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## The Victim/Offender Overlap and Criminal System Reform

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# The Victim/Offender Overlap and Criminal System Reform

Cynthia Godsoe†

*"[N]o one enters violence for the first time by committing it."—Danielle Sered<sup>1</sup>*

*"Legal interpretation takes place in a field of pain and death. . . . Neither [the law] nor the violence it occasions may be properly understood apart from one another."—Robert M. Cover<sup>2</sup>*

## INTRODUCTION

The victim/offender overlap is “the link between victimization and the perpetration of crime and delinquency”;<sup>3</sup> in other words, victimization makes people more likely to harm others, and vice versa.<sup>4</sup> The overlap is especially pronounced in sexual and violent offenses, yet the criminal law continues to posit the victim/offender binary as rigid, mutually exclusive, and morally laden. To take a few examples, while there has long been attention paid to the overrepresentation of young men of color as “offenders” in the system, still missing is the

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† Cynthia Godsoe is Professor of Law, Brooklyn Law School. I owe thanks to the other participants in the *Brooklyn Law Review* symposium—Susan Bandes, Bennett Capers, Margaret Garvin, Bruce Green, Alexis Karteron, Tamara Rice Lave, Katharine Manning, Kate Mogulescu, Anna Roberts, Brandon Ruben, and Steven Zeidman—as well as thoughtful insights from participants in a University of Virginia Law School virtual workshop, as well as Adam Davidson, Brandon Garrett, Leigh Goodmark, Eve Hanan, Carissa Hessick, Alexis Hoag, Ben Levin, Justin Murray, Jocelyn Simonson, Megan Stephenson, and Matt Tokson; excellent research assistance from Eliza Reinhardt and Danika Gallup; and thoughtful and careful editing from the *Brooklyn Law Review* editors.

<sup>1</sup> MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 146 (2021) (quoting Danielle Sered, Executive Director, Common Justice).

<sup>2</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1985–1986) (footnote omitted).

<sup>3</sup> Jennifer M. Reingle Gonzalez, *Victim-Offender Overlap*, in I THE ENCYCLOPEDIA OF THEORETICAL CRIMINOLOGY 3, 4 (J. Mitchell Miller ed., 2014) (also eschewing the frequently used dichotomy of victim or “offender” in a theoretical and empirical discussion of why these categories are not mutually exclusive).

<sup>4</sup> I could use the term criminogenic to characterize this link, but given the sociopolitical construction of crime, and the stigma associated with terms such as “offender,” it is more accurate and just to say “causes harm.”

recognition that they are also disproportionately likely to be victims.<sup>5</sup> One of many measures demonstrating this are studies have found that men who are incarcerated are ten times more likely to suffer from posttraumatic stress disorder (PTSD) than men in the general population.<sup>6</sup> Indeed, the strong relationship between childhood victimization and later violent behavior deemed criminal has been so well-documented that it underlies the term “cycle of violence” as an empirical social science phenomenon.<sup>7</sup> I first encountered this while representing many teenagers termed “crossover youth” due to their being both in the foster care system and, eventually, the juvenile criminal system,<sup>8</sup> and was surprised to find so little on this topic in the criminal law literature.<sup>9</sup> Beginning to fill this gap seems an important topic for this symposium on “The Role of the ‘Victim’ in the Criminal Legal System.”

This phenomenon is well-known among criminologists—indeed it is “one of the strongest empirical associations in criminological literature.”<sup>10</sup> Research shows a significant correlation between trauma and causing harm.<sup>11</sup> On-the-ground

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<sup>5</sup> Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POLY INITIATIVE (Apr. 2020) [hereinafter *Prison Policy Report*], <https://www.prisonpolicy.org/reports/violence.html> [<https://perma.cc/G3W2-L7JT>].

<sup>6</sup> DANIELLE SERED, VERA INST. OF JUST., *YOUNG MEN OF COLOR AND THE OTHER SIDE OF HARM: ADDRESSING DISPARITIES IN OUR RESPONSES TO VIOLENCE 4* (2014) [hereinafter VERA, *YOUNG MEN OF COLOR & THE OTHER SIDE OF HARM*], <https://www.vera.org/downloads/publications/men-of-color-as-victims-of-violence-v3.pdf> [<https://perma.cc/3M9G-3WMF>].

<sup>7</sup> Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 869 (2008).

<sup>8</sup> *Crossover Youth Practice Model*, CTR. FOR JUV. JUST. REFORM, <https://cjjr.georgetown.edu/our-work/crossover-youth-practice-model/cypm-background/> [<https://perma.cc/DDL7-ZDAW>].

<sup>9</sup> I have also previously described the high rate of the victim/offender overlap among juveniles charged with sex offenses. See Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. CRIM. L. 335, 341–44 (2020) [hereinafter Godsoe, *#MeToo*]. This includes the 100 percent overlap, by statutory definition of the crime, among the many minors convicted of statutory rape of other minors. See Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 214–15 (2017) [hereinafter Godsoe, *Recasting Vagueness*].

<sup>10</sup> Caitlin Delong & Jessica Reichert, *The Victim-Offender Overlap: Examining the Relationship Between Victimization and Offending*, ILL. CRIM. JUST. INFO. AUTH. CTR. FOR JUST. RSCH. & EVALUATION 1 (Jan. 15, 2019).

<sup>11</sup> *Id.* at 3–4 (summarizing research). The voluminous Adverse Childhood Experiences (ACEs) research provides a particularly robust demonstration of the overlap. See discussion *infra* Section I.D. The fifth edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) describes trauma as “[e]xposure to actual or threatened death, serious injury, or sexual violence,” see AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 271 (5th ed. 2013), but the definition of trauma many practitioners and researchers use, such as researchers focused on adverse childhood experiences, is broader and includes witnessing even less serious violence, especially repeatedly, family separation, and other harms. See *infra* notes 60–62, 72, and accompanying text.

system actors, particularly in the restorative justice space, also recognize the overlap and the simple truth that “hurt people hurt people.”<sup>12</sup> In contrast, the victim/offender overlap is largely ignored by criminal law policymakers and scholars.<sup>13</sup> This blind spot, and concomitant failure to address the root causes and cyclical nature of violence, perpetuates a racialized narrative of individual culpability and a stark moral binary between those who harm and those who are harmed, while also impeding meaningful change.<sup>14</sup>

I want to emphasize here that language is significant, as advocates and scholars are increasingly recognizing, and as people in the system have always known. Much of the terminology associated with the criminal system—including “victim” and “offender”—are laden with normative and stigmatized concepts, and do not accurately capture the full experiences and humanity of either those who are harmed or those who harm.<sup>15</sup> Moreover, I argue here that the rigidity of these categories perpetuates inaccurate and racialized narratives about harm and legitimizes the current criminal system.<sup>16</sup> Nonetheless, the criminology concept of the overlap I discuss here uses these terms, as does much if not most criminal policy and scholarship. In an attempt to balance these concerns, and be consistent in usage, I will use the term “offender” with quotation marks, and the term victim (rather than, for instance, survivor). More broadly, I aim to raise questions about the appropriateness of using this terminology at all.

In this article, I argue that the overly reductionist, and arguably false, victim/offender binary masks the complexity of

<sup>12</sup> Madeleine Davison, *What Is Prison Abolition?*, NAT'L CATH. REP. (June 2, 2021) (quoting Syrita Steib, Founder & Executive Director of Operation Restoration), <https://www.ncronline.org/news/justice/what-prison-abolition> [<https://perma.cc/8R7Y-JMVV>].

<sup>13</sup> See *infra* Sections I.A, I.B.

<sup>14</sup> Like the entire system, this is highly correlated to race, class, gender, etc. One interesting contrast to this obscuration of victimhood is the political power of the victim rights' movement, which is largely white and middle class, and conservative on criminal policy, and does not usually include, or even acknowledge the type of victims I discuss here. See AYA GRUBER, *THE FEMINIST WAR ON CRIME* 96–120 (2021); Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 322–28 (2020).

<sup>15</sup> See, e.g., Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1456 (2021) (“victim”); Anna Roberts, *LEAD Us Not into Temptation: A Response to Barbara Fedders's “Opioid Policing,”* 94 IND. L.J. SUPPLEMENT 91, 95 (2019) (“offender”); Bennett Capers, *Real Rape, Too*, 99 CALIF. L. REV. 1259, 1265–77 (2011) (“male-victim rape”); Godsoe, *#MeToo*, *supra* note 9, at 340–44 (“juvenile sex offender”).

<sup>16</sup> MATTHEW DESMOND & GREISA MARTINEZ ROSAS, *THE SQUARE ONE PROJECT, BEYOND THE EASIEST CASES: CREATING NEW NARRATIVES FOR CRIMINAL JUSTICE & IMMIGRATION REFORM* 23 (2021), <https://squareonejustice.org/wp-content/uploads/2021/12/CJLJ9282-Beyond-the-Easiest-Cases-report-211206-WEB.pdf> [<https://perma.cc/UL3T-WDSH>]; *id.* at 10 (remarking that the “identities of those who have committed crimes . . . are [often] condensed from full personhood to one label: criminal”).

violence, as well as its often cyclical nature.<sup>17</sup> The criminal system, and society more broadly, only recognizes some types of violence; it rewards or legitimates violence in certain contexts while punishing it in others.<sup>18</sup> Beyond definitions of what is criminal, recognizing the overlap complicates and even undercuts traditional rationales for punishment, including retribution and deterrence, while also strengthening the calls for a different approach to preventing and redressing harm. I focus here on violent crime, given that its prevalence, symbolic importance, and, particularly, its carve-out from reforms, make it a roadblock to meaningful decarceration and systemic downsizing. Drawing lessons from abolitionist practitioners and thinkers,<sup>19</sup> I argue that key to meaningful change is acknowledging and addressing the extent to which those who harm have been victimized, and that victims are more likely to offend. Accordingly, law scholars and policymakers need to incorporate social science research on the overlap into their work and learn from actors on the ground who see it in the majority of cases. Only by doing so will theory about punishment or criminal system law and policy be relevant, effective, or just.

Part I outlines the robust finding of the overlap in social science research, while flagging a few gaps within it. In Part II, I contrast this to the almost complete lack of discussion of the overlap in criminal law policymaking and scholarship, as well as the near-total exclusion of offenses termed violent from reforms or suggested reforms. I posit some explanations for the persistence of the victim/offender binary reification, before

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<sup>17</sup> See, for example, Michelle E. Anderson, *Perpetrator Trauma, Empathetic Unsettling, and the Uncanny: Conceptualizations of Perpetrators in South Africa's Truth Commission Special Report*, 2 J. PERPETRATOR RSCH., no. 1, 2018, at 95, 98–100, in which she demonstrates how questioning the problematic and limiting perpetrator conceptualizations (always labeled in reductionist ways as “evil,” etc.), starts to examine perpetrator’s experience of conflict in a way that breaks down problematic victim/offender binaries. Anderson does this through the lens of South Africa’s Truth and Reconciliation Commission and focuses on the influence of the documentary program that the commission aired in developing a collective understanding of offending in apartheid South Africa. *Id.* at 105–17.

<sup>18</sup> See, e.g., Alice Ristroph, *The Law of Violence 7* (2015) (unpublished manuscript) (on file with author) (noting the “definitional and ideological questions raised by the word violence”); ANDREA J. RITCHIE & BETH E. RICHIE, *NEW FEMINIST SOLUTIONS SERIES: THE CRISIS OF CRIMINALIZATION: A CALL FOR A COMPREHENSIVE PHILANTHROPIC RESPONSE* 4–6, 9 (2017) (explaining the growing criminalization crisis, whereby “the social and political process by which society determines which actions or behaviors—and by who—will be punished by the state”). This limited conception of violence as some interpersonal harms also ignores the “slow violence” of systemic harms such as poverty, racism, etc. See *infra* note 93 and accompanying text. As to more individual interpersonal violence, police and military actors, for instance, are justified or even rewarded for committing violence, while others are punished. See *infra* notes 51, 111 (discussing work of Alice Ristroph).

<sup>19</sup> For background on abolitionists, see Davison, *supra* note 12.

detailing the binary's harms: perpetuation of a racialized narrative of individual blameworthiness;<sup>20</sup> the obscuration of root causes, including trauma; and resultant perpetuation of a cycle of violence. I argue in Part III that the victim/offender overlap can help both to change the false narrative, and to more effectively prevent and redress harm. I conclude by calling for a more preventive and contextual approach to violent offending, and beyond the binary—a legal construct—itself.<sup>21</sup>

## I. DOCUMENTATION OF THE VICTIM/OFFENDER OVERLAP IN VIOLENT CRIME

In this Part, I outline criminologists' findings, and practitioners' confirmation from real-world experience, of a victim/offender overlap across all demographics, and I highlight gaps in their analysis and application to the system. I conclude the Part with an outline of the adverse childhood experiences (ACEs) research, a particularly rich database of evidence of the overlap as to violent crime.

### A. *By Social Science Researchers*

Researchers describe the overlap as “robust” and “substantial,”<sup>22</sup> and report findings that for violent crimes, most or at least half of “offenders” have been victims, or vice versa.<sup>23</sup> Indeed, not long after the advent of the first large-scale victim surveys in the 1970s, prominent researchers concluded that “any

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<sup>20</sup> See NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 56–69, 91–103, 125 (2014) (documenting the extent and racial disproportionality of US incarceration).

<sup>21</sup> Scholars have made similar arguments about race, gender, disability, and other categories once presumed natural. See, e.g., IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, at xxi (1996) (declaring “race is highly contingent, specific to times, places, and situations”); SIMONE DE BEAUVOIR, *THE SECOND SEX* (2012) (discussing gender). This is true also of purportedly scientific or medical phenomenon such as closure. See, e.g., Susan A. Bandes, *Closure in the Criminal Courtroom: The Birth and Strange Career of an Emotion*, in *RESEARCH HANDBOOK ON LAW AND EMOTION* 102, 104 (Susan A. Bandes et al. eds., 2020) (arguing that “closure began as a set of political and law reform goals rather than a description of an emotional state”).

<sup>22</sup> See, e.g., *The Victim-Offender Overlap: One Class of Crime Victim Rarely Seeks or Receives Available Services*, NAT'L INST. OF JUST. [hereinafter *The Victim-Offender Overlap*], <https://nij.ojp.gov/topics/articles/victim-offender-overlap-one-class-crime-victim-rarely-seeks-or-receives-available#noteReferrer2> [<https://perma.cc/7LWK-YTBJ>] (noting that “[t]he overlap between victim and offender is substantial”); Jennifer N. Shaffer, *The Victim-Offender Overlap: Specifying the Role of Peer Groups*, at iii–iv (Dec. 2003) (Ph.D. thesis, Pennsylvania State University), <https://www.ojp.gov/pdffiles1/nij/grants/205126.pdf> [<https://perma.cc/6VZP-D2GN>] (finding that “the relationship between victimization and offending is substantial, robust, and reciprocal”).

<sup>23</sup> See, e.g., *The Victim-Offender Overlap*, *supra* note 22 (under Issue Background, mentioning three studies that support that most victims of violent crimes have been “offenders”).

theory that assumes no overlap exists between populations of victims and ‘offenders’ or that they are distinct types of persons distorts the empirical research.”<sup>24</sup> More recently, researchers have found that “victims of violence are [55] percent more likely” than nonvictims to commit a violent crime.<sup>25</sup> Research consistently reveals this pattern across geography and demographics; for instance, substantial percentages of incarcerated people in New York State, Chicago, IL, and Arkansas have been victimized as a child, witnessed serious violence, or both.<sup>26</sup>

Although the overlap exists across all demographics, it is particularly pronounced among juveniles and young men, who commit the majority of violent crime.<sup>27</sup> Youth of color are more likely than their peers to report experiencing or witnessing community violence.<sup>28</sup> Despite this empirical reality, young men of color are the least likely group to be recognized as victims, and their trauma to be addressed, based largely on racial and gender stereotypes.<sup>29</sup> This is true of law enforcement, service providers, and even the young men themselves.<sup>30</sup>

### B. *By On-the-Ground Actors*

Community-based programs working directly with people impacted by gun and other interpersonal violence report a high level of victimization among “offenders,” particularly the young men often excluded in the social science research explored above. To cite just a few examples, Advance Peace working in Oakland and Richmond, California has found that many people

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<sup>24</sup> Mark T. Berg & Christopher J. Schreck, *The Meaning of the Victim-Offender Overlap for Criminological Theory and Crime Prevention Policy*, 5 ANN. REV. CRIME 277, 278 (2022) (citing research dating to the 1960s and 1970s).

<sup>25</sup> Mark T. Berg et al., *The Victim-Offender Overlap in Context: Examining the Role of Neighborhood Street Culture*, 50 CRIMINOLOGY 359, 376–79 (2012) (also finding that “violent offending increases” the risk for victimization by 68 percent in certain communities, i.e., the dynamic goes both ways and engaging in violence increases the risk of victimization by 169 percent).

<sup>26</sup> *Prison Policy Report*, *supra* note 5 (reporting that 68 percent of people incarcerated in New York prisons reported childhood victimization; over 90 percent of youth incarcerated in Cook County, Illinois, covering Chicago, reported experiencing “one or more traumas”; and one-third of prisoners in Arkansas had reported witnessing a murder, with 40 percent of this group having witnessed it as a juvenile).

<sup>27</sup> See *FBI Crime Data Explorer*, FED. BUREAU OF INVESTIGATION, <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend> (last visited May 20, 2022) (showing that of approximately 618,000 violent crime offenders in 2020, men compromised roughly 77 percent of those offenses; 43 percent of the offenders were aged ten through twenty-nine).

<sup>28</sup> See VERA, *YOUNG MEN OF COLOR & THE OTHER SIDE OF HARM*, *supra* note 6, at 5.

<sup>29</sup> See *id.* at 4.

<sup>30</sup> See *id.* at 4, 8–9.

participating in gun violence are survivors of this violence themselves.<sup>31</sup> Similarly, Lisa Daniels, founder and executive director of a Chicago organization that addresses gun violence through restorative justice, reports that the “cycle[] of violence” is apparent in that “offenders” “are often survivors of similar types of violence that they inflicted on other people.”<sup>32</sup> Public defenders, representing approximately 85 percent of those in the system, have long recognized this fact.<sup>33</sup>

This is particularly true of those working in restorative justice and of abolitionist and abolitionist-adjacent thinkers, as many of the above are. These movement actors have long recognized the interrelated nature of victimization and causing harm, and have incorporated it into their vision of a more effective and just way to prevent and redress harm.<sup>34</sup> This is true of even the most harmful kinds of conduct, such as childhood sex abuse.<sup>35</sup> Others reporting this phenomenon include Danielle Sered, founder of one of the few restorative justice programs for violent crime,<sup>36</sup> as well as the women-of-color-led movements to rethink the way sexual harm and intimate partner violence (IPV) are addressed.<sup>37</sup> One example of the latter, Survived and

<sup>31</sup> COMMON JUST., SOLUTIONS TO VIOLENCE: CREATING SAFETY WITHOUT PRISONS OR POLICE 3–4 (2021) [hereinafter COMMON JUST., SOLUTIONS TO VIOLENCE], [https://www.commonjustice.org/solutions\\_to\\_violence\\_report](https://www.commonjustice.org/solutions_to_violence_report) [<https://perma.cc/5V3V-ZHYJ>].

<sup>32</sup> *Id.* at 14.

<sup>33</sup> Some experienced attorneys put it at 100 percent. See Cynthia Godsoe, *Balancing Client Dignity & Mitigation in Juvenile Defense* (2018) (unpublished manuscript) (draft on file with author) [hereinafter Godsoe, *Mitigation*] (reporting on interviews with public defenders).

<sup>34</sup> See, e.g., COMMON JUST., SOLUTIONS TO VIOLENCE, *supra* note 31 (detailing 18 organizations that promote safety and healing through alternatives to policing and incarceration).

<sup>35</sup> See generally GENERATIONFIVE, ENDING CHILD SEXUAL ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK, <http://www.generationfive.org/wp-content/uploads/2017/06/Transformative-Justice-Handbook.pdf> [<https://perma.cc/WA4E-RPVD>] (acknowledging that one impact of child sexual abuse is a higher likelihood of the victim harming others and offering transformative justice approaches that promote healing and prevent future abuse).

<sup>36</sup> DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION AND A ROAD TO REPAIR 191–233 (2019).

<sup>37</sup> See, e.g., *About S&P, SURVIVED & PUNISHED*, <https://survivedandpunished.org/about/> [<https://perma.cc/S77V-HNSL>] (prison abolition organization “focuse[d] on criminalized survivors to raise awareness about the integrated relationship between systems of punishment and the pervasiveness of gender violence”); Beth E. Richie, *Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (Transcript)*, 5 U. MIA. RACE & SOC. JUST. L. REV. 257, 262–72 (2015) (noting that “prison abolition represents a chance to think about the work to end gender violence and how it needs to be reframed as work against the patriarchal carceral state, and the architecture of racism and related forms of oppression upon which that patriarchal carceral state is built”); Victoria Law, *How Can We End Child Sexual Abuse Without Prisons?*, TRUTHOUT (Oct. 2, 2019), <https://truthout.org/articles/how-can-we-end-child-sexual-abuse-without-prisons/> [<https://perma.cc/H37G-YXJW>] (“[T]he usual response to sexual violence is ‘get



Punished, for instance, critiques the criminalization of self-defense among victims of IPV.<sup>38</sup> Going beyond social science researchers, these community, survivor-led movements have long identified the underlying and intergenerational trauma that leads to cycles of violence. It is thus not surprising that much of the cutting-edge research on, for instance, perpetration trauma, and more meaningful implementation of such research, comes from organizations with community input, such as the Vera Institute of Justice.<sup>39</sup>

### C. *Gaps in Research and Theorizing*

Despite the decades of findings supporting the victim/offender overlap, there are meaningful gaps in research and, particularly, in using the findings to improve the criminal system(s). I discuss three such gaps here.

#### 1. Voices of Victims and “Offenders”

A major gap in research towards understanding violence is the voices of those who harm and are harmed. As the overlap demonstrates, these are often the same people at different times.<sup>40</sup> This myopia runs throughout our criminal system, in that the input of those most impacted—and more broadly their families and communities—is not sought, or is sought only in narrowly constrained, even performative ways. For instance, “offenders” at sentencing are restricted to displaying remorse in exclusively gendered and racialized ways,<sup>41</sup> and victims are

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the perpetrators and lock them up’ . . . What does accountability look like, particularly in the age of Black Lives Matter? How do we talk about sexual violence while we’re really also so aware of virulent state-sanctioned violence and white supremacy against Black communities?”).

<sup>38</sup> See *S&P Analysis & Vision*, SURVIVED & PUNISHED, <https://survivedandpunished.org/analysis/> [<https://perma.cc/JF7Q-D8UY>].

<sup>39</sup> *About*, VERA INST. OF JUST., <https://www.vera.org/about> [<https://perma.cc/QMQ3-MZVQ>]. I do not mean to suggest that restorative justice practices do not designate one person as a victim and one as an “offender” (using perhaps different, less laden terminology). They do, however, usually contextualize both parties better than the existing system, blurring the binary a little. I acknowledge this is a low bar.

<sup>40</sup> See *supra* Section I.A. Indeed, all humans are capable of violence, and most commit some, but what is recognized as criminal, and what escalates into more severe violence, mean that only some are punished.

<sup>41</sup> See, e.g., Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3e1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1555 (1997) (noting “the difficulties of truly knowing a defendant’s state of mind must contribute to the problems of unwarranted disparity and invidious discrimination [in the criminal legal system while also] . . . plac[ing] a premium on the quality of a defendant’s performance . . . [one that] may implicate much deep-seated racial, cultural, class, and gender baggage”); *United States v. Vance*, 62 F.3d 1152, 1158 (9th Cir. 1995) (holding that “[t]here is no particular social purpose to be served by lenience toward those who cry more easily, or

similarly limited to expressing support for only punitive and carceral solutions.<sup>42</sup> Even in documenting the overlap, i.e., experiences of victimization and trauma among “offenders,” social scientists mostly limit input to anonymous survey responses.<sup>43</sup> Fortunately, this is starting to change, with restorative justice and abolitionist groups, calling for the input of those most impacted.<sup>44</sup> Participatory research on, for instance, what “public safety” really means to community members is also expanding our vocabulary and narrative.<sup>45</sup>

## 2. Perpetration Trauma

Another underexplored area is “perpetration trauma,” or trauma arising from committing violence.<sup>46</sup> The existing research demonstrates that it is a significant phenomenon, i.e., the trauma and polyvictimization cycle in which most people committing violent offenses are enmeshed.<sup>47</sup> Research on war veterans, for instance, finds those veterans who have killed others to be more likely to suffer from PTSD than those who have not.<sup>48</sup> Combat-related PTSD also leads to more violence at

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who have sufficient criminal experience to display sentiment at sentencing instead of restraining their emotions in public”).

<sup>42</sup> See discussion *infra* notes 137–140; see also SERED, *supra* note 36, at 20 (describing the inaccurate but “overwhelmingly dominant” trope that victims usually “want[] the greatest possible penalty for the person who hurt them”).

<sup>43</sup> See *supra* Section I.A.

<sup>44</sup> See, e.g., *Our Strategic Priorities*, VERA INST. OF JUST., <https://www.vera.org/strategic-priorities> [<https://perma.cc/VM7N-45G7>] (“We implement approaches rooted in community perspectives, elevating the voices and needs of those who have been directly impacted by our current system.”).

<sup>45</sup> Participatory research centers the community members “too often viewed as [mere] research subjects,” and prioritizes their needs and expertise to build change “through co-learning community-academic partnerships.” Lauren Johnson et al., *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. (forthcoming 2022) (manuscript at 1, 8), <http://dx.doi.org/10.2139/ssrn.3877542> [<https://perma.cc/4KP2-GLKY>] (offering “first known interdisciplinary, community-based participatory research study” focusing on what safety is and how to make safety accessible to everyone).

<sup>46</sup> See Patricia K. Kerig et al., “Harm as Harm:” *Gang Membership, Perpetration Trauma, and Posttraumatic Stress Symptoms Among Youth in the Juvenile Justice System*, 43 CRIM. JUST. & BEHAV. 635, 635–36 (2016).

<sup>47</sup> See *infra* Section I.D. (describing ACEs research). “Polyvictimization” is “having experienced multiple victimizations such as sexual abuse, physical abuse, bullying, and exposure to family violence. This definition emphasizes experiencing different kinds of victimization, rather than multiple episodes of the same kind of victimization.” David Finkelhor et al., *Polyvictimization: Children’s Exposure to Multiple Types of Violence, Crime, and Abuse*, JUV. JUST. BULL. (U.S. Dep’t of Just., Off. of Juv. Just. & Delinq. Prevention, Wash., D.C.), Oct. 2011, at 1, 4.

<sup>48</sup> See Rachel M. MacNair, *Perpetration-Induced Traumatic Stress in Combat Veterans*, 8 J. PEACE PSYCH. 63, 69 (2002). See generally Katy Robjant et al., *Trauma, Aggression, and Post Conflict Perpetration of Community Violence in Female Former Child Soldiers—A Study in Eastern DR Congo*, 11 FRONTIERS PSYCH. 1, 1 (2020) (finding

home upon military members' return.<sup>49</sup> Beyond the military context, there is evidence that perpetrating violence, just like exposure to violence, leads to trauma, and more violence.<sup>50</sup> Research outside the combat experience, however, remains very limited, likely reflecting the dominant narrative about the moral culpability of those who commit crime, particularly violent crime.<sup>51</sup> One positive sign is that a handful of recent studies flag this important issue; for instance, experts at the Vera Institute recommend recognition of trauma cycles as leading to violence, and see addressing trauma as essential to reducing violent crime.<sup>52</sup>

### 3. Theorizing from the Victim/Offender Overlap

Despite the consistent proof of its prevalence, the overlap remains undertheorized in numerous respects.<sup>53</sup> Even with the strong research findings that most "offenders" have been victims, for instance, social scientists resist questioning the binary, let alone moving from these morally laden categories to a continuum. Some researchers divide parties to a criminal incident into three categories, "pure victims, pure offenders,

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that "trauma exposure predicts ongoing perpetration of violence post conflict via [the] resulting mental health problems," and conversely if PTSD is treated for perpetration trauma, "ongoing violent behavior in [the] community post conflict will also decrease").

<sup>49</sup> See generally Claudia Catani, *War at Home—a Review of the Relationship between War Trauma and Family Violence*, 20 VERHALTENSTHERAPIE 19 (2010) (examining whether fathers' war violence experiences contribute to increased family violence).

<sup>50</sup> See, e.g., Adam D. LaMotte & Christopher M. Murphy, *Trauma, PTSD Symptoms, and Dissociative Experiences During Men's Intimate Partner Violence Perpetration*, 9 PSYCH. TRAUMA: THEORY, RSCH. PRAC. & POL'Y 567 (2017) (examining the backgrounds of men who report dissociative experiences during instances of IPV, ultimately finding a correlation between the men's trauma/PTSD symptoms and dissociative experience); see also Marah S. McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 Ohio St. L.J. 525, 580 (2016) (discussing the perpetration of trauma of those who carry out prison execution and examining various coping mechanisms used to get through this such as extreme dehumanization of those on death row/those being executed).

<sup>51</sup> See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 574, 580, 600 (2011) (delineating the violence society permits, even encourages, such as military violence, from violence that society prohibits and punishes).

<sup>52</sup> See VERA, *YOUNG MEN OF COLOR & THE OTHER SIDE OF HARM*, *supra* note 6, at 8; see also Kerig et al., *supra* note 28, at 636 (noting that perpetration trauma, i.e., trauma, increases risk for delinquency, but causing harm also increases risk of traumatization).

<sup>53</sup> See Christopher J. Schreck & Eric A. Stewart, *The Victim-Offender Overlap and Its Implication for Juvenile Justice*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 62 (2011); see also CATERINA G. ROMAN ET AL., OFF. OF JUST. PROGRAMS, *THE VICTIM-OFFENDER OVERLAP: EXAMINING POLICE AND SERVICE SYSTEM NETWORKS OF RESPONSE AMONG VIOLENT STREET CONFLICTS* 27 (2020), <https://www.ojp.gov/pdffiles1/nij/grants/254626.pdf> [<https://perma.cc/6K2Q-V3BL>] (noting that, while the overlap "has been well established and studied in criminology in regard to the prevalence of this phenomenon, but there has been little focus on the exceptional and collateral consequences of being a victim in these communities where the overlap is high").

or victim/offenders,”<sup>54</sup> but there is no real acknowledgement among criminologists that there are rarely, if ever, “pure” victims or “offenders.”

Relatedly, researchers have not employed the strong empirical finding of the overlap over decades towards preventing or understanding offending. Rather than exploring perpetrator trauma, or digging deeper into the acknowledged connection between childhood victimization and offending, researchers have mostly been comfortable concluding (simplistically, in my opinion) that the victim/offender overlap leads youth to “normalize” or become desensitized to violence<sup>55</sup>—despite the psychological and self-reported evidence that that is not a frequent reaction to trauma.<sup>56</sup> The fact that these youth were largely from low-income communities, and disproportionately of color, makes this “cultural” or “affect” conclusion even more problematic.<sup>57</sup> Finally, this conclusion contradicts the medical findings of common reactions to trauma, especially childhood trauma. Experts note that it can manifest in different ways, but two common pathways are “hypervigilance and overreactivity . . . to perceived threats of harm,” and numbness and flat affect.<sup>58</sup> As discussed further below, these common responses to trauma are frequently misinterpreted by law enforcement, judges, and others, as a lack of empathy or remorse.<sup>59</sup>

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<sup>54</sup> See Erin Marsh, *Victim Offender Overlap in Intimate Partner Violence* 68 (July 7, 2011) (Master of Science Thesis, Georgia State University), [https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1003&context=cj\\_theses](https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1003&context=cj_theses) [<https://perma.cc/DT25-VJYH>].

<sup>55</sup> See, e.g., Kerig et al., *supra* note 46, at 637 (discussing studies that have linked posttraumatic dissociation or emotional numbing to higher likelihood of juvenile delinquency).

<sup>56</sup> See Richard G. Dudley, Jr., *Childhood Trauma and Its Effects: Implications for Police*, NEW PERSPS. IN POLICING (Nat’l Inst. of Just., Wash D.C.), July 2015, at 1, 9, <https://www.ojp.gov/pdffiles1/nij/248686.pdf> [<https://perma.cc/6LB4-YTSD>].

<sup>57</sup> This is compounded by the research showing that racial bias leads many people to treat Black children as older than they are, i.e., deny their childhood. See, e.g., Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1370–71 (2015) (discussing the criminalization of prostituted girls). Problematically, some experts have interpreted the research to conclude—despite overwhelming evidence that most young men in these communities have had negative interactions with law enforcement before offending—that one intervention should be for law enforcement to engage with and “mentor” them. See Christopher Freeze, *Adverse Childhood Experiences and Crime*, FBI L. ENF’T BULL. (Apr. 9, 2019), <https://leb.fbi.gov/articles/featured-articles/adverse-childhood-experiences-and-crime> [<https://perma.cc/XEP2-Q8VS>].

<sup>58</sup> Dudley, *supra* note 56, at 4; U.S. DEP’T OF HEALTH & HUM. SERVS., A TREATMENT IMPROVEMENT PROTOCOL: TRAUMA-INFORMED CARE IN BEHAVIOR HEALTH SERVICES 61, 65–66 (2014).

<sup>59</sup> See Godsoe, *Mitigation*, *supra* note 33 (discussing research on this point).

#### D. ACEs Research

Groundbreaking and voluminous research has connected childhood exposure to certain “adverse” events to causing harm, as well as to a high correlation to being harmed by others. The Centers for Disease Control and Prevention (CDC) has demonstrated that ACEs are potentially traumatic events that occur during childhood and that are linked to detrimental long-term health outcomes, mental illness, and substance use, among other harms.<sup>60</sup> Directly experiencing violence or abuse, witnessing violence in the community, the death of a close family member, divorcing parents, and growing up in a home with substance use or mental health issues may all properly be considered ACEs.<sup>61</sup> ACEs are extremely common—well over half of the adults surveyed in one study reported experiencing at least one ACE, and almost one in six had experienced four or more types of ACEs.<sup>62</sup>

The impact of ACEs is cumulative in nature; accordingly, studies show that even in cases where an individual adverse experience has a weak or no effect on the outcome, the accumulation of multiple adverse experiences has greater detrimental developmental effects.<sup>63</sup> The higher the number of ACEs, the greater the correlation with negative outcomes,<sup>64</sup> including increased risk of “injury, sexually transmitted infections, maternal and child health problems (including teen pregnancy, pregnancy complications, and fetal death), involvement in sex trafficking, and a wide range of chronic diseases and leading causes of death such as cancer, diabetes, heart disease, and suicide.”<sup>65</sup>

Additionally, numerous large studies show a strong correlation between a higher level of ACEs and committing violent acts, controlling for other factors.<sup>66</sup> For instance, a study

<sup>60</sup> *Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/aces/index.html> [<https://perma.cc/29T5-X758>].

<sup>61</sup> *Id.*

<sup>62</sup> Women and people of color are at greater risk for experiencing four or more ACEs, and the CDC has recognized that the effects of systemic racism and pervasive poverty are linked with ACEs. *Id.*

<sup>63</sup> See Amber L. Beckley et al., *The Developmental Nature of the Victim-Offender Overlap*, 4 J. DEV. LIFE COURSE CRIM. 24, 28 (2018).

<sup>64</sup> See *id.*

<sup>65</sup> *Preventing Adverse Childhood Experiences*, *supra* note 60 (under “Fast Facts”).

<sup>66</sup> See, e.g., James A. Reavis et al., *Adverse Childhood Experiences and Adult Criminality: How Long Must we Live Before we Possess our Own Lives?*, 17 PERMANENTE J. 44 (2013) (finding that the “offender” group reported nearly four times as many ACEs than the normative sample); see also Naomi N. Duke et al., *Adolescent Violence Perpetration: Associations with Multiple Types of Adverse Childhood Experiences*, 125 PEDIATRICS 778, 778

of over 22,000 youth referred to the Florida Department of Juvenile Justice for delinquency adjudications found that the higher the ACE score, the more likely the young people had engaged in violence from an early age.<sup>67</sup> The authors also discussed other research finding “90% of juvenile offenders in the United States [have] experience[d] some sort of traumatic event in childhood, and up to 30% of justice-involved American youth . . . meet the criteria for post-traumatic stress disorder due to trauma experienced during childhood.”<sup>68</sup> The authors demonstrated that someone’s chance of becoming an “offender” increased with each additional ACE point.<sup>69</sup> The correlation is true of the most serious offenses, including violent and sex offenses; for instance, research has found “those with four or more ACEs were 15 times more likely to have committed an act of violence during the last 12 months.”<sup>70</sup> Consideration of “expanded ACEs,” including exposure to neighborhood and community violence, racism, and poverty, has found an even higher correlation between childhood trauma and offending.<sup>71</sup>

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(2010) (finding, in a study of over 100,000 adolescents examining ACEs and later violence perpetration, that one in four youth reported at least one ACE; each ACE was significantly associated with adolescent interpersonal violence perpetration (bullying, delinquency, fighting, dating violence, weapon carrying on school property) and self-directed violence (suicidal ideation/attempt or self-harm). For each additional type of adverse event reported by youth, the risk of violence perpetration increased from 35 to 144 percent.); Nina Vaswani, *Adverse Childhood Experiences in Children at High Risk of Harm to Others. A Gendered Perspective*, CTR. FOR YOUTH & CRIM. JUST. (2018), [https://cycj.org.uk/wp-content/uploads/2018/08/Adverse-Childhood-Experiences-in-high-risk\\_CYCJ\\_Final-Version-proofed.pdf](https://cycj.org.uk/wp-content/uploads/2018/08/Adverse-Childhood-Experiences-in-high-risk_CYCJ_Final-Version-proofed.pdf) (last visited May 20, 2022) (collecting studies); Hanie Edalati et al., *Adverse Childhood Experiences and the Risk of Criminal Justice Involvement and Victimization Among Homeless Adults with Mental Illness*, 68 PSYCHIATRY ONLINE 1288, 1288 (2017) (reporting that the cumulative effect of childhood adversity was significantly correlated with both victimization and criminal system involvement even controlling for sociodemographic factors, psychiatric diagnosis, and other factors).

<sup>67</sup> Bryanna Hahn Fox et al., *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent and Chronic Juvenile Offenders*, 45 CHILD ABUSE & NEGLECT 1, 3, 7 fig.1, 9 (2015) (analyzing data of childhood trauma “among 22,575 delinquent youth referred to the Florida Department of Juvenile Justice . . . , with results suggesting that each additional adverse experience a child experience[s] increases the risk of becoming a serious, violent, and chronic juvenile offender by [age] 35, when controlling for other risk factors for criminal behavior.” Nearly half of all juveniles studied had been exposed to four or more ACEs.); see also Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. JUV. JUST. 1, 1 (2014) (researching a group of over 64,000 “juvenile offenders” in Florida and finding “disturbingly high rates of ACEs”).

<sup>68</sup> Hahn Fox et al., *supra* note 67, at 2 (citation omitted).

<sup>69</sup> *Id.* at 1 (also demonstrating the dehumanization accompanying much social science research by terming the result “downstream wreckage”).

<sup>70</sup> Babak Jahanshahi et al., *ACEs, Places & Inequality: Understanding the Effects of Adverse Childhood Experiences and Poverty on Offending in Childhood*, BRIT. J. CRIMINOLOGY (Sept. 2, 2021) (summarizing research from both the United States and United Kingdom).

<sup>71</sup> See, e.g., Peter F. Cronholm et al., *Adverse Childhood Experiences: Expanding the Concept of Adversity*, 49 AM. J. PREVENTATIVE MED. 354, 357–58 (2015) (stating the findings also “support the long-standing notion that higher levels of

Half of the ACEs involve direct victimization,<sup>72</sup> so the correlation between ACEs and offending is further very significant evidence of the victim/offender overlap. Some studies explicitly demonstrate how ACEs correlate with higher victimization rates, as well as offending rates. For instance, one study examined the relationship between childhood physical or sexual abuse or growing up with a battered mother and the risk of IPV victimization in women and IPV perpetration by men, and found the childhood experiences increased the risk of IPV victimization in women 3.5 times and of IPV offending 3.8 times for men.<sup>73</sup> Significantly, unlike most of the social science research discussed above,<sup>74</sup> researchers discussing ACEs have recommended preventive childhood interventions, and approaches that incorporate the systemic harms that are a major root cause of crime; as one report concluded: “Given the financial benefits of implementing trauma prevention programs, and the multitude of harmful outcomes ACEs cause later in life, there is empirical evidence for the old adage that a penny of prevention is worth a pound of cure.”<sup>75</sup>

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A caveat is due here—of course, the vast majority of people experiencing trauma and even high numbers of ACEs do not cause violent harm.<sup>76</sup> I want to be careful not to replace the overly simplistic and problematic victim/offender binary with another overly simplistic construct equating trauma with offending.<sup>77</sup> Nonetheless, the strong correlation between

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adversity exist in minority and lower-income populations”); see also Jane Stevens, *Adding Layers to the ACEs Pyramid—What Do You Think?*, PACES CONNECTION (Apr. 7, 2015, 5:00 AM), <https://www.pacesconnection.com/blog/adding-layers-to-the-aces-pyramid-what-do-you-think> (last visited May 20, 2022) (showing the expanded ACEs pyramid including “social conditions” and “historical trauma”).

<sup>72</sup> The conventional and expanded ACEs are emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, household violence, household substance abuse, household mental illness, incarcerated household member, witnessed violence, felt discrimination, unsafe neighborhood, experienced bullying, and lived in foster care. Cronholm et al., *supra* note 71, at 358 tbl.2; see also Hahn Fox et al., *supra* note 67, at 5.

<sup>73</sup> Charles L. Whitfield et al., *Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults: Assessment in a Large Health Maintenance Organization*, 18 J. INTERPERSONAL VIOLENCE 166, 176 (2003).

<sup>74</sup> See *supra* Section I.C.3.

<sup>75</sup> Hahn Fox et al., *supra* note 67, at 9.

<sup>76</sup> There are also known protective factors for those who have experienced ACEs, many of which overlap with ACEs prevention and provide a useful intervention to violence prevention more broadly. Thanks to Alexis Hoag for this important point.

<sup>77</sup> In prior work, I have flagged the perpetuation of harmful group stereotypes as a potential risk or downside of informing courts and other decision-makers about a client’s trauma. See Godsoe, Mitigation, *supra* note 33.

childhood trauma and both victimization and violence, coupled with the victim/offender overlap, indicate that criminal law theory and practice must take this research into account. Moreover, the concern about stigma, while real, is outweighed by the benefits of incorporating such research into the criminal system.<sup>78</sup> This is particularly true in the criminal system's treatment of violent offenses, which is highly stigmatized and often racialized and dehumanizing.<sup>79</sup> A focus on extreme outlier examples, the so-called "Willie Horton" effect, compounds this and stymies much reform.<sup>80</sup>

## II. REIFICATION OF THE VICTIM/OFFENDER BINARY AND ITS HARMS

The victim/offender binary remains very entrenched in the criminal system's treatment of violence, despite the evidence of an overlap. Policymakers and criminal law scholars alike overlook or ignore this evidence, usually doubling down on a racialized narrative of individualized immoral conduct.<sup>81</sup> This is significant as a rhetorical and moral matter, and it also brings very real consequences, including legitimating the racist and punitive existing system.

### A. *Reification of the Binary*

Policymakers at both the federal and state levels leave violent "offenders," usually very broadly defined, out of significant reforms.<sup>82</sup> These include both procedural pretrial measures, such as bail reform, as well as sentencing and other punishment assessment measures, designed to curb and reduce overincarceration.<sup>83</sup> For instance, at least seventy-five state

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<sup>78</sup> Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Dis/ability, and Class Actions*, 47 *FORDHAM URB. L.J.* 293, 305–06 (2020) (making this argument as to children and youth in the Compton school system).

<sup>79</sup> See *infra* Sections II.B, II.C.1.

<sup>80</sup> It is so termed because an entire successful furlough program was upended (and likely a presidential election lost) because one of the thousands of participants committed a violent crime post-release. Government officials used that tragic event to overlook the evidence that the hundreds of other participants in the program were very successful. John Pfaff, Opinion, *The Never-Ending 'Willie Horton Effect' Is Keeping Prisons Too Full for America's Good*, L.A. TIMES (May 14, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-pfaff-why-prison-reform-isnt-working-20170514-story.html> [<https://perma.cc/DL5C-J3QV>].

<sup>81</sup> See *supra* Sections I.A, I.B.

<sup>82</sup> I have previously described the equally rigid and ineffective exclusion of people convicted of a (very wide range) of sex offenses from reforms as well. See Godsoe, *#MeToo*, *supra* note 9, at 353–60.

<sup>83</sup> There are a few exceptions—a handful of progressive prosecutors who will address some violent crime via, for instance, restorative justice. See, e.g., Adam Wisnieski, *Offender Meets*



legislative reforms exclude violent “offenders,” as does the most sweeping recent federal reform legislation, the First Step Act.<sup>84</sup> To take just two state examples, New York excluded people convicted of certain violent crimes from eligibility for bail reform and for sentencing mitigation based on trauma under the groundbreaking Domestic Violence Survivors Justice Act (DVSJA),<sup>85</sup> while Tennessee legislators enacted legislation precluding any sentencing or parole reforms for violent “offenders,” while enacting such reforms for others in the system.<sup>86</sup> This massive gap fatally limits reforms,<sup>87</sup> and ignores the wishes of most victims,<sup>88</sup> yet legislators of all political stripes continue to ignore this evidence, and double down on extreme sentences for those deemed violent. Indeed, they carve out violent “offenders” explicitly and with pride—just consider the recent congressional Federal Prison Bureau Nonviolent Offender Relief Act of 2021.<sup>89</sup>

Legislators, judges, and other system actors also overlook the strong evidence of the victim/offender overlap and trauma, including the ACEs research.<sup>90</sup> To take just a few examples, while “closure” has become a central tenet of death penalty court proceedings and public discourse, the concept largely ignores the significant literature on healing from trauma.<sup>91</sup> Similarly, while other settings for juveniles, such as foster care and educational

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*Victim: A ‘Survivor-Centered’ Approach to Violent Crime*, CRIME REP., (Apr. 12, 2017), <https://thecrimereport.org/2017/04/12/offender-meets-victim-a-survivor-centered-approach-to-violent-crime/> [https://perma.cc/F26T-NDEE] (discussing Brooklyn District Attorney Eric Gonzalez).

<sup>84</sup> See *Prison Policy Report*, *supra* note 5.

<sup>85</sup> SURVIVED & PUNISHED, PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS 11–12 (2020), <https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf> [https://perma.cc/R68T-EB3B].

<sup>86</sup> See Sen. Joey Hensley, *Legislative Update: New Laws Passed in Criminal Justice Reform*, DAILY HERALD (May 15, 2021, 6:00 AM), <https://www.columbiadailyherald.com/story/news/2021/05/15/legislative-update-new-laws-passed-criminal-justice-reform/5088888001/> [https://perma.cc/9ULG-8TPR] (describing Tennessee bill designed “to ensure certain violent sexual offenders serve 100% of their sentences”).

<sup>87</sup> See *infra* Section II.C.2.

<sup>88</sup> See *infra* Section II.C.3.

<sup>89</sup> The bill is sponsored by a Democrat known for supporting criminal system reform before many others. H.R. 132, 117th Cong. (1st Sess. 2021); see also *About Congresswoman Sheila Jackson Lee*, HOUSE.GOV, <https://jacksonlee.house.gov/about> [https://perma.cc/U7CH-JHMP].

<sup>90</sup> See Gwen Adshead, *What the UK Knows About Violent Crime that the US Can't Figure Out*, SALON (July 17, 2021, 2:00 PM), <https://www.salon.com/2021/07/17/what-the-uk-knows-about-violent-crime-that-the-us-cant-figure-out/> [https://perma.cc/NSV3-4W43] (pointing out the difference between the UK and US in this regard); see also Gina Wong, *Criminal Justice Needs a Better Understanding of Childhood Trauma*, CONVERSATION (Feb. 4, 2021, 2:55 PM), <https://theconversation.com/criminal-justice-needs-a-better-understanding-of-childhood-trauma-153848> [https://perma.cc/VX56-QJ5Y] (lamenting that ACEs and other evidence of trauma in “offenders” is “woefully ignored”).

<sup>91</sup> Bandes, *supra* note 21, at n.29.

institutions, increasingly recognize ACEs,<sup>92</sup> the juvenile criminal system remains virtually silent on this topic despite the very large numbers of young people in that system having had adverse childhood experiences. More broadly, the theory and practice of the criminal system obscure the “slow violence” that past trauma, systemic poverty and racism, and the system itself visit upon people within it.<sup>93</sup>

In the rare instances where trauma is incorporated, this usually takes the form of trainings, guidelines, or optional resources, developed by nongovernment actors, rather than meaningful change to policing, prosecution, and sentencing practices.<sup>94</sup> While it is a positive sign that a handful of (progressive) prosecutors and other system actors have called for change in this regard,<sup>95</sup> the vast majority of system actors not only ignore trauma but also continue to stigmatize and punish those who offend for their reactions to trauma.<sup>96</sup> Indeed, judges in the juvenile system have reported becoming “overwhelmed” by the extent of trauma among the children in the system and “frustrated” with the lack of community-based treatment options—essentially erasing young people’s victimhood and

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<sup>92</sup> See, e.g., Frank Alvarez, *Understanding Childhood Trauma: ACEs and Foster Children*, FOSTER CARE NEWSLETTER (Dec. 1, 2018), <http://foster-care-newsletter.com/understanding-childhood-trauma-aces/#.YkDmqC-B13Q> [<https://perma.cc/WZ37-BPYQ>] (discussing progress made in understanding ACEs in foster children).

<sup>93</sup> Rabia Belt, *The Fat Prisoners’ Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future* (2022) (unpublished manuscript) (on file with author); see also Richard Fisher, *The Unseen ‘Slow Violence’ that Affects Millions*, BBC FUTURE (Jan. 31, 2021), <https://www.bbc.com/future/article/20210127-the-invisible-impact-of-slow-violence> [<https://perma.cc/9WRF-H2L2>] (defining slow violence as “harm and damage that plays out over years or decades [in which] [t]he perpetrators may not be obvious, but the victims are . . . and [according to Johan Galtung, happens when] a society causes harm to its citizens and their property, often invisibly, through social or health inequalities, racism, sexism or another systemic means”).

<sup>94</sup> See Debra A. Pinals & Doris A. Fuller, *Mental Health Facts in Brief, Trauma and Its Implications for Justice Systems*, NAT’L CTR. FOR ST. CTS. 1 (2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0021/14493/mhf4-trauma-mar2020.pdf](https://www.ncsc.org/_data/assets/pdf_file/0021/14493/mhf4-trauma-mar2020.pdf) [<https://perma.cc/7D3X-QQPF>]. Research on police violence has demonstrated the premise that training is not sufficient for meaningful institutional change. See, e.g., Alex S. Vitale, *The Answer to Police Violence Is Not ‘Reform.’ It’s Defunding. Here’s Why*, GUARDIAN (May 31, 2020, 5:13 AM), <https://www.theguardian.com/commentisfree/2020/may/31/the-answer-to-police-violence-is-not-reform-its-defunding-heres-why> [<https://perma.cc/Y7T8-W2R5>] (discussing the Minneapolis police department’s failed efforts at reform through expanded training programs in the five years before George Floyd’s murder).

<sup>95</sup> See J. Douglas Overbey & George Gascon, *Opinion, Lawmakers Cannot Ignore the Victimization of Children in the Justice System*, NEWSWEEK (Nov. 4, 2021, 8:00 AM), <https://www.newsweek.com/lawmakers-cannot-ignore-victimization-children-justice-system-opinion-1644726> [<https://perma.cc/ABG7-UQ5R>]. Another positive, yet highly unusual development is the recognition of certain kinds of trauma for sentencing mitigation in the New York DVSJA. See *supra* note 85 and accompanying text.

<sup>96</sup> See Wong, *supra* note 90; Overbey & Gascon, *supra* note 95.

giving up on a nuanced approach.<sup>97</sup> Compounding this is the fact that even the minority of system actors incorporating trauma usually do so only at sentencing, as to mitigation.<sup>98</sup> Yet trauma is so intricately connected with the structural causes of violence, as well as with theories of culpability and deterrence, that incorporating it as a consideration at every stage is essential to a fair and effective system.<sup>99</sup>

Legal scholarship displays a similar blind spot.<sup>100</sup> There are a few notable exceptions, such as Leigh Goodmark on imperfect victims,<sup>101</sup> Miriam Gohara discussing ACEs and trauma in capital mitigation,<sup>102</sup> and Anna Roberts exploring how language perpetuates predetermined guilt without process.<sup>103</sup> Mostly, however, the wide range of criminal law and criminal procedure scholarship ignores this well-documented phenomenon. For instance, several searches revealed only a handful of law review articles even mentioning ACEs, all exclusively in the death penalty mitigation or juvenile justice realms. Even fewer discuss the victim/offender overlap.<sup>104</sup> Indeed, even progressive law scholars seem reluctant to question the good/bad dichotomy of victims versus people who commit violent offenses, especially certain historically underpunished offenses, such as IPV, child abuse, hate crimes, etc.<sup>105</sup> More broadly, consideration of the overlap seems essential to understanding dominant theories of punishment<sup>106</sup>—outlined in

<sup>97</sup> ERICA J. ADAMS, JUST. POL'Y INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 5 (2010).

<sup>98</sup> Examples include New York's DVSJA and Tennessee's Senate Bill 767. See *supra* text accompanying notes 85–86.

<sup>99</sup> See Godsoe, Mitigation, *supra* note 33 (arguing that it is a consideration for defense representation at every stage of the proceeding).

<sup>100</sup> See Jocelyn Simonson, *The Place of the People in Criminal Procedure*, 119 COLUM. L. REV. 249, 249 (making an analogous point about how the ideology of criminal procedure perpetuates these false narratives of us versus them by making “the people” synonymous with prosecution and excluding people accused of crimes along with their families and communities).

<sup>101</sup> Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51 (2013).

<sup>102</sup> Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1 (2018).

<sup>103</sup> Roberts, *supra* note 15; see also Carissa Byrne Hessick & Doug Berman, *Towards a Theory of Mitigation*, 96 BOS. U.L. REV. 161 (2016) (discussing sentencing mitigation).

<sup>104</sup> One particularly interesting recent addition is Andre Douglas Pond Cummings' account of hip hop star Meek Mills's experiences with childhood trauma/ACEs and involvement in the criminal legal system. See ANDRÉ DOUGLAS POND CUMMINGS, FIGHT THE POWER: HIP HOP LAW & POLICY (forthcoming Cambridge University Press). It is of course impossible to cite an absence. Numerous scholars, such as Professor Goodmark and, one of the foremost scholars on victims and the role of emotion in the criminal process, Professor Susan Bandes, confirmed my research that the overlap is basically absent from legal scholarship.

<sup>105</sup> Thanks to Leigh Goodmark for this insight.

<sup>106</sup> See Sara Weskalnies, *Abuse Victims Who Kill and the New Rehabilitation Model*, 2018 MICH. ST. L. REV. 451, 472–76 (2018) (describing the dominant theories of

every first-year criminal law casebook—yet accounts of retributive and utilitarian philosophies further embed this legal construct as natural, absolute, and permanent.<sup>107</sup>

### B. *Reasons for the Stickiness of this Narrative*

I posit here two possible explanations for the stickiness of this moralistic and racialized narrative about individual blame and responsibility—the social control function of criminal law, and the framing of violence as an exceptional and aberrant harm.<sup>108</sup> Numerous commentators have theorized social control as a major function of the criminal system. This lens reveals the dominant purpose of the criminal, and other state systems, to be the regulation of communities marginalized by race, class, immigration status, etc., and the concomitant perpetuation of societal hierarchies.<sup>109</sup> In this framework, the system cannot

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punishment); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 16–23 (2010) (same).

<sup>107</sup> Retributive theories, by focusing on individual culpability, ignore the many societal factors that shape most “offenders,” such as mental illness, substance use and abuse, childhood trauma, etc. See, e.g., *Graham v. Florida*, 560 U.S. 48, 53–54 (2010) (discussing the childhood of defendant Graham, which included parental substance abuse, diagnosis of attention deficit hyperactivity disorder, and use of drugs and alcohol as a teen—none of which was taken into account in his sentencing following a violation of his parole for armed robbery).

<sup>108</sup> Another explanation related mostly to legal scholars is the disconnect between the legal academy and law on the ground. Legal scholars have been criticized by practitioners, judges, and a few of their own, for the disconnect between scholarship and the reality of law on the ground. See, e.g., Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1350–53 (2012) (criticizing the undertheorizing of misdemeanors relative to felonies in legal scholarship); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018) (sociological research describing and analyzing the role of lower-level criminal courts in “sorting,” “hassling,” and “marking” low-income and other marginalized communities); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 HARV. L. REV. F. 200, 210–12 (2021) (summarizing the need for scholarly and pedagogical attention to municipal courts); Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1632 (2020) (criticizing the disconnect between the curricular canon for criminal law and actual practice); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. (forthcoming 2022) [hereinafter *The Place of the Prosecutor*] (critiquing much of legal scholarship for discussing prosecutors in theoretical terms rather than their actual practices).

<sup>109</sup> See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 120 (2019) (detailing the “historical forms of oppression beyond slavery . . . [and calling for us] to dismantle systems beyond police and prisons, including foster care, regulation of pregnancy, and poverty”); see also LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2004) (discussing the use of the criminal justice system as a means to control impoverished Black people); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (documenting how the war on crime has been infused into the governance of virtually all social institutions); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that the American justice system has become the modern vehicle for racial control); JOEY L. MOGUL ET

exist without the racialized and moralistic narrative and othering of “offenders.” To paraphrase Paul Butler, the system is working like it is supposed to; the dehumanization and harms are a feature, not a bug.<sup>110</sup>

This false narrative is particularly tenacious as to violent crime. A number of scholars, including Alice Ristroph, have detailed the varying and malleable constructions of criminal violence, including murder, sexual assault, and IPV.<sup>111</sup> The American approach to violent crime also focuses on individual wrongdoing and pathology, as noted above,<sup>112</sup> which obscures the powerful social drivers of crime (including poverty, childhood trauma, and widespread access to guns in many states), and impedes its effective prevention.<sup>113</sup> This legal construct of violence as exceptional and “deviant” also makes it very difficult to convince the public, policymakers, and even scholars, to follow the data (e.g., very low recidivism rates<sup>114</sup>) and to believe that

AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011) (discussing crime as a social construct used to criminalize homosexuality); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME (2016) (documenting the proliferation of crime control and mass incarceration as a response to the social problems of poverty and inequality); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) (“[T]he real problem of policing: at both an interactional and structural level, [is that] current regimes can operate to effectively banish whole communities from the body politic.”). For examples of where I have described this dynamic as to the juvenile, criminal, and family regulation systems, see Godsoe, *#MeToo*, *supra* note 9; Godsoe, *Recasting Vagueness*, *supra* note 9; Cynthia Godsoe, *An Abolitionist Horizon for Child Welfare*, L. & POL. ECON. PROJECT BLOG (Aug. 6, 2020), <https://lpeproject.org/blog/an-abolitionist-horizon-for-child-welfare/> [<https://perma.cc/AJV7-2SMF>] (and longer work-in-progress). See also Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, and Mutual Aid*, 12 COLUM. J. RACE & L. (forthcoming 2022).

<sup>110</sup> See generally Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (persuasively arguing that police violence against Black men is a systemic, structural problem and calling for radical, abolitionist change).

<sup>111</sup> Ristroph, *supra* note 51, at 593, 602 (also mapping contested constructions of murder, assault, rape and domestic abuse as “one more illustration of the contingent and contested parameters of violence”); see also DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 236 (2021) (describing how American law treats violence as exceptional and punishes or rewards it in an inconsistent and highly racialized fashion so that the “category of ‘violent’ crimes winds up being a legal construction, a kind of conceptual gerrymander”).

<sup>112</sup> See *supra* notes 14–15.

<sup>113</sup> See, e.g., PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE 115–45 (2018) (explaining that the primary investment in lower-income communities since the Jim Crow era has been policing and the criminal system); see also David Alan Sklansky, *Addressing Violent Crime More Effectively*, BRENNAN CTR. FOR JUST. (Sept. 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/addressing-violent-crime-more-effectively> [<https://perma.cc/T5QM-WWQF>] (arguing for abandonment of traditional policies—in particular, aggressive use of decades-long, mandatory prison sentences for ‘violent’ crimes—to address the national increase in homicides).

<sup>114</sup> See *Prison Policy Report*, *supra* note 5 (citing two major recent Bureau of Justice Statistics studies demonstrating that people incarcerated for violent offenses are

these “offenders” can be safely kept in or returned to society. It covers up the reality, proven by research, that the ability to commit violence, and violent behavior, is not aberrant but only some is criminalized.<sup>115</sup>

### C. *Harms of the Binary*

The entrenchment of this empirically false and damaging account of violent offenses thwarts both prevention and successful reentry after criminal system involvement. Research is clear that, by the numbers, meaningful decarceration must include people who committed violent offenses.<sup>116</sup> Extending reforms to include violent offenses is also significant beyond the numbers, in order to counter the myths and bad information that perpetuate the current system. Failure to recognize and account for the victim/offender overlap impedes meaningful reforms, and indeed contributes to an ineffective and unjust criminal system in three significant ways: reentrenching the false racialized narrative of individual blameworthiness; masking and failing to address the root causes of violence; and perpetuating the cycle of violence.

#### 1. Further Entrenches a Racialized Narrative of Individual Blameworthiness

Ignoring the overlap erases the victimhood of “offenders” and obscures the significant structural factors in offending, both of which can serve as explanatory and mitigating factors. This false narrative reinforces the predominant, ignorant view of criminal offending as about individual (rational) “bad actors.” “Othering” is particularly dominant as to those committing violent offenses.<sup>117</sup> As noted earlier, traditional theories of punishment often reinforce this macro narrative, giving it a scholarly, theoretical veneer.<sup>118</sup> In its focus on interpersonal

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less likely to be rearrested within three years for any offense, as well as other studies showing very low reincarceration rates for those convicted of homicide).

<sup>115</sup> Cecilia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847, 868 (2020) (making this point and arguing for the importance of acknowledging the “universality of violence and aggression”).

<sup>116</sup> For arguments that those crimes deemed “violent” must be included to achieve meaningful decarceration, see JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017); and MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165 (2015).

<sup>117</sup> And, as I have previously noted, sex offenses. See Godsoe, *#MeToo*, *supra* note 9, at 335–36, 356.

<sup>118</sup> See, e.g., Gohara, *supra* note 102, at 6 (noting that trauma and “exposure to violence has been well documented to damage the very behavioral domains that are centrally relevant to an assessment of a person’s blameworthiness” but are ignored by judge and other system actors).

violence, this narrative also obscures systemic harms, such as state violence.

This narrative, and concomitant racial disproportionality, is compounded by the on-the-ground lawmaking by police, prosecutors, and other criminal system actors as to who is a victim and who an offender.<sup>119</sup> I have previously shown in the peer statutory rape context that this designation is frequently made based on illegitimate factors unrelated to culpability or harm (e.g., even including age), but rather on illegitimate factors such as gender, race, and sexual orientation.<sup>120</sup> Another example is police designation of “victim of trafficking” versus “prostitution offender” among juvenile girls. Police were influenced by (1) the minor’s cooperation with the police; (2) obvious pimp or john involvement; and (3) a report to the police rather than police observation of prostitution during, for instance, a sting.<sup>121</sup> None of these factors, unlike age, or the conduct of exchanging sex for money, are relevant to the statutory definition of the offense. Similarly, a woman’s demeanor or failure to leave or prevent assault sometimes determines police response to assault within families.<sup>122</sup> There are many more instances of the construction of offending, including marijuana possession, to take just one.<sup>123</sup>

More broadly, research demonstrates that police frequently fail to recognize or misinterpret trauma as, for instance, a lack of remorse.<sup>124</sup> This is particularly the case when they are arresting people in low-income neighborhoods and, often

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<sup>119</sup> For instance, a Connecticut study found that different county police departments had wide ranging rates of dual arrest in IPV situations, ranging from 0 to 45 percent. MERRY MORASH, UNDERSTANDING GENDER, CRIME, AND JUSTICE 140–41 (2006). This is also true of service providers, see *infra* text accompanying notes 141–152, and the victims’ rights movement, see *supra* note 14.

<sup>120</sup> Godsoe, *Recasting Vagueness*, *supra* note 9, at 177–78; see also Godsoe, #MeToo, *supra* note 9, at 341–44 (describing this phenomenon among juveniles convicted of sex offenses more broadly). Susan Miller has documented gender bias in designating “mutual combat” and dual arrests in the intimate partner violence. SUSAN MILLER, VICTIMS AS “OFFENDERS”: THE PARADOX OF WOMEN’S VIOLENCE IN RELATIONSHIPS 8–11, 15–21 (2005); see also Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman: When She Fights Back*, 20 YALE J.L. FEMINISM 75, 82–92 (2008) (describing the stock narrative for domestic violence victims).

<sup>121</sup> Stephanie Halter, *Factors That Influence Police Conceptualizations of Girls Involved in Prostitution in Six U.S. Cities: Child Sexual Exploitation Victims or Delinquents*, 15 CHILD MALTREATMENT 152, 152, 156 (2010) (summarizing research finding that “police officers in the U.S. are inconsistent in their treatment of youth involved in prostitution” (citation omitted)). The vast majority of minors were categorized as one or the other, although police designated a few as both victim and “offender.” *Id.* at 153.

<sup>122</sup> See, e.g., Morash, *supra* note 119, at 134–40 (discussing the expectations for behavior of domestic violence victims).

<sup>123</sup> DOUGLAS N. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 30 (2008) (noting that “such factors as location and race significantly affect the probability that marijuana users and sellers will be punished”).

<sup>124</sup> Dudley, *supra* note 56, at 1.

overlapping, people of color.<sup>125</sup> It is also true even of young children, seven- and eight-year-olds, whom police may inaccurately assume are gang members or “offenders,” rather than victims or witnesses to violence.<sup>126</sup> The false racialized narrative about violence leads police and other first responders to attribute trauma reactions, such as disassociation, to “arrogance[,] . . . aggressiveness[,] and callousness.”<sup>127</sup> Compounding this harmful police approach are the facts that people of color living in low-income neighborhoods are the most likely to have encounters with law enforcement,<sup>128</sup> that the overlap findings are undertheorized,<sup>129</sup> and that service providers are also less likely to designate people from these communities, including children, as victims.<sup>130</sup> This “virtual storm” of wrongful designation compounds trauma, and serves as a pipeline to arrest and prosecution.

## 2. Masks and Fails to Address Root Causes, Including Trauma

The failure to recognize victimhood among violent “offenders” also obscures many of the societal factors underlying violence, such as poverty, adverse childhood experiences, and the lack of resources and infrastructure in many places.<sup>131</sup> Indeed, the primary investment in low-income communities and communities of color, has been the criminal system rather than health care, housing, or education.<sup>132</sup> There is a proven correlation between a weak social safety net, poverty, and crime; “[m]any of the states with the least generous social safety nets use criminal justice to stand in for poverty alleviation and thus have had the nation’s highest incarceration rates.”<sup>133</sup> In short,

<sup>125</sup> See *id.* at 10–11, 15.

<sup>126</sup> *Id.* at 2–3.

<sup>127</sup> *Id.* at 10–11 (citing research).

<sup>128</sup> See *id.* at 15.

<sup>129</sup> See *supra* Section I.C.3.

<sup>130</sup> See *infra* notes 140–151 and accompanying text.

<sup>131</sup> To take just one example, criminalizing and severely punishing gun possession rather than looking to the manufacturing and societal sources of guns similarly warps this root cause.

<sup>132</sup> ELLA BAKER CENTER FOR HUMAN RIGHTS, PUBLIC SAFETY BEGINS WITH PUBLIC HEALTH: MAKING OAKLAND SAFER TOGETHER 4 (2017) (on file with author) (detailing the historic “disinvestment” in communities of color, and noting that “too often, law enforcement officers are the primary—or only—responders to public health problems” including mental health, substance abuse, housing, student discipline etcetera); see also SHARKEY, *supra* note 113, at 115–45 (documenting that the primary investment in lower-income communities since the Jim Crow era has been policing and punishment, and calling for new investments so that the nation can move “away from the idea that punishment can be a sustainable solution to the problem of urban poverty”).

<sup>133</sup> Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 12–13 (2018); see also NAT’L RSCH. COUNCIL OF THE NAT’L ACADS, *supra* note 20, at



economic stress and underresourced communities are overwhelmingly correlated with violence.<sup>134</sup>

As a result, law enforcement and the criminal system are tasked with most of the prevention and response to violence, despite the clear evidence that these interventions do not work very effectively—or at all—to do either of these things.<sup>135</sup> The CDC and other agencies have long recognized violent crime as a public health problem, yet current interventions fail to address the causes in any meaningful way. Indeed, the current framework actually compounds harm via incarceration or other criminal state intervention that is traumatizing, creates more harm and criminal activity, and is frequently a site of violence itself.<sup>136</sup>

### 3. Perpetuates the Cycle of Violence

Unsurprisingly, this myopia perpetuates a cyclical failure to address societal problems and trauma, and then punishes the reaction to such trauma. As discussed below, ignoring the overlap is consonant with overlooking victims' wishes about what interventions they want "in their names"; deters reporting of crimes and cooperation with system actors; and leaves most victims with no services. Combined with the failure to address the root causes of violence, this ignoring of many victims' needs makes it much more likely that those victims will go on to offend, thus creating more victims with unaddressed harms.<sup>137</sup> Finally, victims are used politically to include only certain victims—usually white and female—and for certain, i.e., carceral, ends.<sup>138</sup>

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127 (citing urban economic distress as a significant driver of crime necessitating social infrastructure remedies).

<sup>134</sup> JARED KNOWLES & ANDREA J. RITCHIE, COPS DON'T STOP VIOLENCE: COMBATING NARRATIVES USED TO DEFEND POLICE INSTEAD OF DEFUNDING THEM 5 (2021) [hereinafter COMBATING NARRATIVES], [https://communityresourcehub.org/wp-content/uploads/2021/07/0726\\_PoliceDontStop\\_C.pdf](https://communityresourcehub.org/wp-content/uploads/2021/07/0726_PoliceDontStop_C.pdf) [<https://perma.cc/2AX4-F83L>].

<sup>135</sup> See *id.* at 10–11 (collecting research). This also reflects the larger problem of incident-driven reaction to harm and crime rather than one that looks at root causes and context. Some police don't feel that it is their "job" to look into the context, at least in IPV cases. See Miller, *supra* note 120, at 142.

<sup>136</sup> *Prison Policy Report*, *supra* note 5 (summarizing research demonstrating that long sentences do not deter crime and are likely criminogenic); Capers, *supra* note 15, at 1259.

<sup>137</sup> See *supra* notes 18 and 93, which cite Ristroph and Belt and discuss the "slow violence" of state actors that goes unpunished.

<sup>138</sup> See David M. Greenwald, *Monday Morning Thoughts: When We Think of Victims, We Are Not Picturing Who the Bulk of Crime Victims Actually Are*, DAVIS VANGUARD (May 31, 2021), <https://www.davisvanguard.org/2021/05/monday-morning-thoughts-when-we-think-of-victims-we-are-not-picturing-who-the-bulk-of-crime-victims-actually-are/> [<https://perma.cc/Y3HF-8S6K>].

Compounding this blind spot is the systemic assumption that all victims want the same thing—which is more punishment. Yet research shows that is not true.<sup>139</sup> Many victims of violent crime want effective prevention measures, not incarceration. For instance, one 2016 survey found that 61 percent of survivors of violence would prefer shorter prison sentences and “more spending on prevention and rehabilitation” programs; only 14 percent wanted more investment in prisons and jails, while 82 percent wanted increased investment in “programs for at-risk youth and . . . prevention programs”; and 69 percent preferred holding people “accountable through options beyond just” incarceration, while only 25 percent preferred incarceration.<sup>140</sup>

Indeed, the systems purportedly intended to help victims may be the site of the most robust doubling down on the victim/offender binary; as one 2020 study reports: “[i]ronically, many of the supports that may be needed after a violent injury would come from the big—criminal justice, health and mental health—but it is these systems where the actors are likely to be aligned with this highly adversarial dichotomized model” of the victim and offender binary.<sup>141</sup> The majority of victims do not report crime, and an even larger group do not seek or receive victims’ services. Department of Justice (DOJ) data, from the 2019 National Crime Victimization Survey, show that only 41 percent of victims report their crime to the police.<sup>142</sup> Even fewer receive services through the criminal system.<sup>143</sup> This is particularly true for victims from marginalized communities—where victimization

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<sup>139</sup> There has not been significant research on what victims want until relatively recently, likely because it was assumed that victims want carceral responses and/or because victims who did not want this would be inconvenient, at best, to the project of mass criminalization and mass incarceration. See Lenore Anderson & Robert Rooks, Opinion, *No, Crime Survivors Don’t Want More Prisons. They Want a New Safety Movement*, WASH. POST (Mar. 16, 2021), <https://www.washingtonpost.com/opinions/2021/03/16/prisons-public-safety-trauma/> [<https://perma.cc/RE2W-CGAB>] (describing how crime victims want a new approach to public safety that “emphasizes prevention & treatment over excessive incarceration” and noting that this type of victims’ advocacy is often met with surprise by legislators/policymakers).

<sup>140</sup> ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIM’S VIEWS ON SAFETY AND JUSTICE 16, 18, 20, <http://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [<https://perma.cc/23TG-32J4>] (citing itself as one of the first comprehensive reports on crime victim preferences, noting that “few safety & justice policy debates are informed by comprehensive examination of the experience and views of the nation’s diverse crime survivors,” and detailing findings, including that victims prefer rehabilitation rather than punishment on 2:1 margin); see also *Prison Policy Report*, *supra* note 5 (summarizing the Alliance for Safety and Justice’s survey results).

<sup>141</sup> ROMAN ET AL., *supra* note 53, at 5.

<sup>142</sup> RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2019, at 1 (2020), <https://bjs.ojp.gov/content/pub/pdf/cv19.pdf> [<https://perma.cc/BNH7-ZCU5>].

<sup>143</sup> *Id.* at 9.

rates are higher to begin with—and for victims of violent crime.<sup>144</sup> For instance, per the National Crime Victimization Survey, as few as 8 percent of people who experience violent victimization report that they receive victims' services.<sup>145</sup>

A significant reason for these dismal numbers is categorical prohibitions on eligibility for victims' services, housing, immigration status, public assistance, etc., for people with a past conviction, and sometimes even an arrest.<sup>146</sup> One prominent example of this "victim purity test" is the federal Victims of Crime Act of 1984 (VOCA),<sup>147</sup> which renders many victims ineligible for financial, medical, and psychological assistance if they are deemed an offender or have failed to pay fines or fees from past offenses.<sup>148</sup> Compounding this, service providers overidentify "offenders," and fail to recognize and treat trauma, particularly in young men of color.<sup>149</sup> Victims from poor or marginalized communities often lack access to adequate legal resources, which in turn exacerbates existing health problems and hinders their ability to receive necessary services.<sup>150</sup> Interactions, usually negative, with first responders further reduce the likelihood of people accessing victims' services.<sup>151</sup> Although experts have documented the fact that the "highly adversarial dichotomized [good victim/bad offender] model" negatively affects offender-victim access to victim treatment and services,<sup>152</sup> little to nothing has changed in terms of eligibility criteria. The eligibility criteria remain rigid, and the overlap unrecognized, perpetuating this cycle of harm.

<sup>144</sup> See *id.* at 1.

<sup>145</sup> See *id.* at 9; ALLISON HASTING & KAITLIN KALL, VERA INST. OF JUST., OPENING THE DOOR TO HEALING 7 (2020), <https://www.vera.org/downloads/publications/opening-the-door-to-healing.pdf> [<https://perma.cc/SQ3J-TRGN>].

<sup>146</sup> See *The Victim-Offender Overlap*, *supra* note 22.

<sup>147</sup> 34 U.S.C. §§ 20101–20111.

<sup>148</sup> *Id.* § 20102(b)(8). This is true of most state systems as well, including in IPV and battery cross-complaint cases, where both parties are then rendered ineligible for any restitution, services or victims' funds. See *Victim Compensation*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., <https://nacvcb.org/victim-compensation> [<https://perma.cc/5DYG-NVXA>]; ROMAN ET AL., *supra* note 53, at 2–3, 6–10. Some states, such as New York, are proposing legislation to change that. See A.8619A, 2021–2022 Leg. Sess./S.B. 7573, 2021–2022 Leg. Sess. (2022) (*inter alia*, delinking victim compensation from mandatory cooperation with law enforcement, which has historically excluded many victims from marginalized communities).

<sup>149</sup> ROMAN ET AL., *supra* note 53, at 1.

<sup>150</sup> See Yael Cannon & Andrew Hsi, *Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 FORDHAM URB. L.J. 425, 479–80 (2016).

<sup>151</sup> ROMAN ET AL., *supra* note 53, at 5–6, 27. Compounding this is the widespread lack of trust and legitimacy (for valid reasons such as police violence) as to the criminal system and attendant services, particularly in the communities of color with the highest victimization rates. See VERA, YOUNG MEN OF COLOR & THE OTHER SIDE OF HARM, *supra* note 6, at 6, 8–9.

<sup>152</sup> *Id.* at 5 (citing 2014 research).

### III. PROMISE OF CHANGE

There is growing consensus on the need for serious reform, or even dismantlement, of the criminal system, but there is still a long way to go. Recognition of the victim/offender overlap is essential to any meaningful change, both because it alters the narrative, and it allows for the development of more effective and fair approaches to prevent and redress harm—all harm, including state harm and slow violence.<sup>153</sup> In this Part, I lay out a few changes that this recognition may lead to; it is not intended to be comprehensive at all, but rather to flag a few positive outcomes.

#### A. *Change the Narrative*

Changing the narrative around who offends and why is essential in order to change the legal framework. As advocate and formerly incarcerated person Robert Saleem Holbrook puts it: “narrative change always comes before social change.”<sup>154</sup> While incremental reformist narratives can be useful,<sup>155</sup> the criminal system’s massive size, baked-in racism, and “pathological politics” require a transformational narrative.<sup>156</sup> Essential to this is breaking down the stigmatized myths about who commits violence and why. To go back to one early example, young men of color are very often portrayed as “offenders,” and their victimization—statistically much higher than white or older peers—is ignored.<sup>157</sup>

Incorporating the overlap into the public conversation on the criminal system humanizes people in the system and puts the lie to a moralistic narrative about “bad” actors. For instance, shouldn’t the fact that incarcerated men are ten times more

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<sup>153</sup> For more on slow violence, see *supra* note 93 and accompanying text.

<sup>154</sup> Interview by Professor Jocelyn Simonson with Robert Saleem Holbrook, Executive Director, Abolitionist Law Center, in Brooklyn, N.Y. (Aug. 21, 2021) (recording on file with author). For the importance of narrative to legal systems, and change and legitimation, see Kermit Roosevelt III & Abigail Tootell, *Mirror, Mirror on the Wall: Disney Princesses’ Reflections of Equal Protection*, 56 WAKE FOREST L. REV. 261 (2021).

<sup>155</sup> THE SQUARE ONE PROJECT, BEYOND THE EASIEST CASES: CREATING NEW NARRATIVES FOR CRIMINAL JUSTICE & IMMIGRATION REFORM 23 (2021) (describing narratives as “engines of social transformation”).

<sup>156</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (noting the lack of transparency and excesses of the contemporary system and concluding that “criminal punishment drives criminal law. The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system’s real lawmakers.”).

<sup>157</sup> VERA, YOUNG MEN OF COLOR & THE OTHER SIDE OF HARM, *supra* note 4, at 3–5; see also *supra* text accompanying notes 29–30.

likely to have PTSD than men in the general population<sup>158</sup> influence policymakers and voters on how these harms are best prevented and most fairly addressed? Considering people's complexity, including their victimhood, humanizes those who have committed violence, and lessens the othering that lies at the heart of the system's entrenched narrative.<sup>159</sup>

*B. Take More Effective Measures to Prevent and Redress Violence*

The root causes of violence can only be addressed, and the needs of survivors met, when policymakers fund community-wide interventions other than law enforcement, and system actors and service providers shift to a more nuanced, trauma-informed, preventive approach. Breaking down the victim/offender binary opens the path to more effective interventions around violence. The current "prosecute and punish" approach largely ignores, or even compounds, the underlying causes.<sup>160</sup> Moving the focus away from individuals perceived to be culpable and irredeemable allows for systemic efforts and community investments that are proven to be effective at preventing violence. A growing body of research demonstrates that community-based preventive approaches to violence, including the founding of more nonprofit community-based organizations (CBOs), youth summer jobs programs, and investment in physical neighborhood infrastructure, are correlated with a statistically significant decrease in the rate of violent crime.<sup>161</sup> One recent study in Philadelphia, for instance, found that housing repairs in low-income, largely Black communities was associated with a 21.9 percent reduction in crime, including reductions in violent crime such as assault, robbery, and homicide.<sup>162</sup> Finding a

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<sup>158</sup> *Prison Policy Report*, *supra* note 5.

<sup>159</sup> This also relates to the meaning and stigma attached to terms like victim and "offender," one reason why on-the-ground service providers are advocating for changes to language, such as harmed party and "responsible party." *see also* Common Just., *Beyond "Offender" & Victim: Toward a Humane Event Centered Language for Talking About People Involved in Crime & Violence*, VERA INST. OF JUST., <https://www.vera.org/downloads/publications/common-justice-on-language.pdf> [<https://perma.cc/Q6DV-GJ6H>].

<sup>160</sup> *See* COMMON JUST., *supra* note 31, at 1 (noting that the "familiar, nearly exclusive reliance on law enforcement to respond to harm . . . does not work and comes at extraordinary cost to people and our communities"); *see also* *Prison Policy Report*, *supra* note 5.

<sup>161</sup> *See, e.g.*, SHARKEY, *supra* note 113 (demonstrating this correlation and also documenting strategies, including work of local organizations, that led to decreased violent crime in urban areas); *see also* ZACH NORRIS, DEFUND FEAR 81–98 (2021) (outlining community-based preventive approaches to violence, including building up community resources and societal infrastructures).

<sup>162</sup> Eugenia South et al., *Association Between Structural Housing Repairs for Low-Income Homeowners and Neighborhood Crime*, JAMA NETWORK OPEN 1, 5, 6 fig.2 (July 21, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2782142> [<https://perma.cc/YAC7-DSEX>] (the study covered a seven-year period between 2006 and 2013).

“dose-dependent association” between the homes repaired by the city and a decrease in crime, researchers concluded that many of the root causes of violent crime are structural, including “racist policies[,] . . . residential racial segregation, concentrated poverty, and lack of economic opportunity.”<sup>163</sup>

Community-based public health approaches to violence have also had considerable success at violence prevention in numerous cities across the United States.<sup>164</sup> Yet, while system involvement and prison are proven to increase harm,<sup>165</sup> programs with a demonstrated impact on reducing crime remain underutilized. Specifically, progressive prosecutors have mostly expanded diversion and alternatives to incarceration for low-level crimes, and have received tremendous push-back when applying it to crimes defined as violent.<sup>166</sup> Accordingly, we must look both to grassroots organizations and to other nations for models that work and for a reimagined approach.<sup>167</sup>

On an individual level, a similar reshift in focus can better prevent violent crime, and help victims heal. Two ways to start are recognizing the trauma and past victimhood of most “offenders,” as well as listening to what all victims want and offering services without a litmus test, and options beyond carceral ones.<sup>168</sup> Incorporating the overlap not only humanizes “offenders,” but also effectively prevents more harm by addressing trauma, and, more broadly, reveals that addressing

<sup>163</sup> *Id.* at 2.

<sup>164</sup> Jeffrey A. Butts et al., *Cure Violence: A Public Health Model to Reduce Gun Violence*, ANN. REV. PUB. HEALTH (Jan. 7, 2015), <https://www.annualreviews.org/doi/10.1146/annurev-publhealth-031914-122509> [<https://perma.cc/5G5E-SVYL>] (research on the Cure Violence model). In any event, there is proof that this works probably better, and at least equally well, with far fewer societal costs than the police. Godsoe, *The Place of the Prosecutor*, *supra* note 108 (collecting research).

<sup>165</sup> A National Bureau of Economic Research study concluded that prosecution of some misdemeanors is itself criminogenic. Amanda Y. Agan et al., *Misdemeanor Prosecution* 37–38 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), [https://www.nber.org/system/files/working\\_papers/w28600/w28600.pdf](https://www.nber.org/system/files/working_papers/w28600/w28600.pdf) [<https://perma.cc/DN57-49T2>].

<sup>166</sup> See Godsoe, *The Place of the Prosecutor*, *supra* note 108. For a recent example of pushback, see Jonah E. Bromwich, *Manhattan D.A. Sharpens Crime Policies that Led to Weeks of Backlash*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/nyregion/manhattan-da-alvin-bragg-memo-prosecution.html> [<https://perma.cc/T6JT-Y2VH>].

<sup>167</sup> See, e.g., COMBATING NARRATIVES, *supra* note 134, at 20–21 (listing five “evidence-based strategies to stop violence” other than police, including improving the physical environment, strengthening antiviolence norms, supporting youth, substance abuse treatment, and mitigating financial stress); CATHERINE HEARD, EUR. PRISON OBSERVATORY, ALTERNATIVES TO IMPRISONMENT IN EUROPE: A HANDBOOK OF GOOD PRACTICE (2016), <http://www.prisonobservatory.org/upload/Good%20practice%20handbook%20AS.pdf> [<https://perma.cc/4SJE-Y8MB>] (presenting international alternatives to incarceration).

<sup>168</sup> A caveat is warranted here—by recognition I do not mean simply training system personnel, police, and others, though that is a start that many experts recommend. See *supra* notes 94–95 and accompanying text. Rather, I use “recognize” to mean policies crafted at every stage of the system, and even more broadly, that recognize the overlap, whether it be for charging, sentencing, victims’ services, or other parts of the criminal justice system.

ACEs and other childhood harms is key to crime prevention.<sup>169</sup> Many experts, including law enforcement, have made the same point, advocating for early childhood education and other programs with a demonstrated correlation to crime reduction.<sup>170</sup> Yet little funding has changed—the narrative remains sticky.<sup>171</sup>

As much of this research suggests, effectively addressing violence requires societal changes well beyond the criminal system. Violent harm is so connected to inequality—poverty, structural racism, underresourced families and communities—that it can only be significantly curbed through increased equality. As historian Elizabeth Hinton puts it, “[b]arring fundamental redistributive changes at the national level, the cycle of racial marginalization, socioeconomic isolation, and imprisonment is ever more likely to repeat itself.”<sup>172</sup> Even the recent attention to trauma in some locations, discussed here, cannot succeed unless accompanied by attention to the material needs of those committing and being victimized by violent offenses. People need to ensure their survival needs are met,

<sup>169</sup> Cannon & Hsi, *supra* note 150, at 445.

<sup>170</sup> COUNCIL FOR A STRONG AM., POLICE CHIEFS, SHERIFFS, PROSECUTORS, AND VIOLENCE SURVIVORS: “PRESCHOOL WORKS” 3–8 (2021) (summarizing research demonstrating that early childhood education, after-school programs, and other supports for children and families, are proven to decrease crime). One state, Washington, enacted legislation to reduce childhood ACEs through a coordinated response. Emily Clary, Walla Walla, Washington’s Community Response to Adverse Childhood Experiences: A Case Study & Lessons for Minnesota 5–6, 8–15 (Aug. 9, 2017) (Master of Public Policy thesis, University of Minnesota), [https://conservancy.umn.edu/bitstream/handle/11299/198167/Final\\_Emily%20Clary%20Professional%20Paper\\_%208.9.17.pdf?sequence=1&isAllowed=y](https://conservancy.umn.edu/bitstream/handle/11299/198167/Final_Emily%20Clary%20Professional%20Paper_%208.9.17.pdf?sequence=1&isAllowed=y) [<https://perma.cc/XJZ4-SJAE>]. This is a positive step, but, despite recognizing the connection between ACEs and future violence, the statute does not address the criminal system in any fashion. See H.B. 1965, 62d Leg., 2011 1st Spec. Sess. (Wash. 2011).

<sup>171</sup> Law enforcement agencies are a major obstacle to changing funding as they have adamantly resisted any reallocation despite evidence of the shortfalls to other municipal functions due to high levels of law enforcement funding. See COMBATING NARRATIVES, *supra* note 134, at 6–7. Indeed, despite the largest protests in US history in the wake of George Floyd’s murder, police funding remained at basically the same or even increased levels one year later in most localities. See *id.*

<sup>172</sup> HINTON, *supra* note 109, at 340. Numerous advocacy groups similarly call for funding and narrative shifts in how society determines and achieves safety. See, e.g., *A Roadmap for Re-Imagining Public Safety in the United States*, HUM. RTS. WATCH (Aug. 12, 2020, 8:00 AM), <https://www.hrw.org/news/2020/08/12/roadmap-re-imagining-public-safety-united-states> [<https://perma.cc/2M2G-SN86>]. To cite just one example, voters in Los Angeles County passed Measure J, directing that 10 percent of the county’s unrestricted budget go to youth and community development, health care, and diversion programs. *Measure J Background*, L.A. CNTY., <https://ceo.lacounty.gov/measure-j-background/> [<https://perma.cc/LQA7-FCQA>]; see also *Re-imagine L.A. County*, RELA, <https://reimagine.la/> [<https://perma.cc/PQD7-S7PJ>]. After a constitutional challenge from the LA Board of Supervisors, the measure was suspended, and the county chief executive officer proposed the Care First and Community Investment Program, an initiative which achieves essentially the same financial allocations as Measure J. See *LA County Commits to Community Investment—to Match Measure J, Which Court Put on Hold*, DAILY NEWS (Aug. 10, 2021, 4:12 PM), <https://www.dailynews.com/2021/08/10/la-county-commits-to-community-investment-to-match-measure-j-which-court-put-on-hold/> (last visited May 20, 2022).

before being able to address trauma from victimhood; paraphrasing Maslow's hierarchy of needs, people cannot address trauma unless they have first secured housing, food, and other basic material needs.<sup>173</sup> Despite much political resistance from status quo actors, there are some bright signs on the horizon, such as the child allowance Congress enacted in 2021—a direct support to families common in European countries, but unprecedented in US history.<sup>174</sup> At the same time, it was not renewed for a second year, in the one-step forward, two-steps back, or two-steps forward, one-step back, path to change that is so central to the American approach to societal problems.<sup>175</sup>

### CONCLUSION: THE LAW'S VIOLENCE

In this article, I have not argued for expanding the victim category to justify more punitive interventions, but rather to question and dismantle the victim and “offender” categories themselves, categories deemed “natural” that turn on power relations and false narratives, legitimating the current system.<sup>176</sup> Despite evidence of the victim/offender overlap, criminal system actors, and legal scholars double down on this false binary, perpetuating a system that does not meaningfully correlate to culpability or public safety. It is as if to recognize the victimhood of those who harm, and conversely the harm committed by victims, would open the floodgates to “too much justice,” as Justice Brennan famously lamented in his *McCleskey v. Kemp* dissent.<sup>177</sup>

The ongoing reification of the victim/offender binary is not only unjust but is itself violent. As Robert Cover warned us decades ago, the law's agents “frequently leave behind victims

<sup>173</sup> Kendra Cherry, *Maslow's Hierarchy of Needs*, VERYWELL MIND (Feb. 14, 2022), <https://www.verywellmind.com/what-is-maslows-hierarchy-of-needs-4136760> [<https://perma.cc/4AC2-3XSJ>] Other experts recommend “universal services” for child maltreatment and “poverty-based policies.” Babak Jahanshahi et al., *ACEs, Places and Inequality: Understanding the Effects of Adverse Childhood Experiences and Poverty on Offending in Childhood*, 20 BRIT. J. CRIMINOLOGY 17 (2021).

<sup>174</sup> Steve Dean & Cynthia Godsoe, *It's Time for an Antiracist Welfare Policy*, IMPRINT (Mar. 15, 2021, 7:47 AM), <https://imprintnews.org/child-welfare-2/time-for-an-antiracist-welfare-policy-america/52691> [<https://perma.cc/MH25-X3MF>] (reporting the unprecedented nature of a direct child allowance implemented in the summer of 2021 while also calling for further supports for families, particularly families of color who historically have been marginalized and even punished for their poverty).

<sup>175</sup> *Families Are in Distress After the First Month Without the Expanded Child Tax Credit*, NPR (Jan. 21, 2022, 5:01 AM), <https://www.npr.org/2022/01/21/1074413273/end-expanded-child-tax-credit-families-effects> [<https://perma.cc/D9PL-WM6M>].

<sup>176</sup> Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 123 (1999).

<sup>177</sup> *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987). Recall the juvenile court judges who felt overwhelmed by too much trauma.



whose lives have been torn apart by these organized, social practices of violence.”<sup>178</sup> In legitimating violence and trauma on those deemed “offenders,” the criminal system “requires us to ask how, if at all, the force of law differs from the force it is called into being to regulate as well as whether law can accommodate and control violence without becoming a captive of its own violent instincts.”<sup>179</sup> Until we recognize that victims and “offenders” are humans, in all of their complexity, and often both at once, the answer must be no.

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<sup>178</sup> Cover, *supra* note 2, at 1601.

<sup>179</sup> Austin Sarat & Thomas P. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *LAW'S VIOLENCE* 211, 213 (1993).