LAW JOURNAL FOR SOCIAL JUSTICE

SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY

Volume XVII Spring 2023

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EDITOR INTRODUCTION

Each year, *LJSJ* works internally towards fostering action-orientated legal discourse. To this end, our Symposium was an in-person panel discussion titled *Innocent Behind Bars: A Symposium on Over-Criminalization*, a multi-panel discussion centered around Professor Valena Beety's book *Manifesting Justice*, which discusses the overcriminalization of vulnerable populations and how women and vulnerable populations are uniquely impacted by incarceration. Our panelists included Professors Maybell Romero, Aya Gruber, Yvette Butler, Leigh Goodmark, Daniel Medwed, Omavi Shukur, Russ Covey, Jessica Henry, Wendy Bach, Ji Seon Song, Priscilla Ocen, Eve Hanan, Seema Saifee, Jordan Woods, and Carla Laroche. The Symposium would not have been possible without the generous contributions of the Academy for Justice and the Sandra Day O'Connor College of Law.

This volume starts off with a Keynote Address for *Innocent Behind Bars: A Symposium on Over-Criminalization* where author Valena Beety expands our ideas of wrongful convictions to include miscarriages of justice, bias, and faulty forensic evidence. Professor Beety argues that these wrongful convictions are convictions that should be reversed.

In *Women and No-Crime Wrongful Convictions: The Misclassification Error*, author Jessica Henry examines the numerous types of non-criminal events that have resulted in no-crime wrongful convictions of innocent people. Throughout her piece, she considers the intersectional factors that make women particularly vulnerable to no-crime wrongful convictions.

In *Not Just Mercy: The Untapped Potential of Clemency to Right Wrongful Convictions*, author Daniel Medwed provides an overview of executive clemency, arguing that it is "by no means a fail safe that some apologists for judicial inaction consider it to be." Professor Medwed concludes by discussing how to alter clemency to best support factual innocence claims.

In *Criminalized Survivors and the Promise of Abolition Feminism*, author Leigh Goodmark argues that to protect criminalized survivors of gender-based violence, we must dismantle the carceral system. Abolition feminism, instead, is the only practice that can undo the damage that has been done to these survivors.

In *Manifesting Feminism*, author Aya Gruber explores how the feminist approach to gender violence is invariably endorsing tougher criminal law. Professor Gruber argues that to manifest justice, more feminists should explore noncarceral remedies that reject the penal system, a system antithetical to feminism.

Finally, in *Prosecuting Poverty, Criminalizing Care*, author Wendy A. Bach analyzes a Tennessee law that made it a crime for a pregnant woman to transmit narcotics to a fetus. In this excerpt from her book, Professor Bach focuses on the structural mechanisms that merge punishment and care, arguing that criminalizing care is a steep cost; individuals have to pay in incarceration, in fines, in separation from their family and community and in many other ways that incarceration and conviction can make life difficult.

I want to thank Valena Beety, Jessica Henry, Daniel Medwed, Leigh Goodmark, Aya Gruber, and Wendy Bach for contributing excerpts of their powerful books, as well as to all the scholars who joined our Symposium.

Finally, I would like to thank my Executive and Editorial Board for their continuous hard work and support. Your passion and knowledge are needed out in the legal sphere, and I look forward to seeing how you reshape the law to create a more just world.

Kylie Love
EDITOR-IN-CHIEF

KEYNOTE ADDRESS FOR *INNOCENT BEHIND BARS: A SYMPOSIUM ON OVER-CRIMINALIZATION*

By: Valena E. Beety[1]

Thank you everyone for coming today, thank you for being part of this event. Thank you so much Kylie, Princeton, Madison, the whole crew of the Law Journal for Social Justice. This has been amazing, and I know this afternoon will be as well. Bravo!

I'm particularly honored to be part of this event that is discussing my book, *Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights.*

I'm going to talk today a bit about my book, but also about the amazing scholars who contributed to our Symposium edition. You've heard from some of them already today, you'll hear from some of them this afternoon. I'm going to weave their work into this talk alongside mine.

The goal of my book *Manifesting Justice* is to expand our idea of wrongful convictions to include miscarriages of justice, bias, and faulty forensic evidence.[2] To look at wrongful convictions tied to racism, police and prosecutor misconduct, and false evidence. These are miscarriages of justice, and they are convictions that should be reversed. They are wrongful convictions.

Now you may ask yourself, aren't those convictions reversed anyway? Well, as you heard from Professor Medwed, it's incredibly difficult to reverse a conviction once it has been obtained. So no, to sum everything up, they frequently are not.

There are multiple causes of wrongful convictions. These are a couple of the more notable ones: mistaken eyewitness identification, flawed investigations, false confessions, government misconduct, jail informants, flawed science, and poor lawyering. There are many causes, but I wrote this

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[1] Valena E. Beety, Professor of Law, Deputy Director, Academy for Justice, Arizona State University Sandra Day O'Connor College of Law, author of MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS. Thank you to the ASU Law Journal for Social Justice, the law school, and the Academy for Justice for hosting this symposium. Special thanks for the heart-felt work and tremendous organizing by LJSJ editors Madison Benson, Kylie Love, and Princeton Wilson. This Symposium Edition captures a few of the authors and ideas of a memorable and impactful day. Thank you to Wendy Bach, Leigh Goodmark, Aya Gruber, Jessica Henry, and Daniel Medwed, for contributing to the Symposium with their powerful written pieces, and to all the scholars who joined us and presented their insights at the Symposium.

[2] VALENA BEETY, MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS (2022).

book in particular to share stories I didn't hear being told, and causes that we don't talk about as readily: bias based on gender and bias based on sexual orientation.

Tami Vance and Leigh Stubbs were wrongly convicted based on their gender, their sexual orientation, and faulty forensic evidence.[3] They spent almost 11 years in prison, not only for a crime they did not commit, but for charges that did not happen. The goal of the book is to share their stories, but also, for the students who are here, to share my own. I am a queer woman. I'm married to amazing Professor Jennifer Oliva, who is in the front row - if you haven't met her yet, now's your moment. What I'm trying to share in the book is that my own journey changed a lot. I was a Rape Victim Advocate. I was definitely a carceral feminist. I became a prosecutor so that I could incarcerate perpetrators of violence, and I thought that would stop cycles of violence. I was very committed to that, and it wasn't until I actually got the job of being a prosecutor that I realized that wasn't what I was doing in that job. I then moved on to working as an innocence litigator and advocating for people who had been wrongfully convicted. And now I get to be here in academia and working on policy with the Academy for Justice and teaching all of you.

Our career paths are long, and we learn from every externship we have, every job we have. Our career paths are often not clear, but we continue to learn, we continue to grow. I encourage you to keep learning and to keep growing on your own journey becoming a lawyer and using your law degree.

Today at this Symposium we're talking about how women have been over-criminalized. I am going to use the terms women and men, even though they're under-inclusive in terms of violence and in terms of gender identifiers. For simplification, I'm going to use those terms today.

We're talking about how women are over-criminalized, wrongful convictions, and how pregnancy can be criminalized as well. How did we get here?

Some of you were able to hear from Aya Gruber this morning and her book, *The Feminist War On Crime: The Unexpected Role of Women's Liberation in Mass Incarceration*. Professor Gruber discusses this movement to end violence against women and how it became a law enforcement movement. In her Symposium essay she shares, "there is this sense among feminists. . . that, despite the criminal legal system's racist, inhumane, hierarchical, and masculinist nature, feminist reformers can make limited strategic incursions into it to produce justice for individual women and improved conditions for all."[4] Furthermore, "young feminists

[3] *Id.*

[4] Aya Gruber, *Manifesting Feminism*, 17 L. J. FOR SOC. JUST. (2023).

have presumed that fighting violence against women means collaborating with the American carceral state."[5]

I first learned of the term "carceral feminist" from Aya Gruber. I was reading some of her work, and it hit me like a ton of bricks: that was me, that was 100% me back in the day.

Again, I became a prosecutor to end cycles of violence. I had been a Rape Victim Advocate in Chicago and I thought I was helping survivors by pushing for incarceration. Professor Gruber shares, as she did this morning, "I too felt this sense, and it threw my younger self, a prospective public defender, into a painful dilemma over representing batterers and rapists."[6] I was the prosecutor, but I was not the White Knight that I expected to be. I was not the champion of victims and survivors that I expected I would be. Through that job I learned that incarceration was not stopping and solving cycles of violence. I also learned that public defenders were desperately needed because of the overarching belief that we can criminalize our way out of domestic violence.

Aya Gruber shares how this all started in the second wave of feminism, and of course it goes back further than that. But if we look at the 1980's and 1990's, we see this feminist turn to policing and prosecution to address sexual and domestic violence. She points out that "today, movements like campus rape reform, #MeToo, and prostitution abolition continue to embrace tough-on-crime ideas and policies even as feminists widely bemoan that the US is the world's largest incarcerator."[7] She points out how the beginning of the movement in the 1970s was about community support, about creating shelters, and was the work of grassroots activists.

But in the 1980s, this tough on crime messaging, this law enforcement collaboration to punish the "perpetrator" and to build more prisons, took hold. Hand in hand with this, we had a victim's rights movement that was largely supporting white middle class women and the "perfect victim." Instead, Professor Gruber points out that victims are mourning, they're depressed, and they're angry. But they can't necessarily show certain emotions, and the discourse around victims' rights neither "generates nor tolerates narratives in which victims' families can exercise mercy, kindness, or forgiveness toward defendants. This push for incarceration, for criminalization, did not create safety for survivors."[8]

Gruber shares an ACLU survey of over 900 domestic violence service providers that asked why don't survivors cooperate with law enforcement? Why don't they call the police? 89% of the people who responded said that

[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

their clients don't do that because child protective services will be called. "Oftentimes, if our client calls police, a CPS report will be done then the victim of the domestic violence will be investigated for 'failure to protect the children,' and can have the children taken away because the partner has been abusive."[9] We tangibly see this criminalization of domestic violence harming survivors and harming families.

This morning we also heard from Leigh Goodmark who is the author of *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism*. I'm going to share an excerpt from her book, and her symposium contribution. Goodmark shares the story of Simone Phoenix.

Simone Phoenix went to the Providence, Rhode Island Police Station in 2017 to get an application for emergency housing funds. She wanted emergency housing funds. She'd been assaulted by her husband the week before she wanted to move her and her son out of the house and move closer to her job. She met with two "law enforcement advocates," who, after asking her a number of questions, suggested that she needed a mental health vacation. That was their advice to her. She responded, Ms. Phoenix responded, that she could not afford to take a mental health vacation. She had a new job, and she had parenting responsibilities. She then realized she needed to leave, because her son would be coming home soon and she asked if she was free to leave. The advocate said, "Of course you are free to leave," and she walks down the hall and tries to enter the elevator and is told by two police officers that, no, she is not free to leave.

Ms. Phoenix tells the officers as they start to surround her that she suffers from PTSD, and to not touch her. The officers grabbed her nonetheless, and Miss Phoenix panicked and swung her arm to protect herself. The officers, threw Miss Phoenix to the ground, kicked her repeatedly, handcuffed her so tightly that the fire department had to remove the handcuffs later, and dragged her by her hair to a holding cell, where they left her for three hours. They then took her to a hospital and told the hospital staff that she was suicidal, and she was charged with simple assault and malicious damage to property. After seven court appearances and losing her job, all the charges against her were ultimately dismissed.[10]

In her Symposium essay, Professor Goodmark shares these and other stories of women who were survivors of violence, and how all of them were revictimized by being arrested or prosecuted. She shares, "criminalization was intended to benefit victims of gender-based violence by keeping them safe and ensuring those who harmed them were held accountable. Instead, the criminal legal system has done immeasurable damage to those it was

[9] *Id.*

[10] Leigh Goodmark, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023).

meant to protect."[11] "Sometimes punishment is imposed on someone who has refused to conform to what the criminal legal system expects of them as victims or as witnesses. And sometimes punishment is imposed on those whose crimes cannot be disentangled from the gender-based violence they have experienced."[12]

This was my experience as a prosecutor as well. As I share in *Manifesting Justice*, I prosecuted domestic violence and sexual violence crimes. That was my dream job. But victims and survivors often didn't want to work with me as a prosecutor. They didn't want to move forward with those charges. So, one of the standard tactics in my office, and which I also used, was to arrest the survivor right before trial, to make sure that they would be present for the trial. I, as well, was someone whose actions led to these survivors being arrested and being detained.

What changed things for me was meeting someone who had been wrongly convicted of sexual violence, and also wrongly convicted of murder. That's Levon Brooks. A dentist, Dr. Michael West, was responsible for the wrongful convictions of both Mr. Brooks and Mr. Kennedy Brewer. They were both wrongfully convicted because this dentist falsified bite mark evidence. He "found" bogus bite marks.

I was working in the prosecutor's office and I went down to Mississippi to interview for a job at the Mississippi Innocence Project. A friend of mine worked at the New Orleans Innocence Project and he told me to apply for it, saying how much he loved his job. I thought, well, why not? If it is not apparent, I was unhappy as a prosecutor.

So I went down to Mississippi, and the director of the Mississippi Innocence Project asked me, would you like to meet one of our exonerees, Levon Brooks? He just got out in the past year. I said yes. So, we got in the car and drove a couple of hours to rural Macon, Mississippi.

When we got there, Levon invited me to his mother's funeral. Levon *welcomed* me to his mother's funeral. This is a man whose mother had fought for him to be released from prison for almost 20 years. Then he's released, and within a year she dies.

I was humbled to be there. I talked to Levon, and I said to him, aren't you angry, aren't you angry that now you've lost her? And he said, she was able to put her hammer down. She fought for me all those years, and now she was able to rest.

He's the reason I moved to Mississippi and began working for the Mississippi Innocence Project.

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[11] Leigh Goodmark, *Criminalized Survivors and the Promise of Abolition Feminism*, 17 L. J. FOR SOC. JUST. (2023).

[12] *Id.*

That's where I represented Leigh Stubbs. Hers is the major story behind *Manifesting Justice*: Leigh Stubbs and her co-defendant Tami Vance were two women who met at a drug rehab facility in Columbus, Mississippi, and they fell in love. They completed the program together, and they graduated. They were packing up and leaving and ready to start the next chapter of their lives. But a friend of theirs, Kim, hadn't been doing so well at the rehab facility. She asked, will you take me with you? I want to get out of here – will you take me to my family, to my boyfriend? Of course they said yes.

Within 24 hours Kim had overdosed. Leigh and Tami called 9-1-1 and got Kim to the hospital. Kim was in a coma, and a doctor examining Kim thought that maybe she had been sexually assaulted.

What does this doctor do to determine whether this woman has been sexually assaulted? He calls the police – and calls a dentist to examine Kim's body. Not just any dentist: Dr. Michael West. His behavior shows how even when you believe someone is a victim of violence they're not respected. Kim is completely naked, and Dr. West examines her entire body while she is unconscious. He "finds" bite marks. In fact, he alleges that part of Kim's labia is bitten off. There's no evidence to prove this, but this is his finding. And who could have done this except for the two lesbians who had been with Kim immediately before? That's what starts these charges against Leigh and Tami, and ultimately leads to their wrongful convictions.

How were they wrongfully convicted? Jessica Henry, who you just heard from, wrote the book *Smoke But No Fire: Convicting the Innocent of Crimes That Never Happened*, and she shares in her Symposium essay how wrongful convictions happen to women. She points out that women are more likely than men to be convicted where no crime occurred.[13] Nearly 75% of acknowledged women exonerees were wrongly convicted where no crime occurred. This is often due to faulty forensic evidence and against women who are caretakers.[14]

This means women are less likely to be exonerated. They're not going to have DNA evidence in their case, because there was no crime. They can't use DNA evidence to say it wasn't Valena, it was Jim. They don't have that evidence. Without DNA evidence, it's very hard for them to be exonerated.

Why are women wrongly convicted? Professor Henry shares how part of this is cognitive biases, mental shortcuts. Part of this is tunnel vision, where prosecutors and police focus in on one person as the perpetrator. Part of it is misclassification. She shared with us the story of Beverly Monroe, and, by the way, her daughter, Katie Monroe, worked with Daniel Medwed at the Rocky Mountain Innocence Project after Katie worked to free her

[13] Jessica Henry, *Women and No-Crime Wrongful Convictions: The Misclassification Error,* 17 L. J. FOR SOC. JUST. (2023).

[14] *Id.*

mom. These misclassifications include suicide as murder. We may think that people who commit suicide leave a suicide note, but only 20 to 30% of people who commit suicide leave a note.[15] This idea that it's a murder if there's no note is misleading. More significantly, death scene investigators are urged to come to the scene with the purpose of investigating a homicide. It's a homicide investigation, finding a murder. With that framework in mind, it's more likely for these suicides to be misclassified as murders.

We have a number of women who are the victims of no-crime wrongful convictions. Henry also mentioned medical misdiagnoses of murder, Shaken Baby Syndrome, and Sabrina Butler's wrongful conviction in Mississippi. Unpinning these misdiagnoses are tropes about women as "bad moms." Henry says these "gender stereotypes feed into no-crime wrongful convictions. If women are 'supposed' to be nurturers, then women who violate their 'womanly role,' or who are 'flawed' mothers are blamed and condemned not only because they have been accused of a crime but also because they 'shirk[ed] [their] duties as a woman and a natural caregiver.'"[16]

Gender stereotypes also played a role in Leigh and Tami's wrongful convictions. Leigh and Tami were wrongfully convicted because of faulty evidence in the courtroom and because of faulty testimony against them, including homophobic testimony.

Queer criminal archetypes directly influence policing and punishing people who are queer or not acceptably gendered.[17] What do we mean by queer criminal archetypes? These are stereotypes that because you are queer you are dangerous, degenerate, connected to disorder, deception, disease, contagion, sexual predation, depravity, subversion, treachery, and violence.[18] I would like to say that these stereotypes and these archetypes are of the past, but they are not. We hear currently about allegations of grooming, about the dangerousness of queer people and of transgender individuals. These stereotypes continue today.

In Leigh and Tami's case there was "expert" testimony provided against them about how the bite marks show a homosexual assault and homosexuals are violent. Now, if you're a juror you're giving credence to these experts who are testifying for you. The prosecution's expert was the dentist, Michael West. Here's their exchange:

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[15] *Id.*

[16] *Id*. (quoting Andrea L. Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Conviction of Women*, 78 ALB. L. REV. 1035, 1039-41 (2015)).

[17] JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (Beacon Press 2012).

[18] *See id.*

> Prosecutor: So, in . . . a homosexual rape case, you would expect to find bite marks, it would not be unusual at all to find bite marks on the skin?
>
> Dr. West: No, it wouldn't be unusual.
>
> Prosecutor: In fact, it would almost be expected?
>
> Dr. West: Almost.[19]
>
> Dr. West also testified that part of Kim's genitals had been bitten off in what he called "a combative or sexual orientation phenomena."[20]
>
> Then, we have the defense expert. Here is his testimony:
>
> Prosecutor: Would you expect to find biting or would biting be consistent with a lesbian rape type situation?
>
> Expert: Yes … homosexual crimes . . . are very sadistic. The more violent crimes I've seen in my experience are homosexual to homosexual. They do what we call overkill. They do tremendous damage, tremendous damage.
>
> They're more gory, the most repulsive crimes I've ever seen were homosexual to homosexual.[21]

The prosecutor, in closing, says that the bite marks are important because they indicate a homosexual assault.[22] This was the evidence that was presented to the jury, and the jury found them guilty.

But it's not just queer women. Women across the board have been increasingly incarcerated over the past thirty years, in both state prisons and local jails. The state populations of incarcerated women have grown faster than incarcerated men's populations. And nearly half of incarcerated women are held in jail. We have to recognize the women who are incarcerated in jails.

This brings me to Wendy Bach and her book, *Prosecuting Poverty: Criminalizing Care*. Bach's symposium piece goes directly to this point. Her book is about how, between 2014 and 2016, the State of Tennessee prosecuted women for the crime of fetal assault.[23] These women were

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[19] Beety, *supra* note 2, at 117.

[20] *Id.* at 124.

[21] *Id.* at 148.

[22] *Id.* at 153 ("When you look at all the evidence, you'll realize that while it's a circumstantial evidence case, these two women who were living together, were lovers, whether because of the drugs or the alcohol or their lifestyle, they viciously attacked Kimberly Williams for no reason and tried to cover it up.").

[23] Wendy A. Bach, PROSECUTING POVERTY, CRIMINALIZING CARE (2023).

accused of taking narcotics during pregnancy and harming the fetus they were carrying as a result. She shares, "what struck me was how advocates justified creating this crime and prosecuting these women. For many, they seemed to believe that prosecution was a form of care – that prosecution would lead to treatment, and that, with the discipline of the court system, these purportedly bad [poor mostly white] mothers, could be transformed, into good mothers. They believed, it seemed, that prosecution was a form of care."[24]

Wendy Bach shares:

> the criminalization of care… it's a smoke screen. We use, in the context of the largely-White opiate epidemic, the less harsh rhetoric of treatment to hide what is mostly pure punishment. . . . [F]or the majority of fetal assault defendants, their criminal court files contain no indication that treatment was offered as a part of their case. For those defendants who were offered treatment within, the quality of care tended toward the low end of the spectrum – lots of punishment, in the forms of both incarceration and debt, and very little justice.[25]

Bach also tells us about how she talked with someone who worked in a rural criminal courthouse for years, Cindy.

[A] "little charge" allows [Cindy] to get someone arrested and brought to jail. The person would detox in jail and then, eventually, once the person pled guilty, she would be able to use her resources to get that person into treatment. That's just the way it works. And if that didn't work the first time, as was likely, they could try again once the person was on probation – "lock 'em up, clean 'em up, start 'em over." In that statement, and in the confidence of the fetal assault law proponents about criminalization as a road to care, we hear three interlocking ideas that characterize the relationship between punishment and care. First, punishment systems are a road to care; second, facilities controlled by punishment systems are used as locations of care; and finally, punishment is a form of care in and of itself.[26]

But in jail that's not what's happening. You'll hear from Professor Bach herself this afternoon that there's not treatment that's provided, there's not care that's provided. Her symposium piece highlights these many problems.

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[24] Wendy A. Bach, *Book Excerpt: Wendy A. Bach, Prosecuting Poverty, Criminalizing Care*, 17 L. J. FOR SOC. JUST. (2023).

[25] *Id*.

[26] *Id.*

So, what can we do about convictions based on gender bias and over-criminalization? What can we do? This brings us to our final contributor for the Symposium edition, Daniel Medwed and his book *Barred: Why the Innocent Can't Get Out of Prison*. Medwed walks us through the barriers to overturning a wrongful conviction at every step of the process. He also provides ways we can make the system better, opportunities for change. In his symposium essay he focuses on the false promise of looking outside of courts for clemency. Clemency normally consists of a pardon, a computation, a reprieve. But this benevolence seldom extends to prisoners with viable innocence clients. Medwed starts with the case of *Herrera v. Collins* (1993).[27] This is a key case for innocence litigators because it creates an innocence gateway to have constitutional claims heard. And yet Mr. Herrera did not receive any relief on his claim of actual innocence. Professor Medwed shares about Justice Rehnquist's role in this case:

[Justice Rehnquist] cited the availability of executive clemency in Texas to justify barring him from raising an innocence claim in a federal habeas corpus proceeding. Herrera's claim hinged on newly discovered evidence alleging that his brother Raul had committed the murders of two law enforcement officers that had sent Leonel to death row. In the Court's majority opinion, Chief Justice Rehnquist noted that Herrera had another "forum to raise his actual innocence claim. . . . For under Texas law, petitioner may file a request for executive clemency."

. . .The Chief Justice went on to insist that "clemency has provided the 'fail safe' in our criminal justice system. . . . History is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence."

The problem is that Rehnquist exaggerated the degree to which clemency acts as a guardrail for the innocent. It certainly did not protect Herrera, who was executed with lingering questions about his guilt unanswered four months after the Supreme Court opinion. During his last moments on earth, Herrera proclaimed "I am an innocent man and something very wrong is taking place tonight." [28]

Medwed also shares, "In truth, there are relatively few examples of incarcerated people declared innocent and their records wiped clean by clemency's brush. When executive officials have pardoned prisoners in that manner, it is often because postconviction DNA testing put their innocence in such sharp relief that media attention made it politically expedient to do so."[29]

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[27] 506 U.S. 390 (1993).

[28] Daniel Medwed, *Not Just Mercy: The Untapped Potential of Clemency to Right Wrongful Convictions*, 17 L. J. FOR SOC. JUST. (2023).

[29] *Id.*

Remember, women frequently don't have post-conviction DNA evidence because they're convicted where no crime occurred.

As we discuss all of this today, where does this leave us? What are some solutions?

My book, *Manifesting Justice,* looks at different paths, looks to journalists, and to community activism and support. On a very fundamental level for lawyers and law students, the book also talks about changing state habeas review and implementing a manifest injustice standard, contemplating the confluence of factors leading to a wrongful conviction, and courts considering cumulative error. Are there many things that have gone wrong here, and together we see a wrongful conviction, a miscarriage of justice? It's not about proving innocence, it's about whether this conviction can be upheld when prosecutors and judges know there are so many problems with it. I urge us to change the current standards and examine cases in the interest of justice.[30]

Some questions to always keep in mind are: are there alternatives to incarceration? Are there other ways to deal with these harms? Are there other doors that the state could open to prevent future harms?

Leigh Goodmark shares, "As of 2017, the United States spent approximately $100 billion on policing and $80 billion on incarceration. . . .Dollars that are dedicated to police and prisons are not spent on housing, education, youth programs, health care, mental health services, transportation, cash assistance for survivors of violence, economic development, community centers and green spaces, and noncarceral crisis responses."[31] What about looking in those directions and opening those doors?

My message to the students here today, and thank you for being here, is to find work that you're passionate about. Recognize that there can be many different answers to a problem. For a very long time we've thought that incarceration is the only solution to violence, and it's not. There are other answers as well. Find work you are passionate about, and realize that your path can change; be open to learning from each new job opportunity you have. Finally, think about the different positions that we can hold in our communities, serving as prosecutors, judges, legislators, but also serving on parole boards as well. These are crucial decision-making positions.

Ultimately, it's a group lift to change our system. This Symposium was a group lift, and we have all of these important voices and perspectives here together in the Symposium and the Law Journal for Social Justice. That's

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[30] For more information, *see* ACADEMY FOR JUSTICE, MISCARRIAGES OF JUSTICE, LITIGATING BEYOND FACTUAL INNOCENCE (2023), https://academyforjustice.asu.edu/wp-content/uploads/2023/01/20230123-A4J-MoJ-Report-digital.pdf.

[31] Goodmark, *supra* note 11.

exactly what we need to cultivate more broadly to change the criminal legal system. That's what we need to continue after today is over.

WOMEN AND NO-CRIME WRONGFUL CONVICTIONS: THE MISCLASSIFICATION ERROR

By: Jessica Henry

ABSTRACT

Over one-third of all known exonerations involve no-crime wrongful convictions, in which innocent people are convicted of crimes that never happened in the first place. While women make up a small fraction of all known exonerees, 63% of women exonerees were wrongly convicted in no-crime cases. This article examines the typologies of non-criminal events that have resulted in no-crime wrongful convictions of innocent people: suicides mislabeled as murders, mechanical malfunctions misidentified as homicides, illnesses or natural deaths misdiagnosed as shaken baby syndrome or murder, and accidental fires misclassified as arsons. Throughout, this article considers case studies of women who were wrongly convicted of crimes that never happened and considers the intersectional factors that make women particularly vulnerable to no-crime wrongful convictions.

INTRODUCTION[1]

In 1992, Beverly Monroe was a 54-year-old mother of three with a master's degree in organic chemistry.[2] She had never been in legal trouble before, not even for something as mundane as a speeding ticket. Then she was convicted of murder.[3]

Beverly Monroe first met Roger Zygmunt Comte de la Burde in 1979, while working in the patents department at Philip Morris Incorporated.[4] Burde, who presented himself as a descendent of Polish royalty, was a "wealthy art dealer and notorious philanderer."[5] After he was forced out of Philip Morris for allegedly stealing company secrets, Burde was involved in a host of questionable real estate and art dealerships.[6] He was also involved with other women.[7] Even though Monroe remained Burde's

[1] This article is adapted from Chapter 1 of my book: JESSICA S. HENRY, SMOKE BUT NO FIRE: CONVICTING THE INNOCENT OF CRIMES THAT NEVER HAPPENED (1st ed. 2020).

[2] *Monroe v. Angelone*, 323 F.3d 286, 291 (4th Cir. 2003).

[3] *Id.* at 290.

[4] Ralph Blumenthal, *A Virginia Tale of Love and Death, Suspicions and Doubt*, N.Y. TIMES, (Feb. 22, 2000), https://www.nytimes.com/2000/02/22/us/a-virginia-tale-of-love-and-death-suspicions-and-doubt.html.

[5] *Monroe*, 323 F.3d at 290.

[6] Blumenthal, *supra* note 4.

[7] *Id.*

primary companion for the 13 years before his death, Burde had numerous affairs with other women throughout their time together.[8]

In the early hours of March, 5 1992, Burde's groundskeeper discovered Burde's body lying on a couch in the library of the main house of his Powhatan County estate.[9] Burde had died from a single gunshot wound to his forehead; the shot was fired from his own handgun.[10] He left no note, but had gunshot residue on his fingers.[11] The Powhatan County Sheriff's Office and Medical Examiner originally declared Burde's death to be a suicide.[12] But David M. Riley, a senior special agent from the Virginia State Police, suspected foul play.[13] His single suspect was Monroe, who Riley believed had both motive and opportunity to commit murder. The motive? Burde was seeing another woman, who was allegedly pregnant with Burde's child.[14] The opportunity? Monroe had been with Burde on the evening of his death.[15] Riley concluded that Monroe killed Burde and was trying to cover it up by making his death appear to be a suicide.[16] He reached this conclusion even though only Burde's fingerprints were on the gun.[17]

Riley relentlessly pursued his theory of the case, summoning Monroe for unrecorded interrogation sessions in which he repeatedly insisted that Monroe was present in the library at the time of Burde's death.[18] Finally, after Riley falsely told Monroe that she had failed a polygraph test, Monroe agreed to sign a number of statements—each written by Riley—which placed her in the library during the shooting.[19] These statements also contained a convoluted story of what Monroe might have done if she been in the room at the time of the shooting.[20] Based on these statements, Monroe was arrested for murder.[21]

At trial, the prosecution presented a circumstantial but seemingly strong case against Monroe. There was evidence of Burde's affair with another woman, Monroe's so-called confession, and testimony that the position of

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[8] *Monroe*, 323 F.3d at 291.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 303.
[12] *Id.* at 291.
[13] *Id.* at 291, 295-96.
[14] *Id.* at 305.
[15] *Id.* at 296.
[16] Blumenthal, *supra* note 4.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

the gun made it unlikely that he had shot himself.[22] There was also testimony from a witness who claimed that Monroe had tried to buy an untraceable gun from her several months earlier.[23]

In her defense, Monroe presented a compelling alibi. She explained that she left Burde around 9:30 PM, got gas and called her son, and arrived at a Safeway at around 10 PM.[24] This was corroborated by a store receipt timed at 10:40 PM, a cancelled check, and an eyewitness who remembered seeing her there.[25] She further presented evidence that Burde made a phone call from his home around 10 PM, well *after* she left his house and right around the time she was in the store.[26] Monroe testified that Burde had been depressed, but also raised a roster of alternative suspects who stood to gain from Burde's death or who had a motive to want him dead.[27] Finally, Monroe raised the fact that her fingerprints were not on the gun.

It took the jury less than three hours to convict Monroe of murder.[28] She was sentenced to 22 years in prison.[29]

The story might have ended with Monroe serving out her time in a desolate prison cell. But her daughter, Kate, a newly-minted lawyer, devoted herself to proving her mother's innocence.[30] She uncovered evidence of official misconduct, including the prosecution's failure to turn over critical exculpatory evidence to the defense.[31] The prosecution did not disclose, among other evidence: (1) evidence that Riley had improperly and inappropriately manipulated Monroe during aggressive interrogation sessions, causing her to agree to statements that she later recanted; (2) documentary evidence that the Medical Examiner initially ruled the death a suicide, (3) a laboratory request by a different doctor in the Medical Examiner's Office labeling the death a suicide, (4) statements from Burde's ex-wife to the Medical Examiner that Burde had been having personal problems and was taking an anti-depressant, (5) a statement from the groundskeeper that he had moved the gun when he found Burde's body and (6) evidence that the witness who claimed Monroe asked to purchase a gun was in fact a convicted felon and government informant, who obtained a

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[22] Monroe v. Angelone, 323 F.3d 286, 302-03 (4th Cir. 2003).
[23] *Id.* at 306.
[24] *Id.* at 311.
[25] *Id.*
[26] Blumenthal, *supra* note 4.
[27] *Id.* at 292, 311.
[28] Blumenthal, *supra* note 4.
[29] *Id.*
[30] Stephanie Denzel, *Beverly Monroe: Other Virginia Cases with Perjury or False Accusation*, NAT'L REGISTRY OF EXONERATIONS, (Nov. 7, 2016), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3482.
[31] *Monroe*, 323 F.3d at 293.

favorable deal in a pending gun case and in an open unrelated felony case in exchange for her testimony.[32]

Upon review of the undisclosed evidence, the Fourth Circuit Court of Appeals dismissed Monroe's case and Monroe was exonerated of any wrongdoing.[33] Monroe had fallen victim to a system that failed her. She served eleven years in prison for a suicide that had been mislabeled a murder.[34]

This article considers the misclassification of non-criminal events as crimes, and how the use of the term "crime" transforms the ways in which events are perceived and evaluated.[35] Misclassification often occurs in the difficult cases, in the cases where what happened is ambiguous and is subject to multiple interpretations. This makes sense. Events that are clearly accidents do not result in prosecutions, while events that are clearly crimes and have an identifiable suspect are efficiently resolved by an arrest, prosecution and, typically, a guilty plea. It's the gray cases, the hard cases, that require tough judgment calls.[36] It's in these gray cases where police officers, medical professionals, or forensic experts might misclassify a non-criminal event as a crime. When that misclassification of a crime takes root as truth, the criminal justice process is triggered, and an innocent person is pursued as a suspect for a crime that did not happen.

This article also considers the intersection between gender and no-crime wrongful convictions, as highlighted in case studies throughout this article. The National Registry of Exonerations tracks all known exonerations. In its database, females represent about 8% of all known exonerees, and only 4% of exonerees from actual crime wrongful convictions.[37] Yet, they make up nearly 17% of all no-crime exonerees.[38] Even more strikingly, of all the female exonerees in the NRE database, *70% were wrongly convicted of a crime that never happened*.[39] In contrast, males are far more likely to be exonerated in actual crime convictions (66%) than in no-crime cases (34%).[40] Andrea Lewis and Sandra Sommervold of the Northwestern

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[32] *Id.* at 293-94.

[33] *Id*. at 317.

[34] Denzel, *supra* note 30.

[35] This article considers no-crime wrongful convictions caused by an initial misclassification error. No-crime wrongful convictions can result from a host of other events, for instance, such as false accusations or where the police fabricate crimes, which are beyond the scope of this article. To learn more, see HENRY, *supra* note 1.

[36] DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 21 (2012).

[37] NRE Data (Dec. 12, 2022) (on file with author).

[38] *Id.*

[39] *Id.*

[40] *Id.*

Center on Wrongful Convictions found that exonerated women, particularly in no-crime cases, were especially likely to have been convicted of intentionally killing or physically harming a child or a loved one.[41] They argue that gender stereotypes feed into no-crime wrongful convictions.[42] If women are "supposed" to be nurturers, then women who violate their "womanly" role or who are "flawed" mothers are blamed and condemned not only because they have been accused of a crime but also because they "shirk[ed] [their] duties as a woman and as a natural caregiver."[43] In *Manifesting Injustice: Wrongly Convicted Women Reclaim Their Rights*, Professor Valena Beety highlights the extraordinary story of Leigh Stubbs, wrongly convicted of a crime that never happened, by a system that routinely discriminates against "poor people of color and people with non-mainstream identities such as gender queer and transgender individuals."[44]

This article begins in Part I with an overview of cognitive biases and the ways in which they contribute to no-crime wrongful convictions of women. Part II of this article considers more deeply the misclassification error in the context of non-criminal events that have resulted in no-crime wrongful convictions of innocent people, particularly innocent women.[45] In these cases, suicides were mislabeled as murders, mechanical malfunctions were misidentified as homicides, illnesses or natural deaths were misdiagnosed as shaken baby syndrome or murder, and accidental fires were misclassified as arsons. Throughout, this article provides case studies of women who were wrongly convicted of crimes that never happened and the intersectional factors that make women particularly vulnerable to no-crime wrongful convictions.[46]

I. COGNITIVE BIASES: AN OVERVIEW

Cognitive bias is an umbrella term, rooted in psychology, that explains the ways in which human judgments and decision-making are influenced by unconscious thought patterns.[47] Cognitive biases reflect the brain's attempt

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[41] Andrea L. Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Conviction of Women*, 78 ALB. L. REV. 1035, 1039 (2015).

[42] *Id*. at 1039-41.

[43] *Id.* at 1046. *See generally id.* at 1039-50.

[44] Valena Beety, Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights (2022).

[45] For a full exploration of the factors that cause and contribute to no-crime wrongful convictions, including official misconduct, see HENRY, *supra* note 1.

[46] In its most basic form, intersectionality refers to overlapping and intersecting forms of discrimination that combine and interact in a cumulative manner. For a richer discussion, see, for example, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

[47] By at least one estimate, over 150 types of cognitive biases exist, although that

to quickly process and organize a never-ending onslaught of information. They are a "byproduct of our need to process efficiently the flood of sensory information coming from the outside world."[48] Cognitive biases prevent the brain from overloading by helping us to make sense of the world quickly and efficiently.

The problem, however, is that cognitive biases reflect heuristics, or mental shortcuts, that can lead to unconscious errors in judgment and processing.[49] Because cognitive biases are unconscious, we rely on them without realizing that we are engaging in a flawed or distorted thought process that can result in inaccurate, irrational, or biased conclusions or beliefs.

Cognitive biases have a tremendous impact on wrongful convictions in subtle, but pernicious ways. In no-crime wrongful convictions, cognitive biases help explain how a non-criminal case is transformed into a crime. Professors Keith A. Findley and Michael S. Scott provide insight into how "tunnel vision," a form of cognitive bias, contributes to the creation of a criminal case against an innocent suspect. When police have tunnel vision, they "select and filter the evidence that will 'build a case' for conviction while ignoring or suppressing evidence that points away from guilt."[50] As Findley and Scott explain, the police focus on a particular conclusion—that a crime was committed or that a particular suspect committed that crime—and then:

> filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable.[51]

In addition to tunnel vision, other cognitive biases are prevalent in no-crime convictions. Confirmation bias reflects the unconscious tendency to

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number varies greatly depending on how cognitive biases are defined and categorized. *See, e.g.*, Jeff Desjardins, *Every Single Cognitive Bias in One Infographic*, VISUAL CAPITALIST (Aug. 26, 2021), http://www.visualcapitalist.com/every-single-cognitive-bias/.

[48] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WIS. L. REV. 291, 309 (2006).

[49] Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCH. 430, 450 (1972).

[50] Findley & Scott, *supra* note 48, at 292 (quoting Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002)).

[51] *Id*.

interpret information in a way that confirms pre-existing beliefs or hypotheses, while belief perseverance occurs when a person firmly maintains their beliefs despite being presented with new information that firmly contradicts it.[52] In no-crime wrongful convictions, these cognitive biases prevent authorities from re-examining their determination that a crime occurred, even in the face of evidence that suggests another outcome. Instead, they ignore, minimize or disregard evidence that does not support the "crime" theory of the case.

II. THE MISCLASSIFICATION ERROR

As we will see throughout this article, one error—the initial misclassification error of an event as a crime—is reinforced by criminal justice actors who blindly accept that a crime occurred, and who then work to solve and prosecute that crime. The result is the conviction of an innocent person for a crime that never happened. While this may seem like an unlikely occurrence, it happens more frequently than might first be imagined.

A. Suicides Mislabeled as Murder

In popular depictions of suicide, a person who takes their own life leaves a detailed note explaining their decision and saying good-bye to their loved ones. In reality, however, only 20-30% of people who die by suicide leave behind a note. [53] In the wrongful conviction of Beverly Monroe, for instance, Burde was in the majority of people who died by suicide but did not leave an explanation for his decision. Absent conclusive evidence that a suicide occurred, police and the medical examiner determine that suicide was the cause of death based on context and the finding that the death was self-inflicted and intentional.[54] Whether a death was self-inflicted is determined "by pathological (autopsy), toxicological, investigatory, and psychological evidence, and statements of the decedent or witnesses."[55] Intentionality can be gauged by explicit or implicit evidence that the decedent intended to die by suicide, such as preparations for death, expressions of good-bye or extreme hopelessness, previous suicide attempt or threats, or serious depression or mental disorder.[56]

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[52] SIMON, *supra* note 36, at 23.

[53] JENNIFER L. HILLMAN, *Crisis Intervention and Trauma: New Approaches to Evidence-Based Practice*, 124 (Springer Science and Business Media ed., 2013).

[54] Mark L. Rosenberg, Lucy E. Davidson, Jack C. Smith, Alan L. Berman, Herb Buzbee, George Gantner, George A. Gay, Barbara Moore-Lewis, Don Harper Mills, Don Murray, Patrick W. O'Carroll & David Jobes, *Operational Criteria for the Determination of Suicide*, 33 J. FORENSIC SCI. 6*,* 1445, 1448-51 (1988).

[55] *Id*. at 1448.

[56] *Id.*

In the absence of clear evidence, investigators and medical examiners decide whether a suicide occurred. Vernon Geberth, author of *Practical Homicide Investigation: Tactics, Procedures, and Forensic Techniques*, a popular homicide police handbook now in its fifth edition, suggests that the victim's profile is particularly important in considering whether a death was a suicide:

> Does the victim fit a "Suicide Profile?" Was there any evidence of marked depression or suicide ideations? Did the victim have both short- and long-term plans? . . . Victimology is the collection and assessment of all significant information as it relates to the victim and his or her lifestyle. Personality, employment, education, friends, habits, hobbies, marital status, relationships, dating history, sexuality, reputation, criminal record, history of alcohol or drugs, physical condition and neighborhood of residence are all pieces of the mosaic that comprise victimology.[57]

Geberth also provides detailed guidelines for consideration of the weapon and its location, the lethality of the wounds, and intent and motive.

More significantly, Geberth urges investigators to always arrive at a death scene with the premise that the death was a homicide: "*[a]ll death inquiries should be conducted as homicide investigations until the facts prove differently*. The resolution of the mode of death as Suicide is based on a series of factors which eliminate [h]omicide, [a]ccident and [n]atural [c]auses of death."[58] In other words, the conclusion that a death was by suicide should only occur once other causes of death are ruled out.

That all death investigations should be pursued as a homicide is telling, because it provides a mandate to first look for criminal activity. This mandate can have great influence over how a crime scene is evaluated and processed. Research has consistently shown that law-enforcement personnel have "tough-on-crime" worldviews, with an overall orientation that focuses more on crime control and crime solving than due process and the rights of the innocent.[59] When an investigator arrives at a death scene prepared to find a homicide, that perspective may cause the investigator to create evidentiary inferences that lean away from suicide and towards a homicide designation.

Consider Detective Riley's approach to Burde's death. He jumped to the conclusion that a murder had occurred, and that Monroe was the killer

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[57] Vernon Geberth, *Seven Mistakes in Suicide Investigation*, 61 LAW & ORDER MAGAZINE, 1 (2013), http://www.practicalhomicide.com/Research/7mistakes.htm.

[58] *Id*.

[59] SIMON, *supra* note 36, at 24.

even though the medical examiner initially decided the death was a suicide. Blinded by severe tunnel vision, Riley ignored, devalued or rejected all evidence that pointed away from Monroe's guilt.[60] He simultaneously overvalued Monroe's possible motives to commit murder Riley also failed to pursue other leads or potential suspects in his homicide investigation. He fixated on Monroe to the exclusion of all other possible explanations, and did whatever he could to secure a conviction. He coerced a "confession" from Monroe to build his case, using manipulative and aggressive interrogation techniques that are a model of what *not* to do during questioning, and then hid notes taken by his own secretaries that documented his manipulations.[61] He found a female "professional snitch" to tell a story that Monroe had approached her about buying a gun, but did not provide to the defense the informant's prior history or the inconsistent statements she gave about the so-called gun purchase request.[62] In short, Riley's laser focus on Monroe as a murderer led to a biased and tainted investigation, and ultimately to her wrongful conviction.

Monroe's story and subsequent exoneration from a murder conviction that was in fact a suicide is incredible, but not singular. The National Registry of Exonerations database contains at least six additional exonerees who were wrongly convicted of murder in cases of suicide.[63] These were the lucky ones. The Wrongly Convicted Group, described on its website as "a grass-roots group of advocates working to obtain justice for innocent people on death row or serving long prison sentences due to wrongful convictions," identifies seven additional cases where individuals are fighting to prove their innocence in murder cases that they claim were suicides.[64] The true number of people wrongly convicted of intentional murder for someone else's suicide is unknown. But when it happens, a trail of wreckage is left in its wake.

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[60] *See* Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 504 (quoting Findley & Scott, *supra* note 48, at 292) (internal quotation marks omitted).

[61] Monroe v. Angelone, 323 F.3d 286, 295-96 (4th Cir. 2003).

[62] *Id*. at 315.

[63] Using the NRE database, I searched the term "suicide." I analyzed the cases that contained the term suicide and determined that, as of September 1, 2018, six defendants were exonerated after wrongful convictions for murders later revealed to be suicide: Virginia LeFever, Fredda Susie Mowbray, Cesar Munoz, Carolyn June Peak, John Tomaino and Lon Walker. NAT'L REGISTRY OF EXONERATIONS (2012), https://www.law.umich.edu/special/exoneration/Pages/browse.aspx.

[64] Wrongly Convicted Group, *Category Archives: Suicide-Mistaken-For-Murder*, WRONGLY CONVICTED GROUP WEBSITE, https://wronglyconvictedgroup.wordpress.com/category/3-case-type/no-crime/suicide-mistaken-for-murder/ (last accessed July 18, 2019).

B. Mechanical Malfunctions Mislabeled as Homicide

Then there are people who are convicted of homicide when, in reality, the death was entirely accidental due to technical failures. In 2004, Candice Anderson was driving her Saturn Ion when she was involved in a fatal car accident in which her boyfriend died.[65] The officer who arrived at the scene noted the lack of skid marks or other evidence of evasive actions, Anderson's confused and disoriented demeanor, and her history of recreational drug use. He concluded that Anderson had been intoxicated at the time of accident and that her intoxication caused her boyfriend's death. Toxicology reports later revealed small amounts of a prescription sedative, Xanax, in Anderson's system. The prosecution moved ahead with a criminal case and, in 2007, Anderson pled guilty to criminally negligent homicide.

In 2014, GM recalled 2.8 million cars with possible ignition switch defects.[66] Cars with the defective ignition switch would sometimes shift into the "accessory" mode, shutting off the engine and disabling the airbags and brakes. The Saturn Ion was one of the recalled cars. Although GM had known about the ignition switch defect since at least several months *before* Anderson pled guilty, the police and the prosecution did not.

Instead, Anderson fell prey to the responding police officer's expectation biases. Expectation biases occur

> [w]hen people are led by circumstances to expect some fact or condition (as people commonly are), they tend to perceive that fact or condition in informationally ambiguous situations. This can lead to error biased in the direction of the expectation. …. The personal investment in those [expected] hypotheses will reinforce the tendency to perceive or overvalue confirming information and to miss or irrationally undervalue disconfirming information.[67]

When the police officer arrived at the scene of the car accident, he expected to see skid marks or evidence of defensive driving. In the absence of that evidence, he locked onto the hypothesis that Anderson was criminally liable because she was intoxicated, and that she had not attempted to brake or avoid the accident. He then interpreted the scene in ways that conformed to his hypothesis. Anderson's demeanor, which the officer described as "confused" was attributed to intoxication, rather than to

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[65] Poppy Harlow & Amanda Hobor, *10 Years of Guilt Over GM Crash that Killed Her Boyfriend. It May Not Have Been Her Fault*, CNN MONEY, August 15, 2014, https://money.cnn.com/interactive/news/candice-anderson/index.html.

[66] *Id*.

[67] Findley & Scott, *supra* note 48, at 308-09.

shock from the accident or the severity of her own injuries, which included a lacerated liver for which she received treatment at the hospital. The small amount of prescription medication in her system was deemed to be an intoxicant, rather than an ancillary medication that was unrelated to her driving skills.

The police and prosecutor involved in the case later admitted that if they had known about the ignition switch defect at the time of the accident, the crime scene evidence would have been understood differently. As the prosecutor wrote to the court in an unusual letter of support of Anderson:

At the time, unbeknownst to Ms. Anderson or my office, there were issues regarding her 2004 Saturn Ion. Had I known at the time that G.M. knew of these issues and has since admitted to such, I do not believe the grand jury would have indicted her for intoxication manslaughter.[68]

Had the authorities known about the G.M. recall and ignition defect, they would have had different expectations, and would have interpreted the same evidence that they said proved Anderson's guilt as evidence that would have supported a finding of an accident. Anderson would not have been prosecuted and convicted of causing a fatal car wreck that was, in reality, the result of her car's defective design.[69] Anderson was eventually exonerated of all criminal wrongdoing and settled with GM for an undisclosed amount of money.[70]

Candice Anderson and Beverly Monroe are two women, in two different states, who were convicted of homicide under vastly different circumstances. Yet, their cases are unified by one common denominator: they were each the victim of cognitive biases. Investigators erroneously decided that a crime occurred and pursued that theory to the exclusion of all others, regardless of what an objective view of the evidence might have shown.

C. Medical Misdiagnoses of Murder

The police are not the only ones with unconscious cognitive biases that influence their perceptions. Medical personnel also experience cognitive biases, which lead them to reach the flawed conclusion that a crime occurred

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[68] Rebecca R. Ruiz, *Woman Cleared in Death Caused by GM's Faulty Ignition Switch*, N.Y. TIMES (Nov. 24, 2014) https://www.nytimes.com/2014/11/25/business/woman-cleared-in-death-caused-by-gms-faulty-ignition-switch.html.

[69] *See* Maurice Possley, *Koua Fong Lee*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3376 (Anderson is not alone. Koua Fong Lee experienced a similar situation when his Toyota inexplicably accelerated, causing an accident in which multiple people were killed. Lee was sentenced to eight years in prison but was exonerated after it was revealed that Toyota had recalled cars because they had experienced sudden accelerations).

[70] Ruiz, *supra* note 68.

in a death or injury that was accidental or the result of an undiagnosed illness.

i. Shaken Baby Syndrome/Abusive Head Trauma

Shaken baby syndrome (SBS), now more frequently referred to as Abusive Head Trauma (AHT), is a medical-legal diagnosis used to identify the cause of severe injury or death in infants who presented with a triad of symptoms: subdural hematoma, retinal hemorrhage, and encephalopathy (brain abnormalities and/or neurological symptoms).[71] For decades, the medical and legal establishments endorsed the belief that SBS was the cause of the "triad" in the absence of extraordinary blunt force trauma such as that found in an automobile accident. The American Academy of Pediatrics, which embraced the SBS hypothesis as early as 1993,[72] explicitly called for the "presumption of child abuse" when a child presented with the triad of symptoms.[73]

In case after case, experts testified that the triad of symptoms were produced by abuse that occurred immediately before the first signs of distress appeared.[74] Prosecutors then needed only to prove that the defendant was the last person in the presence of the infant before the symptoms appeared.[75] If they were, then *ipso facto*, the defendant was the abuser. In essence, expert testimony relating to the diagnosis of SBS from the triad of symptoms provided the criminal intent, *actus reus* and identity of the perpetrator in one fell-swoop.

In 1995, Audrey Edmunds was a stay-at-home mother who also watched other children in the neighborhood.[76] On October 16th, Cindy Beard

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[71] Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 4 (2009).

[72] American Academy of Pediatrics: Committee on Child Abuse & Neglect, *Shaken Baby Syndrome: Inflicted Cerebral Trauma*, 92 PEDIATRICS 872 (1993).

[73] American Academy of Pediatrics: Committee on Child Abuse & Neglect, *Shaken Baby Syndrome: Rotational Cranial Injuries-Technical Report*, 108 PEDIATRICS 206 (2001).

[74] Edward J. Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (and Non-Scientific) Experts*, 46 NO. 1 CRIM. L. BULL. ART 6 156 (2010) ("It seems clear that during the past two decades, prosecution expert testimony about shaken baby syndrome has contributed to thousands of convictions"); Tuerkheimer, *supra* note 71 (estimating number of SBS prosecutions and convictions); Debbie Cenziper, *A disputed diagnosis imprisons parents*, WASH. POST (Mar. 20, 2015), https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/In-Maryland-a-baby-collapses-and-a-babysitter-is-blamed.html.

[75] Tuerkheimer, *supra* note 71, at 32.

[76] *See Audrey Edmunds: Eleven years in prison as a result of erroneous medical testimony*, NORTHWESTERN U. PRITZKER SCH. L., http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/wi/audrey-edmunds.htm/; *See also* Alexandra Gross, *Audrey Edmunds*, NAT'L REGISTRY OF EXONERATIONS (June 2, 2018),

dropped six-month old Natalie at Edmunds' home.[77] Beard warned Edmunds that Natalie was being fussy and had taken only half her bottle, but that otherwise the baby seemed fine.[78] One hour later, Edmunds called 911 after she saw that Natalie appeared to be gasping for air.[79] The baby died later that evening. The autopsy showed that Natalie suffered from severe brain trauma, and the forensic pathologist determined she had died from shaken baby syndrome (SBS).[80] Because it was believed that a shaken baby would immediately exhibit symptoms of injury, the last person to care for the baby – Edmunds -- was also the source of the injury.[81] Edmunds was charged with homicide for Natalie's death.[82]

At trial, the prosecution presented multiple experts, each of whom testified that Natalie died of SBS.[83] Because the child would have suffered the fatal injuries immediately after being violently shaken, and because Edmunds was the last person in the presence of the baby, she must have been the abuser.[84]

In her defense, Edmunds vehemently denied ever harming Natalie.[85] Character witnesses took the stand to extol Edmunds as a patient, caring and kind person. A defense expert suggested that the baby's brain injuries could have occurred earlier; in fact, Natalie had been treated by a doctor on multiple occasions for lethargy and other symptoms also consistent with brain injury.[86] But the prosecution in closing argument brushed that defense expert aside, arguing that prior medical history was not relevant: since Natalie died from SBS, the abuse must have occurred immediately before she exhibited symptoms, leaving Edmunds as the only likely culprit.[87]

The jury agreed and convicted Edmunds of murder.[88] She was sentenced in 1996 to eighteen years in prison.[89] After eleven years behind bars,

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https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3201; AUDREY EDMUNDS & JILL WELLINGTON, *It Happened to Audrey: From Loving Mom to Accused Baby Killer* (Dec. 6, 2012) (Edmunds's first-hand account).

[77] Gross, *supra* note 76.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See generally id*.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Audrey Edmunds: Eleven years in prison as a result of erroneous medical testimony*, NW. U. PRITZKER SCH. L., http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/wi/audrey-edmunds.html.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] *Id*.

Edmunds was finally exonerated by scientific evidence that disproved the SBS diagnosis.[90] She has since written a book about her harrowing ordeal: "*It Happened to Audrey: From Loving Mom to Accused Baby Killer*."[91] It's a tough title to process and an even more difficult experience for Edmunds to have lived through.

Today, the so-called science behind the SBS/AHT diagnoses has been largely rejected by the scientific community. In 2009, the American Academy of Pediatrics reversed its earlier stance that the triad of symptoms warranted a presumption of abuse, and recognized the ongoing controversy surrounding the SBS diagnosis.[92] In 2016, the Swedish Agency for Health Technology Assessment and Assessment of Social Services issued a ground-breaking report which determined that studies supporting the SBS hypothesis were insufficient and not rooted in reliable methodologies.[93] In fact, it has been scientifically established that the triad of symptoms can be produced by a variety of non-criminal occurrences, including illnesses, short falls, or other accidental injuries.[94] Real questions have been raised as to whether violent shaking could ever produce enough force to create the triad of symptoms without also causing other injuries that are often not present in these cases.[95] SBS/AHT as a tool to diagnose both the crime and the criminal has been discredited and questioned by doctors, scientists, legal scholars and courts alike.[96]

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[90] Gross, *supra* note 76.

[91] Edmunds & Wellington, *supra* note 76.

[92] Cindy W. Christian & Robert Block, Comm. on Child Abuse and Neglect of the Am. Academy of Pediatrics, *Abusive Head Trauma in Infants and Children*, 123 PEDIATRICS 1409 (2009).

[93] SWEDISH AGENCY FOR HEALTH TECHNOLOGY ASSESSMENT AND ASSESSMENT OF SOCIAL SERVICES, *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking*, SBU ASSESSMENT REPORT 255E, 5 (2016), https://www.ncbi.nlm.nih.gov/books/NBK448031/pdf/Bookshelf_NBK448031.pdf.

[94] Non-homicidal causes of death misdiagnosed as SBS and resulting in no-crime wrongful convictions include sudden infant death syndrome ("SIDS"), venous sinus thrombosis, and sickle cell anemia. *See* Maurice Possley, *Teresa Engberg-Lehmer*, NAT'L REGISTRY OF EXONERATIONS (July 29, 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3952 (SIDS); Stephanie Denzel, *Julie Baumer*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3017 (Feb. 27, 2020) (venous sinus thrombosis); Alexandra Gross, *Melonie Ware*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3814 (sickle cell anemia).

[95] *See* Faris A. Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, 151 FORENSIC SCI. INT'L 71, 76-79 (2005); Ann-Christine Duhaime, Thomas A. Gennarelli, Lawrence E. Thibault, Derek A. Bruce, Susan S. Margulies & Randall Wiser, *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, 66 J. NEUROSURGERY 409, 414 (1987).

[96] Keith A. Findley, Patrick D. Barnes, David A. Moran & Waney Squier, *Shaken Baby*

Yet, prosecutions based on the SBS/AHT theory continue to occur.[97] The Innocence Network has collectively reviewed over 100 criminal convictions that were founded largely on expert testimony about SBS based on the presence of the triad of symptoms.[98] At the time of this writing, the NRE includes thirty exonerations in cases involving SBS misdiagnosis.[99] There are surely an unknown number of people who were wrongly convicted under SBS theories who have yet to be identified or exonerated.

ii. *Other Medical Misdiagnoses of Murder*

Even without the SBS/AHT label, a sudden unexplained death can sometimes be misdiagnosed as a crime by medical personnel when, in fact, the death was caused by an overlooked illness or disease.

In 1989, in Columbus, Mississippi, seventeen-year-old Sabrina Butler found her nine-month-old son lifeless in his room.[100] She called the hospital, frantically performed CPR, and then raced with him to the emergency room.[101] Emergency medical personnel were unable to revive him.[102] The emergency personnel contacted the police, citing their suspicions about the baby's death and specifically citing the baby's swollen abdomen and bruises.[103]

The police aggressively interrogated a shocked and grieving Butler as a murder suspect.[104] In response to intensive questioning, Butler gave a number of inconsistent and contradictory stories before finally—and falsely—stating that she had punched her baby in his stomach.[105] The Mississippi prosecutor, armed with Butler's false confession and the

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Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right, 12 HOUS. J. HEALTH L. & POL'Y 209, 227-238 (2012).

[97] THE INNOCENCE NETWORK, STATEMENT OF THE INNOCENCE NETWORK ON SHAKEN BABY SYNDROME/ABUSIVE HEAD TRAUMA, 1,4 (2019), https://prismic-io.s3.amazonaws.com/innocence-network/12c46af9-9bf7-48fc-a731-a01b3425ced3_STATEMENT-OF-THE-INNOCENCE-NETWORK-ON-SHAKEN-BABY-SYNDROME-6.14.19-1+%281%29.pdf.

[98] *Id*. at 3-4.

[99] *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited June 30, 2019).

[100] Sabrina Butler, *I Spent More Than Six Years as an Innocent Woman on Death Row*, TIME (May 30, 2014, 1:18 PM), http://time.com/2799437/i-spent-more-than-six-years-as-an-innocent-woman-on-death-row/.

[101] *Id*.

[102] *Id*.

[103] *Butler v. State*, 608 So. 2d 314, 315 (Miss. 1992).

[104] Butler, *supra* note 100.

[105] *Butler*, 608 So. 2d at 317.

medical expert's testimony that the baby appeared to have been abused, charged Butler with capital murder.[106]

At trial, the prosecutor relied upon expert testimony that the baby's death was caused by internal injuries consistent with abuse and introduced Butler's false confession to the jury as proof of murder.[107] Butler's lawyers did not present any witnesses or evidence in Butler's defense, and Butler did not testify in her own defense.[108]

Perhaps not surprisingly, Butler was convicted and sentenced to death.[109] She became the only woman on Mississippi's death row and remained in prison for the next five years.[110]

A Mississippi appellate court reversed Butler's conviction based on prosecution error.[111] Aided by new defense counsel at her re-trial, Butler presented testimony from a neighbor that Butler had attempted CPR on her infant while she waited for the ambulance.[112] An expert testified that the baby's bruising could have been caused by Butler's attempts to revive her child.[113] And, perhaps most importantly, the medical examiner testified that he now believed the baby could have died from a kidney disorder.[114] After a brief deliberation, on December 15, 1995, the jury acquitted Butler and she was fully exonerated of any wrongdoing.[115]

Patricia Stallings also suffered a wrongful conviction for murder in St. Louis, Missouri, based on a medical misdiagnosis of an overlooked medical condition.[116] In 1989, Stallings rushed her son Ryan to the hospital when he became ill.[117] Ryan was placed in the pediatric intensive care unit, where doctors found elevated levels of ethylene glycol in his blood.[118] The doctors

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[106] *Id.* at 316-18.

[107] Maurice Possley, *Sabrina Butler*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3078 (Aug. 21, 2019).

[108] *Id.*; *Butler*, 608 So. 2d at 318.

[109] Possley, *supra* note 107.

[110] *Id.*

[111] *Butler,* 608 So. 2d at 319.

[112] Possley, *supra* note 107.

[113] *Id*.

[114] Sabrina Butler, *I Spent More Than Six Years as an Innocent Woman on Death Row*, TIME (May 30, 2014, 1:18 PM), http://time.com/2799437/i-spent-more-than-six-years-as-an-innocent-woman-on-death-row/.

[115] Possley, *supra* note 107.

[116] Rob Warden, *Patricia Stallings: Sentenced to Life Without Parole for a Crime that Didn't Happen*, CTR. ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/mo/patricia-stallings.html (last visited Mar. 19, 2023).

[117] *Id*.

[118] *Id*.

suspected that Ryan had been poisoned with anti-freeze.[119] Ryan seemed to recover in the hospital and was released from the hospital into foster care through protective services.[120] A few weeks later, Stallings was permitted a short visit with her son.[121] Ryan again exhibited symptoms and, shortly afterwards, died.[122]

The prosecution charged Stallings with first-degree murder.[123] Pregnant at the time with her second child, Stallings was incarcerated pending the murder trial.[124] While incarcerated, Stallings gave birth to a second son David, who was promptly placed in foster care.[125] Soon after, David exhibited similar symptoms to those experienced by Ryan and was found to have elevated ethylene glycol levels in his blood, even though Stallings had no contact with him.[126] Unlike Ryan, however, David was diagnosed with methylmalonic acidemia (MMA), a rare and sometimes fatal genetic disorder that can cause elevated ethylene glycol levels.[127]

At Stalling's 1991 murder trial, the prosecution presented expert medical testimony relating to the presence of elevated ethylene glycol in Ryan's blood and brain which was consistent with anti-freeze poisoning.[128] They also established that Stalling had anti-freeze in her home.[129] Stallings' defense lawyer wanted to introduce the theory that Ryan may also have had MMA but failed to offer any actual evidence or expert testimony to support that theory.[130] Without evidence, the judge refused to allow Stallings to offer MMA as an alternative and innocent explanation for Ryan's death.[131] Stallings was convicted and sentenced to life in prison.[132]

Stallings then got a lucky break. The television show *Unsolved Mysteries* focused on Ms. Stallings' conviction for Ryan's death.[133] A biochemist from St. Louis University saw the episode and arranged for

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[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] Michael S. Perry, *Patricia Stallings*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3660 (May 16, 2020).
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id.*
[132] *Id.*
[133] *Id.*

another scientist to re-examine Ryan's blood.[134] The bloodwork demonstrated Ryan had MMA.[135] A second researcher from Yale University also examined the bloodwork and confirmed that Ryan had MMA.[136] The trial prosecutor learned about the test results, and personally requested a new trial for Stallings based on inadequate defense counsel.[137] Stallings was released from prison after serving two years of her sentence, and later was fully exonerated.[138]

In each of these cases, presumably well-intentioned medical personnel believed there was a suspicious death and contacted the authorities. Sabrina Butler may well have fallen victim to intersectional biases about what it means to be a mother who is young, black and poor.[139] Once a criminal cause of injury or death is fixed in the treating physician's mind, that diagnosis may take over and is passed along and reaffirmed to colleagues, the police and prosecutor, all to the exclusion of other non-criminal explanations. The police pursue an investigation, based on the initial misdiagnosis that a crime had been committed, rather than proceed objectively.

The problem is that medical personnel are not criminal investigators. They lack training and expertise in crime identification. When the police uncritically rely on a medical professional's diagnosis of a crime, they abdicate their responsibility to objectively investigate the evidence. A medical misdiagnosis can lead the police and prosecutors to believe that a crime occurred, to approach the "crime scene" with preconceived theories of what happened, to reject evidence (including statements of innocence) that does not conform with a theory of guilt, and to engage in guilt-presumptive interrogations that result in false admissions and confessions. The combination of a medical misdiagnosis of a crime with a guilt-presumptive investigation can lead to the arrest and eventual conviction of an innocent person for deaths that were certainly tragic, but not at all criminal.

D. Fire Mislabeled as Intentional Arson

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] For an intersectional look at the experience of women in the criminal justice system, see VALENA BEETY, MANIFESTING INJUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS 177 (2002). ("[P]olice, prosecutors, and judges misperceive Black girls as less 'innocent' and more adult than white girls, even of the same age. Their adultification means that Black girls are labeled in the courtroom as willing participants in sex trades, rather than as victims."); *See also* Sabrina Butler, *supra* note 100.

Jennifer Hall, a 20-year-old respiratory therapist, was working at her job in a Harrisonville, Missouri hospital in 2001 when a fire in the respiratory therapy office broke out.[140] Hall had stepped outside to buy a soda when she heard the fire alarm blare.[141] She, along with two co-workers, rushed back to the office to put out the blaze.[142] In the confusion, Hall burned her hand on a hot metal door frame.[143]

Three weeks later, Hall was charged with first-degree arson.[144]

Prosecutors pursued Hall under the theory that Hall deliberately set the fire because she was seeking attention and planned to play the role of hero when she was credited for extinguishing the blaze.[145] The prosecution claimed Hall's desire for attention stemmed from a sexual harassment claim that she had filed against a coworker who died shortly before the fire.[146] As evidence to support the attention-seeking theory, the prosecution pointed out that Hall had appeared for work with a new hairstyle – her hair was curly instead of straight.[147]

Fire investigators testified about the suspicious burn on Hall's hand and the presence of what they believed was an unusual amount of charred paper near the fire.[148] Hall's private attorney failed to independently investigate the source of the fire and did not offer a contrary explanation.[149] Not surprisingly, Hall was convicted and was sentenced to three years in prison.[150]

On appeal, a newly retained private attorney did what Hall's trial lawyer did not: he hired a forensic expert who said it was patently clear that the fire was the cause of an electrical short circuit in an old clock.[151] A judge eventually agreed that Hall's lawyer was ineffective, in part for failing to investigate alternative causes of the fire.[152] On retrial, Hall was acquitted.[153]

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[140] Maurice Possley, *Jennifer Hall*, NAT'L REGISTRY OF EXONERATIONS (June 6, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3271.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Jennifer Hall*, CTR. ON WRONGFUL CONVICTIONS, https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/mo/jennifer-hall.html.

[148] Possley, *supra* note 107.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

As Hall's conviction demonstrates, arson prosecutions often turn on the quality of the forensic investigation.

Forensic scientists are supposed to collect, preserve, and analyze evidence in a neutral and objective manner, using reliable scientific methods that result in accurate, evidence-based conclusions.[154] In fire investigations, however, the neutrality of the forensic scientist may be compromised.[155] The "objective" forensic scientist is typically also the lead criminal arson investigator.[156] As a result, the forensic expert does not come to the investigation with a neutral agenda and true independence from law enforcement. Indeed, they often are part of the law enforcement apparatus itself.[157] This does not mean that fire scientists deliberately or intentionally misinterpret evidence. It simply means that they experience unconscious cognitive biases that stem from their dual-role as scientist and investigator.[158]

Fire scientists who share the role of criminal investigator may be particularly susceptible to unconscious bias.[159] The National Research Council cautions that "forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed."[160] Yet, fire scientists may well adopt the perspective of other witnesses and law enforcement investigators instead of engaging in an objective evaluation of the evidence. Fire scientists' conclusions may also be contaminated by information that is not relevant to the objective and science-based determination of the origin and cause of the fire.[161]

Further complicating arson investigations is the nature of fire itself, which usually damages or destroys evidence such as DNA or fingerprints.[162] As a result, fire experts often resort to examining evidence created by the fire itself, such as fire patterns.[163] Fire pattern analysis, when performed correctly, can help determine where a fire started and its cause (fire science).[164] It cannot, however, identify a suspect or shed light on a

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[154] *See* Parisa Dehghani-Tafti & Paul Bieber, *Folklore and Forensics: The Challenges of Arson Investigations and Innocence Claims*, 119 W. VA. L. REV. 549, 579 (2016).

[155] *Id*.

[156] *Id*. at 552.

[157] *Id.* at 579.

[158] *Id*. at 551.

[159] *Id*. at 552.

[160] NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 23 (2009).

[161] Dehghani-Tafti & Bieber, *supra* note 154, at 581-582.

[162] *Id.* at 557.

[163] *Id*.

[164] *Id*.

possible motive (arson investigation).[165] When the two are conflated, information about the investigation may have a biasing influence on the investigation.

As demonstrated in Hall's case, forensic investigators overlooked obvious evidence that showed the fire came from an electrical short and not arson. Prosecutors leaned heavily on gendered stereotypes about a woman scorned, the significance of a new hairstyle, and allegedly attention-seeking behavior to shore up its forensically weak case. The jury was all too willing to believe that gendered narrative. Fire investigations done poorly, combined with stereotypes and biases, can result in the wrongful conviction of people for accidental fires mislabeled as intentional.[166]

E. Mislabeled Crimes Based on False Assumptions: When the Victim Re-Emerges from the Dead

No-crime convictions also occur when false assumptions become realities. Although rare, modern examples of murder convictions where the victim was alive and well still occasionally occur.

Australian teenager Natasha Ann Ryan was fourteen years-old when she went missing in 1999.[167] After years of futile searching, her family believed Ryan dead and continued to pressure the authorities to solve the case.[168] This belief was bolstered by the later confession of Leonard John Fraser, an Australian serial killer, who claimed to have killed Ryan along with three other young women.[169] When Fraser confessed, the prosecution leapt at the chance to hold someone accountable. During Fraser's trial for her murder, Ryan was found hiding in her boyfriend's cupboard.[170] She had been living with him the entire time. The Ryan murder charges against Fraser were dismissed.[171]

Then there are murder convictions for the deaths of people that never existed. Victoria Banks, Medell Banks, and Diane Tucker, sometimes called the "Choctaw Three" were poor, black, intellectually disabled – and charged in Alabama with capital murder for the killing of an infant that never

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[165] *Id*.

[166] Cameron Todd Willingham was put to death in Texas for arson-murder in a case where most people now believe the fire was accidental. He too was a victim of bad fire science and a prosecutor determined to play to the Texas jurors' biases. During the penalty phase of the trial, the prosecutor called an expert witness who testified that Willingham's posters of various rock bands suggested that Willingham engaged in Satanic behavior.

[167] *Alleged Australian Murder Victim Found Alive*, THE GUARDIAN (April 11, 2003), https://www.theguardian.com/world/2003/apr/11/australia.

[168] *Id.*

[169] *Id*.

[170] *Id*.

[171] *Id*.

existed.[172] In 1999, Victoria Banks was in an Alabaman jail when she decided to feign a pregnancy in an effort to obtain an early release.[173] She refused a pelvic examination, and no pregnancy test was ever performed.[174] Two doctors met with her.[175] Although one doctor found no evidence of a pregnancy, the other claimed to hear a fetal heartbeat.[176] Banks' plan proved to be effective; she was released on bond after she threatened to sue the jail for inadequate prenatal care.[177]

When the local Sheriff later encountered Victoria, he asked about the baby.[178] She claimed to have had a miscarriage.[179] The Sheriff thought that was suspicious and brought Victoria, her estranged husband, Medell Banks, and her sister, Diane Tucker, into the station for questioning.[180] The three were interrogated over the course of several days about the "missing baby."[181] They initially protested their innocence, repeating time and again that Victoria had a complete tubal ligation in 1995 and could never have been pregnant.[182] They also explained to the police that Victoria had lied about being pregnant in a desperate ploy to be released from jail.[183] Exhausted and drained after days of questioning, the three eventually confessed to murder.[184] To avoid the death penalty, each defendant pled guilty to manslaughter.[185]

Medell Banks recanted his confession and later challenged his guilty plea. He was exonerated after it was proven that Victoria Banks indeed had a tubal ligation that would have prevented her from ever being pregnant.[186] The Alabama Court of Criminal Appeals threw out his case, noting that a "manifest injustice" had been done.[187] The two women, however, did not

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[172] Bob Herbert, *An Imaginary Homicide*, N.Y. TIMES (Aug. 15, 2002) https://www.nytimes.com/2002/08/15/opinion/an-imaginary-homicide.html.

[173] Maurice Possley, *Medell Banks*, NAT'L REGISTRY OF EXONERATIONS (April 22, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3010.

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *Id*.

[181] *Id*.

[182] *Id*.

[183] *Id*.

[184] *Id*.

[185] *Id*.

[186] *Id*.

[187] *Id*.

move to withdraw their pleas, and continue to be "guilty" in the eyes of the law for the killing of a baby that was never conceived.[188]

CONCLUSION

Women have been exonerated in no-crime case that began years earlier when they were wrongly arrested, prosecuted and convicted of crime that never happened in the first place. The psychology of cognitive biases, particularly as those biases relate to gender, provide a lens to explain, at least in part, how investigators and scientists might come to misclassify an accidental or non-criminal event as a crime. Cognitive biases based on gender are particularly powerful and important in the context of women who do not conform to expectations based in how "real" women should behave – they are not emotional enough, they are too emotional, they do not look like or act like a "good" mother, wife, or girlfriend. These expectations, combined with biases based on race and poverty, make women particularly susceptible to no-crime wrongful convictions.

Once these cognitive biases kick in, the police, working with forensic experts and the prosecution, find evidence of criminality where there was none. They engage in guilt-presumptive investigations to find evidence that "proves" the guilt of the suspect. Prosecutors and judges fail to objectively examine the evidence and instead close ranks to secure a conviction, while defense lawyers fail to ask whether a crime in fact happened in the first place. And jurors accept the "evidence" presented to them and vote to convict.

The result is the stuff of nightmares: an innocent person is wrongly convicted and often imprisoned for years, where no crime happened in the first place.

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[188] *Id*.

NOT JUST MERCY: THE UNTAPPED POTENTIAL OF CLEMENCY TO RIGHT WRONGFUL CONVICTIONS

By: Daniel S. Medwed*

INTRODUCTION

Professor Valena Beety's wonderful new book, *Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights*, chronicles how the courts all too often fail to correct wrongful convictions.[1] One purported justification for this benign neglect is the presence of the extrajudicial clemency process, which provides a mechanism for executive officials to pardon people convicted of crimes or commute their prison sentences. Chief Justice Rehnquist once labeled this process a "fail safe" to protect the innocent.[2]

But Rehnquist overstated the virtues of clemency. Boards authorized to review pardon and commutation requests are ill-equipped to identify legitimate innocence claims. Worse yet, they have historically lacked both the mandate and the political will to right even those wrongs that can be identified by the executive branch. This essay draws upon a chapter from my book *Barred: Why the Innocent Can't Get Out of Prison* to illustrate why clemency is by no means the "fail safe" that some apologists for judicial inaction consider it to be.

Part I provides an overview of executive clemency, focusing on the categories of relief, procedures for seeking those remedies, and theoretical underpinnings. Next, Part II consists of a qualitative case study of an innocent prisoner in Virginia, Marvin Anderson, and how the state clemency procedure operated in his case. Finally, Part III shifts from the descriptive to the prescriptive, offering ideas on how we could alter clemency to better grapple with factual innocence claims.

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* University Distinguished Professor of Law and Criminal Justice, Northeastern University. This essay is a modified excerpt of Chapter Ten of my book BARRED: WHY THE INNOCENT CAN'T GET OUT OF PRISON (2022). I am grateful to my friend Valena Beety for inviting me to participate in this event, and to the outstanding Arizona State law students, Madison Benson, Kylie Love, and Princeton Wilson, who assisted with the symposium.

[1] VALENA BEETY, MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS (2022).

[2] Herrera v. Collins, 506 U.S. 390, 415 (1993).

I. AN OVERVIEW OF EXECUTIVE CLEMENCY

Clemency normally consists of a pardon (full forgiveness for the underlying offense), a commutation (reduction in the prison sentence), or a reprieve (temporary delay, or "stay," of a sentence).[3] Once granted, the gift of a pardon or commutation usually cannot be rescinded, future misdeeds of its recipient notwithstanding. Those transgressions might trigger new criminal charges, not resuscitate old ones. One exception is that a person whose sentence is commuted is occasionally placed under parole supervision.[4] Otherwise clemency returns its recipient to the free world unencumbered by continued government supervision.

The U.S. president wields the clemency power at the federal level,[5] guided by the Department of Justice.[6] Governors, administrators, or a combination of the two control it in the states.[7] Most states embrace a hybrid model in which the governor shares clemency responsibility with an administrative board.[8] The bulk of these jurisdictions authorize boards to make nonbinding pardon and commutation recommendations to the governor, while a few require a favorable endorsement from the board before a governor can act.[9] In many states, the governor has complete autonomy over these decisions.[10] No matter what the precise configuration, governors generally exert much more influence over the clemency process than they do over parole, and with minimal judicial oversight.

Unlike parole, which emerged as an administrative remedy in the nineteenth century, clemency has constitutional underpinnings that predate the nation's founding.[11] The framers of our federal and state constitutions took the concept from England, where monarchs have long used it to pay

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[3] For a description of the assorted categories of clemency, see Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575-578 (1991).

[4] For example, Tennessee's Governor commuted the sentence of Cyntoia Brown, but put her under the supervision of the parole system. *See infra* notes 22-23 and accompanying text.

[5] U.S. Const. art. II, § 2, cl. 1 (assigning the President the "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment").

[6] *Pardon Information and Instructions*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/pardon/pardon-information-and-instructions (last updated Nov. 23, 2018).).

[7] *See Clemency Procedures by State*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/facts-and-research/clemency/clemency-by-state (last accessed Jan. 3, 2023); Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. W. L. REV. 55, 73 (2014).

[8] *See id*.

[9] *Id*.

[10] *See* Cooper & Gough, *supra* note 7, at 73 n. 109 ("Thirteen states give the Governor the sole power to preside over clemency decisions.").

[11] U.S. CONST. art. II, § 2, cl. 1.

tribute to loyal subjects and convince the masses of their magnanimity.[12] The framers envisioned clemency not so much as an imperial courtesy to withhold or dispense on a whim, but as a safety net, one last chance to rescue convicted defendants who merit some form of state-sanctioned benevolence.

Yet this benevolence seldom extends to prisoners with viable innocence claims, contrary to what some observers believe. In Leonel Herrera's case, the United States Supreme Court cited the availability of executive clemency in Texas to justify barring him from raising an innocence claim in a federal habeas corpus proceeding.[13] Herrera's claim hinged on newly discovered evidence alleging that his brother Raul had committed the murders of two law enforcement officers that had sent Leonel to death row.[14] In the Court's majority opinion, Chief Justice Rehnquist noted that Herrera had another "forum to raise his actual innocence claim. . . . For under Texas law, petitioner may file a request for executive clemency. Clemency is deeply rooted in our Anglo- American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[15] The Chief Justice went on to insist that "clemency has provided the 'fail safe' in our criminal justice system. . . . History is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence."[16]

The problem is that Rehnquist exaggerated the degree to which clemency acts as a guardrail for the innocent. It certainly did not protect Herrera, who was executed with lingering questions about his guilt unanswered four months after the Supreme Court opinion.[17] During his last moments on earth, Herrera proclaimed "I am an innocent man and something very wrong is taking place tonight."[18] In truth, there are relatively few examples of inmates declared innocent and their records wiped clean by clemency's brush.[19] When executive officials have pardoned prisoners

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[12] *See* Cooper & Gough, *supra* note 7, at 61-62; Herrera v. Collins, 506 U.S. 390, 415 (1993).

[13] *Herrera*, 506 U.S. at 415.

[14] *Id.* at 396.

[15] *Id.* at 411-12.

[16] *Id.* at 415.

[17] *Man in Case on Curbing Use of New Evidence Is Executed*, N.Y. TIMES, May 13, 1993.

[18] *Id.*

[19] *See, e.g.*, Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121 (2005); Brief of Eleven Individuals Who Have Received Clemency Through DNA Testing as Amici Curiae Supporting Respondent, Dist. Att'y Office for the Third Jud. Dist. v. Osborne, 557 U.S. 52 (2009), (No. 08-6), 2009 WL 271057 (Feb. 2, 2009); Laura Schaefer & Michael L. Radelet, *Have Mercy: New*

in that manner, it is often because postconviction DNA testing put their innocence in such sharp relief that media attention made it politically expedient to do so.[20]

The data instead show that pardons and commutations usually go to those with sympathetic features to their cases (*e.g.*, women who kill their abusers) and/or their personal profiles (*e.g.*, people with limited education who committed crimes at a young age and took tremendous steps toward self- improvement while incarcerated).[21] Cyntoia Brown exemplifies this phenomenon.[22] A fifteen-year-old runaway conscripted into sex work in Nashville, she shot and killed a client in 2006 who she thought was reaching for a gun. At trial, the jury rejected her claim of self-defense, resulting in a murder conviction and life sentence. While incarcerated, Brown earned her GED, finished college, and mentored at-risk youth. Her case gained attention with the rise of the #MeToo movement and when celebrities, like the pop star Rihanna, flocked to her cause. In 2019, Tennessee's governor commuted her sentence in what he characterized as a "tragic and complex case."[23]

Even accounting for trends in the data, there's no real rhyme or reason to how most clemency decisions are made. The frequency with which a particular state draws on its pardon power stems more from its idiosyncratic clemency culture than the merits of any batch of applications.[24] And these clemency cultures do not always mirror a state's political reputation. Clemency is rare in famously liberal Massachusetts and has been for years. From 2002 through 2021, three Massachusetts governors collectively issued only six pardons, all toward the end of Deval Patrick's tenure in 2014 and 2015.[25] In the six years after Patrick's last clemency grant, Massachusetts

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Opportunities for Commutations in Death Penalty Cases, 42 HUM. RTS. MAG. 18 (2016).

[20] *See* Brief of Eleven Individuals Who Have Received Clemency Through DNA Testing, *supra* note 19.

[21] *See, e.g.*, Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239 (2003).

[22] *See, e.g.*, Bobby Allyn, *Cyntoia Brown Released After 15 Years in Prison for Murder*, NPR, Aug. 7, 2019, available at https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder.

[23] *Id*.

[24] For information about clemency practices across the country, see *50-State Comparison: Pardon Policy and Practice*, RESTORATION OF RIGHTS PROJECT, last updated Oct. 2022, available at https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ (last access Jan. 4, 2023).

[25] *See* Maria Cramer, *As 2 Felons Earn Pardons, Time For Others Runs Short*, BOSTON GLOBE, Jan. 2, 2015; *Massachusetts Restoration of Rights and Record Relief*, RESTORATION OF RIGHTS PROJECT, last updated Dec. 13, 2022, available at https://ccresourcecenter.org/state-restoration-profiles/massachusetts-restoration-of-rights-pardon-expungement-sealing/.

held only one commutation hearing, even as 240 applications waited in the queue for evaluation.[26]

Politicians in Massachusetts, perhaps even more than elsewhere, remain scarred by the aftershocks of an event that happened decades ago.[27] In the 1980s, Massachusetts had a work-release program that permitted prisoners to go on furlough for a period of time before returning to their cells. Willie Horton participated in that program, and while on furlough he raped a woman and stabbed her boyfriend. In the 1988 presidential campaign, Republican nominee George H. W. Bush capitalized on this tragedy to portray his Democratic opponent, Massachusetts governor Mike Dukakis, as weak on crime. Many political scientists attribute the shellacking that Dukakis later experienced at the polls in large part to the Horton saga.[28]

The "Willie Horton effect" has arguably frightened Bay State officials from granting liberty, in various forms, to prisoners ever since. Nearby Connecticut has a very different track record; the state issued more than seven hundred pardons in 2018 alone.[29] Some reliably "red" states, like Arkansas and Idaho, are also far less stingy on the pardon front than Massachusetts.[30]

In line with these statewide trends, many individual clemency decisions look mercurial when you put them under a microscope, marked just as often by crass calculation or randomness as by grace. Every now and then clemency serves blatant political purposes and little else. Exhibit A: former President Trump's pardon of political bedfellows Steve Bannon, Michael Flynn, Paul Manafort, and Roger Stone, each of whom played a role as an architect of his unexpected 2016 electoral victory and controversial White House agenda.[31] Some beneficiaries of Trump's last-gasp pardon spree in

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[26] *See State Parole Board, Clemency Process Need Reform*, BOSTON GLOBE, Apr. 5, 2021. Governor Charlie Baker started to take a more charitable approach to clemency in 2022, his last year in office. In January 2022, he commuted the sentences of two men convicted of murder. Matt Stout & Shelley Murphy, *Baker Approves Commutation Requests for two Convicted of Murder*, BOSTON GLOBE, Jan. 12, 2022. Later that year, he issued six pardons and one sentence commutation. Matt Stout, B*aker Recommends Pardons for Siblings Convicted in the Fells Acre Day-Care Abuse Case*, BOSTON GLOBE, Nov. 18, 2022. He subsequently retracted two of those pardons. Ivy Scott et al., *Baker Withdraws Controversial Pardon Requests in Fells Acre Child Abuse Case*, BOSTON GLOBE, Dec. 14, 2022.

[27] *See, e.g.*, Peter Baker, *Bush Made Willie Horton an Issue in 2018, and the Racial Scars Are Still Fresh*, N.Y. TIMES, Dec. 3, 2018; John Pfaff, *The Never-Ending 'Willie Horton Effect' Is Keeping Prisons Too Full for America's Good*, L.A. TIMES, May 14, 2017.

[28] *Id*.

[29] *See 50-State Comparison*, *supra* note 24.

[30] *Id*.

[31] *See, e.g.*, Nicole Lewis, Justin George & Eli Hager, *Trump's Pardons Show the*

January 2021 reportedly paid people close to the president thousands of dollars to lobby on their behalf.[32]

The Supreme Judicial Court of Massachusetts summed up the diverse mix of motivations in the clemency cohort more than forty years ago. It observed that executive officials have issued pardons for "highminded purposes" as well as "merely practical purposes of relieving overcrowded prison conditions, rewarding a prisoner's reform or his turning State's evidence, celebrating a holiday, or doing a political favor." The commonwealth's highest court later noted that "among these various possibilities, the pardon invoked to correct the wrongful conviction of innocent persons is an anomaly which has occurred only rarely."[33]

A rape case from the 1980s demonstrates why the use of clemency "to correct the wrongful conviction of innocent persons" is so anomalous and usually comes about only after science has saved the day.

II. A QUALITATIVE CASE STUDY: MARVIN ANDERSON

In 1982, a Black man on a bicycle approached a white woman in a wooded area of rural Hanover County, Virginia.[34] The man threatened her with a gun and sexually assaulted her. After the attack, the victim rushed to a local hospital, where she told police she would never forget the man's face. She described the assailant as a light-skinned Black man with a medium frame, short hair, and a mustache. There were few other clues to his identity except for one the police glommed on to. According to the victim, the perpetrator claimed he "had a white girl." The investigating

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Process Has Always Been Broken, THE MARSHALL PROJECT (Jan. 19, 2021), https://www.themarshallproject.org/2021/01/19/trump-s-pardons-show-the-process-has-always-been-broken. *Cf.* Heise, *supra* note 21, at 304 ("[M]any standard political factors assumed to influence clemency decisions might be overstated.").

[32] Michael S. Schmidt & Kenneth P. Vogel, *Prospect of Pardons in Final Days Fuels Market to Buy Access to Trump*, N.Y. TIMES, (Jan. 17, 2021) https://www.nytimes.com/2021/01/17/us/politics/trump-pardons.html

[33] *Id.*

[34] This account of the Marvin Anderson case derives from the following sources: Kate Andrews, *This Man Is Innocent*, RICHMOND MAG. (May 26, 2011), https://richmondmagazine.com/news/this-man-is-innocent-05-26-2011/; BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 57-58 (Harvard Univ. Press 2012); Kristen Gelineau, *Saving Grace*, WASH. POST (Oct. 9, 2005), https://www.washingtonpost.com/archive/lifestyle/2005/10/09/saving-grace/d15ff40d-51c1-4a79-97a9-f4b1f98b562b/; Maria Glod, *Cleared Va. Man to Be Pardoned*, WASH. POST (Aug. 21, 2002), https://www.washingtonpost.com/archive/local/2002/08/21/cleared-va-man-to-be-pardoned/4ed2db0b-73fd-4278-863f-104d89512f1c/; *Marvin Anderson*, NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2995#:~:text=In%20December%202001%2C%20Marvin%20Lamont,and%20two%20counts%20of%20rape (last updated Mar. 8, 2019).

officer knew about an eighteen-year-old Black man who lived with a white woman. Based on that absurd leap of logic—that a rapist's boast of an interracial relationship made the only local Black man the officer knew to be romantically involved with a white woman the suspect in the crime—the police began to investigate a churchgoer and volunteer firefighter named Marvin Anderson.

There was a snag with the investigation right out of the gate. Anderson did not have a criminal record, which meant a mug shot was unavailable for viewing by the victim. So, the police visited Anderson's job site, where they located an identification card displaying a color photo of him and his employee number. They slipped the card into an assortment of black-and-white pictures of other men, none of which had any numbers, for the victim to examine. She picked Anderson's as that of her rapist.

This is what's called a suggestive lineup: when the presentation of one member is so dissimilar from the others that it cries out for selection by the witness.[35] The distinguishing feature in an in-person lineup might be height, race, weight, clothing, or age. In a photo lineup, the shape, size, or hue of the picture can add other differentiating traits. When defense lawyers raise the issue in proper and timely fashion at a pretrial suppression hearing, diligent judges ideally find that suggestive identifications violate due process and exclude them from use at trial. But counsel and judges are not always up to the task. Even if they are, the Supreme Court allows prosecutors to salvage a suggestive identification by convincing the judge that it was nevertheless "reliable" because of other factors.[36]

Suggestive identifications figure prominently in the wrongful conviction database. Brandon Garrett's study of the first 250 DNA exonerations in the United States found that mistaken-identification evidence cropped up in 76 percent (190) of them.[37] Of those cases, Garrett determined that at least a third contained lineups that "were biased, or stacked to make the suspect stand out."[38]

The flawed nature of the Marvin Anderson photo array was compounded by what followed. An hour after choosing the picture, the victim observed a live lineup composed of Anderson and several non-suspects, known as "fillers," who looked like him.[39] Although this may have reflected an effort to avoid another suggestive procedure—because the

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[35] *See* Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. REV. 511, 521-22 (2022) (discussing what makes a lineup procedure suggestive); GARRETT, *supra* note 34, at 48-49 (same).

[36] Manson v. Braithwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972).

[37] *See* GARRETT, *supra* note 34, at 8-9, 48-50, 57-59.

[38] *Id*. at 57.

[39] *See* Albright & Garrett, *supra* note 35, at 521 ("a traditional 'six-pack' photo array, in which the suspect's photo is grouped with five photos of innocent 'fillers'.").

lineup was structured so that Anderson would not be conspicuous—the die had already been cast. Primed by the earlier photo array, the victim yet again identified Anderson, who was the only participant in the lineup repeated from the array.

Anderson's attorney later moved to suppress the identification evidence. Counsel pointed out that Anderson was the only person depicted in both the array and the lineup, and that he was "dark-skinned." The judge denied the motion on the grounds that "there's been no showing here that the photographs were irregular or were arranged in an irregular way or, uh, were presented in any way to, uh, identify a particular person."[40]

The identification evidence comprised the crux of the prosecution's case against Anderson at trial. The victim reinforced her prior IDs by identifying him from the witness stand and gave an extensive account of the crime. Beyond the harrowing facts surrounding the rape, the victim divulged other memorable (and inflammatory) details, including that the perpetrator forced her to consume fecal matter. Forensic scientists had conducted serology tests on the crime scene evidence but failed to produce any results that could connect Anderson to the assault.

Anderson presented an alibi defense that revolved around testimony that he was washing his car at the time of the attack. Yet his defense did not put on any evidence related to murmurs in the community that a different man, John Otis Lincoln, had done the crime. The bicycle the rapist had ridden in the run-up to the attack was identified by its owner as having been stolen by Lincoln a half hour before the crime. Anderson begged his attorney to call the bike owner and Lincoln to the stand, a plea that went unheeded.

An all-white jury convicted Anderson of rape, sodomy, abduction, and robbery in 1982. The court then sentenced Anderson, a first-time offender, to 210 years in prison. Harsh sentences like Anderson's are part of the legacy of racial injustice in the South, where Black men have long received disproportionate punishment for sex crimes, especially those involving claims of harm against white women.[41] Even though it is now unconstitutional to give the death penalty for a rape conviction,[42] it was once a common penalty—for Black men at least. Renowned criminologist Marvin Wolfgang found that Black men in the former Confederate and bordering states represented 89 percent of all people executed for rape between 1930 and 1974.[43]

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[40] *See* GARRETT, *supra* note 34, at 58.

[41] *See, e.g.*, John Edmond Mays & Richard S. Jaffe, *History Corrected—The Scottsboro Boys Are Officially Innocent*, 38-MAR CHAMPION, Mar. 2014, at 28.

[42] Coker v. Georgia, 433 U.S. 584 (1977).

[43] *See* Daniel S. Medwed, *Black Deaths Matter: The Race-of-Victim Effect and Capital Punishment*, 86 BROOK. L. REV. 957, 963 n. 32 (2021), citing Margaret Burnham,

Anderson spent five years in the Virginia state penitentiary, maintaining his innocence and hoping to catch a break. That break came from an unexpected source. John Otis Lincoln stepped forward in 1988 to admit he had committed the rape. In a state postconviction hearing that August, Lincoln confessed again, this time under oath in open court. As in many state postconviction proceedings across the country, the hearing took place before the same judge who had presided over Anderson's trial. That judge branded Lincoln a liar and refused to overturn the conviction.

Anderson fought from his prison cell with the help of a broad coalition of civil rights activists, church leaders, and state legislators. In 1993, they petitioned Governor Douglas Wilder to pardon Anderson. Despite the flimsy evidence of guilt, Anderson's sterling background, Lincoln's confession, and the exhaustion of judicial remedies, Wilder declined the pardon application for reasons unstated and unknown. It was not that the governor was ideologically opposed to showing mercy. That same year he gave clemency to high school (and future professional) basketball star Allen Iverson for a conviction that arose from a bowling alley brawl.[44]

Anderson received parole in 1997 after fifteen years in prison. He went back to Hanover saddled with an ankle monitor. He suffered other indignities, too, among them an early curfew, weekly meetings with his parole officer, and sex offender registration. Prohibited from firefighting, he had to drive by the station every time he went to the few jobs he was able to get, first at a galvanizing plant, later as a trucker restricted to a fifty-mile radius.

Although the Innocence Project in New York City had accepted his case back in 1994, they could not track down biological evidence for DNA testing. Anderson's parole grant three years later lent even less urgency to that quest. The lawyers and students assigned to Anderson's case believed he was innocent, but they also believed that any evidence that could prove it had been destroyed. Peter Neufeld, who cofounded the Innocence Project with Barry Scheck, gave it one more shot. He called a friend at the Virginia Department of Forensic Science and asked him to take a final peek at Anderson's file. That phone call led to a startling discovery: A forensic examiner had taped swabs from the rape kit to her worksheets, effectively saving them from destruction under state protocols at the time.

Retrospective Justice in the Age of Innocence, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 291, ed., Daniel S. Medwed (2017).

[44] *See, e.g.*, David Nakamura, *Wilder Releases Va. Prep Star Iverson From Jail*, WASH. POST, Dec. 31, 1993 (page or hyperlink needed). https://www.washingtonpost.com/archive/sports/1993/12/31/wilder-releases-va-prep-star-iverson-from-jail/bb62aa7e-5138-4482-b7f0-41f49ffd0107/

Even so, there was a hang-up. Virginia had not yet passed a law that provided access to biological evidence for postconviction DNA testing, and state officials higher up the ranks than

Neufeld's pal balked at consenting to those tests in fear it would set a bad precedent. Virginia eventually passed a DNA-testing law in May 2001, which provided a legal avenue to test the swabs from the Hanover rape.[45] Those DNA tests excluded Anderson as the perpetrator and implicated John Otis Lincoln.

DNA results in hand, Anderson went back to the trial court in Hanover. He had a different judge because the one who had handled his trial had retired. The new judge found him innocent and indicated he should be removed from the sex offender registry. Governor Mark Warner issued an absolute pardon in 2002, announcing, "I am convinced that Mr. Anderson is innocent of the charges for which he was convicted."[46]

Marvin Anderson ultimately received clemency from the governor of Virginia, but only after DNA test results had conclusively proven his innocence and incriminated another man. The pardon materialized twenty years after Anderson's conviction at trial, fourteen years after the true culprit confessed to the crime, and nine years after a prior governor denied his pardon application without explanation.

Pardoning a criminal defendant on actual innocence grounds after scientific evidence like DNA has already cleared their name is low-hanging fruit that is ripe for governors and clemency boards to pluck. It is important that executive officials grab this fruit, and they have done so on occasion.[47] In some cases, the practical effect of a judicial ruling that overturns a wrongful conviction on direct appeal, habeas corpus, coram nobis, or DNA-testing law may be uncertain. A pardon can go a long way toward clarifying that a defendant is officially deemed "innocent" by the state and eligible for wrongful-conviction compensation, or that their conviction is expunged from their record.[48] In other cases, the pardon may be more symbolic —a

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[45] VA. CODE ANN. § 19.2-327.1 (2023).

[46] Maria Glod, *Cleared Va. Man to Be Pardoned*, WASH. POST (Aug. 21, 2002), https://www.washingtonpost.com/archive/local/2002/08/21/cleared-va-man-to-be-pardoned/4ed2db0b-73fd-4278-863f-104d89512f1c/

[47] *See Brief of Eleven Individuals*, *supra* note 19.

[48] The precise legal consequences of a pardon differ from state to state. A pardon in some states serves to essentially erase the conviction from a person's record. *See, e.g.*, In the Matter of the Petition of L.B., 848 A.2d 899, 900 (N.J. Super. Ct. Law Div. 2004), suggesting that a pardon in New Jersey restores the recipient's rights and makes the conviction eligible for expungement. In others, the relief is more limited. In Nevada, a pardon eliminates most collateral consequences of a conviction, including restrictions on having a gun or obtaining other state licenses, but does not "erase the conviction," and it may still factor into sentencing as a predicate crime if the person is subsequently convicted of an offense. NEV. REV. STAT. § 213.090 (2023).

belt added to the suspenders manufactured by the courts to hold up a declaration of innocence. Symbols matter—for the public, the legal community, and most of all the innocent recipient of the pardon.

But what about cases with compelling innocence claims where the judicial system has failed the defendant? Cases where convictions stay in place due to procedural obstacles described in my book *Barred*— things like strict statutes of limitations, rigid preservation rules, deferential standards of review, and narrow interpretations of what equals "new" evidence?[49] Neither clarity nor emphasis is needed in those instances. Bold action by the executive branch through the exercise of its clemency power is called for instead. Yet far too many clemency decisions are characterized by caution, not boldness.

One reason why clemency falls short of being a "fail safe" to help the innocent, as Chief Justice Rehnquist envisioned it in *Herrera*,[50] is its underlying rationale. The long-standing justification for executive clemency—that we need a channel for benevolent leaders to spare regular people—is based more on mercy and forgiveness than innocence. Its origins go back to ancient Greece and Rome.[51] Julius Caesar was renowned for his frequent acts of mercy toward those he had defeated, and the modern term "clemency" derives from Clementia, the Roman goddess of forgiveness and mercy, who was associated with Caesar at the time.

Although skeptics even then scoffed at this merciful image of clemency, viewing it as an instrument to advance political goals, that notion infused the original American conception of the power. Alexander Hamilton lauded the president's authority to pardon in the Federalist Papers of 1788: "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed."[52] In 1866, the Supreme Court underscored the "unlimited" nature of the presidential pardon power, one that "cannot be fettered by any legislative restrictions."[53] Echoing Hamilton, the Court declared that the breadth of this power emanated from the "benign prerogative of mercy reposed" in the president.[54]

A corollary of this benign prerogative, that clemency is principally a vehicle to distribute mercy from on high to those down below, is that the power is not perceived as a way to revisit the fundamental facts of a

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[49] *See* DANIEL S. MEDWED, BARRED: WHY THE INNOCENT CAN'T GET OUT OF PRISON 15-179 (2022).

[50] Herrera v. Collins, 506 U.S. 390, 415 (1993).

[51] *See* Cooper & Gough, *supra* note 7, at 58-71.

[52] THE FEDERALIST NO. 74 (ALEXANDER HAMILTON).

[53] *Ex parte* Garland, 71 U.S. 333, 380 (1866).

[54] *Id*.

prisoner's case. Several Supreme Court decisions, including one handed down five years after *Herrera*, insist that clemency is not "an integral part of the . . . system for finally adjudicating . . . guilt or innocence" of a defendant.[55] The clemency process is treated as an opportunity not to reassess the accuracy of the conviction, but to evaluate the suitability of the convicted for mercy. It is an act of grace bestowed on a deserving person and assumes the beneficiary is guilty of the criminal act.[56] It goes without saying that executive officials are poorly positioned to reverse a wrongful conviction through clemency if they are dissuaded—even barred—from examining the facts related to innocence.

Clemency procedures in many jurisdictions emphasize abstract questions of forgiveness and mercy, as opposed to specific questions of guilt or innocence, abundantly clear. Sometimes these rules advise that prisoners must accept responsibility for their crimes in order to gain forgiveness and, by extension, clemency. Consider the official "Pardon Information and Instructions" published by the United States Department of Justice, which offers support to the president in reaching federal clemency decisions:

[B]ear in mind that a presidential pardon is ordinarily a sign of forgiveness and is granted in recognition of the applicant's acceptance of responsibility for the crime and established good conduct for a significant period of time after conviction or release from confinement. A pardon is not a sign of vindication and does not connote or establish innocence. For that reason, when considering the merits of a pardon petition, pardon officials take into account the petitioner's acceptance of responsibility, remorse, and atonement for the offense.[57]

Responsibility, remorse, and atonement are terms that likely strike a chord that is in dissonance with what the actually innocent would assert in a pardon petition.

Some states follow the federal approach to clemency.[58] Others nominally permit the consideration of innocence in the assessment process yet suggest clemency on that basis is rare.[59] A number of jurisdictions reach

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[55] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 274 (1998) (citing Evitts v. Lucey, 469 U.S. 387, 393 (1985)).

[56] United States v. Wilson, 32 U.S. 150, 160 (1833) ("A pardon is an act of grace, proceeding from the power [e]ntrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.").

[57] U.S. Dep't of Just., *supra* note 6.

[58] *See, e.g.*, CHARLES D. BAKER, EXECUTIVE CLEMENCY GUIDELINES 4.2.1 (2020)., ("The Governor will rarely grant clemency to a petitioner who has not clearly demonstrated acceptance of responsibility for the offense for which the person is seeking clemency.").

[59] *See* Cooper & Gough, *supra* note 7, at 87-88 (citing Virginia and Georgia as examples).

beyond rhetoric and offer procedures through which boards may grant clemency on the specific grounds of actual innocence. These procedures nonetheless tend to contain one of two chief defects. First, many essentially require a prior judicial finding of innocence. Texas, for instance, authorizes "a pardon for innocence" based on "either evidence of actual innocence from at least two trial officials, or the findings of fact and conclusions of law from the district judge indicating actual innocence."[60] Second, while some states contemplate granting clemency on innocence grounds without a judicial finding to that effect, they still ask the applicant to give executive officials practically irrefutable evidence of innocence. New York will entertain a pardon request when no other administrative or legal remedy exists, and there is "overwhelming and convincing proof of innocence not available at the time of conviction."[61]

Even if clemency on the basis of actual innocence is theoretically possible in a particular state, firm eligibility rules and limited transparency diminish the likelihood of such relief in reality. Some states prohibit people from seeking clemency if they have recent disciplinary infractions on their prison record; other states oblige inmates to serve a minimum percentage of time in a correctional facility before they qualify for a pardon.[62] State public records laws also largely shield the nuts and bolts of the clemency decision-making process from view.[63]

III. MERCY REIMAGINES

I applaud states that at least think about pardoning someone due to factual innocence. But their procedures should have fewer barriers to converting that thought into action. Here is what clemency might look like without those hindrances.

A. Expanded Theoretical Framework

There should always be a mechanism for the executive branch to give mercy to prisoners whose personal transformations or sympathetic backgrounds motivate officials to act. But that blueprint for mercy should be revised to encompass cases with credible innocence claims. If governors and clemency boards have genuine doubts about the accuracy of a

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[60] *Id*. at 94. *See also What Is a Pardon for Innocence?*, TEX. BD. PARDONS & PAROLE, last updated Jan. 2, 2019, https://www.tdcj.texas.gov/bpp/exec_clem/Pardon_for_Innocence.html.

[61] *See* Cooper & Gough, *supra* note 7, at 92. *See also Executive Clemency: Pardons*, NY DEP'T OF CORR[S].& CMTY.SUPERVISION, https://doccs.ny.gov/community-supervision-handbook/executive-clemency (last accessed Jan. 4, 2023).

[62] *See* Cooper & Gough, *supra* note 7, at 84-86.

[63] *Id.* at 74-81.

conviction, then clemency should be available in more than a hortatory or theoretical way. Is not pardoning someone because of dormant fears of a wrongful conviction just another form of mercy writ large, especially if we conceive of mercy as an expression of kindness and compassion rather than solely forgiveness? Surely an innocent prisoner deserves a reversal of his misfortune regardless of his upbringing or conduct within the prison walls?

To empower clemency officials to act on their doubts about the accuracy of certain criminal convictions, states should ditch the pedantic language of the courtroom, those references to previous judicial rulings or certain quantities of evidence. Let governors and clemency boards make more holistic decisions to aid prisoners when they fear justice may not have been done and that an innocent person remains in prison or, if already released, stained with the mark of a wrongful conviction.

B. Clear Windows

The risk with a more holistic approach to clemency, of course, is that it could provide fertile ground for inequities to flourish— even more than they do at the moment. Racial animus and white privilege could infiltrate clemency decisions guided only by loose standards untethered to the language of the law that omit precise burdens of proof and/or the prerequisite of a judicial finding of innocence. To offset that risk, we could inject greater transparency into the clemency process. Make clemency proceedings and documents public (subject to the privacy interests of applicants), compel executive officials to publish their decisions and explain their reasoning, and demand detailed annual reports. With sunlight peeking through the window of the clemency decision- making process, we could limit the chance that bias will taint the process.

C. Diverse Composition

As noted at the outset of this chapter, most states use a hybrid structure in which governors and administrative boards collaborate in making clemency decisions. The composition of these boards is ordinarily skewed toward law enforcement.[64] In some jurisdictions, the board consists solely of state officials, as in Nebraska, where the Board of Pardons is staffed by the governor, secretary of state, and the attorney general.[65] Even in states that press for broader representation, some boards lack participation by members of the defense community. Take Colorado, where state law requires that its board include the executive directors of the Department of

[64] *Id.* at 81-84.
[65] *Id.* at 82.

Corrections and the Department of Public Safety along with a crime victim, but nobody with a criminal defense or civil rights background.[66]

Integrating clemency boards with more members who understand the people whose applications they are expected to evaluate would enhance their decisions.[67] Professor Rachel Barkow, a leading clemency scholar, warns that boards must "not be mere arms of law enforcement" and should instead "mix law enforcement interests with those of defense lawyers and former offenders so that each side can learn from the other and increase the likelihood that sound conclusions will be reached and less subject to political attack."[68] Ex-prisoners, defense lawyers, innocence advocates, and academics would all add important voices. Their perspectives could help boards identify the full range of cases that deserve grace, including those with viable innocence claims in which the inmate does not sing the tune of responsibility, remorse, and atonement.

CONCLUSION

I have tried to help steer Massachusetts toward some of the suggestions mentioned in Part III of this Essay through my work as part of a bar association Clemency Task Force, which drafted a set of reforms in 2021.[69] So far, our proposals have attracted the support of the commonwealth's flagship newspaper, if not the governor or the legislature.[70] I admit these proposed reforms would not quite make clemency the "fail safe" that Chief Justice Rehnquist envisioned. Governors and clemency boards might still feel reluctant to pardon someone a court has not yet exonerated. Implementing more amorphous clemency standards and greater transparency could even have a paralytic effect. Without the political cover afforded by stringent rules and closed doors, inaction might be the default for clemency officials wary of making the wrong decision by releasing a person on innocence grounds who later turns out to be guilty or goes on to commit new crimes.

But these changes could inspire a greater number of right decisions by making it easier to treat actual innocence as a variable in the clemency process and extend mercy to those whose claims strike executive officials as credible. That is a good thing given the current reticence of governors

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[66] *Id.* at 82-83.

[67] *See* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G. REP. 153, 155-56 (2009).

[68] *Id.* at 156.

[69] *Report of the Massachusetts Bar Association Clemency Task Force*, MASS. BAR ASS'N, (2021), https://www.massbar.org/docs/default-source/mba-reports/mba-clemency-task-force-report-2021.pdf.

[70] *See State Parole Board*, *supra* note 26.

and clemency boards to fill the void left by the appellate and postconviction process when it comes to freeing the innocent. While clemency may feel somewhat dated and antidemocratic, the "last surviving feature of the divine rights of kings" in the United States,[71] the more tools we have to pry open wrongful convictions the better. By fine-tuning the clemency process, we can fix more mistakes in the system and provide a backup when judges and juries fail to sort the guilty from the innocent, as they so often do.

[71] *See* Paul J. Larkin Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J. L. & PUB. POL'Y 451, 456 (2020).

CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM[1]

By: Leigh Goodmark

INTRODUCTION

The criminal legal system routinely punishes imperfect victims of gender-based violence. Sometimes that punishment is imposed on factually innocent people, as Professor Valena Beety explores in her powerful new book, *Manifesting Justice: Wrongly Convicted Women Reclaim Their Rights.* Sometimes punishment is imposed on someone who has refused to conform to what the criminal legal system expects of them as victims or witnesses. And sometimes punishment is imposed on those whose crimes cannot be disentangled from the gender-based violence they have experienced, as I document in my book, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism.* That punishment begins when victims are children, continues when victims seek protection from the state or are compelled to participate in prosecution, and is at its apex when victims become defendants in criminal cases. Victims are detained, arrested, prosecuted, sentenced, and incarcerated. They are placed on sex offender registries and live under draconian conditions of parole. Criminalization was intended to benefit victims of gender-based violence by keeping them safe and ensuring those who harmed them were held accountable. Instead, the criminal legal system has done immeasurable damage to those it was meant to protect.

For some, the answer to this problem is reform: to fix the parts of the system that are harming victims of violence while leaving the apparatus of state punishment intact. But reforms cannot and will not prevent the punishment of survivors of gender-based violence. Abolition feminism is the only politics and practice that can do that work.

I. THE LIMITS OF REFORM

A. Fixing the Juvenile System

Advocates for girls and transgender and gender-nonconforming (TGNC) youth have suggested several reforms to mitigate or avoid the harms of criminalization. Gender-informed programming, for example, is frequently cited as a fix for the problems in the juvenile system.[2] The 1992

[1] This article is excerpted from LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM, 171 (2023).

[2] *See* OFF. OF THE CHILD ADVOC., FROM TRAUMA TO TRAGEDY: CONNECTICUT GIRLS

reauthorization of the federal Juvenile Justice and Delinquency Prevention Act provided funding for states to improve their responses to girls.[3] The Office of Juvenile Justice and Delinquency Prevention has led several initiatives exploring gender-responsive programming for girls. But a 2008 review of gender-responsive programs for girls found that few had been properly evaluated and none were effective.[4] Similarly, in 2001, Connecticut legislators required juvenile agencies to implement gender-specific services. Seven years after that mandate, the Connecticut Office of the Child Advocate declared that "girls in Connecticut are in serious trouble," documenting the system's failure to adequately serve incarcerated girls.[5]

Some jurisdictions have tried "Girls' Courts," "an alternative track for female offenders within the juvenile justice court that recognize that young women enter the system with unique and gender-specific traits."[6] Such courts sometimes provide programming, including "parenting classes, yoga, community service, and therapy."[7] However, these courts raise several concerns. Such courts might expand the involvement of the juvenile system in girls' lives, increase the number of girls in detention, keep girls under the supervision of the courts for longer than necessary, and decrease community-based resources for girls by sitting services in courts.[8]

Reformers sometimes use the term "diversion" to describe schemes that are essentially "criminalization lite." In New York, for example, children engaging in commercial sexual activity are referred to the child welfare system for services.[9] But if children come back before the court because they fail to comply with services or engage in commercial sexual activity again, the court can adjudicate them as delinquent.[10] In Florida, rather than arrest girls for domestic violence, police can issue civil citations and place them in domestic violence respite programs.[11] If the girls successfully

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IN ADULT PRISON 9–10 (2008).

[3] Pub. L. No. 102-586, 106 Stat. 4982 (1992) (codified at 42 U.S.C. § 5601 et seq.).

[4] Liz Watson & Peter Edelman, *Improving the Juvenile Justice System for Girls: Lessons from the States*, 20 GEO. J. ON POVERTY L. & POL'Y 215, 222 (2013).

[5] OFF. OF THE CHILD ADVOC., FROM TRAUMA TO TRAGEDY: CONNECTICUT GIRLS IN ADULT PRISON 9–10 (2008).

[6] Wendy S. Heipt, *Girl's Court: A Gender Responsive Juvenile Court Alternative*, 13 SEATTLE J. FOR SOC. JUST. 803, 833 (2015).

[7] *Id*. at 834.

[8] FRANCINE T. SHERMAN & ANNIE BALCK, GENDER INJUSTICE: SYSTEM-LEVEL JUVENILE REFORMS FOR GIRLS 10 (Nat'l Crittenton Found. 2015).

[9] Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1111 (2011).

[10] *Id*.

[11] GENE SIEGEL & GREGG HALEMBA, PROMISING PRACTICES IN THE DIVERSION OF JUVENILE DOMESTIC VIOLENCE CASES 13-14 (Nat'l Ctr. for Juv. Just. 2015).

complete services, the domestic violence charges are dropped.[12] Florida legislators also approved a law creating "secure safe houses" where victims of trafficking could be held for up to ten months.[13] As a retired juvenile judge observed, however, "the term 'secure safe house' may sound comforting and reassuring to adults. . . . But to a traumatized child who has spent a lot of time on the streets and in juvenile detention, it's a jail."[14] In some states, girls can be released from detention, placed on house arrest, and required to wear electronic monitors.[15] But house arrest presupposes a secure and stable place to live, electronic monitoring is invasive and expensive, and one study found that most released girls were rearrested while being monitored.[16]

Diversion programs are not keeping girls out of the juvenile system. In Florida, for example, seventy-five percent of girls arrested for domestic violence from June 2018 to May 2019 were not diverted out of the criminal legal system using civil citations or some other alternative.[17] Instead, some 256 girls who could have gone to respite programs were placed in secure detention, more than half of the time because of the lack of space in respite programs.[18] Diversion also raises concerns about who receives the benefit of such decisions. As law professor Priscilla Ocen has noted, discretionary decisions like whether to divert girls and TGNC youth away from prosecution are "driven more by the characteristics of the child or the biases of the law enforcement official than the conduct of the child or the elements of the offense" and often disadvantage Black youth.[19]

As of 2017, thirty-five states had passed safe harbor laws intended to prevent trafficked minors from being prosecuted for crimes related to their own trafficking, including but not always limited to prostitution.[20] The

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[12] *See generally id*.

[13] Margie Menzel, *Sex Trafficking Bill Gets OK: Detention Questions Remain*, CBS MIAMI (Apr. 8, 2014), https://www.cbsnews.com/amp/miami/news/sex-trafficking-bill-gets-ok-detention-questions-remain/#app.

[14] *Id*.

[15] JERRY FLORES, CAUGHT UP: GIRLS, SURVEILLANCE, AND WRAPAROUND INCARCERATION, 48–49 (Univ. Cal. Press ed., 2016).

[16] *Id*.

[17] *See generally* VANESSA PATINO & LYDIA CAROLINE GLESMANN, ADDRESSING BARRIERS TO USING RESPITE BEDS FOR GIRLS CHARGED WITH DOMESTIC VIOLENCE 7 (Delores Barr Weaver Pol'y Ctr. & Nat'l Ctr. on Crime & Delinq. 2019).

[18] *Id*.

[19] Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1625 (2015).

[20] STEPHEN GIES, AMANDA BOBNIS, MARCIA COHEN, & MATTHEW MALAMUD, *SAFE HARBOR LAWS: CHANGING THE LEGAL RESPONSE TO MINORS INVOLVED IN COMMERCIAL SEX, PHASE 1. THE LEGAL REVIEW* 17–19 (2018) [hereinafter SAFE HARBOR PHASE 1].

research is mixed as to the effectiveness of these laws. Early research found that in many states, safe harbor laws did not generally result in fewer arrests of juveniles; a later study found that safe harbor laws did decrease the number of juveniles arrested for prostitution.[21] Although some judges believed that safe harbor laws changed judicial attitudes about prostitution cases involving juveniles, others expressed concern that the laws provided the illusion of effort with little real change and, while acknowledging that the juveniles were victims, suggested they would still hold those victims in secure detention to prevent them from running away or to secure their testimony in their traffickers' prosecutions.[22] The existence of safe harbor laws did not change law enforcement's treatment of juveniles engaged in commercial sexual activity or the interactions of those youth with law enforcement.[23]

Courts have declined to apply safe harbor laws to crimes involving a juvenile's commercial sexual exploitation. Alexis Martin asked a juvenile court to find that she was a victim of trafficking and apply Ohio's safe harbor law in her case, which could have paused the criminal proceeding while she complied with a court order regarding services.[24] Prosecutors argued that Martin was not a victim of trafficking but a "manipulator" who exploited her relationship with Angelo Kerney to facilitate his murder.[25] Despite the court's finding that Martin had been trafficked repeatedly, her case was transferred to adult court.[26] Martin was sentenced to twenty-one years to life for Kerney's murder.[27] On appeal, the Ohio Supreme Court found that Martin's offenses were not closely enough related to her trafficking to warrant overturning the conviction.[28] Prosecutor Rick Raley told the Ohio Parole Board that "the Safe Harbor law is not 'well, just say you have a pimp and you get out of any sort of criminal responsibility.'"[29]

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[21] *Id*. at 10; *see also* STEPHEN GIES, EOIN HEALY, AMANDA P. BOBNIS, MARCIA COHEN & MATTHEW MALAMUD, *SAFE HARBOR LAWS: CHANGING THE LEGAL RESPONSE TO MINORS INVOLVED IN COMMERCIAL SEX, PHASE 2. THE QUANTITATIVE ANALYSIS* 24 (2018).

[22] Ginny Sprang, Jennifer Cole, Christine Leistner & Sarah Ascienzo, *The Impact of Safe Harbor Legislation on Court Proceedings Involving Sex Trafficked Youth: A Qualitative Investigation of Judicial Perspectives*, 58 FAM. CT. REV. 816, 820–24 (2020).

[23] Stephanie R. Fahy, *Safe Harbor of Minors Involved in Prostitution: Understanding How Criminal Justice Officials Perceive and Respond to Minors Involved in Prostitution in a State with a Safe Harbor Law* 154 (December 2015) (Ph.D. dissertation, Northeastern University); *see also* SAFE HARBOR PHASE 1, *supra* note 20, at 10.

[24] *See* Brief for Human Trafficking Pro Bono Legal Center as Amicus Curiae Supporting Appellant, Ohio v. Martin, 116 N.E.3d 127 (Ohio 2018) (No. 2016-1891).

[25] *Id*. at 12.

[26] *Id*. at 2.

[27] *Martin*, 116 N.E.3d at 130.

[28] *Id*. at 134.

[29] Jessica Contrera, *The State of Ohio vs. a Sex-Trafficked Teenager*, THE

Martin's sentence was commuted in April 2020.[30] She will be on parole until at least 2034, a condition she referred to as a "mental prison."[31] Martin is required to wear a GPS monitoring device and may be placed on a violent offender registry.[32]

Relief is potentially available after a minor's conviction. Pending federal legislation would allow judges to impose lighter sentences on trafficked minors convicted of violent offenses against their traffickers. This bill was inspired by the case of Sara Kruzan, who was sentenced to life without parole after killing her trafficker when she was sixteen.[33] All but six states have vacatur laws, which allow judges to set aside previously obtained convictions and provide relief to those convicted of crimes related to their own trafficking.[34] In several cases, New York courts have vacated the prostitution-related convictions of trafficked minors who were prosecuted as adults. But most state laws fail to provide easily accessible, timely, comprehensive, and confidential relief.[35] Moreover, vacatur laws only become operative after victims of trafficking have already been prosecuted, convicted, and in some cases, incarcerated. While eliminating a criminal history has clear and tangible benefits, by the time a victim seeks vacatur, much damage has already been done.

B. Reforming the Adult System

Reforms at the front end of the criminal legal system are designed to bring fewer victims of gender-based violence into that system. For example, court-based diversion programs, like the Human Trafficking Intervention Courts (HTICs) in New York City, empower judges to order victims of trafficking into services including drug treatment, education, shelter, and job training.[36] But even in cities with diversion programs, trafficking victims are being incarcerated. In response, some "progressive" prosecutors, like Eric Gonzalez in Brooklyn and Marilyn Mosby in

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WASHINGTON POST (June 1, 2021), https://www.washingtonpost.com/dc-md-va/interactive/2021/child-sex-trafficking-alexis-martin-ohio/.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] Sara Kruzan, *Congress Needs to Pass Sara's Law so the Next Sara Kruzan is Met with Empathy, Fairness*, THE HILL (Apr. 16, 2019), https://thehill.com/blogs/congress-blog/politics/439011-congress-needs-to-pass-saras-law-so-the-next-sara-kruzan-is-met/.

[34] ERIN MARSH, BRITTANY ANTHONY, JESSICA EMERSON & KATE MOGULESCU, STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING 10 (2019).

[35] *Id*. at 7-8.

[36] Aya Gruber, Amy Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016).

Baltimore, pledged not to prosecute prostitution cases.[37] As Gonzalez has explained, "The current way of handling sex workers is dangerous. It drives them underground, it doesn't keep us safe, and it's not really getting to the issue of trafficking."[38] Gonzalez has recognized that his decision not to prosecute might undermine the work of the HTICs.[39] But, Gonzalez has argued, "to arrest a sex worker . . . and prosecute in the name of giving them assistance just isn't right. Forcing people through the criminal justice system is not a way to get them help."[40]

Adding or amending defenses is another popular reform. At least thirty states allow victims of trafficking to use their victimization as an affirmative defense to crimes they were forced to commit by their traffickers.[41] The crimes to which those laws apply vary considerably. In some states, trafficking is an affirmative defense to prostitution and prostitution-related charges, but not to more serious crimes.[42] At the back end of the system, reformers have tackled sentencing, arguing for legislation like the DVSJA and other provisions enabling judges to reexamine sentences imposed years ago.[43] Similarly, some prosecutors have created sentencing review units to reconsider long sentences in old cases.[44] Those reforms have had some success in freeing or decreasing the sentences of criminalized survivors. States are also considering legislation that would cap sentences for particular crimes, which could benefit criminalized survivors.[45]

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[37] Otilla Steadman, *More than 1,000 Open Prostitution Cases in Brooklyn Are Going to Be Wiped From the Files*, BUZZFEED NEWS (Jan. 28 2021), https://www.buzzfeednews.com/article/otilliasteadman/prostitution-loitering-cases-brooklyn.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Human Trafficking State Laws*, NATIONAL CONFERENCE OF STATE LEGISLATORS, https://www.ncsl.org/civil-and-criminal-justice/human-trafficking-state-laws (last visited Jan. 8, 2023).

[42] *Id*.

[43] *See, e.g.*, Tamar Kraft-Stolar, Elizabeth Brundige, Sital Kalantry, Jocelyn Getgen Kestenbaum, Avon Global Center for Women and Justice at Cornell Law School & Women in Prison Project, *From Protection to Punishment: Post-Conviction Barriers to Justice for Domestic Violence Survivor-Defendants in New York State*, AVON GLOBAL CENTER FOR WOMEN AND JUSTICE AND DOROTHEA S. CLARKE PROGRAM IN FEMINIST JURISPRUDENCE, Paper 2 (2011).

[44] *See*, *e.g.*, *Sentencing Review Unit*, OFFICE OF THE STATE'S ATTORNEY FOR BALTIMORE CITY, https://www.stattorney.org/office/bureaus-units/sentencing-review (last visited Dec. 15, 2022); *see also Conviction and Sentencing Integrity*, OFFICE OF THE STATE'S ATTORNEY FOR PRINCE GEORGE'S COUNTY, https://www.pgsao.org/copy-of-guns-and-drugs (last visited Dec. 15, 2022).

[45] German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, VOX (Feb. 12, 2019), https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-

Reformers are working to improve prison conditions. The latest version of the Violence Against Women Act (VAWA) includes the Ramona Brant Improvement of Conditions for Women in Federal Custody Act.[46] The act requires that incarcerated people with children be housed in facilities as close to their children as possible.[47] The Bureau of Prisons is tasked with determining whether transgender people should be placed in male or female prisons on a case-by-case basis.[48] The act forbids placing pregnant or postpartum people in segregation, restricts opposite-sex strip searches and bathroom monitoring, and requires that correctional officers receive trauma-informed training.[49] The act guarantees that all incarcerated people receive "adequate" health care and hygienic products at no charge.[50] Correctional officers are precluded from examining a person "for the sole purpose of determining the prisoner's genital status or sex."[51] The act pilots a program allowing incarcerated women who give birth while in prison to live with their children for as long as thirty months and requires the development of a gender-responsive re-entry model.[52]

The development of gender-responsive (usually meaning responsive to the needs of women), trauma-informed programming has long been a priority for reformers. Although some correctional officials have pushed for equity in the conditions of imprisonment in men's and women's institutions, others have argued that incarcerated women should be treated differently, in large part because of their histories of trauma. As a correctional officer explained to sociologist Jill McCorkel,

> "I know we can't treat them like regular inmates, like men. . . . In some ways, it's like these girls are more fucked up than men and less fucked up than men…There's a lot of abuse and bad stuff…but they can't really be thought of as dangerous."[53]

Others in the prison shared this perspective: "We're talking about women who've suffered years of abuse, from the time they were little girls. Most of them are in trouble because of abusive men, you think they just

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sentence-cap-mass-incarceration.

[46] 18 U.S.C. § 4051.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Congress, Title XI (2021).

[53] JILL A. MCCORKEL, BREAKING WOMEN: GENDER, RACE, AND THE NEW POLITICS OF IMPRISONMENT 37–38 (N.Y. Univ. Press ed., 2013).

went out and pulled off some carjacking on their own?" [54] Another staff member concluded, "You can't 'get tough' with them…you can but that's not going to fix anything in whether they reoffend when they get out of here. In fact. . . more of them is gonna end up back in here…'[c]ause they were abused before they got in here and they committed crimes."[55]

In theory, gender-responsive programs foster "safety, respect, and dignity," using "policies, practices and programs that are relational."[56] Gender-responsive institutions are designed to recognize and address the specific challenges faced by incarcerated women: mental health, substance abuse, gender-based violence, poverty. Gender-responsive programs aspire to transform carceral settings into empowering spaces where treatment is the norm—a "nurturing prison."[57] What that means in practice varies significantly: configuring prison spaces to look more like dormitories than cells, allowing incarcerated people to have jewelry or makeup, building nurseries in prisons, or providing gender-specific vocational programming, including cosmetology, culinary, and sewing programs.[58]

Safety, trustworthiness, choice, collaboration, and empowerment are the principles undergirding trauma-informed correctional institutions.[59] Those principles are meant to be manifested through trauma-informed practice, infused in the physical layout of the prison, the language used by correctional officers and others in the prison, the prison's procedures, the treatment provided to those who have experienced trauma, and the general environment of the facility.[60] Trauma-informed programs say they use these principles to inform their intake and other processes, interpersonal interactions with incarcerated people, programming, and disciplinary procedures.[61] In a trauma-informed facility, for example, correctional officials should move quietly and respectfully interact with incarcerated people rather than yelling and refer to incarcerated people by name rather than number. Physical contact is supposed to be explained before being used.[62]

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[54] *Id.* at 38.

[55] *Id.*

[56] Jodie M. Lawston & Erica R. Meiners, *Ending Our Expertise: Feminists, Scholarship, and Prison Abolition*, 26 FEMINIST FORMATIONS 1, 8 (2014).

[57] David Tereshchuk & Laura Fong, *U.S. Jail Populations Drop But Not for Women*, PBS NEWS WEEKEND (June 30, 2019), https://www.pbs.org/newshour/show/u-s-jail-populations-drop-but-not-for-women.

[58] *Id*.

[59] Sheryl P. Kubiak, Stephanie S. Covington & Carmen Hillier, *Trauma-Informed Corrections*, *in* SOCIAL WORK IN JUVENILE AND CRIMINAL JUSTICE SYSTEMS 92 (David W. Springer & Albert R. Roberts eds., 4th ed. 2017).

[60] *Id*.

[61] *Id*.

[62] *Id*.

Preventing sexual abuse by law enforcement is another priority for reformers. Although most states continue to allow police officers to have sex with people they have detained so long as the sexual activity is consensual (leading to credibility contests between officers and the people they detain), there is a growing movement to make all such sexual activity illegal.[63] The Prison Rape Elimination Act (PREA), enacted in 2003, prohibits correctional officers from engaging in sexual behavior with or sexually harassing incarcerated people, limits cross-gender searches and supervision in certain circumstances (like showering), and requires prisons to have procedures for handling sexual abuse complaints and preventing retaliation.[64] PREA's focus is process, not outcomes. Compliance with PREA's provisions is not mandated and the consequences of violating PREA are minimal.[65] And several states—including California, Connecticut, Massachusetts, New Jersey, and Rhode Island—now place transgender people in prisons consistent with their gender identity, a change meant to protect them from emotional, physical, and sexual abuse.[66]

Reformers have pushed for restrictions on the use of solitary confinement. The ACLU has argued that solitary confinement should only be used "in exceptional cases as a last resort," never for longer than fifteen days, and never on those who are particularly vulnerable, including pregnant and postpartum people, people with medical or mental health issues, children, and people over age fifty-five.[67] New York recently passed the Humane Alternatives to Long-Term Solitary Confinement Act, which largely follows those guidelines.[68] Rather than housing transgender people in solitary confinement, some reformers have suggested creating trans-only or LGB/TGNC units or facilities. In the Los Angeles County Jail, for example, people were admitted to the K6G unit if they could convince deputies of their knowledge of "gay subcultural terminology" and the neighborhood where white gay men in Los Angeles congregated. Once

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[63] *See, e.g.,* Katherine Bodde & Erika Lorshbough, *There's No Such Thing as 'Consensual Sex' When a Person is in Police Custody*, ACLU (Feb. 23, 2018), https://www.aclu.org/news/criminal-law-reform/theres-no-such-thing-consensual-sex-when-person.

[64] 34 U.S.C. § 30301 et seq.

[65] *See* Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51 (2012).

[66] Jaclyn Diaz*, New Jersey Prisoners Will Be Placed Based on Gender Identity Under a New Policy*, NPR (June 29, 2021), https://www.npr.org/2021/06/29/1011181718/new-jersey-prisoners-will-be-placed-based-on-gender-identity-under-a-new-policy.

[67] AMERICAN CIVIL LIBERTIES UNION, STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 17 (2019).

[68] Mary Buser, *New York Abolished Long-Term Solitary. Will Guards Get With the Program?*, FILTER (May 6, 2021), https://filtermag.org/new-york-abolish-solitary/.

admitted to the unit, people were given different colored uniforms to identify them.[69]

The clemency process could also be reformed. Parole boards could include members with experience beyond law enforcement and corrections. Risk assessments could be validated and available to those seeking parole. People seeking parole could have the right to present their cases at hearings where they are represented by counsel. Parole decisions could be reviewable. Victim statements could be limited to concerns about future risk, rather than rehashing the crime itself. Prosecutors could be excluded from the parole process altogether. Supporters of incarcerated people could be allowed to speak at parole hearings. The conditions of parole could be less onerous, and terms could be shorter. Parole could meet the treatment needs of those released into the community, and terms could be reduced for compliance with the conditions of parole.[70] The federal clemency process could be streamlined and could incorporate the input of people outside the Department of Justice.[71] And in preparation for release, prisons could make gender-specific reentry services available.[72]

II. THE PITFALLS OF REFORM

These reforms may be well-intentioned, and many respond to real problems in the criminal legal system. But because they largely accept the intervention of the criminal legal system as a given, they have the potential to do serious harm and to preempt the kind of change needed to prevent survivors from being criminalized in the first place. Prostitution diversion programs, for example, rely on police to make arrests to bring victims of trafficking (and others) into the system. Prosecutors decide who is eligible for diversion into the program and what services they must accept.[73] These programs use incarceration as both a carrot (the incentive to enter the program) and a stick (for those who do not complete the program or, in

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[69] Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's 'Masculinity as Prison,'* 3 CAL. L. REV. CIR. 182, 184 (2012).

[70] MEREDITH HUEY DYE & RON H. ADAY, WOMEN LIFERS: LIVES BEFORE, BEHIND, AND BEYOND BARS 208 (Rowman & Littlefield 2019); Edward E. Rhine et al., *Improving Parole Release in America*, 28 FED. SENT'G REP. 96 (2015)*;* Angela Wolf et al., *The Incarceration of Women in California*, 43 U. S.F. L. REV. 139 (2008).

[71] Rachel Barkow et al., *The Clemency Process Is Broken. Trump Can Fix It*, THE ATLANTIC (Jan. 15, 2019), https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enoughwe-need-clemency-reform/580300/.

[72] Holly Ventura Miller, *Female Reentry and Gender-Responsive Programming*, Nat'l Inst. Of May-June 2021, at 12.

[73] Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016).

some cases, because the court believes incarceration will keep them safer).[74] Describing such interventions as victim-centered doesn't change their essence. "Progressive" prosecutors are still prosecutors, and, as *Survived & Punished New York* has argued, even when progressive prosecutors claim to "support survivors," "we know that it will be poor people of color, including survivors fighting for their literal survival, who will be warehoused in cages rife with sexual and physical violence."[75]

Gender-responsive and trauma-informed prisons are still prisons. As Amber Rose Howard, statewide coordinator for Californians United for a Responsible Budget, has explained, "It's ridiculous to think that 'gender-responsive' facilities are somehow better, or to think that women are going to be in a setting where they can somehow grow or be cared for and nurtured. My experience [of] being in jail is that it is completely abusive."[76] Reforming these systems does not undo the damage they cause, both while people are incarcerated and after they are released. Upon leaving prison, criminalized survivors have to completely rebuild their lives—find housing and jobs, repair relationships with children and families—"in a society that does not easily forgive convicted felons."[77] Decreasing the collateral consequences of conviction can make some of this easier, but the stigma of incarceration and negative public perception of formerly incarcerated people remains, even if those convictions are vacated.

Reforms that involve making and changing laws will not, on their own, transform how the criminal system sees and treats survivors of gender-based violence. The legal rules may change, but the system actors remain the same. Changing laws will not uproot the stereotypes and misconceptions people hold about gender-based violence. To the extent that reforms require the exercise of discretion, those reforms will always be problematic. Primary aggressor provisions, meant to mitigate the harms of mandatory arrest laws, allow police to use discretion in ways that continue to ensnare criminalized survivors in the legal system.[78] Moreover, pledges not to prosecute certain crimes (like prostitution) rely entirely on the priorities of

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[74] *Id.*

[75] SURVIVED & PUNISHED NY, NO GOOD PROSECUTORS NOW OR EVER: HOW THE MANHATTAN DISTRICT ATTORNEY HOARDS MONEY, PERPETUATES ABUSE OF SURVIVORS, AND GAGS THEIR ADVOCATES 4 (2021).

[76] Jacob Kang-Brown & Olive Lu, *America's Growing Gender Jail Gap*, THE NEW YORK REVIEW (May 7, 2019), https://www.nybooks.com/online/2019/05/07/americas-growing-gender-jail-gap/.

[77] PATRICIA GAGNÉ, BATTERED WOMEN'S JUSTICE: THE MOVEMENT FOR CLEMENCY AND THE POLITICS OF SELF-DEFENSE 170 (Twayne Publishers 1998).

[78] Jacquie Andreano, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 CAL. L. REV. 1047 (2020).

the individual in the prosecutor's office and that person's willingness to withstand pressure to prosecute.

Such pledges do not preclude police from continuing to arrest for those crimes. Pledges not to prosecute certain individuals (like criminalized survivors) are meaningful only to the extent that prosecutors and survivors see these cases the same way. In the 2021 election several of the candidates for Manhattan district attorney pledged that they would not prosecute survivors of gender-based violence who act to protect themselves.[79] But district attorneys often disagree with survivors about whether they are in fact survivors. In Tracy McCarter's case, for example, the Manhattan District Attorney's Office consistently denied that McCarter was a survivor, describing her as jealous and abusive.[80] Prosecutors withheld information about James Murray's violence toward McCarter from the grand jury because they did not believe McCarter's story that Murray was violent on the evening of his death; therefore, they contended, "any prior history of violence toward the defendant or otherwise is irrelevant."[81] Despite a 2020 tweet in which he claimed to "#StandWithTracy," and his contention that "prosecuting a domestic violence survivor who acted in self-defense is unjust,"[82] Manhattan district attorney Alvin Bragg took two years to ask the court to dismiss the charges against Tracy McCarter and only did so after significant public pressure.[83]

In the prison system, reforms rely on administrators to institute and fund them, while also needing staff to embrace the reforms. While the federal Bureau of Prisons gives lip service to the idea of trauma-informed prisons, a September 2018 report documented the Bureau of Prisons' failure to adequately resource the trauma treatment program and provide training to executive staff, who are tasked with making policy decisions.[84] Similarly, the Department of Justice has used its discretion to certify a pool of PREA auditors made up largely of former correctional officials who have issued

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[79] Lauren Gill, *Prosecutors Ignored Evidence of Her Estranged Husband's Abuse. She Faces 25 Years in Prison for Murder*, THE INTERCEPT (May 24, 2021), https://theintercept.com/2021/05/24/manhattan-district-attorney-domestic-violence-tracey-mccarter/.

[80] *Id.*

[81] *Id.*

[82] Alvin Bragg (@AlvinBraggNYC), TWITTER (Sept. 10, 2020, 8:29 PM), https://twitter.com/alvinbraggnyc/status/1304215413761413120?lang=en.

[83] Victoria Law, *A Judge Dismisses the Murder Charge Against a Domestic Violence Survivor,* THE NATION (Dec. 2, 2022), https://www.thenation.com/article/society/murder-charge-dismissed-tracy-mccarter/.

[84] U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION (2018).

glowing reports on prisons that incarcerated people and their advocates describe quite differently.[85]

Resentencing and clemency rely on exercises of discretionary power as well. Under New York's Domestic Violence Survivors Justice Act, for example, prosecutors can oppose resentencing requests.[86] Judges decide whether the abuse is substantial enough and sufficiently tied to the crime that led to incarceration, whether the sentence was unduly harsh, and whether a person is a threat to public safety.[87] Discretion is built into these choices. In clemency, discretion is vested in the executive: the governor or the president.[88] Many executives have chosen to use that power sparingly at best. In Michigan, for example, only five women convicted of first-degree murder and sentenced to life in prison have been granted clemency in the past thirty years.[89] Over his ten years in office, former New York governor Andrew Cuomo granted commutations to just four criminalized survivors—despite the COVID-19 pandemic.[90] For survivors with "bad facts"—histories of substance abuse, fighting back, being unfaithful in relationships, being angry, jealous, or "less than perfect ladies"—the likelihood of having a sentence commuted plunges.[91]

Discretion enables police, prosecutors, courts, and executives to rely on stereotypes to dismiss the victimization claims of imperfect victims. Discretion allows law enforcement to blame victims who do not turn to the criminal legal system for assistance. Discretion creates space for judgments that the failure to leave or call police or assist with prosecution means that a victim's story of violence is not credible. Discretion can mask implicit bias and outright racism in how police, prosecutorial, and executive power is exercised.

By leaving the basic structure of the criminal punishment system intact, reform legitimates that system and stymies more radical change. As law

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[85] Victoria Law, *Blind Spots: Sexual Assault Allegation Exposes Self-Policing Prison System*, THE INTERCEPT (Nov. 3, 2022), https://theintercept.com/2022/11/03/new-york-prison-sexual-assault-prea/.

[86] Chris Horvatits, *DA Unhappy that Convicted Murderer Will Walk out of Prison After Judge's Order,* WIVB4 (Sept. 9, 2020), https://www.wivb.com/news/local-news/da-unhappy-that-convicted-murderer-will-walk-out-of-prison-after-judges-order/.

[87] *See, e.g.,*Transcript of Sentencing Hearing, People v. Nicole Addimando, No. 2021-04364 (Feb. 11, 2020).

[88] Ronald S. Everett & Deborah Periman, *"The Governor's Court of Last Resort:" An Introduction to Executive Clemency in Alaska,* 28 AK. L. REV. 57, 64 (2011).

[89] Personal communication from Carol Jacobson.

[90] Survived & Punished, *#freethemNY,* SURVIVEDANDPUNISHEDNY.ORG, https://www.survivedandpunishedny.org/mass-commutation-clemency/freethemny/ (last visited Jan. 8, 2023).

[91] Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 20 (2001).

professor Paul Butler has argued in the context of policing, "'successful reform efforts substantially improve community perceptions about the police without substantially improving police practices. The improved perceptions remove the impetus for the kinds of change that would actually benefit the community."[92] Reform expands the reach of the criminal legal system. As community organizer Woods Ervin has noted, "the prison-industrial complex—both prisons, policing, surveillance—they feed off of reform. With each iteration, they've gotten bigger, more deeply entrenched into our communities, and more powerful."[93]

Criminologist Jennifer Musto has argued that the growth of anti-trafficking efforts in the United States has "stretched the bounds of the carceral state in new gendered and punitive-protective dimensions."[94] Reforms focus time, resources, and attention on the criminal legal system. Massachusetts estimates that to replace MCI-Framingham, the oldest women's prison in the country, will cost $50 million, in addition to the $162,000 it costs to incarcerate one woman for one year.[95] Investing in new prisons increases dependence on the carceral system and makes the development of alternatives more difficult—money spent on prisons is not put into communities or services. Reforms are used to justify doubling down on incarceration.

As Angela Y. Davis has argued, prison reform has often led to the creation of "bigger, and what are considered 'better,' prisons."[96] Proposals to create gender-responsive prisons and separate prisons for transgender people—what Critical Resistance's Rose Braz has referred to as "boutique prisons"—follow this pattern.[97] A proposal to build a gender-responsive prison in California, for example, would have meant creating the capacity to cage an additional forty-five hundred people.[98] Prison construction, in

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[92] Paul Butler, *The System is Working the Way It Is Supposed To": The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2020).

[93] Gabriella Paiella, *How Would Prison Abolition Actually Work?,* GQ (June 11, 2020), https://www.gq.com/story/what-is-prison-abolition?mbid=synd_yahoo_rss.

[94] JENNIFER MUSTO, CONTROL AND PROTECT: COLLABORATION, CARCERAL PROTECTION, AND DOMESTIC SEX TRAFFICKING IN THE UNITED STATES 14 (Univ. Cal. Press 2016).

[95] REBECCA STONE ET AL., WOMEN, INCARCERATION AND VIOLENT CRIME: A BRIEFING IN RESPONSE TO PLANS FOR BUILDING A NEW WOMEN'S PRISON IN MASSACHUSETTS (2021).

[96] Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 217 (2000).

[97] Liz Samuels & David Stein, *Perspectives on Critical Resistance*, *in* ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 7 (The CR10 Publications Collective ed., AK Press 2008).

[98] Morgan Bassichis et al., *Building an Abolitionist Trans and Queer Movement with Everything We've Got*, *in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON

turn, feeds increased criminalization—once prisons are built, they must be filled. And, as law professor Kate Levine has observed, "if we make prisons pretty enough, people may believe that they're something other than cages."[99]

Reforms express confidence that the criminal legal system is working—that it is creating safety, preventing violence, holding people accountable—and that it needs only a few tweaks. But there is no evidence that the criminalization of gender-based violence is doing that work.[100] Policing, prosecution, and incarceration do not prevent crime and are particularly ineffective in preventing the kinds of survival-based actions taken by victims of violence.[101] Fear and violence do not prevent violence. As organizer and educator Mariame Kaba has written, "a safe world is not one in which the police keep Black and other marginalized people in check through threats of arrest, incarceration, violence and death."[102] What the criminal system does efficiently and effectively is deploy violence to exert control—criminalization is "violence work."[103] The criminal system's violence shores up powerful economic and social interests and marginalizes communities of color, particularly poor Black communities. Reform efforts are "doomed," Butler has argued, because "they are trying to fix a system that is not actually broken."[104] As organizer Nadja Eisenberg-Guyot has explained, "the dehumanization and violence is the point."[105]

Preventing the punishment of survivors of gender-based violence requires that we radically reconsider our response to harms. Abolition, and specifically abolition feminism, can help us get there.

INDUSTRIAL COMPLEX 31–32 (Eric A. Stanley & Nat Smith eds., AK Press 2015).

[99] Kathryn Miller et al., *Changing the Way We See Modern Policing: Abolition or Reform*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 435, 449 (2021).

[100] LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (Univ. Cal. Press 2018).

[101] DAVID H. BAYLEY, POLICE FOR THE FUTURE 3 (Oxford Univ. Press 1999); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1201 (2015).

[102] Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html.

[103] MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE (Duke Univ. Press 2018).

[104] Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2020).

[105] Anakwa Dwamena, *Closing Rikers: Competing Visions for the Future of New York City's Jails*, NEW YORK REVIEW (Oct. 4, 2019), https://www.nybooks.com/online/2019/10/04/closing-rikers-competing-visions-for-the-future-of-new-york-citys-jails/.

III. ABOLITION

Abolition imagines a world where the solution to social problems, including violence, is not police, punishment, and prison. Although sometimes referred to as prison abolition, closing prisons is only one plank of the abolitionist platform.[106] Abolition also requires moving away from a mind-set that equates punishment with justice and abandoning the tools the state uses to exercise punitive control (police, electronic surveillance, probation, parole) and those that substitute for prisons (child welfare systems, mental health facilities, civil commitment)—what journalists Maya Schenwar and Victoria Law have called "prison by any other name."[107]

Abolition contemplates the dismantling of broader structural factors—racism, heteropatriarchy, transphobia, capitalism—that contribute to oppression both within and outside of carceral systems.[108] Rather than continuing to tinker with the existing system, abolition challenges us to envision a different world entirely, a world where, Kaba has explained, "we have everything we need: food, shelter, education, health, art, beauty, clean water, and more things that are foundational to our personal and community safety."[109] Most abolitionists see abolition as a process—both a goal to reach and a politics to guide our work today.

Abolition is necessarily about building.[110] Without giving people access to the things that they need not only to survive but to thrive, abolition is impossible. That building is not just individual—it must be structural as well, investing in health, education, and safety, creating new and resilient institutions that deliver justice without relying on state violence. As Ervin has noted, the process of abolition is not always linear: "One shorthand we

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[106] Allegra M. McLeod, *Prison Abolition and Grounded Justice,* 62 U.C.L.A. L. REV. 1156, 1161 (2015).

[107] MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS (N.Y. Press 2021).

[108] ANGELA Y. DAVIS ET AL., ABOLITION. FEMINISM. NOW. 65 (Haymarket Books 2022).

[109] MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 2 (Haymarket Books 2021).

[110] *See, e.g.,* Allegra M. McLeod, *Envisioning Abolition Democracy,* 132 HARV. L. REV. 1613, 1617 (2019) (quoting Mariame Kaba: "Prison abolition is about two things: It's the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it's also the building up of new ways of relating with each other."); *What are we talking about when we talk about "a police-free future?,"* MPD 150, https://www.mpd150.com/what-are-we-talking-about-when-we-talk-about-a-police-free-future/#:~:text=%E2%80%9CAbolition%20is%20about%20presence%2C%20not,when%20we're%20feeling%20uncertain (last visited Jan. 8, 2023) (quoting Ruth Wilson Gilmore: "Abolition is about presence, not absence. It's about building life-affirming institutions.")

use at Critical Resistance is 'dismantle, change, build.' . . . They have to be happening simultaneously because they're happening in relationship with each other, and the processes inform each other so that what you are able to build is actually in direct relationship to the community that is building it."[111] Abolition, then, is not an event but a process, where the development of alternatives to the carceral system eventually eliminates any justification for maintaining that system, what Critical Resistance has called "shrink[ing] the system into non-existence."[112] Abolition requires that we change as well. "Our imagination of what a different world can be is limited," Kaba has written. "We are deeply entangled in the very systems we are organizing to change. . . . We have all so thoroughly internalized these logics of oppression that if oppression were to end tomorrow, we would be likely to reproduce previous structures."[113]

In an abolitionist world, law professor Allegra McLeod has observed, justice "involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably."[114] Justice is achieved not through punishment, but by severing the relationship between harm and carceral punishment and enacting policies and practices that ensure equitable distribution of resources, repair relationships, and transform the conditions that enable harms to occur. Law can be used to create structures that enable justice to flourish, just as law now facilitates punishment and undergirds punitive institutions. Abolition requires a leap of faith. It asks us to reject the carceral system without being ready to plunk an alternative down in its place.

A. Abolition Feminism

Abolition feminism is, quite simply, "feminism that opposes, rather than legitimates, oppressive state systems."[115] As Kaba frequently says, "Prison is not feminist."[116] Abolition feminists understand the violence inherent in the carceral system and share the abolitionist commitment to rejecting

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[111] Gabriella Paiella, *How Would Prison Abolition Actually Work?,* GQ (June 11, 2020), https://www.gq.com/story/what-is-prison-abolition?mbid=synd_yahoo_rss.

[112] CRITICAL RESISTANCE, WHAT IS ABOLITION?, http://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf (last visited Jan. 8, 2023).

[113] Kaba, *supra* note 100.

[114] Allegra M. McLeod, *Envisioning Abolition Democracy,* 132 HARV. L. REV. 1613, 1615 (2019).

[115] ALISON PHIPPS, ME, NOT YOU THE TROUBLE WITH MAINSTREAM FEMINISM 163 (Manchester Univ. Press 2021).

[116] John Duda, *Towards the Horizon of Abolition: A Conversation with Mariame Kaba,* TRANSFORM HARM (Nov. 10, 2017), https://transformharm.org/ab_resource/towards-the-horizon-of-abolition-a-conversation-with-mariame-kaba/.

punitive structures and building institutions that will facilitate safety, health, and well-being.

The abolitionist movement has deep ties to the movement to end gender-based violence. Several prominent abolitionists, including Kaba and Beth Richie, began their work in the antiviolence movement.[117] It was through that work that they came to appreciate the damage done by the antiviolence movement's collusion with the state in building repressive systems to police and punish gender-based violence. They saw that intervention by the criminal legal system did not prevent harm or change society's perception of gender-based violence. State intervention managed violence but did not end it.[118] They questioned how systems that regularly did violence to women and queer and trans people, particularly Black people, could be expected to keep victims of gender-based violence safe. They recognized the state as a serial perpetrator of gender-based violence, through policing, imprisonment, the child welfare system, and the drug treatment system.

Abolition feminists reframed the work to end gender violence, Richie has written, as "work against the patriarchal carceral state, and the architecture of racism and related forms of oppression upon which that patriarchal carceral state is built."[119] They agreed with abolitionist and geography professor Ruth Wilson Gilmore that "where life is precious, life is precious,"[120] which meant looking for solutions to gender-based violence that valued those who were harmed and those who did harm, held those who did harm accountable, and incorporated community responses to harm that affirmed those values.[121] For Richie and others it is impossible to be an antiviolence feminist without also being an abolition feminist.[122]

Abolition feminism demands that we end the criminalization of survival, that we no longer arrest, prosecute, convict, or cage victims of gender-based violence. While the goal is to restructure society, abolition

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[117] *Id.*; *see generally* Beth E. Richie, *Keynote: Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (Transcript)*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 258 (2015).

[118] ANN RUSSO, FEMINIST ACCOUNTABILITY: DISRUPTING VIOLENCE AND TRANSFORMING POWER 86 (N.Y. Univ. Press 2019).

[119] Richie, *supra* note 108, at 262.

[120] Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind,* N.Y. TIMES MAGAZINE, (April 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html.

[121] *Id.*

[122] Webinar: *Abolition Feminism: The Heart and Soul of Transformative Justice* (Beth E. Richie Oct. 22, 2020), https://nnedv.zoom.us/rec/play/lR6hyv5qq-2YsxLpdzYqGWtIPb98n9b8mDLIvqVhbK6ss31hfZFjHODnuRBTK6JhUXdfbApVcMdhVVjt.Qq5SOPKQtpP6o3a7.

feminism recognizes that we will have to dismantle, change, and build as we go. As Angela Y. Davis, Gina Dent, Erica R. Meiners, and Richie write:

Holding on to this both/and, we can and do support our collective immediate and everyday needs for safety, support, and resources while simultaneously working to dismantle carceral systems. . . Campaigns to close jails and prisons can move forward as we continue to teach classes inside prisons and as we support restorative justice processes and organize around parole hearings.[123]

Defunding the structures that drive criminalization—police, prosecutors, criminal courts, prisons, probation, parole—and dedicating that funding to services, programs, and people to prevent harm and ensure that all human needs are met is the core abolitionist demand. As Critical Resistance noted, the real work of abolition is done not in prisons but in battles over federal, state, and local budgets.[124] As of 2017, the United States spent approximately $100 billion on policing and $80 billion on incarceration.[125] Government funding is a zero-sum game; over time the "public safety" budgets of most cities have grown, while money for social services is increasingly scarce. Dollars that are dedicated to police and prisons are not spent on housing, education, youth programs, health care, mental health services, transportation, cash assistance for survivors of violence, economic development, community centers and green spaces, and noncarceral crisis responses.

Shifting funding also shifts power—away from the carceral state, toward the communities who distribute those funds. Taking money away from police, prosecutors, and prisons—money that is often given to them in the name of survivors—means not arresting, coercing participation in prosecution, prosecuting, or incarcerating survivors (as victims or defendants). Putting those funds into the community would prevent the violence that ultimately leads survivors to become entrapped in the criminal system and increase the options available to those experiencing gender-based violence. Criminalized survivors have much to gain in a defunded world.

Until full defunding happens, and the criminal system is dismantled, abolition feminism instructs us to pursue "nonreformist reforms" and to use

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[123] ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS, AND BETH E. RICHIE, ABOLITION. FEMINISM. NOW. 5 (Haymarket Books 2022).

[124] Alexander Lee, *Prickly Coalitions: Moving Prison Abolitionism Forward*, *in* ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 109, 111 (The CR10 Publications Collective ed., AK Press 2008).

[125] KATE HAMAJI, KUMAR RAO, MARBRE STAHLEY-BUTTS, JANAÉ BONSU, CHARLENE CARRUTHERS, ROSELYN BERRY, DENZEL MCCAMPBELL, FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES 3 (2017) (ebook).

whatever tools are available to free criminalized survivors.[126] "Reformist reforms" tinker around the edges of the criminal legal system without challenging its legitimacy.[127] Nonreformist reforms move society closer to abolition and do not make it more difficult to dismantle oppressive systems and create replacements. Nonreformist reforms shrink the criminal legal system, free people from cages, and diminish the state's capacity for violence.[128] Decreasing budgets for carceral systems, ending cash bail, disarming the police, and creating community-based interventions are all examples of nonreformist reforms.[129]

Abolition feminists should oppose new criminal laws that purport to make society safer while increasing the reach of the carceral state. Both in the United States and internationally, for example, many in the antiviolence movement are advocating for criminalizing coercive control.[130] "Coercive control" refers to a constellation of behaviors used to restrain a person's liberty and autonomy.[131] Proponents of coercive control laws argue that the criminal law does not presently reach many forms of coercively controlling behavior, including isolation, surveillance, and emotional and economic abuse.[132] They contend that enacting laws criminalizing coercive control would enable the criminal legal system to respond to patterns of abuse rather than isolated incidents and increase community awareness of coercive control.[133] But criminalizing coercive control would also increase the reach of the criminal legal system, and just as previous reforms, like mandatory arrest, have been used against survivors of violence, coercive control laws are likely to be misused as well, particularly against people of color.[134]

An abolition feminist response to criminalized survivors also requires the repeal of existing laws that bring survivors into the criminal legal system. For example, exempting girls and TGNC youth from prosecution for domestic violence and prostitution would prevent their criminalization.

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[126] MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 13, 96 (Haymarket Books 2021).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See generally* Julia R. Tolmie, *Coercive Control: To Criminalize or Not to Criminalize?,* 18 CRIMINOLOGY & CRIM. J. 50 (2018).

[131] *See generally* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (Oxford Univ. Press 2007).

[132] Marilyn McMahon & Paul McGorrery, *Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence?*, 41 Alt. L. J. 98, 98 (2016).

[133] Sandra Walklate & Kate Fitz-Gibbon, *Why Criminalise Coercive Control? The Complicity of the Criminal Law in Punishing Women Through Furthering the Power of the State*, 10 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY 1, 3 (2021).

[134] *Id.*

Six states have set a minimum age for enforcing laws on domestic violence.[135] The Texas Supreme Court has clarified that those younger than fourteen cannot be held criminally liable for prostitution.[136] At least five other states have passed legislation setting a minimum age for prostitution prosecution.[137] Decriminalizing sex work for everyone would prevent victims of trafficking from being arrested for prostitution and related crimes, like loitering (referred to in New York as the "Walking While Trans Ban"—"a targeted Stop & Frisk program for trans folks of color in particular"[138]).

Abolition feminism supports meaningful pretrial reform. Courts make decisions in every criminal case about whether to hold people pending trial or allow them to return to the community, sometimes on their own recognizance, sometimes only if they can post cash bail or pay for electronic monitoring. Bail was meant to ensure that people would return to court; the failure to return would mean forfeiting a substantial monetary sum.[139] But in the context of gender-based violence, pretrial incarceration has become the norm.[140] Particularly for those accused of intimate partner violence, judges assume that release is dangerous and either deny bail or set bail at ridiculously high levels. Although several states are considering or have implemented bail reform, many exclude crimes that victims of violence are frequently charged with, including domestic violence, from those reforms.[141]

Moreover, several states are using electronic monitoring as an alternative to pretrial detention in domestic violence cases, which, while it enables people to avoid lengthy stays in jail pending trial, needlessly increases the reach of the carceral state into their day-to-day lives.[142] Pretrial

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[135] IOWA CODE § 236.2(4)(b) (2022); N.C. GEN. STAT. § 50B-(b)(3) (2022); N.J. REV. STAT. § 2C:25-19(d)-(e) (2013); OKLA. STAT. tit. 22 § 60.1(1) (2014); UTAH CODE ANN. § 78B-7-102 (2022); WASH. REV. CODE § 10.99.020 (2022).

[136] *In re* B.W., 313 S.W.3d 818, 822 (Tex. 2010).

[137] Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1067-68 (2011).

[138] SURVIVED & PUNISHED NEW YORK, PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS 27, https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf.

[139] Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 613 (2018).

[140] COLIN STARGER, THE ARGUMENT THAT CRIES WOLFISH (2020), https://law.mit.edu/pub/theargumentcrieswolfish.

[141] *See generally* Deborah Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801 (2021).

[142] *See generally* Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641 (2019).

reforms that abolish cash bail without carve-outs for certain kinds of crimes and which don't substitute e-carceration for decarceration are abolition feminist reforms. Until such reforms happen, abolition feminists should partner with organizations like the National Bail Out, which coordinates the Black Mama's Bail Out, a yearly effort to post cash bail for Black women and femmes around Mother's Day, to free criminalized survivors pending trial.[143]

Survivor defense work is another component of an abolition feminist strategy. Such defense work goes back to the early days of the feminist antiviolence movement.[144] Defense campaigns tell the stories of individual survivors both to raise awareness of the individual's plight and to educate the public about how the criminal legal system stereotypes and punishes survivors, particularly people of color, low-income people, and LGB and TGNC people. Defense campaigns can include letter writing, financial support, visits to the incarcerated person, fundraising to support the incarcerated person, public art, rallies and other organizing events, social media outreach, recruiting lawyers, court watching, pressuring prosecutors to drop charges, and showing community support for an accused survivor through letters and testimony.[145]

Repealing laws that disproportionately punish criminalized survivors, like felony murder and mandatory minimum sentence statutes, should be on the abolition feminist agenda. While many countries have long since abandoned felony murder (and some never had it at all), most states in the United States continue to extend liability for a death that occurs during the commission of another felony to anyone involved in that incident.[146] Felony murder "is a convenient tool for prosecutors that makes it much easier to yield convictions, since they do not have to prove the mental intent required for murder."[147] A handful of states have either abolished or restricted the application of the felony murder doctrine in recent years.[148] Repealing

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[143] NATIONAL BAIL OUT, https://www.nationalbailout.org/ (last visited Dec. 21, 2022).

[144] *See generally* EMILY THUMA, ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE (Univ. Ill. Press 2019).

[145] ALISA BIERRIA, RACHEL CAIDOR, SUMAYYA COLEMAN, AYANNA BANKS HARRIS, SAIRA HUSSAIN, MARIAME KABA, FÁTIMA KABRONA, COLBY LENZ, ANOOP PRASAD, NEDA SAID, MAYA SCHENWAR, HYEJIN SHIM, ASH STEPHENS, STACY SUH, EMILY SUH, EMILY THUMA, #SURVIVEDANDPUNISHED: SURVIVOR DEFENSE AS ABOLITIONIST PRAXIS (2018) https://survivedandpunished.org/wp-content/uploads/2018/06/survived-and-punished-toolkit.pdf.

[146] MARC MORJÉ HOWARD, UNUSUALLY CRUEL: PRISONS, PUNISHMENT, AND THE REAL AMERICAN EXCEPTIONALISM 47 (Oxford Univ. Press 2017).

[147] *Id.*

[148] *See generally* NAZGOL GHANDNOOSH, EMMA STAMMEN, & CONNIE BUDACI, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING (Sentencing Project 2022) https://www.sentencingproject.org/app/uploads/2022/10/Felony-Murder-An-On-Ramp-

felony murder laws would significantly decrease the number of criminalized survivors incarcerated for murder. A California study found that 72 percent of women serving life sentences for murder were not the killers; in almost 66 percent of cases, the woman's partner was the actual killer, and many of those partners had been abusive.[149] States should also repeal their failure-to-protect laws[150] given how those laws are used to punish criminalized survivors for the actions of their abusive partners.

States should roll back mandatory minimum sentence laws. Mandatory minimums disproportionately affect Black women. In Oregon, for example, Black women were three times as likely as white women to be indicted for crimes carrying mandatory minimums.[151] Although some states have moved to eliminate mandatory minimums, that movement has largely been restricted to "nonviolent" offenses.[152] As with bail reform, such changes would exclude many crimes for which survivors are convicted.

Clemency is a cornerstone of abolition feminist organizing. "Some might suggest that it is a mistake to focus on freeing individuals when all prisons need to be dismantled," Kaba has argued. "But this argument renders the people who are currently in prison invisible, and thus disposable, while we are organizing toward an abolitionist future."[153] Clemency campaigns prevent people from disappearing into prisons. Parole boards and governors have the power to grant clemency to criminalized survivors but have used it sparingly.[154] As of 2020, Survived & Punished California

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for-Extreme-Sentencing.pdf.

[149] Lara Bazelon, *Anissa Jordan Took Part in a Robbery. She Went to Prison for Murder*, THE ATLANTIC (Feb. 16, 2021) (noting that California repealed its felony murder law in 2019 and made the law retroactive, meaning that people convicted before 2019 under the felony murder law can ask to have their sentences decreased pursuant to the new law) https://www.theatlantic.com/politics/archive/2021/02/what-makes-a-murderer/617819/.

[150] Failure to protect laws hold non-abusive parents responsible for the abuse that others inflict on their children. Several failure to protect cases involving criminalized survivors, including the case of Tondalao Hall in Oklahoma, have received significant media attention in recent years. Mark Strassmann, *Oklahoma Woman Imprisoned for Child Abuse Committed by her Boyfriend Freed After 15 Years,* CBS EVENING NEWS (Nov. 9, 2019), https://www.cbsnews.com/news/tondalao-hall-oklahoma-woman-imprisoned-for-child-abuse-committed-by-boyfriend-freed-after-15-years-2019-11-09/.

[151] KELLY OFFICER, SIOBHAN MCALISTER, & KATHERINE TALLAN, UPDATED MEASURE 11 INDICTMENTS, CONVICTIONS, AND SENTENCING TRENDS: 2013-2018, 4 (Or. Crim. Just. Comm'n 2021).

[152] Elizabeth Weill-Greenberg, "*It Tears Families Apart": Lawmakers Nationwide Are Moving to End Mandatory Sentencing,* THE APPEAL (Apr. 15, 2021), https://theappeal.org/it-tears-families-apart-lawmakers-nationwide-are-moving-to-end-mandatory-sentencing/.

[153] Kaba, *supra* note 117, at 110.

[154] *See, e.g.,* Christina Greer, *Cuomo, It's Time to Represent New York and Free Criminalized Survivors of Domestic Violence!,* NEW YORK AMSTERDAM NEWS (Nov. 21,

estimated that there were at least 150 applications for commutation pending before Governor Gavin Newsome that involved victims of intimate partner violence, including Tomiekia Johnson, a former California highway patrol officer whose husband was shot and killed after he assaulted Johnson and they struggled over a gun.[155] Other governors have been similarly restrained. Abolition feminists should demand that they use that power.

Abolition feminists concerned about criminalized survivors should join movements to decrease the collateral consequences of conviction. In 2019 forty-three states and the District of Columbia removed a variety of penalties associated with convictions, including restoring the right to vote, serve on juries, and hold public office.[156] States also expanded the reach of expungement and shielding statutes (which allow people to remove some criminal charges from public records), limited the use of criminal records in occupational licensure, employment, and housing, and eliminated driver's license penalties unrelated to driving.[157] But obstacles remain. The process of applying for these remedies can be complicated, costly, and time intensive. Streamlined systems for accessing benefits, petitioning for restoration of rights, and eliminating convictions from the public record are essential. Abolition feminists should advocate for ending the registration of and removal of the onerous conditions placed on people convicted of sex offenses upon release. And abolition feminists should work to develop abolitionist reentry services—services that engage formerly incarcerated people in their design and delivery, understand and are attentive to the structural factors undergirding mass incarceration and how those structural factors continue to make life difficult for formerly incarcerated people after their release, are community-based, and are not entangled with carceral systems.[158]

Closing jails and prisons is an abolitionist goal. Organizing led by directly impacted people can stop the construction of new jails and prisons.

2019), https://amsterdamnews.com/news/2019/11/21/cuomo-its-time-represent-new-york-and-free-crimina/; Chris McKenna, *Supporters Urge Hochul to Free Mother of Two, in Prison for Killing her Alleged Abuser,* TIMES HERALD-RECORD (Dec. 20, 2022), https://www.recordonline.com/story/news/state/2022/12/20/hochul-urged-to-release-poughkeepsie-mother-nikki-addimando/69734944007/.

[155] Sam Levin, *'Governor, Let Me See My Kids before I Die': Pressure Mounts to Release Elderly Women from Prisons*, THE GUARDIAN (June 3, 2020), https://www.theguardian.com/us-news/2020/jun/03/california-prisons-elderly-women-clemency-coronavirus.

[156] *See generally* MARGARET LOVE & DAVID SCHLUSSEL, PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019 (Collateral Consequences Resource Center 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872864.

[157] *Id.*

[158] Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQUIRY 32, 45–49 (2020).

In Travis County, Texas, county commissioners were close to paying $4.3 million for a new women's jail. But organizers like Annette Price, a formerly incarcerated woman and the director of Grassroots Leadership in Texas, argued that the money could be spent differently, "invested in re-entry programs, mental health and behavioral health, as well as substance abuse, housing, job training, shelters for domestic violence and programs that could help support a safe community."[159] After hearing from more than one hundred formerly incarcerated women and advocates, county commissioners voted to table the project for a year.[160]

In California people incarcerated in women's prisons banded together to protest plans to build gender-responsive prisons, understanding that constructing new prisons would only expand the state's capacity to cage people without changing the day-to-day conditions of their lives.[161] Recognizing that the facilities in which people are currently held are abusive at best and inhumane at worst, abolition feminists should resist the construction of new facilities and focus their efforts on helping criminalized survivors get free. Abolition feminists should champion the construction of projects like Home Free, a housing complex in San Francisco designed specifically for criminalized survivors leaving prison, that can provide the stability and autonomy that people leaving prison frequently find elusive.[162]

Preventing gender-based violence and offering alternatives to police, prosecution, and prison when harm occurs are also essential. Preventing violence starts by making sure everyone has what they need to live: housing, employment with a living wage, physical and mental health care, safe quality childcare, transportation. Offering alternatives to the carceral system means identifying and supporting noncarceral first responders and developing accountability processes that take harm seriously without relying on the carceral system.[163] Transformative justice provides a

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[159] Andrew Weber & Jerry Quijano, *Activists Call on Travis County to Say No to New Women's Jail*, KUT 90.5 (June 7, 2021), https://www.kut.org/crime-justice/2021-06-07/activists-call-on-travis-county-to-say-no-to-new-womens-jail?fbclid=IwAR1Xr09usyXxWV06sAqUKvmSvl4mQVEjkuk4gbEJP9pOpIw545HBx7u-dTo.

[160] Lina Fisher, *Commissioners Court Puts Women's Jail on Ice*, AUSTIN CHRONICLE (June 18, 2021), https://www.austinchronicle.com/news/2021-06-18/commissioners-court-puts-womens-jail-on-ice/.

[161] CURB, HOW "GENDER RESPONSIVE PRISONS" HARM WOMEN, CHILDREN, AND FAMILIES 5 (2007) HTTP://CURBPRISONSPENDING.ORG/WP-CONTENT/UPLOADS/2010/05/CURB_REPORT_V5_ALL_HI_RES.PDF.

[162] Patricia Leigh Brown, *After Lives Fraught with Pain, Housing That Says "You're Worthy,"* N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2021/10/08/arts/design/san-francisco-home-free-apartments.html.

[163] *See generally* JUSTICE TEAMS NETWORK, INTERRUPTING INTIMATE PARTNER VIOLENCE (2022), https://static1.squarespace.com/static/5cf978a41393e70001434b2f/

theoretical framework for these efforts. Transformative justice, Kaba has explained,

> is a community process developed by antiviolence activists of color, in particular, who wanted to create responses to violence that do what the criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.[164]

Transformative justice recognizes the stake that each community member should have in creating and maintaining a peaceful community and builds on community experiences and strengths to create processes and institutions to support that work. Transformative justice is hard work. It requires much more from the community than deferring to the carceral state to punish. But the returns on that investment of time, effort, and other resources can be huge: prevention of violence through transforming the conditions that create violence, meaningful active accountability rather than passive punishment, people engaged in communities instead of caged in prisons.

Only abolition feminism can prevent the continued caging of criminalized survivors. But abolition feminists cannot be focused solely on survivors. Exceptionalism—asking that one group's needs be privileged over others—confers benefits on some groups while abandoning others. As Gilmore has written, arguing that one group of people (like criminalized survivors) "don't belong" in the carceral system "establishes as a hard fact that some people *should* be in cages. . . . And it does so by distinguishing degrees of innocence such that there are people, inevitably, who will become permanently not innocent, no matter what they say or do."[165] There are no deserving and undeserving incarcerated people—almost everyone is an imperfect victim in one way or another.[166]

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t/63688ee4f13a464e73fbbe06/1667796736528/Interrupting+IPV+%28APTP-JTN_FINAL-WEB%29.pdf.

[164] Kaba, *supra* note 117, at 59.

[165] Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, *in* FUTURES OF BLACK RADICALISM 225, 234 (Gay Theresa Johnson & Alex Lubin eds., Verso 2017).

[166] Morgan Bassichis, Alexander Lee & Dean Spade, *Building an Abolitionist Trans and Queer Movement with Everything We've Got*, *in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 15, 39 (Eric A. Stanley & Nat Smith eds., AK Press 2015).

Angela Y. Davis has long argued that those who work to end gender-based violence should be "on the front line of abolitionist struggle."[167] Abolition is a big ask, particularly for an antiviolence movement founded on the belief that only carceral punishment would save lives and hold those who did harm accountable. There will be—there already have been—consequences for those in the antiviolence movement who question the role of policing and prosecution. Embrace, a community-based antiviolence program in rural Wisconsin, lost significant funding after posting Black Lives Matter signs at its offices; local law enforcement led the charge to defund the organization.[168] Several state domestic violence coalitions faced similar backlash for signing on to a statement calling for diversion of funds from the criminal legal system into communities.[169]

Working toward abolition will take a sustained effort over a long period of time, and change may be hard to see in the short term. But preventing criminalized survivors (and others) from being harmed by the criminal legal system justifies the work. The only way to ensure that criminalized survivors are no longer punished by the criminal legal system is to eliminate that system. People created the carceral system. We can dismantle it and build something healing and liberatory in its place.

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[167] ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT 106 (Haymarket Books 2016).

[168] Leah Asmelash, *A Wisconsin County Cut Funding to a Domestic Violence Shelter that Showed Support for Black Lives Matter,* CNN.COM (Oct. 20, 2020), https://www.cnn.com/2020/10/20/us/wisconsin-embrace-police-funding-cut-trnd/index.html.

[169] *See, e.g.,* Tommy Simmons, *Law Enforcement Groups Withdraw Support of Idaho Coalition over Letter Calling for Racial Justice,* IDAHO STATE J. (Oct. 21, 2020), https://www.idahostatejournal.com/news/local/law-enforcement-groups-withdraw-support-of-idaho-coalition-over-letter-calling-for-racial-justice/article_cef47a44-5de3-55f7-9998-3f17ef458777.html.

MANIFESTING FEMINISM

By: Aya Gruber

INTRODUCTION

Manifesting Justice, Valena Beety's groundbreaking book on women, innocence, and the horrors of the American carceral state, is a manifestation of justice.[1] It is also a manifestation of feminism. For too long, young feminists have presumed that fighting violence against women means collaborating with the American carceral state. There is this sense among feminists, both armchair and expert, that despite the criminal legal system's racist, inhumane, hierarchical, and masculinist nature, feminist reformers can make limited strategic incursions into it to produce justice for individual women and improve conditions for all. Professor Beety once harbored this intuition that criminal justice is gender justice, which led her to become a sex-crimes prosecutor.[2] I too felt this sense, and it threw my younger self, a prospective public defender, into a painful dilemma over representing batterers and rapists. It was when we actually practiced as criminal lawyers within the belly of the carceral beast that we came to understand that this feminist sense, while deeply felt and continually socially reinforced, was wrong.

This essay explores some of origins of this sense that the feminist approach to gender violence is invariably endorsing tougher criminal law and argues that to manifest justice, more feminists should take a page from Professor Beety's playbook and explore noncarceral remedies that do not bolster a penal system that is the opposite of feminist. As a prosecutor, Professor Beety discovered that her ability to help women was cabined by the structure of the system in which she labored. She had the power to produce individual convictions, but those "victories" frequently came with a hefty dose of victim maltreatment, especially of marginalized victims, not just by defense attorneys but also by police and other criminal-system actors. Beety saw firsthand that women's involvement with the carceral system, even as victims, risked introducing additional violence—*state* violence—into their lives. The prosecutor's office, she discovered, is an institution that generally lacks the practical and theoretical tools, if not the will, to serve victims who are ambivalent about or against pursuing cases, meet their material needs, and ensure their safety—not only from

[1] *See* VALENA BEETY, MANIFESTING JUSTICE (2022).
[2] *Id.* at 17–19.

defendants—when they do move forward with prosecution.[3] The institution that Professor Beety joined out of a genuine desire for women's empowerment, it turned out, often disempowered them. The penal system had limited ability to help the women most in need and great potential to destroy people's lives, including many women's.

Professor Beety's experiences representing imprisoned innocent women provided her with indisputable evidence that the criminal system is no friend to feminism. Criminal-law actors not only incarcerated innocent women and stood resolutely by these injustices but did so *because they are women*. As Professor Beety demonstrates through beautifully narrated but heart-wrenching stories of incarcerated innocents, criminal legal actors—frequently men—use arrest, prosecution, and punishment to enforce the law of the patriarchy: sexist and homophobic norms of femininity and masculinity.[4] Often the enforcement of compulsory gender entails violently arresting or zealously prosecuting men. Sometimes it manifests as hyperpunitivity toward women who dare to commit "masculine" crimes. And in the most egregious cases, law enforcement's zeal to enforce the cultural law of gender results in the incarceration of innocent women.

Manifesting Justice's critique of the criminal system is feminist, and Professor Beety is a not just a criminal law reformer but a *feminist* reformer. The book proposes concrete systemic and legal changes to the American penal system to improve marginalized women's lives.[5] The strong feminist commitments that once led a young Professor Beety to the D.A.'s doorstep remain, but now, after years of practical experience and studied research, they drive her clarion call for decarceration. Still, such calls to undo mass incarceration are not what most people envision when they think about feminist criminal law activism. Instead, they envision the people at the forefront of #MeToo and the feminist victory of jailing Harvey Weinstein for life.[6] They envision legislation to beef up antitrafficking laws and broaden rape prohibitions to cover intoxicated sex and sex without "affirmative consent."[7] They envision crusades against impunity for "stealthing," "revenge porn," and sex trafficking.[8] When we think about feminist criminal law reform, we think about imprisoning men.

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[3] *Id.* at 18.

[4] *Id.* at 96–99, 184.

[5] *Id.* at 266–71.

[6] *See, e.g.*, *The Lessons of #MeToo's Monster*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/opinion/harvey-weinstein-verdict-metoo.html [hereinafter *#MeToo's Monster*] (characterizing the "lesson" of Harvey Weinstein's conviction and 23-year sentence as "some measure of justice can be attained, and with it the balance of power between sexual predators and their victims can begin to shift.").

[7] *See generally* Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016).

[8] *See, e.g.*, A.B. 453, 2021 Cal. Assemb., Reg. Sess. (Cal. 2021); Stealthing Act of

The following parts explain how the feminist antiviolence agenda came to overlap with tougher criminal law—so much so that people rarely consider anticarceral efforts, even those like *Manifesting Justice* that center imprisoned women, to be feminist. But the carceral feminist intuition that Professor Beety and I once entertained that equates prosecution with women's empowerment is not innate. It is the product of decades of diverse legal and social phenomena. In my 2020 book *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* [*Feminist War*], from which this essay borrows heavily, I trace the complicated history of feminist advocacy and penal reform from the "first wave" of feminism in the latter 1800s to the contemporary era.[9] Early American feminists pushed for criminal laws against drunken "wifebeating," underage sex, and "white slavery," and these laws reflected and reinforced larger social conditions including slavery, segregation, and social purity.[10] In the "second wave," the late 1970s to the 1990s, feminists increasingly turned to policing and prosecution to address men's harmful sexual and domestic behavior.[11] Today, movements like campus rape reform, #MeToo, and prostitution abolition continue to embrace tough-on-crime ideas and policies even as feminist widely bemoan that the United States is the world's greatest incarcerator.[12] A repeat pattern thus emerges where feminist contestation and heterogeneity consistently lose out to a dominant carceral strand of feminism.

I do not recount that entire history here but concentrate on the second-wave era and the strategic, philosophical, and policy alliances between feminist anti-battering and antirape activists and conservative carceral actors. Of particular importance is the narrative overlap between feminist and tough-on-crime discourses of victimhood. These alliances ossified the feminism-prosecution connection that so influenced Professor Beety and me. Indeed, the intuition that criminal law is a friend to feminism is a permutation of a larger American "punitive impulse" that criminal law is a friend to anyone in need.[13] This impulse originates in large part from the

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2022, H.R. 7920, 117th Cong. (2022) (criminalizing nonconsensual condom removal). *See also, e.g.*, IDAHO CODE ANN. § 18-6605 (West 2022); MINN. REV. STAT. § 617.261 (2022) (laws broadly prohibiting intimate image distribution); *CCRI Model State Law*, CYBER CIVIL RIGHTS INITIATIVE (2021), http://cybercivilrights.org/wp-content/uploads/2021/10/CCRI-Model-State-Law-for-NCP.pdf. (model intimate image distribution law).

[9] *See* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020) [hereinafter FEMINIST WAR].

[10] *Id.* at 19–40.

[11] *Id.* at 41–93, 121–50.

[12] *Id.* at 151-90.

[13] *See* Aya Gruber, *Race to Incarcerate: Punitive Instinct and the Bid to Repeal Stand-*

late-nineteenth-century neoliberal politics and wars on crime that convinced the public that criminal law is the only or most acceptable form of state governance.[14] Over time, the notion that social problems demand criminal legal solutions became near automatic and instinctive. Today, more people than ever recognize that the criminal system involves police brutality, racism, jailing innocents, and many other injustices, but when push comes to shove and people see bad behavior—corporate greed, destruction of the environment, street hassling, the drug "epidemic" du jour—it is criminal law that jumps to mind.

Second-wave feminist activists sought to draw public attention to the individual and *structural* antecedents of gender violence. But uring this same time, neoliberal tough-on-crime discourse was on the rise. Politicians and policymakers strategically utilized sentimental and emotionally charged narratives of victims and offenders to ingrain in the public the notion social ills were solely a matter of individual criminality. These narratives were deeply raced and gendered, and they involved stereotypical and discriminatory images of vulnerable white women threatened by violent deviants and minority "superpredators."[15] As much as the discourse policed people, it policed gender roles. Thus, feminists' publicizing of women's vulnerability to violence came at a time when narratives of (white) women's inherent sexual and bodily vulnerability had a distinct conservative political valence. The result was an unplanned synergy between the feminist anti-violence movement and conservative crime-control politics. The anticrime political moment provided stock narratives and carceral public sympathies that helped propel feminist criminal legal reforms to "success." At the same time, feminist antiviolence discourses and programs provided sympathetic images and bi-partisan heft to the crime control issue. The result is that feminism helped shape the modern criminal system, while participation in the criminal system helped shape modern feminism.

I. CREATING THE ROLE OF THE VICTIM

Any child of the 1970s can picture the iconic poster of blond, leggy Farrah Fawcett wearing a paper-thin red bathing suit and training a girl-next-door smile on the onlooker. Fawcett burst onto the celebrity scene in the 1976 TV series *Charlie's Angels* as the stereotypical jiggly blonde in a

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Your-Ground, 68 U. MIA. L. REV. 961 (2014).

[14] FEMINIST WAR, *supra* note 9, at 64-66; BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS 40-45 (2011).

[15] *See infra* notes and accompanying text; Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, THE MARSHALL PROJ. (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth(critiquing "superpredator" rhetoric).

show that sparked the phrase "Jiggle TV."[16] Her rise to fame was meteoric, and her feathered hairstyle can be seen throughout high school yearbooks of the time. Fawcett's *Angels* replacement Cheryl Ladd later reflected on the appeal, "She was sexy, but she was giggly and kind of child-like, and, I believe, unthreatening. It was very appealing to men at a time when women were standing up for themselves and their rights."[17]

For all her fame, Fawcett was not taken seriously as an actor until her dramatic turn playing a battered wife in the 1984 TV-movie, *The Burning Bed.* The movie was based on the real life of Francine Hughes, who in 1977, after thirteen abusive years, set fire to her brutally violent and controlling spouse, Mickey, while he was sleeping. Francine was charged with murder and spent nine months in jail awaiting trial. The jury found her not guilty by reason of temporary insanity. "Temporary insanity—at the time—was not a recognized defense," Hughes' attorney later explained. "It was a hook I used to obtain a not-guilty verdict."[18] Francine's incredible story inspired a biographic novel, which was adapted to a movie script. Fawcett lobbied for the role but, she explained, "[e]veryone at the networks said that was not the way the audience wanted to see me."[19] She nonetheless won the part, and the perfect blond spends much of the movie in bruised-face makeup, with disheveled hair and torn clothes.

The film draws the audience into the cycle of violence, with lulls in the action followed by sudden, unprovoked, and extreme brutality, including violent rape. Throughout, Francine screams, she curls fetal into a ball, she hides in closets—the tension building as Mickey's boogeyman footsteps approach. But she does not fight back. Even in lull moments, Mickey is an execrable character, and Fawcett appears more repulsed by than affectionate toward him. Mickey's abuse and Francine's captivity is enabled by his family members, with whom they live, the police, and the state government. Francine calls the cops, who do nothing. She goes to the welfare office, where the indifferent bureaucrat tells her it is a police matter. She goes to the D.A. who says his hands are tied. She goes to her mother, who sends her back to Mickey. Indeed, the movie has the "right" answers to why she didn't leave. She tried to leave several times, facing resistance from her family and the state. She finally left, only to have *him* get custody of their four

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[16] The Associated Press, *The jiggles that changed television*, TODAY (Mar. 3, 2004), https://perma.cc/8BLP-YT2W.

[17] Leslie Bennetts, *Beautiful People, Ugly Choices*, VANITY FAIR (Aug. 25, 2009), https://perma.cc/Q5PV-V3JJ.

[18] Corey Williams, *Francine Wilson, subject of major spousal abuse case and movie, dies*, THE HERALD DISPATCH (Apr. 1, 2017), https://perma.cc/G3EN-VQAG.

[19] Stephen Farber, *A Serious Farrah Fawcett Takes Control in 'Extremities'*, N.Y. TIMES (Aug. 17, 1986), https://perma.cc/QTF6-RXB2.

children. She divorced Mickey, but he stayed with her, vowing to kill her if she tried to separate.[20]

The Burning Bed was the highest rated TV movie of the season.[21] Fawcett received several award nominations and finally became a serious actor. Her next movie *Extremities*, in which she played a rape victim-turned-vigilante, was released to great acclaim.[22] *The Burning Bed* became a symbol of the battered women's movement. It was the first TV show to flash a 1-800 DV hotline number on the screen. It received accolades from feminists and lawmakers alike. In recent times, the movie has taken on a mythological quality as the single event that galvanized the modern battered women's movement. It has been called a "turning point"[23] in women's rights that "left an indelible mark upon society's collective consciousness."[24] In 2017, *The Washington Post* credited *The Burning Bed* "with dramatically altering public perceptions of domestic violence—redefining it as a crime rather than a private affair and spurring the establishment of shelters across the United States."[25]

As the film became a runaway hit, the real Francine, her 1977 trial a few years behind her, was not doing so well. *People* Magazine profiled Francine the week of *The Burning Bed's* release.[26] After the trial, Francine fell into a difficult period of drug use, during which she met and married Robert Wilson, who was on parole from a 30-year armed robbery sentence. They remained married until his death in 2015. Francine had an especially volatile relationship with her nineteen-year-old daughter Christy, who was twelve at the time of Mickey's killing. A few months before the *People* interview, Child Protective Services contacted Francine about an anonymous report—it appears from Christy—that her youngest daughter was being sexually abused.[27] CPS was unable to follow-up because Francine fled the state with the girls, leaving her two sons with Wilson. Thereafter, Francine and Christy's relationship further deteriorated, and Christy told the *People* interviewer that Francine had recently beaten her up. The *People* profile

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[20] THE BURNING BED (Tisch/Avnet Productions 1984)) https://perma.cc/3B59-R3LM; *See also* Louise Knott Ahern, *'The Burning Bed': A turning point in fight against domestic violence*, LANSING STATE J. (Oct. 27, 2014), https://perma.cc/SPZ5-8MSP.

[21] UPI, *'Burning Bed' Tops Prime Time Ratings*, UPI ARCHIVES (Oct. 17, 1984), https://perma.cc/NF4F-T7CL.

[22] Farber, *supra* note 19.

[23] Ahern, *supra* note 20.

[24] Jay B. Rosman, *Domestic Violence: Recent Amendments to the Florida Statutes*, 20 NOVA L. REV. 117, 125–26 (1995).

[25] Emily Langer, *Francine Hughes Wilson, whose 'burning bed' became a TV film, dies at 69*, THE WASH. POST (Apr. 1, 2017), https://perma.cc/ENW2-44PH.

[26] Gioia Diliberto, *A Violent Death, a Haunted Life*, PEOPLE (Oct. 8, 1984), https://perma.cc/95Z8-YKAY.

[27] *Id.*

concludes with this melancholic observation: "More than a week after the argument, Christy was still sporting slight bruises under her eyes. The fading shiners seemed frighteningly symbolic of other family wounds—wounds grown deeper, darker and more terrible with each passing year."[28]

The real Francine was imperfect; mercurial, conflicted, and aggressive. Her attorney remarked that the movie was "not very accurate"[29] because Francine was not the "reticent, . . . weak person" Fawcett had portrayed.[30] In swapping her *Angel* persona for the battered wife, Fawcett exchanged one iconic raced-and-gendered image—the giggly, sexy girl-next-door—for another—the brutalized helpless victim.

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In the 1970s, feminists widely recognized the importance of centering the victim in discourse and activism. Highlighting victims' stories and experiences was important for practical, educational, and strategic reasons. Feminists' advocates, for example, required an intimate understanding of their clients' needs and perspectives. Reformers also highlighted victim stories to educate a public that, they believed, misunderstood the harm, causes, and magnitude of gender violence. Sometimes activists publicized victims' experiences to dislodge pre-existing stereotypes. For example, highlighting a story about a brutally raped sex worker could help to expel society's tenacious belief that "prostitutes can't be raped". Finally, as pro-arrest advocates well knew, emphasizing the plight of the victim is a winning political strategy.

There were and remain good reasons for feminists to focus on crime victims' needs. Indeed, many feminists tirelessly fight for resources to aid vulnerable and marginalized women. Publicizing victims' plights can also move the public and state to provide aid and change the structures that make certain women vulnerable to violence. When it comes to criminal law and policy, however, focusing on the crime victim and her devastation is a dangerous tactic. The narrative of violent crime victimhood and what victims want has long been politicized, and in the 1980s, it took on a distinctly neoliberal and carceral bent. The ideal victim in crime control discourse was an innocent, brutalized, middle-class, white woman or child, who (or whose family) could only receive closure through the swift and severe punishment of the monstrous offender.

The very label "victim" confines a woman to a single identity: the object of a private wrong-doer. "Any richer sense of the person undermines the

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[28] *Id.*

[29] Scott Pohl, *'Burning Bed' murder case: defense attorney looks back*, WKAR (Mar. 30, 2017), https://perma.cc/2EKK-KE5U.

[30] Kelly Kazek, *Woman who was subject of battered-wife film 'The Burning Bed' dies in Alabama*, AL.COM (Mar. 29, 2017), https://perma.cc/WA98-Y7PS.

claim of victimhood, because victimhood depends on a reductive view of identity," law professor Martha Minow remarks.[31] Victimhood narratives also dictate that the sole reason violence occurs is the internal evilness of the offender. To illustrate, imagine that the statement, "She is a rape victim," describes a poor, undocumented, sex worker of color. This individual suffers greatly from sexism, economic unfairness, racism, sex negativity, and xenophobia, but we call her a "victim" by virtue of one individual act done by a single criminal. As Minow notes, victim discourse "divide[s] the world into only two categories: victims and victimizers."[32] Accordingly, the focus on victimhood is already a subtle but powerful redirection away from structural, social, and institutional accounts of harm and toward individual punishment. The following subsections discuss how feminist and conservative victimhood tropes came to overlap and move feminist reform programs in a carceral direction.

A. Neoliberal Crime Politics

The late 1960s and early '70s was an era of social, economic, and demographic upheaval, as well as a time of war. From the brew of social anxieties emerged a new political awareness and a new generation focused on class solidarity, anti-authoritarianism, and racial and gender justice. Students, people of color, and women took to the streets to protest the war, segregation, poverty, and unequal rights. Just as civil rights activists ranged in their radicalism from Black Panthers to NAACP leaders, so did activists in this "second wave" of feminism. In the 1960s, those identifying as feminists ranged from equal-rights liberals to welfare-rights radicals, lesbian separatists to proud homemakers, and institution-rejecting anarchists to lawyers.

If late-'60s radicalism was a strong backlash to 1950s conservatism, the backlash to the backlash—Nixon's war on crime—was even stronger. At the time that Nixon's 1968 campaign that put crime control at center stage of national politics, 81 percent of Gallup respondents agreed that "law and order has broken down in this country," a majority of whom blamed "negroes" and "Communists."[33] Nixon capitalized on social anxieties about scruffy hippies and hostile Black people fomenting civil unrest and ran a campaign ad pledging to protect law abiding citizens from such "domestic violence."[34] He reportedly later remarked of the ad, "It's all about those

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[31] Martha Minnow, *Survivng Victim Talk*, 40 UCLA L. REV. 1441, 1443 (1993).

[32] *Id.*

[33] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 46 (New Press 2010).

[34] *Id.* at 47 (quoting Nixon ad).

damn Negro-Puerto Rican groups out there."[35] Nixon deftly employed the so-called "Southern Strategy," developed during the 1964 Barry Goldwater presidential campaign, which used dog-whistle crime rhetoric to court Dixiecrats to the Republican Party.[36]

The modern battered women movement was born in this tumultuous political atmosphere. Much of second-wave feminist activism grew out of the leftist sensibilities of the time and opposed Nixon and his law-and-order program. In the early '70s, battered women's shelters cropped up throughout the nation, from the tireless efforts of grassroots activists. One radical ideology that deeply influenced the shelter movement was an intense aversion to the racist, sexist, Vietnam-war supporting state, a.k.a. "the Man." Feminists generally regarded criminal law as an oppressive institution where "[r]elationships of domination based on race, class, and sex are continually played out," as shelter feminist Susan Schechter put it.[37] Yet, within a decade, "law enforcement" became the centerpiece of feminist DV activism. Writing in 1984, advocate Lisa Lerman contrasted non-feminist "mediation" models with the feminist "law enforcement" model:

The 'law enforcement' model . . . is espoused both by grass roots advocates working with battered women, and by an increasing number of court officials, police officers, and others who provide services to battered women. In general, the law enforcement model advocates formal legal action combined with punishment or rehabilitation of wife abusers. The goal is to ensure the safety of the victim and to give the abuser a clear message that society will not tolerate his continued violence against his mate.[38]

Beth Riche observes that despite "notable objections that were raised in isolated forums," this law enforcement agenda "went forward largely unchallenged."[39] The factors that caused "feminist liberatory discourse challenging patriarchy and female dependency [to be] replaced by discourse emphasizing crime control," [40] as Elizabeth Schneider's puts it, are many, and I detail them in the book. Nevertheless, the dawning of the "Reagan eighties" with its crime-control ideologies and victim narratives played an outsized role in the rapid reshaping of feminism's relationship to the

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[35] *Id.*

[36] *Id.* at 42.

[37] SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 177 (South End Press, 1982).

[38] Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L. J. 57 (1984).

[39] BETH E. RITCHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 83 (NYU Press, 2012).

[40] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 183 (Yale University Press, 2000).

carceral state. As concerns over vulnerable female and child victims took center stage in national politics, pro-law-enforcement feminists like Lerman increasingly enjoyed policy successes. In turn, the law-enforcement school of feminism amassed the resources to broadly influence feminist ideology, law reform, and policymaking more generally. Success is indeed addictive, and a winning feminism with momentum quickly outshined other feminisms—including those of women of color and sociologists—that urged caution, involved complicated intersectional theory and empirical study, and touted redistributive programs unlikely to succeed in a neoliberal era.

So let us turn to that neoliberal era. Ronald Reagan, who assumed office in 1981, was the first president to use the crime issue to radically alter the relationship between government, society, and individual. The so-called "Reagan Revolution" was no less than a totalizing and long-lasting ideological shift toward laissez-faire market-based logics and away from social welfare. Reagan vowed to, and did, gut government aid programs, deregulate banks and the market, cut taxes, and end labor and trade protections.[41] As President Obama remarked in 2008, "Ronald Reagan changed the trajectory of America."[42]

The revolution is often thought of as economic, but it was deeply ideological, instilling what experts call a neoliberal ethic. Reagan's policies were less about growing or shrinking any given part of the economy than about how the economy *should* operate. For Reagan and think-tanks like the Heritage foundation that supported him, a "good" economy is, by definition, one where private actors pursue maximum profits and capital accumulation with little or no regulation. A "just" economy eschews "redistribution," presuming that people's current wealth status—whether obtained through birth, work, luck, or favorable government rules—represents the first and fairest distribution.[43] According to political economists, a unique premise of neoliberalism that sets it apart from predecessor liberal economic theories is that healthy economies can tolerate vast disparities of wealth. And, to be sure, since the Reagan revolution, the wealth gap has widened into a chasm.[44] Economists Piketty, Saez, and Zucman explain the reverse Robin-

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[41] *See* MICHAEL ALLEN MEEROPOL, SURRENDER: HOW THE CLINTON ADMINISTRATION COMPLETED THE REAGAN REVOLUTION (University of Michigan Press, 2000); MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM (Zone Books, 2017).

[42] *In Their Own Words: Obama on Reagan,* N.Y. TIMES (Apr. 21, 2019, 12:40 PM), https://perma.cc/4LJ6-GTED.

[43] WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (Zone Books, 2017).

[44] Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, (June 22, 2019, 5:28 pm): 7 fig. 1, https://perma.cc/FR58-ZVP2.

Hood transfer of wealth from the poor to the rich between 1980 and recent years:

[T]he bottom 50% income share has collapsed from about 20% in 1980 to 12% in 2014. In the meantime, [the top 1%] income share increased from about 12% in the early 1980s to 20% in 2014. *The two groups have essentially switched their income shares*, with 8 points of national income transferred from the bottom 50% to the top 1%. The top 1% income share is now almost twice as large as the bottom 50% share, a group that is by definition 50 times more numerous.[45]

How did Reagan and his allies sell an ideology tailor-made for the one percent to the other ninety-nine? Yes, he could inspire American-style "anyone can be a millionaire" hope. Yes, he could argue that the money would "trickle down," giving everyone a higher standard of living. It did not—the official poverty level remained the same between 1980 and the modern era, with the reduction in real poverty due exclusively to increased reliance on government aid.[46] However, Reagan's rhetorical ace in the hole was painting the poor as responsible for their own plights and recasting the problems of poverty as products of criminality.

Reagan contrasted lazy criminals with the rest of hard-working, law-abiding America and drew a straight line from liberals' social welfare ideology to the pressing crime problem:

> Individual wrongdoing, they told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. And somehow . . . it was society, not the individual, that was at fault when an act of violence or a crime was committed. Somehow, it wasn't the wrongdoer but all of us who were to blame. Is it any wonder, then, that a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity.[47]

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[45] Thomas Piketty, Emmanuel Saez, & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, NAT'L BUREAU OF ECON. RSCH. (June 22, 2019, 5:32 pm), https://perma.cc/AF6S-3DJD.

[46] Office of Human Services Policy, *Poverty in the United States: 50—Year Trends and Safety Net Impacts*, U.S. Dep't of Health & Hum. Serv. (June 22, 2019, 5:35 pm), https://perma.cc/CG4Z-F3F9.

[47] Ronald W. Reagan, *Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut,* RONALD REGAN PRESIDENTIAL LIBRARY & MUSEUM ARCHIVES (last visited Apr. 21, 2019, 12:55 pm), https://perma.cc/SU8G-V6A4.

The rhetorical move is brilliant in its simplicity. It reverses the moral order, transforming the "underprivileged" into a "privileged class," transforming society's victims into "victimizers." Moreover, following the Southern strategy, Reagan cast the crime problem in distinctly racial terms. In 1976, his presidential campaign infamously featured a lack "welfare queen" who defrauded the government of tens of thousands of dollars.[48] Reagan's racialized and spectacular crime rhetoric performed the feat of replacing within the American psyche the image of the deserving poor with the image of the low-class minority criminal. This set the stage for a total transformation of government intervention, replacing the safety net with a metal cage.

Reagan strategically publicized the image of scary brown men to frighten voters into believing that crime, not lack of stable employment or income, is the main problem to be addressed by government.[49] Still, information about criminals can inspire fear, but the image of the brutalized "'blameless,' innocent, usually attractive, middle class, and white" woman inspires loathing.[50] The sentimentalized victim provided a rhetorical trump card to conservative policymakers. Whether punishment works or even is deserved fell out of the equation, as society obsessed over victims' trauma and desire for vengeance. Any lingering 1960s-style empathy for defendants—the minorities, protesters, and others who faced the violence of the state—gave way to communing with victims. It is no wonder that in the first week of his presidency and every April thereafter, President Reagan pronounced "Victim's Rights Week."[51]

B. The Victims' Rights Movement

Comparing U.S. and European victims' movements, Marie Gottschalk found the American crime victims' movement to be more influential and punitive than its European counterparts and a significant contributor to U.S. mass incarceration.[52] Indeed, experts have called the victims' rights "one of the most important social movements of our time, comparable in its influence on our political culture to the civil rights movement."[53] In the late

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[48] "'Welfare Queen' Becomes Issue in Reagan Campaign," N.Y. TIMES, (last visited Apr. 21, 2019), https://perma.cc/GZG6-3U68.

[49] *See* Chapter Two, "Leniency as the Enemy of Liberation" for this discussion.

[50] Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 3 SAINT THOMAS L. REV. 584 (1998).

[51] Ronald W. Reagan, *Proclamation 4831—Victims' Rights Weeks, 1981*, RONALD REGAN PRESIDENTIAL LIBRARY & MUSEUM ARCHIVES (last visited June 26, 2019, 2:40 pm), https://perma.cc/YG7M-7R4J.

[52] MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 97-114 (Cambridge University Press, 2006).

[53] Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25

'70s, nascent victims' rights organizations, inspired in part by feminist activism on behalf of battered women, agitated for crime victim's rights within the criminal system. "There is little doubt that the women's movement was central to the development of a victims' movement," notes the victims' rights oral history project.[54] It observes that feminists had painted "the poor response of the criminal justice system" as a "potent illustration[] of a woman's lack of status, power, and influence."[55] Victims' rights activists followed suit, arguing that crime victims are not content to be mere cogs in a prosecutorial wheel, receiving little compassion, services, or courtesy. The federal government took notice, and by the mid-1980s, it was providing significant funding to support victims' programs within D.A.'s offices. States also moved rapidly to adopt victims' rights statutes.[56]

i. Ideal Victims

Victims' rights were originally conceived of as protection against indifferent and antagonistic *prosecutors*. Victims' rights statutes thus contain provisions requiring prosecutors to give notice of relevant dates (such as trial and parole), to seek victim input, and to provide victim compensation. Some of these statutory provisions had a potential to impact defendants. The right to present a "victim impact statement" at sentencing, for example, creates a risk that sentencers will focus on victims' subjective feelings, or worse social status, rather than defendants' conduct.[57] In theory, victim impact statements could benefit defendants if victims called for compassion in sentencing. In practice, however, victims "are angry, depressed, and mourning," as one victim of the Oklahoma City bombing explained.[58] Victims' rights discourse, as law professor Elizabeth Joh observes, neither "generates [n]or tolerates narratives in which victims'

L. & SOC. INQUIRY 1136 (2000).

[54] Marlene Young & John Stein, *The History of the Crime Victims' Movement in the United States*, OFFI. FOR VICTIMS OF CRIME ARCHIVE, (June 26, 2019, 1:04 pm), https://perma.cc/RBN8-WX9F

[55] *Id.*

[56] MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 88-90 (Cambridge University Press, 2006)*, see generally* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (New York University Press, 2002); Aya Gruber, *Victim Wrongs: The Case for A General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMPLE L, REV. 645-67.67(2003).

[57] *See* Elayne Rapping *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y. L. SCH. L. REV. 670-2 (1999) (discussing the prejudicial impact of victim impact statements in death penalty sentencing hearings); Gruber, *supra* note 56 at 658-60.

[58] S. Rep. 108-91, at 85 (2003) (quoting Patricia Perry).

families can exercise mercy, kindness, or forgiveness towards defendants."[59]

Even in the early years, victims' rights organizations did not champion the interests of victims who wanted to avoid the criminal system altogether.[60] This may have had something to do with their composition. Gottschalk notes that "activists in victims' organizations tended to be overwhelmingly White, female, and middle-aged—a group demographic that is hardly representative of crime victims in general."[61] She goes on, "These activists generally were more supportive of the death penalty and of the police, prosecutors, and judges than were victims not active in these organizations."[62] In principle, the movement was about serving the victims caught up in a stressful bureaucratic criminal system and not about unilaterally strengthening law enforcement. However, "[a]s a matter of fact, the vindication of victims' rights has everything to do with the war on crime," Markus Dubber observes.[63] He adds, "To maintain its fever pitch of hatred, the war on crime need[ed] ever more, and ever more sympathetic, victims."[64]

The victim image driving the war on crime was therefore very specific. It actively excluded the marginalized men and women, often defendants themselves, who disproportionately suffer from crime but view prosecution with a jaundiced eye.[65] Victims were innocent women and children—preferably white—who were subjected to men's unspeakable brutality—preferably sexual. Victims were devastated, angry, and vengeful, and defined themselves by that one bad moment in life. Victims felt oppressed by insufficiently zealous prosecutors, defense attorneys, due process protections, and lenient judges.[66] Victims desired and benefitted from greater participation in the criminal process and were satisfied with sole

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[59] Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements,* 10 C. CAL. INTERDISC. L.J. 17, 28 (2000).

[60] Arizona's Victims' Rights Amendment confers the "right" to "refuse an interview, deposition, or other discovery request by the . . . *defendant's* attorney," a right all people *already have*. It does not confer the right to refuse to cooperate with police or prosecutors, which is far more compulsory. ARIZ. CONST. art. II, § 2.1(A)(5) (emphasis added).

[61] GOTTSCHALK, *supra* note 52, at 90 (quoting KATHERINE BECKETT & THEDORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 161 (2000)) (internal quotation marks omitted).

[62] *Id*.

[63] DUBBER, *supra* note 56*,* at 335.

[64] *Id*. at 192.

[65] President Clinton stated, "We sure don't want to give criminals like gang members, who may be victims of their associates, any way to take advantage of these rights just to slow the criminal justice process down." Henderson, *supra* note 50, at 585.

[66] Bruce Shapiro, *Victims and Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, THE NATION, Feb. 10, 1997, at 11.

reward of the perpetrator's incarceration.[67] Indeed, victims took on an almost deific quality, making the war on crime a holy war. The veneration of victims, Minow writes, "reflect[s] an almost religious view of suffering, empowering those who suffer with . . . reverence from others."[68] Clinton's Attorney General Janet Reno, in a speech supporting the federal victims' rights amendment, called victims "but little lower than the angels."[69] Decades later, Candidate Donald Trump picked up on this theme and featured "Angel Moms," the mothers of children killed by immigrants, at his rallies.[70]

What started out as victims pursuing their interests in notice, speedy processes, and statement-making, regardless of defendants' rights, became victims *defining* their interests *as* adverse to defendants' rights. Following the feminist strategy, victim advocates argued that victims had a "right" to swift and aggressive prosecution and easily obtained convictions. Inspired by battered women's activists' equal protection argument, victims' rights reformers argued to "rebalance" the scale between the "privileged" criminal and the disempowered victim.[71] They characterized the system's prioritization of defendants' constitutional rights over swift punishment as *discrimination*. Former Republican senator and activist Jon Kyl credited feminists' for "spawn[ing] a national movement to reform the legal system by recognizing that crime victims . . . were a discrete and unserved *minority* that deserved equal justice under law."[72] The strategy worked. The "unstoppable political force" of victims' rights in the 1980s and 90s, Alice Koskela remarks, "dramatically expanded the rights of crime victims and

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[67] Lynne Henderson, *Revisiting Victims' Rights*, 1999 UTAH L. REV. 383, 408, (1999) (arguing that participation in criminal litigation may not help victims heal).

[68] Minow, *supra* note 31, at 1434.

[69] Janet Reno, *Remarks of the Honorable Janet Reno, Attorney General of the United States, to the Child Welfare League of America*, UNITED STATES DEPARTMENT OF JUSTICE ARCHIVES, (Mar. 13, 1998), https://www.justice.gov/archive/ag/speeches/1998/0313_agcwl.htm, archived at https://perma.cc/WR42-3BU7.

[70] Michelle Goldberg, *Trump's "Angel Moms" Deserve Our Sympathy. But Their Message Is a Lie.*, SLATE, (Sept. 1, 2016), https://slate.com/news-and-politics/2016/09/trumps-angel-moms-deserve-our-sympathy-but-not-our-vote.html, archived at https://perma.cc/GZX2-R27D.

[71] Ronald W. Reagan, *Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut*, RONALD REGAN PRESIDENTIAL LIBRARY & MUSEUM ARCHIVES, (June 20, 1984), archived at https://perma.cc/SU8G-V6A4 (calling criminals a "privileged class").

[72] Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 584 (2005) (emphasis added).

restricted the rights of criminal defendants, causing a fundamental change in the justice system."[73]

In 1982, Reagan formed the President's Task Force on Victims of Crime and appointed as Chair prosecutor Lois Haight Herrington, who would later become his general in the "war on drugs."[74] It should come as no shock that the Task Force's recommendations did not involve addressing the endemic poverty and inequality that impacts the marginalized people comprising the main crime victim population. Instead, asserting that the criminal system had lost "essential balance,"[75] the report advocated nothing less than a reversal of the due-process regime put in place by the liberal "Warren Court."[76] The Task Force's recommendations included laws to abolish parole, limit pre-trial release, increase penalties for failure to appear, prevent defense attorneys from contacting victims, limit judges' sentencing discretion, require victim impact statements, compel schools to report student crimes, and make arrest records for sex offenses and pornography available to employers.[77] Those versed in criminal procedure will recognize many of these recommendations as current law—law that propelled the U.S. to its current crisis of mass incarceration.

ii. *Ideal Battered Women*

With the media focused on horrific real and fictionalized DV cases, it was inevitable that tough-on-crime politicians would take up battering as a victims' rights issue. In 1984, Lois Haight Herrington organized the Attorney General Task Force on Family Violence, and its report put even more distance between anti-battering advocacy and its antipoverty, antipatriarchy roots.[78] She assembled an unusual cast of characters to weigh

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[73] Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158 (1997) (both quotes).

[74] Lois Haight Herrington ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982) https://www.ojp.gov/pdffiles1/ovc/87299.pdf, archived at https://perma.cc/FF4N-ESLQ. In 1987, Reagan appointed Herrington as "Chairman" and Executive Director of the White House Conference for a Drug Free America.

[75] *Id*. at 114.

[76] The "Warren Court Era" stemmed from 1953-1969, when Earl Warren presided as Chief Justice. It is remembered for its distinctly civil libertarian bent.

[77] Herrington, *supra* note 74, at 15-113.

[78] William L. Hart ET AL., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, iii (1984) https://perma.cc/CXN7-SX4D [hereinafter Family Violence AG Report], https://files.eric.ed.gov/fulltext/ED251762.pdf, archived at https://perma.cc/CXN7-SX4D. Hart was later convicted of embezzling crime-fighting funds, in a case that divided the community, with his supporters accusing federal officials of racism. *See* Robert Blau, *Detroit Divided Over Trial of Police Chief of 'A Thousand Faces,'* CHICAGO TRIBUNE, Feb. 2, 1992, https://www.chicagotribune.com/news/ct-xpm-1992-02-02-9201100554-story.html, archived at https://perma.cc/6QNT-LEXH.

in on the most important feminist issue of the time. One unlikely participant was John Ashcroft. Ashcroft's At that time, Ashcroft served as Missouri Attorney General, and the Task Force represented his entré into federal governing. Ashcroft became been a leading figure in the pro-life movement, and later, as George W. Bush's Attorney General, he would spark a national outcry for subpoenaing thousands of women's medical records to gain information to support anti-abortion legislation.[79] Hardly an anti-violence pacifist, Ashcroft is infamous for overseeing and defending the Bush Administration's post-9/11 revival of physical torture.[80]

After serving on the Task Force, Ashcroft adopted DV as a pet issue, writing and speaking on the need to take it seriously for decades. Yet, he was decidedly less serious about protecting Rodi Alvarado Peña, a battered woman who applied for asylum on the ground that the conditions of Guatemalan society kept her trapped in a brutal marriage. In 2004, the Department of Homeland Security recommended to Ashcroft that he grant Alvarado's asylum claim. He refused and stayed the case pending finalization of asylum guidelines—guidelines he never finalized.[81] The issue of DV asylum was finally addressed definitively in 2018, when Trump's Attorney General Jeff Sessions proclaimed that domestic violence is *not* a ground for asylum.[82]

Unsurprisingly, the Family Violence Task Force also saw criminal law as the sole approach to gender violence. Its Chairman, Detroit police chief William L. Hart, made clear, "A victim of family violence is no less a victim than one set upon by strangers."[83] The Task Force's report quotes a young

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[79] *See, e.g.*, David Crary, *Ashcroft Defends Abortion Subpoenas*, BOSTON GLOBE, Feb. 13, 2004, archived at https://perma.cc/E6BD-6P7D; Eric Lichtblau, *Defending '03 Law, Justice Dept. Seeks Abortion Records*, N.Y. TIMES, Feb. 12, 2004, archived at https://perma.cc/G552-Q89F.

[80] Ari Shapiro, All Things Considered*, Ashcroft Defends Actions on Torture Memos*, NPR, (July 17, 2008), archived at https://perma.cc/9RS4-9A8M. I note that there were media reports that Ashcroft internally voiced objections to Bush about the torture program.

[81] *See* Bob Egelko, *Domestic violence ruled a reason for political asylum*, SFGATE, (Aug. 26, 2014), archived at https://perma.cc/WS6U-ACLJ; Rachel L. Swarns, *Ashcroft Weighs the Granting of Political Asylum to Abused Women*, N.Y. TIMES, (Mar. 11, 2004), archived at
https://perma.cc/DH8V-F2NC; Department of Homeland Security Position on Respondent's Eligibility for Relief at 43, Alvarado-Pena, No. A 73 753 922 San Francisco (U.S. Department. of Justice Deportation Proceedings, February 19, 2004), https://perma.cc/S6TP-69U3; William Fischer, *Battered Women and the Contentious Immigration Debate*, NAT'L LEDGER (Apr. 28, 2006), archived at https://perma.cc/YP9Q-6ZFJ.

[82] Daniella Silva, *ACLU sues Jeff Sessions over restricting asylum for victims of domestic, gang violence*, NBC NEWS, (Aug. 7, 2018), archived at https://perma.cc/SLM6-93MP.

[83] Family Violence AG Report, *supra* note 78, at vi.

"feminist" District Attorney Jeanine Pirro for the proposition, "Many of the people across the country have looked at [DV] as a civil problem, as a family problem, as a social problem. We believe it is a criminal problem and the way to handle it is with criminal justice intervention."[84] In this view, addressing poverty, the conditions of asylees, and sexist social norms is *inconsistent* with remedying DV because it detracts from the idea that DV is a problem of individual criminals. Readers might recognize Jeanine Pirro as an uber-right-wing *Fox News* commentator. Pirro is infamous for her race-baiting commentary about President Obama—she demanded that he return his Nobel Peace Prize—and Black Lives Matter, whose leadership sued her for defamation.[85] In 2016, Pirro defended Trump's boast about grabbing women "by the pussy" and made sure to emphasize her feminist credentials:

He has always been a gentleman. . . . I know the man, and I can speak as a woman who [h]as fought for battered women. I have crusaded for women my whole career for a level playing field for women who were victims of crime. And I can tell you unequivocally that whatever that locker room talk was, whatever that frat house language was, honestly, most Americans get it.[86]

Many battered women's advocates welcomed and touted the Task Force's report. One advocate, for example, lauded the report for "promot[ing] changes so long demanded by women" and relied on the report to argue that law enforcement is necessary, even if it fails to deter DV.[87] To be sure the report's get-tough approach had synergy with law-enforcement feminists' pro-arrest stance. The report also rejected mediation on the ground that it assumes "the parties involved are of equal culpability."[88] Nevertheless, even law-enforcement feminists' support of the Task Force report becomes surprising in light of the report's preoccupation with antifeminist "family values."

The family values movement that ascended in the 1980s embraced a vision of God-fearing, law-abiding, heterosexual nuclear families, whose labor was divided strictly along gender lines. The movement is often

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[84] *Id*. at 11.

[85] Associated Press, F*ox News host 'Judge Jeanine' Pirro sued for defamation by Black Lives Matter activist*, USA TODAY, (Dec. 13, 2017), archived at https://perma.cc/P8W6-5D38.

[86] Media Matters Staff, *Fox Host: Trump Sexual Assault Claim Is Just "Locker Room Talk" and "Frat House Language,"* MEDIA MATTERS FOR AMERICA (Oct. 10, 2016), archived at https://perma.cc/A268-4D4S (quoting Judge Jeanine Pirro's appearance on FOX NEWS' *Fox & Friends*).

[87] Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 210 (1992).

[88] Family Violence AG Report, *supra* note 78, at 23.

described as a cultural conservative backlash to 1960s radicalism, feminism, Black activism, and gay rights. However, as Melinda Cooper astutely observes, it was simultaneously part of the neoliberal political-economic revolution. The notion of "family responsibility" helped transform welfare "from a redistributive program into an immense federal apparatus for policing the private family responsibilities of the poor."[89] At the same time, "deficit spending [was] steadily transferred from the state to the private family."[90]

The Task Force report leads off with a quote from Reagan that "building our future must begin by preserving family values."[91] The concluding sentences—the very takeaway from the group's extensive study of DV—reads, "America derives its strength, purpose and productivity from its commitment to strong family values. For our nation to thrive and grow, we must do all that we can to protect, support, and encourage America's families."[92] Family values were front and center when Congress, after years of failed attempts by Democrats, made its first appropriation to battered women's services and shelters in 1984. Democratic representative Les AuCoin quoted the family values language from the report and challenged his Republican colleagues to open the coffers: "Being 'pro-family' means more than providing lip service to the needs of those who are crying out for help."[93]

The report quotes numerous family values groups, including Concerned Women of America, a formidable force in conservative politics whose influence has since only grown.[94] According to the organization's website, Beverly LaHaye founded Concerned Women in 1978 after she saw Betty Friedan on television. She was "stirred to action" by Friedan's "anti-God, anti-family rhetoric [that] did not represent her beliefs, nor those of the vast majority of women."[95] "Feminism is more than an illness," LaHaye once quipped, "It is a philosophy of death."[96] The report quotes another family

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[89] MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM 21 (2017).

[90] *Id.*

[91] Family Violence AG Report, *supra* note 78 at ii.

[92] *Id.* at 119.

[93] 98 Cong. Rec. E4 142-43 (daily ed. Oct. 2, 1984) (Remarks of Rep. Au Coin on H.R. 1904). Conservatives also sought to fund "faith based" DV interventions. *See, e.g.*, "National Domestic Violence Awareness Month, 2005: A Proclamation by the President of the United States of America," *The White House: President George W. Bush Archives* (Sept. 30, 2005), https://perma.cc/SJ8M-EFVU. *see comment

[94] Family Violence AG Report, *supra* note 78 at 118.

[95] *Our History*, CONCERNED WOMEN FOR AMERICA, https://perma.cc/H89T-6BRR (last visited Nov. 28, 2018)

[96] SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 251 (1991).

values activist, "paleoconservative" Allan Carlson of the right-wing Rockford Institute attributing DV to the decline of the nuclear family.[97] Carlson has spent his life fighting the "malignant" forces of "feminism, sexual hedonism . . . and militant secularism" and "build[ing] a new culture of marriage."[98]

In later years, Ashcroft was open about the pro-domesticity designs of DV criminal law reform. Speaking at the Attorney General's 2002 Symposium on Domestic Violence, Ashcroft emphasized "our responsibility—and our privilege—to pass on our values to the next generation of Americans"[99] and explained that DV intervention is necessary to "transform" masochistic female victims into good mothers.[100] Ashcroft recounted a conversation with a former victim: "She said, quote, 'I finally realized the truth, that I was hurting not only myself, but I was hurting my children even more. I was teaching them by example that they deserved to be abused and that violence was acceptable.'"[101] Family values activists stressed *women's* duty to maintain violence-free families, arguing that mothers who tolerate abuse are insufficiently protective. Elaine Chiu observes, "All too often, conservatives . . . interpret opportunity for action to be the same as control over the abuse, and therefore, believe it is justified to penalize battered women anytime they do not use their opportunities and control to end the abuse."[102]

II. FEMINISM'S VICTIMS

The battered women's and antirape movements ran right into this moment of "neoliberal penalty" and victims' rights.[103] Conservative politicians deftly mobilized victim images and passed popular punitive laws to shore up the neoliberal economic agenda. Feminists also relied on victimhood stories to push their anti-DV and antirape agendas. Advocates invited discourse on, empathy with, and scrutiny of gender violence victims, but this had a significant downside. Society was all too willing to scrutinize female victims in ways feminists did not like. The public was receptive to feminist discourse that DV is a horrific and brutal crime committed by

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[97] Family Violence AG Report, *supra* note 78 at 118.

[98] ALLAN CARLSON, THE NATURAL FAMILY: A MANIFESTO 7 (2007), https://perma.cc/F3ZM-KJC9.

[99] John Ashcroft, *Prepared Remarks of Attorney General John Ashcroft. Annual Symposium on Domestic Violence*, DEPARTMENT OF JUSTICE (Oct. 29, 2002), https://perma.cc/6GLL-SZWK.

[100] *Id.*

[101] *Id.*

[102] Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74S.Cal. L. REV. 1223, 1258 (2001).

[103] Harcourt, *supra* note 14.

violent sexists against vulnerable women. Many could not, however, understand why a woman would stay with such a villain. The public accepted that rape is life-destroying for women and rapists are insatiate perverts. Many, however, had a hard time understanding why, in the absence of physical threat, a woman would not just say "no" to her date. When faced with the downsides of centering the victim, feminist commentators often flipped the script, arguing that the focus should be on the "perpetrator's conduct" and not the victim's feelings, character, and actions.

Feminists' attempts to navigate the double-bind of focusing and not focusing on the victim led reformers down some tricky paths. To maintain the strategic advantages of the victim narrative, feminists had to deal with society's notions of "true" victimhood. They had to preserve female victims' innocent status, support reprehension for offenders, and explain why women stayed, without opening the door to arguments that victims choose abuse. Antirape activists, without upsetting the notions that rape is the worst crime that utterly devastates women, were tasked with explaining credibility issues and diverse circumstances without conceding that complaints are *ever* false or that sexual harms exist on a continuum. As a result, feminist discourse too often portrayed DV victims as terrified, coercively controlled women, who stayed with abusers out of fear or psychological dependence. It too often described rape victims as ruined by all non-ideal sex and their testimonial inconsistencies as products of debilitating psychological trauma.

Feminists' ideal victims thus looked similar the victims imagined by conservative politicians. Both were innocent, anguished, preoccupied with the crime that occurred, and desirous of punishment-as-justice. Moreover, feminists' reliance on trauma and damaged psychology to explain imperfect victim behavior resonated with sexist cultural stereotypes about hysterical or cognitively defective abused women.[104] Within that feminist discourse, the ideal victim, like the ideal war-on-crime victim, was a nonpoor white "everywoman," a term coined by Beth Richie.[105] Women who fell outside of the ideal were often not helped, and even harmed, by policies tailored to that victim.

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[104] *See* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 1-93(1994); Mary Ann Dutton, *Update of the 'Battered Woman Syndrome' Critique,* VAW.NET (Aug. 2009), https://perma.cc/4ST8-6BPU. I discuss the trope of ruined rape victims in Chapter 5, "Managing Myths."

[105] BETH RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 90 (2012).

A. Abuse Victims: Coerced and Controlled

One of the most intractable stereotypes of DV victims was that the "true" DV victim takes every possible opportunity to end the abuse and protect her family. There was indeed a feminist takeaway from *The Burning Bed*: Francine never had a real chance to escape her abuse, so we need feminist a pro-arrest, pro-conviction criminal system to enable such escape. As governments gave more attention and poured more resources into DV law enforcement, people could more readily blame abused women for not taking the opportunity to prosecute abusers, stop violence, and protect their children and society. As mandatory and pro-arrest policies for domestic violence became the norm, feminists needed a framework to account for victims who did not want arrest, separation, or prosecution. Still, activists were reluctant to admit that some victims regard abuse as one of many concerns in their lives—perhaps not the most pressing—to be balanced against others. Doing so, activists feared, would reinforce that victims *can* leave but *choose* not to.

For many advocates, the way out of this bind was to argue that when victims decline the criminal process, they are not acting from free will but from "coercive control."[106] Early battered women's advocates rightly observed that many abusers use violence, physical threats, and emotional and financial manipulation to control victims' behavior. Women in coercive relationships must constantly calculate the complex costs and benefits of acquiescence and defiance, and many accede to abusers' demands even when there is no immediate threat.[107] The problem is that advocates used the coercive control narrative in a very specific way. They did not generally invoke coercive control to champion financial and material aid that could help vulnerable women resist controlling men. Rather, coercive control came up when women made nonprosecutorial choices, and it and became the ground to ignore those choices.

Advocates offered the coercive control narrative as *the* explanation for victims' resistance to arrest and prosecution of abusers. One mandatory-arrest proponent argued that if the victim was given control of the arrest decision, "her *real* desire would often go unrealized because she might not feel free to request [the abuser's] arrest."[108] The argument is that allowing coerced victims to choose allows batterers to "control the judicial

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[106] *See* Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: 'Vawa Diversion' and Other Considerations in Support of Battered Women*, 23 ST. LOUIS UNIV. PUB. L. REV. 54 (2004) (noting that "mandatory policies were sought to address . . . coercive control tactics used by the abuser to prevent the victim from seeking assistance").

[107] *See* Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALBANY L. REV. 973, 1006 (June1995).

[108] Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 29 (1978) (emphasis added).

process."[109] But this ignored the probability that the victim is *correct* that declining carceral intervention is the way to stay safe. Nevertheless, advocates reasoned that victims and *abusers* would handle the arrest decision better if they understood that the woman had no option to refuse. However, this was always an unrealistic expectation. Mandatory policy or not, victims still believed arrest put them in danger or otherwise disserved them. Mandatory policy or not, abusers still blamed women for calling the police. Accordingly, many victims stopped calling.

There was a certain hubris in feminist lawyers' belief that they knew how to manage victims' safety better than victims themselves. In cases of battered women who kill, feminists insisted that the victim is *the* expert on her cycle of violence. But non-prosecutorial victims were a different story. As one law enforcement feminist explained, these victims could not be trusted to "tell their stories in ways that accurately describe the violence" because they "often understate the situation, try to protect the batterer, or blame themselves for the violence."[110] In a more extreme move, some feminists argued that separation-averse women suffer from "learned helplessness" and have a type of Stockholm syndrome where they protect the abuser at all costs. One commentator went so far as to propose that courts transfer nonprosecutorial DV victims' decision-making power to legal guardians, as is done with the mentally incompetent.[111]

Along with mandatory arrest policies came mandatory separation and no-drop prosecution policies, and state actors systematically ignored the wishes of "bad" victims who were unwilling to participate in to the carceral system (and thus presumptively incompetent). Prosecutor Donna Wills defended no-drop prosecution, stating, "We need to be able to say that despite a battered woman's ambivalence, we did everything within our discretion to reign in the batterer, to protect the victim and her children, and to stop the abuser before it was too late."[112] Victim advocate Prentice White, wrote about his regret at adopting this rescue ethic. When his client Joan told him of her abuser Mike's behavior, White called in the sheriff while "Joan pleaded with me not to have Mike arrested."[113] "In retrospect," White remarked, "I realized that my reaction was inappropriate."[114] "Like

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[109] Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1891 (Jun. 1996).

[110] Hanna, *supra* note 109 at 1900.

[111] *See* Ruth Jones, *Guardianship for Coercively Battered Women: Breaking the Control of the Abuser*, 88 GEO. L. J. 605, 609 (Apr.2000).

[112] Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L. J. 173, 179 (1997).

[113] Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 725 (Apr.2004).

[114] *Id.*

Mike, I was exercising control over Joan's life . . . when I impulsively—and unilaterally—decided that Mike should be prosecuted and Joan needed rescuing."[115]

Into the 1990s, more and more jurisdictions adopted specialized domestic violence systems with aggressive policing prosecution rules. Within these systems, state actors ignored, subpoenaed, and treated derisively uncooperative victims, even jailing a few on "material witness" warrants. Material witness warrants force witnesses to be present at court on pain of incarceration. The government used them to detain scores of innocent Middle Eastern people after 9/11, compelling one lawyer to call them "a popular device for rounding people up" and "a systematic weapon used against an ethnically identifiable group."[116] Former DV prosecutor Cheryl Hanna recognized that such prosecutorial policies "may indeed cause women to face financial hardship and to experience real emotional trauma" and that disciplined victims "may be treated poorly in other legal proceedings such as divorce and custody cases."[117] She nevertheless defended such policies, including the incarceration of victims on material witness warrants, as necessary to "send a clear message that domestic violence is criminally unacceptable."[118]

In addition to these directly punitive actions, feminists' narrative that victims are pro-prosecution or incompetent created other negative consequences. DV advocates chose to downplay the various structural, economic, and emotional reasons why women reject separation and prosecution in favor of a more politically palatable narrative of brutal manipulative abusers and their wholly controlled, psychologically damaged intimate partners. But domestic partnerships intertwine lives. They merge families and social networks, form economic interdependencies, produce children, and create everyday routines. The untangling of such comingled interests is difficult, and often devastating. Women stayed not just out of "love," which feminists tended to dismiss as a product of psychological dependence or internalized patriarchy, but because of the money, the children, her house—her everyday life.

The feminist victimhood narrative also disparately impacted minority and economically disadvantaged women. To be sure, white middle-class victims also seek to avoid the criminal legal system and separation. Nevertheless, poor women of color face greater constraints that keep them

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[115] *Id.*

[116] Adam Liptak, *Threats and Responses: The Detainees; For Post-9/11 Material Witness, It is a Terror of a Different Kind*, N.Y. TIMES (August 19, 2004), https://perma.cc/SD7J-BU44.

[117] Hanna, *supra* note 109 at 1898 (both quotes).

[118] *Id.*

tethered to violent men, and, in an ironic twist, middle-class white women are more able to opt of out the carceral system created in their image. Studies confirm that "women with income have greater access to resources to assist them in keeping their abuse private; they have the ability to afford private physicians and safe shelters, which results in their being able to escape detection from law enforcement."[119] This is in contrast to the "socio-economically distressed" victims who call the police for aid only to find that aid has been defined as arrest for decades.[120] Donna Coker remarks, "It is a cruel trap when the state's legal interventions rest on the presumption that women who are 'serious' about ending domestic violence will leave their partner while, at the same time, reducing dramatically the availability of public assistance that makes leaving somewhat possible."[121]

Feminists of color warned from the very beginning that women living in social and racial marginality and economic precarity regarded police and prosecutors, not as rescuers, but as repressors. In 2015, the ACLU published the results of a survey of over 900 DV service providers. The survey asked them to, among other things, "identify the primary reasons survivors do not call or cooperate with law enforcement."[122] Eighty-nine percent of the respondents reported that clients' contacts with police sometimes or often involved a call to Child Protective Services. One provider explained, "Often times if our client calls police a CPS report will be done then the victim of the DV will be investigated for 'failure to protect' the children and can have her children taken away because her partner has been abusive."[123] Poor women also worried being arrested for other crimes. One respondent remarked, "Many of our clients were committing crimes (using illegal substances, participating in sex work, had a taser in their possession, etc.) while they were being abused" and were "afraid of being prosecuted."[124] There was indeed reason to fear. A service provider remarked that in her community, "checking victims for warrants is so encouraged, it is part of institutionalized policy."[125] Perhaps the victims

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[119] Susan L. Miller, *Arrest Policies for Domestic Violence and Their Implications for Battered Women*, *in* IT'S A CRIME: WOMEN AND JUSTICE 247 (Roslyn Muraskin & Ted Alleman eds., 1993) (citing studies).

[120] *Id*. at 247; *See also* Jeffrey Ackerman & Tony P. Love, *Ethnic Group Differences in Police Notification About Intimate Partner Violence*, 20 VIOLENCE AGAINST WOMEN 166-67, 177 (2014).

[121] Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1018 (2000).

[122] AMERICAN CIVIL LIBERTIES UNION, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING (2015), https://perma.cc/VXU2-DHCW.

[123] *Id*. at 25.

[124] *Id*. at 28.

[125] *Id*. at 29.

most at risk from calling the police are undocumented immigrant women. Even active participation in a criminal case against their spouse is no guarantee against deportation.

Reformers justified the direct and indirect harm to marginalized women not just by a paternalistic it's-for-her-own-good argument but also because "domestic violence is a crime against society."[126] Channeling Reagan's deft recharacterization of poor street criminals as a "privileged class," battered women's advocates branded individual (often marginalized) men's violence as the main oppressive force in society. With battering established as a "patriarchal force,"[127] in legal scholar Claire Houston's words, feminists argued that "allowing [DV] to continue against an individual woman reinforces male control over women as a class."[128] In turn, violent male police officers using violence to control violent men was not a pathology of a fascist state. It was feminist—an exercise of gender justice. In other words, for law-enforcement feminists, DV criminal policy was not a matter of weighing prosecution-resistant victims' interests against pro-prosecution victims' interests. It was a matter of weighing prosecution-resistant victims' interests against the well-being of *all* women. In this view, the victim who refuses to cooperate is an ally of male supremacy, "an accomplice to her own battering," as feminist psychologist Lenore Walker remarked.[129]

The message-sending or "expressive" argument gives tough-on-crime lawmakers *carte blanche* to create any criminal law, no matter how misguided, ineffective, bad for victims, or disproportionate to the crime. They simply say, "this law creates the penalty of [insert exorbitant sentence] to send a message against [insert behavior of contemporary concern]." Touting the expressive value of a criminal sanction relieves the proponent of responsibility for good governance or for owning up to the high social, political, and economic costs of policing, prosecution, and incarceration.[130] Professors Alice Miller and Mindy Roseman observe feminists' tendency

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[126] Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but is it Enough?*, 1996 U. ILL. L. REV. 533, (1996); *see also* Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 216 (1992) (Mandatory arrest policies are necessary to "show just how advanced we truly are").

[127] Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 252, (2014).

[128] *Id*. at 252.

[129] LENORE WALKER, THE BATTERED WOMAN 69 (1979); *see also* R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE 218 (1992).

[130] One battered women's' advocate argued in 1992, "Even if a law enforcement approach fails to result in specific deterrence . . . [it] sends an appropriate message to the community—that domestic violence is not acceptable." Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 224-225 (1992).

to rely on message-sending as a justification for carceral policies and urge a "politics of accountability"[131] where feminists factor in "the material deprivations [penal law] entails: the intentional infliction of pain, at a minimum."[132] Another problem is that criminalization sent more than the message that "DV is bad," which was already widely publicized. Theorist Bernard Harcourt articulates the point that feminists of color made so many decades ago: "Many contemporary policing and punitive practices . . . communicate a racial and political, rather than moral, message—a message about who is in control and about who gets controlled."[133]

B. Sexual Victims: Children and "Slaves"

However iconic the image of Farrah Fawcett's battered visage was in the 1980s, there was an even more powerful and jurisgenerative victim image: the child victim of the sexual predator. Relentless news coverage throughout the 1980s and '90s of horrific kidnappings and killings of young children, some by known sex offenders, created a sense of public insecurity—and even terror. Legislatures capitalized on this fear and scored political points by passing sex offender management and punishment regimes that tested the limits of constitutional powers, including mandatory registration and community notification, strict residency restrictions, and for some offenders, indefinite civil commitment.[134] Many scholars characterize that moment of collective obsession with sexually violent predators as a "moral panic." Sociologist Stanley Cohen explains that moral panic involves "moral outrage towards the actors (folk devils) who embody the problem," abetted by "an exaggeration of the number or strength of the cases, in terms of the damage caused, moral offensiveness, potential risk if ignored."[135] Moral panic thus thrives at the intersection of brutality and ubiquity. It emerges when the public believes that outrageous behavior committed by a discrete deviant group is also widespread. Social anxiety arose from images of brutal child murders committed by deviant strangers and statistics about the apparent frequency of child sexual assault writ large. In fact, however, such brutal crimes were exceedingly rare, and the more

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[131] BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW 13 (Alice M. Miller & Mindy Jane Roseman eds., 2019).

[132] *Id*. at 13.

[133]. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001).

[134] *See, e.g.*, S.C. CODE ANN. § 23-3-430 (2018); WASH. REV. CODE § 9A.44.130 (2018); MISS. CODE ANN. § 45-33-25 (2018).

[135] STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS xxii (2002).

common assaults involved lower-level sexual touching perpetrated by familiars, often by other children.[136]

In the '80s and '90s, media relentlessly covered child kidnappings, rapes, and killings that represented "every parent's worst nightmare." The names Adam Walsh, Jacob Wetterling, Polly Klaas, and Megan Kanka were seared into public consciousness and memorialized in the titles of federal anti-sex offender legislation.[137] Under the theory that some of the crimes could have been prevented had parents been armed with information, legislatures swiftly passed laws to widely register and notify the public about even minor sex offenders.[138] This predictably caused even more panic, especially in the internet era when sex offenders present as red dots littering an online neighborhood map. The all-encompassing dread of stranger-danger kept parents up at night and their kids inside during the day. Parents developed a false sense of insecurity where every playground became a hunting ground and every second of a child's absence became a moment of terror, leading to "the virtual imprisonment of both poor and privileged children in the name of keeping them safer," Jonathan Simon remarks.[139] The sex predator era, remarks criminologist Richard Moran, produced lasting cultural effects in the form of "a generation of cautious and afraid kids who view all adults and strangers as a threat to them and . . . parents extremely paranoid about the safety of their children."[140]

Accompanying this self-imposed exile was a political demand that the government do more to hold the fiends to account. However, existing criminal law left little room for a ratchet-up solution. Murder and child rape could hardly be punished more severely, and rare opportunistic child sex

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[136] *See* DARKNESS TO LIGHT, CHILD SEX ABUSE STATISTICS: PERPETRATORS (2015), https://perma.cc/MP3U-EKWD; Sarah W. Craun & Matthew T. Theriot, *Misperceptions of Sex Offender Perpetration: Considering the Impact of Sex Offender Registration*, 24 J. INTERPERSONAL VIOLENCE 2057, 2057-72 (2009); Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM. JUST. POL'Y REV. 31, 15-16, (2010) (noting that "several recent studies . . . have found registration and notification laws to be ineffective methods of reducing sexual victimizations" and "there is some evidence to suggest that these types of laws are increasing recidivism" and citing studies).

[137] *See* Remarks on Signing Megan's Law and an Exchange with Reporters, 1 PUB. PAPERS 763 (May 17, 1996), https://perma.cc/PFD9-92L2.

[138] Wayne A. Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 378-79 (2011); *see also* People v. Ross, 646 N.Y.S.2d 249, 250 n.1 (N.Y. Sup. Ct. 1996) (listing registration statutes).

[139] Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CALIF. L. REV. 1415, 1417 (2002).

[140] *Adam Walsh Case Transformed Missing Kid Searches*, FOXNEWS.COM (Dec. 17, 2008), https://perma.cc/625X-X42P (quoting Richard Moran).

offenses are almost impossible to predict and prevent. Clever politicians nonetheless realized that "doing something" was all it took. Law Professor William Stuntz has called such "pathological politics" a primary driver of mass imprisonment.[141] When existing criminal laws already cover the crisis of the day, "legislatures tend to create new crimes not to solve the problem, but to give voters the sense that they are doing something about it," Stuntz explained.[142] Politicians receive "political returns from symbolic legislation."[143] During predator panic, legislatures passed laws tacking more years on to already exorbitant sex offender sentences, for example, Colorado's mandatory sentence of life in prison for nearly all felony sex offenses.[144] These reforms may have been "symbolic," but they affected real people. For sure, they imprisoned violent offenders who brutalize children. But they also imprisoned nonviolent offenders who are children.

John Walsh, the bereaved father of six-year-old Adam, who was kidnapped and murdered in 1981, became a famous TV figure with his show "America's Most Wanted." That show is itself an exemplar of the victim-perpetrator narrative, as media scholar Elayne Rapping observed:

> [The show] invariably pitted victims of traditional nuclear families against the harrowing images of criminals as antisocial loners and lunatics preying on women and especially children. Michael Linder, one of the series producers, explained the criteria for choosing cases for the series in an issue of *TV Guide*: "A drug dealer who shoots another drug dealer is not as compelling as a child molester or murderer. . . . If a man brutalizes innocent children, that definitely adds points." Such a hierarchy of victimization is a mainstay of the Victims' Rights Movement, which plays upon notions of decent families besieged by violent amoral criminals.[145]

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[141] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

[142] *Id*. at 532.

[143] *Id*.

[144] COLO. REV. STAT. §§ 16-13-801 to -812 (1998). *See also* Jessica Fender, *Family members of sex offenders organize lawsuit against Colorado's indeterminate sentences*, DENVER POST (August 13, 2011), https://perma.cc/66TD-RA4M; Wayne A. Logan, *Populism and Punishment: Sex Offender Registration and Community Notification in the Courts*, 26 CRIM. JUST. 44, (2011).

[145] Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 675-676 (1999-2000) (quoting Van Gordon Sauter, *Rating the Reality Shows and Keeping Tabs on the Tabloids*, TV GUIDE, May 2, 1992, at 18).

In 2006, Walsh successfully lobbied the U.S. Congress to pass the "Adam Walsh Child Protection Act" on the 25th anniversary of his son's death. Federal sex offender law was already exceedingly harsh by that time, but the Walsh Act increased already exorbitant penalties, mainly for symbolism, and broadened eligibility for registration and civil commitment. Standing next to the now-celebrity Walsh, President George W. Bush remarked that "we're sending a clear message across the country: those who prey on our children will be caught, prosecuted, and punished to the fullest extent of the law."[146]

At the time, the President, or at least his lawyers, had reason to know that the Act's sentencing provisions were irrelevant to nearly all sex-crime arrestees, whose cases were governed by state law. Federal law has extremely limited jurisdiction over individual violent crimes, affecting defendants only in federalized areas like national parks and Indian territory. The federal public defender had warned Congress that Native Americans would bear the brunt of these harsh reforms and tribes would shoulder the bureaucratic burden of federal sex offender management.[147] In 2006, the year President Bush signed the Act, "[n]early three-quarters of Federal sex abuse defendants were American Indian or Alaska Native," according to the Department of Justice.[148] These suspects "tended to be younger . . . and less educated" than other offenders.[149]

Shortly after the Act's passage, news stories began to familiarize the public with the dark side of reform. In 2007, national media broke the story of the hundreds of former sex offenders forced to live in squalid conditions in a makeshift encampment under Miami's Julia Tuttle causeway.[150] Spurred on by the 2005 rape and murder of nine-year-old Jessica Lunsford in north Florida, anti-predator crusaders and politicians championed some of the strictest residency restrictions in the country, banning sex offenders

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[146] Press Release, The White House, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 ((July 27, 2006)) https://perma.cc/JM5G-2V9J.

[147] Memorandum from Jon Sands, Fed. Pub. Def., Dist. Ariz., to Kelly Land, Assistant Gen. Couns. & Alan Dorhoffer, Senior Staff Att'y 12-13 (Nov. 16, 2006), https://perma.cc/CU6M-S358; *see also* ROBERT ECOFFEY ET. AL., REPORT OF THE NATIVE AMERICAN ADVISORY GROUP 32 (2003), https://perma.cc/QQY8-JV4B.

[148] Mark Motivans & Tracey Kyckelhahn, "Federal Prosecution of Child Sex Exploitation Offenders, 2006," *U.S. Department of Justice: Bureau of Justice Statistics Bulletin*, December, 2007, https://perma.cc/6H25-5DCB.

[149] *Id*.

[150] *See, e.g.,* Jeffrey Kofman, *Sex Offenders Live in Village Under Miami Bridge*, ABC NEWS, September 3, 2009, https://perma.cc/66S9-3CSL; Isaiah Thompson, *Sex Offenders Set Up Camp*, MIAMI NEW TIMES, December 13, 2007, https://perma.cc/3VMW-Q6SZ; Greg Allen, *Bridge Still Home For Miami Sex Offenders*, NAT'L PUB. RADIO NEWS, "All Things Considered," July 21, 2009, https://perma.cc/KK7S-2Y5U

from residing within 2,500 feet of any place where children gather. In Miami-Dade County, this left the airport, the middle of the Everglades, and highway underpasses.[151]

Internal Miami-Dade Department of Corrections memos revealed that officials instructed registrants to live under the causeway, which lacked water, electricity, and basic sanitation, and even issued them identification cards with "Julia Tuttle Causeway" as the address. The first woman to reside at the encampment, Voncel Johnson, had been convicted of indecent exposure (she says falsely). She told NPR in 2009: "I'm thinking [my probation officer is] bringing me to a three-quarter-way house. But when I got here it was . . . pitch dark. The first thing I saw was men, and I'm the only lady here. . . . I broke down. I'm asking her, 'Why do I have to be here?'"[152] Media and public pressure eventually induced Corrections to clear out the encampment and find temporary shelter for its residents elsewhere. But, without a change to the residency laws, the causeway population simply dispersed to other underpasses and the train tracks.[153]

One of the more controversial provisions of the Walsh Act required states to register juveniles as sex offenders. This was a major expansion, considering that in 2009, "juveniles account[ed] for more than one-third (35.6 percent) of those known to police to have committed sex offenses against minors," according to a Bureau of Justice Statistics report.[154] The report further notes, "Early adolescence is the peak age for offenses against younger children."[155] Indeed, kids as young as nine have registered for acts ranging from innocent experimentation and sexting to serious assaults. Perusing a community circular or clicking on a law enforcement-sponsored website, one might not realize that the scary twenty-four-year-old predator was a ten-year-old boy when he fondled his cousin.

Recently, juvenile registrants have received some sympathetic media coverage. A 2016 *New Yorker* article profiled their gut-wrenching tales of homelessness, inability to attend school, public shaming, violence, humiliating "medical treatment," and suicide.[156] There is Charla, who was

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[151] Thompson, *supra* 152.

[152] Allen, *supra*, 152.

[153] Terrence McCoy, "Miami Sex Offenders Live on Train Tracks Thanks to Draconian Restrictions," BROWARD-PALM BEACH NEW TIMES, March 13, 2014, https://perma.cc/E2C3-SGV7.

[154] David Finkelhor, Richard Ormrod, and Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, U.S. DEP'T OF JUST.: OFF. OF JUST. AND DELINQ. PREVENTION, (December, 2009): 1-2, https://perma.cc/C93A-P9WR

[155] *Id*. at 2.

[156] Sarah Stillman, *The List*, THE NEW YORKER, March 14, 2016, https://perma.cc/42EB-B7R2; *see also* Hal Arkowitz and Scott O. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not.*,,,, SCIENTIFIC AMERICAN: THE SCIENCES,

placed on the registry at age ten for pulling down a boy's pants at school and whose photo still appeared online under the banner "Protect Your Child from Sex Offenders." There is Anthony, convicted under "statutory rape" laws for consensual sex as a teenager. Years later, the conditions of his sex-offender status prohibited him from living with his newborn daughter, and his violations of those conditions landed him a ten-year sentence. There is Leah, who at ten year old, was convicted of molesting her siblings. During college, she and her boyfriend drove out of state to meet his parents. They stopped at the local police station so that she could fulfill her sex-offender notification requirement. The front-desk officer said, "We don't serve your kind here. You better leave before I take you out back and shoot you myself."[157] Finally, there is Joshua Lunsford, the brother of Jessica Lunsford, whose murder spurred the Florida residency restrictions. A few years after Jessica's death, eighteen-year-old Joshua was arrested for heavy petting a fourteen-year-old. He faced enhanced penalties under Ohio's newly passed "Jessica's Act," which had been championed by his father.[158]

The government intervention imposed on these children is Kafkaesque, involving "youth shaming"[159] treatments like masturbation logs and penile plethysmography—a process utilizing a machine that physically measures the subject's erection upon viewing sexual images, which was once used in the military to ferret out homosexuals. One pediatric psychologist derided them as "coercive techniques of doubtful accuracy, untested benefit, and considerable potential for harm."[160] Today, the expert consensus is that the draconian sex offender laws did not reduce, and may have increased, child sex offenses.[161] Patty Wetterling, whose murdered son Jacob is the namesake of the 1989 law establishing the federal sex offender registry, became an opponent of juvenile registration. As director of Minnesota's Sexual Violence Prevention Program, she oversaw a 2015 report that called for deprioritizing punitive responses in favor of "taking on the root causes like alcohol and drug use, emotionally unsupportive family environments,

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April 1, 2008,
https://perma.cc/2FUM-VWU7

[157] *Id*.

[158] *Id*. *See also Son of Child-Welfare Crusader Accused of Sex Offense*, THE COLUMBUS DISPATCH, May 31, 2007, https://perma.cc/UUZ2-JQ5A

[159] Stillman, *supra* 158.

[160] Stillman, *supra* 158 (quoting psychologist Mark Chaffin).

[161] Puck Lo, *Sex-Offender Laws Are Ineffective and Unfair*, *Critics Say*, AL JAZEERA AMERICA, October 17, 2004, https://perma.cc/KN7S-Y46A; Wayne Logan, *Challenging the Punitive of "New-Generation SORN Laws*, 21(3) NEW CRIM. LAW REVIEW 426-457 (2018).

and societal norms."[162] Despite such critiques, the sex offender regulations forged in the crucible of panic have been extremely difficult to reverse.

Ask any contemporary feminist, and she will say that feminist antirape agitation had *nothing* to do with the antipredator line of reform and will deny responsibility for its dystopian results. The feminist fight, she will say, was to take "date rape" seriously, not to focus on stranger-danger predators.[163] But the relationship between feminism and child-predator panic is not so easily dismissed. In the 1970s, it was feminists, not conservatives, who spotlighted child sexual abuse and lobbied for legislative change. Leigh Bienen examined feminists' early emphasis on sex offenses against children and their successful efforts to strengthen criminal laws in that arena. She observed, "when feminists began to lobby for changes in the rape laws in the 1970s, recharacterizing sex offenses involving children became a powerful and persuasive component of both the practical and the political arguments for redefining all sex offenses and for changing the criminal justice systems response to sex crimes generally."[164]

Feminists reconceived of sexual misconduct within families as rape, turning it from incest—a phenomenon of intrafamily psycho-sexual dysfunction—to rape—a phenomenon of men's predatory sexuality. Feminists drew a straight line between adult stranger rape and molestation, coining the term "father rape" and urging legislators to abandon the incest legal framework that did not carry the punitive outcomes and social judgment of rape.[165] Camille Gear Rich observes that "feminist scholars found that these claims about predatory male sexuality resonated well with conservative child welfare authorities who assumed that mothers should play the primary caretaking role.[166] Men's sexuality was yet another factor that proved the sexist and heteronormative point that women are particularly suited to childcare. This notion of men constituting a persistent sexual danger to children exists today, as many women—including feminists—bristle at the idea of a man babysitting their children. In the end, "feminists'

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[162] Stillman, *supra* 158. (quoting Minnesota Sexual Violence Prevention Program, *Sexual Violence Prevention*).

[163] *See, e.g.*, Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125(7))) YALE L.J. 195419541954 (2016).

[164] Leigh B. Bienen, *Defining Incest*, 92(4) NW. UNIV. L.REV. 1563-6444 (1998)

[165] Kerwin Kaye, "Sexual Abuse Victims and the Wholesome Family: Feminist, Psychological, and State Discourses," in REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 143, 147-48 (((Elizabeth Bernstein and Laurie Schnaffer eds., 2005).

[166] Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101(3) CAL L. REV. 658658658 (2013).).).

representations of male sexuality . . . influenced legal decision makers, even as [their] critique of the nuclear family [was] cabined."[167]

Back in the 1970s, the "stranger in the bushes" trope was, in fact, more feminist than conservative. Years before Adam Walsh's 1981 disappearance sparked predator panic, feminists organized "Take Back the Night" (TBTN) rallies and marches. In contrast to contemporary campus rape protesters, the student activists of the '70s were distinctly concerned with the stranger rapist hiding in the shadows, not the drunken date. The first TBTN rally in Philadelphia followed the high-profile 1975 murder of Susan Speeth, a young microbiologist who was stabbed to death by a stranger while walking home at night. In the years to follow, there were other rallies sparked by press-worthy stranger rapes and killings.[168] Harvard's 1980 TBTN march, according to *The Crimson*, occurred after "a Harvard student was dragged into the bushes near her dorm and raped."[169]

Like predator-panicked parents, the TBTN protesters feared the shadowy threat of the sexual deviant prowling at night. Most of those in the sexual violence intervention field today recognize that the risk of random violent stranger attack is very low. But fear and fact often diverge. It is a well-established "paradox" that women, who are far less likely than men to be victims, are more fearful of crime. Researchers suggest that women's generalized fear of rape nevertheless creates a general apprehension of random attack, despite its rarity. This outsized fear of crime is influenced by one's sense that her living environment is insecure and perception that she is particularly vulnerable. The latter helps explain why older women, the safest demographic, are the most frightened.[170] Of course, one can rightly blame rapists for creating panic, just as one blames terrorists whose

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[167] *Id*. at 659.

[168] Freedman, "Redefining Rape," at 279; Barbara Burrell, *Women and Politics: A Quest for Political Equality in an Age of Economic Inequality* (New York: Routledge, 2018), 126; Jessica R. Pliley, *Why Is It Congress Seems Concerned with Families Only When Sex Trafficking is at Issue?* THE GEO. WASH. UNIV. HIST. NEWS NETWORK, (Dec. 7, 2014).).). https://perma.cc/6NZM- [cited above in Chapter 1]; Anne Valk, *Remembering Together: Take Back the Night and the Public Memory of Feminism* in U.S. WOMEN'S HISTORY: UNTANGLING THE THREADS OF SISTERHOOD 186
(((Leslie Brown, Jacqueline Castledine, and Anne Valk eds., 2017).

[169] Cleo M. Harrington, *Take Back the Night*, THE HARV. CRIMSON (May 5, 2017) https://perma.cc/3KVG-548Y.

[170] William R. Smith and Marie Torstensson, *Gender Differences in Risk Perception and Neutralizing Fear of Crime: Toward Resolving the Paradoxes*, 37(4) BRITISH J. OF CRIMINOLOGY 37 608-34 (1997); *see also* Roxanne Lieb, Vernon Quinsey, and Lucy Berliner, *Sexual Predators and Social Policy*, CRIME AND JUSTICE 23 (1998): 49 ("Fear of sexual assault is an influential aspect of women's psychology and often leads women to make adjustments in the kinds of activities they engage in and in their perceptions of situations.").

unpredictable acts inspire fear. Fear, however, is as socially constructed as it is instinctual. In the U.S., interest groups drum up anxiety over certain groups—immigrants, MS13, Islamic Jihadists—for their own ends. Fear of statistically unlikely crime like stranger rape is similarly a function of politics and psychological priming.

Nevertheless, campus TBTN protesters did not call for draconian sentences and their rallies did not presage a wave of tough-on-rape legislation. Years later, when statutes like the Walsh Act established exorbitant sentences and unprecedented collateral consequences for rape, many feminist antirape organizations *opposed* them. It is, however, important to note that they mostly did so, not out of civil-libertarian concerns for defendants, but from a fear that excessive sentences would lead *less* punishment: it would increase dismissals, acquittals, and the number of uncooperative victims.[171] The TBTN activists did converge with anti-predator crusaders in their embrace of monitoring—more policing, surveillance, and community notification. Organizers of Harvard's 1980 TBTN applauded the University for improving security and for creating the "House Blotter–a [police] publication describing all crimes that occur each week."[172] They also called on the school to provide floodlights, more police patrols, and regular self-defense classes.[173] The latter are hardly carceral, and TBTN rallies rather quickly evolved away from focusing on stranger rape and toward fighting all gender violence, including state violence. Nevertheless, the high-profile TBTN protests of the 1970s raised public awareness of the omnipresent, night-stalking, predator-rapist-killer, the fear of whom "unit[ed] all women."[174]

Another strand of TBTN was a radical movement that emerged on the West Coast. Less concerned about random attacks at night, these protesters directed their efforts against hardcore pornography—which they considered a glorification and cause of violent rape—and prostitution—which they likened to "modern day slavery." Feminist efforts to ban pornography in the late 1970s and early 1980s sparked the infamous "sex wars" where anti-porn feminists and sex-positive scholars clashed fiercely over the meaning of pornography to women. With signature dramatic flair, legal scholar and activist Catharine MacKinnon compared the hearings on a 1983 Minneapolis anti-pornography ordinance she drafted to the Nuremberg

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[171] Anderson, *supra* 165 at 1957-58 (quoting the National Alliance to End Sexual Violence).

[172] Elisabeth Einaudi and Peggy Mason, *WOMEN: Take Back the Night*, THE HARV. CRIMSON (Nov. 6, 1980,) https://perma.cc/GA42-WNKH.

[173] *Id*.

[174] Mary P. Koss, *Rape: Scope, Impact, Interventions and Public Policy Response*, 48(10) AMERICAN PSYCH. 1062 (1993) (asserting that "uniting all women is the fear of rape.").

trials, arguing that the production of "pornography is a traffic in female sexual slavery" and its "consumption…institutionalizes a subhuman, victimized, second-class status for women."[175] Pornography and the sex it depicted represented an existential threat to all women.

Indeed, those hearings, although for a civil ordinance, in many ways mirrored the predator-law hearings later held in Congress. In the predator hearings, agonized parents and their supporters told gut-wrenching tales of loss, the emotional impact of which drowned out any "cold" policy calculations of the harms and benefits of reforms. The legislation became "simply about taking these sick monsters off the streets . . . to try to end the cycle of horrific violence that is every parent's nightmare," as one Republican remarked.[176] The antipornography ordinance hearings similarly featured a cadre of victims and their advocates, counselors, and supporters recounting heinous, depraved, and violent sex acts, ostensibly related to pornography. To get a sense of the rhetoric, consider this testimony MacKinnon later offered to the Attorney General's Commission on Pornography:

Women in pornography are bound, battered, tortured, humiliated, and sometimes killed. For every act you see in the visual materials . . . a woman had to be tied or cut or burned or gagged or whipped or chained, hung from a meat hook or from trees by rope, urinated on or defecated on, forced to eat excrement, penetrated by eels and rats and knives and pistols, raped deep in the throat by penises, smeared with blood, mud, feces, and ejaculate.[177]

As with tough-on-crime reforms, these spectacular narratives of perverse sex and victim suffering drowned out the experts who testified that the link between pornography and rape was, at best, "equivocal." As law professors Paul Brest and Ann Vandenberg observed of the Minneapolis hearings:

> [The audience] reacted passionately against testimony that opposed or even questioned the proposed law. It wasn't just that the audience favored the ordinance. It included many of the witnesses and others who had organized for the

[175] CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 88 (Harvard University Press, 2006)); (20062006*see also* Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1(1) MICH. J.J.J. OF GENDER AND LAW 30 (1993).

[176] 148 CONG. REC. H916 (2002) (remarks of Rep. Green on the Two Strikes and You're Out Child Protection Act).

[177] Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 623 (1987). Original testimony reprinted in CATHARINE A. MACKINNON, BUTTERFLY POLITICS 101 (2017).

> ordinance in the weeks before the hearings. . . . While speaking publicly of their experiences of abuse may have liberated the victims from a suffocating privacy, reliving the experiences was excruciatingly painful. . . . Under these circumstances, any opposition to the ordinance, especially any questioning of the validity of their experiences, was deeply threatening.[178]

Sex-positive feminists and many gays and lesbians worried that a preoccupation with "deviant" sexuality not only was anti-sexual liberationist but also portended to disparately impact the LGBT community. There was reason to worry. In 1980, the National Organization of Women (NOW) passed a resolution "to ensure that NOW does not work with any groups which might misconstrue pornography, s/m, cross-generational sex and public sex as 'Lesbian Rights issues.'"[179] And in Minneapolis, the antipornography agitation had given the police political cover to target gay bookstores and forcefully arrest buyers, to "terrible effect on the gay community."[180] For MacKinnon, however, gay men's freedom from incarceration was a paltry price for eradicating pornography which threated the lives of all women. Observing that "the gay male community perceives a stake in male supremacy, that is in some ways even greater than that of straight men,"[181] MacKinnon attributed reluctance to support the ordinance to gay men's "suicidal and self-destructive stance in favor of the existing structure."[182] And indeed, she convinced members of the gay community that this was the case. One such testified for the ordinance, stating, "gay men should accept the inconvenience of the world without adult bookstores in order to promote the *survival* of women which is very much threatened by any situation that promotes pornography."[183]

The radical TBTN movement also protested prostitution and, in doing so, reinvigorated the "slavery" trope of the "white slavery" era. In 1979, TBTN participant Kathleen Barry published her popular book on prostitution, *Female Sexual Slavery*. It characterized most commercial sex as slavery, no matter how the woman became involved or the reason she remained in it. "Female sexual slavery is present in ALL situations where

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[178] Brest & Vandenberg, *supra* note 179, at 629.

[179] Alice Echols, *The Taming of the Id: Feminist Sexual Politics, 1968-83*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 50, 61 (Carol S. Vance ed., 1984).

[180] Brest & Vandenberg, *supra* note 179, at 629.

[181] *Id.* at 641.

[182] *Id.*

[183] *Id.* at 629-30 (emphasis added).

women or girls [involved in prostitution] cannot change the immediate conditions of their existence," she proclaimed.[184] Barry explicitly rejected economic accounts that focused on poor minority women and structural conditions because such accounts "undermine the feminist critique of sexual domination."[185] The marginalized status of "black men from the ghetto" was also irrelevant, Barry opined, because pimping "cannot be justified by someone's economic conditions."[186] Nor could male sex workers claim equal victimhood status, no matter how exploited, because sex is inherently *gendered*—something that men weaponize against women. Barry counseled, "The victimization and enslavement to which women are subject in male-dominated society find no equivalent in male experience."[187]

For Barry and other "new abolitionists," sex slavery did not require "whips crack[ing] over writhing, naked bodies," but could be just a matter of "subdued business transactions."[188] Thus, among the many horrors involved when a woman is kidnapped, tortured, locked up, and sold for sex, the factor that defines her situation as "slavery" is simply the commodified sex. This paradigm, sociologist Ronald Weitzer remarks, "depicts all types of sexual commerce as institutionalized subordination of women, regardless of the conditions under which it occurs. The perspective does not present domination and exploitation as variables but instead considers them core ontological features of sexual commerce."[189] Despite her argument that "slavery" applies to "subdued" commercial sex, Barry still highlighted exotic tales of foreign kidnapping that bore a striking resemblance to the white slave crusaders' narratives. "Several thousand teenage girls disappear from Paris every year," Barry reported. "The police know but cannot prove that many are destined for Arab harems. An eyewitness reports that auctions have been held in Zanzibar, where European women were sold to Arab customers."[190] New abolitionists, like their old counterparts, regularly depicted sex slavery through lurid and racialized narratives and then simply applied the label to *all* sex work. "[L]egal scholars, lawmakers, advocacy groups and the media . . . consistently used an eroticized version of the female 'sex slave' to justify and garner public support for anti-trafficking legislation," notes one expert.[191] These spectacular stories combine with

[184] KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 33 (1979).
[185] *Id.* at 8.
[186] *Id.* at 9.
[187] *Id.* at 10.
[188] *Id.* at 10.
[189] Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, 101 J. CRIM. L. & Criminology 1337, 1338 (2011).
[190] BARRY, *supra* note 186, at 33.
[191] Cynthia L. Wolken, *Feminist Legal Theory and Human Trafficking in the United*

statistics on prostitution to complete the brutality-ubiquity dyad that drives moral reactionism.

Like battered women's advocates, new abolitionists created an ideal enslaved victim narrative to maintain women's devastated status and explain why sex work is not a "choice." The sex slave, like the coerced battered woman, is invariably brutalized and damaged, and her free will is an illusion. Sex workers, regardless of what false consciousness might lead them to say, are coercively controlled by men—pimps, fathers, or other enablers—and need rescue. Moreover, when the "it's for her own good" analysis ran out, new abolitionists have been willing to characterize uncooperative "victims," such as sex workers who defend the profession, as accomplices to patriarchy. One activist remarked in 1987, "When the sex war is won, prostitutes should be shot as collaborators for their terrible betrayal of all women."[192]

Accordingly, radical feminists felt justified in pursuing criminalization polices counter to the wishes and material interests of women in the commercial sex industry. Although abolitionist feminists gave lip service to partial decriminalization, their anti-trafficking laws and policies, like the social hygiene laws of old, landed many women in jail. Anti-trafficking raids "saved" victims by arresting them and requiring them to meet with "service providers."[193] Prosecutors even counseled that "arresting the victim" is a useful tool in trafficking interdiction because it allows prosecutors to keep tabs on these potential victim-witnesses. The victim is "required to make periodic court appearances and, in the event that she disappears, prosecutors can seek a warrant for her arrest."[194]

In the end, the TBTN movement was not the same as the conservative antipredator movement, but they were certain related. Significantly overlapping were their narratives of deviant offenders, ruined victimhood, and the ubiquitous danger of sexuality. Together, they established rape as a spectacular and devastating, but still common, crime committed by

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States: Towards a New Framework, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 407, 410 (2006).

[192] JULIE BURCHILL, DAMAGED GODS: CULTS AND HEROES REAPPRAISED 9 (1987). Catharine MacKinnon's stance was more moderate: "Criminal laws against prostitution make women into criminals for being victimized as women . . .This is not to argue that prostitutes have a sex equality right to engage in prostitution." Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 J. MICH. GENDER & L. 13, 20 (1993).

[193] Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1364-67 (2016).

[194] Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 260 (Jill Laurie Goodman and Dorchen A. Leidholdt eds., 2013).

predatory men. Any "tolerated residuum of [sexual] abuse" posed an existential threat to *all* women.[195] Feminists of the TBTN era were happy to traffic in discourse about cloaked marauders in the night. Radical feminist Andrea Dworkin, co-author of the anti-porn ordinance and infamous for her alliance with Jerry Falwell, Jr. against the First Amendment, delivered a speech at a 1979 TBTN rally in Connecticut.[196] Speaking to over 2000 attendees, her predator rhetoric was at once terrifyingly beautiful and beautifully terrifying:

The policemen of the night—rapists and other prowling men—have the right to enforce the laws of the night: to stalk the female and to punish her. We have all been chased, and many of us have been caught. A woman who knows the rules of civilized society knows that she must hide from the night. But even when the woman, like a good girl, locks herself up and in, night threatens to intrude. Outside are the predators who will crawl in the windows, climb down drainpipes, pick the locks, descend from skylights, to bring the night with them… They bring with them sex and death. . . . Once the victim has fully submitted, the night holds no more terror, because the victim is dead. She is very lovely, very feminine, and very dead.[197]

CONCLUSION

Feminist narratives of crime and victimhood developed at a time when ideas of appropriate state governance and the causes social problems were undergoing a revolutionary change. Feminist activists were not spared the revolution, and they had to negotiate this meaning-making moment. Even before the Reagan era, carceral approaches to gender violence championed by privileged white lawyers had begun to eclipse approaches that focused on economic inequality, poverty, sexist social arrangements, and white supremacy. The tough-on-crime moment, with its discourse of monstrous individual offenders, female innocence, and victim devastation and ange, helped the law-enforcement approach take over. In short order, law enforcement became synonymous with fighting sexism, and today many fondly remember second-wave feminism *as* law-enforcement feminism.

To be sure, the prosecutorial programs installed by second-wave feminists are numerous and include mandatory arrest and no-drop prosecution for domestic violence, criminalizing nonforcible sex, and

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[195] Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1314 (1992).

[196] Judy Klemesrud, *Joining Hands in the Fight Against Pornography*, N.Y. TIMES, (Aug. 26, 1985), https://perma.cc/RD3B-RZP8https://perma.cc/RD3B-RZP8.

[197] ANDREA DWORKIN, LETTERS FROM A WAR ZONE 13-14 (1988), 13-4, https://www.feministes-radicales.org/wp-content/uploads/2010/11/Andrea-DWORKIN-Letters-from-a-War-Zone-Writings-1988.pdf. https://perma.cc/87P3-LRCP

prosecution-favoring evidentiary rules. By the 2000s, specialized DV courts and their functionaries were a firmly entrenched and growing portion of states' criminal systems. States had widely reformed their arrest laws to encourage and even mandate DV arrests. Colorado law, for example, dictates that "the officer *shall*, without undue delay, arrest" DV suspects.[198] Many jurisdictions boast detailed DV codes designed to counteract the lenient impulses of state actors and victims. Florida law, for instance, requires each state attorney's office to adopt "a pro-prosecution policy for acts of domestic violence."[199] Specialized DV and sex offender regimes have engendered a robust for-profit cottage industry, allowing courts to outsource treatment and supervision from their overloaded dockets.[200]

This increased concentration of criminal authority in the intimate realm has had profound effects. Since the 1980s, the population of sex offenders in prison has exploded, even as rape offending has precipitously declined.[201] After reform, arrests for domestic violence increased exponentially—with increases in arrests of women outpacing that of men—even as arrests generally declined and violent crime rates reached historic lows. In modern times, domestic assaults are more likely to result in arrest, prosecution, and incarceration than nondomestic assaults. Women, who are violent more often in domestic settings than on the street, have for several years

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[198] COLO. REV. STAT. ANN. § 18-6-803.6 (West 2001).

[199] FLA. STAT. § 741.2901(2) (1995).

[200] *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. Rev. L. & Soc. Change 191, 213-15 n.109-110 (2008) (citing statutes and observing that 49 states and D.C. permit warrantless arrests in DV cases). In 2011, the American Bar Association reported that nineteen states and D.C. have mandatory arrest policies (Alaska, Arizona, Colorado, Connecticut, DC, Iowa, Kansas, Louisiana, Maine, Mississippi, Nevada, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wisconsin); six states have preferred arrest policies; and the remaining twenty-five states give officers discretion, although some states, like New York, mandate arrest for felonies. *Domestic Violence Arrest Policies by State*, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, (last updated June, 2011), https://perma.cc/V5QW-K369. A 2009 survey from the Center for Court Innovation identified 208 specialized DV courts across 32 states, significantly more than the 150 DV courts identified in their 1999 survey. Melissa Labriola et al., *A National Portrait of Domestic Violence Courts*, CENTER FOR COURT INNOVATION (2009), https://perma.cc/APR3-7D64; For a discussion of for-profit companies managing the consequences of carceral regimes, *see* Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579 (2018); Sarah Stillman, *Get Out of Jail, Inc.,*
NEW YORKER (June 23, 2014), https://perma.cc/F7AU-RGJG.

[201] SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 6.0023.2013, https://perma.cc/3MBL-35RW (showing a prison population percentage of .8 in 1990 and 6.2 in 2013). Both the FBI Uniform Crime Reports and National Crime Victimization Survey show steep declines in rape rates from the mid-1990s to the 2010s. *See* Chapter five, note [specify note] (statistics on rape rates)

comprised the fastest growing segment of the prison population. And, in Jim Crow politicians' ultimate triumph of the future, the modern broadened criminalization of what postbellum whites once called "negro crimes"—battering and rape—disproportionately burdens men and women of color.[202]

It does not have to be this way. Feminists can follow Professor Beety's lead and manifest justice by adopting a "neofeminist"—as opposed to post- or nonfeminist—approach to gender violence. This approach holds that sexual misconduct and battering constitute pressing social problems that reflect and reinforce women's subordination and concedes that impunity exacts a social price. At the same time, it is acutely conscious that criminal law causes real injuries and views feminist participation in the penal system with a jaundiced eye. This feminism is mindful that gender is one of multiple intersecting sites of hierarchy, along with class, race, and economic status. Methodologically, neofeminism involves a "distributional" approach to law reform. Feminists all too often adopt backward-looking justifications, rehashing the details of the horrible crimes that provoked their reform efforts instead of looking ahead to how the laws will operate in the world as it exists: a world of racialized over-policing and over-imprisonment. Thus, a basic tenet of modern feminist thought should be that criminal law is a last, not first, resort.

These neofeminist principles and methodologies provide some guideposts to modern women's movements. Feminists should not propose new substantive offenses or higher sentences for existing gender crimes. Feminists should oppose mandatory arrest, prosecution, and incarceration. Feminists should ensure a strict line between college discipline and criminal sanction. Feminists should support sexuality education over sexual assault fear-mongering. Feminists should stop characterizing violence as a function of evil individuals rather than one of social conditions and unfair hierarchies. Feminists should expend capital on reforms that provide material aid to the women most vulnerable to violence. Feminists should topple powerful abusers through political action, not through pumping up already draconian laws that will then be applied, not to the rich and powerful, but to the usual suspects. To be sure, it is not easy to abandon one's deeply ingrained and honestly held carceral feminist intuitions. But doing so can create a movement that manifests feminism *and* justice.

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[202] I discuss statistics on race and DV in the text accompanying notes 101-103 of this chapter. *See also* David Hirschel et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases*, NAT'L CRIM.L JUST. REFERENCE SERV. (2007): 61 Table 4:32, https://perma.cc/RM6L-WBD5 (comprehensive nationwide arrest study showing that police arrested in 48 percent of intimate partner violence cases, 34.6 percent of stranger violence cases, and 28.1 percent of non-domestic relations violence cases and that the assault victim being an intimate partner raised the chance of conviction by 67 percent).

BOOK EXCERPT: PROSECUTING POVERTY, CRIMINALIZING CARE[1]

By: Wendy A. Bach

INTRODUCTION

Between 2014 and 2016, the State of Tennessee prosecuted at least 120 women for the "crime" of fetal assault. The women were accused of taking narcotics during pregnancy and harming the fetus they were carrying as a result.[2] In 2022 I published a book entitled *Prosecuting Poverty, Criminalizing Care* that told the story of those prosecutions. The fetal assault cases were, in the context of both the criminal system and the prosecution of pregnancy-related conduct, fairly minor. They were misdemeanors, so punishment did not exceed eleven months and twenty-nine days, and they only sometimes resulted in incarceration. Now certainly it's essential, when writing about criminal prosecutions, to focus not only on the big cases but on the relatively low-level cases that dominate the system. But these cases struck me as important for another reason. What struck me was how advocates justified creating this crime and prosecuting these women. For many, they seemed to believe that prosecution was a form of care – that prosecution would lead to treatment and that, with the discipline of the court system, these purportedly bad [poor mostly white] mothers could be transformed, into good mothers. They believed, it seemed, that prosecution was a form of care. I argue in that book that:

> [T]he ideas that drove the creation of this crime – that criminalization is a road to care, that the care provided at the end of that road is corrupted by its linkage to punishment, and that, for those society deeply stigmatizes, criminalized care is all they deserve – sit firmly at the heart of the US criminal, child welfare, and social welfare systems. The systems at the heart of this book operate on the assumption that poor people and poor communities are not worthy of care in the best sense of that word. In fact, if we look not at what is said but instead at what is done, not at what some in power purport but at the operation of the systems they create, it is clear that the United States has a set of rules and systems

[1] Published 2022 Cambridge University Press, available for order at: https://doi.org/10.1017/9781108693783.

[2] *See generally* Wendy A. Bach, PROSECUTING POVERTY, CRIMINALIZING CARE (2022).

> that assume that whole categories of deeply stigmatized poor people do not deserve what this book broadly terms care – economic security, housing, healthcare, safety, or support. In poor communities, systems might dole out some meager support, some meager approximation of care, but there is always a high price to pay. That price all too often comes in the form of stigmatization, surveillance, and punishment. Even beyond this, these purported offers of care are often nothing more than a facade behind which we find mostly subordination. A central idea at the heart of these systems is what this book terms criminalizing care – the idea and practice of linking the provision of care (in the Tennessee example healthcare and drug treatment) to involvement in systems that punish and the devastating outcomes that result. So, the Tennessee story, and this book, is not only a story about the operation of one law in the lives of 120 women. It is also a book that highlights that story as an extreme and crystal-clear example of criminalizing care, a phenomenon at the heart of US social welfare, child welfare, and criminal system policy.[3]

The book makes two separate arguments about the criminalization of care. The first is that it's a smokescreen. We use, in the context of the largely-White opiate epidemic, the less harsh rhetoric of treatment to hide what is mostly pure punishment. As I demonstrate in the first half of the book, for the majority of fetal assault defendants, their criminal court files contain no indication that treatment was offered as a part of their case. For those defendants, those who it appears were offered no care at all, the system offered with the system does on the low end of the spectrum – lots of punishment, in the forms of both incarceration and debt, and very little justice. The second argument, and the second half of the book, focuses on both the minority of fetal assault cases where treatment was in fact provided and, more broadly, on the structure and system actors who implement care proximate to or intertwined with punishment systems. That section of the book draws both from the criminal court files and from qualitative interviews with system actors and medical professionals. One chapter of that argument, which focuses on the structural mechanisms that merge punishment and care is lightly edited and excerpted below.

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[3] *Id.*

I. CRIMINALIZATION AS THE ROAD TO CARE AND THE PRICE YOU PAY

"Lock 'em up, clean 'em up and start over."

Cindy Jones, Drug Treatment Coordinator, Rural East Tennessee

Cindy Jones[4] has lived and worked in and around the criminal courts in a rural East Tennessee county for decades. What she told me epitomizes what happens when three phenomena – bias, reliance on punishment systems for care, and incredibly resource-poor environments – collide. Cindy has been a jail administrator, a treatment coordinator, and a probation officer, among other jobs. I originally got her name from the local public defender who is assigned to her courthouse. When I explained my project, he said that he was happy to talk to me but that the person I really had to talk to was Cindy. She was his go-to person to get help for his clients and she, more than anyone else in his community, knows how to get people treatment. So my research assistant and I got in the car and drove out to meet her.

To say that the county where Cindy and this particular public defender work is under-resourced does not begin to do justice to the situation. The county is over 95 percent white and nearly a quarter of the population lives below the poverty line. The median income is $16,000 lower than the median income in the state. The closest drug court is in another county, and lots of folks do not have cars or gas money, so even if they were assigned to go there, it is not clear how they would get there. There are a few short-term detox facilities and a few faith-based longer-term programs outside the county, but Cindy told me that there are no halfway houses or counseling programs nearby, so even if you can get someone an inpatient bed, if they return home there will be no services there to support them when they return. On top of that, many of the people Cindy works with don't have insurance, so getting treatment is incredibly difficult.

When we asked about how she helps people in her community who suffer from addiction, her response was immediate: "lock 'em up, clean 'em up and start over."[5] At first, my research assistant and I were a little confused about what she meant, but slowly it became clear. As she explained it, for the vast majority of her clients, poor people without health insurance, her access to treatment beds was mostly through grants that could only be accessed if a judge authorized the payment. She had access to three

[4] This name is a pseudonym assigned on the request of the interviewee.

[5] Interview with Cindy Jones (pseudonym), Drug Treatment Coordinator, in Rural E. Tenn. (July 6, 2017).

grants, and two of them required a judge's signature, so getting someone into court was the easiest way to get them help. If she gets a call, for example, from a person who wants to get help for someone, the first thing she asks is whether the person has committed any crimes. She made clear that she did not mean major crimes, just a little one, maybe a misdemeanor. If the person could be arrested for that crime, then she can help. Now from her perspective, a misdemeanor is not that big a deal, but as we've seen with the fetal assault charges, the consequences can be significant. Nevertheless a "little charge" allows her to get someone arrested and brought to jail. The person would detox in jail and then, eventually, once the person pled guilty, she would be able to use her resources to get that person into treatment. That's just the way it works. And if that didn't work the first time, as was likely, they could try again once the person was on probation – "lock 'em up, clean 'em up, start 'em over." In that statement, and in the confidence of the fetal assault law proponents about criminalization as a road to care, we hear three interlocking ideas that characterize the relationship between punishment and care. First, punishment systems are a road to care; second, facilities controlled by punishment systems are used as locations of care; and finally, punishment is a form of care in and of itself.

II. PUNISHMENT SYSTEMS AS THE ROAD TO CARE[6]

To tell the story of the role of criminal charges and criminal system involvement in accessing care, we are going to Sullivan County, Tennessee, the home of Barry Staubus and the largest number of women prosecuted for

[6] The ways in which forms of care are accessible to individuals in punishment systems has been referred to as a characteristic of "carceral citizenship." As Reuben Jonathan Miller and Forrest Stuart argue, a criminal conviction,

> changes the nature of one's interactions with public welfare agencies, the labor and housing market, with their families and in civic life. Second, the carceral citizen is included in practices of supervision, correction and care that are otherwise unavailable to conventional members of the polity who have not been accused of a crime. This includes access to prisoner reentry programs and prisoner-specific social service agencies, healthcare and housing services administered through public and private organizations, counseling provided by state and nongovernmental agencies, and services through probation, parole and alternative court systems."

Reuben Jonathan Miller & Forrest Stuart, *Carceral Citizenship: Race, Rights and Responsibility in the Age of Mass Supervision*, 21 THEORETICAL CRIMINOLOGY 532, 536 (2017); *see also* Michelle S. Phelps & Ebony L. Ruhland, *Governing Marginality: Coercion and Care in Probation*, 69 SOCIAL PROBLEMS 799 (2021) (drawing on data from "over 100 focus groups conducted in 2016-2017 with adults on probation and probation officers in several jurisdictions across the country [and detailing] the duties, burdens, and perverse benefits of supervision . . .").

fetal assault per capita in the state. Sullivan County is slightly more resourced than the rural county where Cindy works, so there are more providers and more programs. To understand the fetal assault cases and the general relationship between prosecution, child welfare intervention, and treatment in the area, I spoke to prosecutors, defense attorneys, judges, treatment providers, and lawyers who represent parents and kids in child welfare proceedings. Everyone I spoke to agreed: for folks in poor communities, the road to treatment runs through the agencies and courts.

In the State of Tennessee, every judicial district has an elected public defender. Staff in that person's office represent the vast majority of individuals charged with a crime who the court determines to be indigent. In many of these counties, that's virtually everybody. I interviewed a group of public defenders in Sullivan County about both the fetal assault prosecutions and about the larger relationship between prosecution and treatment. Here's the conversation we had:

> Wendy: So, let's say you have a client that you wanted to get into treatment. Can [that client] get a bed?
>
> Attorney: If you have money, yeah. If you don't have money, it's going to be tougher. Usually, you're going to get that bed after you've been convicted of something. We've got some outfits in the county that they used to move some people out of the jail system. In Kingsport [a city nearby] they've got this place called the Hayhouse and part of their work is they work with people that are drug addicted. But it's a small outfit. They've been around for a while and they've grown and they're part of our judiciary in a way.[7]

During this particular interview I was sitting with four other attorneys in the office. None of them disputed this statement. Barry Staubus said something similar. I asked him if it is easier to get treatment once you are inside the system. He said he thought it was, but for Staubus this was about the knowledge of professionals working in the system. "If you're on probation, I think it would be easier, because they have much more knowledge of the facilities, the resources, and the programs than a person that doesn't."[8]

Providers in the area (and beyond) confirmed that their treatment spots are largely taken up with people who are required to be there by either the criminal or the child welfare courts. For an example, take one highly

[7] Interview with Assistant Pub. Defs., in Kingsport, Tenn. (Aug. 7, 2017).

[8] Interview with Barry Staubus, Dist. Att'y, Second Jud. Dist., in Kingsport, Tenn. (Aug. 7, 2017).

respected program in the area. In the view of the professionals I talked to, this program provides significant support to women struggling with substance-use disorder during pregnancy. The program is a licensed substance abuse and mental health treatment facility, providing intensive outpatient services and support to their patients. The Executive Director confirmed that most of their slots are allocated to system-involved clients and that they struggled to find funding for programs for people outside those systems. Similarly, another strong program I saw includes several programs, but one of the most striking is their residential family treatment program. Technically it is two programs – an intensive outpatient program and a parallel housing program – since the State of Tennessee does not have a mechanism to license inpatient treatment programs that include a woman with her children. Nevertheless, in that program, which has seventeen slots, women can live there with their children while getting treatment. As was the case at most programs I saw, those beds go to women who are in the criminal system. As the Executive Director told me, "[t]he overwhelming majority of the pregnant women on our waiting list are incarcerated."[9] We had an extensive conversation about how they prioritize the people on the waiting list. The Executive Director would not go so far as to admit that system-involved women were given priority, but they did explain how it works. The "wait list is based on how our grants are prioritized."[10] Several of the priority categories had to do with health: pregnancy, injecting substances, unmanaged drug use. But system involvement mattered to. What was clear from that conversation was that being system-involved, either with child welfare, a criminal case, and/or being incarcerated, was a factor that would make it more likely that they would give you a bed. As they explained, "the more problems or the more issues or the more challenges you have the higher you go"[11] on the priority list. Whatever the system, the basic fact remained true. The vast majority of the women were incarcerated prior to entering the program.

Mary Linden Salter, who runs the Tennessee Alliance of Alcohol Drug and Addiction Services and spends her days talking to treatment programs all over the state, agrees.

> If you are a treatment provider and you have a drug court judge who makes you a referral and certainly if you're a pregnant woman, that's going to get moved to the top of the list a little bit differently than somebody else. What we end

[9] Interview with Hope Jones (pseudonym), Exec. Dir. of a Treatment Facility (Aug. 9, 2018).

[10] *Id.*

[11] *Id.*

> up having is a system where drug courts often get preference.[12]

It's tempting to think that this problem – that it is difficult to get a treatment slot if you are not system-involved – is solely a scarcity problem – that given the limited number of beds and the limited resources available, it only makes sense to take those most in need; system-involved folks are the most in need, so the limited beds go to them. There is some truth to that. But there is more. The issue is not only about scarcity, it's also about priorities.

The fetal assault law prosecutions certainly took place in a landscape in which there were almost no treatment resources available in the community for pregnant women struggling with substance use disorder. The Substance Abuse and Mental Health Services Administration hosts a national listing of available treatment resources.[13] A recent search for Tennessee facilities that provide substance abuse treatment of any form and accept Medicaid turned up ninety-eight programs.[14] When that search was narrowed to facilities that are willing to treat pregnant women and postpartum women, only twenty-eight facilities were on the list.[15] In 2014 a similar search was run and journalists from America Tonight followed up with the listed facilities seeking to gain information about whether there were any open treatment beds. From the listing at that time, only "[f]ive clinics confirmed that they allow pregnant women to enroll in their residential treatment and accept Medicaid. With two of the programs completely full, there [were] fewer than fifty beds in Tennessee available to pregnant drug users."[16] Even less available are facilities that allow women to receive inpatient treatment without having to find alternative housing for their children. These facilities, which combine residential treatment with residential care for children, are few and far between. Their programs, however, are a model for how to provide care to pregnant parenting women. Understanding why is quite simple. For women who already have children

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[12] Video Interview with Mary Linden Salter, Exec. Dir., Tenn. All. of Alcohol Drug and Addiction Services (July 3, 2017).

[13] *Behavioral Health Treatment Services Locator*, Substance Abuse & Mental Health Services Admin., https://findtreatment.samhsa.gov/ [https://perma.cc/48ZM-UYA2] (last visited Sept. 7, 2018).

[14] *Locator Map*, Substance Abuse & Mental Health Services Admin., *available at* https://findtreatment.samhsa.gov/locator [https://perma.cc/VDL8-SEAQ] (last visited April 20, 2020).

[15] *Id.*

[16] Sanya Dosani, *Should Pregnant Women Addicted to Drugs Face Criminal Charges?*, AL JAZEERA AM. (Sept. 4, 2014, 4:00 PM), https://america.aljazeera.com/watch/shows/america-tonight/articles/2014/9/4/should-pregnant-womenaddictedtodrugsfacecriminalcharges.html [https://perma.cc/4EVR-RCT9].

and would benefit from residential treatment, offering a program in which they can both recover and parent in the same facility is essential. It allows them to get the help without having to find a place for their children to stay in the meantime, and equally importantly, it allows them to work on healthy parenting as part of their recovery. But this best-practice form of care is also tremendously hard to get. At the time that I completed research for this book, there were only thirty-one beds available statewide that offered this form of residential treatment. All those facilities were not only almost always full but also almost always had an extensive waitlist. For example, one of these facilities, which has capacity for seventeen families at a time, has, at any one time, about sixty on their waitlist.[17] So, in this world of scarce resources, the criminal and child welfare systems play an outsized role in the road to care.

But the issue is not only about scarcity of treatment beds; it is also about funding priorities. To get a sense of this, let's return to a program in Johnson City. I interviewed Judge Sharon Green, the juvenile court judge who sits on every child welfare case in Johnson City, Tennessee (one of the three of the tri-cities) and Judge Arnold, who sits in both Juvenile Court and the lower-level criminal court in the local county. According to both judges, the services that one particular organization provides offer enormous positive support to the women they serve. It is in fact the first choice of the judges in terms of effective service provision. Judge Green reports that it is by far most effective program in the area, specifically at providing the support necessary to help women keep custody of their children. What was striking about my conversation with the Executive Director of that program was their inability to find funding for programs that focused on families without child welfare or criminal involvement.

To say that this Executive Director is resourceful in securing the financial support for her program is a profound understatement. As they explained it,

> [Our organization] is unique, because we get funding from the department of health, from the department of mental health and substance abuse, from department of children's services. We hold a recovery drug court contract, and we also get an appropriation in the governor's budget, and next week we will have a 200 plus fundraiser with people in the community to raise even additional resources above what the state will pay. So we go into situations and look at what

[17] Interview with Hope Jones (pseudonym), Exec. Dir. of a Treatment Facility (Aug. 9, 2018).

> people really need, and then we find the resources, the leverage to bring about that kind of change in their life.[18]

To put it mildly, this is an Executive Director who knows how to access the resources that exist to support the organization's clients and mission. At one point our conversation turned to the topic of whether they provide services to women in the community who are not involved with DCS or courts. As they explained,

> There are families who have more of an internal motivat[ion] to seek out the services, and we've seen some good engagement from them as well. There's just not a lot of funding out there for it. We have a partnership with [a local hospital] and we were doing a nurturing parenting baby steps program and it was just offered to people with high [adverse childhood experiences] scores, and those families ate it up with a spoon. They were not like the nucleus of high risk, high need, but they were on the periphery, and we found some of those people just loved to have the service that came to their house, that was free, but for whatever reason, that's not really funded.[19]

They then went on to talk enthusiastically about another community-based program but again, "we can't fund it."[20] "We've really tried to get it funded, and just haven't been able to yet. When I asked them how much of their caseload is referred to her by DCS and courts, they were clear. It's about 80 percent of the caseload. So here was the organization that was universally recommended to me as the best and most comprehensive treatment and support provider in the area and who wanted to but could not fund programs for non-system-involved women. The result: 80 percent of the caseload came through the agency or the courts.

The judges who hear Juvenile Court cases concur that DCS and courts are the road to treatment in their community. I asked Judge Green about this:

> Wendy: There's no funding for people who aren't agency- and court-involved?
>
> J. Green: Yes.
>
> Wendy: Is that your experience?

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[18] Interview with Exec. Dir., Treatment Program in E. Tenn. (July 26, 2018).
[19] *Id.*
[20] *Id.*

> J. Green: Yes. If DCS is not paying the bill for it, it doesn't happen.
>
> Similarly, Judge Irwin, who presides over child welfare cases in Knoxville, concurred. I asked,
>
> Wendy: [Is it] easier for kids or for the folks we're talking about to get access to treatment through the agency of the courts than it is in the community. Do you think that's true?
>
> J. Irwin: Yes.[21]

It's important to be clear that I am not highlighting these facts to make an argument that women who have a child welfare case or a criminal case should not get treatment, or even that others should not be lower on the priority list. In a world of almost no resources, in the world that Cindy Jones, and treatment providers, and Barry Staubus occupy, perhaps it does make sense to prioritize the beds for people facing criminal charges. What bothers me, though, is that our society seems content to live with a baseline of so few resources, because the result is that, all too often, you have to be in the child welfare or criminal legal system in order to get care.

This can lead to some really disturbing results. Cindy Jones was utterly clear. She had to get them on a "little charge" before she could get them help. Stephen Lloyd, the Director of Journey Pure, who is in recovery, and who was the Medical Director for Substance Abuse in Tennessee from 2015 to 2018, was also clear. During our interview we talked a good deal about access to treatment, both as he accessed it, and as it is accessed for individuals in poverty. He talked a lot about the comprehensive treatment he got as a member of the medical profession, and it was clear he thought that everyone deserved what he got. But not everyone gets that. For someone who is poor he had another plan: "Even knowing what I know, if I needed somebody in treatment that didn't have insurance, I'd tell them to go to Greene County and get caught shoplifting. They'd get into drug court and they could get them treated."[22]

He was not happy about this option, but he understood, like the judges, like Cindy, like the defense attorneys and the prosecutors, that, in poor communities, this is the road to care.

This reality is not lost on those who need treatment. As Mary Linden Salter explained in talking about her work on the Tennessee Redline (a hotline that refers people to treatment):

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[21] Interview with Judge Timothy Irwin, Juv. Ct. Judge, Knox County, in Knoxville, Tenn. (June 15, 2018).

[22] Interview with Stephen Lloyd, Dir. of Journey Pure, in Murfreesboro, Tenn. (Aug. 9, 2019).

> I've had people who call the Tennessee Redline who have said, "what do I have to do? Get arrested in order to get treatment?" They know that that's the way to get treatment. You shouldn't have to go to jail to get treatment. You should be able, if you're ready to get treatment, to access the system without having to go through any kind of a court situation.[23]

The moral import of all of this was not lost on Dr. Lloyd: "how in the world is this possible? Really, we're the richest country in the world. How is this possible we've got to get somebody to go to jail to get treated?"

III. JAILS AS TREATMENT FACILITIES

Access to treatment through the criminal legal system is not just a mechanism for prioritizing slots. It also involves using the mechanisms of punishment as, in effect, part of treatment plans. One of the most striking pieces of this story is the role jails play in treatment. As detailed in Chapter 2, this is not a new story. Dr. Carolyn Sufrin, in her book *Jailcare: Finding the Safety Net Behind Bars* provides a window into this reality.[24] Sufrin provides a rich and nuanced description of how care is provided in that setting[25] and, as you might recall, argued that "jail is the new safety net".[26] Sufrin did her field research in San Francisco, at the women's jail where she was employed as a doctor.[27] While San Francisco is, in many ways, a world away from rural East Tennessee, Sufrin's conclusions were echoed in my interviews. Take, for example, Cindy Jones. In her practice, jail is essential because jail is where you go for detoxification. That's where you "clean 'em up." One story Cindy told made this clearer than anything else. She told us about a man in her community that suffers from severe alcoholism. He was on probation and on her caseload for many years when she was a probation officer. She told us that she kept a look out for when the whites of his eyes turned yellow. That's when she would file a probation violation – to get him arrested and put into jail – to give his liver a break. It turned out that detoxification in jail, without access to medication-assisted treatment, is standard practice in many jails throughout the area. My first glimpse into this reality came when reading a study, conducted in Tennessee, on detoxification of pregnant women and the effect on newborn health. The study, which I talk about extensively in the next chapter, looked at the

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[23] Video Interview with Mary Linden Salter, Exec. Dir., Tenn. All. of Alcohol Drug and Addiction Serv. (Jul. 3, 2017).

[24] *See generally* CAROLYN SUFRIN, JAILCARE: FINDING THE SAFETY NET FOR WOMEN BEHIND BARS (2017).

[25] *See id.* at 6–7.

[26] *Id.* at 5.

[27] *Id.* at ix-xi, 15.

outcomes for 301 women–infant pairs. Of the 301 women in the study, 108 "underwent acute detoxification involuntarily because the jail program in east Tennessee has no ability to provide opiates to prevent or perform an opiate-assisted medical withdrawal."[28]

Using jails as detoxification facilities also plays a key role in a program in Knox County, the home of Knoxville, Tennessee. Knoxville's jail has a program for inmates in which they undergo detoxification in jail and then are placed on Vivitrol. Vivitrol is an opiate-blocker and is one of the prime medications prescribed for the long-term management of substance-use disorder. It is administered monthly, as an injection. Vivitrol is favored by officials in the court and jail systems because, unlike drugs like suboxone, which is generally taken in pill form, it comes in a shot form, so it cannot be sold on the street. Commencing treatment with Vivitrol is difficult, though, because you have to be opiate-free for seven to ten days.[29] That's where the Knox County jail comes in. Individuals are fully detoxed while incarcerated and then put on Vivitrol. One official in the local criminal system explained it to be this way:

> [The prosecutor's office does] a criminal background check to determine if they're suitable candidates and then [a local treatment program] does a medical/psychological part of the testing to make sure that they're suitable to go into this treatment program. And if they pass both of those entrance tests, then what we do is we put them in the Vivitrol program. They're administered a Vivitrol shot in the Knox County Jail . . . .We leave them there a week to make sure they're not having any adverse reactions to that shot. Then they're transferred to [an outpatient program that] starts the treatment portion of that Vivitrol program.[30]

The import of this is astounding. Jails are established to hold defendants pretrial and are sometimes the place where defendants serve misdemeanor sentences. There is a world of constitutional strictures limiting the ability of the government to deprive someone of their liberty and hold them in a jail. But here, even if there is technical compliance with constitutional law, as a practical matter all that disappears. Criminalization of care means, in this case, that jail is no more than part of a treatment program.

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[28] Craig V. Towers, Jennifer Bell, Mark D. Hennessy, Callie Heitzman, Barbara Smith & Katie Chattin, *Detoxification from Opiate Drugs During Pregnancy*, 215 AM. J. OF OBSTETRICS AND GYNECOLOGY 374, 374 (2016).

[29] FOOD AND DRUG ADMIN., HIGHLIGHTS OF PRESCRIBING INFORMATION (1984), https://www.accessdata.fda.gov/drugsatfda_docs/label/2010/021897s015lbl.pdf.

[30] Interview transcript on file with author.

In a world of criminalized care, this might make a perverse sort of sense, but it's essential to remember that detoxification in jail, all too often without any medical assistance, while staggeringly common, is not medical treatment. I talked to Dr. Stephen Lloyd about the practice of detoxification in jail. He first explained his own practice for the management of withdrawal and detoxification:

> Dr. Lloyd: If I have somebody that comes in and needs strictly detox, use suboxone [a maintenance medication]. It's what it's indicated for. I get them stable [on suboxone], and then taper them off over a period of days, depending on their symptoms.[31]
>
> But in most cases that's not what's happening in jail. In jail, you might get other medications to ease the symptoms of withdrawal (although that's certainly not always the case), but you probably will not be tapered. You'll just detox. As to the ethics of this practice, Dr. Lloyd was unequivocal:
>
> Dr. Lloyd: What they are doing with opiate withdrawal is inhumane. You would not do it for another medical condition. It's the equivalent of withholding insulin from a diabetic, absolutely. There's no doubt or argument about that, yet they do it all the time.[32]

And jails are not just being used for detox. They can play a key role in other forms of "care." The final story Cindy told us takes us back a little closer to what started this research – the criminal system's response to women who use illegal substances during pregnancy. Cindy was clear about her court's policy for women like this. If a woman is on probation (either for fetal assault or for another crime) and came in pregnant and testing positive, the probation officer files a violation of probation, alleging a violation of the rule that they not take drugs while on probation. As Cindy describes it the judge will then "lock them up for safekeeping" for the duration of their pregnancies. As she put it, "many a baby has been saved that way." The public defender in the court confirmed this. In his words, the court would make its intentions very clear.

> Public Defender: [As the court puts it], "there's only one way I can protect this baby, if I revoke your probation and

[31] Interview with Stephen Lloyd, Dir., Journey Pure, in Murfreesboro, Tenn. (Aug. 9, 2019).

[32] *Id.*

> you stay in jail for the next few months then you won't be taking drugs in there."[33]

So jails are detox facilities and jails are where people are put for "safe-keeping," all ostensibly in the name of providing care and "saving babies." But as Dr. Lloyd said, this is not what doctors mean when they think about care. It is inhumane. It's likely unconstitutional,[34] it ignores everything we know about best practices for treatment, and it causes enormous harm.

IV. CARE AT A COST

As we have seen, a wide range of laws, rules, and practices lead women out of care systems and into the child welfare and criminal systems. And the systems themselves are, all too often, the place to get care. All these laws, rules, and practices work together as a whole, reinforcing and strengthening the criminalization of care. But, returning to the case study, the question then becomes, what happened in terms of care access? Did criminalized care "work" in the sense that women actually got access to care? And if it did, what do we know about the form of that care.

As explained in detail in Chapter 5, for the fetal assault defendants outside of the Shelby County Drug Court, the idea that prosecution leads to care was, more often than not, a smokescreen hiding a system focused primarily on punishment and debt collection. The women, the vast majority of whom were indigent, often faced months of incarceration and were saddled with significant debt, and for the majority of defendants, their case files contained no indication that treatment was offered at all. But it is the case that a minority of the defendants did in fact get referred to care as part of their criminal cases. It is to that story that this chapter turns next.

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[33] Interview transcript on file with author.

[34] Jailing pregnant women solely as a way to care for the fetus likely violates the constitution. Just like any other person in the United States, a pregnant woman has the right to be free from unwarranted detention and confinement and the right to reproductive decision-making. *See* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 149, 150 (2007). The Supreme Court has held that the state must present "an identified and articulable threat to an individual or the community" for the detention to be deemed constitutional. U.S. v. Salerno, 481 U.S. 739, 751 (1987). Further, the state must show by clear and convincing evidence that detention is necessary to protect a third party. *Id.* However, under *Roe,* the fetus is not a legal person, and therefore cannot legally be considered a third party. Roe v. Wade, 410 U.S. 113, 158 (1973). Thus, the state does not have a compelling interest in jailing pregnant women, and they are not able to demonstrate that confinement is the least restrictive alternative way to protect the states' interest. City of Boerne v. Flores, 521 U.S. 507, 515–16 (1997).

In the fetal assault cases, the relationship between treatment and punishment varied significantly based on geography. The majority of case files outside of Shelby County contain no notation at all indicating that treatment was offered or required as a part of their criminal case. When, in the minority of cases outside Shelby County, notations of treatment access appeared, it seemed almost haphazard. A woman might have been required to get a drug and alcohol assessment or might have been offered an inpatient bed after some period of incarceration, but overall, even in these cases, the focus was on plea agreements, probation, and debt collection. In contrast, the twenty-five women prosecuted in Memphis, the largest urban area in the state, appear to all have been offered a spot in the Shelby County drug court, offering what at least some believe to be a successful model merging care with prosecution. Problem-solving courts, like the Shelby County Drug Court, are supported by extensive public and private funds and embrace rather than reject the court's role in solving social problems. These courts are generally structured around intensive judicial supervision, have a detailed system of dolling out both rewards and punishments, have extensive case management teams, and are often closely allied with treatment providers. But as we will see, even this "best" form of criminalized care involved serious risks.

Before turning to those risks, it is important to note that, for both sets of women (those prosecuted in East Tennessee and those prosecuted in Shelby County), the files themselves reveal very little about the content of treatment itself. We can know that, at least in the view of whomever was taking notes, treatment was offered, and we can know a lot about what happened to the woman in the criminal case, but we know little to nothing about the content of the treatment.

Nevertheless, the files do shed light on what happened in court, both to the women who successfully completed whatever treatment was assigned by the court and to the women who, in the court's view, did not. In both regions, the stories of those who completed are often a harder story to tell from the criminal case files because, in least in some of these cases, the records of their prosecutions no longer exist. This is likely due to the right, in limited circumstances, to have records destroyed (or expunged) if a case is dismissed after completion of a required program.[35] So for example, in Shelby County twelve of the twenty-five women who were prosecuted for fetal assault no longer have public records, indicating that they likely

[35] TENN. CODE ANN. § 37-1-153 (Westlaw through 2022 Legis. Sess.)(allowing the expungement or destruction of the public records of dismissals, cases resolved under diversionary plans and, in limited circumstances, convictions. The result, for the purposes of this research, is that the public records of these prosecutions were not available).

completed the drug court program and had their records expunged.[36] Nikki Brown, who testified in the legislature that she was thankful for the drug court program, is one of those women. And Ms. Brown was not alone. Some of the women who spoke to the SisterReach researchers indicated that the longer-term residential and outpatient treatment services available through the Shelby County Drug Court were beneficial.[37] Similarly, in Sullivan County, the District Attorney informed me that the public records of ten women's cases were expunged because they successfully completed the requirements of probation. Some of those women may have successfully completed treatment. So, to the extent that the women succeeded and potentially therefore did not face punishment, that may well be a positive outcome. But we do not know what happened. Some may have been jailed along the way to completion and others may still have paid a price in loss of children to DCS. But all faced the risk that, had they failed, punishment was the default. To get a sense of the risks women faced in accessing treatment inside this system we can look to the files of women who appear to have gotten offers of treatment but for whom that treatment did not lead to dismissal of their charges and destruction of the court files. This takes us to the Shelby County Drug Court. As we learned in Chapter 1, this is the court that many believe was the driving force behind the fetal assault law and was the model that supporters of that law referred to when suggesting that the fetal assault law would lead to care.

Twenty-five women were prosecuted in Shelby County for fetal assault during the just over two years that the law was in effect. Twenty-one of those women were accepted into the Shelby County Drug Court program and attempted to complete it. Twelve of those women appear to have successfully completed drug court. For three of these women the files exist but their cases end in dismissal, an entry that indicates successful completion. For the remaining nine I obtained their names and evidence of their prosecution early in their cases, but by the time I pulled public records more than a year later, the public records no longer existed, indicating that they had successfully completed the program and had had their records

[36] Although these records were ultimately expunged, my awareness of their existence resulted from the timing of when data was accessed for this project. I accessed data about the Memphis cases twice, once at the time when these cases were still pending, and therefore when the records were available, and again later when they no longer appeared in the court management system. This indicates that these women likely completed their cases, moved to expunge their records, and were given this relief.

[37] Orisha Bowers, Jakiera Stewart, Cherisse Scott, Terri-Ann Thompson, Carmela Zuniga, Lynn Paltrow & Aarin Williams, *Tennessee's Fetal Assault Law: Understanding its Impact On Marginalized Women*, SISTERREACH (2020), https://www.sisterreach.org/uploads/1/2/9/0/129019671/full_report.pdf.

destroyed. Nine other women tried to participate but did not complete the program.

The Shelby Court case files contain a full listing of every event in the case. What is immediately striking is the number of court appearances. These appearances are often described as a form of "judicial probation."[38] It is through this frequent contact that the court, supported by a team of case managers, counselors, and lawyers, personally oversees the defendants' cases, offering encouragement as well as sanctions. This all sounds fairly reasonable, but in practice it can have some very harsh consequences.

To get a sense of the risks women faced when accessing treatment through the drug court, take a look at the case of Lennon Mason, a low-income white woman prosecuted for fetal assault in Memphis. Ms. Mason gave birth to a daughter in 2015. Both Ms. Mason and her child tested positive for cocaine at birth. She was referred to treatment as a part of her DCS case, but the Petition alleges that she "failed to meet her goals" and was dismissed from the program that DCS suggested. Ms. Mason was charged with fetal assault, arrested, and then, like all the Shelby County defendants, held without bail until her first appearance before Judge Dwyer, the judge in charge of the Shelby County Drug Court.

Ms. Mason had several court appearances during the first months of her case. Finally, twenty-two days after her arrest, she pled guilty and was sentenced to nine months' incarceration. Although it is not the focus here, it is important to remember that, given the dearth of solid scientific evidence that cocaine exposure causes harm, it may well have been very difficult for the state to convict Ms. Mason of this crime. Nevertheless, Ms. Mason, like the vast majority of the women charged with fetal assault, pled guilty.

It was only after that plea that this sentence was suspended to enable to her to participate in the court's drug treatment program. Upon agreeing to that participation, she was released from jail. Between that day in late 2015 and mid-2016, when she ultimately failed to complete drug court and was sentenced, she went before the court fifty-three times, all but one of which was a labeled in her file as "Drug Treatment Program." Along the way, she missed a few court dates. Each time that happened a warrant issued for her arrest, and she was, once again, jailed until her next court appearance. All told, Ms. Mason spent an additional fifty days, or nearly two months, in jail. Her appearances before the court were presumably standard drug court appearances, in which she met with team members (drug court counselors, attorneys and the Judge) to monitor her progress in treatment. That treatment itself was likely provided by the Cocaine and Alcohol Awareness Program, the treatment program most closely aligned to the Shelby County

[38] REBECCA TIGER, JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM 13 (2012).

Drug Court. Ultimately, after she missed court the second time, Ms. Mason's participation in drug court was terminated. At that point she was sent to jail to serve the remainder of her nine-month jail sentence. She was also required to pay costs which, by the end of her case, totaled $1,914.50.

Take a moment and think about this set of facts. This low-income woman, who if we believe the court, was struggling with substance-use disorder, was required to be in court fifty-three times over the course of about nine months – somewhere between once and twice a week. If she missed a court appearance she was arrested and jailed, either separating her from her child or making it all the more difficult for her to be reunited with that child. Ultimately, she spent two of the nine months, or just under a quarter of her "treatment," incarcerated. And when that failed, she just went to jail and came out owing the court nearly $2,000.

The other women who participated in but did not succeed in drug court faced similar consequences. Like Ms. Mason, they all pled guilty at the start of their cases and agreed to a sentence they would serve if they did not succeed. They also, like her, served time in jail during their case – an average of thirty-seven days in jail prior to the final imposition of the sentence. Three of them ultimately served sentences from six months to a full year in jail. Five others were transferred to an additional year of regular probation. In total their costs averaged $2,491. Notably, it was clear that these women could not afford to pay those costs. At the time I pulled their files, generally more than a year after their cases were over, they owed an average of $2,461 to the court. So, on average, the women were able to pay only $31 toward their costs in a year.

This data reinforces much of the literature on problem-solving courts. They are intensive and require a good deal of their participants. They use jail as a sanction, often referred to in the literature as shock incarceration, and impose punishments that are often harsher than the punishments a defendant might have received in a more standard court. While the opportunities for treatment are often present, the sanctions for failure are harsh. And for the women who do not complete the program, punishment prevails.

These costs – in jailing and fees, in punishment and family separation – are the price defendants pay for accessing care inside a criminal system. As it turns out, this price is not a fluke. In fact, it's baked into the model. Judge Don Arnold, a judge in Washington County, Tennessee, runs a recovery court. During our interview he patiently answered my questions about the structure of recovery courts, and in particular the way that punishment is related to treatment. I was particularly curious about whether individuals were at risk of higher punishments if they agreed to go to recovery court. The answer was an unequivocal yes. As he explained,

> At the time they are brought into court, they plead guilty to the offense, and usually we set a high sentence . . . . When I take their plea, I take their plea of guilty, and I explain to them ahead of time, when you plead guilty, I'm going to sentence you now . . . . If they don't successfully complete the recovery court, I'll put them in jail the day they're brought back. They'll serve their full time.[39]

Judge Arnold was clear. "The sentence is less if you're not in recovery court than it would be if you go to recovery court." The program is structured, intentionally, to exact a high price from the defendant who fails. Care at a cost is baked in. This means that a defendant who agrees to go to recovery court is taking a huge risk. If they pled guilty in regular court, they would serve one, shorter sentence, but if they fail recovery court the sentence will be longer. And Judge Arnold is not doing anything unusual here. This practice, of setting harsher sentences for an individual in a problem-solving court than they would get for the same charge in a regular court, is fairly standard.[40]

Even in the best of circumstances, when the court is organized to conform to best practices around problem-solving courts, the price of care is high. If you succeed then perhaps, like Ms. Brown, you might be "grateful for the program." But if you fail you face harsh consequences: you pay, in incarceration, in fines, in separation from your family and community and in many other ways that incarceration and conviction can make life tremendously difficult. Criminalized care, it turns out, comes at a high cost. But that is not all. As we will learn in the following chapter, criminalization is not only costly, but it can, at times, corrupt the form of care itself.

The book goes on, from this point, to focus first on the impact of criminalization on the substance and quality of care. The book concludes with a set of detailed recommendations to begin to decouple punishment from care and build systems that support both reproductive justice and an expansive definition of care.

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[39] Interview with Judge Don Arnold, Johnson City Gen. Sessions Ct. Judge, in Jonesborough, Tenn. (July 26, 2018).

[40] Josh Bowers, *Contraindicated Drug Courts*, (PUB. L. & LEGAL THEORY, Working Paper no. 180, 2007) (citing a study of NYC drug courts clearly indicating more punishment than traditional court dispositions, even when including graduates).