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# Equal Protection for Survivors of Gender-Based Violence: From Criminalization to Law Enforcement Accountability

Sandra S. Park

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# Equal Protection for Survivors of Gender-Based Violence: From Criminalization to Law Enforcement Accountability

Sandra S. Park\*

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What is the role of the criminal justice system in addressing gender-based violence? Forty years ago, advocates in the United States zeroed in on the nearly non-existent criminal justice response as a priority for reform. Activists argued that the criminal justice system’s consistent refusal to address domestic and sexual violence was rooted in the

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\* Senior Staff Attorney, ACLU Women’s Rights Project. I thank Marcia Olivo, Leigh Goodmark, and Donna Coker for the invitation to participate in this symposium, my copanelists and other participants for insightful discussion and comments, Move to End Violence and the NoVo Foundation for their support, Ramya Sekaran for valuable research assistance, and the staff of the University of Miami Race & Social Justice Law Review. The views expressed here, however, are my own.

Sandra S. Park also participated as a speaker at CONVERGE! Reimagining the Movement to End Gender Violence Conference that took place at the University of Miami School of Law on February 7-8, 2014. See Michelle Kaminsky et al., *Panel on the Possibilities and Limits of Criminal Justice Reform*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 393 (2015).

Recommended citation: Sandra S. Park, *Equal Protection for Survivors of Gender-Based Violence: From Criminalization to Law Enforcement Accountability*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 401 (2015).

assumption that violence against women is undeserving of societal concern. New laws were enacted that criminalized domestic violence, redefined sexual violence offenses, and governed how these crimes were policed and prosecuted. Millions of dollars flowed into funding law enforcement work. But as these changes were put in place, little attention was paid to how survivors and advocates could hold law enforcement accountable when the same biases that led to systemic sanctioning of gender-based violence also shaped the implementation of the new legal regime.

In this essay, I argue that strengthening the accountability of law enforcement to survivors of abuse and violence, such as survivors of domestic and sexual violence, is a necessary step toward ending gender-based violence and ensuring justice for survivors. I also describe how the civil and human rights frameworks can be used as tools for law enforcement oversight, community engagement, and building survivors' power.

Anti-violence advocates committed to marginalized communities have pushed for greater accountability for many years, taking on law enforcement abuses toward LGBT survivors, women of color, Native American survivors, and immigrant survivors. Yet, many in the mainstream anti-violence movement have not examined and critiqued law enforcement policies and practices, even as groups support the continuing flow of resources towards law enforcement responses. To the extent that advocates have pursued reforms of law enforcement practices, they generally have emphasized increasing the numbers of arrests and prosecutions—for example, through mandatory arrest or no-drop prosecution policies—without a deeper analysis of how bias and overreaching state power can play out in law enforcement.

A focus on holding law enforcement accountable is vital in order to improve how governments respond to gender-based violence—including confronting governmental acquiescence to violence—to improve the criminal justice response for those survivors who seek it, and to transform the relationship between governments, advocates, and survivors. Stronger accountability can be achieved by drawing on civil and human rights principles, forming robust collaborations between domestic and sexual violence advocates and police reform advocates, requiring law enforcement to be transparent about its policies and practices, and creating and using formal mechanisms for community engagement and oversight.

## I. CRIMINALIZATION WITHOUT LAW ENFORCEMENT ACCOUNTABILITY

As many others have described, the movement to end violence against women and girls in the United States adopted criminalization as a primary approach to reform.<sup>1</sup> Thus, much of the early work centered on changing criminal laws and law enforcement practices to ensure arrest and prosecution for domestic and sexual violence, and the federal Violence Against Women Act (VAWA), first enacted in 1994, stressed building up police and prosecutorial capacity to respond to domestic violence.<sup>2</sup> This work was based on an important insight: Society—including governments and law enforcement—treated gender-based violence as acceptable, a private matter unworthy of public concern, based on sexist stereotypes about the roles and rights of women and men.<sup>3</sup>

However, there were and continue to be serious ramifications to relying on criminalization so heavily. Criminalization harmfully impacted many from communities who had a troubled relationship with law enforcement, including people of color and immigrants, by discouraging those who might otherwise seek emergency assistance from doing so and opening the door to law enforcement misconduct based on preexisting biases based on race, gender, national origin, and sexual orientation, among other grounds.<sup>4</sup> It also allowed politicians and other

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<sup>1</sup> ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 4–5, 182–84 (2000); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666, 1668–72 (2004).

<sup>2</sup> SCHNEIDER, *supra* note 1, at 5, 92, 183, 188–90.

<sup>3</sup> Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731, 735–36 (2007); *see also* SCHNEIDER, *supra* note 1, at 12–28; Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 57, 85 (2000); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1539 (1998); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983–85 (1991).

<sup>4</sup> *See* Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147 (2012); Special Rapporteur on violence against women, its causes and consequences, *Report of the Special Rapporteur on violence against Women, its causes and consequences, Ms. Rashida Manjoo—Addendum*, Human Rights Council, ¶ 14, U.N. Doc. A/HRC/17/26/Add.5 (June 6, 2011); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 35–37 (2004); Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 77–79 (2003); Hanna, *supra* note 3, at 1507, 1571–72; Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 23–33 (1998); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251, 1255–56, 1267 (1991).

stakeholders to use the anti-violence agenda to advance goals that departed sharply from the social justice origins of the movement.<sup>5</sup> Thus, many anti-violence reforms have not prioritized preserving the due process and other rights of the accused, though many survivors find themselves in precisely that position.<sup>6</sup> For example, the 2006 authorization of the Violence Against Women Act included a provision authorizing the collection of DNA from anyone detained or arrested by federal authorities, even if they are never charged with a crime or convicted.<sup>7</sup> While such a provision transfers a vast amount of personal, identifying data to the government, casting such a wide net does not help identify perpetrators, and in fact undermines the ability to efficiently test DNA rape kits.<sup>8</sup> Likewise, huge amounts of government funding have been spent on sex offender registries, despite no evidence that they effectively prevent sexual violence.<sup>9</sup> Registries do greatly increase the power of governments, which routinely penalize and incarcerate those

<sup>5</sup> KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 2, 4–9 (2008).

<sup>6</sup> Sack, *supra* note 1, at 1680–81; Harvard Law Review, *Developments in the Law: Legal Response to Domestic Violence - V. Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574, 1597 (1993). The case of Marissa Alexander, a domestic violence survivor who states she fired a warning shot after being chased and abused by her husband, is a compelling example. *Alexander v. State*, 121 So. 3d 1185 (Fla. Dist. Ct. App. 2013). At the time of the conference, Alexander had won her appeal and was facing a new trial. She was subsequently granted a plea deal for time served (three years), which included probation requiring her to wear an ankle bracelet for two years. She was released on January 27, 2014. See FREE MARISSA NOW, <http://www.freemariissanow.org/>.

<sup>7</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162 at tit. X, § 1004 (2006).

<sup>8</sup> Michael T. Risher, Staff Attorney, Am. Civ. Liberties Union Found. of N. Cal., Statement at the Hearing on H.R. 3361 “Utilizing DNA Technology to Solve Cold Cases Act of 2011” before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (April 25, 2012), available at <http://dnapolicyinitiative.org/wp-content/uploads/2012/04/Risher-04252012.pdf>; *Untouched, Thousands of Rape Kits Await Justice*, NATIONAL PUBLIC RADIO (April 21, 2012, 2:05 PM), <http://www.npr.org/2012/04/21/151113247/untouched-thousands-of-rape-kits-await-justice>; Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 291–92 (2010); NANCY RITTER, NAT’L INST. OF JUSTICE, SPECIAL REPORT, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases* iii, 1, 14 (2011), <https://ncjrs.gov/pdffiles1/nij/233279.pdf>; ACLU Washington Legislative Office, *ACLU Letter to Congress Urging Opposition to an Amendment to H.R. 5057 Pertaining to the Collection of DNA Samples from Arrestees*, ACLU, July 14, 2008, available at [https://www.aclu.org/racial-justice\\_prisoners-rights\\_drug-law-reform\\_immigrants-rights/aclu-letter-congress-urging-opposi](https://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/aclu-letter-congress-urging-opposi).

<sup>9</sup> HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 4, 115–117 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>; Deborah Jacobs, *Why Sex Offender Laws Do More Harm Than Good*, AM. CIV. LIBERTIES UNION OF N.J., <http://www.aclu-nj.org/theissues/criminaljustice/whysexoffenderlawsdomoreha>.

who do not comply with numerous notification and residency requirements.<sup>10</sup>

Largely missing from the push towards criminal justice intervention was its complement and counterpoint: oversight of how law enforcement addresses and prevents gender-based violence. While laws were changed to mandate law enforcement interventions, and resources were concentrated into law enforcement agencies and groups working with them, mechanisms were not put in place to monitor and review how law enforcement implements the laws.<sup>11</sup> Instead, the relationship between law enforcement and advocates became one of unequal alliance—advocates support survivors and help train officers, but law enforcement largely has unfettered authority to determine how it responds to violence.<sup>12</sup> To some extent, this might also reflect the lack of effective mechanisms in many jurisdictions to hold law enforcement accountable for misconduct.<sup>13</sup> But until recently, with some notable exceptions, anti-violence groups did not make any concerted effort to ensure that police response to gender-based violence was included in already-existing mechanisms, such as civilian oversight bodies or civil rights investigations into discriminatory conduct by police departments.<sup>14</sup>

<sup>10</sup> HUMAN RIGHTS WATCH, *NO EASY ANSWERS*, *supra* note 9, at 7–8, 49–64, 100–18.

<sup>11</sup> A federal bill authorizing the Attorney General to bring suit when a state or state official “has discriminated on the basis of gender in the investigation or prosecution of gender-based crimes and that discrimination is pursuant to a pattern or practice of resistance to investigating or prosecuting gender-based crimes” was introduced after the Supreme Court issued *United States v. Morrison*, but never enacted. See Violence Against Women Civ. Rights Restoration Act of 2001, H.R. 429, 107th Cong. (2001); Violence Against Women Civ. Rights Restoration Act of 2003, H.R. 394, 108th Cong. (2003).

<sup>12</sup> Karen Rick & Patrick Seffrin, *Police Officers’ Collaboration with Rape Victim Advocates: Barriers and Facilitators*, 28 *VIOLENCE & VICTIMS* 681, 681–696 (2013).

<sup>13</sup> HUMAN RIGHTS WATCH, *CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA* (2013), available at [http://www.hrw.org/sites/default/files/reports/us0113ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0113ForUpload_2.pdf); ACLU HUMAN RIGHTS PROGRAM, *ISLAND OF IMPUNITY: PUERTO RICO’S OUTLAW POLICE FORCE* 103–17 (2012), available at [https://www.aclu.org/files/assets/islandofimpunity\\_20120619.pdf](https://www.aclu.org/files/assets/islandofimpunity_20120619.pdf).

<sup>14</sup> See, e.g., HUMAN RIGHTS WATCH, *CAPITOL OFFENSE*, *supra* note 13, at 27, 181; Police Executive Research Forum, *Critical Issues in Policing Series: Improving the Police Response to Sexual Assault* 9–10, 36–39 (March 2012).

The Department of Justice did include gender considerations as part of two 1997 investigations that the Special Litigation Section conducted into the Pittsburgh, PA and Steubenville, OH police departments. The Pittsburgh investigation focused on use of excessive force and false arrests. The subsequent consent decree briefly discusses gender and mandates that police undergo “annual training by qualified instructors that includes, at a minimum, training on how to relate to . . . persons of the opposite sex” and “training in communications skills and avoiding improper . . . sexual communications.” Consent Decree, *U.S. v. City of Pittsburgh, Pittsburgh Bureau of Police*, No. 97-0354, at ¶ 33 (W.D. Pa. Apr. 16, 1997). In Steubenville, the Department of Justice found that the police

Therefore, the last four decades of anti-violence reforms have created a system that relies primarily on criminal justice intervention, with few formal checks on law enforcement misconduct.

## II. THE IMPORTANCE OF LAW ENFORCEMENT ACCOUNTABILITY ADVOCACY AS A CHECK ON MISCONDUCT AND IMPUNITY

The void of law enforcement accountability and oversight has serious consequences for survivors. Such a void permits law enforcement to continue to act according to its own mandates and biases, undermines survivors who do seek protection through the criminal justice system, and contributes to the vastly unequal power dynamics between law enforcement, advocates, and survivors. And because the criminal justice response to gender-based violence affects so many other aspects of survivors' lives—including their rights in housing, education, employment, and child custody—the failure to address these biases weakens their security in other fundamental ways.

The experience of Lakisha Briggs, an African-American domestic violence survivor in Norristown, PA, provides a starting point for examining the complex individual and community-wide harms that result when checks are not in place to monitor and review policing of domestic and sexual violence.<sup>15</sup> In April 2012, Ms. Briggs' adult daughter called the police when Ms. Briggs was assaulted by her then-boyfriend. A police officer responded, arrested Ms. Briggs' boyfriend, and then informed Ms. Briggs: "You are on three strikes. We're gonna have your landlord evict you." At that moment, Ms. Briggs learned that Norristown had a "three-strikes" law on the books, which authorized the city to revoke or suspend a landlord's rental license and forcibly remove a

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caused and condoned excessive force and false arrests through inadequate policies and failure to train and supervise. Consent Decree, *U.S. v. City of Steubenville*, No. 97-0966 (S.D. Ohio Sept. 3, 1997). The consent decree there added language regarding mandatory training in domestic violence response and investigation, and identifies domestic violence and racial bias allegations against officers as areas of police misconduct. *Id.* at ¶¶ 14(d), 65(d), 67.

<sup>15</sup> The facts discussed here are taken from the federal lawsuit filed on behalf of Ms. Briggs by the ACLU, ACLU of Pennsylvania, and the law firm Pepper Hamilton. The complaint charged that Norristown and its officials violated Ms. Briggs' right to petition the government under the First Amendment, and her rights to due process, equal protection, fair housing, as well as under the federal Violence Against Women Act. Complaint, *Briggs v. Norristown*, No. 2:13-cv-02191-ER (E.D. Pa. Apr. 24, 2013). The lawsuit settled in September 2014, with Norristown repealing the ordinance, paying \$495,000 in damages and attorneys' fees, and agreeing not to pass a similar ordinance in the future. Release and Settlement Agreement, *Briggs v. Norristown*, No. 2:13-cv-02191-ER), (E.D. Pa. Sept. 8, 2014), available at <https://www.aclu.org/womens-rights/briggs-v-borough-norristown-et-al-release-and-settlement-agreement>.

tenant from any property where the police responded to three instances of “disorderly behavior” within a four-month period. “Domestic disturbances” were explicitly included in the list of “disorderly behaviors” triggering the ordinance.

Ms. Briggs was terrified of losing her home, so she instructed everyone in her life not to call the police. Though she ended the relationship, her ex-boyfriend took advantage of the law and continued to harass her with the knowledge that she could not seek assistance. As his physical violence against her escalated, including stabbing her in the neck, she did not reach out to law enforcement, but others did—and the city forced her landlord to begin eviction proceedings against her and threatened to condemn the property and remove her for trespassing.

These ordinances—often called chronic nuisance, disorderly behavior, or crime-free ordinances—exist across the country and are proliferating. Yet, little attention has been paid to them and their impact on people of color, survivors of gender-based violence, and people with disabilities, who are most likely to suffer discrimination, heightened danger, and homelessness because of them.

Ms. Briggs’ experience represents the myriad barriers survivors face and the need for law enforcement accountability. First, she encountered the starkest form of victim-blaming from the city. The ordinance itself codified victim-blaming, by treating survivors as “nuisances” even when they were sincerely requesting assistance. Here, the city designated Ms. Briggs’ home as a police-protection-free-zone and silenced her. Either she could refrain from calling for assistance, or she could call and then lose her home altogether.

Second, Ms. Briggs’ identity as an African-American, low-income, domestic violence survivor rendered her particularly vulnerable to harm based on the ordinance. Norristown enacted a law that specifically provided for enforcement of the ordinance based on domestic violence, even as it knew that domestic violence survivors make up 20% of its homeless population.<sup>16</sup> It crafted the ordinance to give absolute discretion in its enforcement to the chief of police, thus providing few checks on discriminatory implementation.<sup>17</sup> Simultaneously, it expressed concern in filings to HUD about the increasing numbers of minorities and Section 8 voucher holders moving into rental properties.<sup>18</sup> As a

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<sup>16</sup> NORRISTOWN, PA., MUN. CODE § 245-3 (Jan. 5, 2009) (repealed Nov. 7, 2012), available at <http://ecode360.com/11550738>; MUNICIPALITY OF NORRISTOWN, U.S. DEP’T OF HOUS. & URBAN DEV. THIRD PROGRAM YEAR ACTION PLAN 26 (2012).

<sup>17</sup> NORRISTOWN, PA., MUN. CODE § 245-3, *supra* note 16.

<sup>18</sup> MUNICIPALITY OF NORRISTOWN, *supra* note 16. Section 8 vouchers are an essential resource for domestic violence survivors, who often experience unstable and insecure housing.



Section 8 voucher holder, Ms. Briggs had limited housing options.<sup>19</sup> She could not easily relocate from Norristown given her economic circumstances. Thus, the ordinance ultimately denied Ms. Briggs access to police protection and undermined the stability of her housing. These ordinances similarly have harmed women of color who experience domestic violence in other parts of the country. A study of a Milwaukee nuisance ordinance showed that domestic violence was the third most common basis for receiving a citation and that the ordinance was disproportionately enforced in African-American communities.<sup>20</sup>

Third, there was little awareness about the ordinance, which was enacted in 2009, or police implementation of it in the community.<sup>21</sup> It was passed with minimal discussion and no input from relevant stakeholders, such as domestic violence or housing advocates, despite the obvious impact on survivors and tenants. Calls relating to domestic violence make up the single largest category of calls police receive; thus, any law that limits or penalizes police calls will necessarily affect domestic violence survivors.<sup>22</sup> Moreover, Norristown, as a recipient of HUD funding, has an obligation to analyze its policies and practices to determine whether they affirmatively further fair housing as required by the Fair Housing Act.<sup>23</sup> It does not appear that the municipality studied whether enforcement of the ordinance would restrict housing and services to women, people of color, or people with disabilities. The ordinance should have been analyzed and evaluated according to these consequences, among others, before it was passed.

Fourth, the ordinance silenced Ms. Briggs and other domestic violence victims. The ordinance stripped Ms. Briggs of her right to seek police assistance in the first instance. It then deprived her of any opportunity to advocate for herself. The ordinance did not formally provide her with notice of any strikes that might be issued or a mechanism to challenge each strike. With the support of her landlord and her friend, she attended a meeting with city officials including the police

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<sup>19</sup> See, e.g., Eliza Hirst, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL'Y 131, 133–35 (2003) (discussing limited housing options available to survivors).

<sup>20</sup> Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIOLOGICAL REV. 117, 127, 130 (Feb. 2013).

<sup>21</sup> NORRISTOWN, PA., MUN. CODE § 245-3, *supra* note 16.

<sup>22</sup> ANDREW R. KLEIN, NATIONAL INSTITUTE OF JUSTICE, SPECIAL REPORT: PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES § 1.2 (2009), available at <https://www.ncjrs.gov/pdffiles/1/nij/225722.pdf>.

<sup>23</sup> 42 U.S.C. § 3608(e)(5) (2013).

chief, but was unable to convince them of the injustice of the law. Later, she was able to defeat the eviction case that Norristown pressured her landlord to bring against her, but she continued to face the threat of being removed from her home by the municipality pursuant to the ordinance.<sup>24</sup>

Fifth, once police protection was withdrawn from her, she had no other viable options to secure her safety and keep her home. As she said, “If I called the police to get him out of my house, I’d get evicted. If I physically tried to remove him, somebody would call 911 and I’d be evicted.”<sup>25</sup> Given these experiences, Ms. Briggs no longer sees the government as a potential source of assistance, but instead a threat to her home and family.

Ms. Briggs’ experience exemplifies the encounters that too many survivors have with law enforcement: abuse and hostility from law enforcement, execution of policies and practices that heighten the danger survivors face and disempower them in light of other structural inequalities, inability to change police practices using informal mechanisms, and ultimate isolation. There is much more that could be said about what happened to Ms. Briggs. Here, I highlight three main points from her experience that explain why strengthening law enforcement accountability would help address the causes of gender-based violence.

#### *A. Connecting State-Perpetrated, State-Created, and State-Condoned Violence*

A focus on law enforcement accountability places a spotlight on the ways that law enforcement condones and perpetrates gender-based violence, and stresses how the government can address causes of violence. United States law traditionally has distinguished state-perpetrated violence—in other words, violence committed by government officials or employees—from violence committed by private individuals, and often absolves the government of any legal obligation to

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<sup>24</sup> Complaint, *Briggs v. Norristown*, *supra* note 15. Ms. Briggs ultimately was able to vindicate her rights, as well as the rights of other tenants in Norristown, through the federal lawsuit. When the settlement was announced, she stated, “While what happened to me was shocking and frightening, I am relieved that no other family will have to choose between their safety and their home.” *American Civil Liberties Union, Pennsylvania City Agrees to Repeal Law that Jeopardizes Safety of Domestic Violence Survivors*, ACLU, Sept. 8, 2014, <https://www.aclu.org/womens-rights/pennsylvania-city-agrees-repeal-law-jeopardizes-safety-domestic-violence-survivors>.

<sup>25</sup> Erik Eckholm, *Victims’ Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES, August 17, 2013, at A1.

address the latter.<sup>26</sup> Ms. Briggs' case is just one example of why these distinctions are false for so many survivors.

When governments do not respond to or prevent violence committed by police officers, that same bias infuses departments' responses to violence committed by private individuals and makes such violence possible. Ms. Briggs' case might be a particularly clear example of how government policy and practices give rise to violence, because the local law punishes survivors who seek police protection. Yet, survivors of gender-based violence experience governmental withholding of protection and sanction of private violence everyday across the United States<sup>27</sup> They are especially likely to face this misconduct if they are members of marginalized communities, such as Ms. Briggs.

Unless advocates hold law enforcement accountable for the violence it perpetrates, creates, and condones through its failures to act, we will not address a primary contributor to the perpetuation of gender-based violence. Accountability will also improve the state's responses to violence, by focusing on how discrimination by law enforcement compounds the barriers to justice for survivors. Challenging the state's role in sanctioning violence committed by its employees as well as private individuals is key to eliminating a structural cause of gender-based violence and strengthening how the government addresses violence.

#### *B. Preserving Criminal Justice Responses for Survivors Who Seek Them*

Although most survivors do not report violence they experience, thousands of survivors of gender-based violence still seek law enforcement assistance every day.<sup>28</sup> Without the ability to hold law

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<sup>26</sup> See Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13:1 FORDHAM INT'L L.J. 1-3, 27 (1989); see also *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 109 S. Ct. 998 (1989); Julie Goldscheid, *Rethinking Civ. Rights and Gender Violence*, 14 GEO. J. GENDER & L. 43, 55, 67 (2013).

<sup>27</sup> See, e.g., *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005); U.S. DEP'T OF JUSTICE, CIV. RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf); U.S. DEP'T OF JUSTICE, CIV. RIGHTS DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (2011), available at [http://www.justice.gov/crt/about/spl/documents/prpd\\_letter.pdf](http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf); U.S. DEP'T OF JUSTICE, CIV. RIGHTS DIVISION, INVESTIGATION OF THE MISSOULA POLICE DEPARTMENT (2013), available at [http://www.justice.gov/crt/about/spl/documents/misoulapdfnd\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/misoulapdfnd_5-15-13.pdf); ACLU HUMAN RIGHTS PROGRAM, ISLAND OF IMPUNITY, *supra* note 13, at 102-117; HUMAN RIGHTS WATCH, CAPITOL OFFENSE, *supra* note 13.

<sup>28</sup> *Domestic Violence Facts*, FEMINIST MAJORITY FOUNDATION, 2014, available at <http://www.feminist.org/other/dv/dvfact.html#notes>; KLEIN, *supra* note 22, at Ch. 1, Sec. 2.

enforcement accountable for its responses, they are far too likely to face hostility, disinterest, and concrete harms as a result of these interactions. For many survivors, however, the criminal justice system can provide important relief. Law enforcement action can result in immediate intervention into dangerous situations, where other resources or community support may not exist.<sup>29</sup> Moreover, effective criminal justice response often significantly impacts other aspects of a survivor's life, including her ability to maintain her home, job, education, and custody of her children.<sup>30</sup>

Enforcing the criminal laws and holding police accountable for such enforcement are essential to justice and equal protection. Other parts of the movement to end gender-based violence are developing alternative models that do not rely on the penal approaches of criminal justice, but instead look to restorative and transformative justice models.<sup>31</sup> This work is vitally important. I argue here that prioritizing law enforcement accountability should not privilege criminal justice responses above all others, or support efforts to blindly institute increasingly penal and punitive responses to gender-based violence. It also should not ignore or overlook the violence that criminal justice interventions can inflict on people and communities. It instead acknowledges that, for many survivors, criminal justice responses can serve as an important remedy for the violence they are experiencing now. This recognition has driven activists in the United States to work towards strengthening criminal justice responses to gender-based violence committed against service members, Native Americans, and students.<sup>32</sup> It has spurred advocates in

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<sup>29</sup> T.K. Logan & Robert Walker, *Civil Protective Orders Effective in Stopping or Reducing Partner Violence Challenges Remain in Rural Areas with Access and Enforcement*, UNIVERSITY OF NEW HAMPSHIRE CARSEY INSTITUTE POLICY BRIEF NO. 18 (Spring 2011).

<sup>30</sup> *Id.* at 3–5.

<sup>31</sup> Donna Coker, *Enhancing Autonomy For Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1 (Oct. 1999); GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE § 1.3 (2007), available at [http://prisonbookscollective.files.wordpress.com/2010/10/g5\\_toward\\_transformative\\_justice-booklet.pdf](http://prisonbookscollective.files.wordpress.com/2010/10/g5_toward_transformative_justice-booklet.pdf); *Creative Interventions Toolkit: A Practical Guide to Stop Interpersonal Violence*, CREATIVE INTERVENTIONS, (2012), available at <http://www.creative-interventions.org/wp-content/uploads/2012/06/CI-Toolkit-Complete-Pre-Release-Version-06.2012-.pdf>.

<sup>32</sup> *Sexual Assault on Campus: A Frustrating Search for Justice*, THE CTR. FOR PUBLIC INTEGRITY, (2009-2011), [http://www.publicintegrity.org/accountability/education\\_n/sexual-assault-campus/](http://www.publicintegrity.org/accountability/education_n/sexual-assault-campus/); *Basics*, KNOW YOUR IX: EMPOWERING STUDENTS TO STOP SEXUAL VIOLENCE, <http://knowyourix.org/basics/> (last visited May 22, 2015); *Statistics on Violence Against Native Women Policy Insights Brief*, NAT'L CONG. OF AM. INDIANS (NCAI) POLICY RESEARCH CTR., (February 2013); *Vote YES for the Military Justice Improvement Act of 2013 (S. 967)*, ACLU, (Nov. 18, 2013), available at <https://www.aclu.org/military-justice-improvement-act-2013>.

India to push for a comprehensive package of remedies to address sexual violence, including criminal law amendments, because the system so often failed to protect survivors.<sup>33</sup> These efforts are stirring vital awareness and debate about, as well as reforms of, the government's role in systematically ignoring and contributing to violence.

### C. *Building Power of Survivors*

Advocacy to hold law enforcement accountable for how it responds to gender-based violence is a tool for building survivors' power. It can help shift how survivors see and interact with law enforcement agencies, which typically act with few, if any, checks. The current framework of laws, police practices, and social service agencies often disempowers survivors. Survivors are told that criminal laws exist that will address sexual and domestic violence they experience and are advised to turn to the criminal justice system to obtain protection. Yet, they too often are re-victimized by that system. While advocates may be willing to support individual survivors in navigating the system, they are much less likely to engage in systemic reform work in partnership with survivors. Advocacy focused on law enforcement accountability broadens the understanding of how survivors interact with the state and provides a basis for building power from the ground up.

The movement to end military sexual violence is a notable example. Perhaps no institution in the United States is more patriarchal and hierarchical than the military, and it is one of the last institutions to formally exclude women from many positions.<sup>34</sup> The military justice system, the military's analogue to the civilian criminal justice system, embodies this top-down ethos, by authorizing the chain of command to determine whether a case is referred for prosecution or otherwise disposed of.<sup>35</sup> Service members shared their experiences with retaliation from other service members and the chain of command after reporting

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clu.org/womens-rights/aclu-letter-support-military-justice-improvement-act-2013; AMNESTY INT'L, *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA* 4-8, 17 (2007); Serv. Women's Action Network (SWAN), *Military Judicial Reform—SWAN's Campaign to Reform Military Justice*, available at <http://servicewomen.org/military-judicial-reform-2/>.

<sup>33</sup> JUSTICE VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (Jan. 23, 2013).

<sup>34</sup> In January 2013, the Department of Defense announced it would lift women's exclusion from combat positions, a process that is ongoing. *Defense Department Will Lift Policy Excluding Women from Combat*, ACLU, (Jan. 23, 2013), <https://www.aclu.org/womens-rights/defense-department-will-lift-policy-excluding-women-combat>.

<sup>35</sup> Lindsay Rosenthal & Lawrence Korb, *Twice Betrayed: Bringing Justice to the U.S. Military's Sexual Assault Problem* 14–15, 28–33, Ctr. for Am. Progress (Nov. 2013).

sexual violence, including harassment and disciplinary measures.<sup>36</sup> Within the last few years, survivors have organized around the issue of accountability, calling for checks on commanders' complete authority over disposition of cases and naming the sexism at the root of military justice responses to violence.<sup>37</sup> Survivors and advocacy groups have used their power to push for serious reforms of military justice, treatment of and support for survivors, and the rights of veteran-survivors.<sup>38</sup>

Activists working to end violence against Native American women also have made significant progress in using law enforcement accountability as a tool to build power for survivors and tribes generally. The history of colonialism and stripping of tribal sovereignty resulted in criminal justice responses that utterly failed Native American survivors of sexual violence. Federal and state authorities often refused to investigate, arrest, or prosecute, and under federal law, tribes had no jurisdiction over non-Indians who committed violence. After years of advocacy, Native American activists successfully pushed for legislative reforms that give more authority to tribes when dealing with criminal cases, particularly those involving domestic violence.<sup>39</sup> These laws also require federal, state, and local governments to coordinate more closely with tribes in responding to cases, including reporting on how cases are

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<sup>36</sup> U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM, RESPONSE SYSTEMS PANEL, sl. 17 (June 27, 2013), available at [http://www.sapr.mil/public/docs/speeches/DoD\\_SAPRO\\_ResponseSystemsPanel\\_Briefing\\_27Jun13\\_Online.pdf](http://www.sapr.mil/public/docs/speeches/DoD_SAPRO_ResponseSystemsPanel_Briefing_27Jun13_Online.pdf) (reporting that 62% of female survivors reported experiencing some form of retaliation as a result of reporting the sexual violence).

<sup>37</sup> Rosenthal & Korb, *supra* note 35, at 28–33; Service Women's Action Network, *About*, TRUTH AND JUSTICE SUMMIT, <http://truthandjusticesummit.org/about/>; Equality Now, *United States: Sexual assault of women in the military must be stopped*, Action No. 44.1, [http://www.equalitynow.org/take\\_action/sexual\\_violence\\_action441](http://www.equalitynow.org/take_action/sexual_violence_action441).

<sup>38</sup> Military Justice Improvement Act of 2013, S. 967, 113th Cong. (introduced May 16, 2013); Anu Bhagwati, Statement to the House Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs, *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma*, Hearing, July 18, 2012, available at <http://veterans.house.gov/witness-testimony/ms-anu-bhagwati-0>; Am. Civ. Liberties Union (ACLU), ACLU of Conn., Serv. Women's Action Network (prepared by Veterans Legal Services Clinic, Yale Law School), *Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma* (Nov. 2013), <https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf>.

<sup>39</sup> Tribal Law and Order Act of 2010, Pub. L. 111–211 at tit. II (July 29, 2010); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, tit. IX § 901–910 (Mar. 7, 2013); INDIAN LAW RESOURCE CENTER, *RESTORING SAFETY TO NATIVE WOMEN AND STRENGTHENING NATIVE NATIONS: A REPORT ON TRIBAL CAPACITY FOR ENHANCED SENTENCING AND RESTORED CRIMINAL JURISDICTION*, 17–23 (2013) available at [http://indianlaw.org/sites/default/files/TribalCapacityReport\\_Final.pdf](http://indianlaw.org/sites/default/files/TribalCapacityReport_Final.pdf).

handled and resolved.<sup>40</sup> While far from complete, these reforms are notable, given the long history of oppression of indigenous peoples and Native women specifically in this country.

Immigrant women and advocates, in the face of tremendous anti-immigrant fervor and enactment of anti-immigrant policies and laws, also have pushed successfully for law enforcement accountability.<sup>41</sup> Since the first enactment of VAWA, the law has been strengthened to provide immigrant survivors with greater access to immigration remedies.<sup>42</sup> In part, the rationale for these reforms was to allow survivors to access police assistance without fear of deportation.<sup>43</sup> Immigrants have been able to use their right to reach out to law enforcement to protest and limit the impact of some of the most regressive immigration policies that require local law enforcement to play an active role in immigration enforcement.<sup>44</sup> Some of this advocacy has been done in partnership with law enforcement, such as police leaders.<sup>45</sup> The Department of Justice also has highlighted the rights of survivors to equal protection as part of their racial profiling investigation into Sheriff Joe Arpaio and the Maricopa County Sheriff's Office.<sup>46</sup> Asserting the right to hold law enforcement accountable for its misconduct in responding to domestic and sexual violence has been vital to ensuring that the concerns of

<sup>40</sup> INDIAN LAW RESOURCE CENTER, *supra* note 39, at 55–63.

<sup>41</sup> IMMIGRATION POLICY CENTER, REFORMING AMERICA'S IMMIGRATION LAWS: A WOMAN'S STRUGGLE: SPECIAL REPORT, 9-10, (June 2010), available at [http://immigrationpolicy.org/sites/default/files/docs/A\\_Womans\\_Struggle\\_062810.pdf](http://immigrationpolicy.org/sites/default/files/docs/A_Womans_Struggle_062810.pdf).

<sup>42</sup> *Violence Against Women Act of 1994*, Pub. L. 103–322, tit. IV, 108 Stat. 1796 (Sept. 13, 1994); *Violence Against Women Act of 2000*, Pub. L. 106–386, div. B, 114 Stat. 1491 (Oct. 28, 2000); *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. 109–162, 119 Stat. 2960 (Jan. 5, 2006).

<sup>43</sup> Sreeharsha, *supra* note 41, at 8–11; *Domestic Violence Victim's 911 Call for Help Results in Deportation Proceedings*, ACLU OF S. CAL., (May 12, 2011), <http://www.aclusocal.org/a-domestic-violence-victims-911-call-for-help-results-in-deportation-proceedings-secure-communities-program-endangers-crime-victims/>.

<sup>44</sup> Am. Civ. Liberties Union, Written Statement to the House Homeland Security Subcommittee on Border and Maritime Law, *Building a Secure Community: How Can DHS Better Leverage State and Local Partnerships?*, Hearing, 8-11 (July 20, 2012), available at [https://www.aclu.org/files/assets/aclu\\_statement\\_on\\_hearing\\_re\\_dhs\\_s\\_tate\\_local\\_partnerships\\_final.pdf](https://www.aclu.org/files/assets/aclu_statement_on_hearing_re_dhs_s_tate_local_partnerships_final.pdf); Proposed Amicus Curiae Brief of Legal Momentum In Support of Plaintiffs' Motion for Preliminary Injunction, *Friendly House et al., vs. Michael B. Whiting et al.*, No. 2:10-cv-01061-MEA (June 11, 2010), available at [https://www.aclu.org/files/assets/amicus\\_brief\\_Legal\\_Momentum.pdf](https://www.aclu.org/files/assets/amicus_brief_Legal_Momentum.pdf).

<sup>45</sup> THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES, 21, 29–30 (July 2007), available at <http://www.theiapo.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf>.

<sup>46</sup> Complaint, *U.S. v. Maricopa County*, No.12-cv-981 (D. Az. May 10, 2012); Letter from Thomas E. Perez, Assistant Attorney General, to Bill Montgomery, Maricopa County Attorney (Dec. 15, 2011), [http://www.justice.gov/crt/about/spl/document/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/document/mcso_findletter_12-15-11.pdf).

immigrant survivors are addressed. This advocacy benefits immigrants as a whole, by highlighting the devastating impact that the enlistment of police officers as immigration agents has on immigrant communities.

### III. ACHIEVING LAW ENFORCEMENT ACCOUNTABILITY—INSIGHTS FROM CIVIL AND HUMAN RIGHTS LAW

Law enforcement accountability is a foundational tenet of both civil and human rights law. Civil rights law provides that law enforcement cannot discriminate based on membership in protected classes, such as sex, race, and national origin.<sup>47</sup> When police responses are based on bias, such as stereotypes about victims of domestic violence, the government violates its obligation to provide equal protection.<sup>48</sup> Human rights law also adopts nondiscrimination as a core tenet, but goes further in imposing due diligence obligations on the government.<sup>49</sup> Accordingly, governments are held responsible for addressing violence perpetrated by both public and private actors through direct interventions—such as appropriate criminal justice, social services, and other responses—supporting efforts from civil society, providing remedies to victims, and working to prevent gender-based violence.<sup>50</sup> Human rights law’s focus on preventing violence and analyzing how police practices impact survivors helpfully places the spotlight on the state’s conduct.<sup>51</sup> It also emphasizes victims’ right to be treated with dignity and an intersectional analysis, examining how a person’s sex, class, race, sexual orientation,

<sup>47</sup> See, e.g., 42 U.S.C. § 14141; 42 U.S.C. § 3789d.

<sup>48</sup> See, e.g., *Watson v. City of Kansas City*, 857 F.2d 690, 695–96 (10th Cir. 1998); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1990); *Smith v. City of Elyria*, 857 F. Supp. 1203, 1212–13 (N.D. Ohio 1994); see also Niji Jain, *Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability through the Equal Protection Clause*, 60 EMORY L.J. 1011 (2011).

<sup>49</sup> Convention on All Forms of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19, ¶ 9, 11th Session (1992), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>; *Jessica Lenahan (Gonzales) v. United States*, No. 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (July 2011), <http://www.oas.org/en/iachr/decisions/2011/USPU12626EN.doc>.

<sup>50</sup> CEDAW General Recommendation No. 19, *supra* note 49, at ¶¶ 9, 24; United Nations, Comm. on the Elimination of Discrimination Against Women, Communication No. 5/2005, 39th Sess., Jul. 23–Aug. 10, 2007, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007) [*Şahide Goekce (deceased) v. Austria*]; United Nations, Comm. on the Elimination of Discrimination Against Women, Communication No. 6/2005, 39th Sess., Jul. 23–Aug. 10, 2007, U.N. Doc. CEDAW/C/39/D/6/2005 (Oct. 1, 2007) [*Fatma Yildirim (deceased) v. Austria*].

<sup>51</sup> See Sandra S. Park, *CEDAW’s Promise for Strengthening Law-Enforcement Accountability to Survivors of Domestic and Sexual Violence in the United States*, 2014 MICH. ST. L. REV. 357 (2014).



disability status and other identities shape their experiences with the government.<sup>52</sup>

The recognition under civil and human rights law that law enforcement bias in policing domestic and sexual violence is a form of sex discrimination (as well as other types of discrimination) has important legal and policy implications that can bolster accountability work. The Department of Justice has used this argument to open its civil rights investigations into policing of domestic and sexual violence aimed at reforming departments.<sup>53</sup> The ACLU and its coalition partners have pushed the Department of Justice to issue guidance on this issue, as few departments have rooted their treatment of domestic and sexual violence in their civil rights obligations. As a first step, the Office of Community Oriented Policing Services, the Office for Victims of Crime, and the Office on Violence Against Women of the Department of Justice issued a crucial joint statement on addressing gender discrimination in policing. Because “gender bias plays a role in undermining the effective response by law enforcement to crimes against women,” the statement announced that the prevention of sex-based discrimination by law enforcement is a “top priority” of the Civil Rights Division of the Department of Justice in its oversight of law enforcement agencies.<sup>54</sup> Similarly, the latest reauthorization of the Violence Against Women Act uses the equality framework by prohibiting discrimination by grantees based on actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, or disability.<sup>55</sup> Many law enforcement agencies receive VAWA funding and thus are governed by this provision, and

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<sup>52</sup> *Id.* at 377-80; Special Rapporteur on violence against women, *supra* note 4, at ¶¶ 17–20; Crenshaw, *supra* note 4.

<sup>53</sup> U.S. DEP’T OF JUSTICE, CIV. RIGHTS DIVISION, MEM. OF UNDERSTANDING BETWEEN THE U.S. DEP’T OF JUSTICE AND THE CITY OF MISSOULA REGARDING THE MISSOULA POLICE DEPARTMENT’S RESPONSE TO SEXUAL ASSAULT (May 15, 2013), *available at* [http://www.justice.gov/crt/about/spl/documents/missoulapdsettle\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdsettle_5-15-13.pdf); Consent Decree Regarding the New Orleans Police Department, *U.S. v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW (E.D. La. Jan. 11, 2013); Agreement for the Sustainable Reform of the Puerto Rico Police Dep’t, *U.S. v. Commonwealth of Puerto Rico et al.*, No. 3:12-cv-2039 (D.P.R. Dec. 21, 2012), *available at* [http://www.justice.gov/crt/about/spl/documents/prpd\\_agreement\\_12-21-12.pdf](http://www.justice.gov/crt/about/spl/documents/prpd_agreement_12-21-12.pdf).

<sup>54</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, *Joint Statement of The Office of Community Oriented Policing Services, The Office for Victims of Crime, and The Office on Violence Against Women on Addressing Gender-Discrimination in Policing* (June 20, 2013).

<sup>55</sup> 42 U.S.C. § 13925(b)(13)(a) (2013); U.S. DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS—NONDISCRIMINATION GRANT CONDITION IN THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013, 1–9 (April 9, 2014), [http://ojp.gov/about/ocr/pdfs/vawaf\\_aqs.pdf](http://ojp.gov/about/ocr/pdfs/vawaf_aqs.pdf).

potentially other federal statutes.<sup>56</sup> This discrimination analysis, particularly with respect to gender, should be deployed anytime police practices and policies are implemented or changed; because domestic violence calls are the largest category of requests for police assistance,<sup>57</sup> seemingly neutral policies—such as local nuisance ordinances—should not be adopted until an analysis of how they affect survivors, particularly those who are from marginalized communities, has been completed. This would be a proactive tool to prevent the adoption of discriminatory policies.

Community engagement and organizing are essential to law enforcement accountability work under both the civil and human rights frameworks. The human rights framework prioritizes the experiences of survivors and affected communities in addressing human rights violations and creating proactive policies and practices that prevent such violations. Civil rights advocates similarly stress that societal change can only occur by focusing on the experiences of those directly affected in identifying rights violations that are already occurring as well as in shaping police practices that will address the needs of the community. In Puerto Rico, the ACLU of Puerto Rico is part of a coalition effort with other women's rights and anti-violence organizations to push for significant reforms of the Police Department's practices there.<sup>58</sup> They achieved a substantial victory in 2013, passing legislation to ensure that LGBT survivors and people who are assaulted in the context of extramarital relationships are covered by already-existing domestic violence laws.<sup>59</sup> In DC, survivors and advocates launched the DC Justice for Survivors Campaign seeking multiple reforms of how the police department responds to sexual assault cases.<sup>60</sup> The DC City Council

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<sup>56</sup> Goldscheid, *supra* note 26, at 43, 74–75.

<sup>57</sup> KLEIN, *supra* note 22, at §1.2.

<sup>58</sup> Amici Brief of the American Civil Liberties Union et al., *United States v. Commonwealth of Puerto Rico and Puerto Rico Police Department*, No.: 12-2039 (filed April 1, 2013) (agreement signed Dec. 21, 2012).

<sup>59</sup> Michael K. Lavers, *Puerto Rico Governor Signs LGBT Bills into Law*, WASHINGTON BLADE (May 29, 2013), available at <http://www.washingtonblade.com/2013/05/29/puerto-rico-governor-signs-lgbt-bills-into-law>.

<sup>60</sup> THE COUNCIL OF THE DISTRICT OF COLUMBIA COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY, PUBLIC HEARING ON BILL 20-417, *Sexual Assault Victims Rights Amendment Act of 2013* (Dec. 12, 2013), available at <http://dccouncil.us/events/judiciary-and-public-safety-hearing-on-b20-417-sexual-assault-victims-right>; see also D.C. RAPE CRISIS CENTER, *Recommended Changes to B20-417: Sexual Assault Victims' Rights Amendment Act of 2013 (SAVRAA)* (2013), available at <http://dcrap.eccrisiscenter.org/wp-content/uploads/2013/12/Advocates-Recommendations-Summary-FINAL.pdf>; *Grassroots Group Delivers Signatures to DC Council Sexual Assault Reforms*, COLLECTIVE ACTION FOR SAFE SPACES, Jan. 28, 2014, <http://www.collect>

enacted legislation in June 2014 as a result of this activism, providing for an independent expert to assess the Metropolitan Police Department's policies and training and certain rights to victims, including the right to be notified of the results of any toxicology report and after police contact with the suspect.<sup>61</sup>

An independent expert or panel can play a key role in providing redress for survivors and ensuring accountability. This type of oversight can prove to be a valuable resource for survivors, given the difficulty in some communities to challenge police practices. It also helps ensure that survivors have some access to remedies when violations occur, as guaranteed by human rights law. The Department of Justice has included the appointment of an expert monitor to oversee the implementation of police reforms in New Orleans, Puerto Rico, and Missoula in its agreements with the police departments, and this monitor must consult with community members.<sup>62</sup> In these jurisdictions, the agreements require a survey of community members regarding their experiences with policing.<sup>63</sup> The agreement with Puerto Rico specifically mandates the monitor to meet with community stakeholders, including representatives of minority communities, LGBT communities, and civil rights and women's advocacy groups to hear their perspectives on police practices.<sup>64</sup> Survivors thus have the ability to directly influence the way reforms are carried out. In Philadelphia, an independent panel with members from women's rights organizations and other groups review how each department deals with sexual assault cases.<sup>65</sup> One survey showed that the Philadelphia model of external review or audit has been adopted by 35% of responding police agencies.<sup>66</sup>

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iveactiondc.org/2014/01/29/grassroots-group-delivers-signatures-to-dc-council-demanding-justice-for-survivors.

<sup>61</sup> D.C. Council Bill No. A20-0348, *Sexual Assault Victims' Rights Amendment Act of 2013* (enacted June 4, 2014).

<sup>62</sup> Consent Decree Regarding the New Orleans Police Department, *U.S. v. City of New Orleans*, *supra* note 53, at ¶¶ 14, 231-33, 444-46, 461; Mem. of Understanding between the U.S. Department of Justice and the City of Missoula, *supra* note 53, at ¶¶ 2, 3, 32, 35; Agreement for the Sustainable Reform of the Puerto Rico Police Department, *U.S. v. Commonwealth of Puerto Rico*, *supra* note 53, at ¶¶ 17, 220, 225-28.

<sup>63</sup> Consent Decree Regarding the New Orleans Police Department, *U.S. v. City of New Orleans*, *supra* note 53, at ¶¶ 231-33; Mem. of Understanding between the U.S. Department of Justice and the City of Missoula, *supra* note 53, at ¶12 (a); Agreement for the Sustainable Reform of the Puerto Rico Police Department, *U.S. v. Commonwealth of Puerto Rico*, *supra* note 53, at ¶ 241.

<sup>64</sup> Agreement for the Sustainable Reform of the Puerto Rico Police Department, *U.S. v. Commonwealth of Puerto Rico*, *supra* note 53, at ¶ 254; *see also* Mem. of Understanding between the U.S. Department of Justice and the City of Missoula, *supra* note 53, at 2.

<sup>65</sup> Police Executive Research Forum, *supra* note 14, at iv, 16, 36-40.

<sup>66</sup> *Id.* at iv.

Requiring departments to report on how they handle cases and provide accurate data to the community is an important element of accountability. Nearly all agencies collect and keep data on how they respond to domestic and sexual violence cases; yet, most do not view data as a tool for engaging in dialogue and review with advocates or other stakeholders.<sup>67</sup> The human rights framework stresses the importance of collecting data about government practices and sharing such data in order to uncover problems and best practices.<sup>68</sup> The Department of Justice's agreements all provide that the monitor must release key pieces of data regarding sexual and domestic violence, including numbers of cases and their dispositions.<sup>69</sup> Advocates have used these types of data to hold departments accountable.<sup>70</sup> For example, extremely low numbers of reported sexual assaults such as those found in Puerto Rico by the Department of Justice and the ACLU and in D.C. by Human Rights Watch are strong indicators that police are engaging in conduct that discourages reporting or misclassifies complaints.<sup>71</sup> One scholar recently estimated that departments failed to properly classify between 796,213 to 1,145,309 complaints of rapes of female victims in the United States.<sup>72</sup> Such widespread undercounting creates a false understanding of the prevalence of sexual violence and the effectiveness of government responses. Collection and dissemination of accurate data is thus key to examining law enforcement practices and changing them to serve the experiences of survivors.

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<sup>67</sup> *Id.* at 4 (only one-third of police agencies said they collect data for review by organizations external to the police department).

<sup>68</sup> UNITED NATIONS POPULATION FUND, *THE ROLE OF DATA IN ADDRESSING VIOLENCE AGAINST WOMEN AND GIRLS*, (2013), available at [http://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/finalUNFPA\\_CSW\\_Book\\_20130221\\_Data.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/finalUNFPA_CSW_Book_20130221_Data.pdf).

<sup>69</sup> Consent Decree Regarding the New Orleans Police Department, *U.S. v. City of New Orleans*, *supra* note 53, at ¶ 457; Agreement for the Sustainable Reform of the Puerto Rico Police Department, *U.S. v. Commonwealth of Puerto Rico*, *supra* note 53, at ¶¶ 216–17, 250–51; Mem. of Understanding between the U.S. Department of Justice and the City of Missoula, *supra* note 53, at ¶¶ 46, 48.

<sup>70</sup> Another example of a data collection mechanism is the Clery Act, which requires post-secondary schools and universities to report on incidents of sexual assault, domestic violence, dating violence, and stalking, and the programs and procedures in place to respond and address them. Campus Sexual Violence Elimination Act, Pub L. No. 113–4, §304, 127 Stat. 89 (2013). Advocates are currently pushing for more accurate Clery Act reporting at a number of institutions.

<sup>71</sup> ACLU Human Rights Program, *Island of Impunity*, *supra* note 13, at 113–16; Human Rights Watch, *Capitol Offense*, *supra* note 13, at 6–8, 10, 58–59, 61–62.

<sup>72</sup> Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014).

#### IV. CONCLUSION

Law enforcement accountability work is difficult and resource-intensive, achieves change only over the long-term, and requires constant vigilance. Yet, progress has been made in many communities. This advocacy can be used to highlight how discriminatory law enforcement policies and practices are a structural cause of gender-based violence and connect work to end domestic and sexual violence with the violence experienced by other people and communities due to police misconduct. It also helps ensure that the criminal justice system, which is often the only form of justice offered to survivors in the United States, will serve as a source of protection for those survivors who choose to access it. Lastly, a focus on law enforcement accountability puts in place mechanisms and uses strategies that shift the prevailing dynamics between survivors, advocates, and law enforcement and build survivors' power to make change.