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## BOOK REVIEW

### FEMINIST SCRIPTS FOR PUNISHMENT

THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION. By Aya Gruber. Oakland, C.A.: University of California Press. 2020. Pp. xii, 288. \$29.95.

*Reviewed by I. India Thusi\**

In her new book, *The Feminist War on Crime*, Professor Aya Gruber provides a critique of feminists, who have sought political vindication through a governance of punishment.<sup>1</sup> Professor Elizabeth Bernstein coined the term “carceral feminism” to describe the feminist commitment to “a law and order agenda and . . . a drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals.”<sup>2</sup> While feminist movements have expanded the opportunities available to women and girls, too often their means for achieving these accomplishments have been paved on a path of the privileges of feminist elites.<sup>3</sup> These privileges are immune from the pressures of multiple forms of subordination that form the interstitial web of inequality that many other women encounter.<sup>4</sup> These other women are also Other<sup>5</sup>

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\* Associate Professor of Law, Delaware Law School. I am grateful to Jamelia N. Morgan and Ngozi Okidegbe for thoughtful comments on an earlier draft, and to Marisa Piccareto for careful research assistance.

<sup>1</sup> See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 582 (2009) (“Some feminist scholars have begun to express grave concern that ‘a punitive, retribution-driven agenda’ now constitutes ‘the most publicly accessible face of the women’s movement.’” (quoting Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 158 (1998))).

<sup>2</sup> Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* DIFFERENCES, Fall 2017, at 128, 143.

<sup>3</sup> See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (critiquing gender essentialism, which is the “notion that there is a monolithic ‘women’s experience’ that can be described independent of other facets of experience like race, class, and sexual orientation”).

<sup>4</sup> See Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 41–42 (1999) (“The traditional feminist assumption is that gender binds women together. In fact, gender divides them.” *Id.* at 41.).

<sup>5</sup> Professor Edward Said introduced the concept of “the Other” in his seminal piece *Orientalism*, and described it as “a Western style for dominating, restructuring, and having authority over the Orient” in particular. See EDWARD W. SAID, *ORIENTALISM* 3 (1978). His analysis has been applied to subordinated groups more generally. In this piece, I use the term “Other women” to specify women who face subordination because of their gender identity and because of factors in addition to, and in interaction with, their gender identity in the United States. These Other women include Black, Indigenous, Latinx, Asian, poor, disabled, queer, and other women not centered in the mainstream feminist discourse.

women, in that they are often outsiders in American society, not just because they are women, but also because they are women of color, poor, immigrant, less educated, disabled, and/or queer.<sup>6</sup> The positionality of these Other women is important because they often have personal experiences that make engagement with the state apparatus for punishment undesirable.<sup>7</sup> As Professor Beth Richie documents, Black feminists advanced the concerns of the Other women through their activism for state responses that address the systemic, material conditions that make women vulnerable to violence, rather than through engagement with the technologies of punishment.<sup>8</sup> Other women have experienced state violence, either through the inherited trauma that runs in their blood from the violence against their ancestors, or through their daily experiences of everyday subordination within their communities. White, elite feminists have often missed their perspectives.<sup>9</sup> Or, at times, they have outright demeaned their perspectives (p. 56). Either way, the path to gender equality has had an unsettling entanglement with carcerality.<sup>10</sup> And the logics of punishment and imprisonment have informed feminist demands for reforms.<sup>11</sup> This feminist fascination with the carceral is the subject of Gruber's book.

*The Feminist War on Crime* is a call to action to millennial feminists to define a new, anti-essentialist feminist script that rejects incarceration, embraces abolitionism, and seeks to improve the lives of all women (pp. 5, 192). Gruber offers the insight that prisons are no solution to domestic violence or sexual crimes. While people often wonder about the dangerous few when confronted with abolitionist arguments like

<sup>6</sup> See Harris, *supra* note 3; Shirley Lin, "And Ain't I a Woman?": Feminism, Immigrant Caregivers, and New Frontiers for Equality, 39 HARV. J.L. & GENDER 67, 68 (2016) ("[O]nly a few scholars have advocated for the application of feminist legal theory to immigration, much less to the dilemma of the ever-widening gulf between the rights afforded to citizens and non-citizens.").

<sup>7</sup> See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004) ("Given the history of police brutality against [B]lacks, many [B]lack women are reluctant to enlist law enforcement to protect them."); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 172 (1994) ("In spite of the best intentions of many domestic violence activists, who are mostly white women, the interests of many Black women are not served by asking the state for protection such as mandatory arrest laws."); Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014), <https://www.jacobinmag.com/2014/10/against-carceral-feminism> [<https://perma.cc/PWZ5-CKN3>].

<sup>8</sup> BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 148–51 (2012).

<sup>9</sup> See Harris, *supra* note 3.

<sup>10</sup> See Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 244 (2020) (discussing carceral feminism and framing it as part of a "progressive punitivism," which is the trend to "'level up' the punitive apparatus to include targets that the left dislikes").

<sup>11</sup> See Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1557–58 (2014) (arguing that the regulation of sexual harm is too expansive); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 7 (2006) (noting that "the protection order now operates squarely in the arsenal of criminal enforcement").

hers, radical feminists of color have long been adopting alternatives for addressing gender-based violence without expanding the reach of state violence. Groups like INCITE!, Survived & Punished, Mijente, the Movement for Black Lives, and Critical Resistance adopt an intersectional approach to gender-based violence that acknowledges the related harm of state violence. They seek accountability for violence against women without depending upon incarceration. Feminists should more broadly embrace their strategies and techniques.

This Book Review proceeds in three parts. Part I describes the mainstream feminist approach to punishment through a discussion of the feminist script for punishment, which furthers a dominant narrative that promotes prosecution and incarceration as remedies for gender-based harms. Part II describes the harms of this feminist script, which has relied on racialized conceptions of victim, perpetrator, and punishment to expand the reach of punishment for gender-based crimes. Part III embraces Gruber's call for feminists to reframe feminism and begins a discussion of how feminists can reject the feminist script for punishment in favor of a feminist script for healing and abolition. It discusses the activism and organizing of radical feminists of color of yesteryear and today. Part III articulates a path forward for feminists that addresses Gruber's critiques of the current feminist war on crime. Gruber asks feminists to adopt a "neofeminist" approach that will "shift the winds so that feminism sails in the direction of greater justice" for everyone (p. 18). We can find such an approach in the work of these activists.

## I. THE FEMINIST SCRIPT

*The Feminist War on Crime* provides a comprehensive history of the relationship between feminism and mass incarceration. The book "examines historical feminist reform efforts to show that the connection between the feminist antiviolence agenda and incarceration is not natural, inevitable, or desirable" (p. 15). *The Feminist War on Crime* begins with an overview of the historical relationship between racism, puritanism, classism, and feminism in regulating domestic violence and rape.

Gruber's historical analysis of the entanglement between feminism and incarceration illustrates that the feminist rage against the patriarchy has at times transformed into retributivist impulses to punish, which contradict feminist values and exacerbate social injustice.<sup>12</sup> Gruber recounts several examples of feminist campaigns that advanced a feminist script for punishment. Many of these campaigns were motivated by the

<sup>12</sup> See Nadia B. Ahmad, *Re-reading Anita Bernstein's The Common Law Inside the Female Body from the Bottom of the Well: Analysis of the Central Park Five, Border Drownings, the Kavanaugh Confirmation, and the Coronavirus*, 61 B.C. L. REV. ELEC. SUPPLEMENT I-69, I-74 (2020) ("[T]he criminal justice system needs to recognize the point of view of the 'legal other.' From that angle, it appears that the legal system protects women's honor and dignity most fervently when they are victims and the alleged wrongdoers are people of color, particularly [B]lack men.").

laudable aim of eradicating violence against women and improving women's ability to lead safe and healthy lives. Gruber examines the "through the night" campaigns that sought to eliminate rapes on college campuses in the 1970s in Chapter Two. Chapter Three features the movement to expand legal recognition of the harms of domestic violence during the 1970s and 1980s. Chapter Four examines the feminist movement to abolish pornography and prostitution. Chapters Five and Six examine the more contemporary movements to address the harms of sexual assault on college campuses.

All of these campaigns within the feminist movement deal with different forms of actual or asserted harms against women. They occurred in different decades and had various leaders. But they all share a common script about punishment. They developed similar story lines about women. They painted victims and villains that look remarkably similar through the decades. They subscribe to the same dominant story about the role of the criminal law as a sword against perpetrators.<sup>13</sup> While the individual characters in the script vary and are not always identical, many of the elements that advance their pleas for additional punishment are remarkably similar. These stories follow the same script.<sup>14</sup>

#### A. Defining the Feminist Script for Punishment

This section outlines the elements of this feminist script for punishment, which is the dominant narrative that feminists use to advance criminal governance for feminist causes.

1. *The Victim.* — A crucial element of the feminist script for punishment is the ideal victim.<sup>15</sup> Gruber discusses the ideal victim in Chapter Four. The ideal victim is vulnerable and weak. She is often

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<sup>13</sup> See, e.g., I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1349–50 (2010) (discussing the "white letter law of rape" that "governs the application of the black letter law, determining its presumptions and reallocating its burdens of proof and persuasion," and "informs which complainants are believed, which suspects are prosecuted and convicted, and the severity of their punishment").

<sup>14</sup> See David Gurnham, *A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts*, 19 NEW CRIM. L. REV. 141, 142 (2016) ("[W]e must be wary of the carceral feminist tendency to frame traditional sexual script enactment as essentially and necessarily coercive and victimizing.").

<sup>15</sup> See Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 322 (2020) ("Any process built on the assumption that victims are a monolithic group who all want and need to see the offender convicted and harshly punished is deeply flawed. But advocates for victims' rights reform have historically operated from this premise."); Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 162 (2016) ("The paradigm victim of campus sexual assault that emerges from media stories is a white, heterosexual female who experiences nonconsensual penetration, often when she was incapacitated due to intoxication.").

helpless and requires rescuing.<sup>16</sup> She is an obvious she.<sup>17</sup> She is the everywoman whose story can be a symbol for future advocacy to prevent others from enduring the same plight as she has endured. She is battered, raped, or beaten.<sup>18</sup> She is innocent, never guilty.<sup>19</sup> She cares about autonomy, but not so much that she allows other women to exercise theirs in ways that compromise her own.<sup>20</sup> She is usually middle class, although implicitly, as demonstrated by her lack of concern about the material conditions that impact women from lower socioeconomic classes.<sup>21</sup> She is just not worried about poverty.<sup>22</sup> She is not worried about rent. She has a “pristine” face that communicates victimhood, which generally means that she is White.<sup>23</sup> She cares about privileged spaces like college campuses and Hollywood studios, while fast-food restaurants and grocery stores are often afterthoughts to her.<sup>24</sup> She does

<sup>16</sup> See Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1199 (2010) (discussing the connection between case law that paternalistically considered women’s trauma in choosing to obtain an abortion when considering its legality and feminist discourses that focused on women’s trauma and victimhood); Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 121 (2004).

<sup>17</sup> See Jacquie Andreano, Note, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 CALIF. L. REV. 1047, 1052 (2020) (noting that the feminists have promoted narratives that “have resulted in the erasure of victims who do not fit into the accepted paradigm”).

<sup>18</sup> See Hannah Brenner, Kathleen Darcy, Gina Fedock & Sheryl Kubiak, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 533 (2016) (“The ‘ideal victim’ is ‘sort of a public status of the same type and level of abstraction as that of a ‘hero’ or ‘traitor.’” (quoting Joris Van Wijk, *Who Is the Little Old Lady of International Crimes? Nils Christie’s Concept of the Ideal Victim Reinterpreted*, 19 INT’L REV. VICTIMOLOGY 159, 160 (2013))).

<sup>19</sup> *Id.*

<sup>20</sup> See Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1076 (2006) (“The white battered woman identity . . . renders women of color invisible, and subjects victims of domestic violence who are not white to further abuse within a system purporting to exist to help them.”).

<sup>21</sup> See *id.* at 1078, 1081.

<sup>22</sup> Cf. Tara Urs, *Coercive Feminism*, 46 COLUM. HUM. RTS. L. REV. 85, 137 (2014) (challenging dominance feminism’s reliance on an ideal victim that makes judicial relief difficult for “women who are not white, middle-class, heterosexual, or helpless, but nonetheless seek protection from courts” (quoting Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-essentialist Proposal*, 31 WASH. U. J.L. & POL’Y 39, 45 (2009))).

<sup>23</sup> Gruber, *supra* note 1, at 622; Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women’s Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 439–40 (2016) (“[V]ictim narratives have been effective in mobilizing resources and attention to assist some women affected by sexual exploitation and coercion.” *Id.* at 439.).

<sup>24</sup> As Professor Deirdre Bowen recognizes: “It is no surprise that the #MeToo movement gained traction with a white, famous, wealthy woman, Rose McGowan, in 2017. When, in fact, an African American social activist, Tarana Burke, coined the phrase ‘Me Too’ back in 2006.” Deirdre M. Bowen, *#NotMe: A Commonwealth for Mankind*, 57 U. LOUISVILLE L. REV. 587, 606 (2019). Bowen goes on to note: “Centuries of sexual abuse in the workplace, be it the field, the Equal Employment Opportunity Commission office, the factory floor, the fast food restaurant, or the home, did not garner the sense of urgency that #MeToo did. Women of color had spoken up for centuries.” *Id.* at 606–07; see Annelise Orleck, *#MeToo and McDonald’s*, JACOBIN (Sept. 20, 2018), <https://www.jacobinmag.com/2018/09/me-too-mcdonalds>.

not have a complicated relationship with the perpetrator (pp. 14–15). She is merely a victim that needs to muster up the strength to walk away from the perpetrator.<sup>25</sup> She is a Megan,<sup>26</sup> She is a Jessica.<sup>27</sup> She is a Jennifer.<sup>28</sup> She is a symbol that the media cares about and will deify.<sup>29</sup> She only wants sex when she has affirmatively stated so (p. 14). She doesn't play games with sexual partners. She calls the police for help without worrying that they might mistake her for the perpetrator.<sup>30</sup> When she sees the police, she feels relieved because she knows that someone is there to protect her. She is Farrah Fawcett when she played the part of a battered woman in *The Burning Bed*, which "became a symbol of the battered women's movement" (p. 95). She is the every-woman.

2. *The Villain.* — The script also relies on the conception of an ideal villain.<sup>31</sup> He is a perpetrator, and he is often a stranger.<sup>32</sup> He is a dark, shadowy figure that lurks behind the bushes preying on innocent girls.<sup>33</sup> He is the figure that women fear at night when walking home by themselves.<sup>34</sup> He is a he.<sup>35</sup> And he represents the patriarchy. He is the

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jacobinmag.com/2018/09/mcdonalds-strike-metoo-sexual-harassment-organizing [https://perma.cc/4QYU-8T6B].

<sup>25</sup> See Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531, 532–33 (2013) (“The stereotype against which victims are judged is that of the perfect victim: a fictive construct that floats ghost-like between historical, social, and subjective reality, and is generally identified as passive, dependent, white, middle-class, heterosexual, and female.” (footnote omitted)).

<sup>26</sup> H.R. REP. NO. 105-557, at 32 (1998) (noting the “passage of Megan’s Law (Pub. L. 104-145), which amended the community notification provisions of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Pub. L. 103-322), to require the release of relevant information that is necessary to protect the public concerning registered sex offenders”).

<sup>27</sup> Sexual Predator Punishment and Control Act: Jessica’s Law (SPPCA), 2006 Cal. Legis. Serv. Prop. 83 (West).

<sup>28</sup> Jennifer’s Law, 42 U.S.C. § 14661 (2000).

<sup>29</sup> Tara McKelvey, *Cleveland Abductions: Do White Victims Get More Attention?*, BBC NEWS (May 9, 2013), <https://www.bbc.com/news/magazine-22441124> [https://perma.cc/NCD5-PANY].

<sup>30</sup> Cf. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 853, 858–59 (2013) (arguing that modern rape law rests on assumptions that the victim is “facially good and thus deserving of the law’s protection,” *id.* at 858). But see Bernstein, *supra* note 2, at 143.

<sup>31</sup> See MacDowell, *supra* note 25, at 547 (“A victim requires a perpetrator, an identity that is constructed in opposition to the perfect victim. Stereotypes about [Bl]ack men and Latinos render them more likely to be perceived as perpetrators of crime, including domestic violence, than white men.”).

<sup>32</sup> See Capers, *supra* note 30, at 862 (detailing how “[p]atriarchal stories” shape the prosecution of sexual assaults).

<sup>33</sup> See Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43, 64 (1992) (“Archetypal rapes have two qualities . . . : they are by a stranger, and they are by a Black man.” (citing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 81 (1987))).

<sup>34</sup> Gruber, *supra* note 1, at 621–22.

<sup>35</sup> See Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103, 103 (1983) (“The history of rape in this country has focused on the rape of white women by Black men.”).

epitome of male domination over women.<sup>36</sup> He may be privileged and entitled but is not always so. What is clear is his sense of entitlement over women's bodies.<sup>37</sup> He is a threat to all women, and he will repeat his conduct.<sup>38</sup> He is an offender, and only an offender. He offends women's respectability by exploiting their bodies, and he offends common decency.<sup>39</sup> He should be treated like a pariah because he is not capable of redemption. He is merely a violent actor, and women should be warned about him. He is out to violate women's bodies and will do so at any cost. He needs to be stopped and punished through all the tools available within the law. He is never a victim.<sup>40</sup> He is not complicated. He is just evil. He is the pimp who trolls for underage girls to sell on the dark web.<sup>41</sup> He is the rapist who is hiding in the bushes waiting for a weak woman to drag into the bushes for a violent rape. He is the drunk husband who routinely gives his wife black eyes and broken ribs. He is the villain, and criminal laws should punish him.

3. *Racist Tropes.* — The feminist script for punishment also selectively exploits racist tropes to serve its goals. The threat of Black criminality has been a common tool to galvanize support to criminalize conduct in the United States.<sup>42</sup> Feminists advocated for harsher rape laws

<sup>36</sup> Cf. Bowen, *supra* note 24, at 605.

<sup>37</sup> See Claire Houston, *The Trouble with Feminist Advocacy Around Child Victims of Domestic Violence*, 39 WOMEN'S RTS. L. REP. 85, 89 (2018) (critiquing the feminist adoption of criminal law techniques to address male domination).

<sup>38</sup> Guy Hamilton-Smith, *NY Gov. Cuomo's Terrible, Horrible, No Good, Very Bad Plan to Protect Your Kids*, THE APPEAL (Mar. 19, 2018), <https://theappeal.org/ny-gov-cuomos-terrible-horrible-no-good-very-bad-plan-to-protect-your-kids-e206c6bfada> [https://perma.cc/VZ6Q-4KNK] (noting that politically popular sentencing and registry regimes "operate on the assumption that sexual offending is perpetrated by serial predators roaming the streets"); Jessica Testa, *A Judge Wanted to Give a Sex Offender a Second Chance. Prosecutors Want Him in Prison*, BUZZFEED NEWS (Nov. 12, 2018, 7:16 AM), <https://www.buzzfeednews.com/article/jtes/sex-offender-sentencing-michael-hill-metoo> [https://perma.cc/838S-BLRS].

<sup>39</sup> Jill Filipovic, *It'll Never Be the Right Time for Famous Sexual Predators to Make Their Comebacks*, TIME (May 10, 2018, 7:01 AM), <https://time.com/5272331/let-us-now-punish-famous-men> [https://perma.cc/J9z2-HRQV].

<sup>40</sup> See Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 153–61 (2001) (discussing the "[m]yth of the [c]razed [r]apist," *id.* at 153). But see DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 4 (2019).

<sup>41</sup> Josh Kovner, *Out of the Shadows: Sex-Trafficking a Threat to Runaway Connecticut Teens*, HARTFORD COURANT (Dec. 12, 2014, 8:09 PM), <https://www.courant.com/news/connecticut/hc-child-trafficking-exploitation-p-1214-20141212-story.html> [https://perma.cc/8DEZ-SXZT].

<sup>42</sup> See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 20 (2004) ("The myth of innate [B]lack criminality served both to dehumanize African Americans during slavery and to justify the brutal means of social control needed to maintain white dominance after the end of slavery."); Nick J. Sciallo, *The Ghosts of White Supremacy: Trayvon Martin, Michael Brown, and the Specters of Black Criminality*, 117 W. VA. L. REV. 1397, 1398 (2015) (discussing "the ways in which [B]lack criminality haunts United States law as white supremacy's avatar").

by warning about the dangers of “superpredators” during the 1990s.<sup>43</sup> Criminologists wrongly claimed that there was a superbreed of teenagers who were a menace to society.<sup>44</sup> Proponents of this theory claimed that superpredators were extremely violent and threatened the social order.<sup>45</sup> When Linda Fairstein, the prosecutor in the “Central Park Five” case, and police rounded up a group of miscellaneous Black and Brown teenagers in response to a Central Park jogger’s rape, the media responded by sensationalizing the rape, not condemning the racial profiling.<sup>46</sup> The teenagers were portrayed as dangerous and menacing in the popular media, and there was little concern about how these children were processed through the system. They were merely Black threats.<sup>47</sup> The threat of Black men to White women is a key feature of a White supremacist society.<sup>48</sup>

The threat is not only to the virtuosity of the White woman and her body. It is a threat to White male patriarchal interests in the ownership

<sup>43</sup> See Chrysanthi Leon, David L. Burton & Dana Alvare, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 WIDENER L. REV. 127, 146 (2011) (“[Political scientist John DiJulio] and others who warned of juvenile superpredators gave credence to a popular fear of dangerous youth. This particular cycle of the moral panic also focused on sexual abuse, a topic that rose to public prominence due to feminist and child protection advocacy efforts that paid off beginning in the 1970s.”).

<sup>44</sup> *Id.* at 129.

<sup>45</sup> Clyde Haberman, *When Youth Violence Spurred “Superpredator” Fear*, N.Y. TIMES (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-gos.html> [https://perma.cc/T226-EZM6].

<sup>46</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1267 (1991) (“Given the chilling parallels between the media representations of the Central Park rape and the sensationalized coverage of similar allegations that in the past frequently culminated in lynchings, one could hardly be surprised when Donald Trump took out a full page ad in four New York newspapers demanding that New York ‘Bring Back the Death Penalty, Bring Back Our Police.’” (quoting William C. Troft, *Deadly Donald*, UPI, Apr. 30, 1989)); Susan Hanley Kosse, *Race, Riches & Reporters — Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 253 (2007) (“The media demonized masculine [B]lacks, making them appear like animals . . . .”); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 862–63 (2010) (“Although juvenile crime rates had begun to rise several years earlier, it was not until the infamous ‘Central Park Jogger’ case in 1989 that the media began to coalesce around a juvenile crime narrative. . . . On April 22, 1989, . . . the *New York Times* introduced a new term [‘wilding’] into the crime lexicon . . . [and in] New York City newspapers alone, the term ‘wilding’ would appear 156 times in articles over the next eight years.”); Scott Simon, Opinion, *Ex-prosecutor Faces Harsh Criticism After “Central Park 5” Netflix Series*, NPR (June 8, 2019, 8:53 AM) <https://www.npr.org/2019/06/08/730810667/opinion-central-park-5-prosecutor-faces-harsh-criticism-after-netflix-series-air> [https://perma.cc/VUL6-AB5K].

<sup>47</sup> Moriearty, *supra* note 46; see Haberman, *supra* note 45.

<sup>48</sup> See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-racist Politics*, 47 BUFF. L. REV. 1, 82–83 (1999) (“Black male heterosexual practice, though encouraged by white supremacist society to increase the number of slaves, was at the same time stigmatized by white males who saw [B]lack men as a threat to their patriarchal domination over white women.”).

of White women's bodies.<sup>49</sup> Their bodies are for White men's consumption, making claims of rape against Black men particularly threatening to White masculinity. The exploitation of this threat is well known in a number of high-profile constitutional law cases. In the Scottsboro case of *Powell v. Alabama*,<sup>50</sup> two White sex workers accused a group of Black teenagers of raping them rather than risk federal prosecution for engaging in immoral conduct.<sup>51</sup> One of the women recanted her claims of rape, yet the Black boys were repeatedly convicted of rape in a series of trials.<sup>52</sup> Collectively, they served 104 years in prison.<sup>53</sup> Emmett Till was a fourteen-year-old boy accused of whistling at a White woman.<sup>54</sup> As a result, a lynch mob murdered him in 1955 to protect the innocence of White womanhood.<sup>55</sup> In the case of the "Central Park Five," which involved the rape of a White woman, the media described the boys accused of her rape as "savages," "animals," "wolf packs," and "wilding."<sup>56</sup> Clarence Moses-El spent twenty-eight years in prison for rape after a White woman claimed he raped her because she saw his face in a dream.<sup>57</sup> When, after two decades of being incarcerated, Moses-El finally raised the money to have the DNA evidence from the crime in his case tested, police ignored a court order and threw away the DNA evidence before it could be tested.<sup>58</sup> Nevertheless, a White woman's bare assertion that a Black man raped her based on a dream was credible enough to sustain his incarceration.<sup>59</sup> Although he was eventually released in 2015, his case demonstrates the power of the

<sup>49</sup> *Id.*; see also Emily Field Van Tassel, "Only the Law Would Rule Between Us": *Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 917 (1995) (describing how "White men could continue their quasi-legal prerogative of sexual domination of Black women while still maintaining control over Black male/White female non-marital relationships through the threat of lynch law").

<sup>50</sup> 287 U.S. 45 (1932).

<sup>51</sup> *Id.* at 49–50; Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 51 (2000).

<sup>52</sup> See Klarman, *supra* note 51, at 66.

<sup>53</sup> See Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME & JUST. 49, 51 (2015).

<sup>54</sup> See Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2116 (2005).

<sup>55</sup> See Ronald Turner, Essay, *Remembering Emmett Till*, 38 HOW. L.J. 411, 418–20 (1995).

<sup>56</sup> N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1348 (2004) ("The allusions to the Central Park Five as animalistic savages were unmistakable. As an initial matter, 'Wilding,' the very term by which press reports and eventually the general public referred to the crime, connotes savagery."); Kosse, *supra* note 46, at 250.

<sup>57</sup> Rick Sallinger, *Clarence Moses-El Paid Nearly \$2M for Wrongful Conviction, Imprisonment*, CBS DENVER (Feb. 14, 2019, 8:25 PM), <https://denver.cbslocal.com/2019/02/14/clarence-moses-el-wrongful-conviction-imprisonment/> [https://perma.cc/QAF9-9XPL].

<sup>58</sup> *Discarded DNA & the Case of Moses-El*, THE EXONERATION PROJECT, <https://www.exonerationproject.org/blog/discarded-dna-the-case-of-moses-el> [https://perma.cc/HF22-C7ZW].

<sup>59</sup> See Sallinger, *supra* note 57.

dominant narrative about Black men and White women. In May 2020, Christian Cooper, a Black man who was bird-watching in Central Park, asked Amy Cooper, a White woman, to put her dog on a leash. Upset by this request, Amy frantically called the police and claimed that she was being threatened by an “African American man.”<sup>60</sup> By calling the police, Amy was deploying the techniques of this narrative to discipline Christian for stepping out of line. This story of the menacing Black man as a legitimate threat to White women is a key component of the feminist script for punishment.

### B. The Feminist Script in Action

Early feminist campaigns reflect elements of the feminist script for punishment. In Chapter One, Gruber also describes how, from slavery to the Progressive Era, early feminist efforts to address rape relied upon depictions of White women as victims, emphasized the threat of Black men, and ignored the various forms of sexual violence that women of color experienced. For example, Gruber describes the early campaigns to eliminate sex trafficking in the early 1900s. These campaigns addressed the moral panic about White women engaging in prostitution and aimed to end “White slavery” (pp. 25–27). As a result of these White slavery campaigns, the White-Slave Traffic Act,<sup>61</sup> or the “Mann Act,” was passed in 1910. The White slavery campaigns relied on racialized notions of sexual immorality that painted immigrants and people of color as threats to White women’s sexual purity.<sup>62</sup> These campaigns against “modern day slavery” and “White slavery” suggested that, because White women were the victims, this new form of “slavery” was even more abhorrent than the actual enslavement of people of African descent. As Gruber explains, these campaigns relied on racist narratives that prevented racial solidarity amongst anti-rape activists:

One of the greatest barriers to racial and class solidarity within antirape activism was the growing concern with “white slavery” and the “new abolition” movement. At the turn of the century, as the older suffragists and abolitionists passed away, the agenda of temperance and equal rights gave way to stricter social purity movements. By the Progressive Era, the narrative of the seducer who cajoled women into consenting to their own ruin had given way to the narrative of the slaver who captured unsuspecting

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<sup>60</sup> Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020, 4:21 PM), <https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html> [https://perma.cc/DD8Y-HAEH].

<sup>61</sup> White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, § 2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

<sup>62</sup> See Anders Walker, *Strange Traffic: Sex, Slavery, and the Freedom Principle*, 46 CONN. L. REV. 561, 564 (2013) (“Enacted in 1910, the Mann Act emerged amidst a moral panic over White slavery that historians now believe was exaggerated to facilitate a series of ulterior policy agendas, including the regulation of immigrants and prostitutes.”).

girls and procured sex through punishment, not persuasion. Although evidence was largely lacking that the women engaged in prostitution were physically coerced, the vision of enslaved young white girls gave the anti-prostitution crusade an air of emergency and moral authority. (p. 27)

Contemporary sex-trafficking campaigns continue to rely on the feminist script for punishment. They often rely on images of young, White girls as potential sex-trafficking victims, and they often portray dark, shadowy threats as potential sex traffickers. The image below is the prototypical image for sex-trafficking campaigns. This image has been used on at least 556 websites, most of which focus on sex trafficking.



It depicts an innocent White girl who has been taken captive by an unknown, threatening man. She appears startled, which suggests that she does not know her captor. While the image is not intentionally racist, it exploits concerns about White female vulnerability to anonymous threats. The image is on countless posters and websites that invite the public to combat the threat of “modern day slavery.”<sup>63</sup> The framing of sex trafficking as modern slavery intends to communicate the seriousness of the threat, equalizing it to chattel slavery in the United States. Ironically, the modern-day slavery campaigns tend to ignore that White supremacy was the underlying ideology that supported chattel slavery while leveraging White supremacist ideals about victimhood and racialized threats. The focus of these campaigns has been on increasing the law enforcement response to sex trafficking and increasing criminal penalties for pimps and johns as sex traffickers. But as Gruber notes, “the vision of enslaved young white girls” gives the campaigns a sense of urgency (p. 27).

<sup>63</sup> See, e.g., Larbi Arbaoui, *One in 10 Girls Sexually Abused in the World: UNICEF, MOROCCO WORLD NEWS* (Sept. 5, 2014), <https://www.moroccoworldnews.com/2014/09/138179/one-in-10-girls-sexually-abused-in-the-world-unicef> [<https://perma.cc/6JHZ-8YGJ>]; Jenna Kubitz, *It Happens: Anti-domestic Child Trafficking Awareness*, CHANGE.ORG, <http://chng.it/jYPkLqnqd> [<https://perma.cc/YZ2N-EQEH>].

As Gruber discusses in Chapter Two: “In the late 1970s, activists and students came together in ‘take back the night’ (TBTN) rallies to give voice to women’s shared fear of prowlers lurking in the dark. TBTN rallies often occurred after high-profile, if statistically rare, murders and rapes of women by strangers” (p. 43). As Gruber explains, these efforts to “take back the night” focused on security-oriented proposals that nonetheless bought into the narrative of vulnerable White women besieged by threatening strangers (p. 43). Likewise, Gruber documents the evolution of American domestic violence law through the 1980s to now, reflecting the troublesome commitment to punishment even when evidence indicates that punishment is ineffective at preventing domestic violence. Carceral domestic violence activists:

publicized a one-dimensional story involving sexist male officers influenced by chauvinist law and culture, who refused to arrest abusers because they believed that abuse was acceptable, the woman deserved it, or the matter was personal. Police empathy for abusers, the story went, remained unmitigated even when the woman was beaten and bloodied. This narrative *defined* nonarrest as an exercise of sexism, so that every arrest was an instance of gender justice, regardless of the consequences. In turn, violent male police officers using violent arrest to control violent men was not a pathology of a ‘fascist’ state. It was feminist. (p. 70)

Gruber further provides an illustrative example of the contradictions within carceral feminism<sup>64</sup> through the Brock Turner case (pp. 178–90). As is already well known, Brock Turner was a Stanford University student, and his conviction for sexual assault became a symbol for campus sexual assault.<sup>65</sup> On January 18, 2015, Brock Turner sexually assaulted Chanel Miller while she laid unconscious outside the Kappa Alpha fraternity house on Stanford’s campus.<sup>66</sup> Two graduate students passed the scene and observed the sexual assault in progress.<sup>67</sup> They apprehended Turner and called the police, who arrested him.<sup>68</sup> Turner was convicted of assault with the intent to commit rape of an unconscious

<sup>64</sup> Bernstein, *supra* note 2, at 143.

<sup>65</sup> Julia Ioffe, *When the Punishment Feels like a Crime: Brock Turner’s Twisted Legacy — and a Stanford Professor’s Relentless Pursuit of Justice*, HUFFPOST: HIGHLINE (June 1, 2018), <https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber> [https://perma.cc/4J4E-4KHM].

<sup>66</sup> People’s Sentencing Memorandum at 2–4, People v. Turner, No. B1577162 (Cal. Super. Ct. June 2, 2016) [hereinafter People’s Sentencing Memorandum].

<sup>67</sup> Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569, 1588 (2020).

<sup>68</sup> Elena Kadavany, *Former Stanford Swimmer Pleads Not Guilty to Sexual-Assault Charges*, PALO ALTO ONLINE (Feb. 2, 2015, 11:09 AM), <https://www.paloaltoonline.com/news/2015/02/02/former-stanford-swimmer-pleads-not-guilty-to-sexual-assault-charges> [https://perma.cc/A2RU-HZVV].

person, sexual penetration of an unconscious person, and sexual penetration of an intoxicated person.<sup>69</sup> He faced a maximum sentence of fourteen years in prison.<sup>70</sup> Turner's sentencing judge, Judge Aaron Persky, sentenced him to six months in the county jail and three months of probation, as recommended by the Probation Office (p. 180). Turner was also required to register as a sex offender for the rest of his life. This sentence was widely criticized as being too lenient. Turner was transformed into the prototypical predator. Judge Persky was accused of being biased toward the privileged Turner, whom detractors claimed reminded Judge Persky of himself (p. 185). However, Judge Persky routinely followed the recommendations of the Probation Office (p. 185).

Initially, carceral feminists portrayed Judge Persky's lenient sentence as a threat to women.<sup>71</sup> They claimed that he was unable to deliver the sort of justice that victimized women deserved (p. 181). He, like Turner, became a villain in the story of women's equality. And soon his portrayal as a threat to women's equality meant he was also a threat to racial equality. Carceral feminists claimed that the Turner case reflected both a disregard for the seriousness of sexual assault, and the disproportional nature of justice in this country. Feminists, led by Professor Michele Dauber, searched for evidence that Judge Persky was less lenient when there were Black or Brown defendants in his courtroom (pp. 179–83). This claim exploited concerns about the unequal nature of justice in the criminal system to galvanize support for Judge Persky's removal. However, Judge Persky was a judge who consistently granted lenient sentences — or rather sentences that appear lenient within a system with excessively lengthy sentences.<sup>72</sup> He generally followed the recommendations of the Probation Office (p. 185). Public defenders supported him during this challenge, concerned that his removal would contribute to the "culture of mass incarceration [that] has warped our psyches into thinking that lengthy jail or prison terms are always the answer to criminal behaviors."<sup>73</sup> Nevertheless, Judge Persky was ultimately removed from the bench,<sup>74</sup> and he was ordered to pay over

<sup>69</sup> Verdict of the Jury, *People v. Turner*, No. B1577162 (Cal. Super. Ct. May 30, 2016), 2016 WL 3442307.

<sup>70</sup> People's Sentencing Memorandum, *supra* note 66, at 25.

<sup>71</sup> See Danielle De Smeth, Prudence Hutton & Kelly Robbins, *The Brock Turner Sentencing and the Face of Bias*, ORANGE CNTY. L., Oct. 2016, at 54, 56 (suggesting that Judge Persky's sentence reflects bias against victims of sexual assault).

<sup>72</sup> Sajid Khan, *Debriefing and Defending the Brock Turner Sentence*, CLOSING ARGUMENTS (May 31, 2016, 1:15 PM), [https://www.publicdefenders.us/blog\\_home.asp?display=109](https://www.publicdefenders.us/blog_home.asp?display=109) [https://perma.cc/WQ79-3DJY].

<sup>73</sup> *Id.*

<sup>74</sup> Recent Election, *Sexual Assault Law — Judicial Recall — California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369, 1369 (2019).

\$161,825 in legal fees to Professor Dauber's campaign.<sup>75</sup> But the question remains whether this removal reflects justice for feminism.<sup>76</sup> Is the removal of a judge who consistently sentences within the recommendations of the Probation Office consistent with the progressive goals of social justice?

This case and others like it prompted Gruber to write this book, which builds upon a body of scholarship that critically examines the connections between race, gender, and punishment.<sup>77</sup> Gruber's prior experiences as a public defender contextualize her unique insights about the harms of the criminal system. *The Feminist War on Crime* lays bare the tensions between seeking punishment for harms against women within a system that is stacked against marginalized communities. It is a tension that has long resided within the feminist movement but is especially important given the collective recognition that mass incarceration is one of the most important problems for this generation to address.<sup>78</sup> Judge Persky's recall undermines efforts to encourage judges to mitigate the collateral consequences of the criminal system.<sup>79</sup> The outrage about Turner's conduct may have been warranted because he harmed another person. But should the outrage against his conduct automatically translate into the punishment of every person that happens to be connected to his criminal case?

*The Feminist War on Crime* diagnoses the harms of the feminist script for punishment. While the goal was to improve the lives of women by criminalizing harmful conduct, mass criminalization has contributed to the breakdown of communities and promoted a narrative that is both racist and patriarchal. The suggestion that women are always victims who are waiting for the criminal law to rescue them feeds into tropes about the helpless nature of women that are core to patriarchy. It fits within that paradigm and has been so successful, in

<sup>75</sup> Elena Kadvany, *Persky Ordered to Pay Recall Campaign Attorney's Fees*, PALO ALTO ONLINE (Oct. 25, 2018, 11:37 AM), <https://www.paloaltoonline.com/news/2018/10/25/persky-ordered-to-pay-recall-campaign-attorneys-fees> [https://perma.cc/5VN5-DPQP].

<sup>76</sup> See Guy Hamilton-Smith, *The Agony & the Ecstasy of #MeToo: The Hidden Costs of Reliance on Carceral Politics*, 49 SW. L. REV. 93, 95 (2020) ("While many saw the recall and its aftermath as correcting an injustice, a closer reading of events that precipitated them and forces that propelled them suggest a result that sounds less in correcting injustice, and more in compounding it.").

<sup>77</sup> See, e.g., Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1338 (2018); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007); Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 282 (2016).

<sup>78</sup> See Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 32–33 (2011) (arguing that mass incarceration exacerbates heteropatriarchy and hypermasculinity); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004).

<sup>79</sup> See Hamilton-Smith, *supra* note 76, at 112 ("Ramping up on consequences in the wake of cases like Turner's also can only ever be likely to impact those individuals who lack the money, connections, resources, and power to avoid entering into the criminal legal system in the first place.").

part, because it complies within the existing dominant narratives about the nature of women in need of rescuing. The script leans into these narratives that might later be used to limit women's rights. As Bernstein has noted, this narrative locates:

social problems in deviant individuals rather than mainstream institutions . . . [and] seeks social remedies through criminal justice interventions rather than through a redistributive welfare state, . . . advocat[ing] for the beneficence of the privileged rather than the empowerment of the oppressed. As such, this approach leaves intact the social structures that drive low-income women (and many men) into patterns of risky migration and exploitative informal sector employment, including those relatively rare but very real situations that would rightly qualify as "trafficking" or "slavery."<sup>80</sup>

As Gruber notes, this narrative ultimately contributed to the "prosecutorial achievements of second-wave feminism[, which] are numerous and include mandatory arrest and no-drop prosecution for domestic violence, criminalization of nonforcible sex, and prosecution-favoring evidentiary rules" (p. 44). This book invites feminists to interrogate foundational questions about the methods and goals of feminism and to reevaluate the dominant feminist script, which has advanced the goal of punishment over improving the material conditions of women.

## II. THE HARMS OF THE CARCERAL FEMINIST APPROACH

The feminist script for punishment relies on stereotypes about women, men, race, and sexuality and has not allowed for more nuanced analyses of the intersectional systems of oppression. As Gruber states: "There is a deeply ingrained American punitive impulse, originating from the media and government's relentless focus on horrific criminality, that leads even progressive incarceration critics to advocate for strict prosecution of those whom they see as the worst of the worst" (p. 9). The effectiveness of carceral feminism has been due to its reliance on racist and sexist stereotypes.<sup>81</sup> It does not allow for a complicated analysis of the differing forms of oppression that women encounter and the ways that these systems of oppression intersect and diverge.<sup>82</sup> That level of nuance slows down the media spectacle and moral outrage that spark

<sup>80</sup> Bernstein, *supra* note 2, at 137.

<sup>81</sup> See Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1492–93 (2015) ("When Francis Willard, the internationally renowned leader of the Women's Christian Temperance Union, warned white women and girls to stay away from 'dark places,' she alluded not only to the dangers of being present in Chicago's poorest neighborhoods, but also the sexual threat that [B]lack men and women posed for white womanhood and white racial purity.").

<sup>82</sup> See Ahmad, *supra* note 12, at I.-76 ("The interests of the defendant go beyond just the accused and the criminal justice system to the broader community. Consider the mothers of the Central Park Five. These women gave birth to and raised their boys into adolescence. They then had to watch their [B]lack and brown sons be handcuffed, incarcerated, and stripped of their liberty and dignity.").

carceral impulses. As Professor Patricia Hill Collins states, intersectionality provides the “critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities.”<sup>83</sup> Professor Kimberlé Crenshaw explains:

Where systems of race, gender, and class domination converge, as they do in the experiences of women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.<sup>84</sup>

In reality, many victims do not fit within the mold of the ideal victim. Many women do not want the State to intervene in their lives because they do not trust government actors.<sup>85</sup> Black, Brown, Indigenous, and other women and queer people of color are accustomed to police who racially profile, stop and frisk, and harass their communities.<sup>86</sup> Feminists from these communities long warned about the harms of relying on punishment to achieve feminist goals.

#### A. The Black Feminist Resistance

Many women who face intersectional subordination do not want additional entanglement with the carceral apparatus. Immigrant women, especially undocumented women, may be concerned that interactions with the police will eventually lead to deportation.<sup>87</sup> All women, including queer women, may be both victims and perpetrators of violence against women.<sup>88</sup> Likewise, many perpetrators are also victims.<sup>89</sup> They

<sup>83</sup> Patricia Hill Collins, *Intersectionality's Definitional Dilemmas*, 41 ANN. REV. SOCIO. 1, 2 (2015); see also Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1426–27 (2012) (“Intersectionality also points to the relationships between established hierarchies that structure the relative vulnerability of subjects to the public and private exercises of social power.”).

<sup>84</sup> Crenshaw, *supra* note 46, at 1246.

<sup>85</sup> See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2099 (2017) (examining legal estrangement and the “symbolic community exclusion” that Black people feel toward the police).

<sup>86</sup> See Ruttenberg, *supra* note 7, at 171–73, 178 n.32.

<sup>87</sup> See Harris, *supra* note 78, at 27; see also Emily A. Robey-Phillips, *Federalism in Campus Sexual Violence: How States Can Protect Their Students when a Trump Administration Will Not*, 29 YALE J.L. & FEMINISM 373, 414–15 (2018) (“[U]ndocumented survivors [of sexual violence] might therefore rationally avoid any reporting that could lead to contact with police.”). See generally ANGELA S. GARCÍA, *LEGAL PASSING: NAVIGATING UNDOCUMENTED LIFE AND LOCAL IMMIGRATION LAWS* (2019) (examining how undocumented people navigate life and avoid interactions with law enforcement officials).

<sup>88</sup> See Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337, 408 (2015) (“Lesbian partner violence has long been under-reported by its victims, hushed by the lesbian community, and ignored by feminist activists.”).

<sup>89</sup> SERED, *supra* note 40, at 4.

are not unidimensional villains who repeatedly prey on women.<sup>90</sup> Most of them will not offend again.<sup>91</sup> They are not all men. Carceral feminists overlook many factors that complicate their desire to express their disapproval of gender-based violence, often to the material degradation of women who do not fit within the classic feminist mold of White, middle-class women.<sup>92</sup> Gruber discusses how feminists of color resisted carceral tactics:

Feminists of color, like [Shelly] Fernandez and [Bok-Lim] Kim, had argued vociferously that minority women were differently situated from middle-class white women, had different views of racism and sexism, and existed in a different relationship with the state. Black feminists were particularly resistant to policing as a response to minority women's problems. Nevertheless, much in the way antipatriarchy feminists insisted on the every-woman argument, many legal feminists doubled down on their commitment to law enforcement . . . . (p. 62)

In fact, Black feminists long warned about the harms of incarceration. They recognized the importance of an intersectional analysis that considers the harms of the carceral system and the importance of improving the material conditions of women of color. As Gruber discusses in Chapter Two, Black and Brown feminists challenged the punitive approach they noticed within the domestic violence movement (pp. 52–53). In 1977, the Combahee River Collective, a collective of Black women feminists, published a collective statement about their political commitments.<sup>93</sup> They stated:

One issue that is of major concern to us and that we have begun to publicly address is racism in the white women's movement. As Black feminists, we are made constantly and painfully aware of how little effort white women have made to understand and combat their racism, which requires among other things, that they have a more than superficial comprehension of race, color, and Black history and culture. Eliminating racism in the white women's movement is by definition work for white women to do, but we will continue to speak to and demand accountability on this issue.

In the practice of our politics, we do not believe that the end always justifies the means. Many reactionary and destructive acts have been done

<sup>90</sup> See R. Karl Hanson, Elizabeth Letourneau, Andrew J.R. Harris & L. Maaike Helmus, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCH. PUB. POL'Y & L. 48, 48 (2018) (documenting low recidivism rates for sexual offenders).

<sup>91</sup> *Id.*

<sup>92</sup> Cf. Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 17–18 (1991) (responding to the critique of feminism as centering White women and being essentialist).

<sup>93</sup> *The Combahee River Collective Statement*, BLACKPAST (1977), <https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977> [<https://perma.cc/Y7SN-P6TX>].

in the name of achieving “correct” political goals. As feminists, we do not want to mess over people in the name of politics.<sup>94</sup>

The Combahee River Collective called out the racism within the mainstream feminist movement.<sup>95</sup> As Richie notes:

Some aspects of the work to end violence against women have benefited from the ideological shifts associated with the buildup of America’s prison nation. These “benefits” include harsher punishments for so-called violent perpetrators, technological advances to monitor threatening and illegal behavior, and a fundamentally conservative public commitment to “law and order” that does not take into account the roles that families play in social stability.<sup>96</sup>

In 1977, the Santa Cruz Women Against Rape published an open letter to the anti-rape movement to contest its reliance on prisons and prosecution:

We, the members of Santa Cruz Women Against Rape, are writing this letter because we are concerned about the direction the anti-rape movement is taking. . . . [W]e would primarily like to address the issue of the relationship of the anti-rape movement to the criminal justice system. . . . We do not believe that rape can end within the present capitalist, racist, and sexist structure of our society. . . .

. . . .

. . . Attempts at “good relations” with the criminal justice system have served to co-opt our movement, and have led to the belief (or hope) that the criminal justice system can solve the problem of rape. Yet, the sexist and racist nature of the criminal justice system only makes the problem worse.

We are opposed to the criminal justice system orientation of many anti-rape groups for a number of reasons.<sup>97</sup>

These open letters to the mainstream feminist movement illustrate that various feminists recognized the harms of a carceral approach to feminism before many of the excesses of the feminist war on crime occurred.

Despite these warnings from various feminists since the 1970s, the hunger for punishment became a defining feature of carceral feminism. In the Introduction, Gruber tells the story of one of her cases as a public defender (pp. 1–5). Her client, Jamal, was charged with domestic violence after a dispute with his partner, Britney. Despite calling the police on Jamal, Britney had concerns about moving forward with the case. Jamal and Britney shared a child and were living together in the Lincoln Heights housing project. A young female advocate on the case instructed Gruber not to communicate with Britney and proceeded to

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> RICHIE, *supra* note 8, at 3.

<sup>97</sup> Robin McDuff, Deanne Pernell & Karen Saunders, *Letter to the Anti-rape Movement*, OFF OUR BACKS, June 1977, at 9.

prosecute Jamal over Britney's protests. The young family was considerably worse off because of the prosecution. Britney and Jamal remained together but struggled to pay for a baby and an apartment they ultimately lost because of Jamal's conviction. The case initiated a series of cases that they would have to face through the years, none of which was for domestic violence and all of which exacted an immense toll. While feminists vigorously advocated for mandatory arrests and prosecutions for cases like this, it is not entirely clear that this outcome was the best one. As Gruber discusses, solutions that address the material concerns of the family, such as the provision of living wages and affordable housing, would have gone a long way to improving the conditions that exacerbate domestic violence (pp. 194–95). This case illustrates that there appears to be a major disconnect between feminist advocacy and feminism's articulated goals.<sup>98</sup> Punishment is unable to realize a feminist vision that improves the lives of women in a meaningful way.

Along the path to women's equality, the urge to punish and shame has taken priority over materially improving the lives of all women.<sup>99</sup> One might presume that gender equality could be measured by the amount of punishment that a carceral feminist is able to secure for a given act of violence against women.<sup>100</sup> Each year in prison is equivalent to a unit of dignity and value within a woman's life.<sup>101</sup> So leniency in this context is the language of patriarchy.<sup>102</sup> The system is too lenient, and any suggestion that leniency is ever appropriate fails to feed into the moral outrages that carceral feminists benefit from.

### B. Expression over Materiality

*The Feminist War on Crime* convincingly argues that carceral feminists have largely ignored the harms of punishment by emphasizing the importance of the law's role in declaring communal values through the expressive function of criminal law (p. 107). Legal philosopher Joel Feinberg argued that criminal law plays an important role in expressing

<sup>98</sup> See LEIGH GOODMAN, DECRIMINALIZING DOMESTIC VIOLENCE 154 (2018); Kay Hymowitz, *Do Women Really Want Equality?*, TIME (Sept. 4, 2013), <https://ideas.time.com/2013/09/04/do-women-really-want-equality> [https://perma.cc/9NTH-Z4L5].

<sup>99</sup> See GOODMAN, *supra* note 98, at 123, 144.

<sup>100</sup> See Hamilton-Smith, *supra* note 76, at 101–02, 108, 115.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* As political scientist Professor Kristin Bumiller has observed: "Mainstream feminist demands for more certain and severe punishment for crimes against women fed into these reactionary forces. This resulted in a direct alliance between feminist activists and legislators, prosecutors, and other elected officials promoting the crime control business." KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 7 (2008); see also Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663, 707 (2018) (noting that "advocacy gains that have been made over the past three decades are as closely linked to the carceral state as the severity that has garnered so much attention from crimmigration scholars").

the values of a community.<sup>103</sup> By criminalizing conduct, the community expresses its collective morality.<sup>104</sup> Feminists have adopted expressive arguments about the criminal law to argue about the importance of “sending a message” that a specific type of conduct is harmful by criminalizing that conduct (p. 107). However, expressive theories of the law rarely acknowledge that there are multiple publics, with varying degrees of power and access to the deliberative process of determining what is moral and acceptable. This neglect means that criminal law’s expressive value is limited by the systemic marginalization and isolation of entire communities from full political participation.<sup>105</sup> These communities often are those same communities most harmed by the very act of criminalization.<sup>106</sup> As a result, elite members of the public get to proclaim the community’s values and then facilitate which people can be arrested and placed in cages for failing to comply with these communal values. An even more skeptical account suggests that the exclusion of marginalized community members from the deliberative process is intentional or a core feature of the process of making criminal law, because social elites perceive marginalized people as threats. So expression is merely another tool for subordination.

Nevertheless, feminists have been wielding the power to express themselves through punishment. Unfortunately, the harms of criminalization are generally an afterthought in the attempts to wield the criminal law as a sword against the perceived threat of patriarchy. The law’s power to punish and express that certain conduct is immoral has taken precedence over the law’s role in reproducing White supremacy, ableism, and economic subordination. Expression and the symbolism of punishment have been the paramount goal within carceral feminist movements to punish away threats to women.<sup>107</sup> The importance of sending a message about violence against women has erased the violence of the criminal legal system itself.<sup>108</sup>

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<sup>103</sup> See JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 95–118 (1970).

<sup>104</sup> But see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1498–500 (2000).

<sup>105</sup> See John Steele, *A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment*, 16 J.L. & RELIGION 35, 67 (2001) (“[E]xpressive punishment is pathological. It has been inflicted randomly, has been inflicted unjustly . . . , and has been disproportionately inflicted against socially marginalized scapegoats.”).

<sup>106</sup> *Id.*

<sup>107</sup> See Hailey Heartless, *Carceral Feminism & State Violence*, MEDIUM (June 29, 2018), <https://medium.com/@SadistHailey/carceral-feminism-state-violence-e1d135od91e9> [<https://perma.cc/7UF5-X69T>].

<sup>108</sup> EMILY L. THUMA, ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE (2019), as reprinted in *How Feminists Resisted Prisons and Policing in the 1970s*, TRUTHOUT (July 19, 2019), <https://truthout.org/articles/how-feminists-resisted-prisons-and-policing-in-the-1970s> [<https://perma.cc/4M68-D79S>]; Lydia Pelot-Hobbs, *Anti-carceral Feminism*,

As feminists have utilized the expressive function of criminal law, they have found strange bedfellows in social conservatives (p. 102). With regard to domestic violence, feminists have advanced the use of the penal system to punish men who engaged in domestic violence. The system has contributed to the use of coercive tactics to force victims to testify against the accused even when they prefer not to do so.<sup>109</sup> It has contributed to the breaking up of families.<sup>110</sup> With regard to sex work, radical feminists have partnered with social conservatives to abolish pornography and prostitution.<sup>111</sup> They have advocated for the criminalization of pornography because it represents violence against women and have called for the prosecution of johns and pimps as sex traffickers.<sup>112</sup> They paint a grim picture of sex work and rely on loose data and hyperbole to present the most terrifying accounts of the industry as representative of sex work.<sup>113</sup> Social scientists have widely criticized the problematic manipulation of unreliable data that radical feminists advance as serious research.<sup>114</sup> Nevertheless, these provocative accounts have been influential in advancing the story of universal victimhood within the sex trades.<sup>115</sup> Pimps are terrible men who should be criminalized like sex traffickers.<sup>116</sup> Sex-work clients are exploitative johns who manipulate women and who are sex traffickers.<sup>117</sup>

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AGAINST THE CURRENT, July/Aug. 2020, <https://againstthecurrent.org/atc207/anti-carceral-feminism> [<https://perma.cc/BH97-SJGB>].

<sup>109</sup> See Leigh Goodmark, *Autonomy Feminism: An Anti-essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 7, 13–14 (2009).

<sup>110</sup> See *id.* at 38–41; Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172–75 (discussing the racial and economic disparities in the enforcement of child welfare services).

<sup>111</sup> See Anette Sikka, *Trafficking in Persons: How America Exploited the Narrative of Exploitation*, 55 TEX. INT'L L.J. 1, 11–13 (2019) (“Political scholar Allan Hertzke has traced the development of this feminist-evangelical alliance from its very beginning, having been asked specifically by its founders to publicize the movement.” *Id.* at 12.).

<sup>112</sup> See I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185, 196–98 (2018).

<sup>113</sup> *Id.* at 197–98.

<sup>114</sup> Cf. *id.* at 212 & n.102.

<sup>115</sup> See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1707–09 (2010).

<sup>116</sup> See Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 33, 33–34 (1993) (“By the time pimping took a central role on the academic stage, both the academic and popular literature about prostitution were rife with racist stereotypes. The study of pimps was relegated to examining the sexual exploitation of primarily white women by Black men.”).

<sup>117</sup> See, e.g., Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415, 437 (2017) (“All of the characteristics of sex traffickers and their violence is often a shared characteristic of those willing to purchase another for sex.”); Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1024 (2013) (“Not every domestic sex trafficker has ties to the pimp subculture, but many of the defendants the authors have prosecuted for domestic sex trafficking emerged from that subculture . . . ”).

For example, in December 2016, the National Organization for Women (NOW), a preeminent feminist organization,<sup>118</sup> wrote a brief opposing the decriminalization of sex work, based on heteronormative arguments about the sanctity of marriage and procreative sex.<sup>119</sup> The brief suggested that traditional relationships should be protected<sup>120</sup> and made no mention of race, class, or the obvious harms of the criminal legal system that stem from criminalizing sex work.<sup>121</sup> It didn't even claim that sex workers' conduct should be decriminalized while clients' conduct remains criminalized.<sup>122</sup> Instead, these feminists fought for the carceral system.<sup>123</sup> This organization had diverse women at its founding,<sup>124</sup> but somewhere along the way it has prioritized the interests of White, middle-class women although it remains committed to the optics of inclusiveness and diversity. Like many feminist organizations, it has failed to prioritize intersectional analysis to the extent of allowing it to shift priorities, abandon previous commitments, and acknowledge the harms of former techniques. Instead, the commitment to punishing sex work has allowed NOW to adopt arguments that would be harmful to many of the women its leadership claims to protect. Queer women or women who choose not to have children may have relationships worthy of less constitutional protection if NOW's legal arguments about the special value of procreative sex are taken seriously. As for its conception of sex work, there are no sad, lonely women and men who choose to pay for intimacy. Only predators, and more punishment is needed to punish them — even if it means a few women need to be thrown in jail along the way. But, as Gruber highlights in the book, these alliances with socially conservative groups undermine the values that many feminists claim to hold dear (pp. 102–03).

Although it is not clear that criminal expression was the most appropriate mode of realizing the goals of feminism, the symbol of criminalization has come to represent success even when criminalization is unable to achieve the goal of improving the lives of women — the presumed goal of feminism. The material conditions that lead to domestic violence for poor women, such as lack of employment or affordable

<sup>118</sup> *Who We Are*, NAT'L ORG. FOR WOMEN, <http://now.org/about/who-we-are> [<https://perma.cc/H3P4-TEQQ>].

<sup>119</sup> Brief of the National Center on Sexual Exploitation et al. as Amici Curiae, Supporting Defendants-Appellees and Supporting Affirmance at 7, 9, *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascón*, 880 F.3d 450 (9th Cir.) (No. 16-15927), amended by 881 F.3d 792 (9th Cir. 2018).

<sup>120</sup> See *id.* at 11.

<sup>121</sup> *Id.* at 1–31.

<sup>122</sup> *Id.*

<sup>123</sup> See *id.* at 28–29.

<sup>124</sup> *Founding*, NAT'L ORG. FOR WOMEN, <http://now.org/about/history/founding-2> [<https://perma.cc/H324-YCRS>].

housing, are the same or worse for many women.<sup>125</sup> Women have experienced some of the worst harms of the feminist war on crime, including loss of familial income, disruption to support networks following intense surveillance and policing of marginalized communities, and surveillance under the family regulation system. These harms should matter to all feminists. They should be centered in discussions about strategy and political tactics.<sup>126</sup> Too often, the voices that can reflect on these issues are excluded from the exclusive strategy conversations within feminist circles, or they are ignored when they are present.<sup>127</sup> When feminists express viewpoints that counter aspects of the feminist script for punishment, they are demonized as enemies to the cause or portrayed as mind-controlled victims of patriarchy.<sup>128</sup>

Admittedly, feminist activism has improved the lives of women throughout the United States and worldwide, contributing to better workplaces, home lives, and political lives for women.<sup>129</sup> Through this activism, women have achieved the right to vote.<sup>130</sup> The culture of the

<sup>125</sup> See Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 18–46 (2018) (discussing how poverty complicates access to rights).

<sup>126</sup> Cf. Sarah Lamble, *Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment*, 24 LAW & CRITIQUE 229, 245–49 (2013).

<sup>127</sup> See Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 147–48 (1989) (“When women of color have attempted to exercise control over strategy formation in feminist organizations, white feminists have often responded with resistance.”).

<sup>128</sup> See Alexandra Aparicio, *Her Alone: Feminist Perspectives on the Future of Spousal Privileges*, U. CHI. L. REV. ONLINE (2020), <https://lawreviewblog.uchicago.edu/2020/07/06/spousal-privileges> [https://perma.cc/UM9P-KWRE] (“Radical feminists also contend that women may internalize the beliefs of patriarchal society to such an extent that they develop ‘false consciousness,’ under which they ‘voluntarily accept, defend, and even choose roles that help perpetuate the gender hierarchy.’” (quoting Cynthia V. Ward, *The Radical Feminist Defense of Individualism*, 89 NW. U. L. REV. 871, 879 (1995))).

<sup>129</sup> See Annette Ruth Appell, *The Pre-political Child of Child-Centered Jurisprudence*, 46 Hous. L. Rev. 703, 722 (2009) (“Despite their disagreements regarding children, race, and class, feminists have made progress in disaggregating women from compulsory motherhood, dismantling many aspects of patriarchy within this system, and achieving political power and authority. These achievements have no doubt changed and often improved women’s lives and have certainly been transformative, even if feminism has not been successful in dislodging men (non-caregivers) from the center of social organization.” (footnote omitted)); Ann Bartow, *An Equal Rights Amendment to Make Women Human*, 78 TENN. L. REV. 839, 844–45 (2011) (“Title IX was a bold, reasonably comprehensive and impressively successful effort to improve women’s access to educational opportunities that has been in place for nearly forty years. However, it has not brought about true equality even in the context of education.” (footnote omitted)); Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99, 119 (1989) (“[O]pportunities for paid work, however unequal they are in comparison to those for men, have improved women’s alternatives to depending on men for economic support.”); Michele N. Struffolino, *The Devil You Don’t Know: Implicit Bias Keeps Women in Their Place*, 38 PACE L. REV. 260, 263–64 (2018) (noting that while the feminist movement has been successful in many ways, women still must contend with the discriminatory effects of implicit bias).

<sup>130</sup> Declaration of Sentiments, Seneca Falls Convention, Seneca Falls, New York, July 1848, in 1 HISTORY OF WOMAN SUFFRAGE 1848–1861, at 70–71 (Elizabeth Cady Stanton et al. eds., reprt. ed. 1985) (1881).

workplace has fundamentally shifted into a space that is more welcoming of women.<sup>131</sup> The harms of domestic violence are well known, and the private spaces that women have historically occupied have been granted the same protections as other spaces.<sup>132</sup> Overt discrimination is prohibited,<sup>133</sup> and the harms of campus sexual violence are notorious. Nevertheless, feminists have tended to fall short by adopting strategies that are harmful to many women and by failing to center and prioritize intersectional frameworks in their analysis that would have made their strategies inclusive. Accordingly, the gains of feminism have primarily accrued to White elites at the top of the feminist order.

### III. A NEW FEMINIST SCRIPT

The implicit question throughout *The Feminist War on Crime* is what feminism should be. This is a crucial question given the various internal and external struggles that feminism has endured over the past several decades. Struggles remain about the treatment of sex work, the priorities of the movement, and the entrenchment of White supremacy within the feminist movement. It is not entirely clear what the aims of the feminist movement should be. Should it be a movement for all women? Is it possible for it to be a movement for all women? Should the feminist movement be satisfied with attempts at including different women without engaging with how these different women might redirect current activism? How should the feminist movement contend with the growing concern about mass incarceration that many feminists, especially Other feminists, have? Should feminists favor expressions of gender equality through criminal laws even when the expression is likely to contribute to the racial profiling and criminalization of the least powerful communities? Can gender justice come through the criminal law?

Gruber seeks to answer these questions about what feminism should be with her thorough examination of its failings, illustrating the disconnect between feminist advocacy and feminism's articulated goals. By connecting the feminist war on crime that relied on criminal punishment to communicate gender equality to the wars on crime and drugs, she

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<sup>131</sup> But see Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003) (arguing that “sex harassment policies now provide an added incentive and an increased legitimacy for management to control and discipline relatively harmless sexual behavior without even inquiring into whether that behavior undermines gender equality on the job”).

<sup>132</sup> See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 558–59 (2006).

<sup>133</sup> See Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (holding that sex-specific fetal-protection policies violate Title VII); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (recognizing “hostile environment” sex discrimination as a theory of liability under Title VII); Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (holding unconstitutional a Louisiana statute that conferred on husbands sole discretion to dispose of marital property); Muller v. Oregon, 208 U.S. 412, 416–17, 422–23 (1908) (upholding an Oregon maximum hours law that applied only to women).

uncovers the culpability of the feminist agenda in promoting mass incarceration. The harms of mass incarceration are well documented, but there has not been robust engagement with the ways that feminism is implicated in promoting narratives and criminal laws that have contributed to the problem. This is the novel contribution of Gruber's book.

#### A. A Call to Action

At the outset of *The Feminist War on Crime*, Gruber makes an appeal to millennial women, women who are forming their feminist identities and learning about the path to women's equality (p. 5). Part of Gruber's appeal responds to feminist activism on college campuses regarding sexual assault (p. 8). This activism mirrors aspects of the feminist script for punishment that has prioritized expressive punishment. There is a tension between advocacy to address the harms of mass incarceration and racist policing, and demands for more police and imprisonment for gender-based crimes.<sup>134</sup> This tension between the call for more punishment and the call for social justice needs to be taken seriously in order to advance a movement that is sensitive to all the women within it, including the many women of color who do not view the criminal system as a source of protection and care. Millennial feminists may already be sensitive to the role of race, poverty, and other forms of systemic oppression that impact how to think about feminism.<sup>135</sup> Further, millennial feminists may be open to thinking about success and advocacy in ways that move beyond punishment to address social issues. It may be time to transform the feminist endeavor into one that recognizes the harms of the criminal system rather than one that leans into them. Accordingly, *The Feminist War on Crime* is an important intervention as young activists are torn between calls to end mass incarceration and the #MeToo movement's exposure of sexual misconduct. The exposure of male sexual misconduct felt like a heroic endeavor as the movement was developing. But the accompanying call for more crimes and criminalization is a problematic move that fails to adequately consider the shortcomings of the criminal law.<sup>136</sup>

The next wave of feminist activism should seriously consider the benefits of an abolitionist stance toward criminal law that recognizes

<sup>134</sup> See Ann Russo, *Locking People Up Won't Help Combat Sexual Violence*, RED PEPPER (May 15, 2019), <https://www.redpepper.org.uk/locking-people-up-wont-help-combat-sexual-violence> [https://perma.cc/LJF3-FEF4].

<sup>135</sup> See ALISON DAHL CROSSLEY, FINDING FEMINISM: MILLENNIAL ACTIVISTS AND THE UNFINISHED GENDER REVOLUTION 118 (2017).

<sup>136</sup> See Tina Sikka, *A Troubling Triplet: Consent, MeToo and Carceral Feminism*, AREO (Feb. 27, 2020), <https://areomagazine.com/2020/02/27/a-troubling-triplet-consent-metoo-and-carceral-feminism> [https://perma.cc/5WFK-VNKF].

that criminalization creates more harms than the harms that it seeks to redress.<sup>137</sup> Professor Dylan Rodríguez describes abolition as “a practice, an analytical method, a present-tense visioning, an infrastructure in the making, a creative project, a performance, a counterwar, an ideological struggle, a pedagogy and curriculum, an alleged impossibility that is furtively present.”<sup>138</sup> Abolitionism recognizes the harms of the criminal system and looks beyond it to address social problems. Instead of seeking ways to punish more people and send more messages about what society will not tolerate, perhaps feminists should consider new modes to advance a feminist vision of the world. Gruber invites feminists to engage in a radical reimagination of what feminism should do and the world in which it should exist — a “neofeminism” (p. 17). It is a forward-thinking feminism of the future. Shifting away from punishment may provide the space to imagine a world that reflects the goals of feminists. Instead of singularly focusing on protecting women from external harms, it can shift to preventing harms.<sup>139</sup> This approach requires examination of the social features and benefits that might make being a woman easier. It requires a focus on the material conditions that would improve the lives of women (p. 18).

*The Feminist War on Crime* describes the manners in which punishment has been confused for accountability and argues that accountability need not solely or primarily be concerned with punishment. This reclamation of the possibility of visionary goals does not circumvent serious discussions about accountability. Instead, the book demonstrates how punishment has been confused for accountability, and expression has been confused for materiality (p. 180). Meting out punishment and long sentences for gender-based crimes has been championed as a feminist victory and an example of ensuring that villains do not get away with their crimes. However, accountability should not solely, or primarily, be concerned with punishment.<sup>140</sup> Accountability requires actors to take responsibility for their actions and to account for the harms that they have created.<sup>141</sup> Conflating accountability with punishment has

<sup>137</sup> See Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407–08 (2018).

<sup>138</sup> Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1578 (2019).

<sup>139</sup> See Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1605–06 (2017) (“Black feminists are developing an anti-carceral approach that places domestic violence in a broader context of inequitable social structures, tying intimate violence to state violence.”).

<sup>140</sup> See Sebastian Robins, *The Spirit of Restorative Justice: An Interview with Sujatha Baliga*, STILL HARBOR (Nov. 16, 2017), reprinted in DAILY GOOD (Mar. 5, 2018), <https://www.dailygood.org/story/1900/the-spirit-of-restorative-justice-an-interview-with-sujatha-baliga> [https://perma.cc/6UJ2-89RX].

<sup>141</sup> *Id.*

obscured the various ways that a wrongdoer may be held to account for their conduct. For example, there are many possibilities to “call in”<sup>142</sup> people for their wrongdoing and to address community harms responsibly through transformative justice and restorative justice programs.<sup>143</sup> Research suggests that crime victims find these processes more satisfactory than they find the typical criminal legal process.<sup>144</sup> These processes provide mechanisms for holding wrongdoers accountable while avoiding the spectacle of criminal proceedings.<sup>145</sup> They are focused on the experience of crime victims and allow for all participants to heal during the process, allowing for a mechanism for accountability that is truly in line with early feminist acknowledgments that a feminist account of the law allows for caring and empathy.<sup>146</sup> Feminist forms of accountability can reflect these values.

### B. A Feminist Script for Inclusion

Furthermore, millennial feminists should interrogate who the women that their feminism seeks to protect are. The protagonist in the current feminist script does not reflect the values of an inclusive feminism. The

<sup>142</sup> See Ngoc Loan Tran, *Calling IN: A Less Disposable Way of Holding Each Other Accountable*, BGD (Dec. 18, 2013), <http://www.bgdblog.org/2013/12/calling-less-disposable-way-holding-accountable> [<https://perma.cc/N5RH-SPTZ>].

<sup>143</sup> See Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.ORG, <https://transformharm.org/transformative-justice-a-brief-description> [<https://perma.cc/3K99-PBRJ>]. The following provides a description of various models of justice and accountability:

Restorative Justice: A model that aims to repair harm by engaging community members and restoring community balance by calling on shared values, principles, and practices of accountability.

Transformative Justice: . . . [A]n approach to and processes for addressing harm that seeks to not only address the specific situation of harm in question, but to transform the conditions and social forces that made such harm possible. . . .

Community Accountability: A process in which a community such as family, friends, neighbors, co-workers or community members work together to transform situations of harm.

JANE HERETH & CHEZ RUMPF, CRITICAL RESISTANCE, COMMUNITY ACCOUNTABILITY FOR SURVIVORS OF SEXUAL VIOLENCE TOOLKIT 14 (2014), [https://carceralfeminism.files.wordpress.com/2014/04/cassv-reading-group-toolkit\\_shifting-from-carceral-to-tj-feminisms\\_final.pdf](https://carceralfeminism.files.wordpress.com/2014/04/cassv-reading-group-toolkit_shifting-from-carceral-to-tj-feminisms_final.pdf) [<https://perma.cc/5GAD-Q827>].

<sup>144</sup> See Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 174 (2007) (“The greatest claims for restorative justice . . . — that it creates greater compliance with agreements or judgments, reduces imprisonment (and therefore costs to the system), provides greater satisfaction for both victims and offenders, and reduces recidivism rates — have all been substantiated in a variety of different studies on at least three continents (North America, Australia and New Zealand, and Europe), despite methodological difficulties in almost all settings.”).

<sup>145</sup> See *id.* at 163–64.

<sup>146</sup> See generally CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Aparna Polavarapu, *Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda*, 42 HARV. J.L. & GENDER 123, 172 (2019) (arguing that the West can learn from Uganda’s restorative justice approach to domestic violence policies in Uganda).

ideal victim is not an immigrant.<sup>147</sup> She is not queer.<sup>148</sup> She is not Black.<sup>149</sup> She is not Indigenous.<sup>150</sup> She is not poor. She is not caught in the interstitial web of inequality that makes womanhood just one of many factors that contribute to the precarity of her life. She doesn't worry about losing her child to the family regulation system as social workers racially profile her as an incompetent mother.<sup>151</sup> She doesn't worry that the police will shoot her in her own home.<sup>152</sup> She does not worry about losing her welfare benefits because of failing to comply with demands from prosecutors to put her children's father behind bars.<sup>153</sup> The ideal victim does not worry about ICE raiding her home and deporting her once the police intervenes in her domestic violence case.<sup>154</sup> Her life is not complicated by the extensive system of state surveillance in poor Black, Indigenous, and other communities of color. The ideal victim complies with the narratives that feminists tell about her story, and if she doesn't, she is a victim of her own oppression.<sup>155</sup> She is not concerned about the state's indifference to her suffering because she does not have the burden of centuries of state regulation of her family

<sup>147</sup> See Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: "VAWA Diversion" and Other Considerations in Support of Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 49, 49–50 (2004) (“Unfortunately, poor women of color [and immigrant women] have been left to bear the expense and debts owed from waging a war against gender inequality.” *Id.* at 49.).

<sup>148</sup> See Andreano, *supra* note 17, at 1050 (“The legal system’s neglect of LGBT victims can be traced back to the common narrative about domestic violence: that of female victim and male abuser.”).

<sup>149</sup> See Heather Zaykowski, Lena M. Campagna & Erin Cournoyer Allain, *Examining the Paradox of Crime Reporting: Are Disadvantaged Victims More Likely to Report to the Police?*, 53 LAW & SOC’Y REV. 1305, 1312 (2019) (“The criminal justice system also tends to favor white women as victims over women of color, particularly when compared to [B]lack women.”).

<sup>150</sup> See Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1332–33 (2010).

<sup>151</sup> See Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881, 882 (2007); Roberts, *supra* note 110, at 172.

<sup>152</sup> Marisa Iati, Jennifer Jenkins & Sommer Brugal, *Overlooked: Women Killed by Police*, INVESTIGATIVE REPORTING WORKSHOP (Sept. 10, 2020), <https://investigative-reporting-workshop.org/investigation/overlooked-women-killed-by-police> [<https://perma.cc/ZSW2-8QBU>].

<sup>153</sup> Gruber, *supra* note 1, at 650 & n.386.

<sup>154</sup> Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation.*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html> [<https://perma.cc/APF6-B3PN>].

<sup>155</sup> See Kathryn Abrams, *Ideology and Women’s Choices*, 24 GA. L. REV. 761, 762 (1990).

life, separation from her children, sexual assault of her body, and dis-possession of her property in her blood.<sup>156</sup> She is untainted by the savagery of White supremacy.<sup>157</sup> She is not transgender.<sup>158</sup> She is not non-binary.<sup>159</sup> She is not a sex *worker*. For her to be anything but a caricature that fits into the neat feminist script complicates the every-woman narrative that carceral feminists exploit to justify the expressive value of their punitiveness.<sup>160</sup> To require nuance is to compromise the need for the decisive and harsh consequences that they claim are beneficial for all women. Millennials should reject the feminist script for punishment and embrace a new feminist script that embraces and *centers* these women.

If feminism is to become a big umbrella that intends to protect all women, then a contextualized movement that acknowledges the harms of incarceration should be mandatory, not optional. The lives of all women cannot be improved by punishing our way out of harm. While the feminist carceral war has won the narrative war against gender-based violence in many respects, it has not won gender equality for all women. The feminist war on crime has exacerbated the precarity of many women's lives and has brought additional forms of surveillance

<sup>156</sup> See Emily Mendoza, *Jurisdictional Transparency and Native American Women*, 11 CALIF. L. REV. ONLINE 141, 145 (2020) (arguing for "jurisdictional transparency" to address sexual assault and violence against Indigenous women); Suzianne D. Painter-Thorne, *Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M. L. REV. 239, 241 (2011) ("Despite epidemic levels of sexual assaults against native women, tribal governments are largely powerless to prosecute offenders." (footnote omitted)).

<sup>157</sup> See Scott W. Howe, *Capital-Sentencing Law and the New Conservative Court: Why Both Death-Penalty Abolitionists and Proponents Should Defend Most Capital-Sentencing Doctrines*, 2018 CARDOZO L. REV. DE NOVO 157, 171 (discussing how capital punishment represents savagery and racial oppression for some).

<sup>158</sup> See Becca Kendis, Comment, *Human Trafficking and Prostitution Courts: Problem Solving or Problematic?*, 69 CASE W. RSRV. L. REV. 805, 824 (2019) ("Police officers, other legal actors, and service providers who identify and connect eligible individuals with [human trafficking and prosecution courts] may pass over eligible cisgender men and transgender individuals because they do not fit within common perceptions of the 'ideal victim.'"). The organization Survived & Punished describes the problems with the conception of the ideal victim:

In the face of epidemic rates of domestic and sexual violence, anti-violence advocates have partnered with police and district attorneys to try to find protection for survivors, and to institutionalize gender violence as a "crime." However, this pro-criminalization approach to addressing violence has created a racial divide between "good victims" and non-victim "criminals." . . . Survivors are criminalized for being Black, undocumented, poor, transgender, queer, disabled, women or girls of color, in the sex industry, or for having a past "criminal record."

*S&P Analysis & Vision*, SURVIVED & PUNISHED, <https://survivedandpunished.org/analysis> [<https://perma.cc/ZK9Z-JoDH>].

<sup>159</sup> See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 899–900 (2019).

<sup>160</sup> See, e.g., Chuang, *supra* note 115, at 1707 ("Statistics in the trafficking field are notoriously unreliable . . . One of the key obstacles to data collection has been the fact that countries and organizations define trafficking differently, some conflating trafficking with other phenomena, including . . . prostitution.").

to their communities.<sup>161</sup> It has been punitive and has failed to acknowledge its role in furthering White supremacy.<sup>162</sup> As Gruber makes clear, the reliance on a racist system automatically excludes many women from protection. Black and Brown women have been subjected to scrutiny under the family regulation system after reporting a partner for domestic violence.<sup>163</sup> They have been forced to testify against their partners with threats of losing their children and government benefits. Immigrant women have been deported following mandatory arrests of their partners.<sup>164</sup> They have been separated from their children. Poor women who engage in sex work have been subjected to multiple arrests.<sup>165</sup> Black trans women have been profiled as sex workers while walking on the streets of Des Moines and Newark, and they have been wrongfully arrested on multiple occasions.<sup>166</sup> The policing of women and the disciplining of their compliance with gender norms have only intensified with expanded criminalization. While these laws may have

<sup>161</sup> See Chi Adanna Mgbako, *The Mainstreaming of Sex Workers' Rights as Human Rights*, 43 HARV. J.L. & GENDER 91, 109, 126–27 (2020) (“Anti-prostitution activists practice carceral feminism: they seek to solve the ‘problem’ of sex work by calling for entrenched police power in the form of, for example, the continued criminalization of sex workers’ clients (a position that sex workers have argued puts them in precarious situations).” *Id.* at 109.).

<sup>162</sup> See Johonna Turner, *Race, Gender and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach*, 23 RICH. PUB. INT. L. REV. 267, 278 (2020) (“Challenging the logic of carceral feminism, radical feminists of color promoted a vision to end interpersonal and state violence, a recognition of the interlocking nature of gendered and racialized violence, and a strategy of organizing for cultural and social change.”).

<sup>163</sup> See Dorothy Roberts, Introduction, *The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting*, 5 STAN. J. C.R. & C.L. 191, 193 (2009) (“In recent years, the welfare, prison, foster care, and deportation systems have clamped down on poor minority communities, increasing many families’ experiences of insecurity and surveillance.”); Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1707 (2019) (reviewing VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018)) (“The choice to fund punitive rather than supportive programs has led to pervasive law enforcement, public assistance, and child welfare surveillance in poor, black communities. At the same time, appeals to longstanding stereotypes of black procreative pathology and maternal irresponsibility generated public support for these political choices.”).

<sup>164</sup> See Goodmark, *supra* note 109, at 38; Rebecca Tan, *Amid Immigration Crackdown, Undocumented Abuse Victims Hesitate to Come Forward*, WASH. POST (June 30, 2019, 2:17 PM), [https://www.washingtonpost.com/local/social-issues/amid-immigration-crackdown-undocumented-abuse-victims-hesitate-to-come-forward/2019/06/30/3cb2c816-9840-11e9-830a-21b9b36b64ad\\_story.html](https://www.washingtonpost.com/local/social-issues/amid-immigration-crackdown-undocumented-abuse-victims-hesitate-to-come-forward/2019/06/30/3cb2c816-9840-11e9-830a-21b9b36b64ad_story.html) [<https://perma.cc/ZQ4Q-AWET>].

<sup>165</sup> See JUHU THUKRAL & MELISSA DITMORE, URB. JUST. CTR., REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 5 (2003), <https://sexworkersproject.org/downloads/RevolvingDoor.pdf> [<https://perma.cc/CW72-FK9A>].

<sup>166</sup> See Derek J. Demeri, Opinion, *Transgender People Are Being Profiled as Sex Workers. AG's Directive Fails to Address the Issue.*, NJ.COM (Dec. 17, 2019), <https://www.nj.com/opinion/2019/12/transgender-people-are-being-profiled-as-sex-workers-ag-s-directive-fails-to-address-the-issue-opinion.html> [<https://perma.cc/EUF9-RKET>]; Mitch Kellaway, *Black Trans Woman “Profiled” as Sex Worker Gains Online Following, but May Remain Jailed*, THE ADVOCATE (July 20, 2015, 6:58 AM), <https://www.advocate.com/transgender/2015/07/20/black-trans-woman-profiled-sex-worker-gains-online-following-may-remain-jailed> [<https://perma.cc/9F2H-SDSL>].

been well intentioned, they have nevertheless been harmful to countless women who see the carceral system as inherently violent.

### C. An Intersectional, Inclusive, and Noncarceral Feminist Movement

The good news is that there is already a past and present feminist social movement that provides a blueprint for an intersectional, inclusive, and noncarceral feminist movement. Critical Resistance, an organization dedicated to ending the prison industrial complex, was formed in 1997 after activists challenged the use of prisons and police to address social, economic, and political problems.<sup>167</sup> That group organized a conference that “over 3,500 activists, academics, former and current prisoners, labor leaders, religious organizations, feminists, gay, lesbian and transgender activists, youth, families, and policy makers” attended.<sup>168</sup> INCITE! is a feminist organization that centers women, gender-nonconforming, and trans people of color, and has been at the forefront of noncarceral responses to community harms and interpersonal violence. The organization “recognizes that it is impossible to seriously address sexual/domestic violence within communities of color without addressing these larger structures of violence, such as militarism, attacks on immigrants’ rights and Indian treaty rights, the proliferation of prisons, economic neo-colonialism, and the medical industry.”<sup>169</sup> Richie notes that “Black feminists addressed issues of community violence and harm caused by state policy”<sup>170</sup> and described domestic violence in connection to “community and social conditions that link[] intimate partner violence much more closely to public policy and community violence.”<sup>171</sup>

INCITE! and Critical Resistance issued the Statement on Gender Violence and the Prison Industrial Complex in 2001, acknowledging:

The various alternatives to incarceration that have been developed by anti-prison activists have generally failed to provide sufficient mechanism[s] for safety and accountability for survivors of sexual and domestic violence. These alternatives often rely on a romanticized notion of communities, which have yet to demonstrate their commitment and ability to keep women and children safe or seriously address the sexism and homophobia that is deeply embedded within them.<sup>172</sup>

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<sup>167</sup> History, CRITICAL RESISTANCE, <http://criticalresistance.org/about/history> [https://perma.cc/5QVN-YWNF].

<sup>168</sup> *Id.*

<sup>169</sup> Analysis, INCITE!, <https://incite-national.org/analysis> [https://perma.cc/XZQ4-YJMK].

<sup>170</sup> RICHIE, *supra* note 8, at 146.

<sup>171</sup> *Id.* at 148.

<sup>172</sup> INCITE!-Critical Resistance Statement, INCITE! (emphasis omitted), <https://incite-national.org/incite-critical-resistance-statement> [https://perma.cc/R53U-H4PL].

The statement recognizes the harms of an approach that relies on incarceration and prisons to address violence while also recognizing that anti-prison activists need to provide concrete strategies to protect survivors of violence:

It is critical that we develop responses to gender violence that do not depend on a sexist, racist, classist, and homophobic criminal justice system. . . . To live violence free-lives [sic], we must develop holistic strategies for addressing violence that speak to the intersection of all forms of oppression. . . . However, the mainstream anti-violence movement has increasingly relied on the criminal justice system as the front-line approach toward ending violence against women of color. It is important to assess the impact of this strategy.<sup>173</sup>

Both INCITE! and Critical Resistance have developed strategies to address gender-based harm and hold harm-doers accountable. One example is Community Accountability, which is “a community-based strategy, rather than a police/prison-based strategy, to address violence within our communities. Community accountability is a process in which a community — a group of friends, a family, a church, a workplace, an apartment complex, a neighborhood, etc[.]” — defines community values and develops strategies for addressing community members’ abusive behaviors and processes for holding them accountable.<sup>174</sup> INCITE! provides resources on community accountability, transformative justice, and restorative justice that address the question of what to do when someone harms others.

Creative Interventions similarly developed a toolkit for facilitating accountability measures during a violence intervention.<sup>175</sup> Taking accountability is:

based upon the belief that communities working together can overcome violence, and the vision that each of us as individuals are capable of meaningful change towards that end. Our vision of accountability as a process or as a staircase of change means that we value any step leading towards the end of or reduction of violence and that we also see each small step as one that can lead to our bigger vision of community well-being and, ultimately, liberation.<sup>176</sup>

Advocates Mariame Kaba and Shira Hassan published a workbook, *Fumbling Towards Repair*, which provides facilitation guidance on responding to harm and encouraging people who inflict harm to take responsibility.<sup>177</sup>

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<sup>173</sup> *Id.* (emphasis omitted).

<sup>174</sup> *Community Accountability*, INCITE!, <https://incite-national.org/community-accountability> [<https://perma.cc/YFG2-LJZG>].

<sup>175</sup> See *Taking Accountability: How Do We Change Violence?*, in CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE, at S4F-1 (2020), <https://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf> [<https://perma.cc/K67R-KKV4>].

<sup>176</sup> *Id.* at S4F-7.

<sup>177</sup> See generally MARIAME KABA & SHIRA HASSAN, FUMBLING TOWARDS REPAIR: A WORKBOOK FOR COMMUNITY ACCOUNTABILITY FACILITATORS (2019).

Much of the focus of transformative justice and community accountability is on restoring the survivor of harm and addressing the political and social conditions that promote violence and harm. This may look like community members providing mutual aid to the victim or other forms of support to address their harms. The process for holding people accountable for violent behaviors may differ from community to community. Nevertheless, INCITE! has outlined several of the elements that communities may adopt to hold people and/or organizations accountable for violent attitudes and behaviors:

- a) *Acknowledge the abuse.* Create an accountability process where the oppressor/abuser fully understands [and] acknowledges the abuse (as specific acts and patterns and their political implications) without excuses, disclaimers, denials, minimizations, or victim-blaming.
- b) *Acknowledge the consequences of abuse. . . .*
- c) *Make reparations.* Create an accountability process where the oppressor/abuser makes sincere and meaningful reparations which can include a full public apology, payment for damage, payment of debts, behavioral changes, counseling, leaving the organization, political education for self and towards others, etc.
- d) *Make long-term, permanent change.*<sup>178</sup>

Community-based strategies are important because many women, especially women of color, end up incarcerated when police intervene in domestic matters. The organization Survived & Punished seeks to support these women. As the organization describes:

The Survived And Punished Project demands the immediate release of survivors of domestic and sexual violence and other forms of gender violence who are imprisoned for survival actions, including: self-defense, “failure to protect,” migration, removing children from abusive people, being coerced into acting as an “accomplice,” and securing resources needed to live.<sup>179</sup>

It is also important to recognize that there is already a burgeoning millennial, feminist movement that is intersectional, noncarceral, and committed to social justice. This movement is reflected in Black Lives Matter, an organization founded by Black, queer women that is decidedly feminist in its approach and commitment to recognizing the unique harms of intersectional forms of subordination.<sup>180</sup> The platform for the broader coalition of organizations that support Black people, the Movement for Black Lives, has embraced the decriminalization of sex

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<sup>178</sup> INCITE! WOMEN OF COLOR AGAINST VIOLENCE, COMMUNITY ACCOUNTABILITY WITHIN THE PEOPLE OF COLOR PROGRESSIVE MOVEMENT 14 (2005), <https://incite-national.org/wp-content/uploads/2018/08/cmtv-acc-poc.pdf> [https://perma.cc/V9JR-M4JK].

<sup>179</sup> S&P Analysis & Vision, *supra* note 158.

<sup>180</sup> See *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory> [https://perma.cc/ZM28-YKV6].

work, support for affordable housing and equal education, and the elimination of the carceral war on Black people.<sup>181</sup> The platform for the Movement for Black Lives states:

In order to fully achieve the Vision for Black Lives, it is essential to center the experiences of Black women, girls, trans, intersex, and gender nonconforming people, and to understand the ways in which imposition and internalization of cisheteropatriarchy has fueled multiple forms of racialized gender-based violence against and within Black communities.<sup>182</sup>

The platform makes the following demands to “end the war on Black women”:

Interrupt and end criminalization and deportation of Black women. Develop and support non-criminalizing and non-coercive, voluntary, accessible, harm reduction-based and trauma-informed responses to unmet mental health needs, drug use, involvement in the sex trades, survival theft, and community and interpersonal violence. . . .

Ensure that Black women have access to resources that will enable them to escape and avoid interpersonal and community violence, including living wage employment . . . .

Ensure full access to comprehensive sexual and reproductive health care and eliminate discriminatory barriers to health care for all people.

Eliminate the foster system’s power to permanently and irreversibly destroy Black families through termination of parental rights.<sup>183</sup>

Likewise, Mijente is a member organization that is “a political home for Latinx and Chicanx people who seek racial, economic, gender and climate justice.”<sup>184</sup> It has declared: “[O]ur cause isn’t just pro-Latinx, it’s pro-Black, pro-indigenous, pro-worker, *pro-mujer*, pro-immigrant, and pro-pachamama, and . . . prioritize[s] building social movements across place, peoples and issues.”<sup>185</sup> These organizations often are not conceptualized as feminist organizations, but they are decidedly feminist in their embrace of gender equity and commitment to improving the lives of women who were historically excluded from mainstream feminist organizations. These organizations are not single-issue organizations because their people do not live single-issue lives. These organizations also share a legacy with organizations from prior generations that organized to eliminate carceral responses to gender-based crime. It is therefore important to center them in feminist discourses and recognize them as feminist organizations.

<sup>181</sup> See *End the War on Black Women*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-the-war-black-women> [<https://perma.cc/2MZ6-WU88>].

<sup>182</sup> *Id.* (citation omitted).

<sup>183</sup> *Id.*

<sup>184</sup> *Our DNA*, MIJENTE, <https://mijente.net/our-dna> [<https://perma.cc/FE7B-A9S2>].

<sup>185</sup> MIJENTE (emphasis added), <https://mijente.net> [<https://perma.cc/5THF-5PPN>].

#### D. The Urgency of the Call to Action

*The Feminist War on Crime* illustrates why feminists should acknowledge the role of class and race in distorting who and how people are punished within the criminal system. Punishment may send a message through the feminist script. However, as Gruber states, the prison is “a primary site of violence, racism, and degradation in society” (p. 1). The message feminists are sending is a White supremacist message. It is a message that, above all, signals that our willingness to punish takes precedence over protecting women of color. It openly adopts the tools of the master and expects women of color to comply with a system that they know to be racist. It fails to acknowledge the role of intersectionality in creating systemic forms of subordination that make some women’s lives precarious in ways that differ from the precarity of other women’s lives. The women from Survived & Punished, who have been arrested after experiencing gender-based violence, are familiar with the harms of the criminal legal system.

Therefore, Gruber’s suggestion to look beyond the criminal system for justice is not a utopian ideal that ignores the importance of accountability (pp. 197–99). It is a matter of necessity for the poor, immigrant, Indigenous, and disabled women who live in fear of the criminal system and the surveillance and violence that it constantly brings within their lives. Moving beyond punishment is a move to realize a liberatory ideal where women’s needs are satisfied and feminists avoid the harms of an unjust criminal system. Professor Carol Gilligan imagines the ways that women could make the law more empathetic.<sup>186</sup> Rather than relying on the values of individualism and efficiency, the law might embrace the values of caring and empathy. Gilligan argues for an “ethic of care” in the law and imagines the ways that this value would ultimately lead to more just outcomes.<sup>187</sup> This ethic of care would not have to fall solely on women to promote but could be a framework for everyone to embrace.<sup>188</sup> Groups like INCITE!, Critical Resistance, Mijente, Creative Interventions, the Movement for Black Lives, and many others led by women of color provide concrete examples and resources, which embrace a mode of accountability that does not rely on police or prisons and which are instructive for promoting a nonessentialist, noncarceral feminism.

### CONCLUSION

*The Feminist War on Crime* is a timely call for feminists to reckon with the harms of the criminal institutions they helped to build. Ultimately, Gruber is asking for a new wave of feminism that prioritizes

<sup>186</sup> See generally GILLIGAN, *supra* note 146.

<sup>187</sup> See, e.g., *id.* at 74.

<sup>188</sup> Cf. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1582–83 (1987).

material gains for all women over expressive protection for the elite few. Sending messages about what feminism will tolerate should not be confused with improving the lives of all women. Punishing people who are painted as villains taps into the retributivist impulses in this society. But these retributivist impulses are inextricably connected with racism, classism, and ableism. The very color of blame is painted on Black faces, and the carceral feminist agenda has benefited from the White supremacy within the criminal legal system. By tapping into society's urge to protect White female fragility and the concomitant desire to punish Black or Brown male criminality, feminism has been a co-conspirator in the mass incarceration and mass criminalization agendas. The key lesson from Gruber's book is that instead of punishing our way into good governance, feminists should define new modes for accountability and devote energy toward the provision of resources that actually improve the lives of women. As Gruber argues, now is the time for millennial feminists to move away from punishment (p. 192).

Furthermore, it is time for vanguard feminists to consider how they have directly or indirectly contributed to the logics of the feminist script for punishment. More experienced feminists should be willing to consider the harms of their past work and be responsible for how their work may have contributed to the punitiveness of the system. It is not enough to adopt a superficial racial analysis of inclusion that does not deeply engage with the intersectional framework that Black feminists and other feminists of color have been developing. Shallow references to diversity and inclusion, and footnotes about intersectionality and "feminists of color" are also inadequate. I believe that seasoned feminists and feminist organizations should be willing to engage with the work of groups like INCITE! and Survived & Punished. They should be open to reorienting their arguments and strategies in ways that might feel uncomfortable. They should change their existing priorities, so as to accommodate new frameworks and forms of engaging in feminist advocacy that truly lead to a feminism that is also diverse and inclusive in substance, not just in symbols and through the deployment of relevant catchphrases and website imagery. This new feminism requires an openness to prioritizing intersectionality, rather than shallow mentions of a commitment to antiracism in response to accusations of racism. These vanguard feminists, and feminist organizations, should plan to make reparations for the harms that the feminist script for punishment has inflicted upon marginalized communities by furthering a new feminism that reimagines care, accountability, and possibility.