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# From Protection to Punishment: Post-Conviction Barriers to Justice for Domestic Violence Survivor-Defendants in New York State

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## Post-Conviction Barriers to Justice for Domestic Violence Survivor-Defendants in New York State

Cornell University Law School

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Correctional Association of New York

## *Avon Global Center for Women and Justice at Cornell Law School*

The Avon Global Center for Women and Justice at Cornell Law School works with judges, legal professionals, and governmental and non-governmental organizations to improve access to justice in an effort to eliminate violence against women and girls. The Center's gender justice initiatives include in-depth practice-oriented projects, legal research support for judges, a searchable collection of online legal resources, the annual Women & Justice conference, and other events. For more information, please visit: www.womenandjustice.org.

## *Women in Prison Project of the Correctional Association of New York*

The Correctional Association of New York (CA) is a non-profit criminal justice policy advocacy organization. One of four projects at the CA, the Women in Prison Project works to stop the misuse of prison as a response to the social problems that drive crime, to ensure that prison conditions for women are more humane and just, to facilitate the involvement and leadership of currently and formerly incarcerated women in efforts to reform policies that directly affect their lives, and to create a criminal justice system that addresses women's specific needs, protects women's rights, and treats people and their families with fairness, dignity, and respect.

Under the CA's legislative mandate, the Project has the unique authority to monitor conditions inside correctional facilities that house women in New York State. The Project also manages ReConnect, a semi-annual leadership training program for women recently released from prison and jail, and coordinates the Coalition for Women Prisoners, a statewide alliance of more than 1,600 individuals and over 100 organizations. For more information, please visit: www.correctionalassociation.org.

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# Foreword

For the past six years, the Women in Prison Committee of the National Association of Women Judges Women (New York chapter) has worked with the Correctional Association of New York on efforts to improve the administration of criminal justice in New York State, specifically with respect to female prisoners. With the establishment of the Avon Global Center for Women and Justice at Cornell Law School, my Women in Prison Committee colleagues and I encouraged the Center, with its exemplary team of legal scholars in the field of human rights, and the Correctional Association, with its extraordinary century and a half history of inspecting and reporting on conditions in our state's prisons, to undertake a joint project to study and report on the barriers to justice for domestic violence survivors who become criminal defendants in New York State. We felt that this research would make a critical contribution to our collective understanding of the inextricable link between domestic violence and women's incarceration in particular and to our ability to better address the needs and rights of survivors in the criminal justice system.

The statistics are heart-wrenching: an estimated 75% of women in New York's prisons have suffered severe violence at the hands of an intimate partner during adulthood, and more than 9 out of 10 women convicted of killing an intimate partner in New York State were abused by an intimate partner in the past. Efforts to address the inequities in the system of criminal law for domestic violence survivor-defendants are vital not only to ensure a more humane and just criminal justice system but also to enhance and propel global efforts to advance justice and safety for women overall.

With its interviews of experts and survivors and extensive and comprehensive research, this report illuminates the failure of our criminal justice system to respond humanely and compassionately to survivors who become criminal defendants in New York State as a result of illegal acts substantially related to their victimization at the hands of intimate partners, arising out of efforts to protect themselves from extreme physical and mental abuse. The report also offers keen accounts of the challenges survivor-defendants face after they are convicted.

As this report illustrates, these punishments represent not only failures of policy and practice but also violations of survivor-defendants' fundamental human rights. I am hopeful that this report will invigorate and inform the efforts of advocates, policymakers, justice system actors, and others to address the injustices identified. With continued dialogue, understanding, and innovation, and with action on the recommendations for reform contained in this report, our State may look forward to a day when survivors who act to protect themselves and their children from an abuser's violence are given support and protection instead of harsh punishment and incarceration—to a day when survivor-defendants are treated with the fairness and dignity they deserve.

Justice Debra James
Supreme Court, Civil Branch, New York County
Chair, New York Women in Prison Committee,
National Association of Women Judges

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# Introduction & Methodology

Over the past 30 years, domestic violence has been increasingly recognized as a national epidemic. Although significant reforms are still needed, New York, along with many other states, has made important advances in the fight against domestic abuse.[1] These advances, however, have stopped short of reforming the way the criminal justice system responds to survivors who engage in illegal acts to protect themselves from an abuser. Too often, the system responds to such women solely as perpetrators – not survivors – of violence, sending them to prison for long periods of time with little chance for early release. In the cruelest of ironies, these punishments are inflicted on survivors by the very system that should have helped protect them in the first place.

As efforts to eliminate domestic violence move forward, it is critical that the experiences of survivor-defendants[2] are heard and respected, and that the challenges they face are not overlooked. To that end, this report aims to:

(1) Explain the link between domestic violence and incarceration, and the reality that survivor-defendants are routinely sentenced to long prison terms;

(2) Identify some of the many barriers to justice for survivor-defendants convicted of crimes directly related to the abuse they suffered; and

(3) Offer recommendations for reforms that policymakers and practitioners can institute to begin to address the injustices confronting survivor-defendants.

This report is based on research that the Avon Global Center for Women and Justice at Cornell Law School, the Women in Prison Project of the Correctional Association of New York, and students in the Cornell Law School International Human Rights Clinic conducted in New York State. This team:

(1) Analyzed relevant statutes, case law, articles, reports, social science literature, and statistical and qualitative data relating to domestic violence and survivor-defendants in New York State;

(2) Interviewed advocates, attorneys, scholars, a former parole board commissioner, and other experts nationally and within New York;

(3) Conducted and analyzed interviews with domestic violence survivors who were convicted of a crime either involving the use of force against their abusers or under threat of harm from their abusers; and

(4) Collaborated with researchers at Cornell University who polled 800 randomly selected New York State residents about their views on judicial discretion in sentencing survivor-defendants as part of the 2010 Cornell University Empire State Survey.[3]

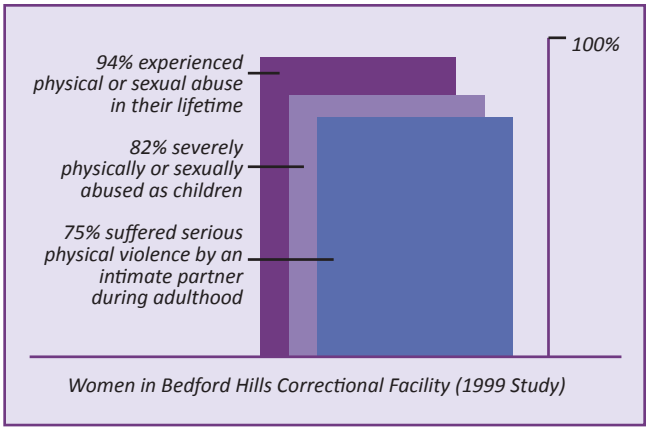
The names of all survivors featured in the report have been replaced with pseudonyms in order to protect their privacy.

# Executive Summary

The link between domestic violence[4] and women's incarceration is inextricable and undeniable. A 1999 report by the federal Bureau of Justice Statistics, the most recent study assessing abuse history prevalence among women in state prisons across the country, found that 57% of women in state facilities had experienced physical or sexual abuse prior to their incarceration.[5] These figures, however, are likely underestimates given: (1) the current collective experience of many organizations working with currently and formerly incarcerated women[6] and (2) a 1999 study of women in New York's Bedford Hills Correctional Facility, which found that 94% of the women studied had experienced physical or sexual abuse in their lifetime, 82% had been severely physically or sexually abused as children, and 75% had suffered serious physical violence by an intimate partner during adulthood.[7]

The crimes for which women are incarcerated are often directly related to domestic abuse. The New York State Department of Correctional Services, for example, found that 67% of women sent to prison in 2005 for killing someone close to them were abused by the victim of their crime.[8] A 1996 study by the State Division of Criminal Justice Services reported that 93% of women convicted of killing intimate partners had been physically and sexually abused by an intimate partner during adulthood.[9] That same year, another study of women in New York City's main jail, Rikers Island, found that most of the 32 domestic violence survivors interviewed reported engaging in illegal activity in response to experiences of abuse, the threat of violence, or coercion by a male partner.[10]

The failure to adequately address domestic violence in the community creates conditions that increase the likelihood of survivors taking actions to cope with abuse and protect themselves and their children – actions for which they are later criminally charged. These acts should not be criminalized and prosecuted, yet, in most cases they are.




Many survivor-defendants spend years, and sometimes decades, behind prison walls. For example, four of the survivors whose narratives appear in this report served a combined total of 57 years: Kate, Victoria, and Desiree, all of whom defended themselves from abusive partners after years of devastating battering, served 17 years, 17 years, and 13 years, respectively, and Natalie, who followed her long-time abuser's orders to participate in a robbery, served 10 years. When this happens, it represents a shameful miscarriage of justice and a violation of survivor-defendants' fundamental human rights.

Much has been identified and written regarding the difficulties facing survivor-defendants during arrest and trial. Survivors confront numerous challenges during this phase of the criminal justice process. For example, law enforcement officials may use coercive tactics during investigation and interrogation such as telling the survivor that her abuser is still alive, promising to let the survivor go if she recounts her story, and stopping the survivor if she begins to discuss the abuse.[11] Prosecutors may decline to factor information about battering

into their decisions about which crime to charge or whether to dismiss the charges entirely, even where there are clear indications that the alleged crime was directly related to an ongoing pattern of repeated abuse.[12] Defense counsel may not have the resources or training to adequately explore their clients' history of domestic abuse and, as a result, may neglect to pose relevant questions to potential jurors during voir dire and may overlook or ineffectively present important potential defenses.[13] Judges may fail to take survivor-defendants' experience with battering and its effects into account during jury instructions.[14] Juries may interpret defendants' claims of abuse as merely an excuse and hand down more punitive verdicts to survivor-defendants who do not fit preconceived stereotypes such as the misconception that "true" battered women are passive and helpless.[15]

Much more about survivors' experiences during arrest and trial still needs to be investigated and brought to light. This report, however, focuses on the challenges and injustices survivor-defendants face after they are convicted. It explores three main areas:

⇨ ***Overly restrictive sentencing statutes and limited access to alternative-to-incarceration programs (ATIs).***

Post-conviction sentencing statutes that establish mandatory minimum sentences constrain judges' ability to take survivor-defendants' experiences of abuse into account, particularly when survivors have been convicted of violent crimes.[16] Harsh sentencing provisions persist notwithstanding an exception carved out for survivor-defendants in New York's 1998 Sentencing Reform Act, known as "Jenna's Law." This law requires judges to impose determinate, or "flat" sentences (for example, eight years) for all violent felony offenses except the most serious (designated as "A-1 offenses"), which still carry an indeterminate term of no less than 15 years to life in prison.

The domestic violence exception permits judges to grant indeterminate terms (i.e., sentences that have a minimum and maximum and permit a parole board appearance after completion of the minimum term) to survivors convicted of certain homicide or assault crimes against their abusers.[17] At the time, the Legislature reasoned that retaining indeterminate sentencing and parole for survivors would lead to less punitive sentencing. Unfortunately, it did not.

The current exception fails to offer sufficiently lower prison terms, does not permit non-incarcerative sentences, is too narrow, and has been woefully underutilized. In 2007, for example, the New York State Sentencing Commission found that only one person was incarcerated on an indeterminate sentence under the exception; he was given 6 to 12 years – longer than the minimum five-year term allowed under the law's general sentencing provisions – and was denied parole twice.[18] In 2009, the Commission found that no individuals were incarcerated on sentences under the exception.[19]

Because judges lack discretion when sentencing individuals convicted of violent and certain non-violent offenses, probation and ATI programs are possible only if a prosecutor agrees to reduce the charge to a lower-level offense. This is a rare occurrence, especially without strong advocacy by a defense attorney and the presence of an ATI that is ready to accept the defendant into its program.[20] For example, Katarina, a survivor whose narrative is presented in this report, initially faced 15 years to life in prison for defending herself from her husband after suffering long years of abuse. She was ultimately sentenced to probation and a community-based alternative program only because that program worked with her attorney to advocate for diversion and to persuade the DA to prosecute her for a lower charge.

The underuse of ATIs is a missed opportunity. Such programs lower recidivism rates, cost less than incarceration, and are more effective than prison in helping individuals heal from abuse, reconnect with children, and become productive community members.[21] In addition, survivors incarcerated for crimes directly related to ongoing battering are particularly good candidates for ATIs because the vast majority

have no prior felony convictions and pose no risk to public safety. For example, 80% of women sent to New York's prisons for a violent felony in 2009 had never before been convicted of a felony, and of the 38 women convicted of murder and released between 1985 and 2003, not a single one returned to prison for a new commitment within a 36-month follow-up period.[22]

Unfortunately, even for survivors who do receive probation, the options for specialized programs are few. Although New York maintains an array of excellent ATIs,[23] only one program in the state is specifically designed to meet the needs of women survivor-defendants, and it only serves survivors in New York City.[24]

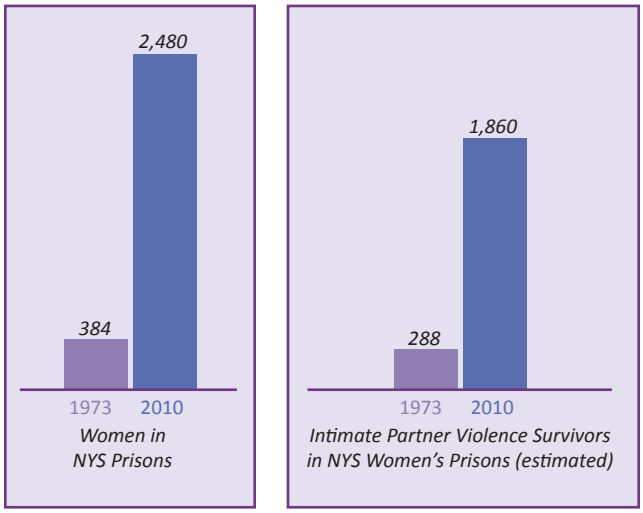
⇨ ***Restrictions on early release programs and barriers to making parole and receiving clemency.***

In addition to misguided statutory restrictions on diversion to community-based ATI programs, incarcerated individuals convicted of violent crimes, including survivor-defendants, face statutory bars on earning "merit time" credits while in prison[25] and limitations on participating in transitional work release programs.[26] Parole boards also often turn a blind eye to the impact of domestic violence on an incarcerated survivor's crime and, particularly in cases involving violent offenses, repeatedly deny release from prison based on the "nature of the crime" rather than the individual's institutional record and actual public safety risk.[27] Finally, New York's Governor, who holds the sole authority to grant clemency, has rarely used this power for convicted survivors: only two of the 30 clemencies granted to women in New York State from 1980 to 2008 were recorded as involving survivors of domestic violence.[28]

⇨ ***Negative collateral consequences resulting from felony convictions.***

Beyond serving time, felony convictions also carry a host of negative collateral consequences – such as barriers to accessing living-wage employment, affordable housing, educational opportunities, and health insurance coverage, separation from and potential loss of custody of children, limitations on voting, and potential immigration consequences – that damage survivors' ability to lead safe, healthy, and productive lives after release. These additional penalties have a particularly harmful impact on the communities most heavily affected by incarceration – low-income communities and communities of color. By further marginalizing the individuals and communities in greatest need of support and opportunity, incarceration and its consequences ultimately perpetuate the conditions in which violence against women thrives.[29]

The challenges discussed in this summary are particularly pronounced for survivors of color, low-income survivors, and Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) survivors who face the intersecting oppressions of racism, sexism, classism, and homophobia and, as a result, confront additional discrimination and stereotyping at all stages of the criminal justice process.[30] Immigrant survivors may also confront anti-immigrant bias and penalties related to their immigration status, including deportation.[31]




In addition, the injustices facing survivor-defendants have only become more pronounced with the dramatic increase in the incarcerated populations of New York State and the United States.[32] From 1973 to 2010, the number of women in New York State prisons swelled by 546%.[33] The number of intimate partner violence survivors in New York's custody likely rose at a

similar rate.[34] This increase disproportionately affects women of color and women from low-income communities. Sixty-five percent of New York's incarcerated women, for example, are African American or Latina,[35] yet women of color comprise less than 30% of the state's female population.[36] Nationally, about 37% of women in state prison had incomes of less than $600 per month prior to arrest.[37]

In 1985, New York State policymakers and women at Bedford Hills Correctional Facility held a unique hearing at the prison about the impact of domestic violence on women's incarceration. Twelve incarcerated survivors testified about their shared histories of horrific intimate partner violence and the failure of the criminal justice system to recognize the impact of that violence on the actions for which they were convicted.[38] That, more than 25 years later, acts by survivor-defendants to protect themselves from and cope with abuse are still routinely prosecuted and survivor-defendants are still routinely sent to prison serves as a call to action.


The following are among the key reforms that New York policymakers and practitioners should make to begin to redress the injustices that often occur in survivor-defendants' cases. By increasing opportunities for survivors to be diverted from prison to alternative-to-incarceration programs, serve shorter sentences, and apply for resentencing and earlier release, these reforms would also help the state reduce its costly and misguided overreliance on incarceration without compromising public safety.[39]

# Key Recommendations

***To the New York State Legislature and Governor:***

- Enact legislation, such as the pending Domestic Violence Survivors Justice Act, that would: (1) reform sentencing laws and the Jenna's Law domestic violence exception to permit judges to sentence survivor-defendants to shorter, determinate terms and to community-based ATI programs in cases where the abuse was a significant contributing factor to the crime; and (2) permit currently incarcerated survivors to petition the courts to review their cases for resentencing.
- Allocate funds to expand and establish more ATI, court advocacy, and reentry programs specifically designed to meet the needs of domestic violence survivor-defendants.
- Fully fund organizations that provide support services for survivors of violence and ensure that funding streams permit organizations – who may currently receive funding that prohibits them from working with survivors after arrest – to continue to work with and advocate for survivors regardless of criminal justice involvement.
- Allow individuals incarcerated for violent crimes, including domestic violence survivors, to be eligible for merit time (a discretionary program based on institutional record and programmatic achievement) and temporary work release.
- Eliminate punitive collateral consequences of conviction and incarceration for all individuals, including survivor-defendants.

***To New York State District Attorneys:***

- Carefully weigh evidence of domestic violence when deciding whether to prosecute a case or what charges to bring against a survivor-defendant. For cases where there is clear indication that the abuse was a significant contributing factor in the alleged crime, institute an office-wide policy for prosecutors either to lower charges to permit defendants to serve time in community-based ATI programs or to refrain from presenting the case to the grand jury for action.

***To New York State Judges:***

- Make use of the limited discretion afforded under New York law, including the domestic violence exception to Jenna's Law, to sentence survivor-defendants to lower sentences.
- Wherever a survivor-defendant meets the statutory guidelines for community diversion, sentence her to probation and an alternative-to-incarceration program instead of prison.

***To the New York State Parole Board:***

- Make release decisions – for all incarcerated individuals, including survivors – that do not rely solely on the nature of the offense for which an individual is incarcerated and that give appropriate weight to an individual's institutional confinement record and actual public safety risk.

# Kate

"I was a victim before I was a defendant," Kate explains. It started when Kate was seven and her stepfather began to sexually abuse her. The abuse continued until she was 10.

At 20, Kate began to date Damien. The first time Damien physically abused Kate was when she told him she could not accept his marriage proposal because she was not yet divorced from a previous marriage. Damien repeatedly slapped her and slammed her head against the car window.

From that day forward and throughout their four-year relationship, Damien beat and raped Kate. On two occasions he held her hostage, once keeping her in their car for 16 hours. On three occasions, Kate's injuries required hospitalization. Twice, Kate admitted to hospital personnel that Damien had caused her injuries.

Kate remembers one of the many incidents when Damien beat her:

> One evening, I picked him up from work [in my car] . . . . We were low on gas, and he said, "If we run out of gas I will kill you." He kept threatening me, and I tried to jump out of the car. He grabbed a pair of scissors and stabbed me in the hip as I held onto the wheel. When we got home, he took me into the garage. As I started walking, I started crying because the pain in my hip hit me. He raped me over his car and then took all of my money. Inside the house, he forced me to lie on the carpet while he lay down on the couch. He said, "Don't get blood on the carpet." . . . When he beat me, it was usually in the car, because I was alone. Most of the time, I was driving. I always drove with my left hand, so I could block the blows with my right hand. . . . I had him arrested five times, but he was never incarcerated.

Late one December evening, Kate was home looking after her sister when Damien drove up and honked the horn. Kate went outside and got into his car. Damien had been doing drugs. He wanted Kate to perform oral sex, but she refused. Damien became upset and accused Kate of being with someone else. He threatened: "That's my ass. I'll take it when I want it." From past experience, Kate knew this meant Damien was going to anally rape her. She tried to calm him down but he only became more enraged.

He demanded to know who Kate was sleeping with, adding that she was "good for nothing" and "ugly" and that no one would ever want her because of the scars he inflicted on her. "This is it! I'm through!" Damien shouted. He grabbed Kate's throat and started to strangle her. Kate could not breathe. She struggled to pry his hands from her neck. Even if she could have managed to scream, it was late at night and no one was around who could help. All she could hear was Damien's voice shouting, "This is it! This is it!"

Damien took his hands off Kate's throat and grabbed her face. "What the fuck did I tell you?" he yelled. Kate went into panic mode. She knew Damien kept a gun under the passenger seat; she was always scared it would go off and shoot her in the ankle. She reached for the gun. Kate had never shot one before. The safety was off. Bullets, it seemed to her, were "just flying out of the gun." Damien let go, and Kate opened the door and fell out of the car. She scrambled to get into the house and fell when she reached the doorway. Kate heard Damien scream, "Bitch, get back here!"

Kate was terrified. In her mind, Damien was invincible, all-powerful and incapable of being harmed, especially by her. She didn't really believe she shot him. Kate ran to her bedroom and locked the door.

When investigators came to Kate's house, they informed her that Damien had been killed in a car accident the night before. They asked her to come with them to identify the car. In shock, Kate complied with the request. As soon as she was in the car, however, one investigator said, "Cut the act. We know you did it. We know you shot him. We know you killed him. Where is the gun? Why did you do it? Sign a statement, and we will take you back home."

At the station, the police told Kate that she would not be convicted if she confessed because she was an abused woman acting in self-defense. Without a lawyer present, Kate gave the police an eight-page statement detailing the events from the previous night. Afterwards, Kate was formally charged, processed, and held in jail.

During trial, Kate wanted to take the stand and tell her story, but her lawyer worried that the prosecutor would diminish Kate's credibility and warned against it. Kate followed his advice. Throughout the trial, Kate felt that nobody seemed to really listen to her about Damien's abuse or want to offer help.

In his closing, Kate's attorney stated, "[Kate] notes calling the police five other times and obviously didn't have the opportunity to call the police on this occasion. [Her abuser] was on her and he was strangling her and she was trying to break free and opening the car door and trying to get out and [in] the same motion trying to display this gun." The jury was not persuaded and found Kate guilty of first-degree manslaughter.

When it came time for sentencing, Kate was nervous. She felt that the judge did not believe she was a "true" battered woman because Kate had a job, a car, and a bank account. Nevertheless, Kate appealed to the judge for understanding:

> I pray for your compassion because I feel that I have already served too much time through all of the years I suffered, from the time I have already done . . . and through the agony of having to defend myself from the man I thought loved me. . . . I was trying to help myself. I was trying to stop the beatings, and I did try to get [my abuser] to help stop himself from battering me and from abusing drugs. Judge [], please, you can affirm today that women are worthy of respect and those women's lives do matter and that battering women must simply stop.

The judge sentenced Kate to the maximum term of 8⅓ to 25 years in prison. She was denied parole five times based on the nature of her crime before her release in 2008. In recounting her experiences in front of the parole board, Kate comments:

> I went to the last live parole board . . . in 2000, and I sat in front of [the] Commissioner and I showed him the Polaroid I had . . . of bruises on me and handprints on my neck. "Do you see this?" Every time you go to the parole board, you feel like you're on trial again. They are interrogating you and screaming at you. I had one Commissioner that was sleeping. The rest of my Parole Board was teleconferenced, which I think is so impersonal. I waited two years for this 2½ minutes, and you can't even come before me? This is my life.

Kate was finally released in 2008, after serving 17 years in prison.[49]

Chapter 1

# Domestic Violence Survivor-Defendants: Sentencing

## A) Overly Restrictive Mandatory Minimum Sentencing Laws

In contrast to the discretion in sentencing recently granted to judges in many cases involving drug offenses,[40] New York law requires judges to sentence individuals convicted of violent offenses (such as murder in the first and second degree, and manslaughter, assault, robbery and burglary in the first degree) to mandatory prison terms in almost all cases.[41] Mandatory prison terms are also still required for certain higher-level non-violent, non-drug offenses.[42] Under New York law, the most serious crimes involving violence (called "A-1 offenses") carry indeterminate sentences – sentences with a minimum and maximum term, where the minimum is no less than 15 years and the maximum is life in prison.[43] For almost all other offenses considered violent under New York's Penal Code, judges must impose a determinate or flat prison sentence – for example, eight years – within a pre-set range outlined in the statute.[44]

Mandatory minimum sentencing removes judges' ability to evaluate the circumstances of the offense and the background of the defendant, including whether she was in an abusive relationship at the time of the alleged crime, in determining whether to impose a sentence of imprisonment. Under such schemes, prosecutors hold a disproportionate amount of power to determine the outcome of a given case. This imbalance results from the fact that, under mandatory provisions, the charge determines the length of the prison term if the defendant is convicted.[45] Because prosecutors determine the charge, they can, in effect, control the type and length of sentence a judge must dispense upon conviction.[46] District attorneys often use this power to pressure individuals charged with crimes to accept pleas rather than risk going to trial and facing potentially long mandatory prison terms.[47]

### *Sentencing for Convicted Survivors: Public Opinion*

Of New York State residents who responded to a 2010 Empire State Poll conducted by Cornell University,[48] 60% reported that they believe judges should have the option of giving reduced sentences to domestic violence victims convicted of crimes directly related to their abuse.

In telephone interviews with a random sample of 800 New Yorkers, researchers asked the following question:

> *Tell me if you agree or disagree with the following statement:*
>
> *Judges should have the option to give reduced sentences to victims of domestic violence who have been convicted of crimes against their abusers (such as homicide or assault) and/or other crimes committed because of an abuser's influence (such as forgery or robbery).*

That 60% of respondents either agreed or strongly agreed with this statement indicates that public opinion across the state favors judicial discretion in survivor-defendants' cases.

## B) Inadequacies in Jenna's Law Domestic Violence Exception

New York currently has a statute that, in theory, provides some mitigated sentencing for certain domestic violence survivors convicted of crimes against their abusers. The State passed this statute as part of its 1998 Sentencing Reform Act – commonly referred to as Jenna's Law.[50] Among other things, Jenna's Law requires judges to impose determinate sentences for all violent felony offenses except the most serious (designated as A-1 offenses, which carry life as the maximum term) and requires that individuals convicted of violent offenses serve 85% of their sentence in prison. The law also increased sentence lengths for individuals convicted of first-time violent felonies.[51]

The Jenna's Law domestic violence exception permits judges to grant indeterminate sentences (i.e., eligibility to come before the parole board after completion of the minimum term) to survivors convicted of certain homicide or assault crimes against their abusers.[52] At the time, the Legislature reasoned that retaining indeterminate sentencing and parole would lead to less punitive sentencing for survivors. Unfortunately, it did not. Although the underlying concept of providing ameliorative sentencing for survivors is positive, the exception fails to offer sufficiently lower prison terms, does not permit non-incarcerative sentences, is too narrow, and has been woefully underutilized in practice.

### *Limitations of Jenna's Law Exception*

*Applies only to survivor-defendants convicted of crimes against their abusers.* The Jenna's Law exception applies only to certain homicide and assault crimes committed against an abuser and does not include other offenses, such as robbery, burglary, or other property crimes where the abuse was a significant factor in the defendant's actions.[53] This overly narrow provision disregards the complex and powerful role that violence, coercion, intimidation, and control play in a survivor's experiences and actions, and, in effect, creates an unfair double standard that penalizes survivors for not committing physical crimes against abusers.

*Excludes murder convictions.* The exception also does not include murder convictions – an inappropriate exclusion considering that some survivor-defendants are convicted of these charges. For example, a battered woman may be convicted of murder for killing her abuser, or she may be convicted of felony murder if she is found guilty of aiding her abuser to commit a robbery during which her abuser killed someone.[54] Survivor-defendants convicted of such acts in which domestic violence was a significant factor should also be eligible for less punitive sentencing.

*Does not permit judges to dispense non-incarcerative sentences.* Under current law, non-incarcerative sentences are permitted mainly for certain non-violent offenses.[55] In these cases, judges can sentence defendants to serve their time on probation while participating in a community-based ATI program. Notwithstanding the significant benefits associated with ATIs,[56] the current Jenna's Law exception permits only mandatory prison penalties.

*Contains insufficiently reduced sentences and may lead to longer prison terms than those available under the general sentencing statute.* Though intended to be more compassionate than the general sentencing statute, the Jenna's Law exception retains a sentencing structure that is too harsh. First, under the exception, defendants can actually receive longer sentences than those permitted under the general sentencing statute. The one person serving a sentence under the exception in 2007, for example, was given an indeterminate sentence of 6 to 12 years – longer than the minimum five-year term allowed under the law's general provisions.[57] Second, because the exception retains an indeterminate structure, with release decisions determined by the parole board, defendants may end up serving more time in prison than they would have under a non-exception determinate sentence. The aforementioned person sentenced under the exception, for example, was denied parole twice.[58] Defendants convicted of violent offenses have

good reason to fear being turned down by parole: the board often denies release for individuals serving time for violent crimes, regardless of whether abuse was a factor.[59] Such sentence lengths and structure undermine the intent of the exception to offer more compassionate and lower sentences for survivors.

*Exception rarely used.* According to the New York State Sentencing Commission appointed by then-Governor Elliot Spitzer, as of February 2007, only one person was serving time under the Jenna's Law domestic violence exception – a male survivor convicted of assault against his father.[60] In 2009, the Commission found that no individuals were incarcerated on sentences under the exception.[61] Among the possible reasons for the exception's disuse are: (1) lack of awareness among defense attorneys and judges about the exception's existence; (2) defendants' reluctance to forgo a determinate sentence with a known release date and accept an indeterminate sentence with a release date contingent upon parole board approval; (3) the exclusion of murder charges; and (4) the law's exclusion until recently of intimate relationships where survivors and abusers do not live or share children together and possible continuing lack of awareness among attorneys and judges about the law's expansion to include these intimate partners.[62]

## Victoria

Victoria met Jim shortly after high school. When they first began dating, Victoria was pleased by Jim's attentiveness. For example, he would always wait for her at the train station to take her home after work. At the time, Victoria thought that this was a kind gesture but, looking back, she realizes that it was a way to limit her association with other people. As the months passed, Victoria grew increasingly isolated until her "world just became everything [Jim]." Jim also began to threaten and verbally abuse her, but he always apologized profusely later, saying that it would never happen again.

Victoria and Jim dated for two years and then got married. They were married for 11 years and had two children. A short time after the wedding, Jim began to abuse Victoria physically, sexually, emotionally, and financially. Victoria would do anything she could to please him, but even the smallest things would set him off.

When Victoria was six months pregnant with her daughter, Jim threw her down a flight of stairs. She was amazed that her baby survived. Jim would also make large purchases that the family could not afford, such as a motorcycle or boat or the latest and best gun on the market. In retrospect, Victoria sees that misusing their finances was another way that Jim exercised his control over her. Sometimes Jim would hide things from Victoria. At night, she would put her jewelry in her jewelry box, but in the morning it wouldn't be there. Jim used these tricks to make Victoria think she was going crazy.

Victoria called the police a few times but this only made matters worse, especially because Jim was a police officer himself. The cops would take Jim out of the house and tell him to walk around the block a few times, or they would stand outside with him for awhile. "And after the cops would leave, it was, get ready for round two, put your boxing gloves on . . . . By calling the cops, I actually did make it worse

than maybe it would have been." Wary of police involvement, Victoria never told the nurses what had happened to her when, on multiple occasions, she was hospitalized as a result of Jim's abuse.

Eventually, Jim was fired from the police force and started working as a private investigator. One night, Jim came home and told Victoria that he had lost his job again. They got into an argument and he came after her with a gun. Victoria was able to tear the gun away from Jim during the struggle. When the fight ended, Jim went to the bedroom to sleep.

Victoria recalls, "I just felt so strongly at that point in the evening [that] it was either going to be a matter of his life or my life. That was the second time that he had tried to use a gun on me, and it was also two weeks before [that] he had actually tried to commit suicide. . . . I clearly felt that if he was going to take his own life, that he would take my life first and then take his life." Victoria went into the bedroom where Jim had fallen asleep, took the gun, and shot him. Victoria left the house and drove around. She was afraid to go back because she did not know the extent of Jim's wound. After about 15 minutes, Victoria decided to go to her neighbor's house. It was not until the police came that she learned Jim had died.

During the interrogation at the police station, Victoria acknowledged that she shot Jim. When the detectives asked if she had been battered, Victoria did not reveal much about the abuse: "I had told them whatever I felt comfortable telling them about my relationship with my husband at that point because, believe it or not, in my own sick way I was still trying to protect my husband."

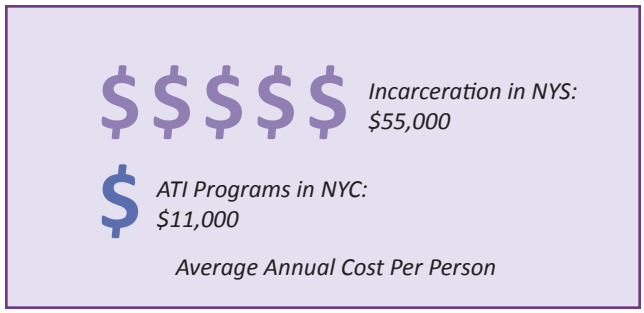
Victoria notes that the District Attorney who prosecuted her case refused to acknowledge the circumstances that led to Jim's death or give any consideration to the abuse she had suffered. Although Victoria thought her attorney was empathetic and trustworthy, she did not think he represented her well – in part because he had no criminal defense experience. Her lawyer did not call any experts to offer testimony about battering and its effects.

Victoria accepted a plea of first-degree manslaughter. Although she had no previous criminal record, not even a speeding ticket, she was sentenced to the maximum term of 8 1/3 to 25 years. She served a total of 17 years in prison.[63]

## C) Limited Access to Alternative-to-Incarceration Programs (ATIs)

Community-based ATIs have significant benefits. They enable individuals to serve their sentences while addressing underlying personal issues, rebuilding connections with children and family, and becoming productive members of society.[64] In addition, ATIs are significantly less expensive than imprisonment: while most ATI programs in New York City cost only $11,000 per person per year,[65] the annual cost of incarcerating one person in New York is more than $55,000.[66] ATIs decrease recidivism rates and increase community safety while saving money.[67] Such programs are particularly appropriate for many survivor-defendants, as they need significant assistance in recovering from abuse, most often have no prior felony convictions, and pose no threat to public safety. For example, 80% of women sent to New York's prisons for a violent felony in 2009 had never before been convicted of a felony,[68] and of the 38 women convicted of murder and released between 1985 and 2003, not a single one returned to prison for a new commitment within a 36-month follow-up period.[69]

Because of restraints on judicial discretion, however, probation and ATI programs in cases involving violent and certain non-violent crimes are possible only if a prosecutor agrees to prosecute the survivor-defendant for a lower-level offense. This is a rare occurrence, especially without strong advocacy by a defense attorney and the presence of an ATI that is ready to accept the defendant into its program.[70] Unfortunately, even for survivors who do receive probation, the options for specialized programs are few. Although New York maintains an array of excellent ATIs,[71] only one program in the state is specifically designed to meet the needs of battered women defendants, and it only serves survivors in New York City.[72]



## STEPS to End Family Violence (STEPS): An Alternative-to-Incarceration Program for Survivor-Defendants

The non-profit organization STEPS[73] manages the only alternative-to-incarceration program (ATI) specifically designed for survivor-defendants in New York State. It is also the only program of its kind in the country.

STEPS works with courts in New York City to advocate for a disposition – a reduction or complete dismissal of charges, or an adjournment in contemplation of dismissal (ACD, where a judge agrees to dismiss the charges after six months or a year if the defendant stays out of trouble) – that involves mandating the survivor-defendant to participate in STEPS as an alternative to being sent to prison. STEPS monitors survivors' compliance and progress and reports directly to the court.

In addition, STEPS provides survivors with individual and group counseling, assistance in navigating the trial process, and services to address the collateral consequences resulting from arrest, including family court involvement, housing issues, and employment and immigration difficulties. STEPS also advocates for survivor-defendants to be released before their trial begins under the program's supervision.

Although STEPS does not directly represent survivor-defendants, it does provide guidance on defense strategy and sentencing mitigation for attorneys and works with individuals close to the survivor-defendant to fill out and corroborate her story.

Defendants and attorneys can benefit from STEPS' involvement: charges have been reduced or dismissed in 85% to 90% of cases on which STEPS has worked.[74]

ATIs like STEPS lower recidivism rates, enhance community safety, and are more effective than prison in helping individuals heal from abuse, reconnect with children, and become productive community members. In addition, ATI programs can save significant taxpayer dollars: annual per-person incarceration costs in New York can run up to five times more than annual ATI fees.[75]

Unfortunately, New York's sentencing law restricts judges from sentencing many survivor-defendants to probation and ATIs. For example, survivor-defendants charged with violent crimes are able to take advantage of STEPS' ATI program only when a district attorney agrees to reduce the charge to a non-violent offense that permits a sentence of probation and the judge agrees to sentence the person accordingly. These restrictions lead to a missed opportunity for survivor-defendants, the overwhelming majority of whom pose no risk to public safety, their families, or society at large.[76]

# Natalie

At age 16, Natalie moved in with her 21-year-old boyfriend, Mark. The abuse began almost immediately. It started with emotional abuse. Mark would call her names, yelling at her and saying things like, "I'm your master" and "I'm your only daddy." The physical and sexual violence soon followed, including slaps, "beat downs," and rapes. As the abuse continued, Natalie became increasingly scared and isolated. "I felt like I needed him. I felt like he was my only support."

Mark was involved in a lot of illegal activity, including selling drugs, and he kept a gun in their house. One day Mark came home and told Natalie to get dressed and get in the car. After driving for a while, Mark seemed to search for something. When Natalie asked what was going on, Mark responded, "Don't ask me questions. Do what I say. I'll let you know what you need to know."

Mark put his gun in his jacket pocket and told Natalie to get out of the car. He took her to the side of a building and told her to stay there. He then approached a woman getting into her car, pointed his gun at her, and yelled to Natalie, "Come on! Hurry up. Let's get in the car." Natalie hurried toward the car, in disbelief about what Mark had just done. Mark told the woman to sit in the back seat and Natalie in the passenger seat.

Mark handed Natalie the gun and told her to point it at the woman. He gave Natalie a look she knew well – it meant that he would hurt her if she did not comply. Natalie tried to reassure the woman with her eyes. She thought, "If only this lady knew how petrified I was."

Mark demanded that the woman give him her ATM card and threatened to kill her if she did not hand it over. He pulled over and put the woman in the trunk of the car. Natalie stayed quiet. She was afraid and in shock.

By this time, it had become dark. Mark continued to drive, and suddenly the police began pursuing them. Later, Natalie learned that the woman had cut the taillights from the trunk of the car. Mark floored the gas, swerving everywhere, and Natalie felt like she was going to die. Finally, Mark stopped the car and told Natalie to run. Eventually, the police caught up with her and placed her under arrest. They found and arrested Mark a couple of miles away.

At the station, Natalie remained silent as she was questioned by the police. She later learned that they were charging her with robbery and kidnapping.

The court appointed Natalie a lawyer. She told him every detail of the abuse, but she believes that he didn't really understand: "He had a complete poker face when I told him the story. He had an I-heard-it-all-before-and-she's-bullshitting-me attitude. . . . I really felt like he didn't have my best interests at heart."

At Natalie's first court appearance, the judge asked what she, a young girl without a record, was doing with a guy like her abuser, Mark, who had "a rap sheet a mile long" – one that Natalie didn't even know about.

The District Attorney initially offered Natalie 6½ to 12 years if she agreed to plead guilty. She refused because she feared that it would force her to discuss Mark's role in the crime and that he would find out and kill her. She could hear his voice saying to her, "Snitches get stitches and wind up in ditches." She was extremely afraid to implicate him in any way.

At the next court appearance, Natalie and Mark were in the courtroom together. The judge remarked that he did not like the way Mark looked at her and decided that the two would be tried separately.

While Natalie was in pre-trial detention, she received a letter from Mark. In the letter, he told Natalie that if she testified against him or talked to anyone about him, her life would be over. He explained that he might not be able to kill her himself but would get someone to do it. Natalie's fear of going to trial overwhelmed her fear of taking a plea. She pled guilty to robbery in the first degree and was given a sentence of 7½ to 15 years. She was denied parole twice before finally being released, after having spent 10 years in prison.[77]

## Chapter 2

# Domestic Violence Survivor-Defendants: Parole, Clemency, & Release

## A) Barriers to Making Parole

As previously discussed, whether an incarcerated person must see the parole board for a release determination depends upon the type of sentence she received. Individuals given indeterminate sentences with minimums and maximums (e.g., 15 years to life) generally appear before the parole board after serving their minimum term or less, depending on "merit time" credits.[78] Individuals with determinate terms (e.g., eight years) do not see the parole board and are eligible for release after serving their sentence minus possible "merit time" and/or "good time" credits.[79]

Appointed parole board commissioners make decisions to grant parole at their discretion.[80] Although parole board commissioners must adhere to legal guidelines set forth in the state's Executive Law,[81] they have broad authority regarding the interpretation of these guidelines.[82]

Parole commissioners' discretion presents particular challenges for people serving sentences for the most serious crimes (A-1 offenses) and violent crimes prior to 1998 – the year New York law was amended to require most violent crimes to carry determinate prison terms. At least some individuals in prison for these offenses are battered women serving time for crimes related to domestic violence.

It became particularly difficult for individuals convicted of A-1 offenses to make parole under the administration of former New York State Governor George Pataki. For example, in 1994, the year before former Governor Pataki took office, the parole board granted release to 28% of people incarcerated for A-1 offenses on their initial appearance. By contrast, in 2002, near the beginning of former Governor Pataki's third term, only 3% of people incarcerated for A-1 offenses were granted parole on their first appearance, dramatically lower than the 1994 rate, as well as the overall approval rate that year (51%).[83] This unstated policy of blanket denials continued notwithstanding that recidivism rates for people convicted of A-1 offenses are significantly lower than those for people convicted of other types of offenses.[84]

As illustrated by the aforementioned statistics, parole commissioners – appointed by the Governor with the advice and consent of the State Senate[85] – are subject to influence by the policies favored by political leaders in office during the time they serve. For example, Robert Dennison, Chair of the Parole Board under former Governor Pataki observes that he "never got any direct pressure from Pataki not to let certain people out . . . but he did make it clear in the newspapers that he didn't want violent felons released."[86] Former Commissioner Dennison further notes that "if you were sponsored by a particular state senator and you made a decision he didn't like, it is conceivable that the next time you are up to be reappointed, he may not push your name to the governor."[87]

More recently, it appears that more individuals convicted of A-1 offenses have been granted parole than in prior years. Over the last four years, 14% of parole-eligible individuals serving time for A-1 offenses were granted release.[88] This increase was likely influenced by new political realities: the election of a Democratic Governor who took a more progressive stance on criminal justice matters than his Republican predecessor and a class-action lawsuit filed in 2006 on behalf of individuals in New York's prisons who were eligible for parole after serving the minimum term for an A-1 felony offense but denied release based on the "'seriousness of the offense,' the 'nature of the present offense,' or similar reasons."[89] The

suit aimed to challenge the legality of the apparent unstated policy under former Governor Pataki's administration of basing release decisions on the "seriousness of the offense" without sufficient regard to the other criteria the parole board is statutorily mandated to consider, including the individual's institutional record and public safety risk[90] – and to reverse this practice in the future.

Notwithstanding this positive trend, individuals, including domestic violence survivors, convicted of A-1 offenses and pre-1998 violent crimes continue to face significant obstacles to obtaining parole release. Survivors also confront specific additional hurdles related to parole. First, parole commissioners often decline to consider information about the impact of domestic violence on the crime in their deliberations.[91] Second, even where an incarcerated woman wants to raise her domestic violence history, evidence of past abuse is often missing from court records, and documents that do exist (e.g., orders of protection, hospital records, and witness statements) are often difficult to gather – particularly from prison.[92] In fact, the only document that automatically follows a defendant to prison and is included in a report prepared for the Parole Board about her case is the Pre-sentence Report,[93] a document frequently rife with inaccuracies and often incomplete, with little or no information about a history of abuse.[94] Third, although an incarcerated survivor can submit a statement to the Parole Board about the domestic violence, many incarcerated people know – through their own and other women's experiences – that inmates must appear contrite to convince the board that they are "reformed." This reality often deters women from including details of their survivor status, which could be viewed as an excuse and avoidance of accepting full culpability for the crime.[95]

In addition, review of parole board decisions is limited. Although an incarcerated person has the right to appeal a decision to the board itself or, after exhausting her "administrative remedies," to seek judicial review by a court,[96] a parole board's decision can only be overturned if a court finds that the board's decision was "arbitrary and capricious" or affected by a "showing of irrationality bordering on impropriety"[97] – extremely difficult standards to meet.[98] Even if a judge makes such a finding, he or she is only permitted to remand the case for a parole rehearing,[99] and it is exceedingly rare for a parole board to reverse its own decision.[100]

As a result of these barriers, many incarcerated survivors may serve sentences significantly higher than the minimum terms imposed by the judge at trial.

## B) Restrictions on Merit Time and Temporary Work Release

In addition to difficulties related to parole, survivors incarcerated for violent offenses are excluded from eligibility for early release through "merit time." Established in New York in 1997, merit time allows state prison officials to grant early release to incarcerated individuals who meet certain criteria, such as obtaining a General Equivalency Diploma (GED) or vocational trade certificate, completing a substance abuse treatment program, or performing community service.[101] While incarcerated people convicted of non-violent crimes can earn merit time in the amount of one-sixth or one-seventh off their sentences depending on the offense, people convicted of violent offenses – including survivor-defendants – are not permitted to earn merit time credits at all.[102]

Though denied merit time eligibility, a 2009 amendment to the Correction Law permits almost all incarcerated individuals convicted of A-1 or other violent offenses to earn a "Limited Credit Time Allowance" of six months off their minimum or determinate term.[103] Though a positive step, this credit time is minimal – especially compared with merit time amounts, which range from one-sixth to one-seventh off the minimum or determinate term[104] – and is significantly more difficult to earn than merit time.[105]

Unlike with merit time, certain incarcerated survivors convicted of violent offenses are eligible for temporary release programs, which can help shorten prison terms, provide opportunities for individuals to establish productive community ties,

and improve the likelihood of successful reentry. Although then-Governor Pataki closed temporary release to people convicted of violent offenses in 1996,[106] eligibility for these programs – including work release, a transitional program that permits incarcerated people to work in the community while living part-time in prison – was restored for certain domestic violence survivors in 2002.[107]

Unfortunately, similar to the Jenna's Law domestic violence sentencing exception, the work release exception was too narrowly conceived – it includes only survivors convicted of homicide or assault crimes against abusers, and it excludes many relationships from eligibility, including abuse by a relative of a spouse, intimate partner who did not regularly live with the survivor, or blood relation other than a parent, sibling, or child.[108] The latter restriction is particularly disappointing considering that such relations are included in the Jenna's Law sentencing exception and in the definition of survivor used by domestic violence service organizations. It makes little sense to define an individual as a domestic violence victim in one context and not another.

Also similar to the Jenna's Law exception, the work release exception has been woefully underutilized: as of 2008, only five of the 25 women in New York State prisons who applied were granted work release under the domestic violence exception.[109] Possible reasons for the exception's underuse include: (1) the statute's exclusion of incarcerated survivors not convicted of homicide or assault crimes against their abusers; (2) the law's overly-narrow definition of what constitutes a domestic relationship; (3) corrections officials' wariness in granting eligibility for fear of potential negative outcomes and press coverage if the individual were to commit another crime while participating in the program; (4) lack of awareness about the exception among incarcerated survivors and their advocates; and (5) incarcerated survivors' reluctance to apply after learning that many other applications were rejected.

# Katarina

Katarina fell in love with Eddy, her older brother's friend, when she was eight. A few years later, Katarina began dating Eddy. She married him at 15 and was pregnant with their first child one year later.

The first years of marriage were happy ones. Then, after Katarina and Eddy both lost their jobs, Eddy began his abuse. At first, Katarina didn't realize that she was being abused. "I saw my dad hit my mom, and I witnessed my father-in-law hit my mother-in-law so my interpretation was that it was okay for a husband to hit his wife. So when he started to put his hands on me, I didn't feel like I was being abused but that I messed up again and he was mad at me."

As the years went on, the violence escalated. Sometimes Katarina was beaten so badly that she had to go to the hospital – once she had to stay for two months. Eddy would take her to different hospitals each time to avoid suspicion. He would always stay near her in the hospital, and no one asked Katarina if he was responsible for her injuries. Katarina was afraid and didn't want Eddy to get in trouble, so she would say that she had fallen or accidentally hurt herself.

One time, Eddy threw Katarina down a flight of stairs. She broke her ankle in three places, fractured her wrist, and dislocated her shoulder. One day while Katarina was home recuperating from the injuries, Eddy

beat her because his sister told him that Katarina had left the apartment without his approval. Katarina was not allowed to go outside without letting Eddy know.

Eventually, Katarina could identify signs that meant Eddy was about to become abusive: "I knew that if his voice was raised, there would be profanity and then there would be hitting. You get used to a pattern of violence."

The first person Katarina told about the violence was her mother, who had also been a victim of abuse. But her mother cautioned that, "What happens in your household, stays in your household." Katarina also told someone in her church, but somehow Eddy found out and responded furiously: "Don't you ever again in your life go outside of this house and tell anyone what goes on in this house. This is my house and I do whatever the hell I want."

One day Katarina summoned her courage to ask Eddy for a divorce. He was outraged and beat her so badly that she was afraid she might die. Katarina felt powerless and continued to stay with Eddy even as his violence got even worse and more frequent. Katarina called the police several times, but they just came and told Eddy to "have a beer, calm down, and take a walk." Eddy had family members in the police department, and Katarina felt that "calling them was like calling no one."

The only time Eddy was arrested was when a new officer, unfamiliar with the precinct's usual protocol, came to their house. Even then, Eddy was only taken in for a few hours and was even angrier when he came home.

One day, Katarina came home and found Eddy drunk. He had been suspended from his job for drinking. He demanded, "Bitch, where the hell you been?" He swung Katarina against the wall and started strangling her. Katarina could not breathe; she knew that he was going to kill her. Her vision blurred, and she felt herself begin to black out: "I just reached out and found something. At the time, I didn't know what it was, but it was a little steak knife. I was trying to get him off me, I stabbed him." Katarina then ran into the street, looking back only once to see Eddy chasing her. She saw two acquaintances and told them, "Oh God, I just stabbed Eddy. I hope he doesn't kill me."

Shortly after Katarina told her friends, the police showed up, grabbed her, and threw her up against the wall. They took her to the police station but did not tell her that Eddy had died until after they charged her with murder. "Everything stopped. I was in complete shock. I had no idea that my husband was dead."

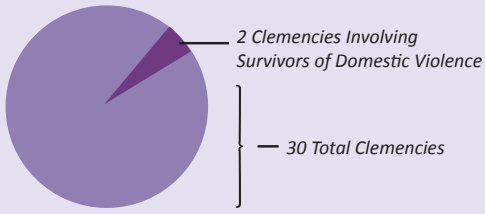
Katarina's lawyer never really asked her exactly what happened. One time, he even mistook Katarina for another client. "To him," she recalled, "I was just another number." At her first grand jury hearing, the District Attorney portrayed Katarina as a violent woman who had a drug problem and went on a killing spree. He dismissed the abuse Katarina suffered at Eddy's hands and at one point asked, "If he was beating on you all the time like you allegedly say he was, then why didn't you leave?"

Katarina was indicted for murder. After 80 days in jail, Katarina's brother introduced her to STEPS to End Family Violence, an ATI program that assists survivor-defendants. STEPS worked with Katarina's lawyer and helped convince the DA to change his position. The DA seemed to become more sympathetic after he learned that Katarina had choke marks on her neck the day Eddy was killed. The trial ended in a hung jury. As a result, a second grand jury was convened, and Katarina was indicted for manslaughter in the second degree – a lower charge without a mandatory prison sentence.

Katarina pled guilty and was sentenced to five years probation, conditioned on her participation in STEPS' ATI program. She credits STEPS with helping her to understand her past and move forward. "STEPS gave me the ability I needed to find myself, to be more empowered and have my own voice. My self-worth had been based on Eddy, a man who screamed hurtful words at me and beat me. STEPS allowed me to rebuild my life because they gave me unwavering support that empowered me to develop myself."[110]

## C) Obstacles to Receiving Clemency

Clemency is used even less frequently than either the Jenna's Law or work release domestic violence exceptions. The New York State Constitution imparts to the Governor sole authority to grant clemency to people convicted of crimes in New York.[111] From 1980 through 2008, executive clemency was granted to a mere 30 women in New York State – and only two of those cases were documented as involving survivors of domestic violence.[112] Given the failures of the criminal justice system to respond fairly and humanely to survivor-defendants, clemency is an option that should be much more rigorously explored and employed by Governors in the future.




*Clemencies Granted to Women in New York State, 1980–2008*

## D) Negative Collateral Consequences of Conviction

Beyond the loss of liberty and often harsh conditions[113] associated with imprisonment, felony convictions carry a host of negative collateral consequences that damage survivors' ability to lead safe and healthy lives after release and inflict serious harm on communities, particularly the low-income communities and communities of color most heavily impacted by incarceration.[114] By destabilizing communities and diminishing community members' ability to access opportunity and sustain productive lives and families, incarceration and the additional hidden penalties attached to conviction erode the community conditions needed to help prevent and combat domestic violence.

*Housing:* Public housing authorities in New York generally have wide discretion to decide whether an individual with a criminal record will be granted eligibility for public housing.[115] Unfortunately, authorities frequently use their discretion to deny admittance to people with felony convictions.[116] In addition, they can prohibit individuals with felony convictions from living with family members in public housing and can evict the entire family if a person with a felony conviction is found to be living in the apartment. Overall, the stigma associated with having a felony conviction and the shortage of affordable housing for all low-income individuals – whether they have a criminal record or not – makes it extremely difficult for formerly incarcerated people to secure permanent housing after release.[117] Safe and stable housing is an essential component of successful reentry for all individuals[118] and is particularly important for formerly incarcerated survivors attempting to avoid returning to abusive relationships.

*Employment:* With the exception of certain jobs, such as those in the law enforcement and home health care fields,[119] New York State law prohibits discrimination against individuals with a criminal record by public employers, occupational licensing agencies, and private employers with 10 or more employees unless there is a "direct relationship" between the offense and the job, or if granting employment would involve an "unreasonable risk" to the property, safety, or welfare of others.[120] While this statute provides critical protection, lack of awareness about the statute along with the stigma associated with incarceration and a challenging job market make it very difficult for individuals to secure living-wage employment after they return home from prison.[121] This is especially true for women, who often enter prison with less employment experience, lower education levels, and in more dire economic circumstances,[122] and who may exit prison with a disproportionate burden in caring for children and elderly relatives.[123] Gainful employment is vital to successful reentry for all individuals, including survivors for whom achieving economic self-sufficiency is a necessary component of avoiding financial reliance on an abusive partner.

*Public benefits:* Individuals reentering the community after incarceration often need public

benefits in order to pay rent, buy food and other necessities, and take care of children while they search for employment. As a result of federal law, individuals, formerly incarcerated or not, are only allowed to receive public benefits for a five-year period.[124] This restriction makes it even more important for formerly incarcerated individuals – particularly women, who are more likely to have received public assistance than men prior to incarceration – to find employment and affordable housing quickly after prison.[125]

*Education:* While federal law only bars a small number of individuals with felony convictions from receiving federal financial aid,[126] confusion about the ban remains and may discourage formerly incarcerated individuals from applying for assistance.[127] In addition, even where there are no legal bans, college admissions personnel may discriminate against formerly incarcerated applicants.[128] Individuals who leave prison without a high school diploma may have trouble obtaining a diploma or a GED because of the time they must spend on covering basic life needs, including reunifying with and caring for families, and finding stable housing and steady sources of income. Access to education allows formerly incarcerated individuals better access to living-wage jobs and increased ability to provide for themselves and their families.[129] It also significantly reduces the chances of an individual returning to prison and heightens self-esteem,[130] essential for all formerly incarcerated people and particularly for survivors who often suffer from intense feelings of shame and low self-worth.

*Children:* In addition to the pain of being separated from children during incarceration, parents in prison with children in foster care are at disproportionate risk of losing their parental rights to their children forever.[131] Although significant reforms to New York's child welfare laws in 2010 make it less likely that incarcerated and formerly incarcerated parents will lose their rights, parents in and home from prison remain in danger of experiencing this devastating outcome.[132] Incarcerated survivors may already have a history of negative interactions with the child welfare system – because of the domestic abuse itself or because the batterer has accused the survivor of child neglect or abuse as part of his attempts to harm and control his victim.[133] A formerly incarcerated mother's ability to quickly secure housing and employment after release is often critical to her ability to preserve her parental rights and prove to the child welfare agency that she deserves to reunify with her children.

*Voting:* In New York State, individuals currently incarcerated for a felony or on parole are barred from voting[134] while individuals who have completed their maximum sentence or who are convicted of misdemeanors or on probation retain their voting rights.[135] Misconceptions about who can and cannot vote, however, are pervasive and lead many people who are, in fact, eligible to vote to refrain from visiting the polls.[136] Felony voting restrictions undermine individuals' self-worth, agency, and ability to take part in decisions that affect their lives. They also distort the electoral process and disproportionately disenfranchise poor communities of color.[137]

*Health insurance:* Many individuals leaving prison must wait until they are released to begin the application process for Medicaid, which can take 45 to 90 days. Without insurance, formerly incarcerated individuals can be denied access to substance abuse and other rehabilitative programs that provide needed support and may be a mandated condition of parole. In addition, people released from prison without coverage may delay seeking care and use costly emergency medical services.[138] In 2007, New York enacted a law requiring the state to suspend, instead of terminate, Medicaid for people entering prison and jail with prior enrollment.[139] Though a very positive step, not all incarcerated individuals have Medicaid at the time of their incarceration. Immediate access to coverage can help individuals achieve stability and success during the early days of reentry[140] and is particularly important given the incarcerated population's disproportionately high rates of chronic illness.[141] The need is especially urgent for women transitioning from prison, who suffer from certain chronic illnesses at higher rates than men and have specific needs related to reproductive health.[142]

# Desiree

Carlos frequently abused Desiree, especially when he was high on drugs. He often gave Desiree black eyes, which she had to cover up with sunglasses when she went to work. When Carlos left the house to buy drugs, he would usually take Desiree's clothes off and tie her to a chair while he was gone. One time, when she decided to go with him rather than be left at home tied to a chair, he took off her stockings and used them to tie her hands to the steering wheel. Another time, while she was naked and tied up, he cut her on the arm with his razor, and she bled until he came back.

Carlos also abused Desiree sexually. "He cut off a broomstick," Desiree recalls, "and laid me on the bed and abused me with it." Desiree felt that the worst thing was when Carlos took his gun out of his tool box and threatened her with it: "First he would shoot it out the window and let me hear it go off. Then he would put it to my head and pull the trigger. . . . I couldn't believe this was happening, just because I didn't want to be with [him]. And then he would sit there and put that stuff up his nose."

Desiree did not want to be with Carlos, but when she told him, he grew angry and beat her up. Desiree had her locks changed four times, but each time Carlos took the new keys from her by force. At one point, she went to the courthouse and got an order of protection. But when Carlos was served with the order "he ripped it up and threw it in my face and said, 'By the [time] the cops get here you'll be dead.' So that order of protection was nothing."

The police came once and told Carlos to go away, but he only came back later after they had left. "And that day," Desiree recalls, "he really beat me up bad for calling the cops." Desiree never went to the hospital for her injuries because she was afraid that if her landlord found out about the abuse, he would evict her.

One morning, Carlos took his gun out. He said, "I'm really going to kill you this time, and the cops will never find me because I'm going to be in Puerto Rico." He had a girlfriend in Puerto Rico with whom he had a child. Desiree knew that Carlos was serious because although he had threatened to kill her before, he had never spoken about a specific plan. This time Carlos did not engage in his usual routine of shooting the gun out the window; instead, he put it immediately against Desiree's head and released the safety. After a while, he took the gun away and put it on the nightstand. Desiree felt that he was really going to kill her this time. As he turned around and started snorting drugs, Desiree picked up the gun and shot him. Desiree put down the gun and ran to another room to get her brother, who had a mental disability and lived with them, got him into her car, and drove to her daughter's house. After that, she called the police.

At the police station, Desiree told the cops what happened. She didn't ask for a lawyer because she wasn't aware she had a right to one. She had never been arrested before and had never been to jail. "They didn't ask about the abuse," she explains. "They didn't ask nothing about what he did to me. Nothing. All they wanted to know about was the shooting, that's all they wanted to know about."

STEPS to End Family Violence, an alternative-to-incarceration program that helps defendants with a history of abuse, became involved with Desiree's case at the beginning. They helped find a lawyer, who Desiree felt was very good and did everything he could for her. At trial, he presented evidence of Desiree's abuse and had an expert witness testify about the effects of domestic violence. The District Attorney, however, did not offer any plea bargain. "He made me feel like I'm just a killer," Desiree recalls. "Like I go around just shooting people." He said that Desiree should have left the abusive relationship and moved out of her house, and argued that she shot Carlos out of jealousy.

In the end, even with STEPS' assistance and a solid attorney, the jury convicted Desiree of murder in the second degree. She feels that jury members misunderstood domestic violence and the role it played in her crime. "I thought maybe the jury was looking at me like I didn't care. But that's not true . . . I said I was protecting myself. I was tired of him beating on me. . . . [I]t was either me or him. So I'm thinking maybe that's why they convicted me."

The judge sentenced Desiree to 17 years to life. Desiree recalls that his words and demeanor suggested that he gave the sentence not because it was right but because he was forced to under the law.

Desiree appealed her case, but the appeal was denied. After many years of advocacy by a new lawyer, STEPS, and others, the Governor of New York granted Desiree clemency. She is one of only two domestic violence survivors granted clemency in New York from 1980 to 2008.[143] Desiree was released after serving 13 years and two months in prison.[144]

## Chapter 3

# Domestic Violence Survivor-Defendants: International Human Rights

Survivors' fundamental rights are protected not only by the laws of the United States and New York, but also by international human rights law. The United States has obligations under international human rights treaties, as well as principles of customary international law.[145] Government officials at all levels – federal, state, and local – are responsible for complying with and enforcing these international law obligations.[146] In the context of domestic abuse, these obligations include the duty to act with due diligence to prevent, respond to, protect against, and provide redress for all forms of gender-based violence.[147] In situations where survivors have become defendants, they also include the duty to uphold the rights of survivor-defendants to a fair trial and to equality and non-discrimination throughout the criminal justice process.[148]

Domestic violence impedes women's ability to enjoy all human rights and fundamental freedoms – including the rights to non-discrimination; to not be tortured or subjected to other cruel, inhuman, or degrading treatment; to life, liberty and personal security; to equal protection of the law; to equality within the family setting; to just and favorable conditions of work; and to the highest attainable standard of physical and mental health.[149] When a domestic violence survivor engages in illegal activity to protect herself and her children from abuse, it represents a failure of the government, as well as of social service providers and the community at large, to have provided adequate protection before her situation progressed to that point. The government continues to have a responsibility towards survivors – now survivor-defendants – whom it did not adequately protect, to ensure that they are treated fairly and humanely.

For survivor-defendants, a criminal justice process that respects their human rights is one that takes into account their experiences of abuse at every stage of the process. As the UN Special Rapporteur for Violence Against Women stated, "[W]omen's criminality under situations of extreme abuse and violence needs to be treated with diligence, and their cases must be assessed in light of mitigating circumstances."[150] Similarly, the UN General Assembly, recognizing the link between domestic abuse and women's involvement in the criminal justice system, has called on states to address structural causes of gender-based violence and strengthen prevention efforts, "including with regard to women who need special attention in the development of policies to address violence, such as . . . women . . . in detention."[151]

International human rights law holds particular implications for the treatment of survivor-defendants following conviction. Several sets of international rules contain standards for a human rights-based approach to sentencing that is discretionary and includes serious consideration of alternatives-to-incarceration. The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) affirm that states have a duty to apply human rights standards to all convicted persons and prisoners without discrimination; this duty includes a responsibility to take into account the gender-specific challenges and circumstances of convicted and incarcerated women.[152] The Bangkok Rules recognize that "violence against women has specific implications for women's contact with the criminal justice system"[153] and call for the development of gender-specific options for diversion and sentencing alternatives that recognize women's common histories of victimization and that do not

involve prison time.[154] The Rules further provide that states should allocate sufficient resources to sentencing alternatives that combine non-custodial sanctions with interventions such as therapeutic courses and counseling for survivors of domestic violence.[155] The UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) similarly recognize the importance of judicial sentencing discretion, providing that judges should have available to them a range of non-custodial sentences, consider the rehabilitative needs of the convicted person, and evaluate whether incarceration is required for the protection of society.[156]

International human rights standards serve as a powerful reminder that domestic violence survivor-defendants – like all people involved in the criminal justice system – are not only criminal defendants but also human beings with rights and that the government has a duty to ensure that these rights are upheld. Such standards, in addition to U.S. legal guarantees and moral principles, can and should guide lawmakers in implementing policy changes to help ensure that survivor-defendants are afforded justice and dignity at all stages of the criminal justice process.

# Conclusion

Survivor-defendants in New York State confront a criminal justice system that routinely fails to recognize the profound impact of violence on their lives and on their alleged criminal activity. A myriad of barriers to justice result in many survivor-defendants serving years – and sometimes decades – behind prison walls. Felony convictions also carry a host of negative collateral consequences that damage survivors' ability to lead safe, healthy, and productive lives after release. Incarceration and its consequences harm individuals and communities, particularly the low-income communities of color most impacted by incarceration, and ultimately perpetuate the conditions in which violence against women thrives. These punishments are inflicted on survivors by a criminal justice system that should have helped protect them in the first place.

The following recommendations would help New York take steps to redress these shameful miscarriages of justice and to ensure that survivor-defendants are treated with more fairness and humanity. In addition, by increasing opportunities for survivors to be diverted from prison to ATI programs, serve shorter sentences, and apply for resentencing and earlier release, these reforms would also help the state reduce its costly and misguided overreliance on incarceration without compromising public safety.[157]

# Full Recommendations

***To the New York State Legislature and Governor:***

- Enact legislation, such as the pending Domestic Violence Survivors Justice Act, that would: (1) reform sentencing laws and the Jenna's Law domestic violence exception to permit judges to sentence survivor-defendants to shorter, determinate terms and to community-based ATI programs in cases where the abuse was a significant contributing factor to the crime; and (2) permit currently incarcerated survivors to petition the courts to review their cases for resentencing.

- Allocate funds to expand and establish more ATI, court advocacy, and reentry programs specifically designed to meet the needs of domestic violence survivor-defendants.

- Fully fund organizations that provide support services for survivors of violence and ensure that funding streams permit organizations – who may currently receive funding that prohibits them from working with survivors after arrest – to continue to work with and advocate for survivors regardless of criminal justice involvement.

- Allow individuals incarcerated for committing violent crimes, including domestic violence survivors, to be eligible for merit time (a discretionary program based on institutional record and programmatic achievement) and temporary work release. Until full eligibility for work release is restored for all people convicted of violent offenses, ensure that the domestic violence exception is expanded to include: (1) incarcerated survivors whose abuse was a significant contributing factor in their crimes (currently, only survivors convicted of physical acts against their abusers are eligible); and (2) a wider range of domestic relationships (currently, the exception excludes many relationships from eligibility, including abuse by a relative of a spouse, intimate partner who did not regularly live with the survivor, or blood relation other than a parent, sibling, or child).

- Allocate funds to implement enhanced domestic violence counseling and support programs in women's correctional facilities, to make all services in women's prisons trauma-informed, and to train staff on the specific circumstances of working with and guarding incarcerated survivors of trauma and abuse.

- Eliminate punitive collateral consequences of conviction and incarceration for all individuals, including survivor-defendants. Such measures should include: increasing access to and ending discrimination against formerly incarcerated people in housing, employment, and higher education; enhancing protection of parental rights for currently and formerly incarcerated parents with children in foster care; expanding visiting and reunification programs for all families separated by incarceration; ensuring immediate access to health insurance upon release; and removing restrictions on voting for individuals with felony convictions.

- Require and fund regular, comprehensive training on domestic violence and the experiences of survivor-defendants for all law enforcement and court officers, including police, prosecutors and prosecution support staff; judges; public defenders and support staff; corrections officials; probation and parole officers; and parole board members.

- Ensure sufficient funding to allow each public defender office across the state to hire or train at least one supervising attorney to have specialized expertise in representing survivor-defendants and to train all support staff on battering and its effects. To ensure that defendants, including survivor-defendants, receive competent representation and support, such offices must be adequately funded to employ social workers or other comparable staff, to maintain legal support personnel, and to incorporate an interdisciplinary approach to defense efforts.

***To New York State District Attorneys:***

- Participate in regular, comprehensive training on domestic violence and experiences of survivor-defendants.

- Carefully weigh evidence of domestic violence when deciding whether to prosecute a case or what charges to bring against a survivor-defendant. For cases where there is clear indication that the abuse was a significant contributing factor in the alleged crime, institute an office-wide policy for prosecutors either to lower charges to permit defendants to serve time in community-based ATI programs or to refrain from presenting the case to the grand jury for action.[158]

***To Defense Attorneys in New York State:***

- Along with support staff, participate in regular, comprehensive training on domestic violence and battering and its effects, including how to safely and effectively investigate whether a client's history of abuse is directly related to the crime with which the client is charged and whether the history of abuse is relevant to possible defenses and sentencing mitigation strategies.

- Wherever possible, partner with advocates, social workers, mental health professionals, and other persons and organizations specifically trained in working with domestic violence survivors to provide clients with needed support services and to assist in understanding and drawing out the full history and context of the abuse – critical to presenting an effective defense.

- Vigorously explore, develop, and, where appropriate, present defenses supported by evidence of battering and its effects, working in partnership with attorneys that have experience in representing survivor-defendants and with experts who can testify knowledgeably about battering and its effects.

***To New York State Judges:***

- Participate in regular, comprehensive training on domestic violence and battering and its effects.

- Make use of the limited discretion afforded under New York law, including the domestic violence exception to Jenna's Law, to sentence survivors to lower sentences.

- Wherever a survivor-defendant meets the statutory guidelines for community diversion, sentence her to probation and an alternative-to-incarceration program instead of prison.

***To the New York State Parole Board:***

- Make release decisions – for all incarcerated individuals, including survivors – that do not rely solely on the nature of the offense for which an individual is incarcerated and that give appropriate weight to an individual's institutional confinement record and actual public safety risk.

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# Endnotes

1. For more information, see the National Coalition Against Domestic Violence, http://www.ncadv.org/ (last visited May 26, 2011) and the New York State Coalition Against Domestic Violence, http://www.nyscadv.org/ (last visited May 26, 2011).

2. This report uses the term survivor-defendant to describe a person who, at the time she was charged with a crime, was a victim of domestic violence and for whom that domestic violence was a significant contributing factor in the crime for which she was charged.

3. The demographic composition of residents surveyed generally comported with the demographic breakdown of the United States identified by the U.S. Census Bureau in its 2006-2008 American Community Survey 3-Year Estimates. *See* Yasamin Miller, Cornell University Survey Research Institute, Empire State Poll 2010, Report 1: Introduction and Methodology 3 (2010), *available at* http://www.sri.cornell.edu/sri/files/esp/2010/Report%201%20-%202010%20-%20Introduction%20and%20Methodology.pdf.

4. The New York State Office for the Prevention of Domestic Violence (OPDV) defines domestic violence as "a pattern of coercive tactics that can include physical, psychological, sexual, economic, and emotional abuse perpetrated by one person against an adult intimate partner, with the goal of establishing and maintaining power and control. Domestic violence occurs in all kinds of intimate relationships, including married couples, people who are dating, couples who live together, people with children in common, same-sex partners, people who were formerly in a relationship with the person abusing them, and teen dating relationships." Suzanne Cecala & Mary M. Walsh, New York State Office for the Prevention of Domestic Violence, New York State's Response to Domestic Violence: Systems and Services Making A Difference 7 (2006), *available at* http://www.opdv.state.ny.us/whatisdv/about_dv/nyresponse/nysdv.pdf. Approximately one in four women nationwide is a victim of intimate partner violence. Patricia Tjaden & Nancy Thoennes, The Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey 9 (National Institute of Justice & Center for Disease Control, July 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

5. Caroline Wolf Harlow, Bureau of Justice Statistics Selected Findings: Prisoner Abuse Reported by Inmates and Probationers, U.S. Department of Justice 1-2 (April 1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/parip.pdf. In 2002, the Bureau reported that 55% of female jail inmates indicated past abuse. Doris J. James, Bureau of Justice Statistics, U.S. Department of Justice Office of Justice Programs, Profile of Jail Inmates, 2002, 10 (revised Oct. 12, 2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf.

6. *See*, *e.g.*, information from Greenhope Services for Women (http://www.greenhope.org/); Hour Children (http://www.hourchildren.org/); Project Path to Recovery at the Postgraduate Center for Mental Health (http://www.pgcmh.org/programs/clinical_programs.html); Women's Prison Association (http://www.wpaonline.org/) (on file with authors).

7. Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 Int'l J. L. & Psychiatry 301, 310–22 (1999) and *Summary: Physical and Sexual Assault Across the Lifespan*, attachment to *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*. A 1994 study of 557 incarcerated women in Oklahoma found that 80% of the women studied reported having been abused in the past. Susan Marcus-Mendoza et al., *Changing Perceptions of the Etiology of Crime: The Relationship Between Abuse and Female Criminality,* 1 Oklahoma Criminal Justice Research Consortium Journal (1994).

8. "Among the 36 women committed for a homicide in 2005, in which the victim-offender relationship was able to be determined, 12 (33%) killed someone they were close to, other than their children . . . [and] 8 of these women (67%) had experienced prior abuse at the hand of the victim." New York State Dep't of Correctional Services, Female Homicide Commitments: 1986 vs. 2005, 14 (July 2007) [hereinafter NYS DOCS], *available at* http://www.docs.state.ny.us/Research/Reports/2007/Female_Homicide_Commitments_1986_vs_2005.pdf.

9. This study, conducted by the National Development and Research Institutes in partnership with the New York State Division of Criminal Justice Services, analyzed interviews with 215 women incarcerated for homicide in New York State between April 1992 and May 1993. New York State Division of Criminal Justice Services, Homicide by Women 8 (June 1996).

10. *See* Beth E. Richie, Compelled to Crime: The Gender Entrapment of Battered Black Women 127-131 (1996). Another study evaluated 525 abused women at a mental health center who had committed at least one crime and found that nearly half had been coerced into committing crimes by their abusers. Marti Tamm Loring & Pati Beaudoin, *Battered Women As Coerced Victim-Perpetrators*, 2 J. Emotional Abuse 3, 13 (2000). The authors of this study are clinicians based in Atlanta, Georgia.

11. *See* Interview with Katarina, Survivor-Defendant, in New York., N.Y. (Feb. 26, 2010 and April 14, 2011); Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence and, Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

12. Allison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 Hastings Women's L.J. 1, 34–39 (1993). *See generally* Angela Browne, When Battered Women Kill 159–78 (1987); Elizabeth Dermody Leonard, Convicted Survivors: The Imprisonment of Battered Women Who Kill 27 (2002).

13. Telephone Interview with Cathy Selin, Senior Attorney, STEPS to End Family Violence, (Nov. 5, 2009); Sarah M. Buel, "*Effective Assis-*

*tance of Counsel for Battered Women Defendants: A Normative Construct*," 26 Harv. Women's L.J. 217 (2003).

14. Telephone Interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

15. *See* Mary Becker, *Access to Justice for Battered Women*, 12 Wash. U. J. L. & Pol'y 63, 73 (2003); Telephone Interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011). These preconceptions can be particularly detrimental to women of color who often suffer from racist and sexist stereotypes of being more assertive and aggressive than white women. *See, e.g.*, Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA Women's L.J. 191 (1991).

16. *See, e.g*., N.Y. Penal Law §§ 70.02, 70.04, 70.08 (McKinney 2010).

17. *See infra* note 52 and accompanying text. Jenna's Law is codified as N.Y. Penal Law § 70.02 (1998) (2010). The exception to Jenna's Law carved out for domestic violence survivors is N.Y. Penal Law § 60.12 (2010).

18. New York State Commission on Sentencing Reform, The Future of Sentencing in New York State: A Preliminary Proposal for Reform 18 (October 15, 2007).

19. New York State Commission on Sentencing Reform, The Future of Sentencing in New York State: Recommendations for Reform 60 (January 30, 2009).

20. Telephone Interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

21. *See* The New York City ATI/Reentry Coalition Services Report 2010 (2010), *available at* http://www.ati-ny.org/files/ATI-final.pdf (last visited Jan. 9, 2010); Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

22. *Table 1B, Crimes by Predicate Felony Status by Gender; 2009 New Court Commitments to NYSDOCS*, NYS DOCS, prepared May 29, 2010 (on file with the Women in Prison Project, Correctional Association of New York). As of April 1, 2010, 79% of women in New York State prisons for violent felony convictions had never been convicted of a felony prior to their current offense. *Table 3B, Crime by Predicate Felony Status by Gender; Under Custody at NYS DOCS as of April 1, 2010*, NYS DOCS, prepared May 25, 2010 (on file with the Women in Prison Project, Correctional Association of New York). Although it is unclear how many of the 38 women identified in this statistic were incarcerated for protecting themselves from an abuser, given the rates of intimate partner violence among women in prison, it is likely that at least some of the 38 women fit into that category. *Testimony on Behalf of the Alliance for Rational Parole Policies*, Testimony Before the New York State Senate Standing Committee on Crime Victims, Crime and Corrections, submitted by the Center for Alternative Sentencing and Employment Services, Center for Community Alternatives, Coalition for Parole Restoration, College and Community Fellowship, The College Initiative, Correctional Association of New York, Exodus Transitional Community, Family Justice, Fortune Society, Interfaith Coalition of Advocates for Reentry and Employment, Legal Action Center, The Osborne Association and Women's Prison Association (January 15, 2008), at 2.

23. *See, e.g*., Center for Alternative Sentencing and Employment Services (CASES), http://www.cases.org/ (last visited May 26, 2011); Center for Community Alternatives, http://www.communityalternatives.org/ (last visited May 26, 2011); Fortune Society, http://fortunesociety.org/ (last visited May 26, 2011); Greenhope Services for Women, http://www.greenhope.org/ (last visited May 26, 2011); Osborne Association, http://www.osborneny.org (last visited May 26, 2011); Women's Prison Association, http://www.wpaonline.org/ (last visited May 26, 2011).

24. *See* STEPS to End Family Violence, http://www.stepstoendfamilyviolence.org (last visited January 7, 2011).

25. N.Y. Correction Law § 803.

26. *Id*. § 851.

27. Telephone Interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011). *See* N.Y. Exec Law 259-i(c)(A).

28. Email from Director of Media Relations and Public Affairs, New York State Division of Parole sent on January 23, 2009 (on file with the Women in Prison Project, Correctional Association of New York).

29. *See* National Clearinghouse for the Defense of Battered Women, The Impact of Arrests and Convictions on Battered Women (September 2008), *available at* http://www.biscmi.org/wshh/NCDBW_%20Impact_of_Arrest.pdf. *See also infra* notes 113-142 and accompanying text.

30. Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, Chapter 13 *in* Domestic Violence at the Margins: Readings on Race, Class, Gender and Culture 194-205 (Natalie J. Sokoloff, with Christina Pratt, eds. 2006). *See generally* Joey L. Mogul et al., Queer (In)Justice: The Criminalization of LGBT People in the United States 120, 132-40 ( (2011); National Coalition of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender and Queer Domestic Violence in the United States in 2008 (2009), *available at* http://www.avp.org/documents/2008NCAVPLGBTQDVReportFINAL.pdf; Beth E. Richie, Compelled to Crime: The Gender Entrapment of Battered Black Women 127-131 (1996); Michelle Bograd, *Strengthening Domestic Violence Theories: Intersections of Race, Class, Sexual Orientation and Gender*, Chapter 2 *in* Domestic Violence at the Margins: Readings on Race, Class, Gender and Culture 25-38 (Natalie J. Sokoloff, with Christina Pratt, eds. 2006); Valli Kalie Kanuha, *Compounding the Triple Jeopardy: Battering in Lesbian of Color Relationships,* Chapter 6 *in* Domestic Violence at the Margins: Readings on Race, Class, Gender and Culture 71-82 (Natalie J. Sokoloff, with Christina Pratt, eds. 2006).

31. Shamita Das Dasgupta, *Women's Realities: Defining Violence against Women by Immigration, Race, and Class,* Chapter 5 *in* Domestic Violence at the Margins: Readings on Race, Class, Gender and Culture 56-70 (Natalie J. Sokoloff, with Christina Pratt, eds. 2006).

32. From 1973 to 2009, the state's total prison population increased by nearly 388%. As of January 2009, 2,618 women were incarcerated in New York's prisons – about 4.3% of the state's total prison population of just under 61,000. Figures derived from Daily Population Capacity Report, 01/01/09 09, NYS DOCS. Letter from NYS DOCS Director of Public Information (May 15, 2001) (on file with the Women in Prison Project, Correctional Association of New York). The increase in the prison population in New York is largely the result of the state's adoption in 1973 of the Rockefeller and Second Felony Offender laws which, until recent reforms, required judges to impose harsh mandatory minimum sentences on individuals convicted of drug offenses. For example, from 1973 to 2008, the number of women in New York's prison for drug crimes increased by 787%. New York's prison population has, however, dropped dramatically in the past decade: the total population dropped by more than 15,000 from its peak in 1999, a decrease of 21%; the women's population dropped by more than 1,400 since 1997, a decrease of 38%. Recent reforms to the drug laws have contributed to this decrease. For example, the number of drug offenders in New York State custody dropped from 17,106 in 2003 to 8,894 in 2010. Total prison population statistics: Letter from NYS DOCS Director of Public Information (May 15, 2001); *Table 4A: Crime by Predicate Felony Status by Gender; Under Custody Population NY DOCS Jan 1 2008*, NYS DOCS, prepared February 14, 2008 (on file with the Women in Prison Project, Correctional Association of New York). Female prison population statistics: NYSDOCS Admissions and Releases, January-October 2010 (Preliminary Data) and NYS DCJS Data Sheet 01/03/97, revised 02/18/97. Drug offender statistics: DOCS Drug Offenders by Race, 1986-2007, NYS DOCS (2008); statistics relayed by NYS DOCS by phone, October 27, 2010.

33. The total female prison population in New York rose from 384 in 1973 to 2,480 in 2010. State of New York Department of Correctional Services, Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2010, 2 (May 2010), *available at* http://www.docs.state.ny.us/Research/Reports/2010/UnderCustody_Report.pdf; Letter from NYS DOCS Director of Public Information (May 15, 2001) (on file with the Women in Prison Project, Correctional Association of New York).

34. This statement assumes that the rate of incarcerated women reporting intimate partner violence (75%) in Angela Browne's 1999 study at New York's Bedford Hills Correctional Facility was similar in 1973 and 2010. Applying the 75% rate, there were 288 intimate partner violence survivors in New York's prisons in 1973 and 1,860 in 2010. Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 Int'l J. L. & Psychiatry 301, 310–22 (1999); State of New York Department of Correctional Services, Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2010, 2 (May 2010), *available at* http://www.docs.state.ny.us/Research/Reports/2010/UnderCustody_Report.pdf; Letter from NYS DOCS Director of Public Information (May 15, 2001) (on file with the Women in Prison Project, Correctional Association of New York).

35. State of New York Department of Correctional Services, Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2010, 3 (May 2010), *available at* http://www.docs.state.ny.us/Research/Reports/2010/UnderCustody_Report.pdf; NYS Data Center, *2000 Census of population and housing, Age by Sex by Race and Hisp/Latino Ethnicity*, Section 3, http://www.census.gov/prod/cen2000/ (last visited May 26, 2011).

36. U.S. Census Bureau, *State & County Quick Facts: New York*, http://quickfacts.census.gov/qfd/states/36000.html (last visited July 29, 2010).

37. Compared to 28% of men. Lawrence A. Greenfield and Tracy L. Snell, Bureau of Justice Statistics, U.S. Department of Justice, Women Offenders (December 1999, rev. 10/3/00).

38. Transcript of Hearing on Domestic Violence, Convened by the Governor's Commission on Domestic Violence, the N.Y. State Division for Women, and the N.Y. Department of Correctional Services, Bedford Hills, New York, September 26, 1985, *available at* http://www.biscmi.org/wshh/dubow_transcript.pdf (last visited on January 16, 2011).

39. This is a goal that New York Governor Andrew Cuomo has repeatedly endorsed. *See* Executive Order No. 7, signed by Andrew M. Cuomo (February 9, 2011), *available at* http://www.governor.ny.gov/executiveorder/7; State of New York, 2011-2012 Executive Budget Briefing Book: Public Safety 63-67 (2011), *available at* http://publications.budget.state.ny.us/eBudget1112/fy1112littlebook/PublicSafety.pdf; Governor Andrew M. Cuomo, State of the State Address, Jan. 5, 2011, *available at* http://www.governor.ny.gov/sl2/stateofthestate2011transcript.

40. Reforms made to New York's drug sentencing statutes codified in sections of New York State's Penal Law and Criminal Procedure Law, including N.Y. Criminal Procedure Law §§ 216.05 and 440.46 and N.Y. Penal Law §§ 60.04, 70.70 and 70.71.

41. *See* N.Y. Penal Law § 70.02.

42. *See id.* § 70.00.

43. *Id.* § 70.00(3). For certain serious crimes judges are required to impose longer sentences. For example, a conviction of murder in the first degree carries a minimum sentence of 20 to 25 years or life in prison without parole; a conviction of aggravated murder carries a sentence of life in prison without parole; a conviction of attempted murder in the first degree or attempted aggravated murder carries a minimum sentence of 20 to 40 years. *Id*. § 70.00(3)(a)(i)(a) (2010). The drug law reforms of 2004 altered sentencing for A-I drug offenses. The determinate sentencing range for individuals convicted of an A-I drug offense with no prior felony convictions is 8 and 20 years; for individuals convicted of an A-I drug offense with a prior non-violent felony conviction, the range is 12 to 24 years; and for individuals convicted of an A-I drug offense with a prior violent felony conviction, the range is 15 to 30 years. *Id.* § 70.00 and Chapter 738 of the Laws of 2004.

44. N.Y. Penal Law §§ 70.02, 70.04, 70.08 (McKinney 2010); Telephone Interview with Robert Dennison, retired Chairman, State of New York Parole Board (Oct. 22, 2009); New York State Division of Criminal Justice Services, *Overview of Key Provisions of Chapter 1 of the Laws of 1998 Jenna's Law,* http://criminaljustice.state.ny.us/pio/jenna.htm (last visited Aug. 6, 2010).

45. *See, e.g.*, N.Y. Penal Law § 70.02(3), which details the mandatory prison terms required for certain violent felony offenses. *See* Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. Cin. L. Rev. 1851, 1851, 1954-1855 (1995).

46. *See*, *e.g.,* Correctional Association of New York, Stupid and Irrational and Barbarous: New York Judges Speak Against the Rockefeller Drug Laws (December 2001), *available at* http://www.correctionalassociation.org/publications/download/ppp/judgesreport.pdf.

47. Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. Cin. L. Rev. 1851, 1854-1855 (1995); *See* Erik Luna and Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo Law Review 1, 12 (2010)*;* Elizabeth Sheehy, *Battered Women and Mandatory Minimum Sentences*, 39 Osgoode Hall L.J. 529, 530 (2001).

48. This percentage excludes individuals who answered "I don't know" when asked the poll question. *See* Yasamin Miller, Cornell University Survey Research Institute, Empire State Poll 2010, Report 1: Introduction and Methodology 3 (2010), *available at* http://www.sri.cornell.edu/sri/files/esp/2010/Report%201%20-%202010%20-%20Introduction%20and%20Methodology.pdf.

49. Interview with Kate, Survivor Defendant, in Ithaca, N.Y. (Nov. 19, 2009 and Feb. 2, 2011); Transcript of Kate's trial (on file with authors); Memorandum from Kate's Defense Counsel to Marge Booker (Jan. 20, 1994) (on file with authors); Letter from Kate to Mrs. Turner (no date) (on file with authors).

50. The 1995 Sentencing Reform Act eliminated indeterminate sentencing and parole for people convicted of second-time violent felony offenses. The 1998 Sentencing Reform Act, Jenna's Law, expanded on the 1995 reforms to require determinate sentences and the 85% rule for all first-time violent felony offenders. Jenna's Law is codified as N.Y. Penal Law § 70.02 (1998) (2010). The exception to Jenna's Law carved out for domestic violence survivors is N.Y. Penal Law § 60.12 (2010). *See also* Spiros A. Tsimbinos, New York's "Jenna's Law": Text and Analysis 3 (Matthew Bender 1998).

51. NYS Department of Criminal Justice Services, *Overview of Key Provisions of Chapter 1 of the Laws of 1998 – Jenna's Law*, http://criminaljustice.state.ny.us/pio/jenna.htm (last visited May 26, 2011); Katherine J. Rosich & Kamala Mallik Kane*, Truth in Sentencing and State Sentencing Practices,* NIJ Journal (Issue No. 252), Pub. No. NCJ- 208706, *available at* http://www.ncjrs.gov/pdffiles1/jr000252e.pdf.

52. N.Y. Penal Law § 60.12 (2010). The court may impose an indeterminate sentence if, after a hearing, the defendant has proved the following: "a) [she] was the victim of physical, sexual or psychological abuse by the victim or intended victim of [her] offense; b) such abuse was a factor in causing the defendant to commit [the] offense; and c) the victim or intended victim [of the offense] was a member of the same family or household as the defendant . . . ." *Id*.

53. New York State Division of Criminal Justice Services, *Overview of Key Provisions of Chapter 1 of the Laws of 1998 Jenna's Law*, http://criminaljustice.state.ny.us/pio/jenna.htm (last visited May 26, 2011).

54. A person can be convicted of Murder in the second degree in New York State if: "Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants . . . ." N.Y. Penal Law § 125.25.

55. In a very limited number of instances, New York law permits a judge to sentence individuals convicted of certain D- and E-level violent felony offenses to a non-incarcerative sentence. *See* N.Y. Penal Law §§ 70.02(2)(c) and 70.02(4)(a).

56. *See* The New York City ATI/Reentry Coalition Services Report 2010 (2010), *available at* http://www.ati-ny.org/files/ATI-final.pdf (last visited Jan. 9, 2010); Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

57. New York State Commission on Sentencing Reform, The Future of Sentencing in New York State: A Preliminary Proposal for Reform 18 & n.18 (October 15, 2007) ("The inmate is a man convicted of manslaughter in the first degree for shooting his father in the head following an argument. He received an indeterminate sentence of 6 to 12 years, a sentence that is actually longer than the minimum determinate term for the crime (5 years). Notably, the Board of Parole has twice denied this inmate release."), *available at* http://www.criminaljustice.state.ny.us/legalservices/sentencingreform/2007prelimsentencingreformrpt.pdf.

58. *Id*. at 18.

59. *See* Citizens Against Recidivism, Inc., *Parole Statistics*, http://www.citizensinc.org/parolestatistics.html (last visited Aug. 6, 2010) (citing State of N.Y. Dep't of Correctional Services, Under Custody Report: Profile of Inmate Population Under Custody on Jan. 1, 2009, *available at* http://www.docs.state.ny.us/Research/Reports/2009/UnderCustody_Report_2009.pdf); Graziano v. Pataki, 2007 WL 4302483, at *2 (S.D.N.Y. Dec. 5, 2007).

60. New York State Commission on Sentencing Reform, The Future of Sentencing in New York State: A Preliminary Proposal for Reform 18 (October 15, 2007).

61. New York State Commission on Sentencing Reform, The Future of Sentencing in New York State: Recommendations for Reform 60 (January 30, 2009).

62. The New York State Coalition Against Domestic Violence (NYSCADV, http://www.nyscadv.org) led a coalition of organizations in the successful effort to pass the "Expanded Access Law" in 2008 (Chapter 326 of the Laws of 2008). This law amended sections of the Family Court Act, Criminal Procedure Law and Judiciary Law to include in the definition of "members of the same family or household" indi-

viduals in "intimate relationships" regardless of whether those persons live or had lived together. These amendments are important because the definition of "members of the same family or household" is used in many circumstances to determine which individuals are considered domestic violence victims and therefore have the right to various protections in the law, including accessing civil orders of protection, certain domestic violence-specific parts of the criminal court system, certain police responses, and mitigated sentencing under the Jenna's Law domestic violence exception. *See* Elizabeth Bliss, New York State Coalition Against Domestic Violence (NYSCADV) Technical Assistance Frameworks: Expanded Access (no date).

63. Interview with Victoria, Strength of a Woman, at 11 (no date) (transcript on file with authors).

64. *See* The New York City ATI/Reentry Coalition Services Report 2010 (2010), *available at* http://www.ati-ny.org/files/ATI-final.pdf (last visited Jan. 9, 2010); Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

65. The New York City ATI/Reentry Coalition Services Report 2010 (2010), *available at* http://www.ati-ny.org/files/ATI-final.pdf (last visited Jan. 9, 2010).

66. National Institute of Corrections, *Overview of New York's Correctional System*, http://nicic.gov/StateStats/?State=NY (last visited Mar. 29, 2011).

67. *See* The New York City ATI/Reentry Coalition Services Report 2010 (2010), *available at* http://www.ati-ny.org/files/ATI-final.pdf (last visited Jan. 9, 2010). This report was produced by the New York City ATI/Reentry Coalition which is a coalition of organizations coordinated by the Legal Action Center that "provides alternatives to incarceration for men, women, and youth who are charged with a crime and also serves people after they have completed their sentence and are returning to the community." *Id*. A five-year evaluation of the Kings County Drug Treatment Alternative to Prison (DTAP) Program, for example, found that participants were 67% less likely to recidivate two years after leaving the program than non-participants. The study also found that DTAP graduates were three and a half times more likely to be employed than they were before arrest. DTAP achieved these results at about half the average cost of incarceration. The National Center on Addiction and Substance Abuse at Columbia University, CASA, Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-To-Prison (DTAP) Program (March 2003).

68. *Table 1B, Crimes by Predicate Felony Status by Gender; 2009 New Court Commitments to NYSDOCS*, NYS DOCS, prepared May 29, 2010 (on file with the Women in Prison Project, Correctional Association of New York). As of April 1, 2010, 79% of women in New York State prisons for violent felony convictions had never been convicted of a felony prior to their current offense. *Table 3B, Crime by Predicate Felony Status by Gender; Under Custody at NYS DOCS as of April 1, 2010*, NYS DOCS, prepared May 25, 2010 (on file with the Women in Prison Project, Correctional Association of New York).

69. Although it is unclear how many of the 38 women identified in this statistic were incarcerated for protecting themselves from an abuser, given the rates of intimate partner violence among women in prison, it is likely that at least some of the 38 women fit into that category. *Testimony on Behalf of the Alliance for Rational Parole Policies*, Testimony Before the New York State Senate Standing Committee on Crime Victims, Crime and Corrections, submitted by the Center for Alternative Sentencing and Employment Services, Center for Community Alternatives, Coalition for Parole Restoration, College and Community Fellowship, The College Initiative, Correctional Association of New York, Exodus Transitional Community, Family Justice, Fortune Society, Interfaith Coalition of Advocates for Reentry and Employment, Legal Action Center, The Osborne Association and Women's Prison Association (January 15, 2008), at 2, *available at* http://www.wpaonline.org/pdf/Alliance%20for%20Rational%20Parole%20Policies%20Testimony.pdf.

70. Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

71. *See, e.g*., Center for Alternative Sentencing and Employment Services (CASES), http://www.cases.org/ (last visited May 26, 2011); Center for Community Alternatives, http://www.communityalternatives.org/ (last visited May 26, 2011); Fortune Society, http://fortunesociety.org/ (last visited May 26, 2011); Greenhope Services for Women, http://www.greenhope.org/ (last visited May 26, 2011); Osborne Association, http://www.osborneny.org (last visited May 26, 2011); Women's Prison Association, http://www.wpaonline.org/ (last visited May 26, 2011).

72. This program is STEPS to End Family Violence, http://www.stepstoendfamilyviolence.org (last visited January 7, 2011).

73. *See* STEPS to End Family Violence, http://www.stepstoendfamilyviolence.org (last visited January 7, 2011).

74. Telephone Interview with Sr. Mary Nerney, Founder of STEPS to End Family Violence (Oct. 29, 2009); Telephone Interview with Cathy Selin, Senior Attorney, STEPS to End Family Violence (Nov. 5, 2009).

75. The New York City ATI/Reentry Coalition Services Report 2010 (2010), *available at* http://www.ati-ny.org/files/ATI-final.pdf (last visited Jan. 9, 2010); National Institute of Corrections, *Overview of New York's Correctional System*, http://nicic.gov/StateStats/?State=NY (last visited Mar. 29, 2011).

76. *See Testimony on Behalf of the Alliance for Rational Parole Policies*, Testimony Before the New York State Senate Standing Committee on Crime Victims, Crime and Corrections, submitted by the Center for Alternative Sentencing and Employment Services, Center for Community Alternatives, Coalition for Parole Restoration, College and Community Fellowship, The College Initiative, Correctional Association of New York, Exodus Transitional Community, Family Justice, Fortune Society, Interfaith Coalition of Advocates for Reentry and Employment, Legal Action Center, The Osborne Association and Women's Prison Association (January 15, 2008), at 2 (noting that none of the 38 women convicted for murder and released between 1985 and 2003 in New York State returned to prison for a new commitment within a 36-month follow-up period), *available at* http://www.wpaonline.org/pdf/Alliance%20for%20Rational%20Parole%20Policies%20Testimony.pdf; Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

77. Interview with Natalie, Survivor-Defendant, in New York., N.Y. (Mar. 19, 2010).

78. N.Y. Correction Law § 803.

79. N.Y. Penal Law § 70.40(1)(a)(ii); N.Y. Correction Law §§ 803, 804, 805 (2010) (1987).

80. N.Y. Exec. Law § 259(c). *See* TODD R. CLEAR ET AL., AMERICAN CORRECTIONS (8th ed. 2008) (1997).

81. *Id*. § 259-i[2][c][a] (2010) (2003).

82. *See* N.Y. Exec Law § 259-c[9] (2010) (2008).

83. *Testimony on Behalf of the Alliance for Rational Parole Policies*, Testimony Before the New York State Senate Standing Committee on Crime Victims, Crime and Corrections, submitted by the Center for Alternative Sentencing and Employment Services, Center for Community Alternatives, Coalition for Parole Restoration, College and Community Fellowship, The College Initiative, Correctional Association of New York, Exodus Transitional Community, Family Justice, Fortune Society, Interfaith Coalition of Advocates for Reentry and Employment, Legal Action Center, The Osborne Association and Women's Prison Association (January 15, 2008) at 2, *available at* http://www.wpaonline.org/pdf/Alliance%20for%20Rational%20Parole%20Policies%20Testimony.pdf; STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, PAROLE BOARD DISPOSITIONS AT DOCS FACILITIES: CALENDAR YEAR 2002.

84. For example, an article in *Atticus*, a publication of the New York State Association of Criminal Defense Lawyers, *NYSACDL Supports Call for Parole Reform*, reports: "According to the Division of Parole, of the 784 people serving life sentences for A-1 violent felonies who were released on parole during 2006, 2007, 2008 and 2009 the recidivism rate, measured by return to DOCS for a new felony conviction, was 1/4 of one percent." Alan Rosenthal et al., Center for Community Alternatives, *NYSACDL Supports Call for Parole Reform*, 23 ATTICUS 27 (Winter 2011), *available at* http://www.communityalternatives.org/pdf/ATTICUS-ParoleReform.pdf. Of individuals serving time for murder in NYS DOCS custody and released in 2006, 0.7% returned to DOCS custody for a new crime within three years of their release compared to a 11% return rate for all individuals released from DOCS custody during that time frame. STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, 2006 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 11, 37 (2006), *available at* http://www.docs.state.ny.us/Research/Reports/2011/2006_releases_3yr_out.pdf.

85. N.Y. Exec. Law § 259-b(1).

86. Trymaine Lee, *Convicted of Murder as Teenager and Paroled at 41*, N.Y. TIMES, June 4, 2010, at MB1 (quoting Robert Dennison, retired Chairman, State of New York Parole Board).

87. *Id*.

88. *Id*. In 2009, 8% of parole-eligible individuals serving time for A-1 violent felony offenses were granted release on their initial appearance. Alan Rosenthal et al., Center for Community Alternatives, *NYSACDL Supports Call for Parole Reform*, 23 ATTICUS 27 (Winter 2011) (citing statistics from the New York State Division of Parole Office of Policy Analysis, 2008), *available at* http://www.communityalternatives.org/pdf/ATTICUS-ParoleReform.pdf.

89. *See* Graziano v. Pataki, 2007 WL 4302483, at *2 (S.D.N.Y. Dec. 5, 2007). In December 2010, the district court dismissed the case, and the plaintiffs intend to appeal. *See Graziano v. Pataki Update: December 10th 2010*, PAROLE NEWS, Dec. 10, 2010, http://parolenews.blogspot.com/2010/12/graziano-v-pataki-update-december-10th.html (last visited Jan. 11, 2011).

90. N.Y. Exec. Law 259-i(c)(A).

91. *See id*. § 259-I [2][c][a] (2010) (2003). Telephone Interview with Robert Dennison, retired Chairman, State of New York Parole Board (Oct. 22, 2009).

92. Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011); Telephone Interview with Robert Dennison, retired Chairman, State of New York Parole Board (Oct. 22, 2009).

93. *See* N.Y. Criminal Procedure Law § 390.60. Training material produced by Anthony J. Annucci, Executive Deputy Commissioner and Counsel for the New York State Department of Correctional Services, states: "The single most important document is the pre-sentence report. It is of enormous importance not only in making security and classification decisions, but also in terms of making program assignments. This report follows the inmate throughout his incarceration. A computer generated summary of the pre-sentence is also entered into the Department's computer for each inmate. Hence, if a pre-sentence report contains inaccurate information, it behooves the affected party to make the appropriate motion to correct the report before the defendant enters the prison system." Quoted in Alan Rosenthal, Center for Community Alternatives, *Sentencing Tips for New York Lawyers: Obtain a Copy of the Pre-sentence Report*, (no date), http://www.communityalternatives.org/publications/obtainACopy.html (last visited May 27, 2011).

94. Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

95. *Id*; Telephone Interview with Robert Dennison, retired Chairman, State of New York Parole Board (Oct. 22, 2009) .

96. N.Y. Exec. Law § 259-i[4] (2010) (2003); McKinney's Consolidated Laws of New York § 7801 et seq.; Garofolo v. Rosa, 891 N.Y.S.2d 899, 974-975 (N.Y. Sup. 2009); Jennifer S. Bales, *Equal Protection and the Use of Protest Letters in Parole Proceedings, A Particular Dilemma for Battered Women Inmates*, 27 SETON HALL L. REV. 33 (1996).

97. Garofolo v. Rosa, 891 N.Y.S.2d 899, 974-975 (N.Y. Sup. 2009); Telephone Interview with Robert Dennison, retired Chairman, State of New York Parole Board (Oct. 22, 2009).

98. *See, e.g.*, R.B. v. State, Executive Dept., Div. of Parole, 892 N.Y.S.2d 855, 857 (2010); Richard v. Travis, 732 N.Y.S.2d 465, 466 (N.Y. App. Div. 2001).

99. *See, e.g.*, Lichtel v. Travis, 731 N.Y.S.2d 533, 535 (N.Y. Sup. App. Div. 2001) ("Notably, the appropriate remedy when a prisoner successfully challenges the denial of an application for parole is remittal for a new hearing.").

100. Trymaine Lee, *Convicted of Murder as Teenager and Paroled at 41*, N.Y. Times, June 4, 2010, at MB1.

101. N.Y. Correction Law § 803.

102. *Id*.

103. N.Y. Correction Law § 803-b.

104. N.Y. Correction Law § 803(1)(d)(iii).

105. A "Limited Credit Time Allowance" requires incarcerated people to achieve more difficult objectives than merit time, such as completing two semesters of college, successfully participating in a State Department of Labor apprenticeship or working as an inmate hospice aid for two years. *See* N.Y. Correction Law § 803-b(c). In addition, such programs exist only in a very limited number of prisons and often have very few slots available.

106. Executive Order No. 5.1, signed by George E. Pataki (October 13, 1996).

107. N.Y. Correction Law § 851.

108. The work release statute requires that the abuser have a "child in common" with the survivor or be a member of the inmate's "immediate family" as that term is defined in N.Y. Penal Law 120.40: "spouse, former spouse, parent, child, sibling, or any other person who regularly resides or has regularly resided in the household of a person." N.Y. Correction Law § 851.

109. Authors cannot determine exactly how many of the 25 applicants were eligible for the domestic violence work release exception without a thorough review of case files and applications. Given the prevalence of domestic abuse histories among incarcerated women, however, there are likely more than five individuals who fit the statutory test for the exception from 2002 to 2008. Statistics relayed by Office of Temporary Release, NYS DOCS by phone, June 6, 2008.

110. Interviews with Katarina, Survivor-Defendant, in New York, N.Y. (Feb. 26, 2010 and April 14, 2011).

111. "The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons." N.Y. Const. art. IV, § 4.

112. Email from Director of Media Relations and Public Affairs, New York State Division of Parole sent on January 23, 2009 (on file with the Women in Prison Project, Correctional Association of New York).

113. For example, incarcerated women are separated from children, risk potential loss of parental rights, encounter substandard medical and mental health services, have few opportunities to participate in effective rehabilitative programs, face possible sexual assault from staff, and live with daily degradation (from being locked in cells and shackled for long periods of time to receiving inadequate sanitary napkins and toilet paper supplies). For incarcerated survivors of violence, the prison environment often mirrors and reinforces the skewed power dynamic experienced in abusive relationships on the outside. *See, e.g.,* Women in Prison Project of the Correctional Association of New York, Report on Mental Health Programs and Services at Bedford Hills Correctional Facility (September 2007); Women in Prison Project of the Correctional Association of New York, Report on Conditions of Confinement at Bedford Hills Correctional Facility (August 2007); Women in Prison Project of the Correctional Association of New York, Report on Conditions of Confinement at Albion Correctional Facility (November 2006).

114. *See* National Clearinghouse for the Defense of Battered Women, The Impact of Arrests and Convictions on Battered Women (September 2008), *available at* http://www.biscmi.org/wshh/NCDBW_%20Impact_of_Arrest.pdf.

115. Federal law prohibits people with certain drug and sex offense-related criminal convictions from living in public housing. *See* Legal Action Center, How to Get Section 8 or Public Housing Even with a Criminal Record: A Guide for New York City Housing Authority Applicants and their Advocates (2006), *available at* http://www.hirenetwork.org/pdfs/How_to_Get_Section_8_or_Public_Housing.pdf; Legal Action Center, Setting the Record Straight: What Defense Attorneys Need to Know About the Civil Consequences of Client Criminal Records (2001), *available at* http://www.hirenetwork.org/pdfs/setting_the_record_straight.pdf.

116. For example, New York City Housing Authority (NYCHA) regulations bar individuals with felony convictions from public housing eligibility for five to six years depending on the type of conviction, unless the disqualified individual presents sufficient evidence of "rehabilitation," which can be difficult, particularly for people convicted of violent crimes. Legal Action Center, How to Get Section 8 or Public Housing Even with a Criminal Record: A Guide for New York City Housing Authority Applicants and their Advocates 2, 12-17 (2006), *available at* http://www.hirenetwork.org/pdfs/How_to_Get_Section_8_or_Public_Housing.pdf.

117. *See* Coalition for Criminal Justice Reform, Blueprint for Criminal Justice Reform: Bringing Justice to Scale 22-23 (September 2007), *available at* http://lac.org/doc_library/lac/publications/Blueprint_Final_9-17-07.pdf; National Housing Law Project, An Affordable Home on Re-entry: Federally Assisted Housing and Previously Incarcerated Individuals (2008), *available at* http://nhlp.org/guidebook (click on the electronically zipped guide).

118. *See* Coalition for Criminal Justice Reform, Blueprint for Criminal Justice Reform: Bringing Justice to Scale 22-23 (September 2007), *available at* http://lac.org/doc_library/lac/publications/Blueprint_Final_9-17-07.pdf; National Housing Law Project, An Affordable Home on Re-entry: Federally Assisted Housing and Previously Incarcerated Individuals (2008), *available at* http://nhlp.

org/guidebook (click on the electronically zipped guide).

119. Legal Action Center, After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People with Criminal Records (2004), *available at* http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

120. N.Y. Correction Law § 752. In addition, tax credits and bonding programs exist for employers who hire individuals with criminal records. National HIRE Network, Legal Action Center, *Protecting Yourself When Using Criminal Background Checks*, http://www.hirenetwork.org/crim_back_check.html (last visited April 13, 2011).

121. *See* The Independent Committee on Reentry and Employment, Report and Recommendations to New York State on Enhancing Employment Opportunities for Formerly Incarcerated People (2006), *available at* http://www.doe.org/criminalJustice/committeeReport.pdf.

122. Nationally, about 40% of women were employed full-time before arrest, compared with 60% of men. About 37% of women had an income of less than $600 in the month before arrest, compared with 28% of men. Lawrence A. Greenfield and Tracy L. Snell, Bureau of Justice Statistics, U.S. Department of Justice, Women Offenders (December 1999, rev. 10/3/00). Nearly 54% of women prisoners do not have a high school diploma, compared with nearly 46% of men. State of New York Department of Correctional Services, Hub System: Profile of Inmate Population Under Custody on January 1, 2008, 51 (March 2008), *available at* http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf.

123. Formerly incarcerated women also face considerable time limitations resulting from meeting immediate life and reentry needs and interacting with multiple service systems such as child welfare, public assistance, health and parole. *See* Dina R. Rose et al., Women's Prison Association, Women, Re-entry and Everyday Life: Time to Work? (March 2008).

124. In certain circumstances, it is possible to receive public benefits for an extended period of time, beyond the five-year cut-off. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law No. 104-193 (1996). Federal law also imposes a lifetime ban from receiving federal public assistance upon people convicted of drug-related felonies but allows states to opt out of this provision. New York opted out of this ban. *See* Legal Action Center, After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People With Criminal Records (2004), *available at* http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

125. Nearly 30% of incarcerated women nationwide were on public assistance before arrest, compared to less than 8% of men. Lawrence A. Greenfield and Tracy L. Snell, Bureau of Justice Statistics, U.S. Department of Justice, Women Offenders (December 1999, rev. 10/3/00).

126. Federal law bars individuals who were receiving federal financial aid for higher education at the time they were convicted of a drug offense from receiving higher education grants, loans, or work assistance for a period of time. Diana Brazzelle et al., The Urban Institute, From the Classroom to the Community: Exploring the Role of Education During Incarceration and Reentry 39 (2009) *available at* http://www.wpaonline.org/pdf/Women%20Reentry%20and%20Everyday%20Life%20-%20Final%20Report.pdf.

127. *Id*.

128. Marsha Weissman et al., Center for Community Alternatives, The Use of Criminal History Records in College Admissions Reconsidered (Nov. 2010), *available at* http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf

129. Diana Brazzelle et al., The Urban Institute, From the Classroom to the Community: Exploring the Role of Education During Incarceration and Reentry 39 (2009), *available at* http://www.wpaonline.org/pdf/Women%20Reentry%20and%20Everyday%20Life%20-%20Final%20Report.pdf; Correctional Association of New York, Education from the Inside Out: The Multiple Benefits of College Programs in Prison (January 2009); Daniel Karpowitz and Max Kenner, Education as Crime Prevention: The Case for Reinstating Pell Grant Eligibility for the Incarcerated (n.d.), *available at* http://www.bard.edu/bpi/pdfs/crime_report.pdf.

130. Diana Brazzelle et al., The Urban Institute, From the Classroom to the Community: Exploring the Role of Education During Incarceration and Reentry 39 (2009), *available at* http://www.wpaonline.org/pdf/Women%20Reentry%20and%20Everyday%20Life%20-%20Final%20Report.pdf; Correctional Association of New York, Education from the Inside Out: The Multiple Benefits of College Programs in Prison (January 2009); Daniel Karpowitz and Max Kenner, Education as Crime Prevention: The Case for Reinstating Pell Grant Eligibility for the Incarcerated (n.d.), *available at* http://www.bard.edu/bpi/pdfs/crime_report.pdf.

131. *See* Julie Kowitz Margolies & Tamar Kraft-Stolar, Correctional Association of New York, When "Free" Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State (2006), *available at* http://www.correctionalassociation.org/publications/download/wipp/reports/When_Free_Rpt_Feb_2006.pdf.

132. 2010 New York Laws, Chapter 113. *See* Rachel Roth, *Prison Shouldn't Be a Bar to Motherhood*, Women's e-News, July 25, 2010, *available at* http://www.womensenews.org/story/incarceration/100722/prison-shouldnt-be-bar-motherhood; Tamar Kraft-Stolar, *A Fair Chance for Families Separated by Prison*, North Star Fund Blog, June 30, 2010, http://northstarfund.org/blog/2010/06/a-fair-chance-for-families-separated-by-prison.php (last visited April 14, 2010). Because incarcerated mothers are more likely to report having children in foster care than incarcerated fathers, these laws disproportionately affect women. Nearly 11% of mothers in state prison nationwide report that their children are in foster homes or agencies, compared with just over 2% of fathers. More than 88% of men in state prison report that their children are living with their mothers. In comparison, 37% of incarcerated mothers report that their children are living with their fathers. Lauren E. Glaze and Laura M. Maruschak, Bureau of Justice Statistics, U.S. Department of Justice, Parents in Prison and Their Minor Children 16 (Bureau of Justice Statistics Special Report, August 2008, rev 1/8/09).

133. National Clearinghouse for the Defense of Battered Women, The Impact of Arrests and Convictions on Battered Women 2-3 (September 2008), *available at* http://www.biscmi.org/wshh/NCDBW_%20Impact_of_Arrest.pdf; Elizabeth M. Schneider, Battered

Women & Feminist Lawmaking 153 (2000) ("A woman with children who talks about her experience of domestic violence in any context that can bring the legal or child-protective process to bear on her life may fear, with good reason, that she will be blamed . . . . Battered women face serious consequences for their behavior; they may be charged with criminal conduct for failure to protect, held liable for abuse and neglect, have their parental rights terminated, or face criminal responsibility . . . ."); Linda Quigley, *The Intersection between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children*, 13 Wm. and Mary J. of Women and L. 867, 867-886 (2007); Telephone interview with Sister Mary Nerney, Founder of STEPS to End Family Violence, and Jesenia Santana, Legal Services Coordinator, STEPS to End Family Violence (May 13, 2011).

134. An estimated 5.3 million people – including almost 677,000 women – in the United States have lost the right to vote because of a felony conviction. The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (November 2006), http://archive.fairvote.org/righttovote/Felony%20Dis%20Laws%20in%20the%20US.pdf (last visited March 2011).

135. Legal Action Center, After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People With Criminal Records (2004), *available at* http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

136. "Researchers found in 2005 that nearly 30% of persons with prior criminal convictions incorrectly believed they were ineligible to vote." Nicole D. Porter, The Sentencing Project, Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010, 21 (October 2010), *available at* http://www.sentencingproject.org/doc/publications/publications/vr_ExpandingtheVoteFinalAddendum.pdf.

137. *See* Alec Ewald, Demos: A Network for Ideas and Action, Punishing at the Polls: The Case Against Disenfranchising Citizens With Felony Convictions (September 2003), *available at* http://www.prisonpolicy.org/scans/demos/punishing_at_the_polls.pdf; Human Rights Watch and The Sentencing Project, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States (October 1998), *available at* http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf.

138. *See* C. B. Forrest & B. Starfield, *The Effect of First-Contact Care with Primary Care Clinicians on Ambulatory Healthcare Expenditures*, 43 Journal of Family Practice 40-48 (1996), *cited in* Re-Entry Policy Council, Council of State Governments, *Chapter 35: Physical Health Care System*, Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community (2003), *available at* http://reentry.microportals.net/Report/PartIII/PolicyStatement35; American College of Physicians-American Society of Internal Medicine, *No Health Insurance? It's Enough to Make You Sick - Uninsured Women at Risk*, Third White Paper, Health Issues of Uninsured Americans Series, (2001).

139. 2007 New York Laws, Chapter 355.

140. An American Journal of Public Health study, for example, confirmed that access to post-release health insurance is "associated with lower re-arrest and drug use." Nicholas Freudenberg et al., *Coming Home From Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families*, 95 American Journal of Public Health 1725 (October 2005).

141. 12.2% of women and 6% of men in New York's prisons are HIV positive. The rate of women in New York's prisons with HIV is 80 times higher than the rate in the general public (0.15%). Laura M. Maruschak, Bureau of Justice Statistics, U.S. Department of Justice, HIV in Prisons, 2006, Tables 1& 2, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp06.pdf; U.S. Census Bureau, *Table 1: Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2005* (2005); U.S. Department of Health and Human Services, National Institute of Allergy and Infectious Diseases (NIAID), HIV Infection and AIDS: An Overview, Table 1 (March 2005). An estimated 22.1% of women and 12.8% of men in New York's prisons have hepatitis C (HCV). The rate of HCV infection among New York's women prisoners is more than 14 times higher than the HCV infection rate in the general public (1.6%). Prison Visiting Project of the Correctional Association of New York, Healthcare in New York State Prisons, 2004-2007 (January 2009), *available at* http://www.correctionalassociation.org/publications/download/pvp/issue_reports/Healthcare_Report_2004-07.pdf; Gregory L. Armstrong et al., *The Prevalence of Hepatitis C Virus Infection in the United States, 1999 through 2002*, 144 Annals of Internal Medicine 705, 707 (May 16, 2006).

142. *See* statistics cited in note 141 *supra*. *See also* Prison Visiting Project of the Correctional Association of New York, Healthcare in New York State Prisons, 2004-2007 (January 2009), *available at* http://www.correctionalassociation.org/publications/download/pvp/issue_reports/Healthcare_Report_2004-07.pdf.

143. Email from Director of Media Relations and Public Affairs, New York State Division of Parole sent on January 23, 2009 (on file with the Women in Prison Project, Correctional Association of New York).

144. Interview with Desiree, Strength of a Woman (no date) (transcript on file with authors).

145. For example, the United States has ratified, and therefore is a party to, the International Covenant on Civil and Political Rights. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, arts. 2, 14, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]. It has signed but not ratified the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 1, U.N. Doc. A/Res/34/180 (Dec. 18, 1979) [hereinafter CEDAW]. However, as a signatory to the latter convention, the United States is obligated to refrain from acts that would undermine the treaty's object and purpose. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

146. *See*, *e.g.*, ICCPR, art. 50; International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

147. *See* CEDAW, art. 1; Committee on the Elimination of all forms of Discrimination Against Women, G.A. Res. 34/180, Gen. Rec. No. 19 (Dec. 18, 1979) [hereinafter CEDAW Committee, General Recommendation No. 19 – Violence against Women] ; Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104 (I) (1993) [hereinafter Declaration on the Elimination of Violence Against Women]. In elaborating upon States' obligations to combat gender-based violence, the former UN Special Rapporteur on Violence

Against Women, Dr. Yakin Erturk, explained that States must act with due diligence to prevent violence against women, including violence that is perpetrated by private actors. The Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Erturk, *Report on The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 19, *delivered to the Economic and Social Council Commission on Human Right*s, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006). *See also* CEDAW Committee, General Recommendation No. 19 – Violence against Women, ¶ 9; Declaration on the Elimination of Violence Against Women, art. 4(c).

148. *See*, e.g., ICCPR, arts. 2, 14; CEDAW, arts. 1, 2, 15.

149. CEDAW Committee, General Recommendation No. 19 – Violence against Women, ¶¶ 1, 7.

150. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Yatkin Erturk*, Addendum: Mission to Tajikistan, Apr. 29, 2009, UN Doc. A/HRC/11/6/Add.2, ¶ 37. In her report, the Special Rapporteur called upon the state party under investigation to "[r]eview sentences against women detainees who murdered their partners because of domestic violence, taking into account the mitigating circumstances around their crime." *Id.* ¶ 84.

151. Intensification of Efforts to Eliminate All Forms of Violence Against Women, GA Res. 61/143, Jan. 30, 2007, UN Doc. A/RES/61/143.

152. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), adopted by GA Res. 65/229, Mar. 16, 2011, UN Doc. A/RES/65/229.

153. *Id*. at Rule 9.

154. *Id*. at Rule 57 ("Gender-specific options for diversionary measures and pre-trial and sentencing alternatives shall be developed within Member States' legal systems, taking into account of the history of victimization of many women offenders and their caretaking responsibilities.").

155. *Id*. at Rule 60 ("Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counseling for victims of domestic violence and sexual abuse . . . .").

156. United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), adopted by GA Res. 45/110, Dec. 14, 1990, UN Doc. A/RES/45/110, Rule 8.1.

157. New York State Governor Andrew Cuomo has repeatedly endorsed the need to downsize the state's prison system. *See* Executive Order No. 7, signed by Andrew M. Cuomo (February 9, 2011), *available at* http://www.governor.ny.gov/executiveorder/7; STATE OF NEW YORK, 2011-2012 EXECUTIVE BUDGET BRIEFING BOOK: PUBLIC SAFETY 63-67 (2011), *available at* http://publications.budget.state.ny.us/eBudget1112/fy1112littlebook/PublicSafety.pdf; Governor Andrew M. Cuomo, State of the State Address, Jan. 5, 2011, *available at* http://www.governor.ny.gov/sl2/stateofthestate2011transcript.

158. District Attorneys' offices in other parts of the United States have adopted some of the policies in this recommendation through specific programs designed to respond to survivor-defendants. *See, e.g*., MARY ASMUS, AT A CROSSROADS: DEVELOPING DULUTH'S PROSECUTION RESPONSE TO BATTERED WOMEN WHO FIGHT BACK (2004, 2007) (discussing program developed by prosecutors in Duluth, Minnesota in which defendants who have a documented history of abuse and meet certain other criteria are eligible to have their prosecution deferred and charges ultimately dropped upon completion of all of the terms of the deferral agreement), *available at* http://www.bwjp.org/files/bwjp/articles/At%20A%20Crossroads_part1.pdf. *See also* JEFFREY P. GREIPP ET AL., AEQUITAS: THE PROSECUTOR'S RESOURCE ON VIOLENCE AGAINST WOMEN, INTIMATE PARTNER VIOLENCE VICTIMS CHARGED WITH CRIMES: JUSTICE AND ACCOUNTABILITY FOR VICTIMS OF BATTERING WHO USE FORCE AGAINST THEIR BATTERERS (2010) (arguing that prosecutors should conduct contextualized evaluation and analysis of cases involving survivor-defendants and consider carefully whether the interests of justice support the prosecutor's use of discretion to dismiss the case or explore alternative dispositions), *available at* http://www.aequitasresource.org/Intimate_Partner_Violence.pdf.