutors' offices and criminal justice reform efforts more broadly. In doing so, we aim to highlight both possibilities and limitations of these approaches, and to identify questions for future research.

B. Shifts in culture change and issue framing

If the meaning of progressive prosecution remains somewhat elusive in general, it is purely unsettled—and sometimes openly contested—when it comes to domestic violence. Does progressive prosecution implicate a departure from the status quo when it comes to intimate partner violence cases? Not necessarily, according to Ben Waxman, Krasner's communications director: "You can push

45. What we did not get nor would be able to achieve at this juncture is a full picture of the magnitude of the issue. We do not know how many misdemeanor cases of domestic violence are dismissed because a victim cannot participate in the prosecution in each office, or how many cases are dismissed for other reasons. Conversely, we do not know how many misdemeanor cases of domestic violence press forward without victim engagement from the outset. We do not have any way to monitor or measure the quality of interaction victims experience throughout the process, or whether their needs are ultimately met.

46. As we gained some momentum with our research, the COVID-19 pandemic struck, followed by multiple incidents of police brutality and further exposure of systemic racism within law enforcement. By late June 2020, other offices furloughed much of their staff due to the pending recession. As offices became consumed with these crises, it became more difficult to conduct follow-up interviews.

for sweeping criminal-justice reform while also efficiently prosecuting serious violent crimes.”⁴⁷ Yet advocates like Michelle Alexander have increasingly asserted that broad-scale criminal justice reform must extend to violent crime.⁴⁸

Among the offices we examined, there is no clear consensus. Some prosecutors believe that vigorous prosecution of domestic violence is “not at all incongruous with progressive prosecution.”⁴⁹ Other offices have openly declared that the conventional treatment of domestic violence cases is not working; District Attorney Chesa Boudin asserts that the system “[h]asn’t worked for victims for decades.”⁵⁰

The most consistent shift from their predecessors’ approach among the offices we spoke with was focused on office culture, issue framing, and the growing recognition of the barriers victims face within the system. Both the public statements of the new wave prosecutors and the staff we spoke with reflected greater cultural competency on intimate partner violence, and increased recognition of the specific intersectionalities that people of color and immigrants experience in these cases.

Kim Foxx (Chicago) recognizes that domestic violence is “one of the more complicated crimes to which our office responds.”⁵¹ She readily acknowledges the intersectional issues around immigration and racial disparities in policing that impact reporting of domestic violence: “We have people who are victims of domestic violence who are living in fear, who are living in danger, because they are afraid that, in as much as they don’t want to be harmed, their families may be broken up, they may be deported. We have people in neighborhoods who . . . don’t trust coming to law enforcement.”⁵² Foxx has worked to institute a culture shift in her office on these issues by creating the expectation that all attorneys spend time volunteering at domestic violence shelters in order to “heighten their

47. Austen, *supra* note 29.

48. Michelle Alexander, *supra* note 35; *see also* INCITE!, *supra* note 34.

49. Telephone Interview with Ian Polumbaum, Assistant Dist. Att’y and Chief of the Domestic Violence and Sexual Assault Unit, Suffolk Cty. Dist. Attorney’s Off. (Apr. 7, 2020) (highlighting prosecutors’ historic reluctance to pursue difficult sexual assault cases and explaining that Rollins is unafraid to prosecute such cases, which he asserts represents significant progress for victims often left out of the process entirely).

50. Email from Rachel Marshall, Dir. of Communications and Policy Advisor, S.F. Dist. Attorney’s Office (Jul. 1, 2020) (on file with authors). When asked to respond to the contention that the criminal justice system is not working for victims, DA Boudin agreed, explaining that the system of prosecuting domestic violence cases “[h]asn’t worked for victims for decades—too often prosecutors exploited victims to get help in securing convictions but ignored their desires and requests when they didn’t align with what [the] DA wanted.” *See also* Telephone Interview with Cristine DeBerry, Chief of Staff to DA Chesa Boudin (Jan. 31, 2020); CHESA BOUDIN FOR DIST. ATT’Y 2019, *supra* note 44.

51. CHI. CHILDREN’S ADVOC. CTR., *Cook County State’s Attorney 2020 Election Guide—Candidate: Kim Foxx*, <https://perma.cc/K6JL-8N8D> (last visited Feb. 2, 2021).

52. Richard Omoniyi-Shoyoola, *Cook County State’s Attorney Kim Foxx: Her Vision for Crime Prevention*, U. CHI. GATE (June 3, 2019), <https://perma.cc/6FPN-2DA4>.

awareness when working cases with such survivors.”⁵³ There is not available data to date analyzing the effect of these policies on victims’ experiences.

In District Attorney Larry Krasner’s office, Director of Victim Services Keziah Cameron explained that the primary shift in her office regarding domestic violence has been philosophical. She explained that her office recognizes the complex interplay between race, class, immigration status, generational trauma, and domestic violence when it comes to prosecuting domestic violence.⁵⁴ Krasner’s office strives to recognize that the root causes of violence are systemic and intergenerational: “a lot of the crime that happens is not because people are mean or evil or wanted to commit crimes, but because they started out in unfair circumstances.” She continues, “a lot of abusers grew up either being abused or watching a parent being abused. The idea of progressive prosecution is if we take some of our resources and address those issues at the beginning, you can end up with less victims.”⁵⁵

District Attorney Chesa Boudin’s Chief of Staff Cristine DeBerry says their office is working to reframe criminal justice in the language of healing as opposed to punishment—an approach that will necessarily include victims.⁵⁶ Boudin’s office is keenly aware that many efforts to center victims have been hampered by colorblindness, which effectively marginalizes the needs and experiences of women of color. DeBerry rightly identified that, from its inception, the mainstream domestic violence movement has been centered on white women, and highlighted the relative lack of time and attention that has been accorded to black survivors of violence—a gap which is particularly stark, given the disproportionate population impacted by these crimes.⁵⁷

One of the most encouraging themes in these conversations has been the increased attention to the need to center victims in these processes. Krasner’s office states that:

The response to violence should be centered on the needs of survivors and based on accountability and developed in consultation with victim advocates and experts. Larry will expand support of victim/witness service programs and use a trauma-informed, evidence-based approach to improve handling of cases, particularly cases of sexual and intimate partner violence, and to improve communication with victims and family members.⁵⁸

In 2016, Foxx’s office announced their plan to “[c]onvene a series of conversations with victim and witness advocates, including traditionally underrepresented victims of crime, to identify strategies for improving services and support for all victims and witnesses, and to collaborate to help increase

53. CHI. CHILDREN’S ADVOC. CTR., *supra* note 51.

54. Telephone Interview with Keziah Cameron, Dir. of Victim Services, Phila. Dist. Attorney’s Off. (Jan. 31, 2020).

55. *Id.*

56. Telephone Interview with Cristine DeBerry, *supra* note 50.

57. *Id.*

58. LARRY KRASNER FOR PHILA. DIST. ATT’Y, *supra* note 38.

clearance rates for cases.”⁵⁹ More recently, the Boudin administration set out on a similar campaign to gather information from survivors and the victim advocacy community in San Francisco to identify needs and begin to reassess what accountability and recovery can look like. Although the details and results of this process have not yet been unveiled, this approach is promising, given the need to incorporate the nuance, complexity, and intersectional realities of victims’ experiences into effective policy making.⁶⁰

These cultural shifts are critical, and also critically hard to measure. As we will discuss below, it is difficult to parse the degree to which these changes in office culture and issue framing translate to impact victim experiences and case outcomes. While an office’s stated policy may reflect an increased understanding of the nuances of the issue, that perspective may or may not translate to direct victim-facing staff in the courts, who often have the most direct contact with victims. Moving forward, we hope to see further inquiry on both quantitative and qualitative measures of victims’ experiences under the new progressive leadership: Do individuals feel more heard, safer, and satisfied with criminal outcomes? If so, what makes that possible? If not, what else can these offices be doing?

C. Less decisive shifts in terms of concrete policies, while some promising reforms emerge in their early stages

Tangible changes to how misdemeanor DV cases are processed through the court system are more challenging to pinpoint. For many offices, the formal approach to IPV has stayed the same in many ways: decision to charge, what to charge, bail, and sentencing. Some of the most concrete policies that speak to domestic violence are actually *exemptions* for IPV from reform efforts. For example, the Rollins Policy Memo exempts domestic violence from liberalized charging and plea bargaining protocols and her policy to decline to charge threats.⁶¹

Some district attorneys explained that the changes they seek to institute have as much to do with shifting the way discretion is exercised on a case-by-case basis as with implementing new policies or initiatives. For example, Boudin argues that one of the most critical things prosecutors can do is “listening to victims and survivors and including them in the [criminal] process and treating them with respect and dignity.”⁶² Like many of the cultural changes discussed above, these changes have the potential to make a profound impact, but as yet, that impact is difficult to measure.

59. KIM FOXX, COOK COUNTY STATE’S ATTORNEY TRANSITION REPORT 6 (Dec. 5, 2016), <https://perma.cc/AYQ4-HVXF>.

60. Telephone Interview with Cristine DeBerry, *supra* note 50.

61. Rollins Policy Memo, *supra* note 42, at App. D.

62. Email from Rachel Marshall, *supra* note 50.

The offices we examined made a range of nascent policy commitments related to DV, from creating restorative justice alternatives, to instituting primary caregiver diversion, to investing in victim support services, to insulating parties from immigration consequences.

First, both Rollins' and Boudin's offices have built on existing programs to employ restorative justice alternatives in some scenarios—Boudin aims to incorporate the practice broadly, while Rollins has aims to employ these practices in a narrower subset of cases, not extending to domestic violence.

Rollins' office has built on and expanded Suffolk County's Juvenile Alternative Resolution (JAR), a pilot program started in 2017 that was designed to serve young people charged with more serious offenses, including but not limited to violent offenses. JAR utilizes restorative justice techniques and community partnerships towards the "shared goal to divert young adults outward, away from the criminal justice system, instead of upward and deeper into it."⁶³ Moreover, successful completion of the program comes with the promise of record sealing of the relevant offense.⁶⁴ Unlike many programs designed to divert young first-time offenders, JAR is not a one-shot deal. Suffolk County Assistant DA Mike Glennon, who manages the program, explains that while they take re-offenses seriously, they do not expect overnight results; the goals are long-term, and the root causes the program seeks to address, such as childhood abuse and early trauma, "are not issues that are going to be solved in 3-6 months."⁶⁵ The program completion data is impressive, with forty-one out of forty-five of the original participants successfully completing the pilot program.⁶⁶ Further metrics (e.g., reduction in violent behavior, future offenses, etc.) are not currently available, but a multiyear study investigating the program across both qualitative and quantitative metrics is currently underway.⁶⁷

Rollins expanded the JAR program to apply to more juvenile and adult cases. Suffolk County now diverts seventy percent of its juvenile cases.⁶⁸ As per the Rollins Policy Memo, there are plans to use the JAR program as a model to expand adult diversion efforts.⁶⁹

Barely six weeks into the Boudin administration, then-Chief of Staff Christine DeBerry described the Boudin administration's protocols regarding

63. SUFFOLK CTY. DIST. ATTORNEY'S OFF., *Early Intervention and Prevention*, <https://perma.cc/9QH5-H58X> (last visited Dec. 17, 2020).

64. *Id.*

65. Telephone Interview with Mike Glennon, Assistant District Attorney in Suffolk County and Chief of Juvenile Unit in DA Rollins' office (Mar. 30, 2020).

66. SUFFOLK CTY. DIST. ATTORNEY'S OFF., *Early Intervention and Prevention*, *supra* note 63.

67. Telephone Interview with Mike Glennon, *supra* note 65.

68. *Id.*

69. Yukun Zhang, *Rollins Lays Out a "Roadmap" for DA Office to Follow*, DORCHESTER REPORTER (Mar. 28, 2019), <https://perma.cc/Y4QJ-HMVY>.

misdeemeanors of intimate partner violence as a “work in progress.”⁷⁰ But their plans are ambitious, particularly with respect to restorative justice. They have committed to offering restorative justice⁷¹ options to every victim who wants to participate, in order to expand “the menu of options to help them heal while holding people who commit crimes accountable.”⁷² This is not a one-size-fits-all proposal: the Boudin administration proposed to create individually tailored restorative justice processes “built according to the needs of the victim,” which can range from traditional restorative justice practices (e.g. “circles”), to mediated victim-offender dialogue.⁷³ This approach will take time, but DeBerry says San Francisco has a head-start because they have been implementing restorative processes in juvenile cases and young adult cases in 2009.⁷⁴ Now, the office seeks to grow their capacity to incorporate restorative practices in intimate partner cases.⁷⁵

In addition to employing restorative justice practices, San Francisco recently began implementing a new program called primary caregiver diversion for custodial parents and legal guardians who reside with and support children under 18, where the defendant’s absence would prove detrimental to the child.⁷⁶ This program, which was adopted by the California legislature in October 2019,

70. Telephone Interview with Cristine DeBerry, *supra* note 50.

71. We do not have robust models for how to translate traditional restorative justice methods to IPV cases. However, both anecdotal experience and peer reviewed research suggest promising results on restorative justice approaches. A recent study published in December 2019 in *Nature Human Behavior* evaluated a restorative justice-based model in Utah, which randomly assigned 222 offenders to either a control group (a standard batterer intervention program) or to the standard batterer intervention program *plus* a restorative justice-based process. The study followed participants for two years, and found statistically significant and meaningful reductions of recidivism, both in terms of the number of the number of subsequent arrests and in terms of the severity of the future offenses which did occur, which decreased by over 50%. Linda G. Mills, Briana Barocas, Robert P. Butters & Barak Ariel, *A Randomized Controlled Trial of Restorative Justice-Informed Treatment for Domestic Violence Crimes*, 3 NATURE HUMAN BEHAV. 1284, 1289 (2019). And significantly for victim advocates, research has found that victims reported higher levels of satisfaction and fairness when offered a RJ option. *Id.* at 1287 (discussing studies). *See also* David B. Wilson, Ajima Olaghere & Catherine S. Kimbrell, *Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis 2-3* (May 12, 2017) (research report, George Mason Univ.), <https://perma.cc/7UAA-33P9>. Again, this is one study focused primarily on offender programming. That said, victims had to opt into the process, so it does at some level evaluate victim readiness and engagement as well. More studies and thought need to be dedicated in this area.

72. CHESA BOUDIN FOR DIST. ATT’Y 2019, *Restorative Justice*, <https://perma.cc/MC4Y-L4HX> (last visited Dec. 17, 2020).

73. *Id.*

74. *See generally* S.F. UNIFIED SCH. DIST., *Restorative Practices*, <https://perma.cc/UU6V-NHEM>.

75. Telephone Interview with Cristine DeBerry, *supra* note 50.

76. Press Release, S.F. Dist. Attorney’s Off., *San Francisco DA Chesa Boudin Announces Primary Caregiver Diversion Program* (Jan. 14, 2020), <https://perma.cc/LY4N-EG87>.

allows qualifying defendants to participate in pre-plea diversion programs, ranging from parenting classes to drug treatment, job training, and housing assistance.⁷⁷ Intimate partner cases are eligible for this intervention, which may serve some victims more effectively than traditional approaches that have historically focused on incarceration, particularly when they are co-parenting children⁷⁸ with their abusers. DA Boudin cited his own personal experience growing up with his parents behind bars and emphasized that the effects of parental incarceration have been “disproportionately egregious” to communities of color.⁷⁹ This initiative gives victims the autonomy and agency to choose to engage in a pre-plea process may mitigate negative impacts for both victim and defendant, limit child welfare involvement and encourage system support for impacted individuals.

Third, many offices spoke to the necessity of finding support for survivors—whether or not they choose to participate in ongoing cases. It is not yet clear the degree to which these edicts have been implemented, although some offices independently confirmed that they have made additional resources available. Rollins’ Policy Memo explains that her office: “prioritizes helping survivors find the support they need, regardless of their participation in ongoing cases, and advocates for policies and programs that provide survivors with needed resources to end cycles of victimization.”⁸⁰ Similarly, Boudin’s office has also increased access to services for victims, including housing and transportation.⁸¹ More data on the nature, availability, and efficacy of these supports would be material. Specifically: what kinds of supports have been employed, and how have such programs been implemented? To what extent do these offices extend such supports to survivors? How effectively do they meet victims needs?

Finally, we found concrete commitments (though limited data) in relation to how offices negotiate potential immigration consequences. DA Boudin explains:

We make very clear to survivors, victims and witnesses in all of our cases that we do not cooperate with immigration officials in anyway. We believe in and honor our City’s commitment as a sanctuary city. . . . We vigorously advocate for victims’ and witnesses’ rights to not have their immigration status discussed or argued in court to the highest extent permitted under the law.⁸²

Both Rollins and Boudin assist undocumented persons in obtaining U-visas.⁸³ DA Rollins has sued to keep ICE agents out of courthouses in Suffolk County, and has instructed her staff to factor potential immigration consequences

77. CAL. PENAL CODE § 1001.83 (2019) (enacted as S.B. No. 394 (Cal. 2019)), <https://perma.cc/3KS9-3K8X>.

78. Telephone Interview with Cristine DeBerry, *supra* note 50.

79. S.F. Dist. Attorney’s Off. press release, *supra* note 76.

80. Rollins Policy Memo, *supra* note 42, at 11.

81. Email from Rachel Marshall, *supra* note 50.

82. *Id.*

83. *Id.*; SUFFOLK CTY. DIST. ATTORNEY’S OFF., *Victim Assistance*, <https://perma.cc/N5RA-C6YT> (last visited Dec. 18, 2020).

into all charging and sentencing decisions.⁸⁴

D. Discussion

It is clear that these offices bring increasing recognition of the intersectional identities and needs of victims into their work; these offices understand that the populations they serve have a multitude of needs, many of which are outside the scope of law enforcement. This is a sea change from years past when “tough on crime” initiatives obscured the humanity of many individuals who interact with the system—both victim and defendant. However, understanding and implementing change are two separate things. We were unable to decipher whether office ethos and culture have made any substantial impact on case approach, administration or outcome. Further inquiry is needed to better understand the degree to which shifts in office culture have translated into better outcomes in terms of victim experience and relative safety.

In misdemeanor cases, the progressive pressure to rely less frequently on incarceration has had an impact on final dispositions in intimate partner cases in at least some offices.⁸⁵ There is increased recognition and attention placed on the deleterious impact to defendants and their families of keeping individuals out of society—incarceration generally results in job loss, and criminal records can make it much harder to secure new employment upon being release, which often means lost income for the family.⁸⁶ For the most part, however, we found that the lower level counts in most of these jurisdictions (intimate partner misdemeanor cases) are not handled in measurably different ways than they were during prior administrations.

II. IMAGINING A PATH FORWARD: QUESTIONS FOR FUTURE RESEARCH AND DISCUSSION

It is clear that the current structure of managing domestic violence within the criminal legal system is failing victims as well as defendants. Further, it is increasingly evident that we cannot solve the issues of the criminal justice system without looking squarely at the question of how to deal with violence in our communities, and in our homes. As fraught as these issues are, we cannot afford to exempt them from the current conversation about system reform. In doing so,

84. Sean Philip Cotter, *Rachael Rollins Would Be ‘Honored’ to Face Arrest over ICE Resistance*, BOSTON HERALD (Apr. 29, 2019), <https://perma.cc/4LM8-C7HZ>; Rollins Policy Memo, *supra* note 42, at 29-30.

85. Telephone Interview with Ian Polunbaum, *supra* note 49 (explaining that there is less emphasis on incarceration in sentencing misdemeanor cases, unless the prosecutor can articulate that a defendant poses a heightened safety threat).

86. Danielle Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 246-50 (2015), <https://perma.cc/R7D5-8LWQ>.

it is imperative to bring those who have been directly impacted by domestic violence to the table, particularly those whose experiences have often been left out: people of color, immigrants, trans individuals, and people with disabilities.

These issues raise profound human questions: *How do we contend with violence? How can we actually protect one another from harm? What does it actually look like for a society to take domestic violence seriously? Is it possible to work to end domestic violence and mass incarceration at the same time? If so, how can those goals be reconciled to achieve better outcomes for victims, defendants, and communities? If not, what other avenues are available?* There are no easy answers, but it is clear the system we have is not working, particularly for the majority of victims who are already marginalized across vectors of race, class, immigration status, gender identity, and disability.

At this juncture, there are still many more questions than there are answers, and significant data gaps remain. Our investigation also raised numerous empirical questions. The offices we investigated reflect increasing recognition of the complexity of victims' experiences, but there is little data to illustrate the degree to which top-down cultural shifts will impact the average victim's experience. Several promising concrete approaches have emerged, including increasing use of restorative justice, refusal to cooperate with immigration agencies, primary caregiver diversion programs, and renewed commitment to provide direct support to victims. However, it is too soon to know how effective these interventions will be, and further empirical research will be critical to evaluate such approaches over time. We need both better data and better metrics in order to do so.⁸⁷

While there are significant questions and data gaps in this area, these gaps are not unique to non-carceral solutions, and should not be used to justify maintenance of a status quo we know works poorly for most victims. Even decades after domestic violence was fully incorporated into the criminal legal system, the evidence on how effectively these structures protect victims remains limited.⁸⁸ As Danielle Sered explains, when we look to alternative models, “we

87. As everywhere, the metrics we apply to prosecutors' offices create institutional incentives. Prosecutors are often wary of being perceived as “soft” on domestic violence because the current metrics we use incentivize aggressive prosecutions: “If one person given leniency goes on to commit a violent crime, the prosecutor's career may well be over—regardless of how many positive changes she enacted.” Kate Brubacher Murphy, *Neighborhood Accountability Boards: A Case Study on the Promise and Limitations of Prosecutor-Led Reform*, 16 STAN. J. C.R. & C.L. 421, 431 (2021). Yet, given the dearth of evidence showing that domestic violence convictions increase public safety writ large, a paradigmatic shift in the incentive system is needed. Chidinma Ume asserts that DAs need to be directly accountable to the general public they represent; she suggests gathering satisfaction data from survivors themselves, in the form of a follow-up questionnaire on the victims experience in the office, asking questions such as: *did you feel like you were heard? How much of the outcome you wanted to see was incorporated into the outcome of the case?* Telephone Interview with Chidinma Ume, Deputy Dir. of Policy, Ctr. for Court Innovation (Apr. 3, 2020).

88. Even mainstream programs like BIP (batterer intervention programs) and DV

cannot measure their success against perfection, because what they stand to displace is, to put it mildly, far from perfect.”⁸⁹

If we are truly to move forward to create a system that protects all of us, we cannot continue to leave the majority of victims out of the conversation. It is important to recognize that neither culture change nor new programming necessarily resolves the risks inherent in interacting with the criminal legal system for people of color, trans individuals, undocumented immigrants, and other systemically marginalized groups. More work is needed to understand what victims want and need, and to develop solutions with those priorities and risk-factors in mind. As lawyers and legal academics, we are wary of presupposing that all solutions to this problem will be strictly *legal* strategies—particularly without victim input. Some of the most substantial protections for victims may come outside of the traditional legal realm. For example, as discussed in Section I, some of the most meaningful solutions may be centered on providing more robust material support to victims so that they are able to leave (fully funding shelters, providing direct material support, etc.).⁹⁰ Again, this investigation requires significantly more depth and breadth of victim input.

As we begin to craft a path forward, we urge researchers and decision makers not to take victims’ needs and desires for granted, and to resist the tendency to universalize a singular victim experience. We call on leaders, law enforcement, and elected officials to acknowledge the magnitude of this crisis, and to seek better alternatives with commitment, urgency, and careful attention to the communities who are most impacted, and the complex needs and risks that both victims and defendants face within the criminal legal system. Only by recognizing the particularized needs and intersectional experiences of the people who are directly impacted by these forms of violence can we come to fully understand the limitations of the current system, and develop models that can offer both victims and defendants better access to accountability, safety, and recovery.

offender programs do not have clear metrics and data: “There are no reliable national statistics about the number of BIPs or DV offender programmes that exist in the USA, since criminal justice-mandated treatment is both local and community-based and there are no national databases that register these programmes.” Mills et al., *supra* note 71, at 1284.

89. SERED, *supra* note 3, at 132. Also note that both legal and non-legal strategies will require significant investment. However, we must also move past the reluctance to engage in alternative forms of justice because of cost. Incarceration costs an average of more than \$33,274 per inmate, per year, nationwide. CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., *The Price of Prisons: Examining State Spending Trends, 2010-2015*, at 7 (May 2017), <https://perma.cc/5J26-MT3W>. In some states, it’s as much as \$60,000 per inmate per year. *Id.* at 9. The cost of recidivism is unknown and ever growing. Further, the public health impact of continued harm to survivors left without an avenue for justice is unaccounted for. Cost should be seen as an investment in better future outcomes for both survivors and perpetrators.

90. Lindauer, *supra* note 19, at 1280.