

NOTES

CRIMINALIZING ABUSE: SHORTCOMINGS OF THE DVSJA ON BLACK WOMAN SURVIVORSHIP

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Commentators posit that reducing domestic abuse requires an increase in prosecutions and a decrease in criminal reform efforts. The “abuser” is as set a role as the “sympathetic victim,” with little room to examine how both may exist simultaneously within an individual. A deeper look into what occurs for survivors reveals that legal discourse often overlooks and scrutinizes Black women’s abuse, particularly with Black women who exist within the same “abused” and “abuser” realm.

The Domestic Violence Survivors Justice Act (DVSJA) aimed to help survivors categorized as both “perpetrator” and “victim.” The law’s harsh requirements leave much to be desired. This Note analyzes the limitations of the DVSJA for Black women survivors. It contextualizes historical and modern biases, investigates how abuse affects Black women uniquely, and proposes how legislators can improve the DVSJA for survivors in New York and across the country.

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If anyone should ask a Negro woman in America what has been her greatest achievement, her honest answer would be: "I survived!"

— Rev. Dr. Pauli Murray.¹

INTRODUCTION

Existing literature does little to address the unique victimization of Black women in the law. Studies looking through a racial lens may ignore Black women by failing to address gender.² Alternatively, gender analysis may center around issues specific to white women.³ White feminist scholars promote carceral feminism, a “neoliberal law-and-order agenda pursued by a coalition of secular anti-prostitution feminists and white evangelicals.”⁴ Carceral Feminism focuses on white womanhood and harms marginalized communities, actively pushing Black women into

1. Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. & Lab., 91st Cong. 335 (1970) (statement of Rev. Dr. Pauli Murray, Professor of American Studies, Brandeis University).

2. See Stewart M. Coles & Josh Pasek, Intersectional Invisibility Revisited: How Group Prototypes Lead to the Erasure and Exclusion of Black Women, 6 *Translational Issues Psych. Sci.* 314, 315 (2020) (“Existing conceptualizations of intersectional invisibility identify its source as a dual lack of recognition of Black women as women and as Black people—that is, intersectional invisibility occurs because the prototypical woman is a White woman and the prototypical Black person is a Black man.”). In cases involving domestic violence and criminal culpability, readers may discern the gender of the defendant, but neither the opinion, nor the court itself, may reveal race. See, e.g., *People v. T.P.*, 188 N.Y.S.3d 842, 843 (App. Div. 2023). The race of the woman was not mentioned in the opinion, but the media revealed a photo of a Black woman. See *Buffalo Woman to Spend 8 Years in Prison for Killing Her Boyfriend*, 2 *WGRZ* (Sept. 6, 2019), <https://www.wgrz.com/article/news/crime/71-9def0c07-4e39-4f32-8b5f-a776061c0982> [<https://perma.cc/X8ZS-6NKR>].

3. See Coles & Pasek, *supra* note 2, at 315 (“Black women may be systematically harmed by single-axis feminist movements that fail to recognize . . . their unique concerns as Black women.”).

4. Shirley LaVarco, Note, Reimagining the Violence Against Women Act From a Transformative Justice Perspective: Decarceration and Financial Reparations for Criminalized Survivors of Sexual and Gender-Based Violence, 98 *N.Y.U. L. Rev.* 912, 922 (2023) (citing Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism”*, *Differences: J. Feminist Cultural Stud.*, Fall 2007, at 128, 137, 143).

prison.⁵ To address this, Black feminist scholars have developed key theories to understand Black women's experiences.⁶ One such scholar, Moya Bailey, coined the term *misogynoir* to describe "the uniquely co-constitutive racialized and sexist violence that befalls Black women as a result of their simultaneous and interlocking oppression at the intersection of racial and gender marginalization."⁷ *Misogynoir* operates as a form of implicit or explicit bias that informs how and why the state views Black women as dual victims and victimizers.

In 2019, the New York State Legislature passed the DVSJA.⁸ The DVSJA amended New York's existing Penal Law § 60.12 and created Criminal Procedure Law § 440.47 to provide resentencing for currently incarcerated individuals.⁹ This statute permits a judge to change a domestic violence survivor's initial sentence if the abuse was a "significant contributing factor" to the crime.¹⁰ The DVSJA is the first legislation of its kind in the United States.¹¹ Advocates and survivors promoted this statute

5. See *id.* ("[T]he carceral approach . . . culminat[ed] in the passage of the Violence Against Women Act as part of the notoriously racist 1994 Crime Bill." (footnote omitted)).

6. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1244 (1991) (explaining the concept of intersectionality "to denote the various ways in which race and gender interact to shape the multiple dimensions of Black women's employment experiences" (footnote omitted) (citing Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal F.* 139, 140)); see also, e.g., Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 2–3 (2d ed. 2000) (detailing Black women's unique viewpoints of themselves within their communities as a part of a larger "intellectual tradition").

7. Moya Bailey, *Misogynoir Transformed: Black Women's Digital Resistance* 1 (2021).

8. Domestic Violence Survivors Justice Act, ch. 31, 2019 NY Laws 144 (codified as amended at NY Crim. Proc. Law § 440.47 and NY Penal Law §§ 60.12, 70.45 (McKinney Supp. 2024)); see also Nicole Fidler & Ross Kramer, *New York Appellate Court Issues Landmark Ruling on DVSJA in the Case of Nicole Addimando, Sanctuary for Fams.* (July 23, 2021), <https://sanctuaryforfamilies.org/dvsja-appeal-nicole-addimando/> [<https://perma.cc/E5TY-ZHZS>] (explaining that the DVSJA allows judicial discretion to reduce a defendant's "unduly harsh" sentence if they were a victim of domestic violence inflicted by "a member of the same family or household" and if the abuse was "a significant contributing factor" of the crime (internal quotation marks omitted) (quoting Penal § 60.12(1))).

9. Domestic Violence Survivors Justice Act, ch. 31, 2019 NY Laws 144 (codified as amended at Crim. Proc. § 440.47 and Penal §§ 60.12, 70.45); The Law, Survivor's Just. Project, <https://www.sjpn.org/dvsja/the-law> [<https://perma.cc/QXL8-V3NF>] (last visited Aug. 8, 2024) ("The DVSJA amended Penal Law § 60.12, which allows for an alternative sentence, and created Criminal Procedure Law § 440.47, which allows for resentencing for survivors currently in prison serving sentences of 8 years or more." (emphasis omitted)).

10. See Penal § 60.12(1)(b) (describing the "significant contributing factor" requirement when assessing a defendant survivor's claim of abuse); The Law, *supra* note 9.

11. SJP Trainings, *Survivors Just. Project*, <https://www.sjpn.org/new-page-1> [<https://perma.cc/UV2F-PTPW>] (last visited Aug. 24, 2024) ("It is the first sentencing reform of its kind in the country, and one of the only sentencing reform efforts to include

to decriminalize trauma and help individuals who commit crime while suffering abuse.¹² Other states have enacted similar laws,¹³ but Black women still face lingering issues that exacerbate coercive abuse, racism, and gendered violence.

This Note examines the impact of New York’s revolutionary DVSJA on Black woman survivorship while proposing solutions and improvements for other states aiming to replicate the statute. Part I summarizes the DSVJA and contextualizes the case law that preceded its passing. Part II describes the unique impact of domestic violence on Black women, the challenges of qualifying for relief under the statute, and the limitations of resentencing. Lastly, Part III offers noncarceral solutions that replace sentencing and help Black women share their experiences as abuse survivors.

I. UNDERSTANDING THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT, ITS ORIGINS, AND THE CONSEQUENCES OF GOOD INTENTIONS

A. *The Domestic Violence Survivor in the Carceral State*

Intimate Partner Violence (IPV), alternatively called domestic violence,¹⁴ occurs when “one partner asserts power and control over the other,” though the legal definition varies by state.¹⁵ The effects of IPV are

survivors convicted of serious violent crimes and offenses involving harm to people other than an abuser.”).

12. The Domestic Violence Survivors Justice Act (DVSJA), Sanctuary for Fams., <https://sanctuaryforfamilies.org/our-approach/advocacy/justice-for-incarcerated-survivors-ny> [https://perma.cc/ZYF7-652H] (last visited Aug. 7, 2024) [hereinafter Sanctuary for Fams., The DVSJA] (“By untying judges’ hands and giving them discretion, the DVSJA would help restore humanity and justice to the way we treat survivors of severe abuse who act to protect themselves and would bring long overdue relief to survivors who have been incarcerated for many years.”).

13. See Liz Komar, Alexandra Bailey, Clarissa Gonzalez, Elizabeth Isaacs, Kate Mogulescu & Monica Szlekovics, Survivors Just. Project & Sent’g Project, Sentencing Reform for Criminalized Survivors: Learning From New York’s Domestic Violence Survivors Justice Act 1 (2023), <https://www.sentencingproject.org/app/uploads/2024/02/Sentencing-Reform-for-Criminalized-Survivors.pdf> [https://perma.cc/GTX6-YGQT] (“Across the country, a growing number of jurisdictions are . . . passing or considering bills designed to allow survivors of family violence, intimate partner violence, and human trafficking to receive shorter sentences for offenses deeply entwined with their victimization.”).

14. Domestic or Intimate Partner Violence, Office on Women’s Health, <https://www.womenshealth.gov/relationships-and-safety/domestic-violence> [https://perma.cc/74MW-PV4B] (last updated Feb. 15, 2021).

15. Off. for Victims of Crime, DOJ, 2018 National Crime Victims’ Rights Week Resource Guide: Intimate Partner Violence Fact Sheet, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_IPV_508_QC.pdf [https://perma.cc/PM8P-ACZ6] (last visited Aug. 7, 2024) (emphasis omitted); Nat’l Coal. Against Domestic Violence, Domestic Violence and the Black Community, https://assets.speakcdn.com/assets/2497/dv_in_the_black_community.pdf [https://perma.cc/M94S-X5PF] [hereinafter Nat’l Coal. Against Domestic Violence, Domestic Violence and the Black Community] (last visited Aug. 7, 2024) (“Domestic

disastrous, with abusers inflicting psychological aggression, stalking, and violence.¹⁶ One in three women and one in four men experience some form of IPV.¹⁷ Additionally, one in three women will experience physical violence, while one in five women will experience sexual violence by an intimate partner.¹⁸ These statistics are even more alarming when investigating the impact abuse has on larger society. While nonexhaustive in its damages, incarceration destroys families, perpetuates cycles of poverty, and violently disrupts communities.¹⁹ This leaves no question that IPV remains a large issue within the United States.

Abuse alters physical and mental comportment. Many abuse survivors develop “Battered Person Syndrome” (BPS), also called “Abused Person Syndrome” (APS).²⁰ Abuse inflicts deep psychological wounds that create feelings of isolation and put survivors at the mercy of the carceral state.²¹ The onset of unhealthy coping mechanisms, post-traumatic stress disorder, and behavioral disorders are common psychiatric symptoms of IPV.²² Survivors of IPV experience trouble sleeping, substance dependency, heightened anxiety, avoidant mannerisms, and a list of many other symptoms that alter their behavior.²³ A survivor may perceive a closer

violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another.”).

16. See About Intimate Partner Violence, CDC (May 16, 2024), <https://www.cdc.gov/intimate-partner-violence/about/index.html> [https://perma.cc/BAX2-RJX6] (noting the “harmful and long-lasting effects of intimate partner violence on individuals, families, and communities”).

17. Domestic Violence Statistics, Nat’l Domestic Violence Hotline, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> [https://perma.cc/449N-VZU6] [hereinafter NDVH Statistics] (last visited Aug. 24, 2024).

18. *Id.*

19. See Inès Zamouri, *Self-Defense, Responsibility, and Punishment: Rethinking the Criminalization of Women Who Kill Their Abusive Intimate Partners*, 30 *UCLA J. Gender & L.* 203, 209 (2023) (“[S]tatistics hint at the existence of a domestic abuse-to-prison pipeline that leads women — especially women of color and poor women — to be criminalized and punished by the state for being victims of abuse.”).

20. N.Y. State Unified Ct. Sys., *Abused Person Syndrome I*, https://www.nycourts.gov/JUDGES/evidence/7-OPINION/7.06_Abused_Person_Syndrome.pdf [https://perma.cc/RA22-8VBH] (last updated May 2024).

21. See Delaney Rives Knapp, *Note, Fanning the Flames: Gaslighting as a Tactic of Psychological Abuse and Criminal Prosecution*, 83 *Alb. L. Rev.* 313, 316–17 (2020) (arguing that “through the criminal justice process, a victim of domestic violence becomes a criminal defendant” only to discover that “[t]he current criminal justice system contributes to the continued gaslighting of domestic violence victims by labeling them criminal defendants when they are truly survivors” (emphasis omitted)).

22. *Intimate Partner Violence: A Guide for Psychiatrists Treating IPV Survivors*, APA, <https://www.psychiatry.org/psychiatrists/diversity/education/intimate-partner-violence> [https://perma.cc/3ZVK-GPP9] (last visited Aug. 7, 2024).

23. See Gunnur Karakurt, Douglas Smith & Jason Whiting, *Impact of Intimate Partner Violence on Women’s Mental Health*, 29 *J. Fam. Violence* 693, 693–94 (2014) (“Intimate partner violence (IPV) has numerous mental health consequences for women.

threat of harm after experiencing long-term abuse.²⁴ These outcomes inform why survivors may exhibit changed behaviors.

Abuse coaxes survivors into acting contrary to their typical nonthreatened behavior. A survivor managing substance dependence, potentially as a coping mechanism, is less likely to act the same as they would while sober or without a substance dependency.²⁵ Instead, they might experience physical withdrawals that push them to act outside of their character.²⁶ Survivors in retraumatizing situations may additionally engage in avoidant behaviors from fear of impending abuse, potentially complying with requests that they otherwise would reject. If a survivor is experiencing both substance dependence and heightened anxiety, their abuser could exploit substance use or threaten violence to force compliance.

Some survivors commit crimes to protect a loved one while others do so as a consequence of their abuse.²⁷ Consequently, after incarceration, IPV survivors may be unhoused and resort to crime “to meet basic survival needs,”²⁸ often resulting in further criminal charges.²⁹ Most women in the carceral system have endured some form of physical or sexual violence as children.³⁰ Even more have experienced IPV as adults.³¹ Prisons do not happen upon traumatized people—they latch on to the less fortunate and hollow them out, leaving them worse than when they came in and battling new wounds. Experiencing abuse strips individuals of their wellbeing and personhood, making them vulnerable to imprisonment.³²

These consequences include depression, anxiety, post-traumatic stress disorder (PTSD), substance abuse, and low self-esteem.” (citations omitted)).

24. See Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationship From Public Health Perspective*, 2 *Health Psych. Rsch.* 62, 62 (2014) (explaining how an abuser oscillates between amicable and violent tendencies); see also Debra Poggrund Stark & Jessica Choplin, *Seeing the Wrecking Ball in Motion: Ex Parte Protection Orders and the Realities of Domestic Violence*, 32 *Wis. J.L., Gender & Soc’y* 13, 24–32 (2017) (illuminating why a survivor who is experiencing long-term effects of abuse can believe harm is imminent).

25. Stark & Choplin, *supra* note 24, at 25–28.

26. *Id.*

27. Komar et al., *supra* note 13, at 5, 7.

28. *Id.* at 1.

29. *Id.* at 7.

30. See Melissa E. Dichter & Sue Osthoff, *VAWnet.org: The Nat’l Online Res. Ctr. on Violence Against Women, Women’s Experiences of Abuse as a Risk Factor for Incarceration: A Research Update 10* (2015), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf [<https://perma.cc/M9C9-DHCD>] (“[Most] incarcerated women reported having experienced some form of interpersonal trauma in their lifetimes prior to their incarceration. Experiences of physical or sexual violence in childhood are reported by approximately 60-70% of incarcerated women or girls. . .”).

31. *Id.* (“[A]dulthood intimate partner violence [is] reported by approximately 70-80% of incarcerated women.”)

32. See Patricia Warth, *Unjust Punishment: The Impact of Incarceration on Mental Health*, N.Y. State Bar Ass’n (Dec. 5, 2022), <https://nysba.org/unjust-punishment-the->

Incarceration presents many challenges for advocates, but researchers contextualize women's incarceration as uniquely harmful. In the last two decades, women's incarceration has grown at twice the rate of men's.³³ Overwhelming numbers of women, many of whom are primary household caregivers, are stuck in pretrial detention in their local jails because they cannot afford to leave.³⁴ Women of color, especially Black women, are the most overrepresented group among incarcerated women and receive the longest sentences.³⁵ Despite the global pandemic reducing women's incarceration between 2020 to 2021, trends still indicate that women's incarceration is a pervasive issue.³⁶ While ample data speak to incarcerated women's issues generally, limited information restricts proper analysis of the lives of Black women uniquely affected by mass incarceration.³⁷

Given the data on the relationship between women's incarceration and IPV, it is unsurprising that states showing disparate sentencing, like Oklahoma,³⁸ have among the highest rates of IPV.³⁹ Oklahoma particularly illuminates the impact of the carceral state on women, as the state heavily persecutes incarcerated women of color for failing to protect their children from IPV.⁴⁰ Oklahoma highlights disparate sentencing for women in domestic violence relationships as well, with women often getting

impact-of-incarceration-on-mental-health/ [https://perma.cc/LZ98-PT6M] (“People with mental illness in the U.S. are 10 times more likely to be incarcerated than they are to be hospitalized.” (citing Nat'l Jud. Task Force to Examine State Courts' Response to Mental Illness, *State Courts Leading Change: Report and Recommendations* 9 (2022))).

33. Press Release, Aleks Kajstura & Wendy Sawyer, Prison Pol'y Initiative, *Women's Mass Incarceration: The Whole Pie 2024* (Mar. 5, 2024), <https://www.prisonpolicy.org/reports/pie2024women.html> [https://perma.cc/HS68-XTSL].

34. *Id.*

35. Ashley Nellis, *In the Extreme: Women Serving Life Without Parole and Death Sentences in the United States* 7 (2021).

36. Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, *Mass Incarceration: The Whole Pie 2022* (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [https://perma.cc/9U9T-JDH3] (“Unfortunately, [reductions in women's incarceration] were largely the result of pandemic-related slowdowns in the criminal legal system—not permanent policy changes. And as the criminal legal system has returned to “business as usual,” prison and jail populations have already begun to rebound to pre-pandemic levels.”).

37. *Id.*

38. See, e.g., Komar et al., *supra* note 13, at 5 (describing how Oklahoma's laws lead to women disproportionately facing higher sentences than their male counterparts).

39. *Domestic Violence by State 2024*, *World Population Rev.*, <https://worldpopulationreview.com/state-rankings/domestic-violence-by-state> [https://perma.cc/DG6Q-PP9V] (last visited Aug. 7, 2024).

40. See Komar et al., *supra* note 13, at 5 (highlighting “Oklahoma's failure to protect law” being used “disproportionately [against] women of color, . . . result[ing] in survivors of abuse facing longer sentences for allegedly failing to protect their children from harm than the person who committed the abuse”).

harsher punishments than their abusive male partners.⁴¹ In recent years, activists have centered the stories of murdered women, illuminating how the legal system fails IPV survivors.⁴²

Abuse-to-incarceration is a reality for many women in New York as well. A third of New York women will experience IPV in their lifetime,⁴³ while nine out of ten women in New York prisons have survived abuse.⁴⁴ New York Evidence Rule 7.06(1)(a) defines BPS as a “constellation of medical and psychological symptoms of a person of any gender who, at the hands of a ‘member of the complainant’s family or household’ has suffered physical, sexual, or emotional abuse or has been coerced to do something contrary to their right not to do so.”⁴⁵ Naturally, there are cases of battered women receiving substantial jail time in the state.⁴⁶

Cases in which women are punished for not acting how they should when dealing with abuse demonstrate how the state vilifies mothers who fail to protect.⁴⁷ In the highly publicized case of Nixzmary Brown, the judge sentenced Nixzaliz Santiago, Nixzmary’s mother, to forty-three years in prison while her abusive partner only received twenty-nine years despite abusing and subsequently killing Nixzmary.⁴⁸ Nixzaliz treated her child’s wounds after her abusive partner wounded her for breaking a printer.⁴⁹

41. AP Poythress, *Who We Fail to Protect: Coalition Building in Oklahoma Women’s Prisons*, in *Good Things for Us to Read*, <https://open.library.okstate.edu/goodthingstoread/chapter/who-we-fail-to-protect-coalition-building-in-oklahoma-womens-prisons/> [<https://perma.cc/C23P-5CUE>] (last visited Aug. 26, 2024) (“In Oklahoma, this more often than not leads to a conviction of the mother, with harsher penalties imposed against her than even the perpetrators of the crime itself.” (citing Ryan Little, *An Obscure Law Is Sending Oklahoma Mothers to Prison in Droves. We Reviewed 1.5 Million Cases to Learn More.*, *Mother Jones* (Aug. 9, 2022), <https://www.motherjones.com/justice/2022/08/failure-to-protect-data-oklahoma/> [<https://perma.cc/93CA-GYUE>])).

42. See *id.*

43. Nat’l Coal. Against Domestic Violence, *Domestic Violence in New York*, https://assets.speakcdn.com/assets/2497/ncadv_new_york_fact_sheet_2020.pdf [<https://perma.cc/2FS2-CHDS>] (last visited Aug. 7, 2024).

44. See *Sanctuary for Fams.*, *The DVSJA*, *supra* note 12.

45. N.Y. State Unified Ct. Sys., *supra* note 20, at 1 (quoting the Criminal Procedure Law and Family Court Act, N.Y. Crim. Proc. Law § 530.11(1) (McKinney 2024); N.Y. Fam. Ct. Act § 812(1) (McKinney 2024)).

46. See, e.g., Kareem Fahim, *Mother Gets 43 Years in Death of Child*, 7, *N.Y. Times* (Nov. 12, 2008), <https://www.nytimes.com/2008/11/13/nyregion/13nixzmary.html> (on file with the *Columbia Law Review*) (describing the case of an abused mother who received almost double the time for not protecting her child from her abusive partner than her partner did for perpetrating the abuse).

47. See, e.g., Jeanne A. Fugate, Note, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 *N.Y.U. L. Rev.* 272, 273 (2001) (illustrating the prevalence of undermining abused mothers, noting one case where the prosecutor suggested that the defendant should have suffered more harm for the jury to believe her abuse).

48. Fahim, *supra* note 46.

49. *Santiago v. Kaplan*, No. 13-CV-00218 (ERK)(LB), 2014 WL 3696024, at *1 (E.D.N.Y. July 24, 2014) (recalling the abuse that transpired after the stepfather became enraged over a printer).

The rationale of one juror, after giving Nixzaliz Santiago the maximum sentence and acquitting her abusive partner for murder, was that Nixzaliz failed her “duty” as a mother by allowing her abusive partner to kill her child.⁵⁰ The judge expressed similar sentiments.⁵¹

Further research also reveals the implicit sexism plaguing the carceral system that specifically targets single mothers.⁵² Women especially suffer from failing to protect their children, facing “a disproportionate share of arrests and convictions in this area.”⁵³ Punishing women for failing one’s duty as a mother, while simultaneously holding a lower standard for their male abusers, is prevalent in the United States and within New York.⁵⁴ The Nixzmary Brown case underscores a larger issue of gender bias in sentencing, with a “battered mother” receiving a harsher sentence than their male codefendants because of sex stereotyping.⁵⁵

It is important to recognize then how disproportionate sentencing affects Black mothers. Assessing criminalized motherhood from a racial lens, Ann Cammett, Law Professor at CUNY School of Law, notes how “often[,] it is black mothers’ *perceived parenting deficiencies* that make them vulnerable to criminal justice intervention.”⁵⁶ Such negative ideologies about Black motherhood feed Black women to prison doors. Section II.A

50. *Id.*; see also Fahim, *supra* note 46 (recalling the juror’s phone interview where they stated that “[s]he was the mother,” that it was “her duty to protect her child,” and that “she allowed” her abusive partner to kill her child). Communications with the Kings County Supreme Court revealed the initial case of Nixzaliz Santiago is not a matter of public record.

51. See Fahim, *supra* note 46 (“You may not have delivered the fatal blow, but the jury found it was in your power to prevent the effects of it . . . Were it not for your failure to act, Nixzmary Brown would have probably not died from that blow on that day.” (quoting Justice Patricia DiMango)). The sentencing of Nixzaliz Santiago is not a matter of public record.

52. See Fugate, *supra* note 47, at 288 n.66 (discussing the uneven treatment of single mothers, particularly of color).

53. *Id.* at 275 (explaining the gender disparity amongst sentencing men and women for failing to protect their children and how sex-stereotyping plays a role); see also Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 *S. Cal. Interdisc. L.J.* 363, 389 (2016) (“Taylor’s status as a poor black mother subjected her to a high degree of scrutiny and public scorn for her decisionmaking, and ultimately, criminalization.”).

54. See G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 *Harv. Women’s L.J.* 89, 105 (1999) (“Through police avoidance of arrest, the assailant learns that his conduct is outside state concern and state reach. Violence within the home is extraneous to state concern and, for the survivor, the private sphere functions as a movable prison.”).

55. *Id.* at 118 (“The perception of woman-as-mother is relational, not individual; her existence is contrived by her proscribed role within the family. Thus, in *Williquette*, the state extracts a higher price for maternal failure to protect because such failure violates social norms of mothering.” (footnote omitted) (citing *State v. Williquette*, 385 N.W.2d 145 (Wis. 1986))).

56. See Cammett, *supra* note 53, at 367 (arguing that tropes of Black women, particularly deriving from the “Welfare Queen” stereotype, feed into the criminalization and hypersexualization of Black women).

will highlight prominent stereotypes of Black women and how those stereotypes inform their vilification.⁵⁷

It was not until New York passed the DVSJA, the first legislation of its kind in the country, that scholars interrogated the relationships between abuse and incarceration.⁵⁸

B. *New York and the DVSJA*

Originally introduced in 2011,⁵⁹ the New York state legislature enacted the DVSJA in May 2019 to be a resentencing tool for incarcerated individuals who survived abuse.⁶⁰ District attorneys opposed the legislation, believing there were already adequate remedies at law,⁶¹ while survivors spent each year educating officials on the effects of harsh sentencing for domestic violence victims.⁶² Domestic violence survivors and advocates across the state of New York pushed the state government to address the criminalization of survivors.⁶³ Proponents of the initial DVSJA bill recognized that:

All too often, when a survivor defends herself and her children, our criminal justice system responds with harsh punishment instead of with compassion and assistance. Much of this punishment is a result of our state's current sentencing structure which does not allow judges discretion to fully consider the impact of domestic violence when determining sentence lengths. This leads to long, unfair prison sentences for many survivors.⁶⁴

57. See *infra* section II.A.

58. See SJP Trainings, *supra* note 11 (“It is the first sentencing reform of its kind in the country, and one of the only sentencing reform efforts to include survivors convicted of serious violent crimes and offenses involving harm to people other than an abuser.”).

59. See DVSJA History, Survivors Just. Project, <https://www.sjpn.org/dvsja/history> [<https://perma.cc/MRP2-CX2A>] (last visited Aug. 7, 2024) (detailing the history of the DVSJA).

60. See Fidler & Kramer, *supra* note 8 (“In 2019, the Initiative, along with survivors and advocates across New York, achieved a major success when New York enacted the Domestic Violence Survivors Justice Act (‘DVSJA’) after nearly a decade of hard-fought advocacy.”).

61. Letter from Janet DiFiore, President, Dist. Att’y Ass’n of the State of N.Y., to Ruth Hassell-Thompson, Sen. & Jeffrion Aubry, Assemb. (May 8, 2012) (on file with the *Columbia Law Review*).

62. DVSJA History, *supra* note 59.

63. See Fidler & Kramer, *supra* note 8 (“In New York, the passage of the DVSJA was hailed as a major victory by advocates of criminal justice reform and the movement to end gender violence.”).

64. Legislative Memorandum in Support of Bill 2019-A03974, from Aubry, Assemb. to NY Assemb. (Jan. 31, 2019), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03974&term=2019&Summary=Y&Actions=Y&Memo=Y [<https://perma.cc/9TKC-L7TH>].

For many, the arrival of the legislation brought in a new era for abuse survivors that allowed them to share their experiences in court.⁶⁵

Since its enactment, the DVSJA has seen some success. The legislation has helped over forty people obtain reduced sentences totaling over eighty years of imprisonment.⁶⁶ In *People v. Addimando*, Judge Reinaldo Rivera decided that survivor-defendant Nicole Addimando qualified for one of the first applications of the DVSJA after shooting her abusive partner following years of sexual abuse.⁶⁷ She received a sentence reduction from nineteen years to seven-and-a-half years and an additional five years of post-release supervision.⁶⁸ Several states have begun to adopt similar forms of the DVSJA as a means of addressing IPV and the incarceration of women.⁶⁹

Still, the statute's effectiveness remains in question. While the DVSJA could help hundreds of incarcerated survivors,⁷⁰ one may ask why it has not already. While the *Addimando* case found success for the survivor, there may be other cases with Black female survivors who are not seen as victims due to racial bias within courts.⁷¹ Furthermore, a jury or judge might have more sympathy for a woman shooting an abusive partner than a woman committing a crime *for* her abuser fearing long-term consequences.⁷² The procedural requirements imposed by the statute and the substantive arguments that the defendant is required to make affect whether a

65. See Cynthia Feathers, Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes, N.Y. State Bar Ass'n J., March 2020, at 15, 16 (detailing how progress was "finally achieved" with the enactment of the DVSJA).

66. See Komar et al., *supra* note 13, at 1 ("35 women, 4 men and 1 non-binary person, 28 of whom are people of color, have received retroactive sentencing relief. These sentence reductions saved a collective 80 years of incarceration . . .").

67. See *People v. Addimando*, 152 N.Y.S.3d 33, 46 (App. Div. 2021) (holding that the facts of Addimando's case met the DVSJA's qualifications); Fidler & Kramer, *supra* note 8.

68. *Addimando*, 152 N.Y.S.3d at 46.

69. See Komar et al., *supra* note 13, at 1 ("[T]he DVSJA has inspired a wave of legislative advocacy in Louisiana, Oklahoma, and Oregon.").

70. See Sanctuary for Fams., The DVSJA, *supra* note 12 ("About 360 incarcerated survivors of domestic violence would be eligible for re-sentencing under the bill.").

71. See Maya Finoh & Jasmine Sankofa, The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence, ACLU (Jan. 28, 2019), <https://www.aclu.org/news/racial-justice/legal-system-has-failed-black-girls-women-and-non> [<https://perma.cc/42L6-FYX5>] (explaining that "[t]he silencing of and structural biases against Black women, girls, and non-binary people can have devastating consequences — including the incarceration of survivors themselves").

72. Heather R. Skinazi, Comment, Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect", 85 Calif. L. Rev. 993, 999 (1997) ("[W]e are often torn between sympathy for the coerced actor and abhorrence at the act she committed.").

survivor receives relief.⁷³ Limited in its remedies,⁷⁴ the statute leaves much to be desired.

The DVSJA is a tool for judges to look outside of the sentencing guidelines and examine whether the domestic abuse was a “significant contributing factor” to the alleged crime.⁷⁵ The language of the statute has several criteria alongside the “significant contributing factor” requirement, though a survivor-defendant can be eligible for resentencing under the DVSJA if they were “a victim of domestic violence subjected to substantial physical, sexual or psychological abuse.”⁷⁶ For individuals seeking resentencing relief who committed the crime before the enactment of the statute, the defendant must be currently incarcerated, serving a minimum sentence of at least eight years,⁷⁷ and serving as “first or second felony offenders” in the original proceeding, while not serving a crime after August 12, 2019, and not being considered a “second . . . or persistent violent felony offender[.]”⁷⁸ For crimes committed after August 12, 2019, the DVSJA still “gives judges the discretion to sentence to shorter prison terms and, in some cases, to community-based alternative-to-incarceration programs,” notably without the requirement of serving an eight-year minimum sentence.⁷⁹ The defendant, however, must still request DVSJA consideration before their initial sentencing.⁸⁰

73. See Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(2)(c) (McKinney 2024) (“An application for resentencing pursuant to this section must include at least two pieces of evidence corroborating the applicant’s claim that he or she was, at the time of the offense, a victim of domestic violence . . .”).

74. See Survivors Just. Project, Domestic Violence Survivors Justice Act: Resource Guide 3 (2021) [hereinafter Resource Guide] (explaining that the statute provides relief to obtain resentencing, and in some cases, sentencing to “Alternative to Incarceration” programs that may include substance abuse programs).

75. See Domestic Violence Survivors Justice Act (DVSJA), So I Stayed, <https://andsoistayedfilm.com/dvsja> [<https://perma.cc/F2DE-FBT2>] (last visited Aug. 7, 2024).

76. Crim. Proc. § 440.47(2)(c); see also Elizabeth Langston Isaacs, *The Mythology of the Three Liars and the Criminalization of Survival*, 42 *Yale L. & Pol’y Rev.* 427, 442 n.32 (2024) (recognizing that the statute did not define “substantial abuse”).

77. Crim. Proc. § 440.47(1)(a).

78. N.Y. Off. of Indigent Legal Servs., *What Is the Domestic Violence Survivors Justice Act?* 1, <https://www.ils.ny.gov/files/NYC%20-%20What%20is%20DVSJA.pdf> [<https://perma.cc/3DSN-9L7J>] (last visited Aug. 7, 2024).

79. Resource Guide, *supra* note 74, at 3, 34; see also N.Y. Penal Law § 60.12(1) (McKinney 2024).

80. Penal § 60.12(1); see also Resource Guide, *supra* note 74, at 10 (“[F]or offenses committed after August 12, 2019, you will NOT have the option to bring your case back to court for reduced DVSJA resentencing once you are sentenced.” (emphasis omitted)). This means that if you commit an offense after the enactment of the statute and failed to request relief under the DVSJA upon your initial sentence, you are barred from seeking resentencing relief. See Komar et al., *supra* note 13, at 10 (“Individuals whose offenses occurred after the enactment date of the DVSJA are not eligible to apply for resentencing, even if they were unable or declined to raise their DVSJA claim at their original sentencing. They are limited to seeking relief at their original sentencing hearing.”).

Lastly, the statute excludes people convicted of murder in the first degree, aggravated murder, sex offenses, terrorism offenses, or conspiracy to commit any of the acts.⁸¹ These exclusionary measures are too narrow to properly address domestic violence survivors. Section II.B will cover the specific limitations of the statute's narrow requirements and how resentencing worsens the mental and physical state of survivors.

II. BLACK WOMAN SURVIVORSHIP

Implicit biases develop into longstanding stereotypes that push Black women into the carceral system. Black women face among the highest rates of IPV.⁸² The depiction of Black women as being worthy of abuse originates from enslavement.⁸³ These stereotypes use imagery and negative associations to objectify Black women, manifesting as implicit biases and harsher carceral punishments.⁸⁴

The DVSJA, previously an object of hope, now reveals substantive and procedural limitations that further harm Black women. Strenuous requirements under the DVSJA make it difficult for Black women to speak on their experiences as victims. Nevertheless, it is important to conceptualize the social barriers facing Black women survivors and how misogynoir harmfully elevates Black women's incarceration.

Section II.A will detail society's abuse of Black women and what ways social norms further their criminalization. Section II.B will then examine the substantive limitation of New York's DVSJA through the timely nexus requirement and section II.C will elucidate procedural limitations. Both will address how the DVSJA often exacerbates Black women's oppression.

A. *Black Women and the Privilege of Victimhood*

Negative associations of Black women inform their abuse. To rationalize the continuous subjugation of Black persons, white people seeking to maintain social superiority forced unfounded, and often reflective, ideologies.⁸⁵ Stereotypes depicting Black women as bestial,

81. Penal § 60.12(1). Upon further investigation, the DVSJA appears to hold more procedural limitations. Continuing research should interrogate how the statute excludes certain crimes, such as possession with intent to distribute, despite covering more serious crimes like murder.

82. See Nat'l Coal. Against Domestic Violence, *Domestic Violence and the Black Community*, supra note 15 (“[B]oth Black women and Black men experience intimate partner violence at a disproportionately high rate.”).

83. See Collins, supra note 6, at 5 (“[C]ontrolling images applied to Black women that originated during the slave era attest to the ideological dimension of U.S. Black women's oppression.” (citations omitted)).

84. See Finoh & Sankofa, supra note 71 (explaining how Black women, girls, and nonbinary persons are not seen as victims).

85. See Collins, supra note 6, at 146 (“Violence against Black women tends to be legitimated and therefore condoned while the same acts visited on other groups may remain nonlegitimated and non-excusable.”).

hypersexual, and deserving of punishment arose during the time of slavery.⁸⁶ These ideologies excused and promoted the continuous rape of Black women, with owners rationalizing control over Black women to manage their labor force.⁸⁷ The common stereotype of the “Jezebel,” for example, depicts Black women as hypersexual beings who cannot experience sexual assault as sexual objects.⁸⁸ Another common stereotype, “The Welfare Mother” or “The Welfare Queen,” describes single Black mothers as being a burden on the government with their own self-inflicted poverty and as cardinally bad mothers who eugenicists believe “produc[ed] too many economically unproductive children.”⁸⁹ This belief blames Black women for living in poverty and for their abuse instead of focusing on what the state and the larger society should be aiming to fix.

These biases continue into the modern century, normalizing Black women’s abuse. Society continuously masculinizes Black women and removes them from the “cult of domesticity,” a realm of privilege afforded to white women that calls for society to protect them.⁹⁰ This outlook is an instance of positive stereotyping, the “subjectively favorable beliefs about members of social groups” that still keep them subjugated with “domain-specific advantage, favorability, or superiority based on category

86. See *id.* at 51 (“Efforts to control Black women’s sexuality were tied directly to slave owners’ efforts to increase the number of children their female slaves produced.”); see also Brianna N. Banks, Note, *The (De)Valuation of Black Women’s Bodies*, 44 *Harv. J.L. & Gender* 329, 338 (2021) (noting that “[t]he Jezebel image ‘arose during the slavery era as an explanation for slave owners’ sexual attraction to and sexual abuse of Black women” (quoting Danice L. Brown, Rhonda L. White-Johnson & Felicia D. Griffin-Fennell, *Breaking the Chain: Examining the Endorsement of Modern Jezebel Images and Racial-Ethnic Esteem Among African American Women*, 15 *Culture, Health & Sexuality* 525, 526 (2013))).

87. See Collins, *supra* note 6, at 51 (explaining that the desire to control Black women’s reproductivity was directly tied to the white enslaver’s economic benefit).

88. See Bernadine Y. Waller, Jalana Harris & Camille R. Quinn, *Caught in the Crossroad: An Intersectional Examination of African American Women Intimate Partner Violence Survivors’ Help Seeking*, 23 *Trauma, Violence & Abuse* 1235, 1236–37 (2022) (“Raping African American women contributed to the expansion of the slave population and therefore the American economy. Framing African American women as inherently hypersexual rationalized their sexual abuse and torture.”); see also Beth E. Richie, *Arrested Justice: Black Women, Violence, and America’s Prison Nation* 116 (2012) (noting the “strong evidence that for the most marginalized groups, deviance from hegemonic gender and sexuality norms continues to be associated with negative consequences”).

89. See Collins, *supra* note 6, at 79–80 (citation omitted) (describing the idea of Black women embodying “The Welfare Queen,” a caricature that depicts single Black mothers as negligent and irresponsible, thereby justifying state negligence of resources).

90. See Waller et al., *supra* note 88, at 1237 (“While the American family ethic and the cult of domesticity decreed that a woman’s place was in the home, the ongoing marginalization and exploitation of African American men made this nearly impossible for African American families.” (citation omitted)); see also Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 *Wm. & Mary J. Women & L.* 39, 47 n.40 (2017) [hereinafter Jacobs, *The Violent State*] (“Collins lists the virtues that are essential to ‘true’ womanhood as piety, purity, submissiveness, and domesticity. Black women could not be true women as they lacked piety and purity.” (citing Patricia H. Collins, *Controlling Image and Black Women’s Oppression, Race & Ethnicity* 266 (1991))).

membership.”⁹¹ Living within the “cult of domesticity” is a privilege that protects certain groups of women and demonizes others.⁹² On the other hand, and through the manifestation of stereotypes formed during slavery, Black women hold burdensome responsibilities within their home and within larger society. Individuals praising Black women for their “strength” undermine their need for support.⁹³ Many Black women are the main breadwinners as the heads of their respective households,⁹⁴ yet, to illustrate the sparseness of care, incarcerated Black women are frequently lacking adequate emotional and financial support compared to incarcerated men.⁹⁵

IPV is inextricably linked to the incarceration of Black women. Modern ideologies perpetuating white supremacy characterize Black women as inherently criminal and deserving of abuse. Black women are uniquely affected as survivors, with almost half of Black women suffering from IPV at some point in their life.⁹⁶ This abuse includes “any physical or sexual violence, psychological aggression, stalking, and/or controlling

91. Alexander M. Czopp, Aaron C. Kay & Sapna Cheryan, Positive Stereotypes Are Pervasive and Powerful, 10 *Persps. on Psych. Sci.* 451, 451 (2015).

92. See Waller et al., *supra* note 88, at 1239 (explaining a study of female participants’ experience with police officers, noting African American women’s “diminished need for the same level of support and intervention that White women survivors are generally afforded”).

93. See *id.* at 1237 (“The Mammy trope characterized African American women as strong, large, asexual, and obedient . . . and trustworthy woman devoid of personal needs.” (citations omitted)).

94. See Jared Trujillo, Reducing Multigenerational Poverty in New York Through Sentencing Reform, 26 *CUNY L. Rev.* 225, 260 (2023) (“A majority of incarcerated women are parents, and many of them are caregivers and breadwinners for their families.”); Sarah Jane Glynn, Ctr. for Am. Progress, Breadwinning Mothers Continue to Be the U.S. Norm 11 (2019), <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/08/Breadwinners2019-report1.pdf> (on file with the *Columbia Law Review*) (“Black mothers are by far the most likely to be the primary source of economic support for their families; they are more than twice as likely as white mothers to be their family’s breadwinner, and more than 50 percent more likely than Hispanic mothers.”).

95. See Breea C. Willingham, Black Women’s Prison Narratives and the Intersection of Race, Gender, and Sexuality in US Prisons, 23 *Critical Surv.* 55, 59 (2011) (“When men are incarcerated, women are usually the ones ‘holding them down’, supporting them and taking care of their children, on the outside. The woman will regularly visit her man and promise to wait for him. But when these women become inmates themselves, they rarely get that same . . . support.”).

96. See Nat’l Coal. Against Domestic Violence, Domestic Violence and the Black Community, *supra* note 15 (“45.1% of Black women and 40.1% of Black men have experienced intimate partner physical violence, intimate partner sexual violence and/or intimate partner stalking in their lifetimes.”).

behaviors”⁹⁷ with a particular emphasis on exercising power and control.⁹⁸ Black women are incarcerated at higher rates than other women,⁹⁹ with their traumatic experiences of abuse often contributing to their criminal convictions. The National Institute of Justice acknowledges that many women in prison have endured childhood trauma, sexual violence, and substance abuse.¹⁰⁰ Political figures also recognize that many women have experienced sexual assault prior to prison, with Black women facing incarceration at twice the rate of white women.¹⁰¹ Meanwhile, scholars have uncovered how the consequences of sexual violence and coercive control lead women to prison, examining how police surveillance and the constant criminalization of abuse survivors inform harsher sentences for Black women.¹⁰²

Coercive control and abuse affect Black women uniquely, yet go ignored in the literature.¹⁰³ Coercive control is an abuse tactic that centers “‘intimate terrorism,’ ‘coercive controlling violence[,]’ or ‘battering,’” developing into “a systematic pattern of behavior that establishes dominance over another person through intimidation, isolation, and terror-inducing violence or threats of violence.”¹⁰⁴ Abusers may threaten

97. Waller et al., *supra* note 88, at 1235 (citing Matthew J. Breiding, Kathleen C. Basile, Sharon G. Smith, Michele C. Black, and Reshma Mahendra, Nat’l Ctr. for Inj. Prevention & Control of the Ctrs. for Disease Control & Prevention, *Intimate Partner Violence Surveillance: Uniform Definitions and Recommended Data Elements*, Version 2.0, at 18 (2015)).

98. *Id.*

99. See Kristen M. Budd, *Incarcerated Women and Girls 2* (2024) (on file with the *Columbia Law Review*) (“In 2022, the imprisonment rate for Black women . . . was 1.6 times the rate of imprisonment for white women . . .”).

100. See Holly Ventura Miller, Nat’l Inst. of Just., DOJ Off. of Just. Programs, FY 2020 Report to the Committees on Appropriations Formerly Incarcerated Women and Reentry: Trends, Challenges, and Recommendations for Research and Policy 3 (2021), <https://www.ojp.gov/pdffiles1/nij/303933.pdf> [<https://perma.cc/R2RU-FFJF>] (“Histories of childhood maltreatment and abuse, co-occurring psychiatric disorders, familial dysfunction, and negative self-concept are also more common among justice-involved women compared to men.” (citations omitted)).

101. DOJ, *The Impact of Incarceration and Mandatory Minimums on Survivors: Exploring the Impact of Criminalizing Policies on African American Women and Girls* 5 (2017), <https://www.justice.gov/media/1082786/dl?inline> [<https://perma.cc/M9PL-P9U8>] (quoting Bea Hanson, Principal Deputy Director of DOJ Office on Violence Against Women).

102. See Jacobs, *The Violent State*, *supra* note 90, at 82 (“When a Black woman is assaulted by an intimate partner[,] she must think carefully about whether to seek the assistance of the police. Police intervention can be lethal for the partner, and it may also expose the woman, herself, to arrest and prosecution.”).

103. See Komar et al., *supra* note 13, at 1 (“[R]esearch on the criminalization of survivors is egregiously scarce . . .”).

104. Melissa E. Dichter, Kristie A. Thomas, Paul Crits-Christoph, Shannon N. Ogden & Karin V. Rhodes, *Coercive Control in Intimate Partner Violence: Relationship With Women’s Experience of Violence, Use of Violence, and Danger*, 8 *Psych. Violence* 596, 596 (2018); see also Jacobs, *The Violent State*, *supra* note 90, at 69–77, 96 (explaining how Black

physical violence to maintain control over their partner.¹⁰⁵ This type of IPV dangerously burrows within the psyche, instilling fear and isolation within an individual, with abusers using the law to threaten their partner into compliance.¹⁰⁶ Unfortunately, current conceptions of violence deemphasize psychological and emotional abuse.¹⁰⁷ Police rely on “incidents over patterns” when addressing domestic violence disputes, ignoring incidents that occur over periods of time.¹⁰⁸ Coercive control may force Black women to stay silent about their abuse, especially if it is psychological in nature.¹⁰⁹ Moreover, Black women are hesitant to come forward to legal authorities for several reasons. Black women may be unwilling to invite the police into their communities and homes over fear of their lives and the lives of even their abusive partners.¹¹⁰ They may fear discrimination and isolation.¹¹¹ Black women may also fear for their own safety when facing police officers.¹¹² Literature often fails to investigate the

women’s sexual assault is frequently ignored within literature and studies, stating that the “[v]ictimization of [Black] women has come to be accepted as normal”).

105. See Komar et al., *supra* note 13, at 7 (“Survivors may still be under the coercive control of the person who abused them – for instance, that individual may threaten to harm them or their family if they disclose.”).

106. See Battered Women’s Just. Project, *Coercive Control Codification: A Brief Guide for Advocates and Coalitions 2* (2021), <https://bwjp.org/assets/documents/pdfs/cc-codificationbrief.pdf> [<https://perma.cc/8679-XZR3>] (“Some [abusers] are . . . coercing their partners to have sex by threatening to contact ICE and get their partner deported.” (footnote omitted)).

107. See Alan Rosenthal & Christiana Wierschem, *DVSJA Statewide Def. Task Force, An Introductory Guide to Coercive Control for the DVSJA Attorney: Coercive Control Is Domestic Violence 16* (2023), https://cdn.ymaws.com/www.nysda.org/resource/resmgr/news_picks_items/Coercive_Control_Guide_FINAL.pdf [<https://perma.cc/ZF5X-KB6V>] (“[S]o much of the dominance a partner establishes over his victim stems from seemingly ‘minor’ physical violence and fights. Domestic violence is not just physical; it is psychological and emotional as well.” (footnote omitted)).

108. *Id.* at 16–17.

109. See Jacobs, *The Violent State*, *supra* note 90, at 94 (“The inability to tell their stories may prevent battered women from healing and exacerbate doubts about battered women’s credibility.” (internal quotation marks omitted) (quoting Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *Yale J.L. & Feminism* 75, 114 (2008))).

110. See *Understanding the Impact of Domestic Violence*, Mass. Gen. Brigham McLean (Apr. 17, 2023), <https://www.mcleanhospital.org/essential/domestic-violence> (on file with the *Columbia Law Review*) (“Black survivors of violence may avoid seeking health care or reporting abuse to law enforcement. . . . Black women may fear judgment from within their own communities, feel pressured to keep their family together, or become influenced by the stereotype of the strong Black woman.”).

111. See Sherri Gordon, *Unique Issues Facing Black Women Dealing With Abuse*, verywellmind, <https://www.verywellmind.com/unique-issues-facing-black-women-dealing-with-abuse-4173228> [<https://perma.cc/SG74-Y78G>] (last updated Jan. 25, 2023) (noting that any Black women act under fear of being labeled a “snitch” and promoting police presence to their immediate community and even their partners).

112. See Banks, *supra* note 86, at 344 (“Because police frequently perceive Black women as ‘potentially violent, predatory, or noncompliant regardless of their actual conduct or circumstances,’ Black women are hyper-vulnerable to police sexual abuse.” (quoting

role of coercive abuse on Black women, a demographic already overrepresented as incarcerated women and facing a higher risk of IPV.¹¹³ Prosecutors and other criminal justice actors also aggravate the effects of Black women's incarceration. Public defenders often fail to screen for domestic violence,¹¹⁴ prosecutors charge women as accomplices when they are victims in other cases,¹¹⁵ and judges hold significant discretion to determine the adequacy of a Black woman survivor's claim of abuse.¹¹⁶

Black woman survivorship—the ways in which Black women face systemic and interpersonal violence—manifests especially dangerously in the criminal system. The accumulation of psychological abuse may push Black women into prison.¹¹⁷ Criminalization and dehumanization conflict with, and ultimately subsume, Black women's victimhood. As mentioned previously, Black women do not have the privilege of protection almost exclusively synonymous with white womanhood.¹¹⁸ White womanhood affords white women protections under the law, which nonwhite women are unable to receive.¹¹⁹

Jasmine Sankofa, Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform, 59 *How. L.J.* 651, 679 (2016)).

113. DOJ, *supra* note 101 (“The incarceration rate for [B]lack women is twice as high as the rate for white women. Many women in prison . . . have been victims of . . . domestic violence . . .” (quoting Bea Hanson, Principal Deputy Director of the DOJ Office on Violence Against Women)).

114. See Letter from Malori M. Maloney to Floyd Prozanski, Chair, Kim Thatcher, Vice-Chair & Members of the Oregon Senate Committee on Judiciary, Or. Just. Res. Ctr. (Mar. 28, 2023), <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/PublicTestimonyDocument/88047> [<https://perma.cc/GET2-53W7>] [hereinafter Letter from Malori M. Maloney to Floyd Prozanski et al.] (“Public defenders are not typically trained to screen their clients for domestic violence. But even when they have the tools to identify clients affected by such abuse, they're faced with prosecutors and judges who don't appreciate the significance of it.”); see also Komar et al., *supra* note 13, at 7 (explaining that defense counsel may not be “sufficiently trauma-informed”).

115. See Sarah L. Swan, Conjugal Liability, 64 *UCLA L. Rev.* 968, 994 (2017) (examining accomplice liability as a “doctrinal disaster” that embodies sexist ideas of a woman being punished for the actions of her husband, resulting in convictions for individuals close to the offender as opposed to the “offense”).

116. See, e.g., Komar et al., *supra* note 13, at 3 (describing the judicial power under the DVSJA for judges to “impose significantly reduced sentences”).

117. See TK Logan, Kellie Lynch & Robert Walker, Exploring Control, Threats, Violence and Help-Seeking Among Women Held at Gunpoint by Abusive Partners, 37 *J. Fam. Violence* 59, 68 (2022) (describing the psychological torture strategies that force abused persons into complying with the demands of their abuser).

118. See Kali Nicole Gross, African American Women, Mass Incarceration, and the Politics of Protection, 102 *J. Am. Hist.* 25, 25 (2015) (highlighting “the legacies of an exclusionary politics of protection whereby black women were not entitled to the law's protection, though they could not escape its punishment”).

119. See *id.* at 30 (discussing the southern chain gang and Black women's participation, adding how “[w]hite women, ‘defined as female, would be protected from the brutal throes of the chain gang’” while Black women were exploited alongside their male counterparts).

The DVSJA is a ripe topic for discussion. A fellow student author at Harvard Law, Brianna Banks, bolstered the sparse literature surrounding Black women survivors, writing *The (De)Valuation of Black Women's Bodies* to examine how stereotypes of Black women “increase the potential for judges and other criminal justice officers to disbelieve them.”¹²⁰ Banks notes how common stereotypes plaguing Black women survivors relate to their incarceration.¹²¹ Banks also examines the impact of domestic violence in Black women's lives. Banks briefly references the DVSJA within the history of Black women facing hypersexualized scrutiny, examining issues of judicial discretion, the standards under DVSJA that ignore the experiences of Black women, and the difficulty in qualifying under the DVSJA's nexus requirement.¹²² Most recently, New York appellate attorney Elizabeth Langston Isaacs discussed the difficulty that Black women face when trying to find corroborating evidence for DVSJA qualification, highlighting how requiring formalized proof of abuse to preemptively disprove potential claims of lying is problematic.¹²³

This Note discusses the criminalization of Black women as abuse survivors more broadly and pinpoints other issues that Black women have when qualifying for the DVSJA.¹²⁴ Furthermore, this Note explains the limitations of resentencing.¹²⁵ While Banks and Isaacs discuss the limitations of requiring a survivor-defendant to provide two pieces of evidence corroborating their abuse under the DVSJA,¹²⁶ this Note expands upon the limitations of the DVSJA's nexus requirement, introduces limitations in its time requirement, and acknowledges the setbacks of a statutory resentencing tool.

120. Banks, *supra* note 86, at 358.

121. *Id.* at 331 (discussing “the historic devaluation of Black women's bodies and further detail[ing] how that particular discrimination has impacted the current criminal justice system's failure to protect Black women and girls”).

122. See Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(2)(c) (McKinney 2024) (explaining that a victim-defendant must show that “at the time of the offense,” they were “subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household”).

123. See Isaacs, *supra* note 76, at 503 (“[T]he DVSJA's corroboration requirement closely parallels the rule of prompt outcry—the message conveyed is that if you did not report your abuse when it happened, then you are presumed to be lying.” (footnote omitted)).

124. See *infra* sections II.B–C.

125. See *infra* section II.D.

126. See Isaacs, *supra* note 76, at 435 (“By requiring documentary evidence corroborating that abuse occurred, this ostensibly progressive legislative reform perpetuates deeply sexist and racist assumptions about who we believe, and who is presumptively incredible.”); Banks, *supra* note 86, at 355–56 (arguing that statutes such as the DVSJA fail to help Black women by failing to recognize how difficult it is for Black women to produce the two required pieces of evidence to corroborate under the DVSJA due to implicit bias and fear of legal authority).

B. *Black Women Living Outside the DVSJA Nexus Requirement*

The first substantive limitation is the “nexus requirement.” To qualify under the New York statute, an individual must prove that the abuse they suffered was “a significant contributing factor to the defendant’s criminal behavior.”¹²⁷ Furthermore, the person must prove a temporal nexus between the crime committed and the abuse alleged.¹²⁸ In *People v. Williams*, survivor-defendant Erica Williams killed her abuser and applied for relief under the DVSJA.¹²⁹ The appellate court denied her motion for resentencing under the statute because she asserted substantial abuse that was “in the past.”¹³⁰ The court held that physical and psychological abuse in the past did not support a strong enough temporal nexus.¹³¹ Following this decision, a survivor must prove that the “abuse and abusive relationship were ongoing.”¹³²

Proving the nexus requirement poses many difficulties for Black women. The DVSJA allows a defendant to prove the nexus of abuse with corroborating evidence. Section (2) (c) of the DVSJA states:

An application for resentencing pursuant to this section must include at least two pieces of evidence corroborating the applicant’s claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the applicant as such term is defined in subdivision one of section 530.11 of this chapter.

At least one piece of evidence must be a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or an order of protection.¹³³

127. See N.Y. Penal Law § 60.12(1)(b) (McKinney 2024) (allowing the court to determine resentencing if “at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant”).

128. See *People v. Williams*, 152 N.Y.S.3d 575, 576 (App. Div. 2021) (“Although the DVSJA does not require that the abuse occur simultaneously with the offense, . . . the ‘at the time of’ language must create some requirement of a temporal nexus between the abuse and the offense or else it is meaningless.” (citations omitted)).

129. See *id.* (“The court correctly denied defendant’s motion for resentencing under the DVSJA because defendant failed to demonstrate that she was a victim of ‘substantial’ abuse ‘at the time of’ the offense.” (citation omitted)).

130. See *id.* (“It is also not enough that defendant was indisputably subjected to substantial physical and psychological abuse in the past.”).

131. See *id.*

132. See Mandy Jaramillo & Daniel C. Speranza, DVSJA Statewide Defender Task Force, Experts and the Domestic Violence Survivors Justice Act: A Guidebook for Defense Attorneys 4 n.6 (2023), https://www.ils.ny.gov/sites/ils.ny.gov/files/DVJSA%20Expert%20Guidebook_2023_v2.pdf [<https://perma.cc/4744-L7RJ>] (discussing the temporal nexus).

133. Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(b) (McKinney 2024).

To satisfy the nexus requirement, individuals may also use an expert witness to explain the nexus of abuse and the criminal action.¹³⁴ This option requires financial resources that indigent Black women may lack. Some Black women may be too scared to reach out, fearing the police or distrusting their attorney's ability to properly communicate their abuse.¹³⁵ Also, attorneys may not screen people for IPV at all,¹³⁶ an error that may close a vital door to resentencing in the future. The current framework places the burden of collecting evidence of abuse on the survivor,¹³⁷ which may put Black women back into their abusive situations or even kill them—unless they have enough formal evidence to satisfy the state.

Additionally, the effects of trauma from domestic abuse can continue long after the abuse has ended.¹³⁸ In *People v. B.N.*, survivor-defendant Brenda M. Newkirk pled guilty to second-degree murder after killing her boyfriend.¹³⁹ She appealed her sentence after serving nine years out of the indeterminate twenty-one-year life sentence.¹⁴⁰ On appeal, she shared that her stepfather and her deceased partner substantially sexually abused her.¹⁴¹ While the court accepted that Newkirk's decision to shoot her partner was the culmination of domestic disputes over a series of days,¹⁴² the court held that the evidence necessary to show the nexus must be corroborated by evidence outside of what the defendant stated.¹⁴³ This case highlights several ways that the DVSJA may fail Black women. Scrutinizing a Black woman survivor's timeliness for addressing her abuser may put her on the outskirts of qualifying for the DVSJA. Additionally, the inherent discretion afforded to the courts, combined with implicit biases, may leave Black women on the outskirts, unable to adequately address their abuse.

134. See Jaramillo & Speranza, *supra* note 132, at 2 (explaining the value of an expert providing key insight on a survivor's abuse informing their criminal actions).

135. See Jacobs, *The Violent State*, *supra* note 90, at 41 (describing the violence Black women experience at the hands of the state, noting that the "most severe violence causes death").

136. See Letter from Malori M. Maloney to Floyd Prozanski et al., *supra* note 114 ("Public defenders are not typically trained to screen their clients for domestic violence.").

137. See N.Y. Crim. Proc. Law § 440.47(2)(c) (explaining that a defendant must have two pieces of corroborating evidence to prove they are a victim of domestic violence).

138. See Jaramillo & Speranza, *supra* note 132, at 4 ("Expert testimony may be especially helpful in: Explaining the ongoing and cumulative effects of the trauma . . .").

139. 192 N.Y.S.3d 445, 449 (Sup. Ct. 2023).

140. *Id.*

141. See *id.* at 450 ("The Defendant alleged that she suffered domestic abuse by two people during her life: sexual abuse during her childhood at the hands of her stepfather, and physical and psychological abuse inflicted by [her deceased partner].").

142. *Id.* at 451.

143. See *id.* at 455 (holding that, while the DVSJA allows reliable hearsay from the defendant's own circumstances, there was still an "objective" evidence requirement that must be satisfied).

Despite general aims of making the law colorblind,¹⁴⁴ misogynoir exists in the courts. In the first case where a survivor was released under the DVSJA, prosecutors called Tanisha Davis a plethora of stereotypes directed at Black women.¹⁴⁵ Although she was released, these statements highlight the underlying bias that Black women must deal with when attempting to speak about their abuse. Still, courts have successfully applied the DVSJA to help Black women with resentencing. In *People v. T.P.*, the appellate court held that Taylor Partlow, convicted in the Supreme Court of Erie County of first-degree manslaughter, suffered “[s]ubstantial physical, sexual or psychological abuse” that was “a significant contributing factor to the defendant’s criminal behavior” and therefore qualified her for resentencing under the DVSJA.¹⁴⁶ It is difficult to determine, however, if the facts of the case merely highlight a victim with more sympathetic facts.¹⁴⁷ Had the court determined that Partlow waited slightly longer than the nexus allowed, or that the evidence proffered by the defendant was insufficient, the outcome may have differed. To address the potential consequences for Black female defendants, one must understand how their oppression informs their perception in the courtroom. Issues of discretion amongst judges, prosecutors, and defenders can conflate with racial bias.

Judicial discretion opens the door for disparate impact, and implicit misogynoir dictates whether judges allow a defendant relief under the DVSJA. Judges ultimately have the choice to apply the DVSJA to determine whether, under the social conditions that relegate Black women as victimizers, Black women deserve leniency.¹⁴⁸ Implicit biases, the unconscious associations about certain groups,¹⁴⁹ and stereotypes that

144. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023) (“[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.” (alteration in original) (internal quotation marks omitted) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

145. See LaVarco, *supra* note 4, at 959 (“At [the defendant’s] trial, prosecutors played on anti-Black tropes, referring to Davis as a ‘hood diva’ and making disparaging remarks about ‘the culture she is from.’” (quoting Tanisha Davis, *Survived & Punished*, <https://survivedandpunishedny.org/tanisha-davis/> [<https://perma.cc/ZN54-ZMHN>] (last visited Oct. 24, 2024))).

146. 188 N.Y.S.3d 842, 845 (App. Div. 2023) (quoting N.Y. Penal Law § 60.12 (McKinney 2024)).

147. The initial case detailing the facts appears sparse.

148. See Banks, *supra* note 86, at 357–58 (“[T]he DVSJA’s allowance of judicial discretion fails to acknowledge the extent to which the criminal justice system discounts the credibility of women survivors. . . . Additionally, the previously discussed negative stereotypes ascribed to Black women increase the potential for judges and other criminal justice officers to disbelieve them.”).

149. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *Yale L.J.* 2626, 2629 (2013) (describing “[i]mplicit racial biases” as “the unconscious associations we make about racial groups”).

permit the maltreatment of Black women inform why judges may not be willing to look at such women and call them survivors.¹⁵⁰ Social reality dictates that Black women endure mental, physical, and psychological pain on a day-to-day basis.¹⁵¹ If Black women are innately seen as deviating from white-centered survivorship, judges may not readily see what is apparent: Black women deserve protection.

Judges may also not consider the circumstances surrounding a Black woman's crime as indicative of domestic abuse, particularly if they believe that inadequate time elapsed between the crime and the abuse suffered.¹⁵² While a court "may consider any fact or circumstances relevant to the imposition of a new sentence which are submitted by the applicant or the district attorney,"¹⁵³ a case with more nuanced facts may illuminate greater racial disparities. If the case perhaps displays the defendant in a less sympathetic light, such as a Black mother failing to protect her child or a Black woman navigating threats of long-term violence, the court may be less inclined to consider the impact of the abuse she suffered and find her actions inappropriate despite her every effort to survive. Scholars already highlight the impact of racial priming on judicial discretion,¹⁵⁴ arguing that judges may be hesitant to link the criminal offense to trauma.¹⁵⁵

Public defenders may also be ineffective while assisting survivors. As previously stated, public defenders may not screen for IPV,¹⁵⁶ leaving many women unable to address their abuse and obtain remedies that would otherwise be available to them.¹⁵⁷ Public defenders may not screen for

150. See Jacobs, *The Violent State*, supra note 90, at 50 ("Legal scholars and legal practitioners also find that judges tend to weigh the testimony of their Black female clients as less credible than the testimony of their abusers."); Banks, supra note 86, at 347 (explaining how the Jezebel trope, a trope calling Black women sexually promiscuous, legitimized their sexual abuse).

151. See, e.g., Waller et al., supra note 88, at 1243 ("Exploitative, stereotypical images have been popularized and perpetuated as normative behavior which have been weaponized against African American women and are salient to their daily interactions." (citation omitted)).

152. See Alaina Richert, Note, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 Mich. L. Rev. 315, 325–26 (2021) (citing *State v. Norman*, 378 S.E.2d 8, 10–11 (N.C. 1989), in which the survivor did not meet the imminence prong since she shot her abuser while he slept, despite enduring twenty years of abuse).

153. *Maria S. v. Tully*, 186 N.Y.S.3d 332, 335 (App. Div. 2023) (internal quotation marks omitted) (quoting Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47 (McKinney 2024)).

154. See Richert, supra note 152, at 326 ("It is particularly difficult for Black women to convince a court that they acted in self-defense because of stereotypes that portray Black women as angry, strong, and assertive.").

155. See id. at 339 ("Thus, nexus requirements enable judges who are unaware of, or who simply ignore, the links between trauma and criminal offenses to refuse to grant statutory relief.").

156. Letter from Malori M. Maloney to Floyd Prozanski et al., supra note 114.

157. Id.

abuse for several reasons: (1) They are overworked in a crowded system¹⁵⁸ and (2) they may be uninformed on when to see the signs, instead relying on the forthcomingness of their abused defendants.¹⁵⁹ Public defenders, an overwhelmingly white group,¹⁶⁰ might also hold their own biases that emerge during what academics L. Song Richardson and Phillip Atiba Goff call “defender triage.”¹⁶¹ This triage occurs when overworked public defenders, with limited resources and limited time, prioritize certain cases.¹⁶² This may result in advocates choosing to expend more energy on a case that they think they are likely to win.¹⁶³ Depending on the race of the defendant, the public defender may see the merits of the case as inherently lower.¹⁶⁴ They may also see their own client as innately hostile,¹⁶⁵ leading them to exert less effort while seeking plea bargains.¹⁶⁶ Believing, even implicitly, that Black women are hostile clients, undeserving of effort, strips them of the adequate representation they need. These implicit actions keep Black women in a system that further abuses them, dissolves them of their personal attachments, and follows them even after they leave prison.¹⁶⁷ Consequently, implicit bias perpetuates a cycle of poverty that feeds into the incarceration pipeline.¹⁶⁸

158. See Richardson & Goff, *supra* note 149, at 2631 (“Indigent defense is in a state of crisis. Defender offices are chronically underfunded, resulting in crushing caseloads.”).

159. Letter from Malori M. Maloney to Floyd Prozanski et al., *supra* note 114.

160. Public Defender Demographics and Statistics in the US, Zippia: The Career Expert, <https://www.zippia.com/public-defender-jobs/demographics/> [<https://perma.cc/XEQ3-GLWP>] (last visited Aug. 7, 2024) (showing that roughly seventy-five percent of public defenders were white); see also Lawyers by Race & Ethnicity, ABA, https://www.americanbar.org/groups/young_lawyers/about/initiatives/men-of-color/lawyer-demographics/ (on file with the *Columbia Law Review*) (last visited Aug. 28, 2024) (sharing that eighty-six percent of lawyers were non-Hispanic whites as of 2020).

161. Richardson & Goff, *supra* note 149, at 2634, 2636 (“Defender triage involves choices about how to allocate precious resources. . . . [S]tudies suggest that when clients are black or otherwise criminally stereotyped, [implicit biases] can influence evidence evaluation, potentially causing PDs to unintentionally interpret information as more probative of guilt.”).

162. See *id.* at 2628, 2631–34 (describing the public defender’s “process of prioritizing cases”).

163. See *id.* at 2635 (“[A]fter reviewing the discovery, [public defenders] may decide that expending resources to conduct a fact investigation would be a waste of time because the state’s evidence is strong.”).

164. See *id.* at 2636 (noting that the darker complexion and the race of a public defender’s client influence attitudes on whether a case “warrant[s] much effort”).

165. See *id.* at 2637 (explaining how perception of a client’s behavior alters a public defender’s attitudes on whether their client is agreeable or worth assisting).

166. See *id.* at 2641 (“[Public defenders] may be less likely to fight for their client’s release on bail and spend time, effort, and scarce resources negotiating a better plea deal.”).

167. See *infra* text accompanying notes 205–209.

168. See Trujillo, *supra* note 94, at 226–27 (“The relationship between incarceration and poverty is circular, cyclical, and symbiotic—poverty is a cause of incarceration and incarceration is a cause of poverty.”).

State agents—police officers and prosecutors—also perpetuate implicit bias in how they investigate and indict cases with abused survivors. Prosecutorial discretion may label a Black woman as a codefendant rather than a victim of abuse.¹⁶⁹ In making Black women codefendants, particularly in violent crimes, prosecutors bar them from DVSJA resentencing.¹⁷⁰ Under threats of life sentences and trials where they are labeled as principal accomplices, Black women can be pressured into taking a plea deal because they need to support their families as heads of their household and the main guardians of their children.¹⁷¹ From this, prosecutors may deem Black women survivors as repeat violent offenders if they succumb to the overwhelming pressure to accept a plea deal.¹⁷² This has an alarming effect on Black women and the greater Black community.¹⁷³ Police also reveal implicit biases and exercise a level of discretion that can be harmful to Black women. For example, during police questioning, officers implement “psychodynamic” interrogation practices closely related to intimate terrorist interrogation techniques that force Black women into coping strategies, similar to when they were in their abusive environments.¹⁷⁴ Brianna Banks discusses how police officers may harbor racial biases,¹⁷⁵ but what legal authorities may not realize is

169. Swan, *supra* note 115, at 995 (“The typical person captured under these forms of conjugal liability is black, poor, and a girlfriend or wife of the primary wrongdoer.”).

170. See N.Y. Penal Law § 60.12(1) (McKinney 2024) (revealing that people convicted of child-sex crimes, or even the conspiracy of such, are barred from obtaining relief); N.Y. Off. of Indigent Legal Servs., *supra* note 78 (listing first-degree murder and the conspiracy to do so among a list of other convictions barring someone from obtaining relief under the DVSJA).

171. See Glynn, *supra* note 94, at 11 (“Black mothers are by far the most likely to be the primary source of economic support for their families; they are more than twice as likely as white mothers to be their family’s breadwinner, and more than 50 percent more likely than Hispanic mothers.”).

172. Lucian E. Dervan, *Fourteen Principles and a Path Forward Toward Plea Bargaining Reform*, ABA (Jan. 22, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/fourteen-principles-path-forward-plea-bargaining-reform/ (on file with the *Columbia Law Review*) (“Plea bargaining accounts for almost 98 percent of federal convictions and 95 percent of state convictions in the United States.”); see also ABA Crim. Just. Section, *Plea Bargain Task Force Report* 7, 28 (2023), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf> (on file with the *Columbia Law Review*) (noting the high likelihood that Black defendants take plea deals and their high rates of pretrial detention compared to their white counterparts).

173. See Rick Jones & Cornelius Cornelssen, *Coerced Consent: Plea Bargaining, the Trial Penalty, and American Racism*, 31 *Fed. Sent’g Rep.* 265, 266 (2019) (explaining the different forms of police corruption that promote plea bargaining, highlighting the monetary incentive in which they can “increase their pay by transporting individuals to long-term detention facilities”).

174. Janet Ainsworth, *When Police Discursive Violence Interacts With Intimate Partner Violence: Domestic Violence as a Risk Factor for Police-Induced False Confessions*, 8 *Language & L.*, no. 2, 2021, at 10, 16–18.

175. See, e.g., Banks, *supra* note 86, at 356 (illustrating cases where police officers do not believe Black women victims because of their skin color).

that the unwillingness to come forward in the face of abuse is how Black women try to protect themselves against violence.¹⁷⁶

Black women, alongside Native women, are murdered at higher rates than any other racial group¹⁷⁷ and are three times more likely to be killed by a partner than any other racial group.¹⁷⁸ In 2020, the Violence Policy Center found that Black women who were killed in a single victim/single offender scenario almost always knew their killer's identity.¹⁷⁹ When Black women do not act within a specific time frame, they are barred from exercising DVSJA as an option.¹⁸⁰ The potential unwillingness of courts to consider how fear and interpersonal relationships affect victims' reporting may conflict with this timing requirement. Courts have dismissed abuse from qualifying under the DVSJA because it occurred outside of the temporal requirement.¹⁸¹ Even outside New York and the DVSJA context, the court in *State v. Norman* rejected survivor-defendant Judy Ann Norman's self-defense claim after shooting her abuser in her sleep, despite twenty years of physical and sexual abuse and numerous attempts to flee, because she was not in imminent harm.¹⁸² This phenomenon, called "learned helplessness," occurs when a victim views attempts to escape as futile.¹⁸³ Instead of criminal justice figures understanding learned

176. See Waller et al., *supra* note 88, at 1244 ("African American women have been routinely objectified, overlooked, experienced overt mistreatment, and had their voices minimized by providers within the very systems that were supposed to assist them. The criminal justice system fails to provide the same deference to African American women as they do White survivors." (citation omitted)).

177. Emiko Petrosky, Janet M. Blair, Carter J. Betz, Katherine A. Fowler, Shane P.D. Jack & Bridget H. Lyons, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, 66 *CDC Morbidity and Mortality Wkly. Rep.* 741, 741 (2017).

178. *Inst. on Domestic Violence in the Afr. Am. Cmty., Facts About Domestic Violence and African American Women* 1, 5 (2015), <https://idvaac.org/wp-content/uploads/Facts%20About%20DV.pdf> [<https://perma.cc/7D85-3KBE>]; see also Miccio, *supra* note 54, at 103 ("Thus, requiring that every battered mother flee the batterer as a condition of 'reasonable conduct' may be signing a death warrant for a specific class of battered mothers.").

179. Violence Pol'y Ctr., *When Men Murder Women: An Analysis of 2020 Homicide Data 7–8* (2022), <https://www.vpc.org/studies/wmmw2022.pdf> [<https://perma.cc/Q4CZ-HZT6>] ("Where the relationship could be determined, 90 percent of Black females killed by males in single victim/single offender incidents knew their killers (464 out of 516).").

180. See Richert, *supra* note 152, at 325 (explaining how victims of domestic violence are often denied self-defense or duress claims because the danger was not imminent enough).

181. See *id.* at 325–26 (showing when a defendant, after having tried to escape and being brutally beaten, was shown to have been outside of the imminent danger requirement of self-defense).

182. 378 S.E.2d 8, 9–11 (N.C. 1989).

183. See Richert, *supra* note 152, at 326 ("[M]any victims of IPV suffer over time from a psychological phenomenon called 'learned helplessness,' where victims may stop seeking to escape since doing so seems futile.").

helplessness, they demand that Black women continue to fight and not surrender hope of escaping abuse.

To complicate Black women and survivorship further, cases in which the victim is also a perpetrator of violence are difficult to fit within the victim–offender binary. Cynthia Godsoe, a professor at Brooklyn Law School, describes the victim–offender overlap as the connection between the “victimization and the perpetration of crime and delinquency.”¹⁸⁴ Legal figures deny Black women their survivorship status and label them as perpetrators of violence¹⁸⁵ despite the coercive control of their partner.¹⁸⁶ Consequently, legal authorities may not recognize such abuse, or choose to cast a wide mask of criminality that erases any nuance instead.

C. *The DVSJA’s Procedural Harm Against Black Women*

From the outset, the DVSJA has several procedural obstacles outside of the substantive nexus requirement that burden Black women.

First, the DVSJA requires a survivor-defendant to affirmatively request relief.¹⁸⁷ While the DVSJA allows for judicial discretion to shorten sentences and provides alternate sentencing schemes for crimes after August 12, 2019,¹⁸⁸ defendants are still required to “request DVSJA consideration before [being] sentenced.”¹⁸⁹ People who commit crimes after this date can request relief only upon their initial sentencing.¹⁹⁰

184. Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 *Brook. L. Rev.* 1319, 1319 (2022) (“The victim/offender overlap is the ‘link between victimization and the perpetration of crime and delinquency . . .’” (quoting Jennifer M. Reingle Gonzalez, *Victim-Offender Overlap*, in *I The Encyclopedia of Theoretical Criminology* 3, 4 (J. Mitchell Miller ed., 2014))).

185. See Richert, *supra* note 152, at 322 (explaining the various ways abusers will use the threat of violence, incarceration, or kidnapping allegations to ensure their victims comply).

186. See Susan Green, *Violence Against Black Women—Many Types, Far-Reaching Effects*, *Inst. for Women’s Pol’y Rsch.* (July 13, 2017), <https://iwpr.org/violence-against-black-women-many-types-far-reaching-effects> [<https://perma.cc/J6NX-RBP6>] (“Black women also experience significantly higher rates of psychological abuse—including humiliation, insults, name-calling, and coercive control—than do women overall.”).

187. See *Domestic Violence Survivors Justice Act*, N.Y. Crim. Proc. Law § 440.47(1)(a) (McKinney 2024) (declaring that an individual must put in a “request to apply for resentencing” under the penal law).

188. *Resource Guide*, *supra* note 74, at 10 (“If you are facing sentencing for offenses committed after August 12, 2019, you must request DVSJA consideration before you are sentenced.” (emphasis omitted)).

189. See N.Y. Penal Law § 60.12(2) (McKinney 2024) (“Where a court would otherwise be required to impose a sentence pursuant to section 70.02 of this title, the court may impose a definite sentence of imprisonment of one year or less, or probation in accordance with the provisions of section 65.00 of this title . . .”).

190. *DVSJA Statewide Def. Task Force, Investigations Under the Domestic Violence Survivors Justice Act: A Best Practices Manual for Defense Attorneys* 3 n.2 (2023), https://cdn.ymaws.com/www.nysda.org/resource/resmgr/news_picks_items/DVSJA_Investigations_Best_Pr.pdf [<https://perma.cc/CE2G-DREM>] [hereinafter *Best Practices*] (“For

The statute also provides resentencing relief for individuals incarcerated before the August 12, 2019 mark,¹⁹¹ unless the individual is on parole.¹⁹² For crimes committed before August 12, 2019, the defendant must have a sentence of at least eight years to qualify for the DVSJA¹⁹³ and still file for relief, assuming they knew of the statute. This requirement demonstrates a potential disparity with some individuals, who may have committed similar crimes under abuse, facing prison time, while others may not receive jail time at all.

There are practical setbacks limiting Black women's relief under the DVSJA. Some incarcerated people spend a large portion of their sentencing in prison before they find the DVSJA.¹⁹⁴ There may be people who need relief but are unsure if they qualify for a reduced sentence or they may not have the necessary emotional or financial resources to appeal. In *People v. T.P.*, survivor-defendant Taylor Partlow was successful at the appellate level, but she was still denied initial resentencing at the lower court level after shooting her abuser.¹⁹⁵ Had she committed the crime after 2019, she would have had to proactively request consideration, know that she qualified for the DVSJA, and be upfront about her abuse, requiring work that undermines the subtle pervasiveness of trauma. Compounding this, the same issues regarding judicial, prosecutorial, and public defender resource discretion still apply, and survivors must still navigate biases

survivors whose offenses occurred *after* August 12, 2019, they may pursue a DVSJA sentencing at their *initial* sentencing under Penal Law § 60.12, but they may not pursue resentencing at a later date, as the law is currently written.”).

191. Crim. Proc. § 440.47(4) (allowing judicial discretion for reduced sentencing); Jaramillo & Speranza, *supra* note 132, at 1 (explaining that “[the DVSJA] gives judges the ability to resentence survivors to shorter prison terms for offenses committed before August 12, 2019.”).

192. Domestic Violence Survivors Justice Act: Resentencing Options, Pro Se (Prisoners' Legal Servs., New York, N.Y.), Aug. 2019, at 11, 12, <https://www.ils.ny.gov/files/Pro%20Se%20Newsletter%20Article%20August%202019.pdf> [<https://perma.cc/7ZUU-F47R>] (“The law does not permit a Survivor of Domestic Violence who is under parole supervision to apply for resentencing.”).

193. Isaacs, *supra* note 76, at 444 (“[T]o qualify for resentencing, in addition to the offense date pre-dating August 12, 2019, the applicant must be (1) in custody, serving a sentence of eight years or more; (2) a first- or second-felony offender; and (3) serving a sentence for one of the included offenses.”); Jean Lee, Domestic Violence Survivors Aren't Getting the Reduced Sentences They Qualify For, PBS News Hour (July 14, 2021), <https://www.pbs.org/newshour/nation/domestic-violence-survivors-arent-getting-the-reduced-sentences-they-qualify-for> [<https://perma.cc/KGB4-9HH2>].

194. See, e.g., *People v. Coles*, 158 N.Y.S.3d 611, 611 (App. Div. 2022) (showing that the defendant qualified for a reduced sentence under DVSJA Penal Law § 60.12 after spending roughly nineteen years in prison after being sentenced to twenty years, despite the law passing three years prior).

195. 188 N.Y.S.3d 842, 843 (N.Y. App. Div. 2023). Her race was absent in the facts of the case, but she appeared on the news and was a Black woman. See WGRZ Staff, Buffalo Woman to Spend 8 Years in Prison for Killing Her Boyfriend, 2 WGRZ (Sept. 6, 2019), <https://www.wgrz.com/article/news/crime/71-9def0c07-4e39-4f32-8b5f-a776061c0982> [<https://perma.cc/X8ZS-6NKR>].

within the courtroom. Importantly, while the DVSJA does allow “[a] court [to] determine that such abuse constitutes a significant contributing factor . . . regardless of whether the defendant raised a defense,”¹⁹⁶ a court, through misogynoir, may not see the defendant as qualifying.

Addressing the second obstacle, the DVSJA narrows the scope of Black women who may otherwise qualify under the DVSJA. Under the DVSJA, only specific crimes allow an individual to qualify for resentencing.¹⁹⁷ The survivor-defendant must also be a first or second violent felony offender.¹⁹⁸ The type of crime is especially important because many women are considered codefendants for violent crimes, even in failing to act, due to abuse or fear of impending abuse,¹⁹⁹ the latter of which is not currently recognized as substantial enough abuse under the DVSJA.²⁰⁰ Additionally, excluding nonviolent offenses ignores the reality that over a quarter of women who are currently in prison are incarcerated for violent offenses.²⁰¹ This crucial quarter includes women who are lumped into crimes as codefendants or principal actors.²⁰² The Sentencing Project writes how “[e]xcluding certain offenses also has the potential to create racial disparities among those who receive relief, given that prosecutors are more likely to bring serious charges against people of color and plea bargaining operates unevenly, often also at the expense of marginalized people.”²⁰³ Prosecutors, in making Black women co-conspirators to violent crimes, force them out of qualifying for relief, either because they are lumped into a heavier violent offense or are pushed into being second- and third-time offenders. Furthermore, women who kill their abusers out of fear of retaliation or lapsed time, as seen in *Norman*,²⁰⁴ cannot qualify for the

196. N.Y. Penal Law § 60.12(1) (McKinney 2024).

197. See id. (defining the offenses that the law covers).

198. Id.

199. See Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. Crim. L. & Criminology 579, 587 (1998) (explaining how an abused mother is held more liable for the abuse and death of her child by her abusive partner than her partner).

200. *People v. Williams*, 152 N.Y.S.3d 575, 575 (App. Div. 2021) (“Although the DVSJA does not require that the abuse occur simultaneously with the offense . . . the ‘at the time of’ language must create some requirement of a temporal nexus between the abuse and the offense or else it is meaningless.” (citations omitted)); see also *People v. B.N.*, 192 N.Y.S.3d 445, 458 (Sup. Ct. 2023) (“If ‘substantial’ does not carry its ordinary dictionary meaning and require a DVSJA application to prove abuse which was ‘considerable in quantity’ or ‘significantly great,’ then any abuse whatsoever qualifies, including a single insult or slap.”).

201. Kajstura & Sawyer, *supra* note 33.

202. Mindy B. Mechanic, *Battered Women Charged With Homicide: Expert Consultation, Evaluation, and Testimony*, 32 J. Aggression, Maltreatment & Trauma 189, 208 (2023) (explaining how courts view battered women who complied with abuser demands as potential accomplices).

203. Komar et al., *supra* note 13, at 16.

204. *State v. Norman*, 378 S.E.2d 8, 10–11 (N.C. 1989).

DVSJA either.²⁰⁵ Courts have criminalized abuse survivors acting in self-defense.²⁰⁶ With the criminal system over-relying on plea deals, prosecutors deeming Black women as co-conspirators instead of victims, and the statute narrowly applying to specific crimes, the state ignores the compounding reasons why Black women may be overrepresented in the carceral system.

D. *When Resentencing Does Not Go Far Enough*

Resentencing is not accessible for many survivors. Survivors may spend many years in prison before getting resentencing relief under the DVSJA.²⁰⁷ Courts may also reject Black women if they fail to meet the numerous qualifications specified within the statute,²⁰⁸ such as if the initial sentence was not “unduly harsh.”²⁰⁹ As a result, Black women’s mental and emotional state can deteriorate while in prison.

Black women often do not have the same support systems as men when they are in prison.²¹⁰ Denise Mann, a pseudonym for a Black mother of four and domestic violence survivor, recalled her experience while incarcerated: “My children’s grandmother refused to bring them to come see me [at Rikers], . . . She said, ‘I wouldn’t bring my dog there.[’] That broke me. Once I got [to Bedford Hills] our bond collapsed somehow.”²¹¹ Beyond leading to emotional neglect while in prison, prison retraumatizes

205. See *Williams*, 152 N.Y.S.3d at 576 (“It is . . . not enough that defendant was indisputably subjected to substantial physical and psychological abuse in the past.”).

206. See Ellie Williams, Note, *Leaving Doesn’t Mean Living: Analyzing the Case of Angela Vaughn, Criminalized Survivors of Gender-Based Violence, and International Human Rights Law*, 51 Ga. J. Int’l & Compar. L. 587, 595 (2023) (“[S]urvivors may act to protect themselves from what they know to be a dangerous situation in circumstances that may not satisfy the traditional legal requirements for self-defense, particularly the requirement that the danger be imminent.”).

207. See, e.g., Jennifer Andrus, *Taking Another Look: How the Domestic Violence Survivors Justice Act Works in Practice* (Feb. 26, 2024), <https://nysba.org/taking-another-look-how-the-domestic-violence-survivors-justice-act-works-in-practice/> [<https://perma.cc/6M7M-XVJE>] (explaining that Patrice Smith, a woman who was sentenced at sixteen, spent twenty-one years in prison before getting the rest of her sentence vacated).

208. See *supra* sections II.A–C (discussing the limitations of the DVSJA in addressing Black woman survivorship).

209. See N.Y. Penal Law § 60.12 (McKinney 2024) (noting the standard for relief requires an inquiry into whether the initial sentence was unduly harsh).

210. See Willingham, *supra* note 95, at 59 (“When men are incarcerated, women are usually the ones . . . supporting them and taking care of their children, on the outside. The woman will regularly visit her man and promise to wait for him. But when these women become inmates themselves, they rarely get that same . . . support.”).

211. Tamar Sarai, *Bias and Misinformation About Domestic Abuse Survivors Still Plague the Courts*, Prism (Apr. 28, 2021), <https://prismreports.org/2021/04/28/bias-and-misinformation-about-domestic-abuse-survivors-still-plague-the-courts/> [<https://perma.cc/4WCU-6L44>] (first and third alteration in original) (internal quotation marks omitted).

women with violence and sexual assault.²¹² Forcing Black women survivors to endure incarceration disrupts their lives and is antithetical to what the DVSJA was supposed to be: a second chance.

Resentencing, even when successfully obtained, does little to mitigate the effects of incarceration. Imprisonment forces Black women to carry a burden that forever follows their shadows, affecting their families, their communities, and their wellbeing. The stigma of going to prison forces many Black women back behind bars. Survivors lose custody of their children because they lack any other familial or economic support.²¹³ Many of these women, like Denise Mann, are shunned by their families and by the larger community.²¹⁴ Black women face high unemployment rates post-incarceration.²¹⁵ Many also face rampant physical and sexual abuse while in prison.²¹⁶ For these women, the trauma of being incarcerated forces a toxic stronghold over their lives that replicates the abuse they faced prior to prison. Other states hoping to model their own DVSJA must consider the potential success of adopting a rehabilitative framework, instead of sentencing reform, to help abuse survivors.

III. REIMAGINING THE DOMESTIC VIOLENCE SURVIVOR

Reducing punitive measures and promoting rehabilitation can assist Black female survivors.²¹⁷ Courts should offer services to prepare and assist

212. See Richert, *supra* note 152, at 335 (explaining the high rates of physical and sexual violence among incarcerated individuals).

213. See Glynn, *supra* note 94, at 11 (“Black mothers . . . are more than twice as likely as white mothers to be their family’s breadwinner, and more than 50 percent more likely than Hispanic mothers.”).

214. See Willingham, *supra* note 95, at 60 (“[T]hough physically free after being released from prison, black women are still being held captive Patrice Gaines, who was briefly incarcerated in 1970 on drug-related charges, notes that when women go to jail or prison, they become part of an ostracised community”).

215. See Council of Econ. Advisers, *Expanding Economic Opportunity for Formerly Incarcerated Persons*, White House (May 9, 2022), <https://www.whitehouse.gov/cea/written-materials/2022/05/09/expanding-economic-opportunity-for-formerly-incarcerated-persons/> [<https://perma.cc/TLE4-FYWF>] (showing that “the unemployment rate for formerly incarcerated Black women was about 43 percent, compared with 5 percent for their never-incarcerated counterparts”).

216. See Emily D. Buehler & Shelby Kottke-Weaver, *Off. of Just. Programs, DOJ, Sexual Victimization Reported by Adult Correctional Authorities, 2019–2020—Statistical Tables 7* (2024), <https://bjs.ojp.gov/document/svraca1920st.pdf> [<https://perma.cc/DAU6-DY2D>] (“There were 21.3 allegations of sexual victimization per 1,000 prison inmates in 2020, which was a significant increase from 2013 (7.7 per 1,000 prison inmates).” (citation omitted)); Yunsoo Park, *Addressing Trauma in Women’s Prisons*, Nat’l Inst. Just., *Off. Just. Programs, DOJ* (May 11, 2022), <https://nij.ojp.gov/topics/articles/addressing-trauma-womens-prisons> [<https://perma.cc/HCN3-MCW2>] (explaining that “incarcerated women are more likely to experience victimization while incarcerated”).

217. See Holly Corbett, *Why Alternatives to Incarceration Are Good for Communities, Workplaces and the Economy*, *Forbes* (Feb. 24, 2023), <https://www.forbes.com/sites/hollycorbett/2023/02/24/why-alternatives-to->

in rehabilitation efforts.²¹⁸ While incarceration hinders survivors from reintegrating into society, programs aimed at healing one's trauma may be effective in assisting abuse survivors. This Note charges advocates to make the DVSJA an entirely rehabilitative form of relief without including the carceral consequences. Furthermore, this Note posits the possibility of legislators making the DVSJA an affirmative defense under the duress model.

This Part proposes solutions and insights on how legislators should look beyond the DVSJA in future cases involving abuse survivors facing incarceration. Section III.A will provide solutions to combat bias in courts. Section III.B will propose amendments to the DVSJA. Lastly, section III.C will provide alternatives to resentencing relief for the DVSJA.

A. *Addressing Bias in Courts*

To help Black women survivors, legislators should address bias within the criminal justice system. If the statute's intent is to allow survivors to speak up regarding their abuse, legal authorities and advocates must find ways to mitigate implicit biases that strip Black women of survivorship.

Educating judges on the full effects of abuse could help them make a more informed decision when handling cases involving survivor-defendants. Providing training resources to judges to help screen for signs of abuse may reduce bias.²¹⁹ It is important to understand that, while the current discourse surrounding implicit biases separates race with Black men and gender with white woman,²²⁰ judges must learn how oppression and perceptions conflate and interact. This can help elucidate for judges the often-erased hardships and trauma facing Black women.²²¹ Paired with educational resources for implicit biases surrounding women of color, judges will be more prepared to exercise discretion in a way that is fully

incarceration-are-good-for-communities-workplaces-and-the-economy/ (on file with the *Columbia Law Review*) (showcasing the success of an alternative to incarceration program with "94% of AFJ's court-involved participants . . . not [being] reconvicted of a new crime within three years of starting the program").

218. *Id.* ("[O]nce incarcerated people return to society, they often lack the resources, such as education and networks, to set them up for success.").

219. See Richardson & Goff, *supra* note 149, at 2646 ("Accordingly, we recommend that attorneys be taught about implicit biases and their probable effects on behaviors and judgments. This type of education is already occurring with judges, so it should be fairly simple to implement this suggestion.").

220. Coles & Pasek, *supra* note 2, at 315 ("[I]ntersectional invisibility occurs because the prototypical woman is a White woman and the prototypical Black person is a Black man.").

221. See Banks, *supra* note 86, at 357–58 (examining the prevalence of Black women's trauma and issues surrounding incarceration going ignored).

informed about how trauma and coercive control conflate with misogynoir.²²²

To reduce public defender bias, advocates should uniformly screen for domestic abuse as a requirement for effective assistance of counsel. Recently, New York courts ruled that not screening for the DVSJA does not constitute ineffective assistance of counsel.²²³ Ideally, lawyers are well-informed about the law and can better screen for DVSJA eligibility than Black women defendants, who may not know of the statute or if they qualify. Furthermore, placing the responsibility to request relief within the public defender's purview forces them into a more active role that may compel them to avoid settling for plea deals and may encourage them to engage more effectively than they would in cases that they deem futile. It should be noted that this remedy does not help alleviate burdens affecting public defenders but rather ensures that individuals have proper representation. As such, if defenders are unable to meet this requirement for any reason, the defendant should not be barred from bringing the request for relief and they should have the opportunity to seek it in the future, even if the defense was not raised. Currently, the burden is on the defendant to maintain evidence of their abuse.²²⁴ If they fail to consider DVSJA in their own cases, they cannot raise the claim again.²²⁵ Requiring court actors to screen for IPV, and ensuring that the failure to do so is not a hindrance on the defendant, can allow the defendant to pursue avenues of relief that would otherwise be lost to them.

B. *Amending the DVSJA*

States across the country are looking to replicate the DVSJA and provide their own tool for assisting abuse survivors.²²⁶ If they want to be sure that their statute readily addresses the complexity of survivors who commit crime while under the stronghold of their abuse, they should consider altering several factors. The first alteration should address the substantive time requirement under the nexus, allowing all crimes to be considered regardless of timing, and interpreting the language to include

222. Bernice Donald, Jeffrey Rachlinski & Andrew Wistrich, *Getting Explicit About Implicit Bias*, *Judicature*, Fall/Winter 2020–2021, at 75, 76 (examining the “subtle” ways judges show implicit bias and negative associations with Black defendants).

223. See *People v. Riley*, 200 N.Y.S.3d 150, 151 (App. Div. 2023) (“[A] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success.” (internal quotation marks omitted) (quoting *People v. Stultz*, 2 N.Y.3d 277, 287 (2004)).

224. See *Resource Guide*, *supra* note 74, at 15 (instructing survivor-defendants on the best way to find corroborative evidence and to reach out to witnesses while navigating trauma).

225. See *Domestic Violence Survivors Justice Act*, N.Y. Crim. Proc. Law § 440.47(1)(a) (McKinney 2024) (explaining that an individual must “submit to the judge or justice who imposed the original sentence” to apply for relief).

226. See Komar et al., *supra* note 13, at 1 (“[T]he DVSJA has inspired a wave of legislative advocacy in Louisiana, Oklahoma, and Oregon.”).

the fuller effects of coercive control. The second alteration should modify the DVSJA's procedural requirements to be more inclusive of abused victims' circumstances.

Addressing the substantive nexus requirement, advocates and states looking to replicate the statute should consider changing the requirement to include a fear of impending abuse and a more inclusive view of coercive control. Scholars argue that "[s]ince the DVSJA is relatively recent, jurisprudence is still developing. Judges are still interpreting this particular language of the DVSJA. The interpretation of this phrase should be informed by current research and science about coercive control and the trauma caused by domestic violence."²²⁷ The Sentencing Project also recognizes the need to "[a]dopt an expansive definition of domestic abuse beyond IPV that includes all family relationships and commercial sexual exploitation."²²⁸ Judges should not consider the IPV survivor a passive actor, but rather an individual forced to choose between life and death.²²⁹ With Black women survivors fearing for their life or forced into prolonged sexual exploitation, courts must broaden their understanding of trauma, either by expanding the current language or by adopting entirely new language. Biases that inform how and why Black women are seen as complacent coperpetrators must be accounted for if the aim is to assist all survivors, not simply the ones in groups that are favored.²³⁰

Next, advocates should alter the procedural elements within the DVSJA. First, advocates should consider adding a pretrial element, incorporating a third-party actor who is involved in the community and who specializes in abuse. This would occur before any case where there is explicit mention of coercive control or at the request of educated public defenders who have flagged the potential abuse. Mindy B. Mechanic, a scholar at California State University-Fullerton, proposes expert consultation during pretrial for survivor-defendants.²³¹ This service occurs before the start of the trial and includes an expert on IPV to consult with the survivor-defendant.²³² Shortfalls within the statute occur because Black women's abuse goes unnoticed or unscreened. A separate case actor,

227. Rosenthal & Wierschem, *supra* note 107, at 17.

228. See Komar et al., *supra* note 13, at 2.

229. See Mechanic, *supra* note 202, at 198 ("Intimate partner violence (IPV) can have lethal consequences. At least one in seven homicides globally are committed by intimate partners . . .").

230. See Richardson & Goff, *supra* note 149, at 2630 ("We use the term implicit racial biases to refer both to unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups).").

231. See Mechanic, *supra* note 202, at 203 (noting pretrial expert consultation "can shape the process, as well as the ultimate outcome or disposition of a case" (emphasis omitted)). Consolidating this pretrial proposal within an evidentiary hearing that Isaacs discusses can alleviate the burden on the state. See Isaacs, *supra* note 76, at 447 ("An initial evidentiary proffer [at the pleading stage] would avoid an onslaught of frivolous litigation.").

232. *Id.* at 203-04.

dedicated to handling these issues and with exposure to uniquely impacted communities, would allow Black women survivor-defendants the opportunity to feel prepared and consult an individual outside of the legal space that they can trust. Furthermore, providing additional resources would alleviate the burden plaguing public defenders, help their clients, and assist judges in utilizing their discretion effectively. It would also undermine the automatic assumption that the Black woman survivor is a co-conspirator by inquiring into their experiences of trauma and abuse without the burden being on them to do so. Next, there are some procedural requirements that should be changed. Changing procedure may still require additional remedies to implement because it does not erase bias entirely. Moreover, there may still be cases where defendants are not seen as defendants. Still, with the incentive for public defenders to have an extra pair of eyes on the case and education within the courtroom on bias, there may be useful effects in making another figure available to help defense counsel.

Second, advocates must remove the specific crime and offender status criteria if they want to assist more survivors. Removing these criteria would allow more Black women to qualify for relief and address the pattern of punishing women as accomplices instead of seeing them as victims of abuse.²³³ If the specific crime and offender status were removed, judges would be able to discern facts of Black women's cases. Judges could bypass the stigmatization of violent charges to see that the survivor-defendant may have been lumped into accomplice liability, had ineffective assistance of counsel that led to convictions, or desperately pled guilty to crimes that made them unqualified for relief. There would be less of an impediment to addressing abuse victims because their prior sentences would play no part in assessing their survivorship. Opponents may argue that this promotes a windfall of defendants frivolously applying for a reduced sentence. Balanced with the egregiously high rates of plea bargaining for state and federal convictions,²³⁴ the pool of defendants who would otherwise *not* be second and third offenders may instead be drastically reduced.

Third, reforms should remove the eight-year minimum sentencing requirement for crimes before August 12, 2019 and its "unduly harsh" extension.²³⁵ There should be no minimum sentence because abuse does not change depending on the length of the sentence. What *does* change is the additional trauma from having to be in prison.²³⁶ The current makeup

233. *Id.* at 207–08 (illustrating how a battered person's belief of harm pushes them into assisting with crime or acting as an accomplice).

234. Dervan, *supra* note 172.

235. See N.Y. Penal Law § 60.12(1) (McKinney 2024) (noting the standard for relief requires an inquiry into whether the initial sentence was unduly harsh).

236. See Richert, *supra* note 152, at 335 ("Spending time in prison denies people suffering from these kinds of trauma the care they need and oftentimes retraumatizes them.").

creates a disparate effect of relief, differentiated only by the date that survivor-defendants committed their crime.²³⁷ Imposing mandatory minimum sentences unduly harms defendants.²³⁸ If legislators removed the minimum sentencing requirements, the change could assuage Black women's trauma and fulfill the purpose of the DVSJA in allowing for informed judicial discretion and a second chance for survivors.²³⁹

Lastly, advocates should allow applications for relief at any time, regardless of whether they brought the claim up prior to, or during, their initial sentencing. Scholars argue that individuals should have the capacity to apply at any time, not just at initial sentencing, to help as many survivors as possible.²⁴⁰ Lifting a barrier for relief would allow more Black women survivors to qualify, giving current incarcerated Black women another opportunity for relief if they failed to raise the request.

The Eighth Amendment also prohibits states from imposing cruel and unusual punishments.²⁴¹ What is more cruel than disparate sentencing for similar, if not the same, crimes, separated by the date of a law? While legal practitioners communicated practical concerns of individuals overutilizing the statute,²⁴² it is clear that the pendulum has not quite swung in the direction of the statute being as far reaching as once expected.²⁴³ With these realities in mind, advocates should consider removing the enactment of the statute as a flag for who qualifies for resentencing relief.

C. *Replacing Resentencing*

Resentencing does not mitigate the harm for women who are already incarcerated and who have been in prison for several years. As such, other bills should consider alternative forms of relief outside of resentencing.

237. See Resource Guide, *supra* note 74, at 25–28, 50 (noting that some individuals do not have a minimum sentence while others, sentenced before the August 12, 2019 deadline, have a minimum eight-year sentence and an original sentence that must be “unduly harsh,” leaving more room for judicial scrutiny on survivors’ experiences).

238. See Richert, *supra* note 152, at 335 (explaining that incarcerated survivors of abuse have issues dealing with post-incarceration realities through housing, employment, education, and more).

239. See Sanctuary for Fams., *The DVSJA*, *supra* note 12 (explaining that the initial goal of the DVSJA was to allow judges the flexibility to provide lighter or alternative sentencing).

240. See Komar et al., *supra* note 13, at 13 (“Given the potential psychological and logistical barriers to reporting victimization at the initial trial sentencing stage, survivors should always have the opportunity to seek resentencing . . .”).

241. See U.S. Const. amend. VIII, § 1 (“Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*” (emphasis added)).

242. See Isaacs, *supra* note 76, at 447 (“The District Attorneys Association of the State of New York (DAASNY) expressed concern that adjudicating post-conviction resentencing motions under the DVSJA ‘could prove burdensome and costly’ . . . They viewed a robust pleading requirement as a way to ease this burden.”).

243. See Komar et al., *supra* note 13, at 1 (stating the law has helped around forty individuals).

1. *Alternative to Incarceration Programs.* — First, legislators hoping to enact similar statutes to the DVSJA should consider replacing resentencing relief with ‘Alternative to Incarceration’ (ATI) Programs. The DVSJA does allow judges to sentence defendants to ATI programs, but this is not the only form of discretionary relief under the statute.²⁴⁴ Currently, New York’s Division of Probation and Correctional Alternatives (DPCA) helps implement over 150 ATI programs “designed to reduce reliance on pretrial detention and/or incarceration and operate in a manner consistent with public safety.”²⁴⁵ DPCA replaces incarceration with specialized psychological services, substance abuse programs, and additional noncarceral programs aimed at rehabilitating defendants.²⁴⁶ Changing the DVSJA from a resentencing tool²⁴⁷ to a holistic rehabilitative program would allow Black women to circumvent the additional trauma of incarceration. Furthermore, it could reduce recidivism and allow pathways for Black women survivors to restart their life. The Mayor’s Office of Criminal Justice credits sentencing alternatives as being useful tools in New York.²⁴⁸

Changing resentencing to more holistic relief allows advocates to shift away from punitive attitudes within courts and toward the rehabilitation of Black women. Associate Professor at Widener Law School Michal Buchhandler-Raphael coins the term “survival homicide” to refer to “cases where survivors of domestic abuse become criminal defendants after killing abusive intimate partners or abusive family members.”²⁴⁹ Buchhandler-Raphael recognizes that cases with survivor-defendants should be treated under a mitigated criminal responsibility model, a framework described as a “shared responsibility model acknowledg[ing] that survival homicide is far from being only a problem of individual

244. See N.Y. Penal Law § 60.12 (McKinney 2024) (“Where a court would otherwise be required to impose a sentence pursuant to section 70.02 of this title, the court may impose a definite sentence of imprisonment of one year or less, or probation in accordance with the provisions of section 65.00 of this title . . .”).

245. Alternative to Incarceration (ATI) Programs, N.Y. State: Div. Crim. Just. Servs., https://www.criminaljustice.ny.gov/opca/ati_description.htm [<https://perma.cc/5FP2-YASH>] (last visited Aug. 8, 2024).

246. See *id.*

247. See Sentencing Reform, Survivors Just. Project (Apr. 19, 2023), <https://www.sjpnny.org/sentencing-reform> [<https://perma.cc/M4RD-EMWK>] (“New York’s law created opportunities for survivors to receive a shorter sentence at their original sentencing hearing and, for those already incarcerated, provided an opportunity for resentencing.”).

248. See Alternatives to Incarceration, NYC: Mayor’s Off. Crim. Just., <https://criminaljustice.cityofnewyork.us/programs/alternatives-to-incarceration/> [<https://perma.cc/5TRM-7ZHY>] (last visited Aug. 8, 2024) (“The success of these programs on reducing re-offending and re-incarceration rests in large part on programs’ adherence to evidence based practices . . . as well as programs’ provision of longer term services to people on a voluntary basis following their completion of a court-mandated program.”).

249. Michal Buchhandler-Raphael, *Survival Homicide*, 44 *Cardozo L. Rev.* 1673, 1676 (2023).

survivors' culpability . . . [with] states hav[ing] a duty to domestic abuse survivors to ensure that they are able to live dignified lives free of violence."²⁵⁰ Ultimately, this framework places the responsibility on the state to address the circumstances surrounding an abused victim committing a crime.²⁵¹ If the state actively addresses circumstances of a Black woman survivor committing a crime, such as sexual exploitation and poverty, it would benefit the larger Black community and survivors of abuse who are coerced into criminal conduct.²⁵²

Some academics go further, exploring an anticarceral feminist approach. Supporters of anticarceral feminism advance collective liberation, clemency, and rehabilitation instead of police interference.²⁵³ Proponents of the anticarceral feminism approach maintain that states need to compensate incarcerated survivors for "unjust prosecutions and confinement, as well as . . . the state violence they have been forced to endure in prisons."²⁵⁴ Shirley LaVarco, a civil rights attorney, argues that the state should offer monetary reparations to incarcerated survivors within legislative text like the DVSJA.²⁵⁵ The reparative ambitions of this framework give room for Black women to repair their lives from abuse and actively addresses trauma by placing community resources directly in Black women's hands. Furthermore, imposing required trauma programs may conflict with Black women's lives managing jobs and their households. Creating a monetary incentive would contribute to their lives and provide an incentive to engage. A sustainable path toward trauma and social recovery could break Black women's abuse-to-prison pipeline, mitigate poverty, and create a sustainable path toward trauma and social recovery.

2. *Creating an Affirmative Defense.* — It is difficult for survivors to make an affirmative duress claim. Currently, a survivor may make such an affirmative defense if they can prove that they were under immediate threat of imminent harm and had no legal alternative.²⁵⁶ Under the Model Penal Code, defendants can make an affirmative duress claim if they were

250. *Id.* at 1681.

251. *Id.*

252. *Id.*

253. See Isaacs, *supra* note 76, at 464 ("[F]or Black, indigenous, migrant, LGBTQ, and disabled survivors, . . . calling the police invites a perpetuation of the harm they have already experienced."); LaVarco, *supra* note 4, at 958 ("For example, advocates in New York have called on Governor Kathy Hochul to grant mass clemency and full pardons to criminalized survivors as the most urgently needed form of reparations for human rights violations against them.").

254. LaVarco, *supra* note 4, at 959.

255. See *id.* at 960 ("[T]he sort of reparations I refer to would be for the benefit of those who have themselves been criminally prosecuted—whether despite or because of their status as survivors of violence—and, oftentimes, subjected to further violence while in state custody.").

256. *Dixon v. United States*, 548 U.S. 1, 17 (2006) (holding that the defendant held the burden to prove beyond a preponderance of evidence the affirmative defense of duress).

“coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”²⁵⁷

To complicate this issue further, the Supreme Court has limited coercive control as a defense. The Supreme Court has been skeptical of defense requests of duress from individuals who “recklessly or negligently placed [themselves] in a situation in which it was probable that [they] would be forced to perform the criminal conduct.”²⁵⁸ Circuit courts also narrowed the affirmative defense from including threats that are not imminent, restricting threats that they might deem as not remote.²⁵⁹ The Supreme Court should account for the impact that abuse has in changing behavior and developing fear in victims. Moving forward, the Court should consider broadening the scope of duress to include perceived harm, as the impact of looming harm is one that primarily affects marginalized identities.²⁶⁰ Advocates should also consider the difficulty for survivors to live after seeking help for abuse, which informs why a uniform “time” to address abuse may be inappropriate when discussing victims.

Broadening the scope of duress may push courts to scrutinizing abuse even more, especially with the political makeup of the current Supreme Court, but attorneys should still persist in developing arguments that nuance crime with trauma and interpersonal violence. Such experiences are prevalent and, with the changing makeup of courts in the future, may prove to be a revolutionary endeavor.

Lawmakers hoping to amend and replicate the DVSJA should also broaden the scope of relief at the state and federal level, changing the resentencing tool to instead mitigate, or erase, criminal liability. Rooted in Eighth Amendment constitutional arguments, congressional representatives should develop a national bill addressing federal crimes committed while under the throes of abuse to circumvent years of “crime and punishment” policies that have harmed survivors, particularly survivors of marginalized backgrounds. State legislators should also do the work on a more grassroots level to ensure that outlets for survivors are still maintained and, if thwarted at the federal level, can be sought through an alternative means.

Making coercive control a defense within the DVSJA instead of an aspect of eligibility offers survivors a chance to navigate, and potentially

257. Model Penal Code § 2.09 (Am. L. Inst. 2023).

258. *Dixon*, 548 U.S. at 4 n.2.

259. See *United States v. Dingwall*, 6 F.4th 744, 759 (7th Cir. 2021) (“[C]ircumstances justify a duress defense only when the coercive party threatens immediate harm which the coerced party cannot reasonably escape.”).

260. See Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault*, 19 Nev. L.J. 227, 234 (2018) (“The problem of psychological assault appears across ethnic, gender, and socio-economic lines, but may have a greater impact on marginalized social groups such as women, children, African Americans, and the LGBT community.”).

avoid, the harmful effects of incarceration. If states and the federal government adopt the DVSJA as an affirmative defense model, and extend the current duress claims to account for more realistic issues of abuse, Black women will not need to face the remedial consequences of incarceration or be burdened by the state imposing programs they are required to attend, conflicting even more with their onerous personal responsibilities. They would be free to heal and live without state disruption.

CONCLUSION

Black women face a unique hardship of domestic violence that falls outside the realm of many current initiatives tailored toward abuse survivors. To rectify lingering issues of enslavement, systemic oppression, and misogynoir, IPV survivors helped bring forth the “Domestic Violence Survivors Justice Act” in New York. While the DVSJA contains considerable limitations, it provides an incredible foundation that can change the lives of many Black women in the carceral system. For New York legislatures looking to modify the statute and other states hoping to remodel it for themselves, understanding the drawbacks for Black women is key to helping all survivors. Their unique experiences provide insights on how to best shape legislation centering abuse. Reducing bias, providing alternative programs that center mitigating trauma, upgrading statutory language, curating pretrial conversations for defendants to feel empowered, and crafting affirmative defenses are the possible avenues advocates should consider in their efforts to recognize the Black domestic violence survivor.