

## LENIENCY AS A MISCARRIAGE OF RACE AND GENDER JUSTICE

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### INTRODUCTION

What is a “miscarriage of justice”? One might think of many ways in which the wheels of criminal justice jump the tracks. The criminal system might permit the conviction of an innocent or the admission of a coerced confession. The system might permit bribery and influence of state actors. The system might tolerate the mistreatment of victims, witnesses, or defendants in the process of adjudication. This particular issue of the *Albany Law Review* focuses on a specific undesirable situation, namely one in which a “guilty” person “goes free.” Typically, victims’ rights activists and conservatives concerned with crime control are the most vocally opposed to leniency and defendants benefitting from legal “technicalities.”<sup>1</sup> There is, however, a set of cases in which the lenient treatment of criminal defendants engenders critique from progressive scholars—scholars whose sympathies otherwise lie with defendants’ rights. In such cases, state actors and jurors treat apparently culpable defendants leniently, not to remedy police misconduct, but because of the minority status of the victim.<sup>2</sup> Progressive scholars contend that defendants who offend against women, racial minorities, and gays in ways that reflect social and cultural hierarchies are the beneficiaries of discriminatory mercy from biased legal actors.<sup>3</sup> Examples include the state’s failure to take domestic violence seriously,<sup>4</sup> the various barriers to successful

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<sup>1</sup> See Barry C. Feld, *Race, Politics and Juvenile Justice: The Warren Court and the Conservative “Backlash”*, 87 MINN. L. REV. 1447, 1532 (2003).

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *infra* Part II.

<sup>4</sup> See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 757–58 (2007)

rape prosecution,<sup>5</sup> and male defendants' disproportionately successful use of the provocation defense in intimate homicide,<sup>6</sup> and "gay-panic" cases.<sup>7</sup>

The liberal position on discriminatory leniency is poignantly exemplified by the progressive outcry against Florida's stand-your-ground law in the wake of Trayvon Martin's death.<sup>8</sup> Publicity of this now high-profile case began in the social network, and online outrage propelled it into national headlines.<sup>9</sup> It soon became politically polarized. Liberals condemn the shooter, George Zimmerman, for acting on racialized suspicion, the Sanford police for declining to arrest,<sup>10</sup> and the Florida law for permitting a person to kill even when safe retreat is possible.<sup>11</sup> Conservatives, by

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("[P]olice viewed domestic violence as either a legitimate exercise of male control within a relationship or at least a private problem inappropriate for public concern.").

<sup>5</sup> See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587–89 (2009) [hereinafter Gruber, *War on Crime*].

<sup>6</sup> See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 76 (1992).

<sup>7</sup> See Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 173, 176 (1992) (discussing the homosexual-advance defense in murder).

<sup>8</sup> See generally *The Trayvon Martin Case*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/trayvon-martin> (last visited May 22, 2013) (assembling articles related to the Trayvon Martin case). I use the term "liberal" interchangeably with "progressive" to denote a left-leaning political position. It does not refer to a Lockean conception of rights and property.

<sup>9</sup> See Emily Steel, *Trayvon Martin Shooting Death Sparks Outrage on Social Media*, WALL ST. J. DIGITS BLOG (Mar. 22, 2012, 11:58 AM), <http://blogs.wsj.com/digits/2012/03/22/trayvon-martin-shooting-death-sparks-outrage-on-social-media>.

<sup>10</sup> See, e.g., Judith Browne Dianis, *'Stand Your Ground' Should Be Repealed*, HUFFINGTON POST BLOG (Dec. 4, 2012, 6:40 PM), [http://www.huffingtonpost.com/judith-browne-dianis/stand-your-ground-repeal\\_b\\_2218727.html](http://www.huffingtonpost.com/judith-browne-dianis/stand-your-ground-repeal_b_2218727.html) (asserting that Trayvon Martin was seen "as threatening, dangerous or suspicious" because he was "seen through a lens of racial stereotypes and biases"); Jeff Weiner & Rene Stutzman, *FBI Interviews: No Evidence Zimmerman a Racist*, ORLANDO SENTINEL (July 12, 2012, 9:17 PM), [http://articles.orlandosentinel.com/2012-07-12/news/os-george-zimmerman-evidence-release-20120712\\_1\\_trayvon-martin-neighborhood-watch-volunteer-george-zimmerman](http://articles.orlandosentinel.com/2012-07-12/news/os-george-zimmerman-evidence-release-20120712_1_trayvon-martin-neighborhood-watch-volunteer-george-zimmerman) (noting the individuals and groups that accused the Sanford police "of doing a shoddy, racially biased investigation" and for failing to promptly arrest Zimmerman).

<sup>11</sup> FLA. STAT. ANN. § 776.013(3) (West 2013) ("A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony."). See also Press Release, ColorOfChange, *As State Task Force Reconvenes, Second Chance on Shoot First Campaign Urges Panel to Reconsider Florida's Shoot First Law* (July 10, 2012), available at <http://www.colorofchange.org/press/releases/2012/7/10/state-task-force-reconvenes-second-chance-shoot-fi>. ("The Florida State Conference of the NAACP supports full repeal of the Stand Your Ground law in Florida."); Sean Lengell, *Black Caucus Members Offer Resolution to Honor Trayvon Martin*, WASH. TIMES INSIDE POL. BLOG (Apr. 4, 2012, 6:46

contrast, tend to side with Zimmerman, a local neighborhood watch leader, denying that he acted on the basis of race, and supporting the law as permitting law-abiding citizens to defend themselves.<sup>12</sup> In a sense, the world has been turned topsy-turvy. Progressive activists and scholars call for the application of police power to Zimmerman and the elimination of a defense-friendly law for all future murder defendants.<sup>13</sup> Conservative commentators lobby for prosecutorial restraint and the scrupulous honoring of a murder defendant's legal rights.<sup>14</sup> What could move the tough-on-crime party to support leniency? What could move state authority skeptics to champion broadening prosecutorial power?

For the past several decades public discussion of the penal system has centered on spectacular crimes in which evil defendants commit grievous harms against paradigmatically innocent and vulnerable victims.<sup>15</sup> This framework permits conservative commentators to embrace ever-harsher criminal laws while exempting certain offenders like Zimmerman from the punitive paradigm on the grounds that he is not a “real” criminal and Trayvon is not a “real” victim. Liberal criminal law scholars, by contrast, generally resist the lure of spectacular retributive rhetoric and its punitive consequence and take a global view of the importance of protecting individuals from state penal authority.<sup>16</sup> Progressive theorists routinely criticize mass incarceration, the one-way upward ratchet of U.S. sentencing policy, and the eroding of defendants' civil liberties.<sup>17</sup> Nevertheless, liberals call for strict prosecution in

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PM), <http://www.washingtontimes.com/blog/inside-politics/2012/apr/4/black-caucus-members-offer-resolution-honor-trayvo> (noting the Congressional Black Caucus's call for repeal of Florida's “Stand Your Ground” law).

<sup>12</sup> See, e.g., *Exclusive: George Zimmerman Breaks Silence on “Hannity”*, FOX NEWS (July 18, 2012), <http://www.foxnews.com/on-air/hannity/2012/07/18/exclusive-george-zimmerman-breaks-silence-hannity?page=8> (explaining Zimmerman's attorney's belief that Stand Your Ground applied to Trayvon Martin's death); Judson Phillips, *Injustice: The Liberal Lynch Mob and the George Zimmerman Case*, TEA PARTY NATION (Mar. 28, 2012, 8:32 AM), <http://www.teapartynation.com/forum/topics/injustice-the-liberal-lynch-mob-and-the-george-zimmerman-case> (asserting that “Trayvon Martin starting a fight,” not racial profiling, led to his death).

<sup>13</sup> See Dianis, *supra* note 10.

<sup>14</sup> See Phillips, *supra* note 12.

<sup>15</sup> See generally Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 665–66 (1999) (explaining how the Victims' Rights Movement has dramatized legal proceedings).

<sup>16</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8–9 (2010).

<sup>17</sup> See *id.* at 95–96; Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 301–04 (2012); Dorothy E.

Trayvon Martin's case, rather than applauding the Sanford police for scrupulously respecting Zimmerman's rights under Florida law.<sup>18</sup> This is because the police's unusually restrained behavior had less to do with any civil libertarian desire to protect Zimmerman's freedom than with the police's overt racism and internalization of the black-as-criminal stereotype (or at least understanding of Zimmerman's stereotypical thinking). Trayvon is thus a far more likely poster child for police racism toward black victims than police moderation toward suspects.

There is little doubt that Zimmerman's suspicion of Trayvon Martin was deeply influenced by racist and racialist norms, just as individual batterers' acts of domestic violence are enabled by patriarchal values and institutional structures.<sup>19</sup> The Sanford police's decision to afford lenient treatment to Zimmerman was also likely influenced by race,<sup>20</sup> just as the failure to arrest batterers can reflect police officers' chauvinist ideology.<sup>21</sup> In these types of cases, the actions of the defendants and the state responses are undoubtedly miscarriages of racial and gender justice with terrible

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Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004); see also Helen Gugel, *Remaking the Mold: Pursuing Failure-to-Protect Claims Under State Constitutions via Analogous Bivens Actions*, 110 COLUM. L. REV. 1294, 1329 (2010) (“In the aftermath of the Warren era, as the more federalist-inclined Burger and Rehnquist Courts took over, there was a sharp curtailment in the national interpretation and application of civil liberties.”); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1076 (2010) (tracing the uptick in racial profiling to Supreme Court cases “afford[ing] vast discretion to law enforcement” in ways that have “exacerbated problems with racial profiling”); Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246 (2005) (“[F]ederal sentencing . . . has become a one-way upward ratchet . . .”).

<sup>18</sup> See generally Adam Weinstein and Mark Follman, *The Trayvon Martin Killing, Explained*, MOTHER JONES (Mar. 18, 2012, 10:42 AM), <http://www.motherjones.com/politics/2012/03/what-happened-trayvon-martin-explained> (chronicling the Trayvon Martin killing, the aftermath, history, and outrage at the lack of prosecution).

<sup>19</sup> See Peggy Cooper Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1570 & n.51 (1989) (“[U]s[ing] the term ‘racialist’ to describe judgments controlled by racial stereotypes without adopting the accusatory tone suggested by the word ‘racist.’”).

<sup>20</sup> See Adam Weinstein, *Trayvon Martin's Death Extends Sanford's Sordid Legacy*, MOTHER JONES (Mar. 28, 2012, 3:00 AM), <http://www.motherjones.com/politics/2012/03/trayvon-martin-sanford-racial-history> (describing the troubling racial history of Sanford and its police department).

<sup>21</sup> See Gruber, *supra* note 4, at 757–58; Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 312 (2004) (discussing individual police officers' lack of understanding and awareness in domestic violence calls).

consequences. Of course, the natural reaction is to seek to deter racialized and gendered crimes and prevent biased state actors from acting leniently by insisting on aggressive prosecution. The question is whether the prosecutorial reaction advances progressive values overall.

This article argues that liberals' focus on leniency in cases of extraordinary violence against minorities and proposals for greater prosecution might not, in the end, further the anti-subordination agenda. Emphasizing the deviant immorality of racist and sexist criminals might actually subvert rather than foster a critique of social hierarchy. . Moreover, ratcheting-up penal authority to address discriminatory leniency may have the practical effect of enhancing rather than undermining racial subordination. Furthermore, using narrative to promote identification with victims at the expense of defendants is fraught with perils to racial and gender justice.

Part I of this article describes the general political divide on penal leniency and demonstrates how crime-control proponents exempt certain offenders and offenses from their punitive prescriptions. Part II examines race and gender theorists' critique of these exemptions and their law reform proposals to address "underenforcement" in minority-victim cases. Part III discusses the danger inherent in both progressives' choice to focus on lenity as the problem, and their severity-boosting solutions.

## I. LENIENCY AS A MISCARRIAGE OF JUSTICE

There are both analytic problems with and normative assumptions in the claim that the "guilty going free" constitutes a miscarriage of justice. Logically, it is impossible for a legally guilty person to be exonerated. A legally guilty person is, by definition, one who has been convicted.<sup>22</sup> Perhaps a legally guilty person might "go free," if she escapes after conviction or is given a very short probationary sentence. However, that is not what most people think about when they think about the guilty going free. The problem with the guilty going free more likely refers to situations in which the person who in fact "did it" fails to be arrested, has their case dismissed, or is acquitted.<sup>23</sup> Even so, the concept that a

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<sup>22</sup> BLACK'S LAW DICTIONARY 776 (9th ed. 2009).

<sup>23</sup> See, e.g., Jeffrey E. Thomas, *Legal Culture and the Practice: A Postmodern Depiction of the Rule of Law*, 48 UCLA L. REV. 1495, 1506–07 (2001) (reviewing a Massachusetts case

factually responsible person avoiding conviction is always unjust carries a tough-on-crime valence because it assumes that punishing the culpable should be the sole meter of justice.

Even the most ardent law enforcement supporter would be hard pressed to argue that a person who turns out to be guilty should be convicted when the state possesses little or no evidence. If subjecting the innocent to punishment is also a situation meriting concern, then the system must at some level strike balance between condemning the factually responsible and sparing the factually innocent.<sup>24</sup> Moreover, procedural rules that protect other important values, like judicial integrity and individual liberty, increase the chances that some factually guilty persons will avoid punishment.<sup>25</sup> Thus, it may be helpful to rephrase the problem as the system permitting certain persons against whom there is some apparent threshold amount of evidence to avoid punishment, without a good (or good enough) reason for doing so.

The primary debate concerns what constitutes a good reason for increasing the probability of exonerating the factually guilty. Herbert Packer has famously articulated two polar models of criminal procedure: the Crime Control Model and the Due Process Model.<sup>26</sup> Jurists and scholars who adhere to the Crime Control Model seek to cast a wider criminal enforcement net<sup>27</sup> by lowering prosecutorial burdens, relaxing standards of proof, and limiting or eliminating the Exclusionary Rule.<sup>28</sup> They see the harm of the factually guilty avoiding punishment as greater than, or at least on the same level as, the harm of factually innocent persons suffering state-sanctioned punishment and the harm of intrusive police investigative power.<sup>29</sup> Thus, conservatives bristle at the notion that

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where a man who murdered his wife went free because of illegally obtained evidence).

<sup>24</sup> See Andrew G.T. Moore, II, *The O.J. Simpson Trial—Triumph of Justice or Debacle?*, 41 ST. LOUIS U. L.J. 9, 9 (1996) (“The adversarial system is one of checks and balances, whose dual objectives are to punish the guilty for their crimes while protecting innocent persons from false conviction.”).

<sup>25</sup> See Rochelle L. Shoretz, *Let the Record Show: Modifying Appellate Review Procedures for Errors of Prejudicial Nonverbal Communication by Trial Judges*, 95 COLUM. L. REV. 1273, 1299 (1995) (“Though it is popular today to criticize those trials in which defendants are acquitted ‘on a technicality,’ such attacks diminish the importance of the integrity of the judicial process.”).

<sup>26</sup> See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149–74 (1968).

<sup>27</sup> See *id.* at 158 (“The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.”).

<sup>28</sup> *Id.* at 159–63.

<sup>29</sup> See Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus*

a confessed child killer goes free simply because his confession was unwarned or even coerced.<sup>30</sup>

By contrast, adherents to the due process school are keenly attuned to the potential for governmental overreaching and maintain that the “cost” of some apparently factually guilty people going free is not too high a price to pay for protecting innocents against false conviction and safeguarding all society members’ privacy and autonomy.<sup>31</sup> Articles engaging this particular debate cover the criminal procedural scholarship landscape. In this context, the positions on whether a non-conviction constitutes a miscarriage of justice fall strictly along political lines. Politically conservative commentators, who tend to support strong governmental action against crime, endorse the crime-control view, whereas more politically liberal thinkers, who tend to be skeptical of state authoritarian power, embrace the due process model.<sup>32</sup>

In a sense, then, the question of the “guilty going free” implicates the most basic of all questions in criminal law: what level of protection should be afforded to criminal suspects, or put another way, how lenient should the criminal law be? The answer to the latter from right and center-right politicians as well as much of society at large is “not very lenient.”<sup>33</sup> It is no secret that over the past half century, the United States has taken a markedly punitive

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*Concrete Harms*, 73 LAW & CONTEMP. PROBS. 69, 84 (2010) (“[P]eople who oppose suppression in a given case view the failure to punish private criminal misconduct—through successful prosecution, conviction, and sentencing—as a concrete harm to crime victims whose rights the defendant violated in committing his crime.”).

<sup>30</sup> See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1127 (1998) (“A society concerned for victims is obligated to do its best to avoid such miscarriages of justice as when a child abuser is set free because of a *Miranda* technicality.”).

<sup>31</sup> See PACKER, *supra* note 26, at 165 (“[T]he demands of the Due Process Model have tended to evolve from an original matrix of concern for the maximization of reliability into values . . . [including] the concept of the primacy of the individual and the complementary concept of limitation on official power.”).

<sup>32</sup> See Colb, *supra* note 29, at 82 (“On the liberal side, past Justices . . . have contended that when a prosecutor introduces the fruits of an unreasonable search or seizure into evidence at trial, the prosecutor has inflicted a further constitutional harm on the defendant who suffered the original unlawful search or seizure.”); David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1032 n.25 (2010).

<sup>33</sup> See Gruber, *supra* note 5, at 618 (“Beginning with the Nixon Administration, the United States has waged several ‘wars’ on crime, sentences have uniformly increased, and being tough on crime has become a sure-win platform on both sides of the political aisle.” (footnotes omitted)); Shoretz, *supra* note 25, at 1299 (noting societal support for the prosecutorial ideology); Gerald F. Uelman, *Victims’ Rights in California*, 8 ST. JOHN’S J. LEGAL COMMENT. 197, 203 (1992) (observing that politicians are “obsessed” with maintaining a “tough on crime” media image).

turn. Today, the United States incarcerates its citizens at a higher rate than any other developed country and has one of the harshest sentencing regimes in the world.<sup>34</sup> Local news shows regularly cover sensationalized stories of horrific crimes against particularly vulnerable victims, especially crimes that appear to have been preventable or in which the defendant did get his “due.”<sup>35</sup> Politicians’ “tough” stances on crime (or their opponents’ “weak” stances) continue to figure prominently in campaign advertising.<sup>36</sup>

Sociologists and legal theorists have offered many explanations of the United States’ current excess of severity. Some trace the shift to changing racial demographics,<sup>37</sup> while others link it to the erosion of small community solidarity.<sup>38</sup> Some characterize mass incarceration as a consequence of capitalism’s management of surplus labor,<sup>39</sup> while others describe it as the continuation of Jim

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<sup>34</sup> Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913–14 (2007) (observing that “the United States leads the world by imprisoning 750 people out of every 100,000 citizens” and that highly mechanized state and federal sentencing guidelines have led to longer sentences and reduced the ability of the judiciary to make case-by-case decisions). See also Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implication of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 307 (2009) (“[T]he United States . . . [is] an outlier, not only among prevailing practices in the Western world, but also in comparison to the United States’ own long-standing practices. United States imprisonment rates are now almost five times higher than the historical norm prevailing throughout most of the twentieth century, and they are three to five times higher than in other Western democracies.”); David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 457 (2001) (“There can be little doubt that the United States is a world leader in penal severity. . . . We boast the highest per capita incarceration rate in the world, and our rate is five times higher than that of the next highest Western nation.”).

<sup>35</sup> See Rapping, *supra* note 15, at 675–77; see also Feld, *supra* note 1, at 1532 (“News media coverage of criminal justice administration typically emphasizes the ‘failures’—defendants freed on legal ‘technicalities’ and by lenient judges—and presents advocates for more severe punishment as the remedy.”).

<sup>36</sup> Republican state candidate Mike Coffman spent millions on ads in Colorado condemning Democratic candidate Joe Miklosi for voting against a tough-on-sex-offenders bill. Carl Hulse, *Colorado Race Turns Fierce After Republican’s Anti-Obama Remark*, N.Y. TIMES, Oct. 30, 2012, at A10 (“Mr. Coffman put out an ad accusing Mr. Miklosi of opposing some mandatory minimum sentences for sexual offenders, a claim the Democrat called badly distorted.”).

<sup>37</sup> See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 85 (2001) (linking the United States’ punitive turn to the balkanization of black neighborhoods).

<sup>38</sup> See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 31–32 (2011) (discussing the shift from localized policing to a “more centralized, more legalized, more bureaucratized” justice system in the twenty-first century as a possible explanation for more severe penal laws).

<sup>39</sup> See, e.g., Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 790 (2005) (discussing the theory that imprisonment increases when labor is abundant but decreases when labor is scarce).

Crow's racist legacy.<sup>40</sup> Some argue that the "wars" on crime and drugs were constructed to support a burgeoning neoliberal ideology,<sup>41</sup> while others assert that they reflected society's already extant fear from elevated crime rates.<sup>42</sup> Whatever the cause, two things about criminal law in the latter Twentieth Century are evident: (1) conservative and moderate politicians used tough-on-crime rhetoric and supported prosecutorial policies to garner public support;<sup>43</sup> and (2) this enabled the systematic ratcheting up of criminal law enforcement, prosecution, and punishment.<sup>44</sup>

The politicization of criminal justice issues profoundly affected public discourse about crime and punishment. It divested the issue of appropriate punishment of nuance and narrowed the discussion to the sole issue of how to pile more sanctions on evil criminal actors.<sup>45</sup> Today, concepts like rehabilitation and social causes of crime seem like legal dinosaurs.<sup>46</sup> Discussing crime as a negative by-product of a densely populated capitalist welfare state carries little political cache. Highlighting communal degradation in urban areas and its link to illegal market behavior<sup>47</sup> will not produce a

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<sup>40</sup> See ALEXANDER, *supra* note 18, at 175–76.

<sup>41</sup> See, e.g., Gruber, *supra* note 5, at 618–20; see also Angelina Snodgrass Godoy, *Converging on the Poles: Contemporary Punishment and Democracy in Hemispheric Perspective*, 30 LAW & SOC. INQUIRY 515, 529 (2005) (observing that “conservatives . . . reframe[d] the crime issue from a question of inadequate social welfare to one of insufficient social control”); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1542 (2006) (arguing that neoliberalism constructs “a sentimentalized vision of the innocent yet victimized, taxpaying, suburban good citizen and then attacking that citizen’s purported enemies—reliably, queers, liberals, feminists, and blacks”).

<sup>42</sup> See, e.g., Vanessa Barker, *The Politics of Pain: A Political Institutional Analysis of Crime Victims’ Moral Protests*, 41 LAW & SOC’Y REV. 619, 625 (2007). But see, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 80 (1997) (“[T]he trend toward greater public punitiveness did not precede the adoption and implementation of tough anticrime policies . . . .”); KATHLYN TAYLOR GAUBATZ, *CRIME IN THE PUBLIC MIND* 5–8 (1995) (tracing public fear to media exaggeration rather than crime rates).

<sup>43</sup> See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 832 (2001).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* at 841 (“[T]he war on crime is fueled by images of . . . [vengeful victims] of horrific crimes . . .”).

<sup>46</sup> See GARLAND, *supra* note 37, at 75 (attributing rehabilitation’s retrenchment in part to “a dominant political block that defined itself in opposition to old style ‘welfarism’”); Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414 (contending that beginning in the 1970s the rehabilitation model suffered a “wide and precipitous decline” and has been replaced by incapacitation); Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic’s View*, 102 DICK. L. REV. 355, 362 (1998) (“Today, rehabilitation is dead.”).

<sup>47</sup> See Feld, *supra* note 38, at 1528–29 (“In an effort to increase audience shares . . . .

large television viewership. Crusading for the rights of convicts is unlikely to land one in the state house. The virtual town square rings with deafening chatter from reporters, public officials, and concerned citizens expressing “zero tolerance” positions on the heinous crime du jour (drug dealing, child sex predation, human trafficking).<sup>48</sup>

As attention veered from social problems to pathological criminals, popular discourse revolved around the individual harms of crime.<sup>49</sup> Rather than focusing on statistical metrics of crime’s externalities, public discussion tended to emphasize violence’s emotional costs to individual victims.<sup>50</sup> It therefore makes sense that the decades experiencing punitive shift in penal theory and rhetoric also saw the rise of “victims’ rights.”<sup>51</sup> The victims’ rights movement marked a “fundamental change” in the dynamics of criminal law and procedure.<sup>52</sup> As one expert notes, “[t]he victim became increasingly pitted against the offender, and only long sentences appeared to validate her pain and suffering.”<sup>53</sup> Within the dominant discourse, the victim occupied a very specific role that inexorably allied victims’ rights with increased punitiveness.<sup>54</sup> Publicized crime victims were innocent by their very nature, and

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[c]rime news coverage focuses on the most frightening and sensational forms of violence . . .”).

<sup>48</sup> See, e.g., Ronald W. Reagan, President, the United States of America, Remarks at the Annual Conference of the National Sheriff’s Association in Hartford, Connecticut (June 20, 1984), available at <http://www.reagan.utexas.edu/archives/speeches/1984/62084c.htm> (lamenting that “a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity” but noting that “at last we’re making progress against these criminal predators in our midst”); 148 CONG. REC. H916 (Mar. 14, 2002) (statement of Rep. Mark Green) (“[T]his [Two Strikes and You’re Out Child Protection Act] is simply about taking these sick monsters off the streets, . . . to try to end the cycle of horrific violence that is every parent’s nightmare.”). Even the liberal President Obama used his important campaign-era speech to the Clinton Global Initiative to highlight one particular policy issue: “[T]he injustice, the outrage, of human trafficking.” Barack Obama, President, the United States of America, Speech to Clinton Global Initiative (Sept. 25, 2012), available at <http://www.politico.com/news/stories/0912/81655.html#ixzz2EgUGGeqK>.

<sup>49</sup> Feld, *supra* note 38, at 1531.

<sup>50</sup> *Id.*

<sup>51</sup> Alice Koskela, Comment, *Victim’s Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158 (1997).

<sup>52</sup> See *id.*

<sup>53</sup> Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission’s Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 568 (2002).

<sup>54</sup> See *id.* at 568–69 (“The victims’ rights movement, however, is not homogeneous and has not spoken with one voice in its demand for increased sentences. . . . Nevertheless, it appears that Congress has heard the cry for higher penalties most loudly.”).

they suffered terribly in the aftermath of extreme violence.<sup>55</sup> Victims, as media and campaign darlings, had to exhibit characteristics to which television audiences could relate. Victimhood stories are compelling precisely because they cause likely voters to think: “This could happen to me or my kid.” Consequently, publicized victims are not generally racial minorities, the economically disadvantaged, gang members, or drug addicts.<sup>56</sup> They are young, white children, suburbanites subjected to random violence, and white female survivors of extreme brutality.<sup>57</sup> Yet these culturally paradigmatic victims are statistical outliers. For this reason, scholars observe:

The public face of the Victims’ Rights Movement hides the most severely affected victims of violent crime, sexism and racism (e.g., prostitutes or teenage black males in the juvenile justice system) who are implicitly disqualified as “genuine” victims in Victims’ Rights rhetoric.<sup>58</sup>

The popular criminal law ideology of recent decades thus reflects a flattened view of the world in which crime is perpetrated by internally evil, fully responsible, violent offenders against vulnerable, innocent, everyday-person victims.<sup>59</sup> Of course, such discourse is infused with racial, socioeconomic, and gender stereotyping. “Defendants are subhuman; they are monsters. The criminal is Ted Bundy, Lawrence Singleton, Richard Allen Davis, Willie Horton—criminals who seem to be the very embodiment of evil. Alternatively, the image of the criminal is the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male.”<sup>60</sup> As

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<sup>55</sup> Lynne Henderson, *Co-Opting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579, 589 (1998) (“Such encounters can cause a number of psychological, social, economic, and spiritual harms to the individual or her survivors.”).

<sup>56</sup> See *id.* at 585 (“We sure don’t want to give criminals like gang members . . . [any rights].” (quoting William Jefferson Clinton, President, United States of America, Announcement in Support of a Victims’ Rights Amendment (June 25, 1996), available at [http://www.pbs.org/newshour/updates/law/jan-june96/victim\\_06-25.html](http://www.pbs.org/newshour/updates/law/jan-june96/victim_06-25.html) (internal quotation marks omitted))).

<sup>57</sup> Henderson, *supra* note 55, at 584.

<sup>58</sup> Vik Kanwar, *Capital Punishment as “Closure”: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 231 (2002).

<sup>59</sup> See generally Henderson, *supra* note 55, at 584–85 (discussing how the portrayals of the victims in the media do not correlate to actual victims and giving examples of racialized media coverage).

<sup>60</sup> *Id.* at 586–87 (footnotes omitted); see Rapping, *supra* note 15, at 675–76 (“[America’s *Most Wanted*] invariably pit[s] victims of traditional nuclear families against the harrowing images of criminals as antisocial loners and lunatics preying on women and especially children.”).

victims, women must be stereotypically vulnerable, pacifistic, and chaste.<sup>61</sup> Experts have accordingly observed that black women, who are stereotyped as powerful (even masculine), violent, and hypersexual, have a much harder time wearing the victim label than white women.<sup>62</sup>

This description of modern criminal law discourse provides background to the popular view of whether it is justified for persons against whom there is some evidence to avoid punishment. When one identifies with victims of horrific violence and remains unconcerned with the fate of defendants who are economic, racial, and moral “others”; when one hears far more about the tragedy of leniency than the harm of severity; and when one fears random acts of violence far more than government overreaching, the answer is clear.<sup>63</sup> There is almost nothing that justifies letting the factually responsible go free. The prevailing rhetoric of criminality has thus produced the “one-way upward ratchet” of criminal law reform, leaving the defense of civil liberties to a dwindling group of liberals who distrust government and object to stereotyping in criminal law discourse. The dominant narrative of criminal law not only explains why policy makers, and most society members, subscribe to crime-control ideology, it also provides insight on how and why conservatives exempt particular classes of offenders and offenses from the punitive program.

The reductionist images of victims and criminals, which reflect entrenched social hierarchies, make it possible to declare that certain offenses are not real crimes, certain victims are just “playing the victim,” and certain offenders are being unfairly targeted. Thus, modern criminal law discourse, though extremely punitive in

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<sup>61</sup> See Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 179 (2006) (“[R]ape law was used to police the sexual—to police virginity, chastity, and monogamy—and to police through the sexual—to enforce gender and racial hierarchies as well as codes of public morality.”).

<sup>62</sup> See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 85 (1999) (“[T]he construction of black women as promiscuous causes jurors in sexual assault prosecutions to doubt black women’s credibility . . . .”); Meghan Condon, Note, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL’Y 487, 492 (2010) (“Minority women are more likely to be arrested than white women, and when they are arrested, they are charged with more serious crimes than white women.”).

<sup>63</sup> See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 144–45 (1987) (observing that society can distance itself from social problems, particularly racism, by inventing a “great public wilderness of others”).

nature, has rendered criminal law virtually impotent at improving race and gender inequality. In the not-too-distant past, those harboring traditionalist sentiments about women's roles routinely argued that because battered women "choose" to remain with abusers they are not real victims, or because battering is a private domestic issue, it is not a real crime. Conservative commentary on rape has asserted that complainants are not real victims on account of precipitating or ambivalent behavior or because they are liars.<sup>64</sup> Recent political campaigns have exposed a cadre of conservative "rape deniers," who insist that unwanted sexual conduct is not a real crime.<sup>65</sup> Studies confirm time and time again that people have an extremely hard time viewing white college boys accused of sexual assault as real criminals.<sup>66</sup> Extreme traditionalists remain sympathetic to men who claim that their wives provoked them to kill or who claim provocation on the basis of a homosexual advance. And even knowing that Trayvon was unarmed and that Zimmerman initiated the confrontation, there are those who characterize Zimmerman as the real victim.<sup>67</sup> This is reminiscent of psychological studies in which the majority of observers shown a picture of a white man with a knife confronting an unarmed black man stated that the black man was the aggressor and the white man was acting in self-defense.<sup>68</sup>

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<sup>64</sup> See generally SUSAN ESTRICH, REAL RAPE 38–41 (1987) (discussing historical literature, which posited that the resistance requirement in rape was necessary to combat a woman's likelihood of lying); Gruber, *supra* note 5, at 590–91 (discussing the view of women as liars).

<sup>65</sup> For example, during the 2012 campaign, Republican U.S. Senate candidate Todd Akin stated that in a "legitimate rape" a woman's body will reject the sperm and U.S. Senate candidate Richard Murdock referred to rape as "something that God intended to happen." John Eligon & Michael Schwartz, *In Rapes, Candidate Says, Body Can Block Pregnancy*, N.Y. TIMES, Aug. 20, 2012, at A13; Jonathan Weisman, *Rape Remark Jolts a Senate Race, and the Presidential One, Too*, N.Y. TIMES, Oct. 25, 2012, at A16.

<sup>66</sup> See, e.g., GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 219 (1989) ("One white female juror told us that a defendant was: 'A nice-looking young fellow. Nice dressed, like a college boy. Neat haircut. I couldn't believe he would be capable of something like this.'"); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 677–78 (1998) (noting that jurors expect a rapist to be "a sex-crazed, deviant sociopath" or "a 'loser' who has no girlfriend").

<sup>67</sup> See, e.g., *George Zimmerman Case – Open Discussion Thread*, LAST REFUGE (Feb. 28, 2013), <http://theconservativetreehouse.com/2013/02/28/02-28-george-zimmerman-case-open-discussion-thread> (providing an open thread dedicated to exposing the "fraudulent" case against Zimmerman); Adam Ondo, *George Zimmerman: Victim of Racist Hatred and Liberal Ignorance*, C. CONSERVATIVE (Mar. 30, 2012), <http://thecollegeconservative.com/2012/03/30/george-zimmerman-victim-of-racist-hatred-and-liberal-ignorance>.

<sup>68</sup> See, e.g., Ralph Norman Haber & Lyn Haber, *Experiencing, Remembering and Reporting*

It should be evident that the punitive turn in the criminal law and the discourse that enabled it are deeply problematic from a race and gender standpoint.<sup>69</sup> Some, like David Cole, go so far as to argue that Americans tolerate the repressive state of criminal justice only because its burdens fall on racial minorities who have little political power.<sup>70</sup> Thus, in addition to being intolerably punitive, the severity of our system is also arguably anti-democratic.<sup>71</sup> At the same time, discriminatory exemptions from the punitive paradigm are also problematic from a subordination standpoint. It is not skepticism toward state authority that underlies moderation in these cases. Rather, it is the veneration of oppressive traditionalist social norms that leads normally authoritarian voices to call for restraint. Thus, these exceptional cases of tolerance from conservatives garner vocal critique rather than support from left-leaning commentators and race and gender justice proponents. Let us turn to that critique.

## II. LENIENCY AS A MISCARRIAGE OF RACE AND GENDER JUSTICE

Progressives lodge targeted critiques of facets of the criminal law that have resisted the punitive trajectory because of bigoted notions that offenses against minorities are not true crimes. Sometimes discriminatory leniency is embedded in the law itself, meaning that the very elements of a crime or defense reflect hierarchy. In other situations, the law too obviously permits state actors and jurors to exercise discretionary mercy in a discriminatory manner. Most of the time, leniency in minority-victim cases results from both factors. This section discusses the progressive critique of leniency in criminal law, focusing specifically onof domestic violence and murder law.

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*Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057, 1063 (2000) (citing the study).

<sup>69</sup> See Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1143–44 (2000) (“[T]he salience of crime is establishing new relations in terms likely to exacerbate racism [and] promote inequality . . . .”); cf. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1971–72 (2008) (observing that while statistics indicate the criminal justice system is “hard-wired for punitive racism,” in recent years it has become evident that the “truth is more complex”).

<sup>70</sup> See Cole, *supra* note 34, at 466 (“[W]e can afford to be so punitive only because the burdens of our tough-on-crime policies do not fall equally on the majority, but disproportionately on a disempowered minority group.”).

<sup>71</sup> See *id.* (“This is not to suggest that racial disparities are the only explanation for the severity of our system, but it is to suggest that they may be a *necessary* if not sufficient condition.”).

*A. Leniency Toward Defendants Who Abuse Women*

The tough-on-crime crime shift coincided with other later Twentieth Century social movements. The so-called “second wave of feminism” refers to the first major coalescing of ideology and activism in support of women’s empowerment after the suffragettes.<sup>72</sup> In addition to seeking formal workplace equality and critiquing the gilded cage of middle class domesticity,<sup>73</sup> the second-wave feminist agenda targeted under-enforcement of gender crimes like domestic violence and rape.<sup>74</sup> At the same time as the public embraced President Nixon’s “War on Crime,”<sup>75</sup> many still harbored chauvinistic beliefs that exempted many types of domestic violence and sexual assault from the reach of criminal law. Structural inequality kept women in abusive relationships, and cultural mores perpetuated male domination.<sup>76</sup> A not uncommon view was that domestic abuse was a private and personal matter, or worse, appropriate management of female domestic partners.<sup>77</sup> This view ran rampant in police departments that were, and often still are, largely composed of men steeped in hyper-masculinist norms.

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<sup>72</sup> See Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 920, 950 (2010) (describing the “second wave” of feminism as “stretching from the 1960s until the 1990s”); Jane E. Larson, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252, 1252 n.1 (1993) (“The term ‘Second Wave’ is used to refer to the second broad-based feminist movement in the history of the United States, beginning in the late 1960s.”).

<sup>73</sup> See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 32 (1963) (arguing that women desire more than mere domesticity and tending to their homes).

<sup>74</sup> See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 377 (1975) (“When rape is placed where it truly belongs, within the context of modern criminal violence and not within the purview of ancient masculine codes, the crime retains its unique dimensions, falling midway between robbery and assault.”); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1496, 1498 (2008) (“[T]he second wave of the feminist movement gave rise to . . . the domestic violence revolution.” (internal quotations omitted)).

<sup>75</sup> Gruber, *supra* note 5, at 618.

<sup>76</sup> See Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 39 (1999) (“Social supports for battering include widespread denial of its frequency or harm, economic structures that render women vulnerable, and sexist ideology that holds women accountable for male violence and for the emotional lives of families, and that fosters deference to male familial control.” (footnotes omitted)).

<sup>77</sup> See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 248–49 (2005) (“The battered women’s movement developed an ideology that contested the appropriation of women’s bodies, challenged conceptions of male supremacy in the family, and analyzed how the individual power of the patriarch was supported and legitimized by the state.”).

The early feminist response to the problem of the habitually abused wife was a grassroots effort to garner resources for shelters and other financial support for these women.<sup>78</sup> However, enabling separation appeared an incomplete solution for two primary reasons. First, temporary sheltering would not necessarily break the battering cycle.<sup>79</sup> Due to continuing economic need, children, and emotional ties, an abuse victim might return to the relationship, and there would be no incentive for the man to discontinue battering.<sup>80</sup> Second, facilitating the means of escape from such relationships did not deter future violence, appropriately punish, or produce formal legal equality.<sup>81</sup> For these and other reasons, part of the feminist program was to push for consistent arrest, prosecution, and punishment of domestic abusers.<sup>82</sup> Domestic violence reformers called for equality in enforcement and chastised state actors for failing to treat domestic assault in the same manner as nondomestic violence.<sup>83</sup>

The criminal justice actors and government leaders of the 1970s, compared to those of today, readily appear as knuckle-dragging relics on the issue of domestic violence. They actively resisted abandoning traditionalist gender norms and enforcing anti-abuse criminal laws.<sup>84</sup> Nevertheless, feminist reformers were tenacious in

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<sup>78</sup> Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666 (2004) (“The early battered women’s advocacy movement was a grassroots effort to provide services and shelter to domestic violence victims, independent of state involvement.”).

<sup>79</sup> *See id.* (“[M]any battered women’s advocates realized the need to effect systemic change, and focused not only on assistance to individual women, but also on revamping the laws and policies that ignored domestic violence as an issue for the public justice system.”).

<sup>80</sup> *See id.* at 1734–35.

<sup>81</sup> *See id.* at 1666 (“Battered women’s advocates also worked to . . . increase access for domestic violence victims to civil protection orders against their abusers. . . . [and] advocated for increased enforcement of the criminal law, including aggressive police involvement and prosecution in domestic violence cases.” (footnote omitted)).

<sup>82</sup> *See id.*

<sup>83</sup> *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 16 (1999) (noting that mandatory policies create equality between domestic violence and non-domestic crimes).

<sup>84</sup> *See* Christine O’Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 942–43 (1999) (attributing prosecutor reluctance both to the belief that domestic violence is a private problem and the fear that victims would not follow through on the case); Andrea D. Lyon, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253, 298 (1999) (attributing the “high incidence of women arrested” under mandatory policing to officers punishing women who call police but refuse to leave the batterer).

lobbying and publicity efforts. In Congress, in the media, and on the streets, they told survivors' stories.<sup>85</sup> Domestic violence activists used the tool of heart-wrenching narrative to garner sympathy for abuse victims and foment outrage against perpetrators.<sup>86</sup> In 1985, the issue caught the attention of then-Surgeon General C. Everett Koop, who characterized domestic battering as a pressing health problem.<sup>87</sup> Soon, by design or chance, the interests of feminist reformers and conservative policymakers, even those who harbored patriarchal beliefs, converged, and policymakers were willing to extend their punitive philosophy to acts of intimate abuse.<sup>88</sup> In 1984, President Reagan's "task force" on domestic violence, which included a number of right-wingers like John Ashcroft, issued a report calling for the aggressive prosecution of battering.<sup>89</sup> The tough-on-domestic violence stance thereafter became a mainstay of the conservative political platform. In 2003, George W. Bush declared "war" on abusers, stating, "[o]ur government is engaged in the fight, as it should be. Government has got a duty to treat domestic violence as a serious crime. It's part of our duty. If you treat something as a serious crime, then there must be serious consequences. Otherwise, it's not very serious."<sup>90</sup>

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<sup>85</sup> See Gruber, *supra* note 4, at 793 ("Feminists were vocal, organized, and effective in their efforts to persuade the government that domestic violence was not acceptable.").

<sup>86</sup> See G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 185 (2005) ("[I]f you have never spoken with a battered woman, simply read the narratives of women-survivors contained in the pages of testimony from the VAWA, the state court reports or the hearings conducted by the Attorney General and the Commission on Civil Rights."); Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567, 588 (2003) ("The simple and sensationalist story lines encouraged by tragic cases of domestic violence and law and order frameworks . . . serve media and political interests.").

<sup>87</sup> See Mary S. Hood & Julie Kuncze Field, *Domestic Abuse Injunction Law and Practice: Will Michigan Ever Catch Up to the Rest of the Country?*, 73 MICH. B.J. 902, 906 n.1 (1994) ("In 1985, Surgeon General C. Everett Koop told health professionals that domestic violence was a 'public health menace.'"); Jan Hoffman, *When Men Hit Women*, N.Y. TIMES MAG., Feb. 16, 1992, at 23 ("C. Everett Koop, the former Surgeon General, has identified domestic violence as the No. 1 health problem for American women, causing more injuries than automobile accidents, muggings, and rapes combined.").

<sup>88</sup> See Jo Dixon, Review Essay, *The Nexus of Sex, Spousal Violence, and the State*, 29 J. L. & SOC'Y REV. 359, 362 (1995).

<sup>89</sup> See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 4 (1984) [hereinafter FINAL REPORT]. The report stresses that "[t]he legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and the abuser." *Id.* at 4 (emphasis omitted). See also Dixon, *supra* note 88, at 362 (noting that the Attorney General's report emphasizes criminal enforcement).

<sup>90</sup> Remarks on Domestic Violence Prevention, 2 PUB. PAPERS 1266 (Oct. 8, 2003).

The convergence of domestic violence activists' interests and crime-control interests produced some profound effects—some intended by reformers, some unintended—some good, some bad. It is indisputable that the criminal law has been restructured to sanction domestic violence, not just as much as, but more than non-gendered acts of violence. States engaged in widespread, cutting-edge law reform that stepped to the very edge of constitutionality. Today, scholars and practitioners are quite familiar with legal mechanisms like mandatory arrest and prosecution,<sup>91</sup> special domestic violence courts,<sup>92</sup> expansive protection order procedures,<sup>93</sup> mandated victim advocacy,<sup>94</sup> restricted plea bargaining,<sup>95</sup> and relaxed evidentiary rules.<sup>96</sup>

Aside from direct legal changes, the domestic violence reform

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<sup>91</sup> All fifty states now allow police to make warrantless arrests of those accused of domestic violence offenses. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3601 (2012) (allowing warrantless arrest for domestic violence, but only mandating arrest in cases of “physical injury”); HAW. REV. STAT. § 709-906(2) (2012); 750 ILL. COMP. STAT. ANN. 60/301(a) (LexisNexis 2012); IOWA CODE § 236.12(2)(a) (West 2012); KY. REV. STAT. ANN. § 431.005(2)(a) (LexisNexis 2012); N.J. STAT. ANN. § 2C: 25-21(b) (West 2012); O'Connor, *supra* note 84, at 942. In addition, several states make arrest in domestic violence cases mandatory. *See, e.g.*, ALASKA STAT. § 18.65.530(a) (2012); CAL. PENAL CODE § 836(c)(1) (West 2013); COLO. REV. STAT. § 18-6-803.6(1) (2012); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2012); WASH. REV. CODE ANN. § 10.31.100(2)(c) (LexisNexis 2012). States have also adopted legislation calling for the implementation of special prosecution policies. *See, e.g.*, FLA. STAT. ANN. § 741.2901(2) (West 2012) (“The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence, as defined in s. 741.28, and an intake policy and procedures coordinated with the clerk of court for violations of injunctions for protection against domestic violence.”); IOWA CODE ANN. § 236.12(3) (“A peace officer’s identification of the primary physical aggressor shall not be based on the consent of the victim to any subsequent prosecution or on the relationship of the persons involved in the incident, and shall not be based solely upon the absence of visible indications of injury or impairment.”); MINN. STAT. ANN. § 611A.0311 (West 2012) (providing “procedures to encourage the prosecution of all domestic abuse cases where a crime can be proven”).

<sup>92</sup> *See generally* Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285, 1296–1310 (2000) (providing an overview of various specialized domestic violence courts).

<sup>93</sup> *See generally* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 810–1094 (1993) (surveying civil protection order (“CPO”) statutes in all fifty states, the District of Columbia, and Puerto Rico); Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 *GEO. PUB. POL’Y REV.* 51, 53–56 (2000) (explaining the process of obtaining a CPO and discussing its effectiveness in preventing domestic violence).

<sup>94</sup> *See* Suzanne J. Schmitz, *What’s the Harm?: Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law*, 10 *WM. & MARY J. WOMEN & L.* 295, 296–300 (2004) (describing the function of the domestic-violence victim’s advocate).

<sup>95</sup> *See, e.g.*, UTAH CODE ANN. § 77-36-2.7(6) (LexisNexis 2012) (“The court may not approve diversion for a perpetrator of domestic violence.”).

<sup>96</sup> *See* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 *IND. L. REV.* 687, 708–09 (2003).

movements produced other notable consequences. To be sure, decades of publicity, legal maneuvering, and activism changed the way that many people in society think and talk about intimate abuse. On the positive side, only those far outside of the mainstream regard wife beating as tolerable or private.<sup>97</sup> However, the domestic violence dialogue has proven less effective at conveying a general feminist message.<sup>98</sup> Given the dynamics of interest convergence, it is hardly surprising that domestic violence reformers tailored their techniques of persuasion to status quo cultural norms.<sup>99</sup> Much like the victims' rights rhetoric discussed above, the domestic violence script generally involved an innocent, vulnerable, nonviolent female victim, a deliberately controlling, chauvinist man, a pattern of extreme violence, and threats of death for any attempt to leave the relationship.<sup>100</sup> The dominant narrative left little room to consider mutual violence, sporadic abuse, or any positive aspects of the relationship.<sup>101</sup>

In the 1980s and '90s, a pivotal movie portrayal of battering and a high profile murder case involving domestic abuse infused the already reductionist domestic violence narrative with racial imagery.<sup>102</sup> The movie, *The Burning Bed*, starring former Charlie's

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<sup>97</sup> See Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 115, 129 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (asserting prosecutorial policies set "a standard of zero tolerance for battering that other institutions can emulate"); cf. Tsai, *supra* note 92, at 1325 (expressing doubt that criminal laws alone, in the absence far-reaching social reforms, could change such deeply held beliefs).

<sup>98</sup> See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH L. REV. 1, 12–13 (1991).

<sup>99</sup> Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.").

<sup>100</sup> See Mahoney, *supra* note 98, at 11 (asserting that judicial opinions treat domestic violence as "aberrant and unusual"); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975 (1995) (critiquing the "inaccurate, reductionist, and potentially demeaning representation of woman battering"); O'Connor, *supra* note 84, at 960 (noting the "commonly held notion of battered women as weak, passive or even pathological for staying with abusive men").

<sup>101</sup> See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1014–20 (2000). See generally Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 120 (2008) (noting the failure of many involved with the aid of battered women to deal with the wide range of experiences on the part of the battered).

<sup>102</sup> See Suzanne J. Groisser, *Elizabeth M. Schneider, Battered Women and Feminist Lawmaking*, 10 COLUM. J. GENDER & L. 385, 391 (2001) (book review) (noting that Simpson gave a "face" to the problem of domestic violence); Laurie L. Levenson, *Stereotypes of Women*

Angel Farrah Fawcett as the battered housewife, and the real life O.J. Simpson drama brought into stark focus the face of domestic abuse: a beautiful, white, severely beaten face. Feminist reformers had attempted to publicize that battering happens across races and socioeconomic statuses, but the paradigmatic image of an abused woman that emerged from the insertion of the domestic violence narrative into the cultural din operatively excluded many types of women.<sup>103</sup> In the end, such legal and discursive changes unambiguously demonstrate that the criminal justice system “takes domestic violence seriously,” but many experts now question whether the changes have actually made women safer and furthered gender equality in general.<sup>104</sup>

### *B. Leniency Toward Defendants Who Kill Minorities*

The United States has a sordid history of tolerating and even supporting racist violence against minorities, particularly African Americans. From murderous overseers to Jim Crow-era lynchings, governmental and societal acceptance of private racial violence continues to mar the image of the United States as a diverse melting pot and bastion of liberty.<sup>105</sup> More recent years have experienced a spate of hate crimes against minorities and foreigners and the conscious targeting of middle eastern-looking men in the wake of the terrorist attacks on the twin towers.<sup>106</sup> Beyond patently racist killings, scholars have complained of general under-enforcement of criminal laws in minority neighborhoods.<sup>107</sup> These experts see the tendency of police and prosecutors to exercise moderation in minority-victim cases as evidence of bigoted

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*in the O.J. Simpson Case*, 1994 WL 681370 (O.J. Commentaries) (“The name Nicole Brown Simpson has now become synonymous with the image of the battered wife—a young, beautiful woman, unable to escape her abuser, and unable to get the criminal justice system to respond to her pleas.”); Mahoney, *supra* note 98, at 2–3 (1991) (asserting that the movie *The Burning Bed* created a cultural image of the battered woman as an ultimately innocent, meek creature subjected to terrorism-like violence).

<sup>103</sup> See Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implication of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 116–17 (2000).

<sup>104</sup> See Tsai, *supra* note 92, at 1291.

<sup>105</sup> See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 31–32 (1996).

<sup>106</sup> See AM.-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH 8 (Hussein Ibish ed., 2003), available at <http://www.adc.org/PDF/hcr02.pdf>.

<sup>107</sup> See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29 (1997).

devaluation of people of color.<sup>108</sup> As with the domestic violence issue, scholars have noted that both the formal law and its enforcement in a biased society create disparities in minority murder-victim cases.<sup>109</sup>

For decades, progressive legal theorists have critiqued broad formulations of provocation and self-defense for permitting those who kill race and gender minorities to have their charges mitigated or to be acquitted. The provocation defense permits the jury to reduce murder to manslaughter when a defendant acted in the heat-of-passion triggered by adequate provocation. Such mitigation allows the defendant to avoid the death penalty and even life in prison.<sup>110</sup> There are different formulations of the provocation defense, ranging from narrow categories of adequately provoking events to broad formulations based on the emotional state of the defendant.<sup>111</sup> The traditional categorical version of provocation, currently the law in just a few jurisdictions, limits the defense to legislatively and judicially annunciated classes of seemingly inciting behavior, typically mutual combat, false arrest, physical assault, and adultery.<sup>112</sup> Over the years, the largely liberal criminal law professoriate critiqued the categorical approach as under inclusive, asserting that juries might reasonably find circumstances outside of those specifically delineated to constitute adequate provocation.<sup>113</sup> To them, the miscarriage of justice occurred when the law excluded sympathetic classes of defendants, like battered women or parents

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<sup>108</sup> *See id.*

<sup>109</sup> *See id.* at 23.

<sup>110</sup> *See* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1107–09 (2011) (comparing state sentences for murder and voluntary manslaughter).

<sup>111</sup> *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1342 (1997) (observing that provocation law has “two poles” from categorical to liberal).

<sup>112</sup> *See, e.g.,* *People v. Garcia*, 651 N.E.2d 100, 110 (Ill. 1995) (“The only categories of provocation recognized by this court are substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender’s spouse.” (other citations omitted) (citing *People v. Chevalier*, 544 N.E.2d 942, 944 (Ill. 1989); *People v. Fausz*, 449 N.E.2d 78, 80 (Ill. 1983))).

<sup>113</sup> *See, e.g.,* Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 733 (1995) (“The rigid common law categories of ‘adequate provocation’ have largely given way to the view that the issue is one for the jury to decide.”); *see also* MODEL PENAL CODE § 210.3 cmt. 4(a) (1980) (“By eliminating any reference to provocation in the ordinary sense of improper conduct by the deceased, the Model Code avoids arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter.”).

who witness their children killed.<sup>114</sup> Thus, most jurisdictions adopt more liberal provocation laws and define the defense with regard to whether a reasonable person would have been provoked to passion, irrespective of the specific nature of the provoking act.<sup>115</sup> The Model Penal Code's ("MPC") formulation of provocation is extremely defense friendly and shifts the question to whether the defendant acted under a condition of extreme emotional distress for which there is a reasonable explanation or excuse.<sup>116</sup>

Progressive theorists, particularly feminists, have critiqued broad versions of the defense, narrow versions of the defense, and indeed the defense itself for giving a pass to defendants who kill minority victims or kill in ways that reflect social hierarchy. Unlike the domestic violence reform movement, which incorporated activism, theory, and political maneuvering,<sup>117</sup> the liberal critique of murder defenses has primarily taken place on academic terrain. In the 1990s, several legal theorists began to focus on the provocation defense's utilization by abusive men who kill their partners, men who kill when women attempt to leave them, and men who kill in response to homosexual advances.<sup>118</sup> Some assert that the whole

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<sup>114</sup> See MODEL PENAL CODE § 210.3 cmt. 4(a) ("Section 210.3 sweeps away the rigid rules that limited provocation to certain defined circumstances.").

<sup>115</sup> See, e.g., GA. CODE ANN. § 16-5-2 (2012) ("reasonable person"); LA. REV. STAT. ANN. § 14:31(1) (2012) ("average person"); MO. REV. STAT. § 565.002(1) (West 2012) ("person of ordinary temperament"); NEV. REV. STAT. ANN. § 200.050(1) (LexisNexis 2012) ("reasonable person"); TEX. PENAL CODE ANN. § 19.02(a)(1) (West 2012) ("person of ordinary temper"); WIS. STAT. § 939.44(1)(a) (West 2012) ("ordinarily constituted person"); cf. ARK. CODE ANN. § 5-10-104(a)(1)(B) (2012) ("[R]easonableness . . . is determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believed them to be."); CONN. GEN. STAT. ANN. §§ 53a-54a, 53a-55 (2012); DEL. CODE ANN. tit. 11, § 632 (2012); HAW. REV. STAT. § 707-702(2) (2011) ("The reasonableness of the explanation shall be determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be."); KY. REV. STAT. ANN. §§ 507.030, 507.040, 507.050 (West 2012); MINN. STAT. ANN. § 609.20(1) (West 2012); N.Y. PENAL LAW §§ 125.15, 125.20 (McKinney 2012); N.D. CENT. CODE ANN. § 12.1-16-02 (West 2011); OR. REV. STAT. § 163.135(1) (2012) ("[R]easonableness . . . must be determined from the standpoint of an ordinary person in the actor's situation under the circumstances that the actor reasonably believed them to be.").

<sup>116</sup> MODEL PENAL CODE § 210.3(1)(b). See also Berman & Farrell, *supra* note 110, at 1044 n.64 (observing that nine states have adopted the MPC formula in whole and two have in part, citing statutes).

<sup>117</sup> See Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 387 ("The goals of domestic violence activists were explicit: to conceptualize domestic violence as an offense against women, to oblige law enforcement to treat violence against women as a legal issue . . . and to charge batterers with crimes commensurate with . . . the harm inflicted . . .").

<sup>118</sup> See, e.g., Nourse, *supra* note 111, at 1332; JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 193 (1992); N. Kathleen (Sam) Banks, *The "Homosexual Panic" Defence in Canadian Criminal Law*, in 1 CRIM. REP. 371, 371 (5th ed. 1997); Gary David Comstock,

notion of exoneration based on anger privileges masculinist belligerence over preferred feminine passivity.<sup>119</sup> Others contend that even if there is room for an emotion-based mitigation defense, it should not be premised on categories like adultery, but should be reserved for those who react passionately to truly wrongful or illegal behavior on the part of victims.<sup>120</sup> Most commonly, progressives criticize the broad formulations of the provocation defense and claim that the reasonableness standard is so flexible that it gives cover to defendants whose pre-existing bigoted beliefs underlie their anger.<sup>121</sup>

Gender theorists note that the provoked killer occupies a very specific space in American cinematic and literary culture that has little to do with the reality.<sup>122</sup> In the public eye, provoked men are those moved to kill after heartbreaking episodes like the wanton slaying of a loved one or systematic betrayal by a life partner.<sup>123</sup> More recently, the category of paradigmatic provoked defendants has expanded to include battered women or mothers of abused or raped children. In the end, the preferred image of a provoked killer is one of a normally nonviolent person compelled to engage in an uncharacteristic killing when the victim's wrongful, illegal, and horrific act produces uncontrollable and involuntary passion.<sup>124</sup>

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*Dismantling the Homosexual Panic Defense*, 2 LAW & SEXUALITY 81, 86–89 (1992); Coker, *supra* note 6, at 71–72; Mison, *supra* note 7, at 146.

<sup>119</sup> HORNER, *supra* note 118, at 192 (“[T]he doctrine of provocation . . . reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular women’s natural aggressors.” (emphasis omitted)); Coker, *supra* note 6, at 102–03 (“The doctrine supports a belief in the inevitability of a [man’s] angry response to provoking events and then conflates anger with violence . . .”).

<sup>120</sup> See Nourse, *supra* note 111, at 1394 (requiring a “warranted excuse” for the killing); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–94, 636 (1981) (“The ordinary man would never be provoked to take another life by jibes, assaults, or even the bad fortune of discovering adultery in progress.”).

<sup>121</sup> See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 235 (2003) (advocating a “normative” conception of reasonableness); Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims’ Rights*, 76 TEMP. L. REV. 645, 678–80 (2003); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 350 (1996) (endorsing an “evaluative” conception of emotion in criminal law that requires provocation defendants to demonstrate that their emotional reactions stemmed from correct moral appraisals); Mison, *supra* note 7, at 176 (arguing in favor of a reasonableness standard based on society’s “normative aspirations”).

<sup>122</sup> See Coker, *supra* note 6, at 89.

<sup>123</sup> See Stephen Holden, *Day in Town Takes an Unexpected Tryst*, N.Y. TIMES, May 8, 2002, at E1 (reviewing film about a nonviolent suburbanite who kills his wife’s paramour). For other paradigmatically provoked men, see generally Mel Gibson and Liam Neeson (various movie roles—not Gibson’s personal life).

<sup>124</sup> See Coker, *supra* note 6, at 90 (observing that “the popular image of the man who kills

Progressive legal theorists examined actual nonfictional cases in which defendants argued the provocation defense and found that many of the defendants departed in significant ways from the cultural image of the provoked actor.<sup>125</sup> Those who commit intimate homicides and argue provocation often have a history of domestic violence.<sup>126</sup> In some of the cases, the man's belief that his partner had been unfaithful had more to do with his own controlling jealousy than any actual facts.<sup>127</sup> Perhaps most disturbingly, in many of these intimate homicide cases the "provoked" killer's passion was based partially or solely on the woman's attempt to leave him.<sup>128</sup>

Theorists also critique a category of cases in which the defendant's claim of provocation is based on the decedent having made a same-sex advance or even, the fact of the decedent's homosexuality.<sup>129</sup> In the 1990s, the "Jenny Jones murder," which involved a straight male talk show guest killing another guest for revealing his same-sex "crush" on national television,<sup>130</sup> and the horrific slaying of Matthew Shepard, which inspired a namesake federal hate crime law,<sup>131</sup> put a national spotlight on the relationship between the provocation defense and homophobia. More recently, critical scholars have linked the provocation defense to lenient attitudes toward ethnic killings after the September 11, 2001 attacks.<sup>132</sup> The upshot of these revelations is that the provocation defense allows defendants to use the fact of their bigoted natures to justify murderous acts and permits jurors and state actors to apply discriminatory social norms.

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his wife is someone who 'suddenly cracked').

<sup>125</sup> Nourse, *supra* note 111, at 1343–44.

<sup>126</sup> Coker, *supra* note 6, at 82.

<sup>127</sup> See Nourse, *supra* note 111, at 1409.

<sup>128</sup> See *id.* at 1411.

<sup>129</sup> See, e.g., Mison, *supra* note 7, at 133–36; Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 478 (2008).

<sup>130</sup> *Talk Show Held Negligent in Guest's Killing*, CNN (May 7, 1999), [http://www.cnn.com/SHOWBIZ/TV/9905/07/talk.show.slaying.03/index.html?\\_s=PM:SHOWBI](http://www.cnn.com/SHOWBIZ/TV/9905/07/talk.show.slaying.03/index.html?_s=PM:SHOWBI). See generally Lee, *supra* note 129, at 495–96 (describing the "Jenny Jones murder case" and the defense of diminished capacity).

<sup>131</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009) (codified at 42 U.S.C. §§ 3716–3716a (Supp. 2009)). See generally Lee, *supra* note 129, at 479 (describing the Matthew Shepard case and the "gay panic" defense); *Our Story*, MATTHEW SHEPARD FOUND., <http://www.matthewshepard.org/our-story> (last visited May, 23 2013) (describing the killing of Matthew Shepard and the subsequent passage of the Hate Crimes Prevention Act).

<sup>132</sup> See, e.g., Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1317 (2004).

Critical scholars have poured through the books to bring these cases to light, and they tell the victims' stories. They recount tales of innocent women subjected to extreme violence at the hands of powerful and privileged men. For example, critics highlight the Hippolito Martinez case, in which the married defendant killed his paramour for dancing with a man who turned out to be her brother.<sup>133</sup> We are told that Martinez “struck Esther in the face and shot her five times” and then “told police, ‘I shot her and I hope she dies.’”<sup>134</sup> Like victims' rights advocates, provocation scholars utilize heart-wrenching narratives that prime listeners to desire for the perpetrators to suffer harsh consequences.<sup>135</sup> It is no wonder then that such theorists converge on prosecutorial solutions to the problem of discriminatory mercy in provocation law.

Some critics call for outright abolition of the defense and contend that conceiving of anger as an exculpating factor is in itself patriarchal because it legally privileges masculine aggression.<sup>136</sup> A closely related reform preserves some form of the provocation defense but narrows it in a gender-conscious manner.<sup>137</sup> Proponents argue that the defense should only be permitted when a “reasonable woman” would have been provoked to kill.<sup>138</sup> Female passiveness is thereby substituted for male belligerence, and the defense only applies to those acts so provocative as to move a pacifistic-by-nature woman to kill.<sup>139</sup> Other proposals are less openly gender conscious and seek to level the playing field by confining the defense to killings precipitated by unquestionably inciting, clearly wrongful, or illegal acts or by insisting that the killing be “normatively reasonable.”<sup>140</sup>

The identified problem is that the provocation defense, especially in its broad form, permits exoneration of those whose anger reflects,

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<sup>133</sup> *E.g.*, LEE, *supra* note 121, at 36–37.

<sup>134</sup> *Id.* at 37.

<sup>135</sup> *See generally* Lee, *supra* note 129, at 544–47 (presenting narratives of violence against minorities).

<sup>136</sup> *See, e.g.*, HORDER, *supra* note 118, at 186–97 (advocating abolition of the provocation defense); Lee, *supra* note 129, at 521–22; Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 692 (2001).

<sup>137</sup> *See, e.g.*, CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 178 (2000).

<sup>138</sup> *Id.* (“[M]en would have to behave as a reasonable woman would under the circumstances.”).

<sup>139</sup> *See id.* at 179–80 (“If the jury must determine whether the facts and circumstances were sufficient to arouse the passions of the ordinary reasonable woman, claims of intimate provocation will become a rarity and eventually disappear entirely.”) (emphasis omitted).

<sup>140</sup> *See* Lee, *supra* note 129, at 505.

at least in part, repressive social hierarchy (i.e., sexism in domestic relations, homophobia, and masculinist violence).<sup>141</sup> Critics lodge a similar objection against broad formulations of self-defense.<sup>142</sup> In contrast to provocation law, which treats anger as a source of exculpation, self-defense bases exoneration on fear.<sup>143</sup> The typical formulation of self-defense allows the defendant to use deadly force upon reasonable fear of imminent death, serious bodily injury, or a violent felony.<sup>144</sup> An archetypal case of self-defense would involve one using proportional force to ward off a sudden unprovoked attack with a weapon.<sup>145</sup> Self-defense law, however, allows the defendant to use force even if he was mistaken about being under attack, so long as that mistake is reasonable.<sup>146</sup> As a consequence, just as provocation law allows biased state actors and jurors to find that sexist and homophobes were reasonably angered, broad self-defense laws permit the exoneration of defendants whose “reasonable” fear is informed by their pre-existing prejudices. Doctrines like Florida’s stand-your-ground law, which permit the defendant to use force even when safe retreat is possible, increase the chances that a

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<sup>141</sup> See *id.* at 521–22; FORELL & MATTHEWS, *supra* note 137, at 179.

<sup>142</sup> See generally Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787–89 (1994) (discussing the impact racial prejudices can have on a defendant’s “reasonable belief” when claiming self-defense).

<sup>143</sup> See *id.* at 789.

<sup>144</sup> The New York self-defense statute, for example, provides that a person may use force “when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person” and that deadly force may be used if “[t]he actor reasonably believes that such other person is using or about to use deadly physical force,” or “is committing or about to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery,” or “is committing or attempting to commit a burglary.” N.Y. PENAL LAW § 35.15(1)–(2)(c) (McKinney 2013). Cf. MODEL PENAL CODE § 3.04(2)(b) (1962) (“The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat . . .”).

<sup>145</sup> See Armour, *supra* note 142, at 786.

<sup>146</sup> See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 815–17 (N.D. 1983) (citations omitted) (describing the standard by which an accused’s mistake is to be judged reasonable). The determination of reasonableness may be either objective, subjective, or something in between. Compare *State v. Prioleau*, 664 A.2d 743, 751–52 (Conn. 1995) (in between), *Buchanan v. State*, 567 So. 2d 194, 198 (Miss. 1990) (objective), *State v. McKoy*, 422 S.E.2d 713, 716 (N.C. 1992) (in between), and *State v. Moore*, 729 A.2d 1021, 1027, 1030 (N.J. 1999) (in between), with *United States v. Scout*, 112 F.3d 955, 960 (8th Cir. 1997) (subjective), *Brown v. United States*, 619 A.2d 1180, 1182 (D.C. 1992) (subjective), *Brown v. State*, 528 S.E.2d 868, 870 (Ga. Ct. App. 2000) (subjective), *People v. Morgan*, 719 N.E.2d 681, 700 (Ill. 1999) (subjective), *Milam v. State*, 719 N.E.2d 1208, 1210 (Ind. 1999) (subjective), and *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995) (subjective).

defendant who acts on bigoted beliefs rather than nonbiased evidence of a threat can successfully claim self-defense.<sup>147</sup>

Publicized racial self-defense cases include the Bernhard Goetz case, in which a troubled white subway passenger was acquitted of the admitted execution-style killing of four black youths,<sup>148</sup> and the Amadou Diallo case, in which four police successfully avoided conviction for firing a total of forty-one shots at and killing an unarmed black man who had pulled out his wallet.<sup>149</sup> Now added to this infamous list is the Trayvon Martin case. Critical race scholars not only question the assumption that fear rather than anger underlay these defendants' decisions to shoot,<sup>150</sup> they also assert that the defendants' emotional state could not be separated from their internal racial beliefs.<sup>151</sup> Critics indict defense attorneys for utilizing rhetoric that exploits jurors' biases and stirs up racial fear and hatred.<sup>152</sup> They also observe that police, prosecutors, judges,

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<sup>147</sup> Compare FLA. STAT. § 776.013(3) (2013) (stating that a person who is not engaged in unlawful activity has no duty to retreat and “has the right to stand his or her ground” and even respond with deadly force “if he or she reasonably believes it necessary to do so” to prevent death or serious injury to him or herself or a third person), with N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2013) (“The actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating . . .”).

<sup>148</sup> See *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986) (reinstating the indictment against Bernard Goetz, a white man who shot and wounded four black youths on New York City subway train after one or two of them asked for five dollars, because he claimed they were going to rob him); Stephen L. Carter, Comment, *When Victims Happen to be Black*, 97 YALE L.J. 420, 420 (1988) (discussing the *Goetz* case).

<sup>149</sup> Jane Fritsch, *4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1; LEE, *supra* note 121, at 175–76 (discussing the Diallo incident and subsequent trial).

<sup>150</sup> The assumption that Goetz acted on fear rather than anger barely passes the straight-face test given Goetz's own account of his feelings. In his confession to the police, he states that he intended to shoot the boys when he realized that “they were intending to play with me.” THE TRIAL OF BERNHARD GOETZ (Aae Films, 1988). He goes on to say, “I wanted to kill those guys. I wanted to maim those guys. I wanted to make those them suffer in every way I could . . . If I had more bullets I would have shot them all again and again.” *Id.*

<sup>151</sup> See, e.g., Carter, *supra* note 148, at 424–25 (discussing the racial implication of the *Goetz* case); e. christi cunningham, *Exit Strategy for the Race Paradigm*, 50 HOW. L.J. 755, 771 (2007) (“Amadou Diallo's race meant that the police officers intentionally, negligently, or unconsciously saw rapist, guilt, and danger when they looked at a man standing in the vestibule of his apartment building reaching for his wallet.”); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 317 (2012) (asserting that even if Zimmerman is not consciously racist, he could have been influenced by a racialized “stereotype of a dangerous thug”).

<sup>152</sup> See, e.g., Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1306 (1995) (criticizing criminal defense attorneys in particular for using “narratives or stories that construct racial identity in terms of individual, group, or community deviance”). But see Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1602 (1999) (“To blame criminal defense lawyers for the perpetuation of racism

and jurors tend to be unusually lenient in such cases, and this moderation necessarily correlates with the race of the decedent.<sup>153</sup> As a consequence, race theorists, like provocation critics, propose reforms that limit self-defense, by, for example, requiring the defendant's fear to be objectively reasonable, normalizing the reasonableness standard to presumptively exclude racialized fear, or requiring retreat.<sup>154</sup>

The liberal position in favor of narrowing murder defenses to ensure that racists and sexists cannot exploit them receives little criticism from commentators, regardless of political leaning. Granted, there are those on the extreme right who harbor traditionalist views of women or embrace the black-as-criminal stereotype, and they might object to liberals "playing the race/gender card" in such cases. For example, the conservative gun lobby suspends its generally anti-criminal defendant stance when it comes to self-defense.<sup>155</sup> Gun rights activists argue for expansive formulations of self-defense, envisioning that the outcome will favor "law-abiding citizens," homeowners facing burglars, and other "ordinary folk" who fear crime.<sup>156</sup> Nonetheless, broadening the reach of murder laws does not generally arouse the wrath of crime-control adherents.

As for progressive commentators, how could anyone with a shred of race and gender sensitivity be anything other than outraged at cases like that of Hipolito Martinez, Bernhard Goetz, and George Zimmerman? In such cases, the legal process reflected and reinforced patriarchal male domination of women and racist views of black criminality. Some intrepid moral theorists argue that even the admitted racist whose judgments were influenced by the decedent's ethnicity should be able to utilize self-defense if he feared for his life because the wrongfulness of adhering to racial

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and racial stereotypes exaggerates the influence of the least powerful actors in the criminal justice system.").

<sup>153</sup> See Carter, *supra* note 148, at 444 (discussing the relationship between the race of the victim and the likelihood that the defendant receives the death penalty).

<sup>154</sup> See, e.g., LEE, *supra* note 121, at 226 (advocating a normative reasonableness standard). See generally Armour, *supra* note 142, at 787–90 (critiquing the conflation of reasonableness in self-defense with typicality).

<sup>155</sup> See Susan Ferriss, *NRA Pushed 'Stand Your Ground' Laws Across the Nation*, HUFFINGTON POST (Mar. 26, 2012, 10:16 AM), [http://www.huffingtonpost.com/the-center-for-public-integrity/nra-pushed-stand-your-gro\\_b\\_1379617.html](http://www.huffingtonpost.com/the-center-for-public-integrity/nra-pushed-stand-your-gro_b_1379617.html) (discussing the difficulties in prosecuting individuals who claim the defense of a stand your ground law).

<sup>156</sup> See *id.* (reporting that Republican Florida state legislator Dennis Baxley defended the importance of the stand-your-ground law to "law-abiding citizens").

stereotypes is not coextensive with murder culpability.<sup>157</sup> This argument, however, tends to have little purchase with critical scholars who have long problematized the relationship between individual rights and the maintenance of racial and gender domination.<sup>158</sup> In the end, siding against those who criticize discriminatory leniency is a difficult endeavor for any progressive. For this reason, much like tough domestic violence laws have gained support across the political spectrum, proposals to equalize murder prosecutions by restricting the provocation defense and self-defense enjoy broad popularity in the criminal law academy.<sup>159</sup>

### III. SOME CAUTIONS AGAINST VIEWING LENIENCY AS A MISCARRIAGE OF JUSTICE

Progressives are quite skeptical of regarding situations as miscarriages of justice when procedural rules that guard against government overreaching result in the factually guilty avoiding criminal sanctions. They instead tend to concentrate on the unjust application of severe criminal sanctions to the innocent and disproportionately to minority groups.<sup>160</sup> However, when it comes to situations in which defense-favoring criminal laws permit racists and sexists to avoid criminal sanctions, the fear of authoritarianism evaporates in the face of concerns over reinforcing social hierarchy. As observed above, there appears to be a general progressive consensus that the criminal law should enable aggressive prosecution of batterers, wife killers, and violent racists.

This section questions progressives' compartmentalized faith in penal authority as a solution to, rather than a cause of, social inequality. In doing so, it sounds three cautionary notes: (1) a caution about the method of argumentation utilized in the progressive critique of discriminatory lenity; (2) a caution about the

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<sup>157</sup> See, e.g., Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 171 (2008) ("If an actor kills only because he believed that he was about to be killed, and if he believed that he was about to be killed only because he was a racist, we can and should condemn the racism that lead [sic] to the belief. Citizens of liberal states should not be racists. Nonetheless, a liberal state has no basis upon which it can legitimately say that such an actor forfeits his claim of self-defense.").

<sup>158</sup> Peter Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 203, 205 (2005) (observing that critical theorists "uncover the multifarious ways in which legal doctrine and institutions constitute, perpetuate and reflect social disadvantage").

<sup>159</sup> See *supra* Part II.B.

<sup>160</sup> See Paul Butler, *Retribution, For Liberals*, 46 UCLA L. REV. 1873, 1875 (1999).

message that ultimately materializes when progressive criminalization efforts filter through the matrix of media, politics, and cultural predispositions; and (3) a caution about the meaning of reform, that is, the overall effects of aggressive domestic violence prosecution and narrowing murder defenses.

### A. Method

Anti-formalism is one of the principle tenets of critical legal theory. Critics resist rights rhetoric, reliance on “objective” methodological deduction, and other “neutral” status quo preserving principles, for good reason.<sup>161</sup> Formalism, without a doubt, can normalize, hide, and reinforce extant unequal power distributions within society.<sup>162</sup> Critics expose formalism’s assumption of baseline equality among individuals, reliance on individuals’ undiminished capacity to exercise choice, and construction of a narrative of the status quo that reinforces such assumptions.<sup>163</sup> Take, for example, antidiscrimination laws that purport to address gender inequality. Adhering to liberalism’s paradigm, these laws claim to achieve formal equality by requiring employers to treat men and women the same for the purposes of hiring, promotion, and termination.<sup>164</sup> Assuming that such laws remedy inequality is problematic to the critic for several reasons. First, the laws only address overt, clearly identifiable, discriminatory treatment, leaving intact more subtle actions and signals that disempower women.<sup>165</sup> Second,

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<sup>161</sup> See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 389 n.7 (1984) (contending “that rights theory does not provide an objective, apolitical basis for decisionmaking”); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058–59 (asserting that the legal decisions cannot be “rationally justified by the inherent logic of rights”).

<sup>162</sup> See Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564 (1983) (observing that one of the “overriding concerns” of critical legal studies and leftist legal theorizing in general “has been the critique of formalism and objectivism”).

<sup>163</sup> See Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 11–12 (2010) (“Critical legal scholars have long censured proponents of rights, fault, and other seemingly neutral rules for using arbitrary deontic principles to obscure the maldistributive and inegalitarian effects of certain legal arrangements.”).

<sup>164</sup> See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984) (“[L]iberalism . . . conceive[s] of persons as autonomous, self-defining individuals possessing equal moral worth and dignity.”).

<sup>165</sup> See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 832–33 (1989) (observing that the liberal push toward market work combined with the cultural pressure on women to stay home leads women “to make choices that marginalize them economically in order to fulfill those same responsibilities”).

antidiscrimination laws cannot address gender inequality that permeates society by way of unequal private relationships, women's disparate responsibility for household management and child care, inequality in education and post-educational opportunities, networking disparities, and the like.<sup>166</sup> Finally, the sameness model fails to account for the most basic biological differences between the sexes.<sup>167</sup>

The picture painted by formalistic antidiscrimination law is one of women who compete on equal terms with men but sometimes freely choose to “drop out” of the system in order to pursue other priorities (or simply because they can't hack it).<sup>168</sup> Critics respond by attempting to disrupt the dominant picture of gender dynamics in the work place through a variety of techniques of persuasion, including personal narrative. Declaring that the “[p]ersonal [i]s [the] [p]olitical,”<sup>169</sup> feminist legal theorists, for example, tell stories about workplace inequality—stories involving harassment, poor treatment while pregnant, and childcare pressures.<sup>170</sup> Critical race theorists similarly use the tool of storytelling to counter assumptions about the status quo and demonstrate the existence of

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<sup>166</sup> See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 18 (1984) (contending that liberal feminism “aims to” grant women greater equality of opportunity within the present “white supremacist, capitalist, patriarchal” state).

<sup>167</sup> Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1306 (1987) (“Legal equality analysis ‘runs out’ when it encounters ‘real’ difference, and only becomes available if and when the difference is analogized to some experience men can have too.”); Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women’s Rights During Pregnancy*, 26 LAW & INEQ. 171, 194 (2008) (“[Formal equality] requires the state to treat pregnant women the same as other individuals.”).

<sup>168</sup> See Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 81, 82 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (noting that it may be easy to pursue social change that “seeks gender neutrality” because “gender neutrality is simply the male standard”).

<sup>169</sup> Carol Hanisch, *The Personal is Political*, in *NOTES FROM THE SECOND YEAR: WOMEN’S LIBERATION* 76, 76 (Shulamith Firestone ed., 1970) (originating the term).

<sup>170</sup> See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 975–76, 983–85, 987–89, 995, 1005 (1991) [hereinafter *Call of Stories*] (recounting influential feminist narratives and analyzing the critique of narrative). See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1186–87, 1202–03, 1221 (1989) (discussing issues of gender discrimination in the workplace); Susan Ayres, *Incest in A Thousand Acres: Cheap Trick or Feminist Re-Vision?*, 11 TEX. J. WOMEN & L. 131, 143 (2001) (“The power of storytelling is especially effective in feminist revision because it provides an alternative discourse for silenced feminine voices and perspectives.”); Wendy Pollack, *Sexual Harassment: Women’s Experience vs. Legal Definitions*, 13 HARV. WOMEN’S L.J. 35, 42, 72, 74, 78–82 (1990) (discussing sexual harassment narratives).

gross inequality in the shadow of antidiscrimination law.<sup>171</sup> These “theorists believe that racism is part of American culture, and that telling counterstories about the victim’s experience may help to change the dominant culture.”<sup>172</sup>

It is in this critical vein that feminists, progressive theorists, and reformers tell the stories of victims of domestic violence, intimate homicides, and bias crimes. Prior to the second-wave feminist intervention, the dominant narrative regarding domestic violence characterized it as minor and private and portrayed women as willing partners in or instigators of the abuse. Through telling abuse survivors’ stories, reformers publicized that domestic violence is severe and ongoing, women try to leave, those who stay are scared, coerced, or psychologically damaged, and the perpetrators are criminal, deviant, and even deranged.<sup>173</sup> Through painting a new picture of domestic abuse, feminists have been able to counter the social mindset that domestic violence is not an appropriate matter for penal intervention. Similarly, the prevailing image of a provoked intimate homicide defendant is often one of a generally nonviolent man incited to kill by his loved one’s extremely violent, deceptive, or immoral act. Through reciting the facts of actual cases, reformers contradicted these assumptions and instead demonstrated that the provocation defense gives cover to sexist and controlling wife killers.<sup>174</sup>

However, the tool of spectacular narrative carries certain dangers to the progressive program, depending on the context of its use. Certain individual stories have the ability to counter widely held generalities precisely because they are particularly persuasive.<sup>175</sup>

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<sup>171</sup> See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) (“Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 876–77 n.254 (1997) (“[D]ominant legal rules that reproduce [hierarchy] can be challenged practically through court process, legal storytelling, and reconstruction of legal doctrine and method.”).

<sup>172</sup> Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1412 (1992).

<sup>173</sup> See Stark, *supra* note 100, at 975–76.

<sup>174</sup> See, e.g., FORELL & MATTHEWS, *supra* note 154, at 170 (quoting facts in a dissent to a murder reversal).

<sup>175</sup> *Call of Stories*, *supra* note 170, at 982. Here, I am mainly referring to highly descriptive stories of victimhood. Of course, not all narratives are of this nature. As Kathy Abrams explains:

Narratives may depict different kinds of experience—autobiographical or that of others,

Vivid victimhood stories can invoke in listeners a certain amount of emotion or passion that garners immediate support for the implied resolution and primes the listener to interpret any further investigation in that vein.<sup>176</sup> Moreover, vivid stories by their nature lead listeners to attribute an extreme amount of significance to their content, whether by overestimating how often such incidents occur or by giving undue weight to the consequences of such incidents.<sup>177</sup> Inducing a listener to passion, and to believe a topic is significant, can be valuable or troubling, depending on the situation. When narratives truly disrupt dominant, oppressive assumptions, they prove to be beneficial to the anti-subordination agenda.<sup>178</sup> For example, critical scholars object to the widespread belief among society members, especially those of the majority race and gender, that workplace discrimination is exceedingly rare and most such claims are fraudulent.<sup>179</sup> By telling vivid stories of discrimination, critics can counter this belief. In this situation, arousing a bit of passion on behalf of the discrimination victim and creating a belief that her case is significant, either in its representative capacity or

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physical or emotional, pain or pleasure or revelation. They may vary in their formal or stylistic features, tending toward simplicity or complex ambiguity, punctuating an analytic discussion or supplanting it. They may differ in their claims to persuade, offering stories as characteristic of the experience of a group, or as individual yet worthy of consideration; asking the reader to believe the narrator's account or compare it with her own experience.

*Id.*

<sup>176</sup> JOSEPH A. AMATO, VICTIMS AND VALUES: A HISTORY AND A THEORY OF SUFFERING 175 (1990) (“There is an elemental moral requirement to respond to innocent suffering. If we were not to respond to it and its claim upon us, we would be without conscience and, in some basic sense, not completely human.”).

<sup>177</sup> See RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 190 (1980) (“[V]ivid information, that is, concrete, sensory, and personally relevant information, may have a disproportionate impact on beliefs and inferences.”); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208–09 (1973) (finding that vivid descriptions of a phenomenon are easily recalled and can therefore cause the reader to overestimate the frequency of the phenomenon).

<sup>178</sup> See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1316 (1999) (“Anecdote, when well deployed, may be an effective tool in challenging the authority or universality of the conventional narrative. The greatest danger of the grand narrative is that it ossifies.”); Richard Delgado, *Stark Karst*, 93 MICH. L. REV. 1460, 1471 (1995) (reviewing KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION (1993)) (“[Counter narrative] aims at challenging one or more narratives of the majoritarian faith.”).

<sup>179</sup> See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1360–61 (2012) (“[W]hile the public believes that discrimination is fundamentally wrong, it also believes it is a narrowly defined phenomenon: a phenomenon that is aberrational and rare in today's society.”).

because of its ramifications, is extremely methodologically useful.<sup>180</sup> It may, in fact, work better to dispel common false assumptions about the frequency and import of discrimination than counter statistics or deconstructing the problematic nature of the prevailing belief in discrimination's rarity.

However, criminal law is a specific context in which victim storytelling generally carries a right-leaning valence. Although narratives about battered women, intimate homicides, and bias violence disrupt certain traditionalist beliefs about race and gender based crime, they actually support a larger set of entrenched and subordinating beliefs. As noted in Part I, the overarching governing narrative in criminal law for the past several decades has been one focusing on the plight of victims. Storytelling accordingly has most often been the preferred technique of tough-on-crime politicians, victims' rights reformers, and prosecutors. Stories of innocent, vulnerable victims subjected to brutal violence provided the fuel to the engine of the late twentieth-century penal state. Such stories also have had the effect of hiding those most likely to be actual crime victims (poor people of color with involvement in the system).

To be sure, progressives have made various attempts to disrupt this dominant cultural script through counter narrative. The most obvious method of undermining the script is publicizing stories involving sympathetic criminal defendants—the wrongly convicted, those who had “good reason” for the crimes, and those with tragic backgrounds.<sup>181</sup> But this strategy, although noble, generally fails. In a contest over who deserves society's compassion, the victim generally prevails over the accused. Society, it seems, has a much higher tolerance for the system mistreating defendants, who are often men of color without impeccable backgrounds, by convicting the factually innocent, punishing the sympathetic, and assessing disproportionate sentences to nonviolent offenders, than for leaving the interests of paradigmatic victims, invariably vulnerable children

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<sup>180</sup> Angela Onwuachi-Willig, *Foreword: This Bridge Called Our Backs: An Introduction to “The Future of Critical Race Feminism”*, 39 U.C. DAVIS L. REV. 733, 736 (2006) (“[Storytelling] serves as a bridge toward understanding the legal status of women of color and the ways in which women of color face multiple discrimination on the basis of factors, including but not limited to race, gender, class, able-bodiedness, and sexuality.”).

<sup>181</sup> See, e.g., Stephen B. Bright, *The Death Penalty and the Society We Want*, 6 PIERCE L. REV. 369, 373–74 (2008) (telling stories about sympathetic defendants); Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2635 (1998) (reviewing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997)) (discussing the role race can play in the way the public views perpetrators of crime).

and other law abiding white citizens, unvindicated. Moreover, in terms of pure volume, tragic victimhood stories far outnumber sympathetic defendant narratives. Reports of extraordinary private brutality and the need to remedy it are far more prone to satisfy the public's salacious curiosity and provide cathartic release than reports of over-policing. Moreover, since the rise of the politic of individual responsibility and neoliberal philosophy in the latter twentieth-century, stories about criminals' poor social background fail to gain significant traction.<sup>182</sup>

Interestingly, the legal technique that has seemed the most effective at restraining the criminal law leviathan is formalism. From the Warren Court rights revolution,<sup>183</sup> to statistics on mass incarceration, seemingly objective and impersonal arguments about restraining governmental authority, producing utility, or saving money seem to hold the most promise of reversing the punitive tide of American politics.<sup>184</sup> That formalism, normally the bane of the

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<sup>182</sup> The concept of “rotten social background” as an exculpatory notion was first introduced by Judge Bazelon. *United States v. Alexander*, 471 F.2d 923, 959–60 (D.C. Cir. 1972) (Bazelon, C.J., dissenting). Richard Delgado observes that although “[f]orty years have passed since publication of Judge David Bazelon’s dissent, . . . [t]he country is groaning under the expense of mass incarceration, while the gap between the rich and the poor now stands highest of any industrialized nation.” Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 4 (2011). It is apparent “the country has not adopted a rotten social background defense and is unlikely to do so anytime soon.” *Id.* at 5. See also Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131, 146 (2011) (attributing the failure of this argument to “the culture of neoliberalism, the culture of control, and the culture of therapy”).

<sup>183</sup> See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 25, 67–71 (David M. Trubek & Alvaro Santos eds., 2006) (describing the Warren Court rights revolution as one of the primary examples of latter twentieth-century public law neoformalism). Granted, the proposition that the rights revolution served to restrain rather than amplify American punitiveness is subject to objection. See STUNTZ, *supra* note 38, at 216–36 (asserting that Warren Court innovations, particularly the exclusionary and *Miranda* rules, created greater inequality and ended up giving police and prosecutors more power); Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1442 (2012) (reviewing STUNTZ, *supra* note 38) (“[T]he procedural innovations of American criminal justice [are] at best a folly and at worst a sinister deception.”). What I am saying, however, is that the language of rights, more than language of personal stories, was effective at producing legal change that forthrightly concerned restraining governmental authority. This is not to deny that the rights revolution may have proven ultimately impotent or that criminal law formalism, in the end, served to mask systemic unfairness.

<sup>184</sup> See David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 34 (2011) (asserting that the most prominent factor underlying the recent slight downtick in American punitiveness is “the serious budgetary crisis [is] afflicting nearly all states and the federal government”); cf. Elliott C. McLaughlin, *Marijuana Advocates Hope to Rise from ‘Prohibition’*, CNN (Dec. 4, 2012, 10:16 AM), <http://www.cnn.com/2012/12/01/us/marijuana-legalization-and-prohibition/index.html> (noting various economic arguments behind the

critic, proves to be the potential savior of anti-subordination in penal law and makes sense when one understands the nature of late modern American criminal discourse. Philosopher James Q. Whitman writes about the human predisposition to degrade, which “can be very successfully stirred up by any skilled tough-on-crime politician.”<sup>185</sup> Recognizing that “[d]egradation in punishment is a part of human nature, which has not been successfully abolished in the pursuit of our grand republican experiment in the United States,” Whitman argues that thoughtful criminal law policy should be an enterprise of “acknowledging the truth of the ugliness around us, in a spirit of frankness, and working with that ugliness.”<sup>186</sup> Thus, understanding the “ugliness” of the publicizing and even democratizing of penal policy sheds light on why formalism more than defendant narrative provides the best hope of countering the ruthless and hierarchical aspects of the American criminal system.<sup>187</sup>

Progressives who tell minority-victim stories not only engage in the discursive technique that has justified and perpetuated unrelenting punitiveness in American criminal punishment,<sup>188</sup> they also specifically seek to aggravate societal disgust and desire to degrade the targeted offenders. There is thus an irony in provocation critics problematizing male defendants’ “passion” as a manifestation of their sexist belief systems, and simultaneously fomenting societal passion against those defendants, without questioning the belief systems that may be driving society’s passion to punish. Now, the critic may respond that using victimhood narrative in the quest to equalize criminal law is really an instance of using the master’s tools to dismantle his house. However, one should understand the tool of the victim narrative as one that is made to construct a larger punishment house, not break that house down. In the end, focusing on tragic battered women and murdered wives may have created a harsher, more powerful penal system,

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marijuana legalization juggernaut).

<sup>185</sup> James Q. Whitman, *A Plea Against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 101–02 (2003).

<sup>186</sup> *Id.* at 106–07.

<sup>187</sup> *Id.* at 107; see Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 *ALA. L. REV.* 571, 575 (2011) (“[W]e are presently ill-equipped to disentangle understandable concern for bodily safety from irrational fear, prejudice, or thoughtless punitiveness.”).

<sup>188</sup> See MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS* 192 (2002) (“To maintain its fever pitch of hatred, the war on crime needs ever more, and ever more sympathetic, victims.”); Gruber, *supra* note 4, at 769–70 (noting that “the tragedy of the victim” sustained tough-on-crime ideology).

without any institutional reconsideration of the biased nature of the system as a whole.

Moreover, the progressive victim-based discourse has not successfully intervened in the dominant characterizations of victims and offenders. Compelling women victims are those subjected to extreme violence, who did not engage in any wrongful behavior, and otherwise do not exhibit any objectionable traits. In this sense, minority-victim narratives, once disciplined by prevailing victims' rights sentiments, cement rather than uproot victim stereotypes and continue to allow the criminal system to ignore the most marginalized victims while it heaps punishment on the most marginalized offenders.<sup>189</sup> In the criminal law context, the narrative model seems to benefit only those powerful or archetypal enough to have their stories heard and thus “[l]istening to individual narratives may make it more difficult to engage with the larger, systemic, and more fundamental group problems.”<sup>190</sup>

### B. Message

Domestic violence reformers often assert that one of the greatest successes of the movement is that it sent a message that domestic violence is a real crime that produces real victims.<sup>191</sup> Similarly, one of progressives' chief complaints about provocation and self-defense law is that the administration of such defenses reflects and expresses patriarchal, homophobic, and racist views.<sup>192</sup> Consequently, there is a pervasive expressive ideology underlying murder defense reform.<sup>193</sup> Proponents justify pro-prosecution

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<sup>189</sup> See Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L & WOMEN'S STUD. 387, 435 (1996). Andrew Taslitz explains the difficulty in disrupting dominant discourse:

[N]ew tales must create a common bond of understanding by appealing to old ones. We must first be convinced of some inadequacy in the old one, either a lack of coherence, completeness, or explanatory (predictive) power, to consider modifying that story. Story change is, therefore, both difficult and incremental. So cultural tales lay a heavy hand on the scales of justice.

*Id.* (footnotes omitted).

<sup>190</sup> Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39 U. BALT. L.F. 57, 69 (2009).

<sup>191</sup> See, e.g., ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 186 (2000) (“[Mandatory prosecution policies] send a message that domestic violence shall not be treated as a less serious crime than violence between strangers . . . .”); Sack, *supra* note 78, at 1670–71 (applauding the message-sending power of mandatory policies).

<sup>192</sup> See Sack, *supra* note 78, at 1679–80.

<sup>193</sup> See, e.g., Kahan & Nussbaum, *supra* note 121, at 352.

Because criminal law expresses condemnation, what a political community punishes,

reform proposals because of their message-sending abilities.<sup>194</sup> It is therefore necessary to explore several expressive questions, including exactly what message reformers hope to send, what messages have actually been sent, and whether the messages ultimately received by the public dismantle social hierarchy.

### 1. Domestic Violence Messages

The anti-abuse movement has never spoken in a singularly unified voice. The movement was, and still is, far from monolithic and uniform.<sup>195</sup> Domestic violence activists include survivors concerned with telling their stories, district attorneys seeking avenues toward successful prosecution, and feminists troubled by domestic violence's role in reflecting and perpetuating gender inequality. These disparate actors express differing, even conflicting, messages. Victim advocates and prosecutors support a retributivist message that domestic violence is a horrific crime perpetrated by deviant, controlling men who must be punished for the sake of societal security.<sup>196</sup> Feminists, by contrast, emphasize domestic violence's relationship to larger social attitudes, unequal distribution of power among the genders, and women's economic disadvantages. Today, the prosecutorial messages of state actors and victim advocates seem to have eclipsed and perhaps even undermined the anti-subordination message of feminists.<sup>197</sup>

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and how severely, tell a story about whose interests are valued and how much. That such significance is often attached to the law can be seen in the recurring complaint that lenient treatment of certain offenses—whether domestic violence or hate crimes—shows that the well-being of certain persons just ‘doesn't count’ in the eyes of the law.

*Id.* (footnotes omitted).

<sup>194</sup> *Id.* at 352–53.

<sup>195</sup> See Gruber, *supra* note 4, at 829–30 (noting the diversity in the anti-abuse movement).

<sup>196</sup> See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1908 (1996) (“Prosecutors need to be able to look beyond the theoretical dilemmas . . . and to stop worrying about whether the choice to pursue a case conflicts with their feminist (or nonfeminist) ideals.”); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 182 (1997) (“As guardians of public safety, prosecutors must proceed against domestic violence offenders with or without victim cooperation . . .” (emphasis omitted)).

<sup>197</sup> See Aya Gruber, *A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 588 (2012). I have observed elsewhere that “rather than the criminal justice system adopting a feminist agenda, feminist reformers essentially adopted the criminal justice system's agenda.” *Id.*; see also Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 93 (2003) (“Once efforts to enlist the [criminal] law in the fight against domestic violence became successful, . . . the law essentially took over anti-

In seeking to fit abuse survivors into the role of paradigmatic victim, the domestic violence narrative cannot entertain any possibility that women contribute to the violence or that they obtain any benefits from maintaining the relationship.<sup>198</sup> This, in turn, sends a simplistic message that battering is a matter of what criminal male agents do to innocent female objects and divests theorizing and policymaking in the area of necessary complexity.<sup>199</sup> The prosecutorial message, in addition to portraying women as passive objects of abuse, also serves to entrench rather than undermine negative gender stereotypes.<sup>200</sup> As one expert notes, the characteristics of battered women that emerge from aggressive prosecution policies “reify[] the cultural stereotypes of the incapacitated and irrational woman—stereotypes that confine women to, rather than liberate women from, oppressive homes.”<sup>201</sup> In addition, the essentialist characterization of abused women has meant that those outside the paradigm (i.e., women who have criminal records, who return to the relationship, and who “fight back”) are often viewed as autonomous agents rather than “real” victims.<sup>202</sup>

Significantly, the messages sent about gender violence over the past several decades have coincided with the larger criminal law narratives. The modern criminal law narrative is one of individual responsibility and regards crime as a matter of the internal immorality of criminals. Whether by fate or tactical design, the dominant anti-abuse message fits well into the modern American criminal law script. By focusing on controlling men who commit horrific acts of violence against sympathetic, white women, the domestic violence narrative has supported the notion that curtailing

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domestic violence efforts.”).

<sup>198</sup> See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 1 (2009) (critiquing the prioritization of separation in domestic violence reform ideology).

<sup>199</sup> See Gruber, *supra* note 4, at 814 (“[B]y ignoring the myriad of social, economic, racial, and emotional reasons why women are reluctant to prosecute domestic violence, these reformers give license to society to ignore its complicity in creating the problems that lead to domestic violence.”).

<sup>200</sup> See JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 346 (2006) (“[R]epresenting women as end points of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men, . . . objectifies women . . .”).

<sup>201</sup> Miccio, *supra* note 77, at 242.

<sup>202</sup> See Goodmark, *supra* note 198, at 4 (“The problem with policies like mandatory arrest is that they reify two goals—safety and perpetrator accountability—and marginalize autonomy, serving women who share the goals of the system but disenfranchising those with divergent goals.”).

intimate abuse is simply a matter of changing the behavior of a subclass of exceptionally sexist and violent men.<sup>203</sup> Such a message conveys that domestic violence is “a problem in and of itself and not linked to the larger issues of women’s economic situation, gender socialization, sex segregation, reproduction, and women’s subjugation within the family.”<sup>204</sup>

## 2. Murder Messages

Similar observations can be made in the provocation and self-defense context. Progressives often claim that they want to change such laws because they hope to convey a message that abusive or unequal domestic relationships, homophobic disgust toward same-sex love, and acceptance of stereotypes that link race and criminality are condemnable.<sup>205</sup> The question is whether the efforts to publicize the facts of clearly unjustified killings and to narrow murder defenses adequately convey these anti-subordination messages. Focusing on the punishment of murder defendants may not be the best avenue toward eliminating racism, sexism, and homophobia.

Feminists’ chief complaint about broad formulations of the provocation defense is that they put judges in a situation of allowing controlling, jealous, and violent men to argue that they were provoked.<sup>206</sup> In fact, these arguments are generally unsuccessful, as are often the defenses of murder defendants.<sup>207</sup> Thus, it is the very

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<sup>203</sup> See 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, 112 (2004) (“[T]he problem of [domestic] violence . . . [should not] be understood as a pathology of a few individual men. Instead, it must be analysed within the context of the larger patterns of presumed male entitlement, authority, and power constructed in the culture.”).

<sup>204</sup> Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers*, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römken, & Marianne Wesson, 10 J.L. & POL’Y 313, 359 (2002); see also Mahoney, *supra* note 98, at 12 (“Societal denial amounts to an ideology that protects the institution of marriage by perpetuating the focus on individual violent actors, concealing both the commonality of violence in marriage and the ways in which state and society participate in the subordination of women.” (footnote omitted)).

<sup>205</sup> See, e.g., Kahan & Nussbaum, *supra* note 121, at 352; Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 84–85 (2010).

<sup>206</sup> See generally Nourse, *supra* note 111.

<sup>207</sup> See Ramsey, *supra* note 205, at 83 (“[R]age killers are more likely to be convicted of murder than to receive manslaughter mitigation, whereas prosecutors and juries tend to accept the EMED claims of defendants who assert that they committed homicide out of fear.”).

fact that such defendants are even allowed to make a claim of provocation that concerns progressives.<sup>208</sup> So what message is sent by disallowing such defendants to put forth a defense that in some ways reflects antiquated gender hierarchies? One might assert that it is a cultural feminist and pacifist message that all humans, including men, should not resort to violence except in the most extraordinary situations.<sup>209</sup> Indeed, some of the proposals seek to gender sensitize the provocation law by asking the jury to determine whether the defendant acted reasonably by considering what a “reasonable woman” would have done in the situation.<sup>210</sup> There is, however, something quite contradictory about a proposal that bolsters feminine nonviolent ideology through greater application of criminal punishment. Ratchet-up proposals run up against feminists’ views of the American criminal system as the embodiment of male “hierarchical rule and coercive authority,”<sup>211</sup> “a primary location of racist, sexist, homophobic, and class-biased oppression in this country,”<sup>212</sup> and a system designed “to perpetuate and replicate existing power.”<sup>213</sup> Furthermore, there is a certain unfairness in codifying female-centric passivity when, in fact, the vast majority of murder defendants are male.<sup>214</sup> In terms of sending an anti-violence message, it is hard to imagine a move less pacifist than widening the application of first-degree murder sentencing, which in many states includes the death penalty.<sup>215</sup>

One might then argue that reform proposals communicate that sexist, homophobic, and racist beliefs are not reasonable or tolerable in our modern society.<sup>216</sup> However, the powerful retributive

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<sup>208</sup> See, e.g., Nourse, *supra* note 111, at 1342–43, 1351–52, 1358–59, 1362–63 (relating facts of disturbing homicide cases in which defendants were permitted to assert the provocation defense).

<sup>209</sup> See HORDER, *supra* note 118, at 192 (“One must now ask whether the doctrine of provocation . . . reinforces the conditions in which men are perceived and perceive themselves as natural aggressors.”).

<sup>210</sup> See V. F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 364 (2004).

<sup>211</sup> HOOKS, *supra* note 166, at 118.

<sup>212</sup> Mari J. Matsuda, *Crime and Affirmative Action*, 1 J. GENDER RACE & JUST. 309, 319 (1998).

<sup>213</sup> Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 153 (1998).

<sup>214</sup> Cf. Dressler, *supra* note 113, at 735 (“[A]s long as males are defendants in criminal homicide prosecutions more often than women, men are the primary beneficiaries of *all* criminal law defenses.”).

<sup>215</sup> See Nourse, *supra* note 111, at 364–65 n.11 (“[P]rovocation may exist as an important safety valve restricting the potential for the death penalty . . .”).

<sup>216</sup> See Mison, *supra* note 7, at 176 (“Provocation theory and the reasonable-man standard

message of prosecutorial reform may effectively eclipse the anti-subordination message. Hearing victim narratives leaves the listener with the feeling that a defendant who so brutally takes the life of another must be subjected to extremely harsh punishment.<sup>217</sup> But the focus on the extreme behavior of abnormal and statistically atypical men frames the issue of sexism, racism, and homophobia in criminal law insularly rather than institutionally. As framed, the problem is that the law gives a defense to particularly deviant killers—not that current cultural attitudes, legal arrangements, and institutional structures provide a hospitable environment for sexist, racist, and homophobic beliefs to flourish. When the defendant has engaged in such extreme behavior, it is easy to see his belief system as a departure from—rather than confirmation of—prevailing social norms.<sup>218</sup> Moreover, holding individuals accountable for homicidal acts regardless of their individual motivations and predispositions is consonant with modern tough-on-crime sentiments,<sup>219</sup> rather than more liberal views of criminal responsibility. Progressives generally favor a broader view of culpability that factors in psychological pathologies, social background, and personal attributes.<sup>220</sup>

Perhaps, then, the benefit of reform is that it undermines stereotypes, such as women are “provocateurs,” men are violent by nature, and blacks are criminals.<sup>221</sup> However, reform might actually reinforce, rather than supplant, certain stereotypes. For example, by endorsing the “reasonable woman” standard in provocation law, the law can reinforce reductionist “female supremacist” norms that incorporate stereotypical views of women’s

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should evolve with the society whose normative aspirations they are intended to reflect.”).

<sup>217</sup> See, e.g., LEE, *supra* note 121, at 278 (“Ratcheting up . . . makes particular sense when the defendant has taken another human being’s life.”).

<sup>218</sup> See, e.g., Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33 (1984) (“Reasonable people do not kill no matter how much they are provoked . . .”).

<sup>219</sup> See, e.g., Reagan, *supra* note 48 (“Individual wrongdoing, they told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. . . . And today we still pay the price for those years of liberal leniency . . .”).

<sup>220</sup> *But see* Morse, *supra* note 253, at 30 (“[A]ctors who commit the same acts . . . should, on moral grounds, be convicted of the same crime and punished alike without regard to differences in background, mental or emotional condition, or other factors . . .”).

<sup>221</sup> See Michael A. Smyth, *Queers and Provocateurs: Hegemony, Ideology, and the “Homosexual Advance” Defense*, 40 LAW & SOC’Y REV. 903, 927 (2006) (criticizing provocation for incorporating the last vestiges of homosexual stereotyping that has mostly “fallen out of favor”).

conditions and preferences.<sup>222</sup> Indeed, a philosophy that exalts female nonviolence not only disadvantages male homicide defendants, but doubly burdens female homicide defendants, such as battered women who kill.<sup>223</sup> Alternatively, narrowing provocation and self-defense law can entrench a hegemonic view of the reasonably provoked person.<sup>224</sup> It conveys that only those homicide defendants who acted absolutely uncharacteristically in uncontroversially provoking situations deserve a defense.<sup>225</sup> Given dominant views of who is nonviolent and what is provocative, the narrowed formulation would likely disadvantage the most marginalized homicide defendants.<sup>226</sup> Racial minorities, those with past criminal history, and those who for cultural or personal reasons were provoked by behavior that might be considered innocuous to a white middle class American would face much greater obstacles.<sup>227</sup>

Racial justice proponents, like provocation critics, challenge Florida's lenient self-defense law in the hope of sending an anti-stereotyping message that it is unacceptable to assume that young black men are criminals.<sup>228</sup> That is not, however, the only, or even

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<sup>222</sup> Cf. Janet Halley, *The Politics of Injury: A Review of Robin West's Caring for Justice*, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 74 (2005) (“[F]emale supremacist thinking . . . [asserts that] exceptional human good can be seen only ‘from a truly woman- and child-centered perspective.’” (quoting ROBIN WEST, *CARING FOR JUSTICE* 277 (1997))); Williams, *supra* note 165, at 806 (“[The cultural feminist] attempt to rehabilitate traditional stereotypes as ‘women’s voice,’ and to associate women’s voice with the new epistemology, fails to come to terms with the extent to which the gender stereotypes were designed to marginalize women.”).

<sup>223</sup> Cf. Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1073 (2005) (advocating for a standard that would stop jurors from focusing on gender stereotypes, such as helplessness and passivity, in battered women cases).

<sup>224</sup> See Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 817 (1992) (stating that powerful, dominant parties, such as tobacco companies, doctors, and males, prefer an objective approach).

<sup>225</sup> See Nourse, *supra* note 111, at 1394 (proposing that the provocation defense apply only when the defendant’s acts were “warranted”).

<sup>226</sup> See Delgado, *supra* note 224, at 818 (“Powerful actors . . . want objective standards applied to them simply because these standards always, and already, reflect them and their culture.”).

<sup>227</sup> See Burke, *supra* note 223, at 1045 (“Because of the role of reasonableness in the law of criminal defenses . . . juror reliance on biased social norms permits majority culture defendants to claims self-defense and provocation more successfully than nonmajority defendants . . .”).

<sup>228</sup> See Richardson & Goff, *supra* note 151, at 302 (“[T]he automatic association of ‘Blacks’ with ‘criminal,’ for instance, may cause someone to interpret ambiguous behavior by a black target as more criminal than identical behavior by a white target.”); *id.* at 326 (stating that jurors may be affected by “conscious or non-conscious” racial biases when determining what is reasonable).

most powerful, message that has materialized from the critique of stand-your-ground. For many, the principal problem with the lenient law is not that society harbors racist views of black men, but that Florida's law allows too many "bad" actors to get away with murder.<sup>229</sup> When Trayvon's case made national news, reporters began making their case against permissive self-defense laws.<sup>230</sup> Critical media coverage could have centered exclusively on cases in which white suburbanites killed minority cat burglars, fearful property owners killed minority trespassers, or police officers assumed unarmed black men were attackers.<sup>231</sup> Not surprisingly, much of the critical media coverage has portrayed the injustice of stand-your-ground as its tendency to allow the "usual suspects"—gang members, "thugs," and drug dealers—to defend against murder charges.<sup>232</sup> In the end, liberals' ratchet-up proposals express faith that by convicting more defendants of murder, the criminal law can shape social attitudes and help eliminate racism,

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<sup>229</sup> See, e.g., Erin Fuchs, *The Florida Stand Your Ground Law Helped Drug Dealers Beat Murder Charges: Report*, BUS. INSIDER (June 4, 2012, 1:02 PM), <http://www.businessinsider.com/the-florida-stand-your-ground-law-is-being-used-in-shocking-ways-report-2012-6> (stating that defendants have successfully invoked the Florida legislation as a defense when the defendant was the person who provoked the altercation in question).

<sup>230</sup> See, e.g., Kameel Stanley & Connie Humburg, *Many Killers Who Go Free with Florida 'Stand Your Ground' Law Have History of Violence*, TAMPA BAY TIMES (July 21, 2012, 4:30 AM), <http://www.tampabay.com/news/courts/criminal/many-killers-who-go-free-with-florida-stand-your-ground-law-have-history/1241378> (stating that Florida's self-defense legislation has benefited defendants with past criminal history).

<sup>231</sup> This was done to some extent by the liberal media. See, e.g., Maria Rohde, *Bo Morrison Killing and 'Castle' Law In Wisconsin Compared to Trayvon Martin Case*, HUFFINGTON POST (Mar. 26, 2012, 8:59 PM), [http://www.huffingtonpost.com/2012/03/26/bo-morrison-killing-like-trayvon-martin\\_n\\_1381325.html](http://www.huffingtonpost.com/2012/03/26/bo-morrison-killing-like-trayvon-martin_n_1381325.html) (discussing a case involving a homeowner who shot an intoxicated, but unarmed, African-American who wandered onto his front porch after attending a neighbor's party).

<sup>232</sup> See, e.g., Fuchs, *supra* note 229 (stating that a majority of defendants who have invoked the law as a defense have gone free); David Hemenway, *Don't Ignore the Evidence: Stand Your Ground Is Bad for Florida*, HUFFPOST MIAMI BLOG (Nov. 13, 2012, 10:32 AM), [http://www.huffingtonpost.com/david-hemenway-phd/stand-your-ground\\_b\\_2119322.html](http://www.huffingtonpost.com/david-hemenway-phd/stand-your-ground_b_2119322.html) ("The law has been used to free gang members, drug dealers fighting with their clients, and perpetrators who shot their victim in the back."); Nils Kongshaug, *Trayvon Martin's Death Puts Florida's 'Stand Your Ground' Law Under New Scrutiny*, ABC NEWS (Mar. 25, 2012), <http://abcnews.go.com/US/trayvon-martin-stand-ground-laws-scrutiny-florida-shooting/story?id=15988474> ("The people who are using this law are not law abiding citizens. The people who are using this law are thugs and gangs and drug dealers." (internal quotation marks omitted) (quoting Florida State Attorney William Meggs)); Stanley & Humburg, *supra* note 230 (chronicling the case of Maurice Moorner, an apparently violent domestic abuser who killed his ex-girlfriend's new boyfriend and whose case was dropped by prosecutors because of stand-your-ground, as well as other cases of "habitual offenders," like gang-members Jackson Fleurimon and Dervaunta Vaughn).

sexism, and homophobia.<sup>233</sup> However, given the current dynamics of American criminal law, liberal theorists should pause before endorsing the notion that criminal punishment solves, rather than exacerbates, social problems and status-based inequality.<sup>234</sup>

Finally, there is an argument that a murder trial, where a defendant's freedom and even life is at stake, is not a good forum for dispelling racial and gender stereotypes, especially the black-as-criminal stereotype. In these high-profile cases, defendants obtain some of the best defense attorneys, who have a duty of zealous advocacy.<sup>235</sup> When the accused claims self-defense and has a colorable claim, the defense attorney's job is to paint the decedent as the aggressor in the particular incident and as a violent person generally. In the course of defending, attorneys are likely to invoke gender and racial stereotypes, whether by design or implicitly. As this article is being written, George Zimmerman's attorney is requesting Trayvon Martin's school records and Facebook postings in order to show that Trayvon was the actual "thug" and that Zimmerman is the real victim.<sup>236</sup> However, to enter into a contest over who is the real victim in any given shooting, is to already cede the game. Even if Zimmerman is ultimately convicted, society is no closer to abandoning the black-as-criminal stereotype and understanding the role that neighborhood watches and other modes of crime control have in reinforcing that stereotype.<sup>237</sup> Moreover, the defense's focus on Trayvon Martin will provide years worth of fuel for the proponent of racial stereotyping. If the innocent Trayvon Martin can be "credibly" thought of as a "thug," one can

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<sup>233</sup> See Burke, *supra* note 223, at 1066–67 (explaining an author's assertion that "raising the bar" in regards to all defendants would lead to "more just results").

<sup>234</sup> See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 6 (2007) (observing how the United States transformed from a "welfare state" to "penal state" through the criminalization of social issues and is becoming "less democratic" and "more racially polarized").

<sup>235</sup> See Herman J.F. Hoying, Comment, *To File or Not to File: The Practical and Ethical Implications of Motion Practice on Sentence Negotiations in Capital Cases*, 15 CAP. DEF. J. 49, 54 (2002). See generally Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1179 (2011) (representing that even a prosecutor has a duty to be a zealous advocate).

<sup>236</sup> Lizette Alvarez, *Judge Rules Martin Files Can Be Used by Defense*, N.Y. TIMES, Oct. 20, 2012, at A18.

<sup>237</sup> While there has been some limited discussion of Zimmerman's acting outside of neighborhood watch norms by carrying a weapon, there has been virtually no discussion in the role of neighborhood watches in instilling community fear and fomenting suspicion toward unfamiliar minorities. See Campbell Robertson & John Schwartz, *Shooting Focuses Attention on a Program That Seeks to Avoid Guns*, N.Y. TIMES, Mar. 23, 2012, at A12.

certainly guess what that means for black men with actual criminal records.<sup>238</sup>

### C. Meaning

The final cautionary note regards the practical meaning of anti-leniency reform. Recall that progressives hope to generally improve the lives of women, racial, and sexual minorities through increasing prosecution of minority-victim crimes. Thus, the success of progressive domestic violence and murder defense reform is not measured by the exact same metrics used generally to gauge the success of criminal laws. It is axiomatic that prosecution-increasing reforms will increase prosecutions. It is also likely that such reforms will have at least a residual deterrent effect. The question here, however, is whether the reforms have improved the lives of minorities, helped to dismantle status-based subordination, and increased overall equality.

#### 1. The Meaning of Domestic Violence Reform

It is a near impossible task to summarize the definitive meaning of domestic violence reform. The results of reform mean different things to different people. Prosecutors and victims' advocates see the widespread implementation of mandatory policies and other severe measures as great successes and push for even broader prosecutorial power.<sup>239</sup> Conservative politicians laud revised laws on the grounds that they are "tough" on battering and preserve family values.<sup>240</sup> Defense attorneys regard reformed procedures as a grand assault on defendants' rights and well-being.<sup>241</sup> So-called

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<sup>238</sup> Already, headlines blare, "*Trayvon Martin: Typical Teen or Troublemaker?*" Yamiche Alcindor, *Trayvon: Typical Teen, or Troublemaker?*, USA TODAY, Dec. 12, 2012, at 1A.

<sup>239</sup> See Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1268 (2010) ("It was within this context of the general conservatization of criminal justice policy and the rise of the so-called victims' rights movement . . . that current mandatory domestic violence law policies were drafted.") (footnotes omitted).

<sup>240</sup> See FINAL REPORT, *supra* note 89, at 119 (characterizing anti-abuse legislation as policy designed to "support and strengthen family values and family well-being"); SIMON, *supra* note 234, at 187 (observing that policy-makers cemented domestic violence's status as a serious crime of violence by linking it to the degradation of the family structure).

<sup>241</sup> See Renée Harrison, *Representing Defendants in Domestic Violence Prosecutions: Interview with a Public Defender*, 11 J. CONTEMP. LEGAL ISSUES 63, 67–68 (2000) (interview with a public defender who states that mandatory policies have gone "too far"). See generally Gruber, *supra* note 4, at 802 (discussing criminalization policies).

“men’s rights” activists harbor disdain for domestic violence reform in general and denigrate it as reverse sexism.<sup>242</sup> Domestic violence reform law holds different meanings for these groups because of the difference in the groups’ core values. For example, prosecutors, victims’ rights advocates, and conservative politicians embrace crime-control ideologies and place an inordinate amount of faith in the penal system. Defense attorneys and civil libertarians, by contrast, regard prosecution-friendly procedural changes as an affront to individual freedom.

Unlike the above interest groups, feminist and other progressive legal theorists have not reached such a clear consensus on the success or failure of the domestic violence experiment. While progressive scholars are united in their desire to further an anti-subordination agenda, they disagree on whether domestic violence reform has done so.<sup>243</sup> Proponents of reform make favorable empirical observations, such as revised domestic violence laws make women safer and deter future acts of violence.<sup>244</sup> Critics set forth contradictory empirical observations. They assert that there are many ways in which harsh prosecution of domestic violence makes women worse off. Some contend that mandating prosecution puts women in greater danger of abuse because they lose control over the case and thus the ability to capitalize on that control to bargain for safety.<sup>245</sup> In addition, mandating arrest and prosecution can have

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<sup>242</sup> See, e.g., The Nat’l Fathers’ Res. Ctr., *Domestic Violence*, NAT’L FATHER’S RESOURCE CENTER, <http://www.fathers4kids.com/html/DomesticViolence.htm> (last visited May 23, 2013) (“Since society offers women so many perks for claiming that they are victims of DV . . . false or staged DV allegations now appear to be even more frequent in family court cases than false sex abuse allegations.”).

<sup>243</sup> Compare Gruber, *supra* note 4, at 823 (“I am skeptical of [further work on domestic violence within the criminal framework] and hold the suspicious belief that, however well-intentioned, most criminal law reforms end up becoming yet another procedural vehicle for warehousing the worst off.”), with Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 569 (2000) (“[S]ome feminists’ . . . [have] unwavering support for mandatory policies.”).

<sup>244</sup> See, e.g., Hanna, *supra* note 196, at 1895 (“[Mandatory] prosecution protects not only the victim, but also other women who might enter into a relationship with the abuser.”); Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 535 (“Supporters believe mandatory arrest laws will curtail domestic violence . . .”).

<sup>245</sup> See, e.g., Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman’s Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN’S L.J. 183, 191 (1997) (“[T]he opportunity to [control prosecution] may be just the power the battered woman needs to stop the violence in her life.”); see also David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 150–51 (N. Zoe Hilton ed., 1993) (citing a study showing that battered women bargain for their safety).

the effect of deterring women from reporting abuse and seeking aid.<sup>246</sup> Moreover, some experts observe that while increased incarceration likely has a temporary deterrent effect because it incapacitates the abuser, misdemeanor prison sentences do not break the cycle of violence and, in fact, may enable or extend it.<sup>247</sup>

Critics highlight other ways in which aggressive domestic violence prosecution can produce negative consequences for the very women it hopes to empower. First, mandatory arrest policies often result in disproportionate increases in the number of women arrested for intra-family offenses.<sup>248</sup> Second, abuse victims, particularly poor women of color, once involved in the criminal system, can find themselves on the other side of the prosecution table as defendants in abuse and neglect cases.<sup>249</sup> Ultimately, for many already marginalized women, involvement in the domestic violence system can mean loss of parental rights, incarceration on unrelated grounds, and disqualification for public housing.<sup>250</sup>

Scholars also note that reforms privilege separation over maintenance of familial relationships, even going so far as to impose de facto divorce.<sup>251</sup> While some women benefit unconditionally from severance from abusive partners, others find themselves actually worse off when abusive partners are incarcerated. A prison term for

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<sup>246</sup> See, e.g., Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1489 (2001) (reviewing ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000)) (“[T]he chief deterrent effect of mandatory arrest policies may well be their tendency to deter calls to police . . . .”); Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 469 (2003) (“[B]y coercing the victim’s participation the state may have taught her to distrust the system.”).

<sup>247</sup> See Mills, *supra* note 245, at 191 (“Perversely . . . the effect of mandatory policies is to align the battered woman with her batterer, to protect him, and to further entrench her in the abusive relationship.”).

<sup>248</sup> See Gruber, *supra* note 4, at 804 (“[P]olice . . . found ways around mandatory policies or enforced them in such a way that the woman, herself, was punished for resorting to state intervention.”) (citation omitted).

<sup>249</sup> See Coker, *supra* note 101, at 1044 n.144 (“If arrests of women are increased by a mandatory arrest policy, the result is particularly devastating for poor women whose children are more likely to become the subject of abuse and neglect proceedings.”).

<sup>250</sup> See *id.* at 1047–48 (“[D]rug addicted women are particularly vulnerable both to domestic violence as well as to state violence. An investigation into domestic violence may result in the victim losing her children or in her own incarceration or both.”) (citation omitted).

<sup>251</sup> See, e.g., Goodmark, *supra* note 198, at 35 (explaining that this assumes that battered women would choose separation over autonomy); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 8 (2006) (“[T]his Article ultimately points to a criminal law practice that I call ‘state-imposed de facto divorce,’ wherein prosecutors use the routine enforcement of misdemeanor DV to seek to end (in all but name) intimate domestic relationships.”).

the partner puts many women in a prolonged state of economic insecurity and single parenthood.<sup>252</sup> For women whose partners face deportation, these burdens become permanent.<sup>253</sup> In the end, for many women, separation is undesirable, and for others, it is desirable but realistically unfeasible.

A related issue is the meaning of domestic violence reform to the anti-subordination agenda more generally. One of the most prominent critiques of reform involves the observation that aggressive prosecution policies subordinate women. Critics highlight the paternalism inherent in mandatory policies and argue that the policies deny victims' agency,<sup>254</sup> promote an objectifying and stereotypical view of female victims, and merely replace batterers' control with the coercive power of the state.<sup>255</sup> Others note that the criminal law agenda has actually served to undermine efforts to improve women's lives through non-penal means. The "zero tolerance" stance has led to an over-resourcing of criminal law programs at the expense of distributive programs that would serve marginalized women in general.<sup>256</sup> Domestic violence law and

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<sup>252</sup> See Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 415 (2005) ("Other reasons [women do not report abuse] include fear of losing the financial or economic support the abuser provides, desire to keep the family unit intact, concern for their children, emotional attachment to the abuser, and perceived or real lack of options to leave the abuser and become self sustaining.") (quoting Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. OF ISSUES IN NURSING (Jan. 31, 2002), <http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.html>).

<sup>253</sup> See generally Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L.J. 27, 28 (2002) (discussing the adverse impact of mandatory domestic-violence policies on immigrant victims).

<sup>254</sup> See, e.g., Goodmark, *supra* note 198, at 1 ("Domestic violence law and policy [which] prioritizes the goals of policymakers and battered women's advocates—safety and batterer accountability—over the goals of individual women . . . has profoundly negative implications for the autonomy of women who have been battered . . .").

<sup>255</sup> See Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 821 (2000) (observing that domestic violence criminalization leads women to cede "control to the state" and they get "little support in return").

<sup>256</sup> Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 432–33 (2003) ("Twenty-five years ago, women of color were saying that we should not turn to the criminal legal system. But we put all our eggs in one basket without seeking other creative ways of community intervention.") (quoting ANANNYA BHATTACHARJEE, AM. FRIENDS SERV. COMM., WHOSE SAFETY?: WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 26 (2001), available at <http://afsc.org/sites/afsc.civactions.net/files/documents/whose%20safety.pdf>).

policy has created an institutional framework in which states and agencies receive funds for distributive measures only if they commit to complementary or concurrent criminalization measures.<sup>257</sup>

Finally, there is the question of whether such reform has promoted equality in general. There is currently a trenchant racial critique of aggressive policing and prosecution.<sup>258</sup> As noted above, immigrant women often have the most to lose when embroiled in a criminal system inherently hostile to their interests. This is just one example of how the separation model poses the greatest danger to women who are already economically and socially marginalized. Similarly, non-immigrant women of color are deeply wary of the implications of amplified police and prosecutorial power.<sup>259</sup> Racial scholars comment that minority abuse survivors are particularly reluctant to get involved with the state penal system.<sup>260</sup> Aggressive policies thus provide disproportionate motivation to at-risk women to remain silent and suffer private abuse, so as to avoid exposing themselves and their partners to the iron fist of state control. At the same time, increases in policing in marginalized communities can lead to further social degradation by incarcerating men, disintegrating families, and decreasing the number of productive society members.<sup>261</sup> Indeed, experts note that minority men suffer excessively under strengthened domestic violence prosecution.<sup>262</sup> There is irony in the fact that images of battered white women propelled forward reform that disproportionately burdened minority men.<sup>263</sup> Given that most relationships are intraracial,<sup>264</sup> one might

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<sup>257</sup> See, e.g., Violence Against Women Act, 42 U.S.C. § 3796hh(c)(1)(A) (2006) (stating the Act's "proarrest" purpose and requiring states seeking grant money to, among other things, certify that their laws "encourage or mandate arrests of domestic violence offenders").

<sup>258</sup> See Maguigan, *supra* note 256, at 429.

<sup>259</sup> See Coker, *supra* note 101, at 1015; Epstein et al., *supra* note 246, at 482.

<sup>260</sup> Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795, 806 (2004) (reviewing PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* (2003) ("[M]andatory arrest policies . . . could decrease the number of black women who would actually call the police for fear that they would be contributing to the already unbearable level of criminal justice intrusion into the lives of black men.")).

<sup>261</sup> See Epstein et al., *supra* note 246, at 482.

<sup>262</sup> LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 31 (2003) (noting that the rate of prosecution of men of color is "disturbingly disproportionate" to the rate of prosecution of white men); Coker, *supra* note 101, at 1034–35 (observing that domestic violence criminalization disproportionately affects African American and Latino men and citing studies); Maguigan, *supra* note 256, at 439 (recognizing this disproportionality as well).

<sup>263</sup> Coker, *supra* note 101, at 1028–29 ("Research purportedly about 'battered women' or 'domestic violence' frequently rests on data gathered only or mainly about white women.");

expect the outrage to be directed at white men. However, reform took place in a system already infused with racial disparity at every level.<sup>265</sup> Thus, even though minority women victims' claims are treated with greater ambivalence than those of white women,<sup>266</sup> the burdens of increased prosecution still manage to fall most heavily on the shoulders of men of color.

Of course those steadfastly committed to the domestic violence reform project, including many progressives, possess an arsenal of counterarguments to lodge at critics of aggressive policing, prosecution, and punishment.<sup>267</sup> They, moreover, are tenacious in their insistence that fighting domestic abuse should remain a priority on feminists' and progressives' agendas.<sup>268</sup> But this does not mean that scholars who question the virtues of turning to state punitive authority to remedy this particular manifestation of women's inequality are supporters of battering any more than critics of Guantánamo are supporters of terrorism. There is no question that battering is a serious matter. It causes real harm and constitutes a terrible symptom of patriarchy's social blight. However, after thirty years of legal activism, millions of dollars spent, and thousands of men (and women) imprisoned, the question of whether the domestic violence criminal law experiment is a progressive success remains up for debate.

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Barbara Fedders, Note, *Lobbying For Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 294 (1997) (describing domestic violence policy advocates for the Violence Against Women Act as "overwhelmingly white and middle-class").

<sup>264</sup> See CHARLES FRANK ROBINSON II, *DAUGHTERS OF DANGER: SEX AND LOVE IN THE SEGREGATED SOUTH* 130–31 (2003) (noting that even in modern society, there is a reluctance for interracial marriages due to past anti-miscegenation ideas).

<sup>265</sup> See Fedders, *supra* note 263, at 293 ("[E]ven in a mandatory-arrest regime, the police still must make probable-cause determinations about whether violence has occurred; probable cause is not a colorblind calculation.").

<sup>266</sup> See Kimberlè Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 93, 100 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (noting that domestic violence advocates feared that communities would be unconcerned with domestic violence if it was considered a minority issue).

<sup>267</sup> See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1262–63 (2009) ("Domestic violence and marital rape, [advocates of domestic violence reform] insisted, were not family matters, but rather were questions of dignity and citizenship that required the public intervention of the criminal law.").

<sup>268</sup> See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1514–15 (1998) (discussing the continued push for criminalization in response to domestic violence despite potential shortcomings of this approach).

## 2. The Meaning of Murder Defense Reform

Unlike domestic violence reform, states and the federal government have not sought to systematically narrow murder defenses, although such an effort may now be afoot in the wake of the Trayvon Martin case. Rather, there has been a historical movement toward more liberal defenses followed by several impromptu shifts to broader or narrower versions of murder defenses, generally unrelated to the progressive critique laid out above.<sup>269</sup> As a result, one can only attempt to forecast the likely effects of generally narrowing provocation and self-defense. One result contemplated by reformers is that it will make it more difficult for controlling men, racists, and homophobes to avoid murder convictions. This is probably beyond dispute, although it might be the case that such legal reforms make little difference where the cultural norms favoring such defendants are strong.<sup>270</sup> Nevertheless, it is impossible to deny that eliminating the provocation defense increases the chances that a homicide defendant claiming to be provoked will be convicted of murder.<sup>271</sup>

However, for our purposes, the question is not just the retributive one. In other words, the progressive agenda is not just about making sure the factually guilty are subjected to severe punishment—it is about countering social hierarchy in its many forms. Nevertheless, critical theorists tend to view the bias problem in murder law narrowly. They point out the injustice of individual

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<sup>269</sup> See Berman & Farrell, *supra* note 110, at 1031 (discussing shifts in provocation law); Ramsey, *supra* note 205, at 42. If anything, there has been a notable movement of states toward broader formulations of self-defense that accommodate battered women who kill. See *Weiand v. State*, 732 So. 2d 1044, 1051 (Fla. 1999) (“[The court] join[s] the majority of jurisdictions that do not impose a duty to retreat from the residence when a defendant uses deadly force in self-defense, if that force is necessary to prevent death or great bodily harm from a co-occupant.”); *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (“[A] defendant’s conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury.” (quoting *State v. Hazlett*, 113 N.W. 374, 380 (N.D. 1907))).

<sup>270</sup> See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (“[The] ‘sticky norms problem’ . . . occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm.”).

<sup>271</sup> See LEE, *supra* note 121, at 273 (“The [proposed] reform addresses the [specific] problem of invisible bias by heightening juror scrutiny of all claims of reasonableness, making it more difficult for defendants claiming they were provoked to receive the mitigation from murder to manslaughter.”).

cases where the defense gives cover to seemingly undeserving and bigoted killers and propose severity boosting legal reforms to address those bad cases. Critics of murder law leniency thus assume that a murder sentence is the fair baseline for unreasonably angered or scared killers, and the main problem is that biased state actors and jurors fail, for discriminatory reasons, to apply that sentence to enough defendants.<sup>272</sup> There also seems to be a sense that progressives need not worry about how ratcheting up punishment in this context might exacerbate subordination because the defendants are not minorities—they are controlling men, white racists, and straight homophobes.<sup>273</sup> Reform proponents thereby assume that narrowing provocation and self-defense will take away an unfair advantage from socially privileged defendants without burdening any socially marginalized individuals.<sup>274</sup> Through a foray into demography, one can investigate both the assumption that a murder sentence is a just baseline and the idea that reigning in defenses will only negatively affect the socially privileged.

At the same time as progressives developed their arguments about provocation's lenity, something radical was happening all across the nation in murder sentencing, due to two primary changes. First, so-called "truth in sentencing" curtailed judicial discretion, virtually eliminated parole, and undermined other limits on incarceration like good-time, earned-time, and work-release.<sup>275</sup> Second, since the 1980s, states steadily increased the statutory penalties for murder. Over the past few decades, states have doubled—even tripled—the minimum amount of time a person convicted of first degree murder must spend in jail.<sup>276</sup> In 1967, for

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<sup>272</sup> See, e.g., *id.* at 276 (discussing the problematic application of the reasonableness requirement).

<sup>273</sup> See, e.g., *id.* at 277 ("The biggest problem [with provocation law is the] majority [of] culture defendants [are] able to rely on dominant social norms of masculinity, race, and sexual orientation to bolster their claims of reasonableness.").

<sup>274</sup> See *id.* (proposing a solution that will purportedly "even the scales" between privileged defendants and others).

<sup>275</sup> See generally PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEPT OF JUSTICE, NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 2 (Jan. 1999), available at <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf> (study on truth in sentencing).

<sup>276</sup> Compare COLO. REV. STAT. § 39-18-7 (1963), with COLO. REV. STAT. § 18-1.3-401 (2012) (showing that the minimum term for life offenders went from ten years in 1963 to life without parole ("LWOP") currently); compare FLA. STAT. § 775.082 (1992), with FLA. STAT. § 921.141 (2012) (emphasizing that the minimum sentence went from twenty-five years in 1992 to LWOP currently); compare NEV. REV. STAT. § 200.030 (1986), with NEV. REV. STAT. § 200.030 (2012) (demonstrating that the minimum sentence went from ten years in 1986 to twenty years currently); compare N.M. STAT. ANN. § 41-17-24(4) (1964), with N.M. STAT. ANN. § 31-

example, defendants convicted of first-degree murder in South Dakota became parole eligible after serving five years.<sup>277</sup> Today, such offenders must remain in prison for the remainder of their natural lives.<sup>278</sup> States have also elevated the maximum and minimum sentence terms for second-degree murder.<sup>279</sup> For example, in 1977 West Virginia, the sentence for second-degree murder ranged from five to eighteen years.<sup>280</sup> Today, those convicted of second-degree murder face a minimum of ten years and a maximum of forty.<sup>281</sup> As a result of changes like these, federal and state prison populations have exploded, increasing by 628 percent between 1970 and 2005.<sup>282</sup> Proposals to increase the

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21-10(A) (2012) (showing that the minimum term for life offenders went from ten years in 1964 to 30 years currently); *compare* S.D. CODIFIED LAWS § 23-60-15 (1967), *with* S.D. CODIFIED LAWS § 24-15A-32 (2012) (emphasizing that the minimum term for life offenders went from five years in 1967 to LWOP currently); *compare* TEX. PENAL CODE ANN. § 1257 (West 1961), *with* TEX. PENAL CODE ANN. § 12.31(a) (West 2011) (portraying that the minimum sentence went from two years in 1961 to LWOP currently).

<sup>277</sup> S.D. CODIFIED LAWS § 23-60-15 (1967).

<sup>278</sup> S.D. CODIFIED LAWS §§ 22-6-1(1), 22-16-12 (2012).

<sup>279</sup> *Compare* ALA. CODE § 318 (1959), *with* ALA. CODE § 13A-6-2(c) (2012) (asserting that the minimum sentence went from ten years in 1959 to LWOP currently); *compare* ARK. CODE ANN. § 5-4-401(a)(3) (1987), *with* ARK. CODE ANN. § 5-4-401(a)(2) (2012) (sentencing range went from five to twenty years in 1987 to six to thirty years currently); *compare* CAL. PENAL CODE § 190 (West 1970), *with* CAL. PENAL CODE § 190 (West 1988) (stating that the minimum sentence went from five years in 1970 to fifteen years in 1988); *compare* COLO. REV. STAT. § 18-1-105 (1979), *with* COLO. REV. STAT. § 18-1.3-401(1)(a)(V) (2012) (emphasizing that the maximum sentence went from twelve years in 1979 to twenty-four years currently); *compare* IND. CODE § 10-3404 (1975), *with* IND. CODE § 35-50-2-3 (2012) (sentencing range went from fifteen to twenty-five years in 1975 to forty-five to LWOP or death currently); *compare* IOWA CODE §§ 707.3, 902.9 (1979), *with* IOWA CODE § 707.3 (2012) (stating that the maximum sentence went from twenty-five years in 1979 to fifty years currently); *compare* N.J. STAT. ANN. § 2C:11-3(b) (West 1979), *with* N.J. STAT. ANN. § 2C:11-3(b)(1) (West 2012) (describing murder to be a crime of the first degree and stating that the sentence range went from fifteen to thirty years to thirty years to LWOP currently); *compare* N.M. STAT. ANN. § 40-24-10 (1954), *with* N.M. STAT. ANN. §§ 30-2-1(B), 31-18-15(A)(4) (2012) (asserting that the minimum sentence went from 3 years in 1954 to 15 years currently); *compare* OR. REV. STAT. § 163.115(3)(b) (1990), *with* OR. REV. STAT. § 163.115(5)(b) (2012) (sentencing minimum went from ten years in 1990 to twenty-five years currently); *compare* 18 PA. CONS. STAT. § 4701 (1963), *with* 18 PA. CONS. STAT. § 1102(b) (2012) (asserting that the maximum sentence went from twenty years in 1963 to life currently); *compare* S.C. CODE ANN. § 24-21-610(2) (1976), *and* S.C. CODE ANN. § 16-3-20(A) (1984), *with* S.C. CODE ANN. § 16-3-20(A) (2001) (emphasizing that the minimum sentence went from ten years in 1976 to twenty years in 1984 to 30 years in 2001); *compare* TENN. CODE ANN. § 39-2408 (1956 & Supp. 1974), *with* TENN. CODE ANN. §§ 39-13-210(c), 40-35-111(b)(1) (2012) (sentencing range went from ten to twenty years in 1974 to fifteen to sixty years currently); *compare* WIS. STAT. § 939.50(3)(b) (1982), *with* WIS. STAT. § 939.50(3)(b) (2012) (asserting that the maximum sentence went from twenty years in 1982 to sixty years currently).

<sup>280</sup> W. VA. CODE § 61-2-3 (1977).

<sup>281</sup> W. VA. CODE § 61-2-3 (2012).

<sup>282</sup> DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW

application of the murder sentencing regime should be considered in light of these monumental changes.

The second assumption is that restricting the provocation defense will not exacerbate inequality overall.<sup>283</sup> That might be the case if privileged sexists and homophobes constituted the bulk of defendants seeking to use the provocation defense. However, according to the FBI's Bureau of Justice Statistics, between 1980 and 2008, only about ten percent of all homicides could be categorized as male-on-female intimate homicides.<sup>284</sup> The vast majority of defendants who would be affected by narrowing murder defenses are not the sexists, racists, and homophobes about whom progressives worry, and they are decidedly not privileged. First, these are youthful offenders, many falling between the ages of eighteen and twenty-four.<sup>285</sup> Second, they are men of color. The FBI Bureau of Justice Statistics reports that between 1980 and 2008, African-Americans constituted 52.5% of homicide defendants.<sup>286</sup> Although the Bureau did not divide the remainder between Latino and non-Latino defendants, its latest report (2006) on crime in the seventy-five largest counties includes an ethnicity breakdown.<sup>287</sup> According to the report, white, non-Latinos represented only ten percent of murder defendants, with Latinos making up twenty-two percent and blacks constituting an unsettling sixty-seven percent.<sup>288</sup> These statistics bear out the fact that "[p]olicies meant to increase the severity of punishments for violent crimes will, in the nature of things, disproportionately affect black offenders."<sup>289</sup> In the end, the net result of efforts to make murder law gender-, race-, and sexual orientation-sensitive may be to exacerbate rather than diminish criminal law's racial problems.

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DIRECTIONS FOR REDUCING CRIME 1 (2007), available at [http://employees.oneonta.edu/ostertsf/ReconsideringIncarceration\\_VeraInstitute.pdf](http://employees.oneonta.edu/ostertsf/ReconsideringIncarceration_VeraInstitute.pdf).

<sup>283</sup> See *supra* note 273 and accompanying text.

<sup>284</sup> See ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 10, 18 (2011), available at <http://bjs.gov/content/pub/pdf/htus8008.pdf>. I arrived at this statistic by combining the percentage of homicides that are "intimate" homicides (sixteen percent) with the percentage of male victims in those cases (thirty-six percent).

<sup>285</sup> *Id.* at 4.

<sup>286</sup> *Id.* at 12.

<sup>287</sup> See, e.g., THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 19 (2010), available at <http://bjs.gov/content/pub/pdf/fdluc06.pdf>.

<sup>288</sup> *Id.*

<sup>289</sup> Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1256 (2005).

## CONCLUSION

When an individual engages in intentional extreme acts of violence and “gets off Scot free,” the logical response is to cry foul and condemn the miscarriage of justice. However, there is absolutely nothing logical about one of the most socially advanced, democratic, and integrated countries in the world simultaneously being the most cruelly punitive. Cries of injustice do not occur in a vacuum and are not always (or even often) reserved for those who commit the most brutal acts and are treated with extreme impunity. Because of the politicized and pathological nature of U.S. criminal law discourse, the technique of condemning lenient criminal policies by claiming they harm victims is deployed across the spectrum of criminal laws.<sup>290</sup> Today, “intentional” acts of violence encompass neglect, unforeseen harm, and the like.<sup>291</sup> “Extreme violence” means basically any crime, and “getting off Scot free” can include the application of constitutional procedure or any legal arrangement exempting the defendant from “appropriate” harsh punishment. And what is considered appropriate punishment today bears little resemblance to fair incarceration thirty years ago. Consequently, the condemnation of leniency in criminal law has been a significant contributing factor to the United States’ distressing ascension to the pinnacle of world punitiveness.

Progressives committed to race and gender justice also logically condemn discriminatory leniency’s reflection and reinforcement of social hierarchy. However, by focusing on extreme violence and the plight of victims, using the tool of victim narrative, and calling for greater law enforcement and prosecutorial solutions, theorists may end up pursuing juridical equality at the expense of greater social justice. This is not to say that critical scholars should be unconcerned with society’s ambivalence towards violence against women and minorities. Critics are correct to condemn and try to remediate societies inegalitarian tendencies. However, granting greater authority to the state to incarcerate individuals is an extremely fraught method of reducing subordination. Progressive theorists and jurists should utilize their critical technologies to seek solutions to discrimination without simultaneously contributing to

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<sup>290</sup> See *supra* Part I.

<sup>291</sup> See, e.g., RICHARD A. GREENBERG ET AL., NEW YORK CRIMINAL LAW 410 (3d ed. 2007) (outlining special homicide provisions which are applicable to the death of a child as a result from child abuse or neglect and require intent).

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the miscarriage of justice that is the oppressive American penal state.