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## A TALE OF TWO ME TOOS

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*What is #MeToo's legacy? The conventional account currently being indelibly forged into our collective memory is that #MeToo was an unconditional progressive victory. It was a reckoning of the disempowered against the powerful that profoundly challenged sexist culture. This Article complicates and even counters that narrative by shining a light on #MeToo's dark side, namely, its carceral and neoliberal messages and policy reforms. Although today's George-Floyd-mindful feminists often describe #MeToo as having nothing to do with criminal law, the reality is that the movement featured familiar tough-on-crime discourses, passionately called for more criminal law and prosecutorial power, and, in fact, produced several new carceral laws and policies. Yet, just hours after famous actor Alyssa Milano sent the tweet heard around the world, Black Twitter revealed that Me Too already existed: Tarana Burke's "me too movement." This Me Too centered on survivors' material and emotional needs, focused on young women of color living in socioeconomic precarity, and embraced noncriminal "transformative justice." Milano's #MeToo, by contrast, incorporated popular narratives of criminality, bolstered the legitimacy of the penal state, and relied on traditional notions of sex and gender. And it was Milano's that became the Me Too. This Article contrasts the two Me Toos to critique the individualistic and punitive #MeToo movement that is and mourn the intersectional and restorative Me Too movement that could have been. #MeToo's emphasis on sensational stories and social media-derived evidence of "epidemics" effectively cut off debate, enabling carceral reforms to pass at a dizzying pace. This Article is the first to catalogue, describe, and examine the actual criminal laws and policies erected in #MeToo's name. Even a surface analysis of these reforms reveals that, contrary to advocates' claims, they do not just close "loopholes." Instead, each new or broadened criminal law raises troubling issues of civil liberties, defendants' rights, and state power, and each portends to sweep in people—including women—who bear little resemblance to the unrepentant monstrous offenders featured in #MeToo discourse.*

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1676
II.	MILANO'S #METOO: INDICATORS AND POPULAR PUNITIVISM.....	1683
	A. <i>Producing an Indicator</i> .....	1684
	B. <i>Indicators and Popular Punitiveness</i> .....	1689
III.	MILANO'S #METOO: SENTIMENTALITY AND SEX EXCEPTIONALISM ...	1692
	A. <i>Sentimentality and Tough-on-Crime Politics</i> .....	1692
	1. <i>Sentimentality in the Tough-on-Crime Era</i> .....	1693
	2. <i>#MeToo's Monsters</i> .....	1697
	B. <i>#MeToo and Sex Exceptionalism</i> .....	1702
	1. <i>The Dominance Feminist Frame</i> .....	1703
	C. <i>Sex Wars as Proxy Wars</i> .....	1706
IV.	BURKE'S ME TOO.....	1712
	A. <i>An Intersectional and Noncarceral Movement</i> .....	1712
	B. <i>Trickle-Down Feminism and the Everywoman</i> .....	1717
V.	THE CARCERAL STATE'S ME TOO .....	1725
	A. <i>Statutes of Limitations</i> .....	1728
	B. <i>Admission of Prior Bad Acts Evidence</i> .....	1733
	C. <i>Expansions of Substantive Rape Law</i> .....	1737
	1. <i>Affirmative Consent</i> .....	1737
	2. <i>Intoxication</i> .....	1739
	D. <i>New Offenses and Other Carceral Reforms</i> .....	1743
VI.	CONCLUSION.....	1752

## I. INTRODUCTION

#MeToo is a Rorschach test. To many casual observers, #MeToo embodies a novel and important, if diffuse, message of women's empowerment. Feminist anti-rape activists regard the movement as a conditional success, having enabled some but not enough new policies and laws on sexual misconduct. The pundits and policymakers who took the mantle of #MeToo characterize it as nothing less than the second "civil rights movement."<sup>1</sup> But civil libertarians themselves see #MeToo as a mixed bag: good for women but not so much for due process and free speech.<sup>2</sup> And some conservatives view the movement as confirmation of feminism's misandry and the lengths to which liberals will go to destroy "good guys."<sup>3</sup>

1. Jodi Kantor & Megan Twohey, *A Year of Reckoning*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/sunday-review/me-too-weinstein-a-year-later.html> [https://perma.cc/34FB-CUW9].

2. See Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo/553427/> [https://perma.cc/UX2V-XMA4].

3. See, e.g., Rachel Tripp, *As the Kavanaugh Debacle Shows, the #MeToo Culture Is Unfair to Men*, WASH. EXAM'R (Sept. 29, 2018, 12:00 AM), <https://www.washingtonexaminer.com/opinion/as-the-kavanaugh->

Although the takes on #MeToo are diverse and divergent, everyone agrees it is a historical watershed. For progressives,<sup>4</sup> #MeToo was a reckoning of the disempowered against the powerful that profoundly challenged sexist culture.<sup>5</sup> I also believe that #MeToo expressed a general message of women's empowerment and produced positive outcomes like reducing survivors' stigmatization, funding women's sexual harassment lawsuits, spotlighting men's outsized, abuse-enabling market power, and producing some pro-labor policies.<sup>6</sup> But let me put my cards on the table: I argue that we suffer from an overabundance of #MeToo adulation and emphasize its dark side, namely, its carceral and neoliberal messages and policy reforms. I do this not to be contrarian. Rather, when analysts avoid critically scrutinizing #MeToo like other historical moments and simply reiterate its revolutionary status, we cannot know the range of "#MeToo's lessons."<sup>7</sup> As #MeToo recedes into the past, it is important to also take stock of its contestable messages and consequences.<sup>8</sup>

This Article upends the conventional account that is currently being indelibly forged into our collective memory: #MeToo was an unconditional progressive victory. The claims that follow, however, are from the vantage point of my steeple. Not all readers will share my sense that the "progressive" position is a

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debacle-shows-the-metoo-culture-is-unfair-to-men [<https://perma.cc/GZ3K-EKZ7>]; see also ANNA BROWN, PEW RSCH. CTR., MORE THAN TWICE AS MANY AMERICANS SUPPORT THAN OPPOSE THE #METOO MOVEMENT (2022), <https://www.pewresearch.org/social-trends/2022/09/29/more-than-twice-as-many-americans-support-than-oppose-the-metoo-movement/> [<https://perma.cc/5DJX-N2T9>] (showing a strong partisan divide between #MeToo supporters and opponents).

4. I use terms like progressive, liberal, and conservative in a colloquial sense and do not make claims about *everyone* in those groups. See BROWN, *supra* note 3 (tracing the bipartisan divide). One can quarrel with all my claims about these groups. For example, one could note that some progressives and feminists criticized #MeToo from the outset—indeed, I am one of those few. Jodi Kantor, Megan Twohey, Grace Ashford, Catrin Einhorn & Ellen Gabler, *Finally: Ashley Judd and Other Weinstein Accusers Respond to Verdict*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-accusers.html> [<https://perma.cc/2QE5-4KE6>] (interviewing stakeholders, of which one (me) raises critique); see also Alex Press, *#MeToo Must Avoid "Carceral Feminism,"* VOX (Feb. 1, 2018, 8:40 AM), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> [<https://perma.cc/MMT5-S3JY>]. But most #MeToo critique involved conservatives' pro-men arguments and moderates' due-process concerns, the latter of which garnered swift push-back from progressives. See, e.g., Alexandra Brodsky, *Powerful Men Are Crying 'Due Process' to Avoid Public Criticism*, WASH. POST (Oct. 29, 2019, 10:51 AM), <https://www.washingtonpost.com/outlook/2019/10/29/powerful-men-are-crying-due-process-avoid-public-criticism/> [<https://perma.cc/5YJF-H2BB>].

5. See Gwen Bouvier, *From 'Echo Chambers' to 'Chaos Chambers': Discursive Coherence and Contradiction in the #MeToo Twitter Feed*, 19 CRITICAL DISCOURSE STUD. 179, 181 (2020) (showing how the media portrayed #MeToo as "not just a Twitter feed, but a sexual and political revolution for oppressed women").

6. Jamillah Bowman Williams & Elizabeth Tippet, *Five Years On, Here's What #MeToo Has Changed*, POLITICO (Oct. 14, 2022, 11:16 AM), <https://www.politico.com/newsletters/women-rule/2022/10/14/five-years-on-heres-what-metoo-has-changed-00061853> [<https://perma.cc/AF6Z-ZMEZ>].

7. Opinion, *The Lessons of #MeToo's Monster*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/opinion/harvey-weinstein-verdict-metoo.html> [<https://perma.cc/4GS9-NFDW>] [hereinafter *#MeToo's Monster*] (characterizing the "lesson" of Harvey Weinstein's conviction and twenty-three-year sentence as "some measure of justice can be attained, and with it the balance of power between sexual predators and their victims can begin to shift").

8. Anna North, *7 Positive Changes That Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019> [<https://perma.cc/BPQ6-D772>] (not mentioning the criminal laws propelled by #MeToo but crediting #MeToo with minimum wage reform's increased popularity).

sustained opposition to the overbroad, discriminatory, and inhumane U.S. criminal system.<sup>9</sup> Nor do I expect readers—even many liberal readers—to share my deep skepticism of feminist agendas that empower women vis-à-vis their victim status within that system.<sup>10</sup> These are strong views that require serious justification, which I have provided elsewhere and mostly do not revisit here.<sup>11</sup> Accordingly, this Article speaks to the progressive and feminist #MeToo celebrants who have serious concerns about racialized mass incarceration and socioeconomic inequality—the very people who might spark the next social media-driven national reckoning.

Of #MeToo's many messages, general empowerment and support for survivors were but two. The movement grew out of a tweet by the celebrity Alyssa Milano during heady press coverage of Harvey Weinstein's decades of open and notorious sexual wrongdoing in the glamorous Hollywood world. Milano sought social media proof of the magnitude of unreported, unpunished sexual assaults.<sup>12</sup> At its very founding, #MeToo's target was men's widespread *criminal* behavior, and its goal was eliminating impunity.<sup>13</sup> The movement undergirded a plethora of penal system-broadening reforms, including an extension of the criminal law to more sexual behaviors, broader definitions of rape and sexual assault, longer sentences, abolition of the statute of limitations for sex crimes, and prosecution-favoring evidentiary rules.<sup>14</sup>

Yet, the widely accepted characterization of #MeToo as a feminist revolution shields its carceral philosophies and projects from the skepticism progressives retain for other penal projects. Despite the voluminous commentary on #MeToo, the movement's carceral messages and, importantly, the actual criminal laws made in its name have received little attention.<sup>15</sup> In #MeToo's heyday,

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9. Anticarceral and anticapitalist sentiments have been expressed by the progressive House caucus. *See generally The Progressive Promise*, CONG. PROGRESSIVE CAUCUS, <https://progressives.house.gov/the-progressive-promise> (last visited July 8, 2023) [<https://perma.cc/2ZYU-LT77>].

10. *See generally* AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020) (discussing progressive stances on mass incarceration and inequality).

11. *See generally, e.g., id.*; Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 *STAN. L. REV.* (forthcoming 2023) [hereinafter *Sex Exceptionalism*]; Aya Gruber, *Sex Wars as Proxy Wars*, 6 *CRITICAL ANALYSIS L.* 102 (2019); Aya Gruber, *Equal Protection Under the Carceral State*, 112 *NW. U. L. REV.* 1337 (2018); Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Court*, 68 *FLA. L. REV.* 1333 (2016); Aya Gruber, *Consent Confusion*, 38 *CARDOZO L. REV.* 415 (2016) [hereinafter Gruber, *Consent Confusion*]; Aya Gruber, *A Provocative Defense*, 103 *CALIF. L. REV.* 273 (2015); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211 (2015); Aya Gruber, *Neofeminism*, 50 *HOUS. L. REV.* 1325 (2013) [hereinafter *Neofeminism*]; Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 *WASH. L. REV.* 581 (2009); Aya Gruber, *The Feminist War on Crime*, 92 *IOWA L. REV.* 741 (2007).

12. *See infra* Section II.A.

13. *See infra* Part II.

14. *See infra* Part V.

15. *See, e.g.,* Gillian Thomas, *As the Weinstein Scandal Sinks in, Where Do We Go from Here?*, *ACLU* (Oct. 17, 2017), <https://www.aclu.org/news/womens-rights/weinstein-scandal-sinks-where-do-we-go-from-here> [<https://perma.cc/4ATZ-MHZJ>] (focusing not on defendant's civil liberties and structural causes of abuse but on "how . . . we make sure that such an egregious abuse of power never happens again?"). This was part of the overall trend of the ACLU to itself become carceral when feminist issues are at stake. *See, e.g., Sexual Assault and Harassment in the Military*, *ACLU*, <https://www.aclu.org/issues/womens-rights/violence-against>

conservatives criticized #MeToo's "persecution" of innocent men on the word of lying women, which they saw as an abuse of our legitimate "bad hombre"-catching penal system.<sup>16</sup> To be sure, liberals' fear of aligning with such voices underlay the reluctance to critique the movement's open embrace of broad criminal liability, summary procedure, and harsh discipline for minor misconduct, although Al Franken's case was the tipping point for some.<sup>17</sup> Indeed, the few liberals willing to raise concerns risked being labeled rape apologists, and female critics were liable to be branded patriarchy's handmaidens with "internalized misogyny."<sup>18</sup> Consequently, there has been little scrutiny of #MeToo's somewhat panicky constructions of sex and contributions to the racist punishment system of the most punitive nation on earth.

#MeToo remained the picture of progressivism despite that mere hours after Milano pressed "send," it emerged that Tarana Burke, a Black woman and youth counselor who worked with marginalized survivors, founded the "'me too' Movement" in 2006.<sup>19</sup> This me too centered on survivors' material and emotional needs, focused on young women of color living in socioeconomic precarity, and embraced noncarceral "transformative justice."<sup>20</sup> Burke's "Me Too" was not tailor-made for internet virality; in fact, it was not online at all. In its decade of existence before Milano's tweet, it had not garnered national attention.<sup>21</sup> But within days of #MeToo going viral, women of color on Twitter brought Burke's me too to the public's attention.<sup>22</sup> They blasted the media for effusively praising a rich white woman with no expertise on sexual assault for a movement that was

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women/sexual-assault-and-harassment-military (last visited July 8, 2023) [https://perma.cc/6WRW-MKUZ]; see also Lara Bazelon, *The ACLU Has Lost Its Way*, ATLANTIC (May 10, 2022), https://www.theatlantic.com/ideas/archive/2022/05/aclu-johnny-depp-amber-heard-trial/629808/ [https://perma.cc/7BBS-76XM] (criticizing the engineering of Amber Heard's *Washington Post* op-ed about being abused by Johnny Depp).

16. See, e.g., Amy Swearer, *Don't Gaslight Us on #BelieveWomen*, HERITAGE FOUND. (May 26, 2020), https://www.heritage.org/gender/commentary/dont-gaslight-us-believewomen [https://perma.cc/G88K-A9TJ]; Tripp, *supra* note 3.

17. Laura McGann, *The Still-Raging Controversy over Al Franken's Resignation, Explained*, VOX (May 21, 2018, 6:20 AM) https://www.vox.com/2018/5/21/17352230/al-franken-accusations-resignation-democrats-leann-tweeden-kirsten-gillibrand [https://perma.cc/J22U-X3HE].

18. See *infra* notes 272–82 and accompanying text.

19. *History & Inception*, ME TOO, https://metoomvmt.org/get-to-know-us/history-inception/ (last visited July 4, 2023) [https://perma.cc/78SV-77Z6]; see also *About Tarana Burke*, TARANA BURKE, https://www.tarana-burke.com/bio (last visited July 8, 2023) [https://perma.cc/PYN4-KM2B]; Tarana Burke, *What 'Me Too' Made Possible*, TIME (Oct. 12, 2022, 12:01 PM), https://time.com/6221110/tarana-burke-me-too-anniversary/ [https://perma.cc/DKX6-VJGF]; TARANA BURKE, UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT 2–5 (2021) [hereinafter UNBOUND].

20. Elizabeth Adetiba, *Tarana Burke Says #MeToo Should Center Marginalized Communities*, NATION (Nov. 17, 2017), https://www.thenation.com/article/archive/tarana-burke-says-metoo-isnt-just-for-white-people/ [https://perma.cc/J4MP-BNTK]. For discussions of transformative justice, see generally MARIAME KABA, *WE DO THIS 'TIL WE FREE US* (2021); Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 219, 219 (2018).

21. See *infra* Section II.A; see also *History & Inception*, *supra* note 19.

22. They circulated the video, TED, *Tarana Burke: Me Too Is a Movement, Not a Moment*, YOUTUBE (Jan. 4, 2019), https://www.youtube.com/watch?v=zP3LaAYzA3Q [https://perma.cc/ANM7-D97J].

the brainchild of a nonwealthy Black woman with lived experience and practical expertise.<sup>23</sup>

Burke's was not the #MeToo that emblazoned T-shirts and mugs, moved corporate and governmental entities to swift punitive action, raised millions of dollars, and created a flurry of criminal laws.<sup>24</sup> Burke reflected on *that* #MeToo in 2021, remarking that from the time she entered the public arena, she endeavored to "build and sustain this movement before it goes off the rails and becomes a hashtag that's forgotten or becomes something that's just about men who cause harm."<sup>25</sup> She added, "[w]e have been trying to keep laser-focused on survivors."<sup>26</sup> Burke understood the survivor-supporting aspect of #MeToo as unfinished business, even as the popular movement reached a zenith and the end of its media lifecycle. She was less sanguine about #MeToo's *finished* business: its achievement of worldwide internet domination, status of ready media soundbite, and laws to incarcerate "men who cause harm."<sup>27</sup>

In addition to providing a lesson about the potential carcerality of social-justice movements, this tale sheds light on the power and limitations of social media as a change-making entity. Social media has the unique ability to take ideas viral and grant an audience with the world to alternative, even fringe, viewpoints that would otherwise die on the vine. Indeed, a popular pro-social-media narrative, utilized by the left and the right, is that social media is particularly liberatory because it amplifies grassroots movements and the authentic voices of regular people.<sup>28</sup> Just as #MeToo's status as feminist paints it with progressive purity, #MeToo's origination online makes it appear nonelite, truly democratic, and independent of larger structural hierarchies.

As social media critics observe, however, the notion of the internet as a public square ignores the reality that powerful political and corporate entities strongly influence virality.<sup>29</sup> Indeed, a popular progressive take on the many right-wing, QAnon, or January 6-style online movements is that they are not truly grassroots but manipulated by the Trumps and Murdochs, based on

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23. See A Black Woman Created the "Me Too" Campaign Against Sexual Assault 10 Years Ago, EBONY (Oct. 18, 2017), [www.ebony.com/black-woman-me-too-movement-tarana-burke-alyssa-milano](http://www.ebony.com/black-woman-me-too-movement-tarana-burke-alyssa-milano) [https://perma.cc/EV7L-76HH].

24. Susan Faludi, Opinion, *Feminism Made a Faustian Bargain with Celebrity Culture. Now It's Paying the Price*, N.Y. TIMES (June 20, 2022), <https://www.nytimes.com/2022/06/20/opinion/roe-heard-feminism-backlash.html> [https://perma.cc/LYF3-JPLS]; Elizabeth Segran, *The Strange World of #MeToo Marketing*, FAST CO. (Dec. 4, 2018), <https://www.fastcompany.com/90274849/the-strange-world-of-metoo-marketing> [https://perma.cc/HA4X-7DJQ].

25. Julianne McShane, *It's Been Four Years Since #MeToo Went Global. Tarana Burke Wants to Stay 'Laser-Focused' on Healing*, LILY (Oct. 21, 2021), <https://www.thelily.com/its-been-four-years-since-metoo-went-global-tarana-burke-wants-to-stay-laser-focused-on-healing/> [https://perma.cc/ET53-S63K].

26. *Id.*

27. *Id.*

28. Lina Dencik & Oliver Leistert, *Introduction*, in CRITICAL PERSPECTIVES ON SOCIAL MEDIA AND PROTEST BETWEEN CONTROL AND EMANCIPATION 1, 1 (Lina Dencik & Oliver Leistert eds., 2015).

29. Oliver Leistert, *The Revolution Will Not Be Liked*, in CRITICAL PERSPECTIVES ON SOCIAL MEDIA AND PROTEST BETWEEN CONTROL AND EMANCIPATION, *supra* note 28, at 35, 47–41.

misinformation and deepfakes, and fueled by Russian bots.<sup>30</sup> Liberals mostly decline to extend such skepticism to left online movements like Black Lives Matter and #MeToo, which they often treat as “salt of the earth”—fully independent of and even counter to the status quo hierarchy.<sup>31</sup> Yet we will see that #MeToo’s success was significantly dependent on its promotion by powerful people, repetition in traditional media outlets, and reflection of mainstream discourses.

The world of 2023 is quite different than that of 2017, including in ways that impact #MeToo’s legacy. Today, women focus on abortion law more than tallies of allegations against famous men; fear of Trump destroying democracy has overshadowed disdain for his p-grabbing remarks; and importantly, there has been a new “new civil rights movement”: worldwide protests against the racialized violence of policing and prison.<sup>32</sup> Add to this the increasingly popular progressive critiques of “white feminism”<sup>33</sup> and “carceral feminism,”<sup>34</sup> along with conservatives’ decision to resurrect a gay-deviance discourse,<sup>35</sup> and the platform of zero tolerance for sexual transgressions is no longer the progressive favorite it once was. In recent times, some #MeToo leaders have distanced themselves from #MeToo’s penal agenda, creating a somewhat strange mix of stridently condemning impunity and remaining ambivalent about punishment.<sup>36</sup>

30. See, e.g., Jessica Guynn, *Trump Supporters, Conservatives Rage Over Russian Bot Purge*, #Twitter-LockOut, USA TODAY (Feb. 21, 2018), <https://www.usatoday.com/story/tech/news/2018/02/21/trump-supporters-conservatives-rage-over-russian-bot-purge-twitterlockout/359291002/> [<https://perma.cc/W734-Y5M6>]; Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPS. 211, 217 (2017).

31. See generally Linda S. Greene et al., *Talking About Black Lives Matter and #MeToo*, 34 WIS. J. L. GENDER & SOC’Y 109 (2019).

32. Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, 7:39 PM), <https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/> [<https://perma.cc/X822-J3N2>]; Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> [<https://perma.cc/AZ2F-B2AP>].

33. See Jennifer C. Nash & Samantha Pinto, *A New Genealogy of “Intelligent Rage,” or Other Ways to Think About White Women in Feminism*, 46 SIGNS: J. WOMEN CULTURE & SOC’Y 883, 889 (2021) (“[W]hite feminism [is] a term used to condemn white women offenders who often speak in the language of feminism while performing racism.”).

34. See, e.g., Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 3 J. FEMINIST CULTURAL STUD. 128, 143 (2007) (coining term); GRUBER, *supra* note 10, at 7. Despite its increasing visibility, the critique is still a minority position, either ignored by feminists proposing criminal law, see, for example, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); or characterized as part of the antifeminist backlash to #MeToo. Josephine Bartosch, *Putting Women Last*, CRITIC MAG. (June 2021), <https://thecritic.co.uk/issues/june-2021/putting-women-last/> [<https://perma.cc/T3BU-H5UK>] (“[T]he anti-carceral justice movement has become a Trojan Horse through which dangerous ideas, such as the full decriminalisation of the sex industry, are exported . . .”).

35. See Jo Yurcaba & Jay Valle, *A National ‘Don’t Say Gay’ Law? Republicans Introduce Bill to Restrict LGBTQ-Related Programs*, NBC NEWS (Oct. 19, 2022, 5:26 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/national-dont-say-gay-law-republicans-introduce-bill-restrict-lgbtq-re-rcna53064> [<https://perma.cc/Y8VF-ZHHN>]; *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (Mar. 10, 2023), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country> [<https://perma.cc/6DZF-A4UW>].

36. See, e.g., Ashley Judd, *Ashley Judd: What Harvey Weinstein’s Arrest Does—and Doesn’t—Change for the #MeToo Movement*, TIME (May 26, 2018), <https://time.com/5292610/harvey-weinstein-arrest-ashley-judd/> [<https://perma.cc/G4PN-22BZ>].

Despite these cultural transformations, #MeToo's progressive reputation has remained intact. Today, some feminists fondly remember it as having *nothing* to do with criminal law.<sup>37</sup> One recent study of feminists' perceptions of #MeToo found that "the majority of feminists did not perceive the Me Too movement as creating a shift towards carceral feminism or increased desire for carceral punishment."<sup>38</sup> Indeed, many contemporary characterizations of #MeToo describe it as Burke's intersectional, support-focused program rather than the celebrity and media-promoted movement that called for swift "takedowns."<sup>39</sup> There is a collective amnesia that #MeToo's carceral call was once so passionate that supporters decried the presumption of innocence as a boon to rapists and reveled in accused men's "civic death," if not actual death.<sup>40</sup> That contemporary #MeToo supporters now adopt Burke's perspective rather than the one forged in the fire of wall-to-wall media coverage of a "monster" is positive.<sup>41</sup> But Burke's was never the #MeToo that went viral, occupied headlines, and continues to create real criminal laws that affect real people. The frank reality is that Burke's ideas began to take the helm *after* #MeToo ceased trending, faded from the front page, and was dethroned by another national reckoning.

A critical analysis of #MeToo illuminates that popular reform movements, especially those that have a robust virtual component, can translate into the low-hanging fruit of criminalizing identified "bad apples."<sup>42</sup> #MeToo's emphasis on sensational stories with simplistic notions of justice and social media-derived evidence of "plagues" and "epidemics" effectively cut off debate.<sup>43</sup> Promoting reactionary punitive impulses that move decision-makers to abandon scrutiny of

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37. Elizabeth Carter Moberly, *Is the Me Too Movement Influencing a Shift Towards Carceral Feminism?* (2021) (unpublished M.A. Thesis, University of North Carolina at Greensboro); see, e.g., Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21<sup>st</sup> Century Activism*, 2019 U. CHI. LEGAL F. 371, 372 (2019) (reviewing #MeToo's legal and policy changes without mentioning criminal law).

38. Moberly, *supra* note 37, at 46.

39. Holly Corbett, *#MeToo Five Years Later: How the Movement Started and What Needs to Change*, FORBES (Oct. 27, 2022, 12:02 PM), <https://www.forbes.com/sites/hollycorbett/2022/10/27/metoo-five-years-later-how-the-movement-started-and-what-needs-to-change/?sh=3d4ceba05afe> [<https://perma.cc/L9B7-8D7Y>].

40. See, e.g., *The Problem with "Innocent Until Proven Guilty,"* TRAUMA INST. & CHILD TRAUMA INST. (Oct. 25, 2017), <https://www.ticti.org/blog/innocent-guilty/> [<https://perma.cc/2AUy-EUZX>]; Olivia Babin, *Opinion, Weinstein Will Die in Prison and I Couldn't Be Happier*, SUNFLOWER (Mar. 15, 2020), <https://thesunflower.com/49928/opinion/opinion-weinstein-will-die-in-prison-and-i-couldnt-be-happier/> [<https://perma.cc/4KGH-H6ET>]; Ben Leit, *Harvey Weinstein is Going to Prison. That Is Not Good Enough*, SPECTATOR (Mar. 6, 2020), <https://spec.hamilton.edu/harvey-weinstein-is-going-to-prison-that-is-not-good-enough-9064e458cdfd> [<https://perma.cc/2R6C-6X7J>]; Quora submitted question, "Should Harvey Weinstein Receive Capital Punishment for the Suffering He Caused So Many Women?," QUORA, <https://www.quora.com/Should-Harvey-Weinstein-receive-capital-punishment-for-the-suffering-he-caused-so-many-women> (last visited July 8, 2023) [<https://perma.cc/5HY4-J5LL>]; see also Loïc Wacquant, *Deadly Symbiosis*, 3 PUNISHMENT & SOC'Y 95, 119 (2016) (describing conviction as "civic death").

41. See *infra* Subsection III.A.2 and accompanying notes.

42. Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1240 (2022).

43. Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 543 (1989) (calling this crime discourse the "routinization of caricature—worst cases framed as typical cases, the episodic rhetorically recrafted into the epidemic"); see also ROGER N. LANCASTER, *SEX PANIC AND THE PUNITIVE STATE* 31 (2011) (discussing use of spectacular rhetoric in sex cases).

criminal law proposals, even if in service of benign ideals, has proven time and again to harm the most subordinated people.<sup>44</sup> Moreover, criminal law reforms created in the name of fighting monstrous criminals *and* gender justice are particularly difficult to reverse, even when evidence shows them to be harmful to marginalized people, including women.<sup>45</sup>

Part II examines the Milano #MeToo movement and argues that it sought to and did produce an “indicator” about the prevalence of unpunished sexual assault packed with normative assumptions about the nature of sexual harm, the needs of victims, and the risks and rewards of state penal power. Part III connects this #MeToo’s discourse to past tough-on-crime advocacy that traded on sentimental narratives about devastated victims and the entrenched cultural aversion to sex. Part IV contrasts Milano’s #MeToo with Burke’s bottom-up me too and argues that celebrity “me too” declarations never had a strong potential to “trickle down”<sup>46</sup> and produce policies and discourses that would serve the most marginalized women.<sup>47</sup> Part V sketches #MeToo’s spate of carceral reforms and shows that each, in fact, raises thorny issues about state power, defendants’ rights, and sex regulation.

## II. MILANO’S #METOO: INDICATORS AND POPULAR PUNITIVISM

The tweet heard around the world originated as Alyssa Milano’s effort to produce a powerful quasi-empirical “indicator” about the prevalence of sex crimes.<sup>48</sup> Commentators often describe the tweet as a blank canvas on which women independently and authentically painted their own experiences.<sup>49</sup> But existing dominant discourses about crime, victimhood, sex, and the criminal system significantly managed the meaning of the tweet from the outset. #MeToo’s mainstream and punitive discourse propelled the movement to a cultural and legal phenomenon while cabining its radical and nonpenal potential. Burke’s me too, which long predated the hashtag movement, was from the outset noncarceral, focused on the least powerful, and supportive of transformative justice.<sup>50</sup>

44. See discussion *infra* Section II.B and accompanying notes.

45. See LANCASTER, *supra* note 43, at 230–33; discussion *infra* Section IV.B and accompanying notes.

46. V. Jo Hsu, *(Trans)forming #MeToo: Toward a Networked Response to Gender Violence*, 42 WOMEN’S STUD. COMM’N 269, 273 (2019) (coining “trickle-down” justice term).

47. Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/7TBU-EXZZ>].

48. See Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHRO. S83, S83 (2011); Willem F.M. de Vries, *Meaningful Measure: Indicators on Progress, Progress on Indicators*, 69 INT’L STAT. REV. 313, 315 (2001) (defining “statistical indicators as single numbers . . . that try to capture a more or less complex reality”). See generally THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE (1995); Elizabeth Popp Berman & Daniel Hirschman, *The Sociology of Quantification: Where Are We Now?*, 47 CONTEMP. SOCIO. 257 (2018) (reviewing current status of sociology of quantification).

49. See, e.g., Leigh Anne Jasheway, *The #MeToo Movement and Its Impact on Women’s Writing*, WRITER’S DIG. (Mar. 29, 2018), <https://www.writersdigest.com/publishing-insights/metoo-movement-and-its-effect-on-womens-writing> [<https://perma.cc/R3HN-KFLL>].

50. See discussion *infra* Part IV and accompanying notes.

Although it came on the Twitter scene mere hours after Milano's tweet, its radical nonpunitive ideas failed to capture the nation's attention. The media gives a one-line credit to Burke for the catchphrase, even as it focuses on punishing bad men rather than meeting survivors' needs and on incarceration rather than transformation.<sup>51</sup>

### A. *Producing an Indicator*

On October 15, 2017, Alyssa Milano sent a tweet that changed the way the world discusses and understands sexual misconduct.<sup>52</sup>

FIGURE 1



Milano issued this directive to her millions of followers, and the unattributed excerpt gives us a sense of why. This was an informal experiment to quantify sexual assault and harassment.

The effort was about creating what Sally Engle Merry calls an indicator.<sup>53</sup> Merry observes that “an indicator produces knowledge . . . by announcing what it measures.”<sup>54</sup> She adds, “[I]abeling is essential to produce a measure that is readily understood by the public and simple in its conception.”<sup>55</sup> Having already put a label on that to be measured (“sexual harassment” and “sexual assault,” a tort and crime, respectively), Milano’s goal was objective numerical proof that these lawless behaviors occur in great “magnitude.”<sup>56</sup> The project was informal and created on impulse, but its knowledge-production features are unmistakable. Merry explains:

51. See, e.g., Lisa Respers France, *A Mixed Weinstein Verdict and Hollywood's Uneven Record of Accountability in the #MeToo Movement*, CNN (Dec. 19, 2022, 9:41 PM), <https://www.cnn.com/2022/12/19/entertainment/metoo-weinstein/index.html> [<https://perma.cc/5YL2-D3RB>]; Elena Nicolaou & Courtney E. Smith, *A #MeToo Timeline to Show How Far We've Come—& How Far We Need to Go*, REFINERY29 (Oct. 5, 2019, 11:55 AM), <https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein> [<https://perma.cc/B5XB-L7KD>].

52. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976?lang=en](https://twitter.com/Alyssa_Milano/status/919659438700670976?lang=en) [<https://perma.cc/42BE-6TNU>].

53. See Merry, *supra* note 48, at S83.

54. *Id.* at S84.

55. *Id.*

56. See *supra* note 52 and accompanying text.

As forms of knowledge, indicators rely on the magic of numbers and the appearance of certainty and objectivity that they convey. A key dimension of the power of indicators is their capacity to convert complicated contextually variable phenomena into unambiguous, clear, and impersonal measures. They represent a technology of producing readily accessible and standardized forms of knowledge. . . . Indicators submerge local particularities and idiosyncrasies into universal categories, thus generating knowledge that is standardized and comparable across nations and regions.<sup>57</sup>

There is perhaps no better engine to produce lay indicators than social media. Social media is a great aggregator of opinion, any of which can take the mantle of “public opinion.” When a post or tweet seeking to measure public opinion catches on due to algorithmic luck, the retweeter’s fame, or a mainstream media boost, empirical proof is amassed in the mere seconds it takes to press on a tiny heart.<sup>58</sup> Criminal law scholars often discuss knee-jerk reactions to crime issues.<sup>59</sup> In the case of Milano’s #MeToo, the reactions literally took as much time as a knee takes to jerk. Milano, a famous celebrity in the glamorous Hollywood world, sent the tweet during twenty-four-hour Weinstein coverage. Predictably, the tweet produced the desired indicator: sexual assault is magnitudinous. Now, imagine instead that I or any other random person tweeted Milano’s same words prior to the Weinstein coverage. Notwithstanding some random algorithmic boost, not much would have happened. Yet nobody would have held up my tweet’s fizzle as proof that sexual assault *rarely* occurs.

Knowing this dynamic, we may all be disposed to take Twitter polling with a large grain of salt. But that is not what happened with #MeToo. Little skepticism was directed toward the tweet’s measuring methods or the fact that famous people can produce whatever indicator they want.<sup>60</sup> This is because the tweet was not about exploration but *confirmation* of a sexual assault problem that feminist advocates and the media already believed existed.<sup>61</sup> They just needed a shiny number, and they got one: “19 million.”<sup>62</sup> Reporting on the Weinstein case, #MeToo, and the “dizzying” collection of “high-profile allegations in recent

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57. See Merry, *supra* note 48, at S84.

58. See generally Claire-Anne Ferrière, *#metoo and Twitter: The Feminist Movement on Social Media*, in HUMANS R SOCIAL MEDIA 360 (Diana Daly ed., 2022) (ebook) (discussing #MeToo and digital aggregation).

59. See, e.g., Rebecca Gordon, *Defining Justice: Why It’s Time to Rethink Our Kneejerk Response to Crime*, GUARDIAN (Sept. 27, 2016, 7:00 PM), <https://www.theguardian.com/us-news/2016/sep/27/us-justice-system-crime-punishment-prison> [<https://perma.cc/4R8C-7WKV>].

60. See AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT’L L. 253, 282 (2009) (“[Q]uestions such as ‘Can it be counted? If so, when and how? How accurately? By whom?’ are never merely technical.”).

61. See Merry, *supra* note 48, at S83.

62. SHIANG CHENG LIM, FATIMA GHANI & MICHELLE REMME, SEXUAL HARASSMENT: A GLOBAL PROBLEM 1 (2019), [https://collections.unu.edu/eserv/UNU:7881/n2019-11-22\\_PB\\_SH\\_A\\_Global\\_Problem.pdf](https://collections.unu.edu/eserv/UNU:7881/n2019-11-22_PB_SH_A_Global_Problem.pdf) [<https://perma.cc/E8NM-W4RX>] (citing indicator to support claim that “[s]exual harassment is a widespread and global problem”); Anna Pivovarchuk, *The Me Too Movement: Changing the Rules of the Game*, FAIR OBSERVER (Nov. 15, 2019, 1:35 PM), <https://www.fairobserver.com/culture/me-too-movement-history-consequences-womens-rights-news-17621/> [<https://perma.cc/L5UD-9FWY>] (“The sheer magnitude of revelations caught many by surprise.”).

days,” an *Atlantic* article published on October 21, 2017, that featured the simple headline: “America’s Sexual-Assault Epidemic.”<sup>63</sup>

Milano’s tweet was forthright that the responses to it would amalgamate into a universal measure of sexual assault and harassment with its predetermined notions of crime and victimhood.<sup>64</sup> Nevertheless, the women who commented were not content to play the role of anonymous indicator-generators. In Milano’s feed, in Facebook posts, in blogs, and in the local press, women told their stories, transforming a counting exercise into an affective one.<sup>65</sup> The affective conversation produced by the broad participatory push was, in many ways, liberating. Women divulged their most painful secrets and found support and affirmation. Women decried sexual microaggressions without people telling them to get over it. To someone who has suffered sexual harm, the reassurance that “it’s not your fault” is a soothing balm like no other.<sup>66</sup> #MeToo allowed people to share a range of experiences of unwanted and uninvited sexual behavior, receive support and succor, and be in solidarity.

Yet even this good was conditional. Feminist media scholars observe that as an affective enterprise, #MeToo had costs. Surveys revealed that women’s telling and reading “Me Too” stories left many feeling more drained than uplifted.<sup>67</sup> Moreover, the hashtag nature of the movement cemented the idea that “recognizing the extent of sexual violence requires the public performance of affective digital labor, of pain, grief, anger, and sadness on social media.”<sup>68</sup> Indeed, adopting a victimized identity, especially in public fora, is not just a questionably feminist enterprise but a questionable healing method. Lynne Henderson, herself a survivor of rape, critiques the false promise of emotional closure through participating in criminal processes, noting “the process of emotionally reliving a traumatic event can be extremely painful and frightening.”<sup>69</sup> Susan Bandes observes that victims’ rights rhetoric involves contradictory notions of the affective implications of victims’ involvement in punishment.<sup>70</sup> Advocates insist on the victim’s right to intense trial participation because it enables emotional closure and healing.<sup>71</sup> But those same advocates support harsh sentences

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63. Gillian B. White, *America’s Sexual-Assault Epidemic*, ATLANTIC (Oct. 21, 2017), <https://www.theatlantic.com/business/archive/2017/10/weinstein-sexual-assault/543582/> [<https://perma.cc/M9UJ-RLQX>].

64. See Milano, *supra* note 52.

65. See, e.g., *id.*; Ferrière, *supra* note 58.

66. See Stefanie K. Johnson, Ksenia Keplinger, Jessica F. Kirk & Liza Barnes, *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo> [<https://perma.cc/93HU-U8FY>] (“[T]he knowledge that so many women experience sexual harassment has tempered its deleterious effects on self-doubt and self-esteem.”).

67. See Kaitlynn Mendes, Jessica Ringrose & Jessalynn Keller, *#MeToo and the Promise and Pitfalls of Challenging Rape Culture Through Digital Feminist Activism*, 25 EUR. J. WOMEN’S STUD. 236, 238 (2018).

68. Carolyn Elerding & Roopika Risam, *Introduction: A Gathering of Feminist Perspectives on Digital Labor*, FIRST MONDAY (Feb. 7, 2022), <https://journals.uic.edu/ojs/index.php/fm/article/view/8278/6646> [<https://perma.cc/DVX7-LJVQ>]; see also Allison Page & Jacquelyn Arcy, *#MeToo and the Politics of Collective Healing: Emotional Connection as Contestation*, COMM’N, CULTURE & CRITIQUE 1 (2019).

69. Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 980 (1985).

70. Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1253 (2022).

71. See *id.* at 1270.

because only long prison terms compensate for the victim going through the “hell” of participating in trial.<sup>72</sup>

Indeed, #MeToo’s architects *designed* it not for affective closure but for tangible social and legal change.<sup>73</sup> While many of #MeToo’s diverse participants were more interested in dispelling women’s shame than punitive policies, #MeToo’s “call to action,” as the press dubbed it, was punishing the accused men who, because of fame or viral happenstance, came into the public eye.<sup>74</sup> Women raised their voices and performed the emotional labor of saying “me too”—a labor that could be empowering or exhausting—yet the media, law, and policy-makers focused squarely on men—their deeds, pathologies, and fates.

The tightly controlled parameters of #MeToo evacuated women’s individual stories of critical nuance. First, the discussion was “law talk,” as Lesley Wexler argues.<sup>75</sup> The “problem” to be measured was *legal*: violations of the civil and criminal statutes governing sexual misconduct.<sup>76</sup> Indeed, Milano and the original poster probably put their tweets in legal terms because the Weinstein press coverage was already steeped in legalese. Law was the measure of justice, and “me too” allegations had to be legible in the law. This notion underlay the numerous debates over what behavior “counted” and the public tendency to label an ever-greater range of sexual misconduct as egregious sexual assault and harm, with all the social reprehension and legal consequences attached thereto.<sup>77</sup> Even the informal discipline (canceling, shaming) proceeded in the shadow of the law. These measures were necessary, the argument went, because the formal legal system is too inaccessible, biased, lenient, or slow to provide victims a “meaningful” remedy.<sup>78</sup> The focus on legal cognizability displaced a more creative

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72. *Id.*

73. See Catharine A. MacKinnon, *Where #MeToo Came From, and Where It’s Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/> [https://perma.cc/XK59-VECM].

74. See Claudia Koerner, *Here’s How Laws Are Changing with the #MeToo Movement*, BUZZFEED NEWS (Oct. 11, 2018, 6:29 PM), <https://www.buzzfeednews.com/article/claudiakoerner/one-year-later-heres-how-laws-are-changing-with-the-metoo> [https://perma.cc/F5FZ-W5G2]; Rebecca Beitsch, *#MeToo Movement Has Lawmakers Talking About Consent*, PEW CHARITABLE TRS. (Jan. 23, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/23/metoo-movement-has-lawmakers-talking-about-consent> [https://perma.cc/4TMH-ST5D] (discussing affirmative consent legislation).

75. Lesley Wexler, *#MeToo and Law Talk*, 2019 U. CHI. LEGAL F. 343, 343 (2019).

76. *See id.*

77. Christa Bugg, *Opinion, Ending Rape Culture with Cancel Culture*, RED & BLACK (Dec. 13, 2021), [https://www.redandblack.com/opinion/opinion-ending-rape-culture-with-cancel-culture/article\\_7c81f602-1407-11ec-9708-0782edeb9ecb.html](https://www.redandblack.com/opinion/opinion-ending-rape-culture-with-cancel-culture/article_7c81f602-1407-11ec-9708-0782edeb9ecb.html) [https://perma.cc/7P8D-7BZ8]; *see also* Lili Loofbourow, *Why Society Goes Easy on Rapists*, SLATE (May 30, 2019, 5:45 AM), <https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html> [https://perma.cc/45L3-XBH5] (discussing range of examples of sexual assault and accompanying legal consequences).

78. Toulia Drimonis, *It’s Not Cancel Culture, It’s Consequences*, CULT MTL (July 14, 2020), <https://cult-mtl.com/2020/07/cancel-culture-consequences-justice-harpers-letter-freedom-of-speech-censorship-quebec-musicians-music-arts-ubisoft-montreal-allegations-sexual-harassment-assault-rape-toxic-workplace/> [https://perma.cc/R7U5-DB34] (“We live in a world where rape and assault barely get a slap on the wrist from our justice system . . . so forgive me for not being particularly worried about any lasting effects for those being called out.”); Abby Loïselle, *Opinion, Embrace Cancel Culture, Especially in the Case of Sexual Misconduct*, STUDENT LIFE (Apr. 15, 2021, 10:25 PM), <https://tsl.news/cancel-culture-is-useful/> [https://perma.cc/259D-JG6K].

discussion of the range of sexual, gender, and labor harms women face and the many ways they might be addressed. Wexler notes that the early and exclusive focus on the law's role in defining and managing sexual harm served to "limit and obscure some of #MeToo's more transformative possibilities."<sup>79</sup>

Second, #MeToo's law talk concerned intentional injury. The "epidemic" was of sexual harassment and assault: individual acts egregious enough to trigger state penal power. Milano's tweet arose not in the context of the government debating a bill to provide financial aid to vulnerable women or workplace equity measures but in the context of a *criminal* investigation of a powerful sexual predator. Every "me too," in turn, raised the specter of a similar unrepentant, repeat sexual abuser getting away with it. Milano's tweet had created a participatory moment, a "me too" moment, and a lot of people participated, including people whose "me too" experiences involved things like creepy behavior and catcalling.<sup>80</sup> But the press touted the 19-million indicator as proof of a sexual plague mostly without delving into the substance of tweet comments or affording attention to the ones describing more minor incidents.<sup>81</sup>

These "local particularities," if discussed at all, were part of a conversation that minor conduct *is* "sexual harassment and abuse," even if, due to prevalent sexism, many people do not think so.<sup>82</sup> The *New York Times*, in its almost obsessive coverage of #MeToo, solicited stories from men who would go on the record and apologize for their past bad sexual behavior.<sup>83</sup> Max Maples related an incident from 2005 when he was sixteen or seventeen and "coerced my then-girlfriend" into oral sex.<sup>84</sup> "I don't believe she voiced any explicit dissent," he

79. See Wexler, *supra* note 75.

80. A sampling of three responses to Milano's tweet included two revelations of child molestation and this: "Standing in a line for food when a man took unwanted pictures of my chest. I was shocked." @da\_morgue, TWITTER (Oct. 26, 2019, 4:22 AM), [https://twitter.com/da\\_morgue/status/923479982076293121](https://twitter.com/da_morgue/status/923479982076293121) [<https://perma.cc/6K7C-T4LJ>]; Milano, *supra* note 52 (displaying comments below tweet); Cathy Young, *Assessing #MeToo, Five Years On*, BULWARK (Nov. 28, 2022), <https://www.thebulwark.com/assessing-metoo-five-years-on/> [<https://perma.cc/5EG7-WYVS>] ("#MeToo rose on a wave of wrenching personal stories—stories of women (and in some cases men) sexually exploited, even sexually terrorized, by powerful abusers like Weinstein. But almost at once, other stories began to show up: ones of unsupported, ambiguous accusations, with little if any evidence of abuse of power and with plenty of room for subjective interpretation and fuzzy or distorted memories."); see Heidi Matthews, *What Is To Be Done About the Problem of Creepy Men?*, AEON (Nov. 15, 2019), <https://aeon.co/ideas/what-is-to-be-done-about-the-problem-of-creepy-men> [<https://perma.cc/CF63-DEAL>] (noting that the crux of many #MeToo claims was "grossness" and "creepiness").

81. See generally LANCASTER, *supra* note 43.

82. See Merry, *supra* note 48, at S84 (discussing local particularities with respect to the power of indicators); Ferrière, *supra* note 58, at 370 ("The 'me too' movement therefore stages a depersonalization and a generalization of the movement, from the particular Harvey Weinstein case to thousands of women saying that they too, suffered sexual assault. Specificities and individualities are left aside to focus only on commonalities."); Anna E. Jaffe, Ian Cero & David DiLillo, *The #MeToo Movement and Perceptions of Sexual Assault: College Students' Recognition of Sexual Assault Experiences Over Time*, 11 PSYCH. VIOLENCE 209, 209 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8713172/> [<https://perma.cc/7MSD-WWWG>] (conducting study on labeling past events as sexual assault post-#MeToo).

83. Alicia P.Q. Wittmeyer, Opinion, *Eight Stories of Men's Regret*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/interactive/2018/10/18/opinion/men-metoo-high-school.html> [<https://perma.cc/4P7Y-7B7M>].

84. *Id.*

recalled, “but I had to cajole to get what I wanted.”<sup>85</sup> That cajoling consisted of “something to the effect of ‘Please, could you do that one thing again.’”<sup>86</sup> Maples lamented that his actions might have made her “violated.”<sup>87</sup> He contacted his ex to make sure it was ok to go public with the story that the *Times* considered newsworthy, and “interestingly, she didn’t even remember the incident in question.”<sup>88</sup>

Within the mainstream liberal discussion, efforts to differentiate among the credibility of allegations, the nature of the conduct described, or the historical context in which they occurred were shot down as victim-blaming, men’s-rights, and rape-culture arguments.<sup>89</sup> The Weinstein coverage and Milano’s tweet had already established the incontestable seriousness of *all* “me too” sexual experiences before the comments even started coming in.<sup>90</sup> The message was clear: Sexual assault is an epidemic, and punishment is the cure.<sup>91</sup>

### B. Indicators and Popular Punitiveness

Popular punitivism describes “the support of the populous for increasingly punitive responses to criminal conduct.”<sup>92</sup> Indicators have long driven popular punitivism. The publicization of crime statistics fueled mass incarceration because of the public’s deeply ingrained tendency to react to rising crime, or just the existence of crime, with calls for more policing, prosecution, and incarceration.<sup>93</sup> We have seen time and again the situation where policing levels are high and a certain crime blips up.<sup>94</sup> The press covers the crime surge (not the policing surge) with alacrity.<sup>95</sup> People react not by reasoning that the crime increase proves that over-policing is bad policy but by insisting on more policing and

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. See, e.g., Felicia Gans, *Matt Damon Faces Backlash After Saying There’s a ‘Spectrum’ When It Comes to Allegations of Sexual Misconduct*, BOS. GLOBE (Jan. 15, 2018, 10:02 PM), <https://www.bostonglobe.com/arts/2017/12/15/matt-damon-says-there-spectrum-behavior-when-comes-allegations-sexual-misconduct/Fc4pKMDKQzVfnxmnr3LLJ/story.html> [<https://perma.cc/3Y53-H24F>]; Edward Helmore, *Minnie Driver: Men like Matt Damon ‘Cannot Understand What Abuse Is Like,’* GUARDIAN (Dec. 17, 2017, 3:04 PM), <https://www.theguardian.com/film/2017/dec/16/minnie-driver-matt-damon-men-cannot-understand-abuse> [<https://perma.cc/CN7B-NKX5>].

90. Ferrière, *supra* note 58, at 368 (“Alyssa Milano’s intention in launching this movement on Twitter was not to provide people with a space to explain what they went through, but rather to identify as part of a community.”).

91. Of course, incarceration, termination, and ostracism lie on a disciplinary spectrum, and deplatforming hardly resembles prison and the sex-offender registry.

92. Wayne Martin, *Popular Punitivism: The Role of the Courts in the Development of Criminal Justice Policies*, 43 AUSTL. & N.Z. J. CRIMINOLOGY 1, 1 (2010).

93. See Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 397–98 (2006); RACHEL ELISE BARKOW, PRISONERS OF POLITICS 109 (2019).

94. See, e.g., KESHA S. MOORE, RYAN TOM & JACKIE O’NEIL, THURGOOD MARSHALL INST., THE TRUTH BEHIND CRIME STATISTICS 16 (2022), <https://www.naacpldf.org/wp-content/uploads/2022-08-03-TMI-Truth-in-Crime-Statistics-Report-FINAL-2.pdf> [<https://perma.cc/5HAA-GMMQ>].

95. See *id.*

prosecution to fight the rising tide.<sup>96</sup> When crime declines—something that rarely makes headlines—people ruminate that hyper-policing and mass incarceration worked.<sup>97</sup> Carceral actors and institutions have an amazing ability to fail up.

Crime-wave news coverage is experiencing something of a renaissance these days. Experts have expressed concern that the increasing “copaganda” signals a potential return to the 1980s era of racialized crime-fear politics.<sup>98</sup> In 1999, Quinnipiac began asking New Yorkers whether crime was a “very serious” problem.<sup>99</sup> Back then, despite higher crime rates and a still popular tough-on-crime talk lingering from earlier, just 35% of respondents answered the question in the affirmative.<sup>100</sup> Fast forward to February 2022, and well over 70% said that New York has a very serious crime problem.<sup>101</sup> What accounts for the difference? Did the city’s millions of residents become awash in violent crime? No. Homicide rates, the media’s preferred crime indicator, were 50% lower than in 1999.<sup>102</sup> Bloomberg News published an article that points to the answer.<sup>103</sup> Noting that “incidents of violent crime [homicide, larceny, burglary, and assault] remain at historic lows in New York City,” the article reported that crime did not rise, but crime coverage did.<sup>104</sup> During Mayor Bill DeBlasio’s tenure, press coverage on crime in New York averaged about 132 stories per month.<sup>105</sup> That number started to increase when the tough-on-crime Mayor Eric Adams announced his candidacy, ballooning to 800 stories per month after his inauguration.<sup>106</sup>

Empirical claims about crime rates and spectacular stories about monsters reliably drive popular punitivism to the benefit of police departments seeking money, prosecutors seeking ease of conviction, and for-profit prison companies seeking warm bodies. As Rachel Barkow observes, “criminal justice policy in the United States is set largely based on emotions and the gut reactions of lay people. We have been doing this for decades, with the public and politicians

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96. See John Pfaff, *Why Our Fixation on the Murder Rate Is Killing Us*, SLATE (Oct. 8, 2021, 9:00 AM), <https://slate.com/news-and-politics/2021/10/murders-rose-in-2020-dont-give-more-money-to-police.html> [https://perma.cc/8WNW-3VPZ].

97. See *id.*; MOORE ET AL., *supra* note 94, at 10–11; 74% of NYC Voters Say Crime Is a Serious Problem in the City, an All-Time High, NBC N.Y. (Feb. 9, 2022, 10:18 PM), <https://www.nbcnewyork.com/news/local/74-of-nyc-voters-say-crime-is-a-serious-problem-in-the-city-an-all-time-high/3544026/> [https://perma.cc/6L9G-UJMR].

98. See STUART SCHRADER, BADGES WITHOUT BORDERS: HOW GLOBAL COUNTERINSURGENCY TRANSFORMED AMERICAN POLICING 26–27, 33 (2019).

99. *Despite Crime Approval, Mayor’s Job Rating Is Negative, Quinnipiac College Poll Finds; New Yorkers Concerned with Race Relations, Police*, QUINNIPAC UNIV. (Apr. 8, 1999), <https://poll.qu.edu/Poll-Release-Legacy?releaseid=731> [https://perma.cc/DUG2-V9AV].

100. See *id.*

101. See 74% of NYC Voters Say Crime Is a Serious Problem in the City, an All-Time High, *supra* note 97.

102. Fola Akinnibi & Raedah Wahid, *Fear of Rampant Crime Is Derailing New York City’s Recovery*, BLOOMBERG (July 29, 2022), <https://www.bloomberg.com/graphics/2022-is-nyc-safe-crime-stat-reality/> [https://perma.cc/MA9X-PYEB].

103. See *id.*

104. *Id.*

105. *Id.*

106. *Id.*

reacting to stories or panics about crime with ill-informed laws and punitive policies.”<sup>107</sup> With the “New Jim Crow” critique gaining popularity over the last decade, some of the tough-on-crime fervor has died down.<sup>108</sup> But the pattern remains where the press concentrates on a crime “spike” or a particularly heinous crime, the public reacts with demands that lawmakers do something—not knowing that the conduct is already amply criminalized—and the law adapts accordingly.<sup>109</sup> William Stuntz points to the example of the public dustup over carjacking in the 1990s:

In 1992, a Maryland woman and her one-year-old daughter had their car hijacked; the mother was killed in the course of the theft. The story made national headlines and created the (mistaken) impression that these “carjacking” cases were common. The public demanded that politicians solve this new problem, notwithstanding that existing criminal laws—auto theft, robbery, assault, kidnapping, and homicide—already covered the relevant behavior. Given any combination of those crimes, offenders could be both convicted and given very severe sentences. In such cases, legislatures tend to create new crimes not to solve the problem, but to give voters the sense that they are doing something about it. This happened with carjacking at both the state and federal levels.<sup>110</sup>

Although they carry a powerful aesthetic of veracity, indicators are infrequently numerical truths.<sup>111</sup> For example, most criminal law commentators accept the idea that tough-on-crime attitudes in the 1980s responded, at least in part, to *actual* spiking crime.<sup>112</sup> There is a popular perception that society in that period was riddled with dangerous gangs and drugs.<sup>113</sup> But was that period more dangerous than the years preceding, such that the public’s reasonable fears, not media frenzy and politics, drove crime-control policies? In the 1980s, there were some increases in certain violent crimes in certain areas because of the crack trade.<sup>114</sup> Of course, the media and politicians whipped up public fear about “the crack epidemic” with a narrative that incorporated longstanding tropes of Black criminality.<sup>115</sup> But to answer the question at hand: no. There was no general crime tsunami.

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107. BARKOW, *supra* note 93, at 1.

108. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

109. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 532–33 (2001).

110. *Id.* at 531–32.

111. See Merry, *supra* note 48, at S85 (discussing the power of numbers).

112. See *infra* notes 113–16 and accompanying text.

113. See LAUREN BERLANT, *THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP* 25–54 (1997) (arguing that such feelings were part of a conservative political program that created an “infantile” identity); LANCASTER, *supra* note 43, at 26 (“[J]ust as mass media create ‘publics,’ media panics tend to forge a certain kind of citizenship and a certain kind of state.”).

114. Scott Boggess & John Bound, *Did Criminal Activity Increase During the 1980’s? Comparisons Across Data Sources* 17–24 (Nat’l Bureau of Econ. Rsch., Working Paper No. 4431, 1993), <https://www.nber.org/papers/w4431> [https://perma.cc/W5MT-4JUF].

115. See *id.*; ALEXANDER, *supra* note 108, at 52–53 (discussing crack and race).

A 1993 study sought to put numbers to the “widely held belief that the level of serious criminal activity increased during the 1980s, particularly among the urban underclass.”<sup>116</sup> Examining crime data from 1979 to 1992, the researchers concluded that “statistics do not support the notion that there [was] any overall rise in the level of criminal activity.”<sup>117</sup> Instead, “there was a large increase in the incarceration rate, primarily attributable to an increased probability of incarceration . . . and a sizable increase in the number of arrests and incarcerations for drug law violations.”<sup>118</sup> When President Clinton signed the 1994 Crime Bill, which critics have called the “blueprint for mass incarceration,” crime rates were already in decline.<sup>119</sup> They continued to decline for the next quarter century, while police forces and the prison population continued to expand.<sup>120</sup>

### III. MILANO’S #METOO: SENTIMENTALITY AND SEX EXCEPTIONALISM

#MeToo incorporated other mainstream ideas and discourses that have historically sparked popular punitiveness. First, the movement centered on spectacular and sentimentalized stories of ideal victims and monstrous offenders. #MeToo, like the crime victims’ movement that helped fuel tough-on-crime policies in the 1980s and 1990s, traded in tropes about vulnerable white women preyed on by evil, remorseless, physically repulsive predators.<sup>121</sup> Second, #MeToo was intently focused on sex, which for millennia has been one of the most stable drivers of punitive sentiment and a great disrupter of dispassionate reason.<sup>122</sup>

#### A. *Sentimentality and Tough-on-Crime Politics*

From its inception, #MeToo was very much in keeping with the popular punitive movements of the past, given its utilization of raced, classed, and gendered narratives involving horrendous offenders and white nonpoor female victims.<sup>123</sup> Contemporary news coverage, which continues to feature “worst of worst” crimes against innocent children and white women and is rife with language like “monster,” “predator,” and “serial rapist,” resembles that of the 1980s

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116. Boggess & Bound, *supra* note 114.

117. *Id.* at 1.

118. *Id.* at 24.

119. *See id.* at 12.

120. *See* Brenden Beck & Aya Gruber, *Facts About Defunding Police Departments*, N.Y. DAILY NEWS (June 15, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-facts-about-defunding-police-departments-20200615-fvqkukbngbb2bko3tev5fq52oe-story.html> [<https://perma.cc/N6R8-ZMKF>].

121. *See* Elayne Rapping, *Television, Melodrama, and the Rise of the Victims’ Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 680 (2000); Lynne Henderson, *Co-Opting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579, 584 (1998).

122. Carole Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 1, 7 (Carole S. Vance ed., 1984) (explaining that sex provokes “negative sanctions”).

123. Rebecca A. DiBennardo, *Ideal Victims and Monstrous Offenders: How the News Media Represent Sexual Predators*, 4 SOCIOLOGY 1, 1 (2018) (study of *L.A. Times* finding prevalence of these narratives).

and 1990s.<sup>124</sup> According to Lauren Berlant, the 1980s ushered in a dangerous national politics of “sentimentality”:

While at other moments in U.S. history the mediations of mass culture have been seen as dangers to securing an ethical national life, the collective experiences of national mass culture now constitute a form of intimacy, like the family, whose national value is measured in its subjugation of [experiential] forms of public life.<sup>125</sup>

Mass-media cultural narratives of innocent victims suffering at the hands of monstrous offenders, today boosted significantly by the internet, have proven remarkably reliable in creating a uniquely American punitive intimacy uniting people in the casting out of the designated evil other.<sup>126</sup>

### 1. *Sentimentality in the Tough-on-Crime Era*

President Reagan famously made crime control and victims’ rights key features of his political agenda and neoliberal agenda of recasting social issues and individual choices.<sup>127</sup> Reagan warned 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.”<sup>128</sup>

Scare ads about criminals inspired fear, and narratives about brutalized innocent victims inspired loathing.<sup>129</sup> Victims were “‘blameless,’ innocent, usually attractive, middle class, and white.”<sup>130</sup> These images stood in contrast to images of criminals, who were “subhuman . . . monsters” or alternatively “the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male.”<sup>131</sup> Such images, Elayne Rapping explains, triggered the public’s “melodramatic imagination” and craving for “moral simplification, [and] reassuring fantasies.”<sup>132</sup> Victimhood narratives were deeply raced, classed, and gendered.<sup>133</sup> The producer of *America’s Most Wanted*, a long-running television crime series created by John Walsh, whose son Adam was murdered, candidly explained: “A drug dealer who shoots

124. See, e.g., William Pitts, ‘He’s a Monster’: Accused Pedophile in Court Friday, 12NEWS (Jan. 15, 2020, 6:10 PM), <https://www.12news.com/article/news/crime/accused-pedophile-gordon-golding-court/75-fa52f207-089f-4403-a777-7762cb9f6f43> [<https://perma.cc/5EHK-UWSX>]; DA: Repeat Offender Arrested for Child Sex Abuse Material Crimes in Camden County, FOX 29 (Feb. 27, 2023, 2:03 PM), <https://www.fox29.com/news/da-repeat-offender-charged-for-possessing-child-sex-abuse-photos-videos-in-camden-county> [<https://perma.cc/4DPZ-TD3V>].

125. See BERLANT, *supra* note 113, at 179.

126. See *id.*; see also MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS 13–31 (2002).

127. See, e.g., Ronald W. Reagan, *Remarks at the Annual Conference of the National Sheriff’s Association in Hartford, Connecticut*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM ARCHIVES (June 20, 1984), <https://www.reaganlibrary.gov/archives/speech/remarks-annual-conference-national-sheriffs-association-hartford-connecticut> [<https://perma.cc/SU8G-V6A4>].

128. *Id.*

129. See Henderson, *supra* note 121.

130. *Id.*

131. *Id.* at 586–87.

132. Rapping, *supra* note 121, at 678, 680 (quoting Lynn Joyrich, *All That Television Allows*, in PRIVATE SCREENINGS: TELEVISION AND THE FEMALE CONSUMER 227, 233 (Lynn Spigel & Denise Mann eds., 1992)).

133. *Id.* at 668.

another drug dealer is not as compelling as a child molester or murderer. . . . If a man brutalizes innocent children, that definitely adds points.”<sup>134</sup> Even in today’s relatively incarceration-skeptical era, the fascination with white female vulnerability persists in the form of true-crime broadcasts that, as P.E. Moskowitz notes, tell “stories largely about white victims, based on uncritical accounts of police and prosecutors.”<sup>135</sup>

Victimhood discourse also involves a “reductive view of identity” in which victims are devastated for life and left with a traumatized persona formed solely by the single crime event.<sup>136</sup> The devastated-victim image taps into “an almost religious view of suffering, empowering those who suffer with . . . reverence from others,” as Minow notes.<sup>137</sup> Indeed, candidate Donald Trump picked up on this theme and featured “Angel Moms,” the mothers of children killed by immigrants, at his rallies.<sup>138</sup>

Trading in sentimental images, Rapping observes, is particularly effective—and particularly dangerous—because the images “seem to be ‘superpolitical’” and “beyond ideology” when they are, in fact, “deployed in the service of an agenda which is intensely political and ideological.”<sup>139</sup> In 1982, Reagan formed the President’s Task Force on Victims of Crime.<sup>140</sup> Asserting that the criminal system had lost “essential balance,”<sup>141</sup> the Task Force advocated nothing less than a reversal of the due process regime put in place by the liberal “Warren Court.”<sup>142</sup> The Task Force characterized victims as vengeful and desiring intense involvement with the criminal process. Their enemies were insufficiently zealous district attorneys, defense attorneys, due process protections, and

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134. *Id.* at 676 (citing Van Gordon Sauter, *Rating the Reality Shows and Keeping Tabs on the Tabloids*, TV GUIDE 18 (May 2, 1992); Anna Williams, *Domesticity and the Aetiology of Crime in America’s Most Wanted*, CAMERA OBSCURA 97–98 (Jan.–May 1993)).

135. P.E. Moskowitz, *True Crime Is Cathartic for Women. It’s also Cop Propaganda.*, MOTHER JONES (May/June 2020), <https://www.motherjones.com/media/2020/06/true-crime-podcasts-white-women/> [<https://perma.cc/XK3S-Y2ZD>].

136. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. Rev. 1411, 1433 (1994).

137. *Id.* at 1434.

138. Michelle Goldberg, *Trump’s “Angel Moms” Deserve Our Sympathy. But Their Message Is a Lie.*, SLATE: THE SLATEST (Sept. 1, 2016, 2:49 PM), <https://slate.com/news-and-politics/2016/09/trumps-angel-moms-deserve-our-sympathy-but-not-our-vote.html> [<https://perma.cc/GZX2-R27D>].

139. Rapping, *supra* note 121, at 681.

140. See LOIS HAIGHT HERRINGTON ET AL., PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT ii (1982), <https://www.ncjrs.gov/pdffiles1/ovc/87299.pdf> [<https://perma.cc/FF4N-ESLQ>]. In 1987, Reagan appointed Herrington as “Chairman” and Executive Director of the White House Conference for a Drug Free America. See *Appointment of Lois Haight Herrington as Chairman and Executive Director of the White House Conference for a Drug Free America*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (May 5, 1987), <https://www.reaganlibrary.gov/archives/speech/appointment-lois-haight-herrington-chairman-and-executive-director-white-house> [<https://perma.cc/6JD8-SQEV>].

141. HERRINGTON ET AL., *supra* note 140, at 114.

142. See *id.* The “Warren Court Era” lasted from 1953–1969, when Earl Warren presided as Chief Justice. The Court is remembered for rulings with a distinctly civil libertarian bent. See Robert Longley, *The Warren Court: Its Impact and Importance*, THOUGHTCO. (Feb. 2, 2021), <https://www.thoughtco.com/the-warren-court-4706521> [<https://perma.cc/NG58-36VT>].

lenient judges.<sup>143</sup> Lynne Henderson observes, “[v]ictims’ rights’ were—and are—used to counter ‘defendants’ rights’ and to trump those rights if possible. In an argument that traces back to at least the early twentieth century, people accused of crimes are probably ‘guilty as sin’ and undeserving of so much legal protection.”<sup>144</sup> Within victims’ rights logic, victims’ and defendants’ interests are inversely related, such that the more the defendant suffers, the more the victim heals.<sup>145</sup>

This highly specific victim image, carefully curated within tough-on-crime discourse, has actively excluded the marginalized men and women who disproportionately suffer from crime. In 2007, the Bureau of Justice Statistics released a telling report on Black victimization between 2001 and 2005.<sup>146</sup> It found that Black people were victimized at significantly higher rates than white people and were about twice as likely to be victims of sexual assault, robbery, and aggravated assault.<sup>147</sup> Moreover, in 2005, African Americans made up approximately 13% of the U.S. population but 49% of the country’s homicide victims.<sup>148</sup> Among the Black population, victimization correlated with being male, young, low-income, and residing in an urban area.<sup>149</sup> But in 1980s and 1990s victims’ rights parlance, the poor, young, Black male teen was the ultimate criminal—a “superpredator.”<sup>150</sup> Supporting a victims’ rights amendment in 1996, President Bill Clinton stated, “[w]e sure don’t want to give criminals like gang members, who may be victims of their associates, any way to take advantage of these rights . . . .”<sup>151</sup>

Nowhere were sentimental victim narratives more prevalent than in discussions of sex offenses. In the 1980s and 1990s, antipredator discourse shepherded

143. HERRINGTON ET AL., *supra* note 140, at 110–11; *but see* Lynne Henderson, *Revisiting Victims’ Rights*, 1999 UTAH L. REV. 383, 408 (arguing that victim participation in criminal litigation may not help their healing process).

144. Henderson, *supra* note 121, at 582–83.

145. *See generally* Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1 (2010) (describing idea that criminal punishment is distribution of pain from victim to offender).

146. ERIKA HARRELL, U.S. DEP’T OF JUST.: OFF. JUST. PROGRAMS: BUREAU JUST. STAT., BLACK VICTIMS OF VIOLENT CRIMES 2 (2007), <https://www.bjs.gov/content/pub/pdf/bvvc.pdf> [<https://perma.cc/M2QU-KD8F>]. This appears to be the only report of its kind, although there are other victimization surveys, but those focus on general victimization. *See National Crime Victimization Survey*, BUREAU OF JUST. STAT., <https://bjs.ojp.gov/programs/nvcs> (last visited July 8, 2023) [<https://perma.cc/9HES-ECNL>].

147. HARRELL, *supra* note 146, at 3. *But see* RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEPT. OF JUST.: OFF. JUST. PROGRAMS: BUREAU JUST. STAT., CRIMINAL VICTIMIZATION, 2019, at 11 (2020), <https://www.bjs.gov/content/pub/pdf/cv19.pdf> [<https://perma.cc/PLN5-AGKY>] (finding that Black victims comprise a higher percentage of the overall black population than white victims in the white population).

148. HARRELL, *supra* note 146, at 1, 3.

149. *Id.* at 1.

150. Beth Caldwell & Ellen C. Caldwell, *Superpredators and Animals—Images and California’s Get Tough on Crime Initiatives*, 11 J. INST. JUST. & INT’L STUD. 61, 62 n.3 (2011); *see also* Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on ‘Super-Predators’ after Encounter with Activist*, WASH. POST (Feb. 25, 2016, 2:50 PM), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/> [<https://perma.cc/LU2C-PFW7>].

151. PBS NewsHour, *Clinton’s Announcement in Support of a Victims’ Rights Amendment*, PBS (June 25, 1996, 11:13 AM), [https://www.pbs.org/newshour/politics/law-jan-june96-victim\\_06-25](https://www.pbs.org/newshour/politics/law-jan-june96-victim_06-25) [<https://perma.cc/GM F7-4H5G>] (quoting President Bill Clinton during his announcement supporting a Victims’ Rights Amendment).

in exorbitant sentences for sex offenses and draconian, costly, and ineffective post-conviction regulations to manage the people convicted of them.<sup>152</sup> Sociologist Stanley Cohen explains that moral panic involves “moral outrage towards the actors (folk devils) who embody the problem,” abetted by “an exaggeration of the number or strength of the cases.”<sup>153</sup> As I have noted elsewhere:

Social anxiety arose from images of brutal child murders committed by deviant strangers and statistics about the apparent frequency of child sexual assault writ large. In fact, however, [such] brutal stranger crimes were exceedingly rare, and the more common assaults involved lower-level sexual touching perpetrated by familiars, often by other children.<sup>154</sup>

The “mass culture” of predator fear obscured the experiential reality of sex offending, leading to policies that experts largely agree are excessively punitive, nondeterrent, and even criminogenic.<sup>155</sup> It would be bad enough if focusing on imagined monsters led to extreme policies that were so much tilting at windmills. But there are real-world consequences to such penal excesses. It is naïve to think that prosecutors will reserve the penal power granted to them in the heady moments of predator fear for the “real bad guys.”<sup>156</sup> Prosecutorial power, as criminal

152. JUDITH LEVINE & ERICA R. MEINERS, *THE FEMINIST AND THE SEX OFFENDER: CONFRONTING HARM, ENDING STATE VIOLENCE* 50–52 (2020); LANCASTER, *supra* note 43, at 29–30.

153. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* xxvi–xxvii (3d ed. 2002); *see also* LANCASTER, *supra* note 43, at 29–30.

154. GRUBER, *supra* note 10, at 109. *See Child Sexual Abuse Statistics: Perpetrators*, DARKNESS TO LIGHT, [https://www.d2l.org/wp-content/uploads/2017/01/Statistics\\_2\\_Perpetrators.pdf](https://www.d2l.org/wp-content/uploads/2017/01/Statistics_2_Perpetrators.pdf) (Dec. 22, 2015) [<https://perma.cc/MP3U-EKWD>]; Sarah W. Craun & Matthew T. Theriot, *Misperceptions of Sex Offender Perpetration: Considering the Impact of Sex Offender Registration*, 24 J. INTERPERSONAL VIOLENCE 2057, 2058 (2009); Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM. JUST. POL’Y REV. 31, 45–46 (2010) (noting that “several recent studies . . . have found registration and notification laws to be ineffective methods of reducing sexual victimizations” and “there is some evidence to suggest that these types of laws are increasing recidivism” and citing studies).

155. John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 39 (2009) (“By framing sex offenders as monsters, we not only dehumanize them, we also hide from our own anxieties about deviant sexual conduct and undermine rational strategies for addressing such conduct.”).

156. Sex-offense criminalization has always been deeply raced. Ruth D. Peterson & John Hagan, *Changing Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research*, 49 AM. SOCIO. REV. 56, 57 (1984) (“When blacks violate white victims, the high sexual property value attached to the white victims and the racial fears of authorities can justify severe treatment.”); Robert W. Hymes, Mary Leinhart, Sandra Rowe & Williams Rogers, *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 J. SOC. PSYCH. 627, 631 (1993) (finding mock jurors more likely to convict Black stranger-rape defendants and all defendants in cross-racial date rapes); CHRISTOPHER HARTNEY & LINH VUONG, NAT’L COUNCIL ON CRIME & DELINQUENCY, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM* 11 tbl.1 (2009), [https://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](https://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf) [<https://perma.cc/2L2A-DQN4>] (finding that in 2006 Black rape defendants’ incarceration rate was over three times that of white defendants); HOWARD N. SNYDER, U.S. DEP’T OF JUST.: OFF. OF JUST. PROGRAMS: BUREAU JUST. STAT., *ARREST IN THE UNITED STATES 1990–2010* (2012), <https://bjs.ojp.gov/content/pub/pdf/aus9010.pdf> [<https://perma.cc/Q9HJ-Q68T>] (reporting that 13,210 white people (including Hispanics), 6,300 Black people, 290 American Indians and Alaska-native people, and 280 Asian Americans and Pacific Islanders were arrested for forcible rape). The foregoing studies likely understate the disparity because they put Latinos in the white category. HARTNEY & VUONG, *supra*, at 2. *See generally* Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOCIO. REV. 842 (1980); NAZGOL GHANDNOOSH, *THE SENT’G PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES* (2014), <https://www.sentencingproject.org/app/uploads/2022/08/Race-and-Punishment.pdf> [<https://perma.cc/JK6Z-GRZZ>].

law and procedure experts have documented in a variety of areas, is notoriously difficult to manage, much less recruit to progressive ends.

## 2. #MeToo's Monsters

#MeToo discourse overflows with monster talk,<sup>157</sup> which tends to accompany joyous celebrations of high-profile convictions and new criminal laws. Weinstein's and Cosby's convictions and sentences, according to the press, were some of #MeToo's greatest victories, justice for all women and fair compensation for every victim's affective labor in saying "me too."<sup>158</sup> The press lauded the Weinstein verdict as "vindication" of the #MeToo movement and a clear refutation of the critique that #MeToo—and the press—had "gone too far."<sup>159</sup> The conviction, proclaimed the *New York Times* editorial board, "stands for [the proposition] that some measure of justice can be attained, and with it, the balance of power between sexual predators and their victims can begin to shift."<sup>160</sup> For the media, the conviction and sentence proved that their wall-to-wall coverage, indeed trial-by-press, of Weinstein was, in fact, justified, if not required by justice.<sup>161</sup>

The widely celebrated sentence was the twenty-three-year, likely natural life, sentence handed down to the unquestionably criminal but also elderly and ailing Weinstein in a New York courtroom.<sup>162</sup> After the sentencing, the media

157. See Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130, 130–31 n.2 (2011) (discussing discourse of "predators" and "monsters").

158. Michael R. Sisak & Tom Hays, *Harvey Weinstein Found Guilty in Landmark #MeToo Moment*, ASSOCIATED PRESS (Feb. 24, 2020), <https://apnews.com/article/ap-top-news-harvey-weinstein-sexual-assault-castate-wire-us-news-67057b46fcd3f1183cf6a699a399c886> [<https://perma.cc/5L76-N9M3>]; Eric Deggans, 'Allegedly' No More: Cosby Conviction Marks a New Chapter for #MeToo, NPR (Apr. 27, 2018, 12:47 PM), <https://www.npr.org/2018/04/27/606384814/allegedly-no-more-cosby-conviction-marks-a-new-chapter-for-metoo> [<https://perma.cc/BB82-CXGZ>].

159. Colin Dwyer & Vanessa Romo, *Harvey Weinstein Found Guilty of Rape, Sexual Abuse in Mixed Verdict*, NPR (Feb. 24, 2020, 12:10 PM), <https://www.npr.org/2020/02/24/805258433/harvey-weinstein-found-guilty-of-rape-but-acquitted-of-most-sexual-assault-charge> [<https://perma.cc/3RAY-7R2K>]; Laura Newberry & Maura Dolan, *Harvey Weinstein Verdict in New York Makes a Conviction in L.A. More Likely, Experts Say*, L.A. TIMES (Feb. 24, 2020, 3:36 PM), <https://www.latimes.com/california/story/2020-02-24/harvey-weinstein-legal-analysis> [<https://perma.cc/MJW8-82K4>]; Bianca Fileborn & Rachel Loney-Howes, *Weinstein Conviction a Partial Victory for #MeToo, but Must Not Overshadow Work Still To Be Done*, CONVERSATION (Feb. 25, 2020, 1:15 AM), <https://theconversation.com/weinstein-conviction-a-partial-victory-for-metoo-but-must-not-overshadow-work-still-to-be-done-132434> [<https://perma.cc/EE83-ZARK>]; Constance Grady, *Some Say the Me Too Movement Has Gone Too Far. The Harvey Weinstein Verdict Proves That's False*, VOX (Feb. 24, 2020, 5:07 PM), <https://www.vox.com/culture/2020/2/24/21150966/harvey-weinstein-rape-conviction-sexual-predatory-assault-me-too-too-far> [<https://perma.cc/4SWK-223B>].

160. See #MeToo's Monster, *supra* note 7.

161. Lisa Respers France & Chloe Melas, *Time's Up and Others React to Harvey Weinstein Sentence*, CNN: CNN ENT. (Mar. 11, 2020, 4:35 PM), <https://www.cnn.com/2020/03/11/entertainment/hollywood-reactions-harvey-weinstein-sentence/index.html> [<https://perma.cc/P9UY-BXV2>] (Quoting Ronan Farrow, who tweeted, "The Weinstein sentence reminds us of the importance of those sources and of leaders at news organizations who refused to kill the story . . .").

162. See Eric Levenson, Lauren del Valle & Sonia Moghe, *Harvey Weinstein Sentenced to 23 Years in Prison After Addressing His Accusers in Court*, CNN, <https://www.cnn.com/2020/03/11/us/harvey-weinstein-sentence/index.html> (Mar. 11, 2020, 4:26 PM) [<https://perma.cc/TY3U-C77B>]. For discussions of incarceration of the elderly, see generally AM. C.L. UNION, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE

ran several features on female stars' and other #MeToo thought leaders' celebratory reactions.<sup>163</sup> Mira Sorvino, a celebrity who had been harassed by Weinstein, tweeted, "23 years. Harvey Weinstein has been sentenced to 23 years in prison for his crimes of rape and sexual assault. I literally cried tears of amazement, gratitude that the justice system has worked on behalf of all of his victims today."<sup>164</sup> Yet, for all the discussion about Weinstein's sentence and insistence that it was the apogee of justice, few stuck around to find out just what such a sentence entails. Weinstein went to prison—most cared not where—and disappeared like the rest of the people who justice requires become nonentities.

Like other chronically ill detainees, the diabetic Weinstein's health quickly deteriorated in prison.<sup>165</sup> He lost seventy-five pounds and became wheelchair-bound and nearly totally blind.<sup>166</sup> His social health hardly fared better: His family abandoned him, and he said he feels like he is in "hell."<sup>167</sup> When Weinstein was hospitalized for an angioplasty after chest pains brought on by the verdict,<sup>168</sup> far from a sense of concern, many insisted he was faking it so he wouldn't have to go to the "notorious" (as in notoriously inhumane) Rikers Island jail where he

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ELDERLY (2012), [http://www.aclu.org/files/assets/elderlyprisonreport\\_20120613\\_1.pdf](http://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf) [<https://perma.cc/2ZBR-XGQX>]; TINA CHIU, VERA INST. OF JUST., IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE (2010), <https://www.vera.org/downloads/publications/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf> [<https://perma.cc/W4KL-WMSE>].

163. See, e.g., J. Kim Murphy, *Hollywood Reacts to Harvey Weinstein Verdict: 'I Hope the Handcuffs Are Tight'*, VARIETY (Feb. 24, 2020, 10:38 AM), <https://variety.com/2020/biz/news/weinstein-guilty-hollywood-reactions-1203513047/> [<https://perma.cc/S2AE-F5TS>]; Amy Kuperinsky, *Celebrities React to the Harvey Weinstein Verdict, Including His Accusers*, NJ.COM (Feb. 24, 2020, 3:03 PM), <https://www.nj.com/entertainment/2020/02/celebrities-react-to-the-harvey-weinstein-verdict-including-his-accusers.html> [<https://perma.cc/6GC9-GNA4>]; Lisa Richwine & Jill Serjeant, *Actresses and Activists React to Harvey Weinstein Verdict*, REUTERS, <https://www.reuters.com/article/us-people-harvey-weinstein-reactions-fac/actresses-and-activists-react-to-harvey-weinstein-verdict-idUSKCN20I227> (Feb. 24, 2020, 11:58 AM) [<https://perma.cc/PRU7-3LGD>].

164. Klaritza Rico, *Mira Sorvino, Rosanna Arquette React to Harvey Weinstein Sentencing: 'Justice is Served'*, CHI. TRIB. (Mar. 11, 2020, 3:11 PM), <https://www.chicagotribune.com/entertainment/ct-ent-celebs-react-harvey-weinstein-sentencing-20200311-z6e52mxe5nfdrlhxbu6ben2kme-story.html> [<https://perma.cc/58AR-6JX2>].

165. Ken Auletta, *Harvey Weinstein's Last Campaign*, NEW YORKER (May 30, 2022), <https://www.newyorker.com/magazine/2022/06/06/harvey-weinsteins-last-campaign> [<https://perma.cc/3AWT-AQXR>]; Rachael Bedard, Joshua Vaughn & Angela Silletti Murolo, *Elderly, Detained, and Justice-Involved: The Most Incarcerated Generation*, 25 CUNY L. REV. 161, 176 (2022) ("Jails and prisons were not designed to house frail and medically vulnerable people; as a result, sick elders who are incarcerated are particularly vulnerable to poor health outcomes.").

166. See Victoria Bekiempis, *Harvey Weinstein Has Lost 4 Teeth in Prison*, VULTURE (Apr. 12, 2021), <https://www.vulture.com/2021/04/harvey-weinstein-now-almost-technically-blind-losing-teeth.html> [<https://perma.cc/5N6D-KZZ6>]; Auletta, *supra* note 165.

167. See Emmeline Saunders, *Rapist Harvey Weinstein's Adult Children Disown Him as He's Left to Face Horrific Actions*, MIRROR (Feb. 26, 2020, 11:03), <https://www.mirror.co.uk/3am/celebrity-news/rapist-harvey-weinsteins-adult-children-21579855> [<https://perma.cc/Q5L3-F2CA>]; Priscilla DeGregory & Lee Brown, *Harvey Weinstein Complained He Was Going Through 'Hell on Earth' Before Sentencing*, N.Y. POST (Mar. 11, 2020, 12:08 PM), <https://nypost.com/2020/03/11/harvey-weinstein-whined-he-was-going-through-hell-on-earth-before-his-sentencing/> [<https://perma.cc/U44F-83Q3>].

168. See Rebecca Rosenberg, Larry Celona & Bruce Golding, *Harvey Weinstein is Now on Rikers Island After Heart Surgery*, PAGE SIX (Mar. 5, 2020, 1:22 PM), <https://pagesix.com/2020/03/05/harvey-weinstein-awaiting-transfer-to-rikers-island-after-heart-surgery-source> [<https://perma.cc/AFG6-8RVJ>].

and the other heinous criminals belong.<sup>169</sup> Indeed, the imprisoned Weinstein's intense suffering was more often a cause for celebration than reflection. Even as COVID-19 ravaged communities and devastated incarcerated populations, voices in the media and social media expressed indifference, satisfaction, and outright joy when Weinstein contracted the disease.<sup>170</sup>

In June 2022, Weinstein pleaded for the New York judge to order the prison to let him see a dentist for his dental disease because the prison had given him two options: live with rotting teeth or have them pulled.<sup>171</sup> That produced the headline, "Harvey Weinstein asks judge for a private dentist appointment for fake teeth so he can look more 'presentable.'"<sup>172</sup> To date, the post-sentencing Weinstein press coverage has mostly ignored his physical condition in prison, preferring to focus on his temerity to appeal the New York conviction and defend against charges in the Los Angeles trial.<sup>173</sup> When the media has reported on his physical ailments and indignities, it is usually to somewhat gleefully illustrate his "downfall."<sup>174</sup>

As this Article was being written, Weinstein went to trial for sexual offenses in Los Angeles.<sup>175</sup> With #MeToo in the rearview mirror, the media coverage paled in comparison to that of the New York trial. Still, uniting right-wing rags and the liberal press was the eager reporting of testimony on Weinstein's genitals. We learned from a variety of outlets that he has "deformed genitals," a penis that looks like it was "chopped off and sewn back on," that it is "distorted"

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169. Jon Lockett, *Wien Whine: Harvey Weinstein, 67, Shares Photo of Himself in Hospital in Bid to Prove He Isn't Faking Illness to Gain Sympathy*, U.S. SUN (Dec. 15, 2019), <https://www.the-sun.com/news/157199/harvey-weinstein-67-shares-photo-of-himself-in-hospital-in-bid-to-prove-he-isnt-faking-illness-to-gain-sympathy/> [<https://perma.cc/7THF-CSFT>]; Lucy Domachowski, *Harvey Weinstein Accused of Faking Illness to Dodge Notorious Rikers Island Jail*, MIRROR (Feb. 26, 2020, 2:21 PM), <https://www.mirror.co.uk/3am/celebrity-news/harvey-weinstein-accused-faking-illness-21581561> [<https://perma.cc/PT24-W9XF>].

170. Natasha Lennard, *What's Wrong with Cheering Harvey Weinstein's Reported Coronavirus Diagnosis*, INTERCEPT (Mar. 23, 2020, 4:45 PM), <https://theintercept.com/2020/03/23/harvey-weinstein-coronavirus/> [<https://perma.cc/5EPB-CPD8>].

171. Azmi Haroun, *Harvey Weinstein Asks Judge for a Private Dentist Appointment or Fake Teeth So He Can Look More 'Presentable' Before Sex Crimes Trial: 'This Situation Is an Emergency'*, INSIDER (Sept. 14, 2022, 8:33 PM), <https://www.insider.com/harvey-weinstein-asks-judge-fake-teeth-before-sex-crimes-trial-2022-9> [<https://perma.cc/RHM2-ACFS>].

172. *Id.*

173. Helena Andrews-Dyer, *Harvey Weinstein's Rape Conviction and Jail Sentence Upheld in New York*, WASH. POST (June 2, 2022, 2:16 PM), <https://www.washingtonpost.com/arts-entertainment/2022/06/02/harvey-weinstein-conviction-upheld/> [<https://perma.cc/56G2-G2XD>] ("A New York court of appeals upheld former movie producer Harvey Weinstein's rape conviction and 23-year prison sentence Thursday, confirming the landmark decision that represented one of the most significant verdicts of the #MeToo movement.")

174. Jan Ransom, *Harvey Weinstein's Stunning Downfall: 23 Years in Prison*, N.Y. TIMES, <https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html> (June 15, 2021) [<https://perma.cc/Z3QY-C6B5>].

175. James Queally, *Harvey Weinstein Sentenced to 16 Years in Prison for Los Angeles Rape*, L.A. TIMES (Feb. 23, 2023, 7:53 PM), <https://www.latimes.com/california/story/2023-02-23/harvey-weinstein-sentenced-to-xx-in-los-angeles-rape-case> [<https://perma.cc/WBH4-C6L4>]; Livia Albeck-Ripka & Lauren Herstik, *Opening Statements Begin in Harvey Weinstein's Los Angeles Trial*, N.Y. TIMES, <https://www.nytimes.com/2022/10/24/us/harvey-weinstein-trial-los-angeles.html> (Dec. 19, 2022) [<https://perma.cc/XN2B-6GHH>].

and “kind of fish-like.”<sup>176</sup> The prosecutor detailed Weinstein’s disfigured privates in his opening statement, maintaining that Weinstein’s deformities bolstered the testimony of a single victim-witness whom Weinstein denied meeting.<sup>177</sup> But multiple victim-witnesses, including ones with whom Weinstein admitted having “transactional” sexual relations, testified about his abhorrent body. One such described Weinstein as having “lots of bruises, markings, yellow and green, lots of stretch marks on his belly, very not physically fit at all.”<sup>178</sup> The prosecution’s message was clear: no woman would have “transactional” sex with such a subhuman, and *any* sexual encounter with Weinstein, no matter how minor, was serious because of his grotesqueness.<sup>179</sup>

One could imagine a #MeToo that did not glory in dehumanization and defendants’ suffering within our notoriously harsh, amnesty international-criticism-provoking prison system. Even accepting the #MeToo presumptions that convictions satisfy victims, encourage reporting, and change culture, one could still argue that when convictions come with a side of intense inhumanity, many victims are less happy about them, and bad cultural values are produced.<sup>180</sup> Interestingly, actress Ashley Judd, who had spearheaded the crusade against Weinstein, made some gestures toward such a critique even as she celebrated the New York conviction: “I would love for Harvey to have a restorative justice process in which he could come emotionally to terms with his wrongs. The criminal justice system is a distant second to a more humane kind of process.”<sup>181</sup>

But to be clear, *no* #MeToo stakeholder, not even Tarana Burke,<sup>182</sup> criticized the operative life sentence handed to Weinstein, a serious offender to be sure, but also an old, sick person who would soon join America’s uniquely large and appallingly treated geriatric prison population.<sup>183</sup> The praise for Weinstein’s long carceral sentence was generally unconditional. Only the rare carceral critic

176. Marjorie Hernandez, *Harvey Weinstein’s ‘Deformed’ Genitals Could Be a Deciding Factor in His LA Rape Trial*, N.Y. POST (Dec. 6, 2022, 9:03 AM), <https://nypost.com/2022/12/06/harvey-weinsteins-deformed-privates-scrutinized-in-la-rape-trial/> [https://perma.cc/P4CV-9LQX]; Elizabeth Wagmeister, *Harvey Weinstein’s Abnormal Testicles Are Key Focus of Final Arguments in Trial*, VARIETY (Dec. 2, 2022, 4:15 PM), <https://variety.com/2022/film/news/harvey-weinstein-abnormal-testicles-rape-trial-1235448425/> [https://perma.cc/8FWV-BK7Y]; Marjorie Hernandez, *Harvey Weinstein’s Penis Looked Like It ‘Had Been Chopped Off, Sewn Back On’: Accuser*, N.Y. POST (Nov. 7, 2022, 8:33 PM), <https://nypost.com/2022/11/07/harvey-weinsteins-penis-looked-like-it-had-been-chopped-off-sewn-back-on-accuser/> [https://perma.cc/TQC4-6EGA]; see Auletta, *supra* note 165.

177. See Hernandez, *Harvey Weinstein’s ‘Deformed’ Genitals*, *supra* note 176.

178. *Id.*

179. Cf. Jennifer V. Coons & Russ K.E. Espinoza, *An Examination of Aversive Heterosexism in the Courtroom: Effects of Defendants’ Sexual Orientation and Attractiveness, and Juror Gender on Legal Decision Making*, 5 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 36, 40–41 (2018).

180. See *Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice*, ALL. SAFETY JUST. 14 (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [https://perma.cc/RLT3-M8EK] (finding, among other things, that by a margin of three to one, victims prefer accountability through rehabilitation, not prison; by a margin of fifteen to one, victims prefer increased investments in schools rather than prisons; and six in ten prefer shorter sentences).

181. Jodi Kantor et al., *supra* note 4.

182. Burke emphasized the benefit to victims of being able to “look him in the eye and say, “[y]ou did this to me.” His guilt, she said, is “a thing we have.” *Id.*

183. See *supra* notes 164–72 and accompanying text.

dipped a toe in the taboo waters of concern for Weinstein as an infirm, vulnerable, and hated sex-offense prisoner in a notoriously cruel penal system. And even that concern was deliberately unsympathetic. “[T]his isn’t a sympathy case for Harvey Weinstein. Terrible guy,” one writer opined, “[b]ut his dental ordeal—and the pleas he’s made for proper care—are emblematic of an issue much bigger than him.”<sup>184</sup> The writer explained, “[a]t the end of the day, access to medical and dental care are human rights. And when we start asking questions about who deserves teeth and who doesn’t, it can lead us down a dangerous road.”<sup>185</sup>

The lack of an anti-carceral critique may be somewhat surprising considering that #MeToo occurred just as “criminal justice reform” became a popular bipartisan issue. But even before #MeToo, liberals simply carved sex crimes out of the critique of mass incarceration.<sup>186</sup> In the late 2010s, lawmakers championed a slate of “criminal justice reforms” and exempted sex crimes and crimes identified as “violence against women” from them.<sup>187</sup> In fact, they used higher sentences for crimes like domestic violence and sexual assault as bargaining chips for reducing incarceration time for other offenses, many of them serious and violent.<sup>188</sup> Criminal law reforms, from bail to parole, continue to regularly exempt sex offenders, including misdemeanants.<sup>189</sup> New York, for example, exempted sex offenses, including the failure to register one’s residence, from bail reform.<sup>190</sup> The consensus liberal principle that people should not be jailed for poverty apparently did not apply to unhoused registrants arrested for not reporting an address.<sup>191</sup>

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184. Maggie Harrison, *Harvey Weinstein’s Rotting Teeth Reveal a Lot About Prison Healthcare*, NEOSCOPE (Sept. 16, 2022), <https://futurism.com/neoscope/harvey-weinstein-prison-healthcare> [<https://perma.cc/H967-NYRG>].

185. *Id.*

186. See GRUBER, *supra* note 10, at 170–71 (discussing carve out). See generally ALEXANDER, *supra* note 108.

187. See GRUBER, *supra* note 10, at 5–8; *An Overview of the First Step Act*, FED. BUREAU OF PRISONS (2019), <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/QU46-88UC>].

188. *An Overview of the First Step Act*, *supra* note 187; H.B. 628, 2022 Reg. Sess. (La. 2022) (exempting violent sex offenders from parole reform); Don Thompson, *California Advances Broadest US Law Sealing Criminal Records*, AP NEWS (Aug. 18, 2022), <https://apnews.com/article/arrests-california-legislature-gavin-new-som-government-and-politics-a8ced0a719da790859ff26736a1c017c> [<https://perma.cc/N2CD-R48C>] (exempting sex offenders from record-sealing law).

189. See, e.g., Ivan Pereira, *Here Are Some of the Major New Laws that Go into Effect in 2023*, NBC NEWS (Jan. 1, 2023, 4:05 AM), <https://abcnews.go.com/US/major-new-laws-effect-2023/story?id=95089296> [<https://perma.cc/6XS4-6BAM>].

190. Roxanna Asgarian, *The Controversy Over New York’s Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained> [<https://perma.cc/5UUP-F2AX>].

191. N.Y. CRIM. PROC. LAW § 510.10(4)(e) (LexisNexis 2019) (exempting any “misdemeanor defined in article one hundred thirty” [Sex Offenses]). This included misdemeanors like sexual contact, N.Y. PENAL LAW § 130.20(1)–(2), bestiality, and necrophilia, N.Y. PENAL LAW § 130.20(3). Section 130 does not cover moral offenses or failure to register. The bail reform bill left the requirement that judges employ a special risk assessment before releasing people with past sex offenses. H. Rose Schneider, *How NY’s Bail Reform Laws Stack Against Other States*, UTICA OBSERVER-DISPATCH (Dec. 16, 2019, 8:09 AM), <https://www.uticaod.com/story/news/2019/12/15/how-ny-s-bail/2074109007/> [<https://perma.cc/P94Q-K9ZG>]; see *Sex Exceptionalism*, *supra* note 11.

Even after the George Floyd protests of 2020, #MeToo retrospectives continued to celebrate high-profile prosecutorial victories as #MeToo's greatest achievements.<sup>192</sup> One writer recently assessed #MeToo's legacy:

Men accused of wrongdoing have . . . been held accountable under the law: Harvey Weinstein is currently serving a 23-year prison sentence for sexually assaulting two women and faces 10 additional counts of rape and sexual assault in California . . . ; last month, a jury found the singer R. Kelly guilty on nine federal sex trafficking and racketeering charges.<sup>193</sup>

But, she warned, “[b]y other measures, the movement seems to have stalled: In June, Bill Cosby was released from prison after nearly three years behind bars due to [a] Pennsylvania Supreme Court ruling.”<sup>194</sup>

The ruling that stalled #MeToo was the Court's decision to vacate Cosby's convictions because the prosecution violated a nonprosecution agreement the district attorney had used “to induce the waiver of Cosby's fundamental constitutional right.”<sup>195</sup> The Court explained:

Cosby reasonably relied to his detriment upon that decade-old decision when he declined to attempt to avail himself of his privilege against compulsory self-incrimination and when he provided Constand's civil attorneys with inculpatory statements . . . neither our principles of justice, nor society's expectations, nor our sense of fair play and decency, can tolerate anything short of compelling the Montgomery County District Attorney's Office to stand by the decision of its former elected head.<sup>196</sup>

But this nuance was lost among media headlines, like that one that simply declared, “Sexual assault survivors are devastated by Bill Cosby's release.”<sup>197</sup>

### B. #MeToo and Sex Exceptionalism

In #MeToo discourse, fighting men's sexual misbehavior *is* women's empowerment. Sex is so subordinating that a man who intentionally discriminates against and belittles women at work is not nearly as bad as a coworker who engages in sexual banter or asks someone out. A man who intentionally steals from his date is of little public concern, while a man who intimately touches his date mistakenly believing the touch was wanted has committed an egregious felonious act.<sup>198</sup> We rarely hear about the trauma of women physically injured in street

192. See McShane, *supra* note 25.

193. *Id.*

194. *Id.*

195. Commonwealth v. Cosby, 252 A.3d 1092, 1144 (Pa. 2021), *cert. denied sub nom.* Pennsylvania v. Cosby, 142 S. Ct. 1230 (2022).

196. *Cosby*, 252 A.3d at 1144.

197. Anne Branigin & Caroline Kitchener, *Sexual Assault Survivors Are Devastated by Bill Cosby's Release: 'It Makes You Feel Hopeless,'* LILY (June 30, 2021), <https://www.thelily.com/sexual-assault-survivors-are-devastated-by-bill-cosbys-release-it-makes-you-feel-hopeless/> [https://perma.cc/TR5N-X4TT]. The evidence behind the headline consisted of quotes from a Kentucky woman who said that “she reported her rape as a freshman in college [and] was told she didn't have enough evidence for a prosecution,” “a victims' rights lawyer,” and a psychology professor who claimed that “high-profile cases” trigger trauma. *Id.*

198. See *infra* Subsection V.C.1 (discussing affirmative consent); Sally Kohn, *Sexual Harassment Should Be Treated as a Hate Crime*, WASH. POST (Dec. 11, 2017, 6:00 AM), <https://www.washingtonpost.com/news/>

fights, but the plight of women who experience verbal “hassling” is a popular topic.<sup>199</sup> #MeToo discourse is full of stories of the suffering of professional women who experienced workplace sexual harassment (and their vindication when they take the dethroned harasser’s job), but it pays little mind to the suffering of the undocumented housekeeper who works in that professional’s home and is fired for missing a day.

Elevating individual men’s sexual misconduct to the primary and universal site of female subordination suggests that other women-subordinating conditions—economic, status-based, state-inflicted—are far less important.<sup>200</sup> When sex is at issue, everything else is not the problem.<sup>201</sup> Gayle S. Rubin calls this the “fallacy of the misplaced scale,” where “everything pertaining to sex has been a ‘special case’ in our culture.”<sup>202</sup> Indeed, #MeToo discourse is saturated with discussions of whether and how to subject more types of sexual behavior to regulation, discipline, and punishment.<sup>203</sup> But outside of pay equity for famous women in Hollywood, the movement spent little time discussing the myriad of other pressing women’s issues, including childcare and abortion, that keep women—especially poor women of color—vulnerable to sexual and other forms of abuse. Aside from the rights to prosecute or sue sexually misbehaving men, the “new civil rights movement” did not involve all that many rights.<sup>204</sup>

### 1. *The Dominance Feminist Frame*

The concept that sexual misconduct is constitutive of gender subordination is not new. The belief that “sex ruins women” stems from both ancient masculine norms and modern conservative and feminist theorizing.<sup>205</sup> I have explored “sex exceptionalism” in criminal law elsewhere and do not repeat that analysis here.<sup>206</sup> Nevertheless, some background on certain sex-exceptionalist feminist theories can shed light on #MeToo’s emphasis on sex rather than general gender inequality or conditions, like employment insecurity, that enable people like Weinstein to exploit female workers. A specific school of American feminist

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posteverything/wp/2017/12/11/sexual-harassment-should-be-treated-as-a-hate-crime [https://perma.cc/2AH6-Y2FE].

199. See, e.g., *Why Stopping Street Harassment Matters*, STOP STREET HARASSMENT, <https://stopstreetharassment.org/about/what-is-street-harassment/why-stopping-street-harassment-matters/> (last visited July 8, 2023) [https://perma.cc/8K4F-K9MV]; RIGHT TO BE, <https://righttobe.org/> (last visited July 8, 2023) [https://perma.cc/46GH-YV6N?type=image].

200. Clare Hemmings, *Resisting Popular Feminisms: Gender, Sexuality and the Lure of the Modern*, 25 GENDER, PLACE & CULTURE 963, 970, 974 (2018) (calling this “sexual violence feminism” and noting that it can “function[] . . . as a trope through which ongoing inequality is managed or even ensured rather than alleviated”).

201. See *id.* at 971.

202. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality* (1984), reprinted in GENDER, SOCIETY AND SEXUALITY 143, 150–51 (Peter Aggleton & Richard Parker eds., 1998).

203. See, e.g., Sandee LaMotte, *How #MeToo Could Move from Social Campaign to Social Change*, CNN (Nov. 9, 2017, 1:18 PM), <https://www.cnn.com/2017/10/30/health/metoo-legacy/index.html> [https://perma.cc/L8QV-BM9W].

204. See *id.*

205. See generally *Sex Exceptionalism*, *supra* note 11 (tracing the genealogy of this idea).

206. See generally *id.*

legal theory, “dominance feminism,” popularized the idea that men’s sexual behavior is constitutive of gender inequality.<sup>207</sup> To be sure, earlier feminists also prioritized regulating sex, notably the anti-vice Women’s Christian Temperance Union.<sup>208</sup> After the sexual revolution, however, many liberals saw negative attitudes toward sexuality and anti-vice crusades as moralistic and passé.<sup>209</sup> Dominance feminism came on the scene in the 1970s amid protests sparked by high-profile rape-murders, and it upended this tentative liberal rejection of sexual regulation.<sup>210</sup> In the dominance feminist view, commercial sex, including “prostitution” and “pornography,”<sup>211</sup> was something liberals should strongly condemn rather than celebrate.<sup>212</sup>

Formulated in large part by law professor Catharine MacKinnon, the theory posits that American society is a “patriarchy” shaped by male-centric norms that amount to an invisible “affirmative action plan” for men.<sup>213</sup> The notion that ubiquitous “neutral” social norms, traditions, and practices privilege men is as old as American feminism itself.<sup>214</sup> But dominance feminism stood apart by focusing nearly exclusively on sexuality.<sup>215</sup> MacKinnon saw sex as the primary—perhaps the sole—weapon of the patriarchy.<sup>216</sup> Patriarchal sex norms are so strong, she argued, that they lead women to suffer from “false consciousness” and believe that the sex they have is acceptable, equal, and free, when, in fact, it is almost always unequal, denigrating, and subordinating.<sup>217</sup> Thus, the key to eliminating patriarchy is fighting sexual subordination, including much of the sex that women accept and some that they welcome.<sup>218</sup>

Dominance feminism was but one of many feminisms in the late twentieth century, and other feminists—notably the sex radicals of the 1980s—did not share the distaste for unrestrained sexuality.<sup>219</sup> Shaped by race, region, culture,

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207. See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 646–47 (1983) [hereinafter *Feminist Jurisprudence*]; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 5–8 (1987) [hereinafter DISCOURSES]; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 109 (1989) [hereinafter FEMINIST THEORY]; ANDREA DWORKIN, INTERCOURSE 14–17 (1987). See generally Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (thoroughly analyzes the promises and pitfalls of dominance feminism). For critiques of dominance feminism, see generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (sex-positive critique); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (racial critique); Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL’Y 7, 11 (2004) (epistemic critique).

208. See *Sex Exceptionalism*, *supra* note 11.

209. See *id.*

210. *Id.*

211. I prefer to use “sexual imagery” and “sex work” rather than the stigmatizing terms pornography and prostitution, but those were not the terms of the time. Notably, dominance feminist writings still use those words, and activists often use the term “sex slaves.” See *supra* notes 200–07 and accompanying text.

212. See Abrams, *supra* note 207, at 304–05, 317.

213. See DISCOURSES, *supra* note 207, at 36; FEMINIST THEORY, *supra* note 207, at 128.

214. See *Sex Exceptionalism*, *supra* note 11.

215. See *id.*

216. See DISCOURSES, *supra* note 207, at 49.

217. *Feminist Jurisprudence*, *supra* note 207, at 637 n.5.

218. *Id.* at 647.

219. See Vance, *supra* note 122, at 1.

and sexuality, feminist philosophies and movements encompassed a range of ideas about gender, biology, equality, state power, and economic distribution.<sup>220</sup> Sex radicals, many of whom were LGBTQ, argued that sex, erotic imagery, and sex work are not invariably masculinist and subordinating and expressed concerns about how heightened regulation in those areas affects groups with minoritized sexualities (*i.e.*, raids of gay booksellers under dominance feminist-endorsed anti-pornography statutes).<sup>221</sup> Sex-radical feminists argued that the construction of sex as inherently subordinating and dangerous not only invited overregulation but also restricted women's access to sexual pleasure.<sup>222</sup>

Black feminists cautioned that norms of acceptable sexuality have always been raced.<sup>223</sup> In the white majority mindset, Black men's "savage" sexuality made them an utmost threat to white women, justifying lynching in the late eighteenth and early twentieth centuries, while Black women's "savage" sexuality made them unrapeable.<sup>224</sup> In fact, white women's natural *aversion* to sex formed part of the discourse of white female superiority.<sup>225</sup> These racialized constructions of sexuality do not live in the Jim Crow past. They persist today and create the intractable problem that Black men are disproportionately represented in the convicted sex offender pool and receive, on average, higher sentences than white men, while at the same time, state actors and others disregard the sexual abuses of Black women or treat them as less serious than offenses against white women.<sup>226</sup>

Despite the heterogeneity of feminist theorizing on sexuality, dominance feminist ideas about sexual harm came to the fore.<sup>227</sup> This makes sense considering that they overlapped with older views of women's relationship to sexuality. When dominance feminism emerged, the idea that sex is a matter of utmost gravity and precarity for women had been around for thousands of years.<sup>228</sup> Perhaps

220. GRUBER, *supra* note 10, at 6. *See generally* Abrams, *supra* note 207.

221. *See generally* Vance, *supra* note 122 (articulating sex radical position); Abrams, *supra* note 207, at 310 (describing sex radicals).

222. Abrams, *supra* note 207, at 311; *see also* Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 611–12 (1987) (describing the debate over dominance feminists' anti-pornography ordinance).

223. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 85–108 (2d ed. 1997) (discussing race in rape law enforcement); GRUBER, *supra* note 10, at 37–38 (discussing rape enforcement in post-bellum South); Hazel V. Carby, "On the Threshold of Woman's Era": *Lynching, Empire, and Sexuality in Black Feminist Theory*, 12 CRITICAL INQUIRY 262, 270 (1985) (discussing role of Black sexuality in rape enforcement and lynching); Harris, *supra* note 207, at 600 (discussing rape enforcement as tool of racial oppression); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L. J. 103, 118–21 (1983) (discussing racial disparities in rape penalties). *See generally* MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH-CENTURY SOUTH* (1997) (discussing rape and other criminal cases involving white women and Black men).

224. *See* D'EMILIO & FREEDMAN, *supra* note 223, at 86, 101; HARRIET JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 45 (1861); Dorothy Roberts, *The Paradox of Silence and Display: Sexual Violation of Enslaved Women and Contemporary Contradictions in Black Female Sexuality*, in *BEYOND SLAVERY: OVERCOMING ITS RELIGIOUS AND SEXUAL LEGACIES* 41, 41–60 (Bernadette Broton & Jacqueline Hazelton eds., 2010).

225. *See* BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 70 (1984).

226. *See* GRUBER, *supra* note 10, at 19; *supra* note 156 and accompanying text.

227. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 86–87 (1995).

228. *See generally* *Sex Exceptionalism*, *supra* note 11.

it is more than just a “strange bedfellows” coincidence that dominance feminists and family-values moralists converged on anti-prostitution and anti-pornography measures.<sup>229</sup> Wendy Brown observes that MacKinnon’s focus on sex pushed to the side:

the privatization and pervasive feminization of reproductive work; a gendered division of labor predicated on the exchange between household labor and socialized production; gendered religious, political, and civic codes; and other sharply gendered spheres of activity and social norms—in short, all elements of the construction of gender that are institutionalized, hence enforced, elsewhere than through the organization of desire.<sup>230</sup>

Duncan Kennedy calls dominance feminism’s account of patriarchy “paranoid structuralism” because in it, the patriarchy, whether by false consciousness, legal rules, or social arrangements, always wins.<sup>231</sup> Perhaps the fact that the most powerful feminists of the time adopted sex regulation as their agenda, including an outsized focus on the commercial sex that many female workers saw as necessary for economic survival, makes the idea of an insidiously self-perpetuating patriarchy not so paranoid.<sup>232</sup>

### C. Sex Wars as Proxy Wars

Within #MeToo discourse, sex is the lens through which to view gender inequality. In the movement’s heyday, the press was open that fighting individual male sexual misconduct was the key to achieving all kinds of victories for women, from increasing diversity in corporate management to securing women CEOs and equalizing the power of managers and workers.<sup>233</sup> When #MeToo debuted, however, there was a long-established scholarly critique that employers, when directed to police sexual harassment, concentrate on the “sexual” more than on the “harassment.”<sup>234</sup> They focus on sexual conduct that is questionably harassing while ignoring harassing conduct that is not sexual.<sup>235</sup> For this reason, it is easy to imagine a no-sexual-conduct-at-work rule but difficult to envision a

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229. See Wendy Kaminer, *Feminists Against the First Amendment*, ATLANTIC (Nov. 1, 1992), <https://www.theatlantic.com/magazine/archive/1992/11/feminists-against-the-first-amendment/305051/> [https://perma.cc/YDZ9-Q24T]; cf. Brest & Vandenberg, *supra* note 222, at 633 (noting that right-wing groups mostly stayed out of the fight to enact the Minneapolis anti-pornography ordinance because of the presence of feminists).

230. BROWN, *supra* note 227, at 86.

231. Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1338 (1992).

232. See Amy Zimmerman, *Ashley Judd’s Anti-Prostitution Crusade Angers Sex Workers: ‘You Are Harming People.’* DAILY BEAST (Nov. 28, 2018, 4:00 AM), <https://www.thedailybeast.com/sex-workers-blast-ashley-judds-anti-prostitution-crusade-you-are-harming-people> [https://perma.cc/8GTL-WMJU].

233. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [https://perma.cc/8E5N-KEDZ].

234. See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063 (2003); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685 (1998); Dana Neacsu, *Tempest in A Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601, 645 (2002).

235. See Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195, 198 (1995).

rule that regulates nonsexual sexist behaviors like mansplaining, lack of inclusion, promoting “good guys,” dismissive attitudes, and the like.<sup>236</sup> The former rule is simple; it controls sex, which is easily identifiable and already stigmatized. The latter rule seeks to control diffuse discriminatory structures and behaviors that are not stigmatized, have deep roots, and seem intractable. As a result, the social injunction against sexual misconduct can lead to hyper-regulation of sexuality, which may burden LGBTQ individuals and others with nonconforming sexuality, while it minimizes pervasive nonsexual discrimination.<sup>237</sup> Today, there are reports that #MeToo has rendered workplace sexuality taboo, while highly sexist but nonsexual behaviors and microaggressions run rampant.<sup>238</sup>

Take the case of Chris Matthews. By 2020, the bombastic Hardball anchor’s old-school-gadfly ways had not aged well, and he had already made a series of on-air gaffes, including being dismissive toward Elizabeth Warren, comparing a Bernie Sanders victory to Nazis taking over France, and confusing Black Democratic candidate Jamie Harrison with Black Republican senator Tim Scott.<sup>239</sup> He had also come under fire for sexist remarks, like calling Hillary Clinton a “she-devil.”<sup>240</sup> One insider noted, “[e]ach time he went on air, he was at risk for saying something that was not okay.”<sup>241</sup> Despite this, Hardball’s less-than-stellar ratings, and the fact that Matthews had become a late-night TV joke, NBC was prepared to let him stay through the 2020 election.<sup>242</sup>

But then there was a “coup de grace” that prompted the network to act. A female journalist wrote an opinion piece that detailed Matthews’s history of offensive racist and sexist remarks and her personal experience of receiving unwanted sexual attention from him in the form of “compliments,” including, “Why haven’t I fallen in love with you yet?” and “Keep putting makeup on her, I’ll fall in love with her.”<sup>243</sup> The mainstream press, still enamored of #MeToo’s zero-tolerance directive, amplified the part of the article describing Matthews’s

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236. See Johnson et al., *supra* note 66 (suggesting that while blatant sexual harassment in the workplace has declined since #MeToo, general hostility toward women has increased).

237. See Colker, *supra* note 235, at 198. See generally Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet Halley eds., 2002).

238. Johnson et al., *supra* note 66; see also Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 LAW & SOC. INQUIRY 1, 10–11 (2012) (“[C]ontrary to the equalizing aims of sexual harassment law, policy training sessions often polarize men and women and reify rather than break down traditional gender stereotypes.”).

239. Sarah Ellison & Paul Farhi, *The End of the Chris Matthews Era: How the Bombastic Host Got Forced Out at MSNBC*, WASH. POST (Mar. 3, 2020), [https://img3.washingtonpost.com/lifestyle/media/the-end-of-the-chris-matthews-era-how-the-bombastic-host-got-forced-out-at-msnbc/2020/03/03/57766b7e-5d68-11ea-9055-5fa12981bbbf\\_story.html](https://img3.washingtonpost.com/lifestyle/media/the-end-of-the-chris-matthews-era-how-the-bombastic-host-got-forced-out-at-msnbc/2020/03/03/57766b7e-5d68-11ea-9055-5fa12981bbbf_story.html) [https://perma.cc/NPV9-YY9A].

240. Niki Jagpal, *Chris Matthews Teased Segment by Asking Whether Clinton Is a “She Devil,”* MEDIA MATTERS (Nov. 19, 2007, 4:07 PM), <https://www.mediamatters.org/nbc/chris-matthews-teased-segment-asking-whether-clinton-she-devile> [https://perma.cc/WR4Q-WSNG].

241. Ellison & Farhi, *supra* note 239.

242. *Id.*

243. Laura Bassett, *Like Warren, I Had My Own Sexist Run-In with Chris Matthews*, GQ (Feb. 28, 2020), <https://www.gq.com/story/chris-matthews-experience> [https://perma.cc/2H79-ZT7B].

“love” comments to the journalist.<sup>244</sup> This prompted the network brass, still smarting from the Matt Lauer sexual harassment revelations, to tell Matthews to step down.<sup>245</sup> And it was for these comments alone, and not his many past sexist, racist, and inappropriate remarks, that Matthews apologized.<sup>246</sup> Signing off permanently, he stated, “[c]ompliments on a woman’s appearance that some men, including me, might have once incorrectly thought were OK, were never OK. Not then and certainly not today. And for making such comments in the past, I’m sorry.”<sup>247</sup>

Still, only the rare commentator voiced concern that #MeToo could spur a sex panic or cultivate unhealthy sexual beliefs, especially among young people prone to social-media influence.<sup>248</sup> This is not particularly surprising given that venturing into the dangerous waters of questioning the intense vitriol toward Weinstein or the public’s desire for swift takedowns was liable to get one branded a rape-culture-producing apologist. #MeToo proponents established early on that people like writer Daphne Merkin, who had questioned some of the highly punitive online responses to relatively minor sexual misconduct, sit right alongside the Trumpist, boys-will-be-boys contingent as the “backlash.”<sup>249</sup> According to the punditry, this backlash, like the 1980s family-values backlash to feminism identified by Susan Faludi, was a reactionary outcry against the rapid empowerment of women by people who enjoy the spoils of patriarchy.<sup>250</sup>

Back in the 1990s and 2000s, even the most die-hard carceral critics and civil libertarians hesitated to critique the draconian sex-offender system for fear of being branded pervert-enablers. Only last year, Old Dominion University, capitulating to public pressure, placed on leave and banned from campus a sociology-criminology professor who studies child sex offenders.<sup>251</sup> The university did so because of public outcry that the professor had described research subjects as “minor-attracted persons” rather than using the highly stigmatizing—and thus

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244. Christina Cauterucci, *For God’s Sake, New York Times, #MeToo Is Not Going to End Flirting and Fun Sex*, SLATE (Jan. 5, 2018), <https://slate.com/human-interest/2018/01/the-new-york-times-joins-the-chorus-of-voices-arguing-that-metoo-will-end-flirting-and-fun-sex.html> [https://perma.cc/774Q-VU7X].

245. *Id.*

246. David Bauder, *Chris Matthews Retires from MSNBC, Cites Comments to Women*, ASSOCIATED PRESS (Mar. 2, 2020), <https://apnews.com/article/entertainment-us-news-ap-top-news-chris-matthews-bernie-sanders-e4a0d1acc9c808b0b35e9d99a77cda15> [https://perma.cc/B3GH-4LPC].

247. *Id.*

248. And any implication was swiftly repudiated as “backlash.” See *supra* note 89 and accompanying text; Bartosch, *supra* note 34; Cauterucci, *supra* note 244.

249. Daphne Merkin, Opinion, *Publicly, We Say #MeToo. Privately, We Have Misgivings.*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html> [https://perma.cc/7TTP-NTH3]; Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash> [https://perma.cc/TA4H-FU6J]; Cauterucci, *supra* note 244.

250. See generally SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

251. Colleen Flaherty, *Controversial Scholar Resigns*, INSIDE HIGHER ED. (Nov. 29, 2021), <https://www.insidehighered.com/news/2021/11/29/controversial-scholar-pedophilia-resigns-old-dominion> [https://perma.cc/HUT5-PQ69].

apparently appropriate—term “pedophile.”<sup>252</sup> The professor had good reason to reject that term. Their research, which aimed to reduce sexual assault, had shown that such stigmatization increased subjects’ risk of offending.<sup>253</sup> There was always an unwritten rule in criminal law circles that any critique of the sex offender registration system comes with the required coda that the author feels *absolutely no* sympathy for the monstrous offenders, similar to the caveat offered by the critic of Weinstein’s tooth-decay ordeal.<sup>254</sup> But times have changed somewhat, and over the past several years, critics have increasingly been willing to recognize the humanity of disempowered sex-offense registrants.<sup>255</sup>

Not so with #MeToo’s sexual transgressors. In January 2018, Catherine Deneuve and 100 other French women in the public sphere ventured into these dangerous waters with an open letter.<sup>256</sup> Asserting that there is a difference between “rape” and “trying to pick someone up,” they cautioned that not all transgressing men should be shunned.<sup>257</sup> The authors warned that #MeToo discourse was a revival of a familiar “puritanism in the name of a so-called greater good, claiming to promote the liberation and protection of women, only to enslave them to a status of eternal victim and reduce them to defenseless preys of male chauvinist demons.”<sup>258</sup> They added that this serves the interests of “the enemies of sexual freedom, the religious extremists, the reactionaries and those who believe . . . women are a species ‘apart,’ children with adult faces who demand to be protected.”<sup>259</sup> The letter continues: “Incidents that can affect a woman’s body do not necessarily affect her dignity and must not, as difficult as they can be, necessarily make her a perpetual victim. Because we are not reducible to our bodies.”<sup>260</sup> These points, while certainly debatable, appear to reflect feminist concerns over women’s diminished status.

The letter is extremely inartful in tone, and a reader not generously inclined could interpret it as telling women to “get over” some pretty bad behavior like

252. *Id.*; Susan Svrluga, *ODU Professor Placed on Leave Amid Uproar over Research into ‘Minor-Attracted Persons,’* WASH. POST (Nov. 17, 2021, 7:21 PM), <https://www.washingtonpost.com/education/2021/11/17/old-dominion-professor-allyn-walker> [<https://perma.cc/AB3R-KJ6P>]; Brendan Cole, *Who is Allyn Walker? ODU Professor Quits After Pedophilia Remarks Spark Backlash,* NEWSWEEK (Nov. 25, 2021, 12:09 PM), <https://www.newsweek.com/allyn-walker-virginia-old-dominion-university-pedophilia-minor-attracted-1653340> [<https://perma.cc/98D9-MLL5>].

253. See ALLYN WALKER, A LONG, DARK SHADOW: MINOR-ATTRACTED PEOPLE AND THEIR PURSUIT OF DIGNITY 165 (2021).

254. See *supra* notes 182–85 and accompanying text.

255. See, e.g., Sarah Kohan, *Registering a Home When Homeless: A Case for Invalidating Washington’s Sex Offender Registration Statute,* 95 WASH. L. REV. ONLINE 205, 207 (2020).

256. *Nous Défendons une Liberté d’Importuner, Indispensable à la Liberté Sexuelle,* LE MONDE (Jan. 13, 2018, 3:11 PM), [https://www.lemonde.fr/idees/article/2018/01/09/nous-defendons-une-liberte-d-importuner-indispensable-a-la-liberte-sexuelle\\_5239134\\_3232.html](https://www.lemonde.fr/idees/article/2018/01/09/nous-defendons-une-liberte-d-importuner-indispensable-a-la-liberte-sexuelle_5239134_3232.html) [<https://perma.cc/68XL-223M>].

257. *Id.*; see also Valeriya Sazonova, *Catherine Deneuve and Others Denounce the #MeToo Movement,* N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/movies/catherine-deneuve-and-others-denounce-the-metoo-movement.html> [<https://perma.cc/93B6-8YHX>].

258. *Full Translation of French Anti-#MeToo Manifesto Signed by Catherine Deneuve,* WORLD CRUNCH (Jan. 10, 2018), <https://worldcrunch.com/opinion-analysis/full-translation-of-french-anti-metoo-manifesto-signed-by-catherine-deneuve> [<https://perma.cc/E4MQ-4UQY>].

259. *Id.*

260. *Id.*

subway grinding.<sup>261</sup> (Deneuve later clarified that it meant to differentiate between types of sexual transgressions, not call them all nonserious).<sup>262</sup> One could also critique the contention that deplatforming the creative works of a few harassing famous men somehow devastates art. Yet the swift reaction from French “radical” feminists was not so much a critique as a full-frontal attack. In their own open letter, they called Deneuve and her cohort “apologists for rape” and “defenders of pedophiles.”<sup>263</sup> That vitriolic criticism could also be directed at male #MeToo critics, but other responses to Deneuve and company had a distinctly sexist and ageist tone.

The French feminists compared Deneuve and other signatories to a tiresome “uncle who does not understand what is happening.”<sup>264</sup> Actress Asia Argento, a high-profile Weinstein accuser who was later publicly accused of sexual assault herself, declared that “interiorized misogyny ha[d] lobotomized them to the point of no return.”<sup>265</sup> One critic of the letter said the silent part out loud: the signatories were “too old and decrepit to understand women’s issues today.”<sup>266</sup> Critics of Deneuve and company painted a picture of a bunch of dusty, dimwitted, useless old ladies who had long since aged out of the sexual world—an image strikingly similar to ones held by the male employers who decline to hire middle-aged and older women. Indeed, the backlash seemed to prove a main point of the letter: #MeToo served to “intimidate people into speaking ‘correctly,’ shut down those who don’t fall into line, and [characterize] those women who refused to bend . . . as complicit and traitors.”<sup>267</sup> Nevertheless, Deneuve ended up apologizing.<sup>268</sup>

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261. *See id.*

262. Catherine Deneuve, *#MeToo Controversy: Read Catherine Deneuve’s Letter Published in “Liberation,”* LIBÉRATION (Jan. 15, 2018), [https://www.liberation.fr/debats/2018/01/15/metoo-controversy-read-catherine-deneuve-s-letter-published-in-liberation\\_1622561/](https://www.liberation.fr/debats/2018/01/15/metoo-controversy-read-catherine-deneuve-s-letter-published-in-liberation_1622561/) [https://perma.cc/KHV5-B4L8].

263. *See* Nick Miller, *French Feminists Debate the ‘Hand on the Bum’ in the Wake of #MeToo*, SYDNEY MORNING HERALD (Jan. 11, 2018), <https://www.smh.com.au/world/europe/french-feminists-debate-the-hand-on-the-bum-in-the-wake-of-metoo-20180111-p4yydz.html> [https://perma.cc/HT4U-FCZR]; Aurelien Breeden & Elian Peltier, *Response to French Letter Denouncing #MeToo Shows a Sharp Divide*, N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/world/europe/france-sexual-harassment.html> [https://perma.cc/U9EQ-PWQM].

264. Miller, *supra* note 263.

265. *Women Strike Back at Catherine Deneuve for Slamming #MeToo Movement*, FR. 24 (Oct. 1, 2018, 9:37 PM), <https://www.france24.com/en/20180110-women-strike-back-catherine-deneuve-slamming-metoo-movement> [https://perma.cc/P3FY-UF95] (quoting a Tweet by Argento that has since been deleted). In 2018, an actor accused Argento of sexual assault and filed a civil suit against her. The matter was settled out of court. Michael Nordine, *Asia Argento Settled a Sexual Assault Case Filed Against Her by an Underage Actor*, INDIEWIRE (Aug. 19, 2018, 10:13 PM), <https://www.indiewire.com/2018/08/asia-argento-sexual-assault-settlement-jimmy-bennett-1201996225/> [https://perma.cc/8WRH-NT2U]; Kim Severson, *Asia Argento, a #MeToo Leader, Made a Deal with Her Own Accuser*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/asia-argento-assault-jimmy-bennett.html> [https://perma.cc/5T2K-ACR3].

266. Agnès Poirier, *After the #MeToo Backlash, an Insider’s Guide to French Feminism*, GUARDIAN (Jan. 13, 2018, 7:03 PM), <https://www.theguardian.com/world/2018/jan/14/french-feminists-catherine-deneuve-metoo-letter-sexual-harassment> [https://perma.cc/EWH8-ESDW].

267. *See* *Nous Défendons une Liberté d’Importuner, Indispensable à la Liberté Sexuelle*, *supra* note 256.

268. Amy Held, *Catherine Deneuve Apologizes to Sex Assault Victims After Controversial Letter*, NPR (Jan. 15, 2018, 4:26 PM), <https://www.npr.org/sections/thetwo-way/2018/01/15/578154065/catherine-deneuve-apologizes-to-sex-assault-victims-after-controversial-letter> [https://perma.cc/EG3X-TWNW].

The Deneuve drama also illustrates the extent of #MeToo's incorporation of dominance feminist frames. Asia Argento's quip about "internalized misogyny" mirrored dominance feminism's false consciousness theory, although perhaps MacKinnon would not go so far as to call dominance feminism's critics "lobotomized."<sup>269</sup> Deneuve and her cohort lamented, "we don't recognize ourselves in this feminism," and this was apparently just fine with contemporary feminists.<sup>270</sup> #MeToo discourse made clear that "feminism" no longer reserved a place for those who advocate restraint regarding the regulation of minor sexual misconduct or deny that sexual incidents invariably leave women devastated and traumatized. #MeToo's champions saw sexual liberty as being in inalterable conflict with women's empowerment and held that when push comes to shove, concerns for sexual freedom must always yield to concerns for women. "Feminism is not about protecting sexual liberation," declared the creator of France's #Me-too hashtag #BalanceTonPorc,<sup>271</sup> "but about protecting women."<sup>272</sup>

To sum up, the Milano #MeToo produced a powerful indicator and sentimental narrative that successfully moved public attitude and created law and policy changes. The #MeToo indicator confirmed that sexual abuse—a devastating, criminal, and discriminatory act that requires penal intervention—is widespread. The indicator vindicated an existing narrative that the exclusive cause of "sexual assault and harassment" is individual bad men who intentionally harm women, and women, regardless of their socioeconomic circumstance, are invariably vulnerable to and utterly devastated by these men's acts *because they are women*. The solution is thus simple: more and stronger civil and criminal laws directed at the individual offenders. #MeToo also reflected existing ideas about the criminal legal system generally: criminal laws solve identified problems, criminal laws are a symbolic victory, and criminal punishment serves victims. And the movement reflected dominant frames about sex-crime laws specifically: sex crimes are uniquely bad; we need more sex regulation and stronger enforcement; and sex offenders must be severely punished, even tortured, and forever banished.

One could imagine a totally different Me Too movement with calls-to-action against the widespread exploitation—sexual and nonsexual—of marginalized female workers and for material support to the women most vulnerable to violence, including state violence. One could imagine an alternative Me Too focused on women's needs rather than men's punishment and that viewed incarceration with a healthy dose of skepticism. One could imagine a Me Too movement that was bottom-up rather than top-down and led with the experiences of

269. *See id.*

270. *Nous Défendons une Liberté d'Importuner, Indispensable à la Liberté Sexuelle*, *supra* note 256.

271. "Balance ton porc" roughly translates to "squeal on your pig," a clever phrase to be sure. But notice the shift in message from the original #MeToo. #MeToo was ostensibly about women and their experiences; it was mostly an indicator enterprise. #BalanceTonPorc, by contrast, appears on its face to be a directive about men, specifically to call them out. *See* Frank Andrews, Yelena Peigne & Judith Vonberg, *Catherine Deneuve Denounces #MeToo in Open Letter*, CNN (Jan. 11, 2018, 8:33 AM), <https://www.cnn.com/2018/01/10/europe/catherine-deneuve-france-letter-metoo-intl/index.html> [<https://perma.cc/JQ34-6TB9>].

272. *See id.*

the least powerful. One does not have to imagine it. Within hours of Milano's tweet going viral, Burke's me too movement became known. It is a testament to the power of the initial Milano version that, despite Burke's quick entry on the scene, Me Too remained individualist, carceral, and focused on the privileged.

#### IV. BURKE'S ME TOO

In 2006, Tarana Burke quietly started the “me too movement” as part of her social service program Just Be, Inc., which “focused on the health, well being [sic] and wholeness of young women of color.”<sup>273</sup> As a youth counselor, Burke observed that many young women of color could not access programs like rape crisis centers.<sup>274</sup> Remarking that the “me too” mantra “started in the deepest, darkest place in my soul,”<sup>275</sup> Burke recounts an emotional conversation with a girl at a youth camp:

For the next several minutes this child, Heaven, struggled to tell me about her “stepdaddy” or rather her mother’s boyfriend who was doing all sorts of monstrous things to her developing body . . . I listened until I literally could not take it anymore . . . Then, right in the middle of her sharing her pain with me, I cut her off and immediately directed her to another female counselor who could “help her better.” . . .

I could not find the strength to say out loud the words that were ringing in my head over and over again as she tried to tell me what she had endured . . . I watched her put her mask back on and go back into the world like she was all alone and I couldn’t even bring myself to whisper . . . me too.<sup>276</sup>

##### A. *An Intersectional and Noncarceral Movement*

In her 2021 memoir, Burke recalls in moving detail her painful and personal journey to becoming an advocate for Black girls subjected to sexual abuse and exploitation.<sup>277</sup> If the #MeToo indicator was an evacuation of nuance, Burke's memoir is steeped in it. She reflects, for example, on the backlash to her call to hold singer R. Kelly responsible for his decades of abuse:

Black people are always carrying a sense of responsibility for uplifting the good name of our people because we are so used to others reducing our humanity and worth. While we absolutely have to name and work to eradicate the violence that Black people, particularly women and femme-presenting folks, experience at the hands of white men—specifically law enforcement both in and out of incarceration—we also have to name and work toward solutions that will interrupt the violence we experience at the

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273. *Purpose*, JUST BE, INC. (2013), <https://justbeinc.wixsite.com/justbeinc/purpose-mission-and-vision> [<https://perma.cc/PTX9-PFSE>].

274. See Tarana Burke, *the Activist Behind ‘Me Too’*, URBAN NEWS (Nov. 9, 2017), <https://theurbannews.com/lifestyles/2017/tarana-burke-the-activist-behind-me-too/> [<https://perma.cc/9KF4-Y35F>].

275. Tarana Burke, *The Inception*, JUST BE, INC. (2013), <https://justbeinc.wixsite.com/justbeinc/the-me-too-movement-cmml> [<https://perma.cc/KVE5-VCGW>].

276. *Id.*

277. UNBOUND, *supra* note 19, at 12.

hands of our partners, pastors, uncles, cousins, classmates, teachers, coaches, and others. Black men don't have to be excoriated in that process, but they do have to be prepared to listen, understand, and in some instances embrace accountability for the harm they have caused or make space for Black women and femmes.<sup>278</sup>

Burke advocates holding Black men accountable for sexual harm but recognizes the complexity, difficulty, and even practical vagueness of this call.<sup>279</sup> Her philosophy of accountability is in direct opposition to the #MeToo hashtag movement's message that the excoriation of men *is the point*. Such zero-tolerance stands in stark contrast to Burke's call for accountability with love and insight that "[u]nkindness is a serial killer."<sup>280</sup>

Burke's take on criminal law is measured and astute, as one might expect from someone with a depth of theoretical knowledge and lived experience. Her views depart from absolutist positions on criminal law's status as a friend or foe to victims. Many #MeToo leaders exhibited an abiding faith that the prosecution and incarceration of offenders is good for victims.<sup>281</sup> In direct opposition, some abolitionists and restorative-justice proponents argue that the criminal system *harms* victims, particularly victims who already experience social and economic marginality.<sup>282</sup> These critics further note that when victims, especially female victims, voice such concerns, they are silenced and even mistreated by prosecutors and other "pro-victim" contingents.<sup>283</sup> Examining prosecutorial practice and victims' rights, Markus Dubber characterizes the victim as the prosecutor's pawn:

Most prosecutors spend most, if not all, of their time processing more or less unconditional surrenders. Like a chess master, they play several games against a group of vastly inferior opponents [defendants] . . . [T]hose opponents who dare to interfere with the quick disposal of their [cases] . . . must be stamped out and put in their place. Rather than admit that the authority of the prosecutor, and therefore the state, is at stake, it is far more convenient to invoke the rights of the victim, who all too often is all too willing to play the part of the discombobulated heap of helplessness in need of state protection from the forces of evil.<sup>284</sup>

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278. *Id.* at 247.

279. *Id.* at 247–48.

280. *Id.* at 15.

281. *See supra* notes 164–71 and accompanying text.

282. *See, e.g.,* MARIAME KABA, *WE DO THIS 'TIL WE FREE US* 49–52 (2021); ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, *ABOLITION. FEMINISM. NOW.* 2 (2022); *Introduction to Restorative Justice Diversion*, IMPACT JUST. (Feb. 18, 2021), <https://impactjustice.org/introduction-to-restorative-justice-diversion> [<https://perma.cc/E7X3-SUJM>] (introducing Sia Henry & Erica Washington). *See generally* Yale Law School, *Reb Law Friday Keynote: Sujatha Baliga on Me Too, Forgiveness and Restorative Justice*, PANOPTO (2018), <https://yalelaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=3ccf6dfd-c5f9-4b60-99ce-a88801263cfd> [<https://perma.cc/5STE-4XE6>].

283. *See, e.g.,* GRUBER, *supra* note 10, at 173; LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 5 (Claire. M. Renzetti ed., 2018).

284. DUBBER, *supra* note 126, at 202.

Critics of mass incarceration rightly point out the inaccuracy of prosecutors' and politicians' essentialist portrait of victims as inherently punitive.<sup>285</sup> But the fact is that some victims want nothing more than to see the person who harmed them rot in prison.<sup>286</sup> Thus, justifying an anti-carceral or abolitionist stance on the ground that it is what victims want is tricky because many victims, especially those who self-identify as and fit society's idea of "crime victim," say they want incarceration.<sup>287</sup> To bridge this gap, critics must either be willing to say that vengeful victims can simply be excised from "the victim's voice," or articulate a theory of whether victims' notions of justice should control criminal processes and how, if at all, the criminal legal system should incorporate the victim's "voice."<sup>288</sup> To be sure, the latter runs up against contemporary victims' rights discourse's insistence on victims' epistemic superiority: "that the victim knows better than anyone else about the victimization, and indeed, the victim cannot be wrong about it."<sup>289</sup>

Burke recognizes this tension between victim-centric and decarceral ideologies.<sup>290</sup> She navigates it by philosophically opposing the mass-incarceration system and educating victims about noncriminal avenues, but ultimately meeting victims where they are.<sup>291</sup> Asked by an interviewer about the "tools" of the carceral state, Burke ruminates:

I think there's no eloquent answer for this, and I have not heard, even amongst my peers and colleagues, the answer that makes me feel like that's it. The way that I think about this, and I've spent a lot of time thinking about it, because I consider myself very much an abolitionist in a lot of ways around other issues. But because I am entrenched in this issue, and I deal with survivors across many different demographics, you know, all stripes, everybody's not in the same place. So I'm not going to try to impose my views and values on a survivor who is trying to just find a nugget. And if that nugget is, "I'm going to get this rape kit done, I'm going to prosecute, I'm going to whatever," I can educate about alternatives and other things, but it is not my position to tell you that this is what justice should look like for you.<sup>292</sup>

Burke is, however, clear that criminal law should not be the sole arbiter of whether a person is worthy of empathy, consideration, and assistance.<sup>293</sup> She

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285. See, e.g., *id.*; Harris, *supra* note 207, at 600.

286. See *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*, *supra* note 180.

287. See *supra* notes 180–82 and accompanying text (discussing constructed nature of crime victims' wishes).

288. See, e.g., Bandes, *supra* note 70, at 1253–59 (making a case against admission of victim impact statements).

289. Minow, *supra* note 136, at 1434.

290. See Samhita Mukhopadhyay, *On #MeToo Anniversary, Tarana Burke Talks About the Modern Movement's Impact, Restorative Justice, and Aziz Ansari*, TEEN VOGUE (Oct. 15, 2019), <https://www.teenvogue.com/story/metoo-anniversary-tarana-burke> [https://perma.cc/VB4G-MUE7].

291. See *id.*

292. *Id.*

293. See *id.*

queries, “[s]o many ways that people experience sexual violence don’t rise to the level of crime. And so then what? You’re just out of options?”<sup>294</sup> In the end, Burke’s philosophy is simple: as a longtime victim advocate, Burke is “laser focused” on achieving the wellbeing of those who have survived sexual violence, in whatever form that may take.<sup>295</sup>

This is the “Me Too” movement that existed for over a decade when Milano sent her tweet. If Burke’s Me Too sentiments of the aughts seem quite different from the mainstream feminist discourse on sexual assault at that time, it is because they were. Mainstream feminist approaches to sexual harm tended to reflect victims’-rights views of crime and dominance-feminist views of sex—views that drew criticism from queer theorists, sex radicals, Black feminists, and civil libertarians.<sup>296</sup> Burke herself articulates a racial critique of the idea that the “answer” to sexual violence is ever harsher penal policy:

There is no escaping America’s painful history of weaponizing sexual violence as a tool against Black men. The Black community is all too familiar with the fact that we are socialized to respond to the vulnerability of white women in this country. Black folks had seen too many instances of white women’s tears marking the end of Black men’s lives in one way or another.<sup>297</sup>

Milano’s #MeToo, which centered on white nonpoor women, was sex exceptionalist, focused on individuals rather than structures, and prescribed carceral punishment, which fit well within the mainstream feminist view of sexual harm.<sup>298</sup> Burke’s “Me Too” did not.

After women of color revealed Burke as the founder of Me Too, Milano, the press, and other celebrities quickly brought Burke into the fold, scrupulously crediting her for the phrase and acknowledging that women of color also say “me too.”<sup>299</sup> #MeToo’s power players created space for women of color within the movement, but it was within *Milano’s* movement.<sup>300</sup> Burke recognized right away how power and whiteness, not experience and effort, transported #MeToo into an international phenomenon. She remarked, “[i]n this instance, the celebrities who popularized the hashtag didn’t take a moment to see if there was work

294. *Id.*

295. See McShane, *supra* note 25.

296. See, e.g., GRUBER, *supra* note 10, at 49 (tracing these critiques of mainstream feminist discourse).

297. See UNBOUND, *supra* note 19, at 246.

298. See *supra* Part II.

299. See Paulina Cachero, *19 Million #MeToo Tweets Later: Alyssa Milano and Tarana Burke Reflect on the Year After #MeToo*, YAHOO! (Oct. 15, 2018) <https://www.yahoo.com/now/19-million-metoo-tweets-later-195400791.html> [<https://perma.cc/8Z69-3GTX>]; Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/RB33-B6PP>].

300. Errin Haines, *Tarana Burke Doesn’t Define #MeToo’s Success by Society’s Failure*, 19TH (Oct. 14, 2022, 10:24 AM), <https://19thnews.org/2022/10/tarana-burke-me-too-movement-success-future/> [<https://perma.cc/P33S-DLW2>] (“Burke said that while she is far less often overlooked as the founder of #MeToo than when the hashtag went viral five years ago, it’s still difficult to get people to talk directly about the intersection of race and sexual violence.”).

already being done [and] sisters still managed to get diminished or erased.”<sup>301</sup> Burke also observed that the movement expended enormous effort discussing white, rich, and famous victims and spared little time for the women most vulnerable to sexual abuse and least able to obtain relief. She lamented that there was a lack of attention to Black victims, as well as “Asian, Latinx, Indigenous, queer, or trans folks,” even though the “stakes were higher for them.”<sup>302</sup>

Nevertheless, perhaps the first step in moving #MeToo from a punishment-centric, mostly white movement to a survivor-centric, intersectional one was greater diversity and inclusion within the movement itself. It is logically intuitive that #MeToo’s inclusion of a diverse set of people would lead to its incorporation of a diverse set of ideas about sexual harm, survival, and punishment. As intuitive as it may be, the logic did not hold. Now, the very fact that Burke’s me too existed and became part of the national conversation made Milano’s #MeToo better than it would have been. But the celebrity and media entities who welcomed Burke’s infusion of diversity did so in the manner that privileged women always had: by saying “and Black women too.” This Black-women-too ethos required no alteration in how #MeToo characterized the women at the center of concern, the causes and effects of sexual misconduct, and the state’s role in managing it.<sup>303</sup>

Feminists of color have long criticized mainstream feminists’ assertion that minority women experience gender subordination as white women do but *also* experience racism. Kimberlé Crenshaw urged feminists to adopt an “intersectional” approach and recognize the interactive relationship of race, gender, class, and other statuses in producing women’s experiences and understanding.<sup>304</sup> She and other feminists of color rejected mainstream feminism’s 1+1=2 account where Black women are Black + woman, with the woman side identical to a white woman.<sup>305</sup> When MacKinnon was seen as espousing such an account at a 1991 Yale Law School conference, the Yale Collective on Women of Color and the Law penned an open letter stating:

Women’s experiences which are not shared with white women have been the most difficult to admit into feminist discourse, usually because white feminists classify them as race-based rather than gender-based. We disagree with your notion of an empirical reality which would pervade all experiences “as a woman” in Third World and in white cultures.<sup>306</sup>

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301. *A Black Woman Created the “Me Too” Campaign Against Sexual Assault 10 Years Ago*, *supra* note 23.

302. UNBOUND, *supra* note 19, at 243.

303. Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105, 111 (2018) (“[T]he movement has merited criticism not only for initially ignoring the contributions of women of color to the creation of the movement, but even more, for ignoring the unique forms of harassment and the heightened vulnerability that women of color frequently face in the workplace.”).

304. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL F. 139, 140 (1989).

305. See *id.* at 154; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–43 (1991); see also Harris, *supra* note 207, at 587.

306. Cathy Powell, *Open Letters to Catharine MacKinnon*, 4 YALE J.L. & FEMINISM 177, 179 (1991). See generally Onwuachi-Willig, *supra* note 303.

That Black Twitter's class and race critique would end in #MeToo's leaders making a Black-women-too concession rather than radically rethinking the movement's carceral and neoliberal paradigm was predictable, given #MeToo's original model. According to its leaders and the press, #MeToo's plan was to harness the power of celebrity and wealth to become a national movement, and once established, it could then help women who shared few commonalities with celebrities.<sup>307</sup> This "trickle-down" theory of empowerment, as V. Jo Hsu labels it, permeated #MeToo discussions.<sup>308</sup>

For its 2017 "Person of the Year" cover story, *Time* magazine featured "The Silence Breakers," highlighting women who had gained national attention for speaking up about sexual misconduct.<sup>309</sup> The article, penned by *Time*'s entertainment writer, takes a back seat to the fashionable full-page photos of the women, most of whom are famous. It offers this analysis:

Emboldened by Judd, Rose McGowan and a host of other prominent accusers, women everywhere have begun to speak out about the inappropriate, abusive and in some cases illegal behavior they've faced. . . . When a movie star says #MeToo, it becomes easier to believe the cook who's been quietly enduring for years.<sup>310</sup>

In fact, the article is clear that when it comes to sexual misconduct, there is no difference between a celebrity and a cook:

Movie stars are supposedly nothing like you and me. They're svelte, glamorous, self-possessed. They wear dresses we can't afford and live in houses we can only dream of. Yet it turns out—in the most painful and personal ways—movie stars are more like you and me than we ever knew.<sup>311</sup>

### B. *Trickle-Down Feminism and the Everywoman*

After #MeToo went viral, the Weinstein saga was not just a celebrity story; it was about "everywoman." Beth Richie coined the term "everywoman" when describing the feminist movement's characterization of domestic violence as something that women across the race, class, and socioeconomic spectrum experience at similar rates and in a similar manner.<sup>312</sup> Propped up by a long-existing discourse of universal female victimhood, advocates also envisioned the "battered woman" as a nonpoor white woman.<sup>313</sup> Privileged feminists grappled with the abuse issue in good faith, but they naturally viewed it from their own standpoint—one that, for example, sees police as protectors not harmers.<sup>314</sup> But feminists' insistence that this standpoint was *every woman's* effectively wrote out

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307. See Zacharek, Dockterman & Edwards, *supra* note 47.

308. See Hsu, *supra* note 46, at 273.

309. Zacharek, Dockterman & Edwards, *supra* note 47.

310. *Id.*

311. *Id.*

312. See BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* 107 (2012).

313. See *supra* notes 132–36 and accompanying text (discussing raced victim images). See generally Onwuachi-Willig, *supra* note 303.

314. See GRUBER, *supra* note 10, at 183.

the experiences of the women most structurally vulnerable to violence.<sup>315</sup> To take it back to #MeToo, the discourse treats experiencing sexual misconduct as the great equalizer between the celebrity and the cook and proclaims that every woman is united in the same harm, remedial needs, and sense of justice.<sup>316</sup> In this view, criminal justice meted out to Weinstein is justice for all.

By featuring white, rich, and powerful people, the #MeToo discussion suggested that the cause of sexual misconduct is solely individual men's predatory drive and not the multiple interlocking structures of oppression that render marginalized women disproportionately vulnerable to sexual and other violence, both private- and state-perpetrated.<sup>317</sup> It is, therefore, interesting to note that Weinstein was *also* notorious for using his enormous economic and social power within the uniquely precarious entertainment gig economy to abuse and unfairly extract labor from workers in ways that had nothing to do with sex.<sup>318</sup> The Weinstein story could have been a sex-adjacent story about economic and social systems that disempower workers.<sup>319</sup> But stories of structural inequality and the costs of capitalism do not bleed, so they rarely lead.<sup>320</sup> Weinstein's predatory and deviant sexuality, more than his unacceptable level of power and more even than his sexism, took center stage.

It is precisely because celebrities are not everywoman that #MeToo did not trickle down and change the exploitative working conditions of poor women subjected to sexual and other workplace abuses and sex workers vulnerable to sexual assault. When a producer harasses a rich and famous celebrity, it is no doubt a grave harm that should be prevented. But importantly, that celebrity can leave the job without experiencing homelessness and can complain through whisper networks or officially without repercussions like being deported or going to jail.<sup>321</sup> To be sure, rich celebrities have a lot to lose by reporting and should be commended for doing so, but the stakes *matter*. The line cook cannot take down her harasser when he is the owner of the restaurant, and the job is all that stands between her family and homelessness. The farmworker cannot rely on the police when she is undocumented. The sexually abused domestic partner cannot say "me too" if it means her partner's imprisonment or deportation and her family's

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315. *See id.*

316. ALISON PHIPPS, ME, NOT YOU: THE TROUBLE WITH MAINSTREAM FEMINISM 3 (2020); Heather Berg, *Left of #MeToo*, 46 FEMINIST STUD., INC. 259, 261 (2020).

317. And the structures that can lead marginalized men to engage in such wrongful conduct, including structures of racial and gender subordination.

318. *See* Sara Khorasani, *Harvey of Hollywood: The Face that Launched a Thousand Stories*, 41 HASTINGS COMM'N & ENT. L. J. 103, 105, 107–108 (2019).

319. This is like human trafficking discourse's singular focus on sex trafficking. *See* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657–60 (2010).

320. Beale, *supra* note 93, at 421–40. Some see the demand for this type of information to be a vestige of older survival mechanisms. *See generally* BOBBY DUFFY, WHY WE'RE WRONG ABOUT NEARLY EVERYTHING (2019).

321. Hsu, *supra* note 46, at 269.

impoverishment.<sup>322</sup> And then there is the sex worker. The broad criminal laws made in #MeToo's name saddle sex workers with arrests and force them into more dangerous and less profitable deals so clients will undertake the new risks.<sup>323</sup> But such scenarios are largely foreign to celebrities and celebrity-preoccupied media, so they saw Milano's #MeToo's as inclusive because famous people "inspire" regular folk to report, sue, and prosecute.<sup>324</sup>

On November 10, 2017, hoping to piggyback on the heady media coverage of #MeToo, *Alianza Nacional de Campesinas*, an organization of Latina farmworkers and Latinas from farmworker families, penned an open letter of solidarity praising the celebrities who came forward with their stories of abuse.<sup>325</sup> "We do not work under bright stage lights or on the big screen," they wrote.<sup>326</sup> "We work in the shadows of society in isolated fields and packinghouses that are out of sight and out of mind for most people in this country."<sup>327</sup> Still, for all the recognized differences between a high-powered star and an invisible farmworker, *Alianza* saw in the celebrity story, their story: "Even though we work in very different environments, we share a common experience of being preyed upon by individuals who have the power to hire, fire, blacklist and otherwise threaten our economic, physical and emotional security."<sup>328</sup> The letter imagined the celebrities as having at stake what they had at stake, stating, "[c]omplaining about anything—even sexual harassment—seems unthinkable because too much is at risk, including the ability to feed our families."<sup>329</sup>

This letter embodied the very trickle down that #MeToo supporters touted. Three hundred of the most famous and powerful celebrities and industry insiders, including multimillionaires Meryl Streep and Jane Fonda and *billionaires* Salma Hayek and Oprah Winfrey, wrote an open letter back to the farmworkers establishing the *Time's Up* organization.<sup>330</sup> The letter states that despite the economic and social chasm between them, the celebs shared the farmworkers' fears and even their economic insecurities:

To the members of *Alianza* and farmworker women across the country, we see you, we thank you, and we acknowledge the heavy weight of our common experience of being preyed upon, harassed, and exploited by those who abuse their power and threaten our physical and economic security.

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322. See AM. C.L. UNION, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 1–2 (2015), <https://www.aclu.org/report/sexual-assault-domestic-violence-and-policing> [https://perma.cc/8YEW-RUZZL].

323. Berg, *supra* note 316, at 281–82.

324. Kantor et al., *supra* note 4.

325. 700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault, TIME (Nov. 10, 2017, 11:11 AM), <https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [https://perma.cc/U4FT-U6U5].

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Open Letter from Time's Up*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html?mtrref=www.google.com&assetType=REGIWALL> [https://perma.cc/SQD3-4LCD].

We have similarly suppressed the violence and demeaning harassment for fear that we will be attacked and ruined in the process of speaking. We share your feelings of anger and shame. We harbor fear that no one will believe us, that we will look weak or that we will be dismissed; and we are terrified that we will be fired or never hired again in retaliation.<sup>331</sup>

Praising the new initiative, the *New York Times* noted, “Time’s Up . . . helps defuse criticism that the spotlight on the #MeToo movement has been dominated by the accusers of high-profile men, while the travails of working-class women have been overlooked.”<sup>332</sup>

Time’s Up quickly amassed millions of dollars, initially due to a few rich donors but soon augmented by a very successful GoFundMe campaign that gathered donations from ordinary folks.<sup>333</sup> High-powered lawyer Roberta Kaplan quickly established the Time’s Up Legal Defense Fund, which partnered with the National Women’s Law Center to pay the publicity and legal costs for individual women who sue managers and coworkers for sexual harassment.<sup>334</sup> Outside of that, Time’s Up’s initial agenda was opaque, involving vague equality goals and some successful agitation for pay equity in Hollywood.<sup>335</sup> Forbes quickly lauded Time’s Up for creating “sorely needed” reform on a pressing issue: the payday of the highest paid female actors. Lamenting that in 2017, “[t]he top 10 [highest-paid] actors banked a cumulative \$488.5 million—nearly three times the \$172.5 million combined total of the 10 top-earning women,”<sup>336</sup> Forbes celebrated as a feminist victory that *Grey’s Anatomy* actress Ellen Pompeo leveraged Time’s Up to get her producer, fellow Time’s Up sponsor Shonda Rimes, to increase her \$13 million salary to “a \$20 million-plus annual payday [making] her the top-paid actress in a TV drama.”<sup>337</sup>

Time’s Up very publicly imploded in 2021 when its board resigned in the wake of the media revelations that Roberta Kaplan had advised New York Governor Andrew Cuomo on how to deflect the sexual harassment claims against him.<sup>338</sup> Indeed, from early on, Time’s Up’s powerful leaders struggled with

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331. *Id.*

332. Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html> [https://perma.cc/62MD-MPHN].

333. Avery Anapol, *Time’s Up Is the Largest Fundraiser in GoFundMe History*, HILL (Dec. 6, 2018, 12:16 PM), <https://thehill.com/blogs/blog-briefing-room/news/420062-times-up-is-the-largest-fundraiser-in-gofundme-history/> [https://perma.cc/TYS8-R3D9].

334. *TIME’S UP Legal Defense Fund*, TIME’S UP FOUND., <https://timesupfoundation.org/work/times-up-legal-defense-fund/> (last visited July 8, 2023) [https://perma.cc/GY6K-7UEW].

335. *Open Letter from Time’s Up*, *supra* note 330.

336. Natalie Robehmed, *The World’s Highest-Paid Actors 2017: Mark Wahlberg Leads with \$68 Million*, FORBES (Aug. 22, 2017, 9:58 AM), <https://www.forbes.com/sites/natalierobehmed/2017/08/22/the-worlds-highest-paid-actors-2017-mark-wahlberg-leads-with-68-million/?sh=1709e8763f92> [https://perma.cc/6BU8-T4A4].

337. Natalie Robehmed, *How Time’s Up Could Help Close Hollywood’s Pay Gap*, FORBES (Jan. 17, 2018, 3:55 PM), <https://www.forbes.com/sites/natalierobehmed/2018/01/17/how-times-up-could-help-close-hollywoods-pay-gap/?sh=4eab4adc49ef> [https://perma.cc/4VB5-T73M].

338. Jodi Kantor & Michael Gold, *Roberta Kaplan, Who Aided Cuomo, Resigns from Time’s Up*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/09/nyregion/roberta-kaplan-times-up-cuomo.html> [https://perma.cc/TXJ3-YJAG]; Jodi Kantor, Arya Sundaram & Melena Ryzik, *Time’s Up C.E.O. Resigns amid*

#MeToo's believe-all-women directive when women lodged allegations against their allies. (Cuomo was a vocal Time's Up supporter and signed #MeToo's signature legislation).<sup>339</sup> Time's Up's CEO Roberta Tchen, a former Obama staffer and Democratic operative, drew flack for defending Joe Biden against Tara Reade's sexual assault allegations.<sup>340</sup> Time's Up also received criticism for failing to condemn founder Oprah Winfrey for pulling her funds from a rape exposé on mogul Russel Simmons—Oprah had concerns over the documentary's racial tone and the featured accuser's credibility.<sup>341</sup> Time's Up's tepid response led the accuser to remark, "I've gone from being skeptical of Time's Up exploiting survivors to raise money for pay equity of celebrity actresses to thinking they are nefarious."<sup>342</sup>

That Time's Up faced its own reckoning over its leaders taking the side of benefactors over accusers is only somewhat revealing about whether the organization was ever poised to empower farmworkers. More telling are the discoveries the press made once the Cuomo scandal put the organization under a microscope and the media talked to its workers. Indeed, it is surprising the workers talked to the press at all.<sup>343</sup> Despite Time's Up's public objections to nondisclosure agreements as tools of harassers, the organization made *their* workers sign them.<sup>344</sup> According to "many" employees, the organization created to manifest #MeToo for marginalized workers was "a classic toxic work environment."<sup>345</sup> Employees reported being told to "watch their tone, say thank you, ask fewer questions," receiving work contacts "by leadership at all hours and even on weekends with

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*Crisis over Cuomo Ties*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/26/business/times-up-tina-tchen.html> [<https://perma.cc/X6MT-KEHN>]; *Statement from the TIME'S UP Governing Board of Directors*, TIME'S UP FOUND. (Sept. 4, 2021), <https://timesupfoundation.org/newsroom/statement-from-the-times-up-governing-board-of-directors/> [<https://perma.cc/TGC7-X8JM>].

339. See Kantor & Gold, *supra* note 338.

340. See Lisa Lerer, "I'm Sure for American Women, This is Frustrating," N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/05/06/us/politics/tina-tchen-times-up-joe-biden-tara-reade.html> [<https://perma.cc/AB9W-4T7F>]; Ryan Grim, *Time's Up Said It Could Not Fund a #MeToo Allegation Against Joe Biden, Citing Its Nonprofit Status and His Presidential Run*, INTERCEPT (Mar. 24, 2020, 2:58 PM), <https://theintercept.com/2020/03/24/joe-biden-metoo-times-up/> [<https://perma.cc/6STW-J6R8>]. Alyssa Milano received backlash of her own for her silence on the Biden allegation, after which she expressed support for "giving men due process." Emmanuel Felton, *Alyssa Milano Is Still Standing by Joe Biden Despite Criticism She Received from Other Activists*, BUZZFEED NEWS (Apr. 23, 2020, 2:06 PM), <https://www.buzzfeednews.com/article/emmanuelfelton/alyssa-milano-joe-biden-endorsement> [<https://perma.cc/G94T-3EBK>].

341. Rebecca Keegan & Tatiana Siegel, *When Time's Up Didn't Step Up*, HOLLYWOOD REP. (June 5, 2020), <https://www.hollywoodreporter.com/business/business-news/time-s-up-didnt-step-up-1296938/> [<https://perma.cc/QQ6P-FLT6>].

342. *Id.*

343. Lili Loofbourow, *How Did Time's Up Go So Wrong?*, SLATE (Sept. 23, 2021, 4:32 PM), <https://slate.com/news-and-politics/2021/09/how-times-up-imploded-workplace.html> [<https://perma.cc/KUS5-MH4A>].

344. *TIME'S UP Calls on NBC to Release Survivors from NDAs and Conduct Independent Investigation*, TIME'S UP NOW. (Oct. 26, 2019), <https://timesupnow.org/newsroom/times-up-calls-on-nbc-to-release-survivors-from-ndas-and-conduct-independent-investigation/> [<https://perma.cc/8QTM-BHXJ>]. Two years later, Time's Up acknowledged that it, too, had enforced nondisclosure agreements and nondisparagement clauses. *TIME'S UP Statement on Employee Non-Disclosure Agreements*, TIME'S UP FOUND. (Oct. 7, 2021), <https://timesupfoundation.org/newsroom/times-up-statement-on-employee-non-disclosure-agreements/> [<https://perma.cc/QYP8-DGN8>] (promising not to enforce those provisions going forward).

345. Loofbourow, *supra* note 343.

demands,” and having to exhibit “hyper-responsiveness to the celebs who sported their pins at awards ceremonies and galas.”<sup>346</sup> At the same time, Time’s Up’s excessive executive compensation drew attention. In 2019, CEO Lisa Borders received \$504,115 despite having to resign from the job after only a few weeks when a woman publicly accused her son of sexual assault.<sup>347</sup> The organization explained that the half million of pay for one month of work resulted from a severance contract.<sup>348</sup> When Tchen became CEO in 2020, her annual salary was \$635,912.<sup>349</sup>

Did Time’s Up trickle down? Yes, but in the way that charities run by wealthy and corporate entities tend to. They trickle down through capitalist beneficence, which is what the neoliberal architects of trickle-down economics always envisioned.<sup>350</sup> The leaders of Time’s Up were a formidable bloc with the potential to move lawmakers and corporations to major pro-worker, anti-poverty structural changes. Instead, Time’s Up’s greatest lobbying success was New York’s “safety” package that included extending the statute of limitations for second- and third-degree rape, specifying that sexual harassment included conduct that was neither severe nor pervasive, and promulgating a model sexual harassment policy.<sup>351</sup> An organization founded by billionaires and multimillionaires was never the likeliest candidate to spearhead a radical pro-worker, antipoverty agenda. Time’s-Up staffers reported feeling “horrified” by the leadership’s plan for addressing the issue of Latina workers’ pay disparity: Time’s Up would partner with “luxury brand Tory Burch” to sell “a pendant featuring ‘a faux Susan B.

346. *Id.*

347. See Loofbourow, *supra* note 343; Chloe Melas, *Time’s Up CEO Resigned After Sexual Assault Allegations Were Made Against Her Son, Group Says*, CNN (Feb. 23, 2019, 3:11 PM), <https://www.cnn.com/2019/02/18/entertainment/lisa-borders-resigns-times-up/index.html> [<https://perma.cc/H6VB-KJ4P>].

348. Gene Maddaus, *Time’s Up Financial Reports Show Growth, Detail CEO Severance*, VARIETY (Dec. 22, 2020, 8:00 AM), <https://variety.com/2020/biz/news/times-up-financial-reports-ceo-severance-1234868225/> [<https://perma.cc/ST6S-9V36>]. For discussion of other Time’s Up layoffs, see generally Emily Shugerman, *Staff Fumes, Ashley Judd Weeps as Time’s Up Pink-Slips Almost Everyone*, DAILY BEAST (Nov. 20, 2021, 3:13 AM), <https://www.thedailybeast.com/staff-fumes-ashley-judd-weeps-as-times-up-lays-off-everyone> [<https://perma.cc/K6RH-PCP7>]; Michael Scherer, *Time’s Up Group to ‘Completely Rebuild’ After Criticism for Its Role in Andrew M. Cuomo Sexual Harassment Accusations*, WASH. POST (Nov. 19, 2021, 1:15 PM), [https://www.washingtonpost.com/politics/times-up-report/2021/11/19/362070a0-4876-11ec-95dc-5f2a96e00fa3\\_story.html](https://www.washingtonpost.com/politics/times-up-report/2021/11/19/362070a0-4876-11ec-95dc-5f2a96e00fa3_story.html) [<https://perma.cc/KH44-Q4DV>].

349. *Times Up Foundation: Tax Filings by Year*, NONPROFIT EXPLORER, <https://projects.propublica.org/nonprofits/organizations/824526736> (last visited July 8, 2023) [<https://perma.cc/KC3Y-V62S>]; Paul Penley, *2020–2021 Nonprofit CEO Compensation Study*, EXCELLENCE IN GIVING (Aug. 9, 2021), <https://analytics.excellenceingiving.com/2020-2021-nonprofit-ceo-compensation-study/> [<https://perma.cc/XN7Y-NKZF>] (putting the average 2020 CEO compensation for nonprofits with a \$5 and \$10 million annual expenditure (Time’s Up’s was \$8.9 million) at \$178,274).

350. Robert P. Weiss, *Charitable Choice as Neoliberal Social Welfare Strategy*, 28 SOC. JUST. 35, 38 (2001); Bryan Evans, Ted Richmond & John Shields, *Structuring Neoliberal Governance: The Nonprofit Sector, Emerging New Modes of Control and the Marketisation of Service Delivery*, 24 POL’Y & SOC’Y 73, 77–78 (2005); Mark Karlin, *The Limits of Trickle-Down Philanthropy*, TRUTHOUT (Jan. 10, 2016), <https://truthout.org/articles/the-limits-of-trickle-down-philanthropy> [<https://perma.cc/3LH5-8RVR>].

351. *Start Spreading the News: We Passed the TIME’S UP Safety Agenda in New York*, TIME’S UP NOW (Oct. 1, 2019), <https://timesupnow.org/start-spreading-the-news-we-passed-the-times-up-safety-agenda-in-new-york/> [<https://perma.cc/JL7B-GA3Z>]; *Combating Sexual Harassment in the Workplace*, N.Y. STATE (2020), <https://www.ny.gov/programs/combating-sexual-harassment-workplace> [<https://perma.cc/VV52-7ZZA>].

Anthony coin dipped 52 percent in gold to represent the lowest amount Latina women receive on the dollar.”<sup>352</sup>

Time’s Up’s solidarity alternatively embodied an “everywoman” ethic. The “stars are just like us” idea buried the very important differences between rich celebrities and low-wage workers, for whom individual lawsuits and criminal prosecution are a fraught enterprise.<sup>353</sup> Of course, civil suits can help individual women, and they *might* produce positive policy changes.<sup>354</sup> That said, the threat of lawsuits has mostly led employers to simply adopt strict policies against sexual and ostensibly sexual behavior rather than expansive worker protections.<sup>355</sup> Moreover, anti-harassment policies, like all pro-worker policies, are worth only the paper they are written on unless employees can actually use them. The most vulnerable workers face structural barriers—at-will termination, undocumented status, lack of labor unions, unavailability of severance pay, absence of a social safety net, and the list goes on—that make it nearly impossible for them to avail themselves of sexual harassment and many other policies.<sup>356</sup>

#MeToo meant to trickle down to low-wage workers, not by altering the fundamental conditions of their economic precarity, but by inspiring them to report harassers, despite all the risks.<sup>357</sup> In turn, resources went to the existing tort and criminal systems and not to eliminating the structures that keep vulnerable workers from engaging those systems—or better, eliminating socioeconomic conditions that keep workers vulnerable. #MeToo literally put a celebrity face on sexual harassment, and this may have had a *reverse* empowerment effect. A recent study, one in a long line, confirmed that people’s perceptions of whether sexual harassment occurred and was harmful depends to a significant degree on whether they perceive the plaintiff as young, prototypically feminine, and conventionally attractive.<sup>358</sup> Women of color, particularly Black women, have fared particularly poorly in individual sexual harassment lawsuits.<sup>359</sup>

A distinctly neoliberal thread runs through #MeToo’s conception of workplace equality. One feminist libertarian argued that because corporate managers can summarily terminate accused employees, #MeToo is an argument for *capitalism*: “The modern American capitalist system . . . has delivered social justice more swiftly and effectively than supposedly more enlightened public bodies tend to. As we observe and adjust to the sociosexual storm we’re all in, let’s appreciate the powers and paradigms making it possible: feminism, but also free

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352. Loofbourow, *supra* note 343. For a critique of this type of popular feminism, see generally SARAH BANET-WEISER, *EMPOWERED: POPULAR FEMINISM AND POPULAR MISOGYNY* (2018).

353. Zacharek, Dockterman & Edwards, *supra* note 47.

354. See *supra* notes 200–04 and accompanying text.

355. Zacharek, Dockterman & Edwards, *supra* note 47.

356. See, e.g., NANETTE L. YRAGUI, PATRICIA PACHECO, DEIBI SIBRIAN & ERICA C. SANTOS, WASH. STATE DEP’T OF LABOR & INDUS., WASHINGTON STATE JANITORIAL WORKLOAD STUDY APPENDIX B: MISTREATMENT OF JANITORIAL WORKERS: A HIDDEN HEALTH & SAFETY ISSUE (2020).

357. See *supra* notes 308–67 and accompanying text.

358. Jin X. Goh, Bryn Bandt-Law, Nathan N. Cheek, Stacey Sinclair & Cheryl R. Kaiser, *Narrow Prototypes and Neglected Victims: Understanding Perceptions of Sexual Harassment*, 122 J. PERSONALITY & SOC. PSYCH. 873, 873 (2022).

359. Onwuachi-Willig, *supra* note 303, at 2; Crenshaw, *supra* note 304, at 148.

markets.”<sup>360</sup> In keeping with this neoliberal ethic, the main state intervention featured most prominently in #MeToo was the criminal punishment of individual offenders.<sup>361</sup>

To a celebrity, utilizing criminal law and advocating for tougher laws can provide a sense of justice and making a difference in the world with few personal costs. Celebrities need not worry that invoking and expanding the power of the penal state can backfire on them and their communities. But the cost-benefit analysis of enhanced policing and prosecution is not the same for the privileged and the marginalized. Consider again the example of domestic violence. In the late 1970s, well-to-do white advocates pushed the idea that abuse is a matter of men’s sexism emboldened by weak criminal laws.<sup>362</sup> They dismissed, even dressed down, the women of color who argued that abuse also stemmed from white supremacy and economic marginality and called for material aid to poor women.<sup>363</sup> Aid was not a solution for wealthy white abuse victims, according to experts at the time, because of their “reluctance to reduce their or their children’s standard of living” and the “welfare stigma” that “prevented [them] from considering [state] payments as a potential solution,” as one expert put it.<sup>364</sup> At the same time, criminal law and policing posed less risk to the nonpoor women, and they had more resources to avoid involving the police. So, criminalization won out, and studies later confirmed it was a decent proposition for wealthy white women but a devastating one for poor women of color.<sup>365</sup>

The criminal policies pushed by the privileged do trickle down in a sense by incarcerating the already policed class of defendants who little resemble the famous men and corporate actors featured in #MeToo stories. Of course, as Burke recognized, some marginalized victims see criminalization as their path toward justice, although perhaps fewer in number than pro-criminalization advocates presume.<sup>366</sup> But the important point is that the celebrity exhortations to tough-on-sex-crime policies are not the product of a careful struggle with the many harms involved with augmenting the penal system because celebrities generally do not bear the brunt of those harms.

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360. Elizabeth Nolan Brown, Opinion, *NBC Didn’t Fire Matt Lauer. We Did.*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/matt-lauer-sexual-harassment-nbc.html> [<https://perma.cc/NZ7D-Q3MU>].

361. See *supra* Subsection III.A.I.

362. See Elizabeth Nolan Brown, *Will Feminists Please Stop Calling the Cops?*, FEMINISM (Apr. 2021), <https://reason.com/2021/03/27/will-feminists-please-stop-calling-the-cops/> [<https://perma.cc/VBW9-U5XD>].

363. GRUBER, *supra* note 10, at 52–53.

364. *Id.* at 57 (citing U.S. COMM’N ON C.R., BATTERED WOMEN: ISSUES OF PUBLIC POLICY 172 (1978), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/battered-women-issues-public-policy> [<https://perma.cc/EE3R-MFUW>]).

365. *Id.* at 58 (citing Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 137–69 (1992)).

366. See Mukhopadhyay, *supra* note 290; Adetiba, *supra* note 20; see also Hadar Dancig-Rosenberg, Roy Rosenberg & Anat Peleg, *Post or Prosecute? Facebook, the Criminal Justice System and Sexual Assault Victims’ Needs*, 2023 U. ILL. L. REV. (forthcoming 2023) (finding that sexual assault survivors rated Facebook as more able to address most of their needs than the criminal justice system).

## V. THE CARCERAL STATE'S ME TOO

#MeToo proved remarkably generative of criminal laws and policies. Spurred on by crisis talk and politics, reforms to existing penal law and newly minted offenses came at a dizzying pace, with extraordinarily little discussion of mass incarceration or defendants' civil liberties. While conservatives sometimes opposed harsher measures, articulating a "what about the guys?" argument, their embrace of an anti-#MeToo agenda was always tepid and did not extend to opposing measures that targeted "real perverts."<sup>367</sup> The most highly publicized set of carceral reforms, and indeed the ones that frequently topped the press's list of #MeToo successes, were reforms that extended the time periods of or eliminated statutes of limitations for sex offenses.<sup>368</sup> These changes, like the criminalization measures of the past, came on the heels of familiar tough-on-crime discourses of monstrous offenders who remain free to rape because of lenient criminal laws and their "technicalities." Other #MeToo reforms include prosecution-favoring evidentiary rules,<sup>369</sup> affirmative consent requirements in rape law,<sup>370</sup> extension of sexual assault to intoxicated but not incapacitated sex,<sup>371</sup> new substantive crimes and punitive policies,<sup>372</sup> lengthening sentences for sex offenses, and making post-sentencing regimes even harsher.<sup>373</sup>

Examining in detail whether each of these reforms, despite contributing to racialized mass incarceration and bolstering society's carceral and sex-regulatory impulses, are nonetheless justified because of their retributive and deterrence benefits is beyond the scope of this paper, whose primary ambition is to show that #MeToo was *in fact* carceral. My main point is cautionary: these criminal law reforms barreled in on a wave of celebrity activism, public titillation, politics, and spectacular narrative, and the freight train did not stop even when progressives began to prioritize anticarceral, racial, and civil-rights concerns. The train did not stop for Burke's me too. The train did not even stop in the face of the worldwide protests against America's racist policing and punishment system. Fueled by the familiar narrative that criminal laws are long-overdue fixes necessary for justice and accountability, the #MeToo train pushed and continues to push sex-crime law in an ever more punitive direction.<sup>374</sup>

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367. See Jess Zimmerman, *Not All Men: A Brief History of Every Dude's Favorite Argument*, TIME (Apr. 28, 2014, 11:49 AM), <https://time.com/79357/not-all-men-a-brief-history-of-every-dudes-favorite-argument/> [<https://perma.cc/84DF-GK9R>].

368. See *infra* Section V.A.

369. See *infra* Section V.B.

370. See *infra* Subsection V.C.1.

371. See *infra* Subsection V.C.2.

372. See *infra* Section V.D.

373. See, e.g., Gen. Assemb., 2022 Pa. Legis. Serv. Act 2022-144 (S.B. 118) (Pa. 2022) (adding trafficking offenses to registry and amending 42 PA. CON. STAT.); Fla. H.R., Fla. Sess. Law Serv. Ch. 2020-83 (C.S.H.B. 333) (Fla. 2020) (abolishing bail pending appeal for sex offenders, amending 903.133 FLA. STAT.); H.B. 379 (Ala. 2019) (proposing mandatory chemical castration for parole eligibility for child sex offenders); S.B. No. 61 (S.D. 2018) (bumping up failure to register address from a misdemeanor to a felony).

374. See *supra* notes 194–205 and accompanying text (critiquing sex-offender policies). After #MeToo, several states strengthened and broadened their sex-offender punishment and management system. See *supra* note 373 and accompanying text.

These laws will not be confined to Weinstein and his ilk. Symbolic legislation, especially federal legislation, is often duplicitous of state law, as Stuntz notes,<sup>375</sup> but it also frequently carries higher penalties, which produce serious consequences for the “usual suspects”—the typically policed segments of society—and unanticipated others. Consider, for example, the 2006 “Adam Walsh Child Protection and Safety Act,” enacted on the twenty-fifth anniversary of Adam Walsh’s death.<sup>376</sup> Federal sex offender law was already exceedingly harsh by that time, but the act symbolically increased already exorbitant penalties and broadened eligibility for registration and civil commitment.<sup>377</sup> Federal law has extremely limited jurisdiction over individual violent crimes, mostly affecting defendants in federalized areas like national parks and Indian territory.<sup>378</sup> The federal public defender had warned Congress that Native Americans would bear the brunt of these harsh reforms and tribes would shoulder the bureaucratic burden of the broadened sex-offender management.<sup>379</sup> According to the Department of Justice, at the time of the Act’s passage, “[n]early three-quarters of the sex abuse defendants arraigned in Federal court . . . were American Indian or Alaska Native.”<sup>380</sup> These suspects “tended to be younger . . . and less educated” than other offenders.<sup>381</sup>

Below, I will sketch some reasons to believe that the costs of #MeToo’s criminal law reforms to the most vulnerable in society outweigh their purported safety and symbolic benefits, including some analyses I have articulated elsewhere.<sup>382</sup> But the responsibility of analyzing the costs of carceral proposals lies with their proponents—the #MeToo champions and conversation-setters who advocated from a position of power and extreme influence. Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir have written thoughtfully about “governance feminism,” which describes the phenomenon of feminist ideas and agendas increasingly influencing and even becoming top priorities of governmental decision-makers.<sup>383</sup> They contend that feminist discourses and agendas have vastly different valences when they move from the margin to the center or, as Halley puts it, when feminists “trade the megaphone for the gavel.”<sup>384</sup>

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375. See *supra* notes 109–10 and accompanying text.

376. Adam Walsh Child Protection and Safety Act, 34 U.S.C §§ 20901–20991 (2006).

377. See *id.*

378. See Letter from Jon M. Sands, Federal Public Defender, to Kelly Land, Asst. Gen. Couns. on Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, (Nov. 16, 2006).

379. *Id.*; see also ROBERT ECOFFEY ET. AL., REPORT OF THE NATIVE AMERICAN ADVISORY GROUP 32 (2003), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104\\_Native\\_American\\_Advisory\\_Group\\_Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf) [<https://perma.cc/QQY8-JV4B>].

380. MARK MOTIVANS & TRACEY KYCKELHAHN, DEP’T OF JUST., BUREAU OF JUST. STAT. BULL., FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006 (2007), <https://www.bjs.gov/content/pub/ascii/fpcseo06.txt> [<https://perma.cc/6H25-5DCB>].

381. *Id.*

382. See *infra* notes 397–403 and accompanying text.

383. See generally JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ & HILA SHAMIR, GOVERNANCE FEMINISM: AN INTRODUCTION (2018).

384. See *id.*; Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 103, 114–15 (2015).

To be sure, activists who occupy a position of relative invisibility and marginality often use spectacular, hyperbolic, and highly punitive language to bring attention to their little-known issue in the hopes of eventually producing reasonable egalitarian change. Even then, strategies easily become institutions, as Angela Harris has warned,<sup>385</sup> and advocates can later find themselves in a “be careful what you wish for” situation. But it is wholly another situation when privileged people with a bully pulpit the size of the world passionately espouse one-sided, carceral narratives and actively suppress critique, even or especially from the left.<sup>386</sup> Drawing from Max Weber, Halley and coauthors argue that feminist governors, like all governors, should embrace “ethics of responsibility.”<sup>387</sup> “To engage governance,” they note, “is to make use of force; to do so responsibly is to acknowledge that this is so whether one uses law to justify a bombing raid or merely tilts legal institutions as they engage in the ‘daily grind.’”<sup>388</sup>

Falling back on good intentions and desire for feminist solidarity in a political moment may cut it when regular folk are simply shouting platitudes into the caliginous Twitterverse, but real “engagement in politics can be fully responsible only if one is willing to look down and behold the blood on one’s own hands.”<sup>389</sup> Mindy Jane Roseman and Alice Miller advocate a “politics of accountability”<sup>390</sup> where feminists factor in “the material deprivations [penal law] entails: the intentional infliction of pain, at a minimum.”<sup>391</sup>

In my book, *The Feminist War on Crime*, I endorse a “neofeminist” approach that prioritizes the problem of women’s subordination but is freed from the liberalism, essentialism, and authoritarianism of past carceral feminist movements.<sup>392</sup> Within neofeminism, there is no everywoman. Women’s needs are ever shifting and racially, culturally, and economically contextual. Understanding this complexity means that deciding on ex ante rules that “serve women” is tricky business. Yet, #MeToo proponents adopted backward-looking justifications, simply rehashing the details of the horrible crimes that provoked their reform efforts and proposing criminal reforms that they presumed would have prevented the crimes. But this ignores that criminal law enforcement takes place within a larger structural reality of selective and racialized policing and prosecution and inhumane mass incarceration.<sup>393</sup>

Thus, neofeminism endorses a “distributional” approach where law and policy proponents contemplate the many interests involved and make evidence-informed predictions about how reform might actually distribute harms and

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385. Harris, *supra* note 207, at 605 (quoting Cynthia Ozick, *Literature and the Politics of Sex: A Dissent*, in *ART & ARDOR* 284, 287 (1983)).

386. HALLEY ET AL., *supra* note 383, at ix.

387. *Id.* at xiv.

388. *Id.*

389. *Id.* at xv.

390. Alice M. Miller & Mindy Jane Roseman, *Introduction*, in *BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW* 1, 13 (Alice M. Miller & Mindy Jane Roseman eds., 2019).

391. *Id.*

392. See GRUBER, *supra* note 10, at 17; see also *Neofeminism*, *supra* note 11, at 1325.

393. Halley, *supra* note 207, at 30.

benefits over time. Jorge Esquirol describes the enterprise as looking beyond formal rules to the “winners and losers” of a given legal regime.<sup>394</sup> As Halley et al. explain, “[b]asically, you are trying to identify the consequences of introducing a change in the status quo and then deciding whether they are ‘worth it.’”<sup>395</sup> Mapping how any given legal intervention will operate in the real world is an arduous empirical and normative enterprise.<sup>396</sup> Nevertheless, given what we know about the American criminal system and its embedded pathologies, a global analytical principle emerges: Criminal law should be “a last, not first, resort.”<sup>397</sup>

The sexual misconduct highlighted by “Me Too” is real and unacceptable, and much of it reinforces gender and other hierarchies. My point is not that we should refrain from condemning and countering such behavior but that, as Burke urges, our feminist imagination should extend beyond seeing criminal law as the sole (or preferred) mechanism of justice and social change.<sup>398</sup> The following *brief* analyses of the criminal law reforms that rode the coattails of the #MeToo juggernaut reveal that each is likely to have far-reaching and problematic consequences. These new penal efforts were inspired by Harvey Weinstein and helped condemn him to a life of incarceration, securing a public victory for the movement. But they will not end with Weinstein. Now that the #MeToo megaphone has died down and it’s all the gavel, does anyone care which defendants are being affected and whether they are, in fact, monstrous? Is anyone keeping tabs on the operation of the laws recently touted as the ultimate achievement in gender justice?

#### A. *Statutes of Limitations*

The press has hailed statutes of limitations reform as a main legal achievement of #MeToo. In the wake of the movement, states eliminated or greatly lengthened statutes of limitations for sex offenses, meaning that the crimes now take much longer to or never “time out.”<sup>399</sup> The logic behind the move, as *Glamour* magazine proclaimed in a 2020 headline, is simply, “In the #MeToo Era,

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394. Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMPARATIVE L. 75, 89 (2008).

395. HALLEY ET AL., *supra* note 383, at 254.

396. *See id.* at 67–68.

397. GRUBER, *supra* note 10, at 17.

398. *See* Mukhopadhyay, *supra* note 290.

399. Minnesota passed one of the most sweeping reforms, abolishing the nine-year statute of limitations for all (first to fourth degree) sexual assaults, including contact offenses. H.R., H.F. 1121, 2021 Leg., 92nd Sess. (Minn. 2021) (amending MINN. STAT. 628.26); *see also, e.g.*, Time’s Up Act, Pub. Act No. 19-16 (Conn. 2019) (amending CONN. GEN. STAT. § 46a-54, eliminating the statute of limitations for child sex offenses and increasing adult sexual offense SOLs by 400%); Pa. Gen. Assembly, Pub. L. 641, No. 87 (Penn. 2019) (Amending Title 42 of PA. CONS. STAT., eliminating child sex offense SOLs and increasing adult sexual offense limitations from two years to twenty and twelve years); S.B. 5649, 2019 Reg. Sess., 66th Leg. (Wash. 2019) (eliminating child sex offense SOLs and increasing adult sexual offense limitations to twenty years); PR LEGIS 34 (2018) (eliminating SOLs for child sex offenses).

Survivors Want Them Eliminated.”<sup>400</sup> Camille Cooper, the vice president of public policy at the Rape, Abuse, and Incest National Network, articulated a familiar argument against the “rapist-protecting” statutes: “[t]he act of rape doesn’t change over time—just because a certain amount of time has passed doesn’t mean that someone is less culpable.”<sup>401</sup> She went on, “[w]e don’t want to reward a rapist for being good at not getting caught.”<sup>402</sup>

There is a time-worn prosecutorial argument that legal protections afforded to the accused are “technicalities” that free criminals.<sup>403</sup> Statutes of limitations, constitutional and statutory evidence exclusion rules, burdens of proof, and the presumption of innocence all skew criminal processes in favor of defendants and have the effect of sparing some guilty people from punishment. This, the prosecutorial argument goes, is a grave injustice and necessarily bad for victims. Most in the criminal law world are very familiar with the critique that “[t]he criminal is to go free because the constable has blundered.”<sup>404</sup> Indeed, a familiar 1980s victims’ rights argument that proved very effective in promoting the crime-control agenda was that liberal judges caused the criminal system to “los[e] essential balance” with defendants enjoying outsized power.<sup>405</sup> In the Fourth Amendment context, critics of Warren Court-era procedural protections have protested the unfairness of guilty criminals benefitting from the exclusionary rule.<sup>406</sup> Nevertheless, the soundbite that the exclusionary rule is a technicality that lets the guilty off the hook has historically resided strictly within the conservative tough-on-crime camp.<sup>407</sup>

The elimination of statutes of limitations presents even higher civil libertarian stakes than the elimination of the exclusionary rule. When a police officer engages in an unconstitutional search and finds drugs in the detainee’s pockets, that person is very likely guilty. The exclusion of the drugs and dismissal of the guilty person’s case are collateral consequences of enforcing the Fourth Amendment. But there was never a real risk of false conviction.<sup>408</sup> Statutes of limitations aim to protect *innocents* from being convicted. Accordingly, the Supreme Court, noting that the statutes “are found and approved in all systems of enlightened jurisprudence,” has called them “vital to the welfare of society” and “favored in the law.”<sup>409</sup> Over time, memories fade and change, and evidence—including exculpatory evidence—goes stale or disappears, meaning that there comes a point

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400. Jenny Singer, *Statutes of Limitations Put an Expiration Date on Prosecuting Sexual Assault. In the #MeToo Era, Survivors Want Them Eliminated*, GLAMOUR (Jan. 7, 2020), <https://www.glamour.com/story/statutes-of-limitations-sexual-assault> [<https://perma.cc/LWS6-QVXA>].

401. *Id.*

402. *Id.*

403. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 16–17 (2003).

404. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

405. HERRINGTON ET AL., *supra* note 140, at 114.

406. See generally Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (contrasting “due process” and “crime control” models of criminal procedure).

407. See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 111 (2003).

408. Packer, *supra* note 406, at 39.

409. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

at which the general risk of a false conviction is too high to tolerate.<sup>410</sup> The Supreme Court thus recognizes that “the right to be free of stale claims in time comes to prevail over the right to prosecute them.”<sup>411</sup>

This rationale mirrors that of the famous Blackstone ratio: it is worth some guilty offenders who committed old crimes to going unprosecuted to avoid the greater harm of imprisoning innocents.<sup>412</sup> Now, not everyone agrees with that principle. A person more attuned to the need to incarcerate offenders than to prevent the incarceration of innocents could certainly protest the balance struck by procedural protections like the presumption of innocence and statutes of limitations.<sup>413</sup> Indeed, one who is enthusiastic about punishing guilty offenders within the carceral state might advocate for the reversal of all procedural rules, at least for “serious” offenses.<sup>414</sup> But progressives tend to hold that the greater injustice lay in the state imposing suffering on an innocent and that the need for procedural protections reaches a zenith when charges carry significant penalties.

#MeToo discourse’s characterization of statutes of limitations leaves one with the impression that sexist legislatures created them for the sole purpose of protecting Harvey Weinstein and other predators.<sup>415</sup> #MeToo exhibits a distinct lack of attention to the statutes’ innocence-protecting purposes, as well as other policy reasons for crimes to time out. After a certain period of living one’s life, even a guilty defendant can develop a reliance interest in nonprosecution that makes eleventh-hour prosecution seem unfair. Many progressives would have sympathy for a woman who was part of a robbery conspiracy twenty years ago and moved on with her life only to find herself prosecuted at mid-age and forced to leave her productive life and family. But #MeToo discourse cannot fathom that a person charged with a decades-old sex offense could be innocent or someone who committed the offense when much younger is now a good person and beloved parent.

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410. *Stogner v. California*, 539 U.S. 607, 615 (2003) (“Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.”) (internal citations omitted).

411. *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944).

412. 4 WILLIAM BLACKSTONE, COMMENTARIES 434 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

413. See, e.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 74 (2008); Paul G. Cassell, *Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New “Innocence” Procedures*, 56 N.Y.L. SCH. L. REV. 1063, 1064 (2012); Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (satirizing the Blackstone ratio). Volokh offers this as his closing:

The story is told of a Chinese law professor, who listened as a British lawyer explained that Britons were so enlightened that they believed it was better that ninety-nine guilty men go free than that one innocent man be executed. The Chinese professor thought for a second and asked, “Better for whom?”

*Id.* at 211 (footnotes omitted). See generally Marvin Zalman, *The Anti-Blackstonians*, 48 SETON HALL L. REV. 1319 (2018) (cataloging critiques of the Blackstone ratio and related criminal procedure doctrines).

414. See John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

415. See *supra* notes 413–14 and accompanying text. This is familiar discourse in the child sex offense arena. See Symone Shinton, *Pedophiles Don’t Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*, 92 CHI.-KENT L. REV. 317, 318–19 (2017) (advocating for eliminating SOLs because there is “no cure” for pedophilia and there is an “epidemic” of child sex abuse).

Instead, we see monsters. We see Cosby and Weinstein—unrepentant, powerful, flagrant “serial rapists” who flaunted their criminal behavior for years. But there is a catch in justifying the elimination of statutes of limitations by referencing serial offenders: such offenders, like Cosby and Weinstein, are likely to have also committed crimes that have *not* timed out. But this is not enough, the #MeToo discourse insists, because the victims in Weinstein’s older cases should also get their day in court.<sup>416</sup> The elimination of statutes of limitations is, in this sense, like Stuntz’s carjacking example; it is a symbolic legal victory that piles on charges against “worst of the worst” defendants who already face decades in prison.<sup>417</sup> Piling cases on to charged serial rapists, while not completely benign from a civil libertarian standpoint, is one thing. But that’s not all that is at stake. Eliminating statutes of limitations affects the serial rapists, the innocents, and the reformed alike.<sup>418</sup>

I would venture that many #MeToo adherents who hesitate little in supporting the elimination of statutes of limitations in sex cases likely do not (or would not if they thought about it) support abolishing limitations across the board.<sup>419</sup> Yet, Cooper’s carceral logic that a crime is a crime no matter when it occurred and that the system should not reward people who get away with it holds for *all* crimes.<sup>420</sup> In the above robbery example, one might imagine that the victims of the timed-out robberies also want their day in court.

Nevertheless, we might consider whether there is something exceptional about sex offenses, such that, unlike other serious crimes, they should never become stale. One argument is that many victims in sex-offense cases, especially child sex-offense cases, delay reporting.<sup>421</sup> The most popular argument, however, is that sex offenses, like murders, are so serious that the benefits of

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416. See *supra* notes 399–401 and accompanying text.

417. See *supra* notes 109–10 and accompanying text.

418. The abolition argument frequently relies on the false idea that sex offenders, especially child sex offenders are extremely high recidivists. See, e.g., Shinton, *supra* note 415, at 326. In reality, sex offenders are relatively low recidivist offenders. Ira Mark Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 502–07 (2015). About a third of those who offend against children are children themselves. DAVID FINKELHOR, RICHARD ORMROD & MARK CHAFFIN, U.S. DEP’T OF JUST.: OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS 1–2 (2009), <https://www.ojp.gov/pdffiles1/ojjdp/227763.pdf> [<https://perma.cc/C93A-P9WR>]. Juvenile sex offenders are at the *lowest* risk for sexual re-offense. Heather Hensman Kettrey & Mark W. Lipsey, *The Effects of Specialized Treatment on the Recidivism of Juvenile Sex Offenders: A Systematic Review and Meta-Analysis*, 14 J. EXPERIMENTAL CRIMINOLOGY 361, 362–63 (2018).

419. See, e.g., Shinton, *supra* note 415, at 318–19 (“[S]tatutes of limitations are generally necessary and beneficial to society . . .”).

420. See *supra* notes 415–17 and accompanying text.

421. See, e.g., Rachel Korberg, *Statutes of Limitations for Sex Crimes Further Punish Survivors. It’s Time to End Them*, WASH. POST (Feb. 4, 2022, 1:36 PM), <https://www.washingtonpost.com/opinions/2022/02/04/sex-crime-statutes-of-limitations-end/> [<https://perma.cc/M6WV-GCYQ>]. The author dismisses the evidentiary concerns of statutes of limitations because in *her* case, she had preserved texts and other evidence. *Id.* But this argument can be used by a particular victim against any *general* rule that protects defendants. Scholars have, indeed, made various suggestions for how the law might continue to have reasonable time-bars but make exceptions for cases carrying less risk. See, e.g., Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 153 (2008).

preventing false convictions are outweighed by the need to prosecute.<sup>422</sup> Indeed, advocates do not deny that sex-offense statutes of limitations are as long or longer than those of many other serious felonies but simply decry that sex-crime limitations exist at all.<sup>423</sup> Elsewhere, I have explored why Americans intuitively hold that a range of sex crimes are graver than nearly all other crimes, including extremely violent ones, and do not revisit that analysis here.<sup>424</sup> But again, the idea that an advocate's characterization of a given crime as very serious trumps the need for procedural protections is one that should give progressives pause.

For child sex offenses, the trend has been to eliminate the statute of limitations altogether.<sup>425</sup> To be sure, the abuse of children is extremely serious, sometimes difficult to prosecute, and often discovered years after the incident.<sup>426</sup> For those who see prosecution as justice and closure, lifting statutes of limitations, even at the expense of some innocents, is warranted. Nevertheless, in the rush to be on the right side of a bipartisan issue during a heady cultural moment, decision-makers barely discussed, much less seriously grappled with, the grave costs of such a move.<sup>427</sup> As civil libertarians have long argued, cases that rely on child testimony for their primary proof pose some of the greatest risks of false convictions, as illustrated by infamous cases like the McMartin preschool case.<sup>428</sup> This significantly raises the stakes of tinkering with defendant-protecting procedures in such cases. The passage of time compounds the risks, as the controversies over recovered memories demonstrate.<sup>429</sup> Public defenders also express concern that eliminating statutes of limitations harms the defendants who committed long-ago crimes when *they* were children.<sup>430</sup>

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422. See, e.g., Shinton, *supra* note 415, at 318.

423. In Pennsylvania, for example, prosecutors have a two-year window to commence prosecutions of crimes, but for an array of child sex offenses, there is no time limit, and a twenty- or twelve-year limit for adult offenses. H.B. 962, 2019 Gen. Assembly, Reg. Sess. (Pa. 2019). In Minnesota, before reform, felonies had SOLs of three to six years and sex offenses had SOLs of nine years. MINN. STAT. § 628.26. Felonies now retain those same SOLs, but sexual assaults have no prosecution time limits. H.R. 4608, 92d Leg., Reg. Sess. (Minn. 2022).

424. See generally *Sex Exceptionalism*, *supra* note 11.

425. See, e.g., Conn. Pub. Act No. 19-16 (2019) (eliminating statute of limitations for child sex offenses).

426. See Shinton, *supra* note 415, at 320.

427. See *id.* at 330–31.

428. See Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 LAW & CONTEMP. PROBS., 127, 127–28 (2002). See generally RICHARD BECK, WE BELIEVE THE CHILDREN: A MORAL PANIC IN THE 1980S (2015).

429. See generally Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129 (1993) (discussing the delayed discovery doctrine's application to prevent the statute of limitations from tolling in childhood sexual abuse civil actions); D. Stephen Lindsay & John Briere, *The Controversy Regarding Recovered Memories of Childhood Sexual Abuse: Pitfalls, Bridges, and Future Directions*, 12 J. INTERPERSONAL VIOLENCE 631 (1997). There is evidence that retrieving repressed memories of childhood sex abuse makes patients worse off. Harold Merskey, *Ethical Issues in the Search for Repressed Memories*, 50 AM. J. PSYCHOTHERAPY 323, 329–30 (1996).

430. Not only are juvenile offenders low recidivists, see sources cited *supra* note 418, adult defendants who are tried for sex crimes they allegedly committed as juveniles are convicted at a higher rate and receive higher sentences than similarly situated juvenile defendants. Lee M. Vargen, Camille C. Weinsheimer, Patricia I. Coburn, Kristin Chong & Deborah A. Connolly, *Youth-Perpetrated Child Sexual Abuse: The Effects of Age at Court on Legal Outcomes*, 24 PSYCH. PUB. POL'Y & L. 248, 252 (2018).

Of course, adult victim-witnesses do not pose the same level of risk, and advocates have rightfully excoriated the police for ignoring rape kits for decades.<sup>431</sup> Those rape kits should be tested, and the police should be required to competently investigate rape cases (and, frankly, many other crimes). But addressing decades-long police inaction and shoddy investigative techniques by abolishing statutes of limitations not only encourages police indifference but saddles defendants with the costs of police misbehavior precisely *when* police are lax.<sup>432</sup> The better reform would be to incentivize timely and thorough investigation.<sup>433</sup>

The discourse that defendants are guilty and “getting away with it” blinds the public to the inherent false-conviction risks of prosecuting decades-old cases.<sup>434</sup> When an allegation surfaces or is pursued decades after the alleged event, whether due to police malfeasance, victim hesitation, or something else, the ensuing prosecution carries risks. It is difficult to obtain evidence—third-party witnesses, calls, surveillance videos, tests, records, etc.—that shed light on what happened. With evidence lost to the passage of time, there is just the victim’s claims about or recollection of long-ago events and the defendant’s denial—along with the #MeToo directive to believe the victim.

### B. Admission of Prior Bad Acts Evidence

Another #MeToo victory for prosecutors came about primarily via the Weinstein and Cosby prosecutions, and it involves evidentiary rules. In both cases, prosecutors were largely successful in their requests to introduce evidence of prior sexual crimes for which the defendants had never been arrested, charged, prosecuted, or convicted.<sup>435</sup> In fact, the trials became known for introducing a “parade” of “prior bad acts” witnesses who made clear that Weinstein and Cosby were serial rapists with a propensity to commit sexual assault.<sup>436</sup> In the face of such testimony, even jurors with significant questions about evidence underlying the present charges—such as the credibility of the victim-witness in Cosby’s case—could conclude that the defendant was guilty because the past allegations

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431. See Hunter Grolman, Comment, *Pressing Pause: Tolling Statutes of Limitations for Sex Offenses While Rape Kits Remain Untested*, 26 AM. U. J. GENDER SOC. POL’Y & L. 973, 973–74 (2018).

432. *State v. Swartz*, 723 N.E.2d 1084, 1086 (Ohio 2000) (noting that statutes of limitations “discourage inefficient or dilatory law enforcement”).

433. Statute of limitation reform is not retroactive. *Stogner v. California*, 539 U.S. 607, 632–33 (2003).

434. See James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1232–46 (2004) (discussing problems with reviving old rape cases based on DNA testing).

435. Chris Francescani, *Weinstein Trial Spotlights the Use of ‘Prior Bad Acts’ Witnesses*, ABC NEWS (Jan. 7, 2020, 4:28 AM), <https://abcnews.go.com/US/weinstein-trial-spotlights-prior-bad-acts-witnesses/story?id=68082022> [<https://perma.cc/5G8T-JLB6>]; Gene Maddaus, *Pennsylvania Supreme Court Troubled by Bill Cosby Trial Witnesses*, VARIETY (Dec. 1, 2020, 8:04 AM), <https://variety.com/2020/tv/news/bill-cosby-pennsylvania-supreme-court-argument-1234843012/> [<https://perma.cc/52QH-FV63>].

436. *Andrea Constand Confronts Bill Cosby After Parade of Women Take Aim*, YAHOO! SPORTS (Apr. 13, 2018), <https://sports.yahoo.com/andrea-constand-confronts-bill-cosby-160155018.html> [<https://perma.cc/7NH2-H3B3>].

had to be more than mere coincidence.<sup>437</sup> This is why prosecutors pushed so hard for those prior bad acts witnesses.

Rules of evidence generally prohibit the admission of prior bad acts evidence to prove current behavior.<sup>438</sup> The idea is that the government must shoulder the evidentiary burden of proving that the defendant committed the *present* crime beyond a reasonable doubt and may not subvert this requirement by impugning the defendant's past or character. Prior bad acts, especially allegations of prior heinous crimes, are so prejudicial that they lead jurors to judge defendants (and other witnesses) on their past behavior rather than scrutinizing the facts at hand.<sup>439</sup> The law does not tolerate imprisoning people regardless of the evidence at hand because they are "bad" people. But prior bad acts evidence can be admissible when it is *independently* relevant, that is, not just about character and propensity.<sup>440</sup> Evidence rules typically contain "common scheme" exceptions for when defendants' past alleged crimes relate to a larger enterprise involving the present crime<sup>441</sup> and "modus operandi" exceptions for when the past alleged crimes were so signature that they are relevant to the current case where the signature is present (*e.g.*, a burglar who leaves a red rose at the scene of the crime).<sup>442</sup>

In 1995, during sex-predator panic and in the wake of some high profile rape cases, an alliance of victims' rights advocates, anti-rape activists, prosecutors, and tough-on-crime politicians advocated a novel federal evidentiary rule specifically exempting sexual assault defendants from the prior bad acts prohibition.<sup>443</sup> Advocates asserted that past sexual misconduct is so predictive of future sexual offending that the "probative" or truth-seeking value of the prior bad acts evidence outweighs the danger that the jury will convict the defendant

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437. See Aaron Cooper, *Witness Says Cosby Accuser Talked About Fabricating Sexual Assault Claims Against a Celebrity for Money*, CNN, <https://www.cnn.com/2018/04/18/us/bill-cosby-trial-defense-key-witness/index.html> (Apr. 18, 2018, 9:57 PM) [<https://perma.cc/9NVP-2FAS>]; Lauren del Valle & Eric Levenson, *Harvey Weinstein Accuser Says Their Relationship Was Complicated and 'Does Not Change the Fact that He Raped Me'*, CNN, <https://www.cnn.com/2020/02/04/us/harvey-weinstein-jessica-mann-trial/index.html> (Feb. 4, 2020, 8:07 PM) [<https://perma.cc/6LL8-ZPH9>].

438. See, *e.g.*, FED. R. EVID. 404(b).

439. *Boyd v. United States*, 142 U.S. 450, 458 (1892) ("Proof of [prior robberies] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law . . .").

440. See FED. R. EVID. 404(b)(2) (Prior bad acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of intent.").

441. See *United States v. Martinez-Mercado*, 919 F.3d 91, 101 (1st Cir. 2019) (finding the fact that prior and current alleged conspiracy involved robberies of homes "did not reveal a continuing or connected scheme linking the prior alleged conspiracies to the instant conspiracy") (internal quotations omitted).

442. *United States v. Trenkler*, 61 F.3d 45, 53 (1st Cir. 1995) ("[T]he two acts [must be] sufficiently idiosyncratic to support the inference that they are the handiwork of the same individual.").

443. FED. R. EVID. 413(a) ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault."). See generally Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961 (1998) (examining the political history of the rule change).

because of his character and propensity to commit crime.<sup>444</sup> In fact, sexual assaults are less likely to be repeat offenses than other crimes, and there has never been such a general exemption for even high recidivist crimes like burglary.<sup>445</sup> In addition, jurors are more likely to be prejudiced by past rape allegations than other bad acts.<sup>446</sup> Because past sexual assault evidence has low evidentiary value and high prejudice potential, the legal community nearly uniformly objected to the proposed rule. The Congressional Advisory Committee on Evidence Rules issued a formal report opposing the rule, which was unanimous save for the prosecutor's representative.<sup>447</sup>

But sex exceptionalism and predator panic ruled, and the measure passed.<sup>448</sup> After the change, defendants' prior crimes generally remained inadmissible to prove propensity, but juries were invited to adjudicate sex-crime defendants' guilt based on unproven allegations of past misconduct. Notably, this was a *federal* rule change, one that was never mirrored by New York law, which governed Weinstein's case, or Pennsylvania law, which governed Cosby's case.<sup>449</sup> Instead, those jurisdictions retained the general common scheme and modus operandi exceptions.<sup>450</sup> Thus, to admit the parade of prior bad acts witness in these high profile cases, the prosecutors urged an expansive reading of those exceptions and forged into law a logic that would negatively affect all defendants, not just sex-crime defendants.<sup>451</sup>

Prosecutors in both cases argued that the very elements of the charged crimes, in some combination with surrounding circumstances, *were* signatures. Cosby, for example, faced charges of sexual assault via administering incapacitating substances.<sup>452</sup> The prosecutor asserted that the crime itself—administering drugs for sex—was a signature mode and that several of them over time were

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444. See Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 567 (1997); Ellis, *supra* note 443, at 980–81.

445. Baker, *supra* note 444, at 578–79 (discussing recidivism statistics).

446. *Id.* at 567, 580–81.

447. JUD. CONF. OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 159 F.R.D. 51, 52 (1995); Ellis, *supra* note 443, at 971; see also Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U.L. REV. 127, 142 n.59 (2001) (“Certain public interest groups, such as the National Organization for Women and the American Civil Liberties Union echoed these sentiments, as did many legal scholars.”).

448. Ellis, *supra* note 443, at 972.

449. In some states, legislatures adopted the federal approach, but the supreme courts found the approach unconstitutional under state law. *State v. Cox*, 781 N.W.2d 757, 772 (Iowa 2010); *State v. Ellison*, 239 S.W.3d 603, 608 (Mo. 2007), superseded by constitutional amendment, MO. CONST. art. 1, § 18(c), as recognized in *State v. Williams*, 548 S.W.3d 275, 280 (Mo. 2018); *State v. Gresham*, 269 P.3d 207, 219–20 (Wash. 2012).

450. See *People v. Molineux*, 61 N.E. 286, 299 (N.Y. 1901) (establishing common scheme in New York and holding that the crimes must be connected “for the accomplishment of a common purpose,” and that “[t]his connection must clearly appear from the evidence,” or the evidence must be because the “minds of the jurors must not be poisoned and prejudiced”); see also N.Y. R. EVID. 4.28; PA. R. EVID. 404(b).

451. See generally C. Rauch Wise, *Roland B. Molineux and His Illegitimate Offspring: The History and Mystery of 404(b)*, CHAMPION, (2014) (critiquing expansive readings of *Molineux*).

452. *Commonwealth v. Cosby*, 224 A.3d 372, 401 (Pa. Super. Ct. 2019), vacated on other grounds, 252 A.3d 1092 (Pa. 2021).

common schemes.<sup>453</sup> The trial judge allowed five women to testify about their decades-old experiences with Cosby, a move that was upheld by the Superior Court of Pennsylvania.<sup>454</sup> Civil libertarians worried that the prior bad acts evidence hindered, not furthered, the jury's search for truth. Evidence expert Aviva Orenstein remarked, "[e]ven if [Cosby's attorneys] were able to discredit each individual woman, at a certain point, the jury is going to think, where there's smoke, there's fire."<sup>455</sup> Indeed, prosecutors' claims that the crime is itself a signature or a scheme (*i.e.*, sex + assault is the common scheme/modus operandi) make the exception to swallow the rule.<sup>456</sup> What good is a ban on prior burglary evidence when "robbing an unoccupied house at night" is a modus operandi?<sup>457</sup> What good is a ban on prior shoplifting evidence when the "lifting from shops" is the common scheme?<sup>458</sup>

It should come as no surprise that prosecutors often seek the advantage of admitting prior bad acts evidence in all kinds of cases, frequently advocating for broad interpretations of modus operandi and common scheme.<sup>459</sup> The #MeToo-driven evidentiary reforms in New York and Pennsylvania make it easier to convict defendants of all kinds on their pasts rather than evidence of the present offense.<sup>460</sup> The more admissible prior bad acts evidence, the less defendants with records enjoy the presumption of innocence. It is well documented that racially disparate policing and prosecution saddles Black defendants with lengthier arrest and conviction records than their white counterparts.<sup>461</sup> In turn, there is a pattern where racial disparities in arrests create racial disparities in convictions, which together create racial disparities in criminal records. Narrowing the bad acts prohibition gives prosecutors a great advantage when defendants have records, thereby creating even more racial disparity.<sup>462</sup>

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453. *Id.* at 397–98.

454. *Id.* at 397–98, 406.

455. Joseph Ax, *#MeToo Casts Long Shadow over Cosby's Sexual Assault Retrial*, REUTERS: ENT. NEWS (Apr. 8, 2018, 7:02 AM), <https://www.reuters.com/article/us-people-cosby/metoo-casts-long-shadow-over-cosby-sexual-assault-retrial-idUSKBN1HF0FG> [<https://perma.cc/BW22-EDJS>].

456. *Cosby*, 224 A.3d at 399 (stating that a common scheme is present when the defendant "engaged in a pattern of non-consensual sexual intercourse with acquaintances who were in an unconscious or diminished state").

457. *See Pena v. State*, 867 S.W.2d 97, 99 (Tex. App. 1993) (finding a modus operandi between prior and current burglary because "[i]n each instance, the burglar parked close to the front of the houses of elderly individuals, entered through a window at the back of the house, and stole televisions and jewelry").

458. *Buell v. People*, 439 P.3d 857, 861 (Colo. 2019) (finding prior shoplifting of jewelry at Sears relevant to shoplifting of steaks at Safeway because defendant "stole merchandise from two retail stores in the same city, in incidents occurring within two and one-half months of one another, by hiding the merchandise in his clothing").

459. *See Wise*, *supra* note 451, at 31–34; *State v. Martin*, 556 S.E.2d 706, 712 (S.C. Ct. App. 2001) ("In the instant case, we find evidence of Martin's marijuana use was logically relevant and admissible, not to impugn his character, but rather to establish his motive, as well as his intent for possession marijuana.>").

460. Deborah Tuerkheimer, *Opinion, #MeToo Comes to the Cosby Courtroom*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/opinion/metoo-bill-cosby.html> [<https://perma.cc/V3N2-L5ZS>].

461. Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 2–3 (2016).

462. *Id.*

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C. *Expansions of Substantive Rape Law*

1. *Affirmative Consent*

The #MeToo movement provided the impetus for state legislatures to adopt rape law reforms that anti-rape activists had advocated for decades but mostly went unadopted because of their controversial nature. One of the most well-known is the affirmative consent standard. Affirmative consent reform significantly broadens the definition of rape and sexual assault offenses that carry serious prison sentences.<sup>463</sup> Instead of defining rape as sexual intercourse compelled by force or against the victim's will, affirmative consent reforms define rape as sexual intercourse in the absence of an "affirmative" expression of consent.<sup>464</sup> Sometimes shorthanded as the "yes means yes" rule, the standard requires not just consensual sex but that the parties engage in some sufficient *performance* of consent.<sup>465</sup> In the absence of this performance, sexual intercourse is criminal rape, regardless of the state of mind of *either* the victim or the defendant.

Scholarly debate on affirmative consent abounds. In my prior article, *Consent Confusion*, I have categorized the various arguments for and against affirmative consent in detail.<sup>466</sup> I will not repeat that debate here. But taking seriously the "ethic of responsibility" and "politics of accountability," we should consider how these new affirmative consent rules are, in fact, operating. Who are the people turning out to be the "winners and losers" of the regime? Critics of affirmative consent argue, and indeed some proponents admit, that it is a deliberately overbroad standard constructed to create cultural transformation and aid prosecutors in achieving convictions. The problem, critics note, is that the standard outlaws a lot of "ordinary" sex.<sup>467</sup> They explain that many, perhaps most, people use subtle and nonverbal signals rather than clear "affirmative" expressions to communicate consent to sex, and reform makes all those people felons.<sup>468</sup>

The most popular response to this worry from reformers is distributional: affirmative consent does not in fact operate this way because prosecutors use their newfound power judiciously.<sup>469</sup> According to advocates, police and prosecutors do not pursue cases of questionably consensual sex just because neither party said "yes." In fact, they maintain, prosecutors do not pursue "miscommunication" cases at all. Thus, affirmative consent laws end up punishing defendants whose conduct constitutes rape even under traditional standards.<sup>470</sup>

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463. See, e.g., H.B. 32d Leg. (Alaska 2022) (defining consent as "a freely given, reversible agreement specific to the conduct at issue"); 13 VT. STAT. ANN. tit. 13 § 3251(3) (2021) (defining consent as "the affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time"); S.B. 5965, 2015–2016 Reg. Sess. (N.Y. 2015) (defining affirmative consent for colleges and universities as "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity").

464. See Gruber, *Consent Confusion*, *supra* note 11, at 433.

465. Halley, *supra* note 207, at 110–12; see also Gruber, *Consent Confusion*, *supra* note 11, at 433.

466. See Gruber, *Consent Confusion*, *supra* note 11, at 419–20.

467. See *id.* at 416.

468. *Id.* at 415–23 (citing studies on communication).

469. See *id.* at 423–24 (explaining that affirmative consent does not accurately reflect consent).

470. See Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 444, 468 (2016).

As I explain in *Consent Confusion*, this argument is strange because it justifies affirmative consent laws on the ground that they will *not* be followed. And it seems to conflict with the argument that the reform increases reporting and controls recalcitrant police and prosecutors. To be sure, evidence shows that even in cases of violent forcible rape, victims often forego reporting to police because of structural barriers, self-blame, and hesitancy to contact the police, reluctance to be involved in criminal processes, not because laws against forcible rape are insufficiently tough. An affirmative consent standard would do nothing to incentivize these victims whose rapes satisfy the elements of nonreform laws. By contrast, in miscommunication cases, many victims fail to report because they do think what happened was “rape.”<sup>471</sup> Affirmative consent laws expressly tell victims in such miscommunication scenarios—and the police and prosecutors on their cases—that sex without a clear expression of consent *is* serious rape. For some reformers, increasing the reporting and prosecution of questionably consensual scenarios is the goal. But this position contradicts the thesis that affirmative consent will *not* affect the prosecution of miscommunication cases.<sup>472</sup>

In support of that thesis, Deborah Tuerkheimer canvassed published appellate cases and found that the term “affirmative consent” cropped up, not in ambiguous communication situations, but in cases involving force, intoxication, and unconsciousness.<sup>473</sup> This suggests that despite reform, prosecutors decided to pursue cases that met nonreform standards. One must, however, exercise caution in drawing conclusions from the fact that the few appeals all involved traditional rape scenarios. We simply do not have any evidence on how often prosecutors, contravening the affirmative-consent laws, decline to pursue rape complaints where there might have been actual consent, but the affirmative expression (the “yes” or equivalent) is lacking.<sup>474</sup>

It is difficult to accept the contention that prosecutors will invariably use their affirmative-consent discretion in the “best” way. Reformers say that prosecutors will use affirmative consent only when they are convinced the defendant committed traditional rape but lack sufficient proof of force or nonconsent. Even this use is not immune from civil libertarian reservation.<sup>475</sup> As with crimes like “possession of burglary tools,” we might ask whether there should be make-up offenses that broadly punish ordinary behavior simply to relieve prosecutors of the burden to prove every element of an actual crime. Such broad criminal laws

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471. Gruber, *Consent Confusion*, *supra* note 11, at 454.

472. Cf. Ashe Schow, *Student Newspaper Just Fine with False Accusations*, WASH. EXAM’R (Oct. 22, 2015, 1:59 PM), <http://www.washingtonexaminer.com/student-newspaper-just-fine-with-false-accusations/article/2574703> [<https://perma.cc/QSE9-P258>] (discussing student newspaper’s claim that false accusation is a justified cost of increased reporting).

473. Tuerkheimer, *supra* note 470, at 444–51. Tuerkheimer included all jurisdictions whose rape statutes plausibly required performative consent. *Id.*

474. See Beatrice Diehl, Note, *Affirmative Consent in Sexual Assault: Prosecutors’ Duty*, 28 GEO. J. LEGAL ETHICS 503, 507 (2015) (prosecutors have a duty to strictly enforce affirmative consent to educate an “unaware” society about “acceptable sexual behavior”).

475. David P. Bryden, *Reason and Guesswork in the Definition of Rape*, 3 BUFF. CRIM. L. REV. 585, 591 (2000) (noting “danger[]” that affirmative consent will lower the burden of proof in serious cases).

are enormously effective at inducing pleas—regardless of guilt—and these pleas contribute significantly to mass incarceration.<sup>476</sup>

In any case, affirmative consent proponents place a lot of faith in prosecutorial discretion, which according to a plethora of evidence, is infested with racial bias, and for a crime whose very meaning has been *defined* by race.<sup>477</sup> Likely, prosecutors invoke the affirmative-consent option when they instinctively view the defendant as “a bad guy” and the victim as a credible “good girl” or when the victim is particularly vehement. These invocations might overlap with the type of cases reformers think should be pursued, but they might not. Prosecutors’ instincts about defendants’ sexual danger may be influenced more by racial and socioeconomic characteristics than by the nature of the event.<sup>478</sup> Similarly, assessments of complainants’ true victimhood may involve race, class, and gender stereotyping. Moreover, the most vehement victims can also be the most biased and unbelievable.<sup>479</sup>

Affirmative consent proponents have faith that the standard is leading to prosecutions of real rapists and changing culture without punishing innocents and disproportionately burdening the marginalized.<sup>480</sup> But “faith” is the correct word because there is no reason to believe this is happening. Indeed, if prosecutorial discretion is the sole mechanism that transforms an overbroad reform into a measured, nonracist tool of fair judicial administration, there is ample reason to worry.<sup>481</sup>

## 2. *Intoxication*

Another controversial expansion of rape law involves intoxicated sex. States typically criminalize sex with “incapacitated,” “unconscious,” and “physically helpless” people as felony sexual assault.<sup>482</sup> Consequently, if someone is incapacitated to the point of passing out, having sex with that person is unquestionably a crime. The difficulty arises, however, when people who have sex are highly intoxicated but still conscious. Is every very drunk person “incapacitated” or “physically helpless,” such that sex with them is a rape? If the answer is “no,” there could be a situation where a person imposes sex on a victim who is passing

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476. See, e.g., Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/5653-QQXR>].

477. See ESTELLE B. FREEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION* 89–103 (2013).

478. See Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 360 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1815, 1818–20 (1998) (both discussing race and prosecutorial discretion in capital punishment); see also Bryden, *supra* note 475, at 591 (postulating that affirmative consent might lead to discriminatory enforcement).

479. See Henderson, *supra* note 121, at 584 (“‘Victims’ are ‘blameless,’ innocent, usually attractive, middle class, and white.”).

480. See Gina Lepore, *Affirmative Consent: Shifting the Culture*, ETR (July 20, 2015), <https://www.etr.org/blog/my-take-affirmative/> [<https://perma.cc/2A9A-YMTZ>].

481. But see Diehl, *supra* note 474, at 507 (urging prosecutors to use affirmative consent to prosecute ambiguous cases).

482. See *supra* note 473 and accompanying text.

out, but because the victim is not fully unconscious, it is not sexual assault. If the answer is “yes,” the rule renders intoxicated sex, a very common and often pleasurable occurrence, a felony.<sup>483</sup> Prior to #MeToo, courts generally handled the intoxication question on a case-by-case basis, examining the level of intoxication to determine if the person was in fact incapacitated or helpless.<sup>484</sup> Even if a person’s level of intoxication did not reach the threshold for incapacity, a defendant who imposed sex on that person could still be prosecuted under force and non-consent rules.<sup>485</sup>

But then came #MeToo. Announcing a broad expansion of New York’s rape laws in 2019 to cover incapacitated sex, then-Governor Cuomo asserted that the measure was merely closing “[a] loophole” that had long “allow[ed] rapists to walk free.”<sup>486</sup> “Our laws must protect the people of this state,” Cuomo insisted, “not condone rape as a punishment for consuming alcohol.”<sup>487</sup> Cuomo made it sound as if the New York Penal Code provided a defense to forcible rape whenever the victim is voluntarily intoxicated. But the Code, like all codes of the time, pretty much said the opposite: if a person is intoxicated to the point of physical inability, *any* sex is rape; no additional finding of force or nonconsent is required.<sup>488</sup> New York law *already* covered offenders who imposed sex on people intoxicated to the point of helplessness.<sup>489</sup> Still, Time’s Up immediately released a congratulatory statement, “TIME’S UP commends Governor Andrew Cuomo for his leadership in proposing to close the ‘rape intoxication loophole,’” which it further characterized as “[a] legal technicality [that] has shielded sexual abusers from accountability and hindered sexual abuse survivors from obtaining the justice they deserve.”<sup>490</sup>

At the time of Cuomo’s announcement, New York prohibited sex with a person who is “physically helpless,” meaning either “unconscious” or “physically

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483. Halley, *supra* note 207, at 113–14; *see also* Aya Gruber, *Making Drunk Sex a Crime: Why a New Push to ‘Close a Loophole’ Would Actually Establish a Troubling New Legal Regime*, N.Y. DAILY NEWS (Jan. 12, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-drunk-sex-is-not-a-crime-20200112-lbc3t7ogtfcoulou53y4utal2ou-story.html> [<https://perma.cc/FWZ2-FJTP>].

484. *See, e.g., infra* note 501 and accompanying text.

485. *See* State v. Moorman, 358 S.E.2d 502, 506 (1987) (“In the case of a sleeping, or similarly incapacitated victim, it makes no difference whether the indictment alleges that the vaginal intercourse was by force and against the victim’s will or whether it alleges merely the vaginal intercourse with an incapacitated victim.”); State v. Bass, 223 So. 3d 1242, 1246 (La. Ct. App. 2017) (evidence of intoxication supported conviction for forcible rape).

486. *See* Chris Glorioso, *Gov. Cuomo Will Make Closing Drunk Rape Loophole a Pillar of State of State Address*, NBC N.Y., <https://www.nbcnewyork.com/investigations/gov-cuomo-will-make-closing-drunk-rape-loophole-a-pillar-of-state-of-state-address/2243552/> (Dec. 17, 2019, 9:56 PM) [<https://perma.cc/9XHY-JDYT>].

487. *Id.*

488. *See* S.B. 6679, 2019–20 Reg. Sess. (N.Y. 2019).

489. *See* Alex Woodward, *New York to Close Rape Intoxication Loophole That Lets ‘Abusers Walk Free,’* INDEPENDENT (Dec. 17, 2019, 6:46 PM), <https://www.independent.co.uk/news/world/americas/rape-intoxication-loophole-new-york-drunk-alcohol-drugs-law-a9250551.html> [<https://perma.cc/ENN7-F2CE>].

490. *TIME’S UP Responds to Cuomo Bill to Close Rape Intoxicant Loophole*, TIME’S UP (Dec. 17, 2019), <https://timesupnow.org/newsroom/times-up-responds-to-cuomo-bill-to-close-rape-intoxicant-loophole/> [<https://perma.cc/P8LC-C69T>].

unable to communicate unwillingness to an act.”<sup>491</sup> New York courts had long interpreted the helplessness provision to encompass situations where the victim was voluntarily intoxicated.<sup>492</sup> Courts had upheld findings of physical helplessness in situations where the intoxicated victim was passing in and out of consciousness, where the victim testified she was highly intoxicated with little memory of events and “woke up” to the defendant having sex with her,<sup>493</sup> where the victim had a high blood alcohol level and testified to being “blurry” about what happened but was able to “resist defendant’s advances,”<sup>494</sup> and where the victim testified she “was so drunk [she] didn’t know what was going on.”<sup>495</sup> One court found sufficient evidence for the prosecution to proceed on a helplessness theory when the victim testified that “although he was aware of what was going on, he was very intoxicated and was unable to speak.”<sup>496</sup> In short, New York courts adhered to the principle that “the state of the victim’s physical helplessness at any given moment is largely a question of fact for the jury.”<sup>497</sup>

The question is why all the fanfare about closing a loophole that did not exist? Manhattan District Attorney Cyrus Vance Jr. spearheaded the loophole-closing initiative that was ultimately forged into law during an onslaught of #MeToo heat for his prior decision not to prosecute Weinstein.<sup>498</sup> Some argued that the initiative was part of his larger public relations campaign to deflect criticism and display his anti-rape bona fides in anticipation of a hotly contested primary race.<sup>499</sup> One of Vance’s primary opponents called the initiative “disingenuous.”<sup>500</sup> He remarked, “[i]t’s not a loophole; the rape statutes one and three definitely allows [sic] a prosecutor who wants to prosecute rape cases, to prosecute.”<sup>501</sup> Politics aside, New York was not the only state that created new intoxication rules, which appear to be yet another instance of #MeToo symbolic criminal law reform.<sup>502</sup> Activists and legislatures wanted to see clear language criminalizing sex with intoxicated people,

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491. *Sex Crimes: Definitions and Penalties New York: Rape in the First Degree*, RAINN, <https://apps.rainn.org/policy/policy-crime-definitions-export.cfm?state=New%20York&group=3> (Mar. 2020) [<https://perma.cc/EXT8-3JVU>].

492. *See, e.g., infra* notes 509–12 and accompanying text.

493. *People v. Bjork*, 963 N.Y.S.2d 472, 476 (N.Y. App. Div. 2013).

494. *People v. Cecunjanin*, 889 N.Y.S.2d 691, 694 (N.Y. App. Div. 2009) (“[T]he fact that the victim was able to resist defendant’s advancements at one point in time does not mean that she retained this ability throughout the entire incident.”).

495. *People v. Perkins*, 810 N.Y.S.2d 596, 598 (N.Y. App. Div. 2006).

496. *People v. Himmel*, 686 N.Y.S.2d 504, 506 (N.Y. App. Div. 1999).

497. *Cecunjanin*, 889 N.Y.S.2d at 694 (quoting *People v. Teicher*, 422 N.E.2d 506, 511 (N.Y. 1981)).

498. *See* Bernadette Hogan & Nolan Hicks, *Cuomo in Push to Close New York’s Drunk Rape Law Loophole*, N.Y. POST (Dec. 17, 2019, 9:02 AM), <https://nypost.com/2019/12/17/cuomo-in-push-to-close-new-yorks-drunk-rape-law-loophole/> [<https://perma.cc/4AZS-53YU>].

499. *Id.*

500. *See id.*

501. *Id.*

502. *See, e.g.,* IL Pub. Act 102-1096 (2022) (prohibiting sex when a person cannot give “knowing consent” because of intoxication); MINN. STAT. Ann. § 609.341 (2022) (prohibiting sex when “a person is under the influence of any substance or substances to a degree that renders them incapable of consenting or incapable of appreciating, understanding, or controlling the person’s conduct”); Guam Pub. Law 36-102 (2022).

even when incapacity, helplessness, force, and nonconsent provisions already covered objectionable conduct.<sup>503</sup>

But, as we have seen, symbolic law reforms have real effects. New York's revised rule criminalizes sex when the victim is intoxicated to a degree that renders such person "temporarily incapable of appraising or controlling his [or her] conduct."<sup>504</sup> While it is not entirely clear, one could argue that the provision applies to a larger group of intoxicated victims than the helplessness provision. The question is one of interpretation. "Temporarily incapable of appraising or controlling" one's conduct could mean being so intoxicated as to lose all cognitive ability or it could mean being drunk enough to make bad decisions.<sup>505</sup> Wherever that line is drawn, the point is that the reform may have substantively shifted the threshold of "how drunk is too drunk" with no debate.<sup>506</sup>

It is worth mentioning that New York, like most jurisdictions, does not allow defendants to defend against sexual assault by claiming that they, too, were intoxicated, even when they were *more* intoxicated than the victim.<sup>507</sup> Consequently, if two people have sex while intoxicated to the level of the "incapable of appraising" standard, they are *both* rapists and victims. Again, we can only speculate at this point whether the loophole-closing language makes a difference in the way intoxication cases are prosecuted and adjudicated. It may very well be mere symbolism, given that a loophole never existed. Nevertheless, the language arguably broadens the prohibition against intoxicated sex, and criminal legal actors may be adapting accordingly. As with affirmative consent, we should think about who will be prosecuted for intoxicated sex under the new, broader, prohibitions, and whether they are the people we imagine to be unjustly excluded by the old definition.

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503. In Minnesota, reform followed a Supreme Court ruling that the incapacity provision, which required the defendant to administer intoxicants, did not cover the victims' voluntary intoxication. *State v. Khalil*, 956 N.W.2d 627, 642 (Minn. 2021). Critics simply ignored that the court indicated that the jury *could* have legitimately found "physical helplessness" based on the level of the victims' intoxication, *id.* at 643, and that the prosecution could have brought charges for nonconsensual sexual contact. *Id.* at 629. Also of note, the prosecution did charge Khalil with forcible rape, but the jury acquitted him of that crime. *Id.* at 643 n.2. The loophole argument commonly asserts that *victims* who are too incapacitated to consent suffer the same harm whether or not voluntarily intoxicated. See, e.g., *New Minnesota Law Is 'Significant Victory' for Survivors of Sexual Assaults While Intoxicated*, CBS NEWS (Sept. 14, 2021, 10:54 PM), <https://www.cbsnews.com/minnesota/news/new-minnesota-law-is-significant-victory-for-survivors-of-sexual-assaults-while-intoxicated> [https://perma.cc/S4B5-22P4]. Even if this is true, criminal liability is about the *defendant's* culpability, and as such, we might question whether a person who clandestinely administers drugs for the purpose of compelling sex has the same culpability as one who has sex with a highly intoxicated person.

504. N.Y. Penal Law § 130.00, 130.05 (McKinney).

505. *Id.*

506. Illinois's new provision that criminalizes sex when intoxication undermines "knowing" consent is certainly broader than physical helplessness. See IL Pub. Act 102-1096, *supra* note 502.

507. N.Y. Penal Law § 130.10.

*D. New Offenses and Other Carceral Reforms*

#MeToo fueled a slew of new legislative enactments that activists had been pushing well before the Weinstein case broke. The newly minted criminal laws, of which many are serious felonies, cover “human trafficking” offenses,<sup>508</sup> including the controversial Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”),<sup>509</sup> nonconsensual condom removal,<sup>510</sup> and technology-related crimes like upskirting, cyberstalking, online harassment, and nonconsensual intimate image distribution.<sup>511</sup> A detailed analysis of each of these measures is well beyond the scope of the Article, but it bears repeating that every single one of them serves to bolster and legitimize a penal state that has garnered worldwide condemnation, and each operates in a system infested with racial bias, brutal hierarchy, and hypermasculine norms. In addition, as I will sketch below, on the surface of the proposals, one can detect quite predictable distributional costs to marginalized people, including women.

Take, for example, the FOSTA legislation that easily passed with overwhelming bipartisan support in early 2018 at the height of #MeToo.<sup>512</sup> Anti-trafficking groups had long sought legislation to shut down the infamous “Backpage” website that served as a broad platform to connect commercial sex sellers with buyers.<sup>513</sup> In December 2017, celebrities including Amy Schumer and Seth Meyers released a pro-FOSTA public service announcement with more than a little QAnon-ness, warning that rapists can “go online and buy a child for sex . . . as easy as ordering a pizza,” that this happens “on the hour, every hour, 24-7, 24-7, 24-7” in “every town and every city . . . even *your* city,” and that FOSTA was the key to stopping this “barbaric” and “outrageous” epidemic.<sup>514</sup> These sentiments were echoed repeatedly on the congressional floor.<sup>515</sup>

FOSTA made it a ten-year felony for a person to “own[], manage[], or operate[] an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person.”<sup>516</sup> That was it. There was no requirement that

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508. See, e.g., Legis. Serv. Act 2022-144 (S.B. 118), 206th Gen. Assemb., Reg. Sess. (Pa. 2022) (adding trafficking offenses to registry); S.B. 540, 2019 Leg. (Fla. 2019) (“Human Trafficking” bill creating a registry for those who solicit prostitution); H.B. 1540, 2021–2022 Leg., 87th Sess. (Tex. 2021) (“Human Trafficking” bill making solicitation of prostitution a felony); S.B. 5988A, 2017–2018 Reg. Sess. (N.Y. 2017) (creating crime of “sex trafficking of a child” defined as “intentionally advanc[ing] or profit[ing] from prostitution of another where such person is a child less than eighteen years old”).

509. 18 U.S.C. § 2421A.

510. See, e.g., Assemb. B. 453, 2021–2022 Leg. (Cal. 2021); Stealthing Act of 2022, H.R. 7920, 117th Cong. (2022).

511. See discussion *infra* Section V.D.

512. 18 U.S.C. § 2421A.

513. The government ended up seizing Backpage *before* passage of FOSTA and charged its purveyors under existing racketeering and money laundering statutes. See generally U.S. GOV’T ACCOUNTABILITY OFF., SEX TRAFFICKING: ONLINE PLATFORMS AND FEDERAL PROSECUTIONS (2021), <https://www.gao.gov/assets/gao-21-385.pdf> [<https://perma.cc/A5AH-RE2M>] [hereinafter GAO REPORT].

514. 50EGGS, *PSA Featuring Seth Meyers, Amy Schumer, John Charles, Tony Shalhoub and Others—FOSTA-SESTA*, VIMEO, <https://vimeo.com/249095210> (last visited July 8, 2023) [<https://perma.cc/52US-8LQ2>].

515. See, e.g., H.R. Rep. No. 115-572, at 5 (2018).

516. 18 U.S.C. § 2421A(a).

the prostitution involve child slavery or indeed any force, coercion, nonconsent, fraud, etc. Indeed, the measure did not require *trafficking*. Promoting “prostitution” was the targeted behavior. If the computer service involved five or more sex workers, the penalty became twenty-five years.<sup>517</sup>

FOSTA was a study in swift deterrence. It immediately shut down platforms that advertised sex work and deterred other providers who were unwilling to go deep underground or overseas from hosting commercial sex advertisements.<sup>518</sup> Providers accordingly ramped up policing of their sites to cleanse them of commercial sex.<sup>519</sup> As a result, no one has, in fact, been convicted under FOSTA.<sup>520</sup> What the legislation did not deter was harm to children and vulnerable women.<sup>521</sup> It was never a tenable thesis that large-scale child sex trafficking, a highly criminalized and investigated enterprise, would mostly happen in the open on legitimate internet platforms and be as easy as ordering pizza. Only high levels of security and secrecy can sustain such an operation, especially if it has been ongoing. And if a Backpage-type site was a part of such operations, shutting it down closed off investigators’ avenue into that underground world.<sup>522</sup>

FOSTA mostly affected adult sex workers, and not for the better. Sex workers’ organizations universally condemned the measure for putting people in greater danger and further entrenching their vulnerability and marginalization.<sup>523</sup> In 2020, a sex-worker collective released the report *Erased*, which relayed findings from a large-scale project surveying and interviewing sex workers, including individuals who identified as trafficked and coerced, about FOSTA’s effects on their lives.<sup>524</sup> The report’s conclusion did not mince words:

There is tremendous fear in the community as sex workers try to comply with and work around rules that aren’t always apparent, and rules that are often enforced differently for different people. People are losing access to work and are less able to support themselves and their families. Increased financial insecurity, increased exposure to violence, lack of access to community resources, inability to find work, and increased feelings of fear and anxiety are a few very visible effects of FOSTA-SESTA.<sup>525</sup>

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517. *Id.* § 2421A(b).

518. *See* GAO REPORT, *supra* note 513, at 14–15.

519. There has been one prosecution under FOSTA, *United States v. Martono*, No. 20-CR-00274-N-1, 2021 WL 39584 (N.D. Tex. Jan. 5, 2021), involving the operator of the website *cityxguide.com*, which is currently pending.

520. *Id.*

521. *See* GAO REPORT, *supra* note 513, at 25.

522. Emily Morgan, Note, *On FOSTA and the Failures of Punitive Speech Restrictions*, 115 NW. U. L. REV. 503, 528–29 (2020).

523. *Id.*

524. *See generally* DANIELLE BLUNT & ARIEL WOLF, HACKING//HUSTLING, ERASED: THE IMPACT OF FOSTA-SESTA (2020), <https://hackinghustling.org/wp-content/uploads/2020/01/HackingHustling-Erased.pdf> [<https://perma.cc/72XX-FVM3>].

525. *Id.* at 43. SESTA (Stop Enabling Sex Traffickers Act) was the name of a companion Senate bill, the provisions for which were folded into FOSTA. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, 132 Stat. 1243 (codified as amended in scattered sections of 18 and 47 U.S.C.) (2018).

In New York City, FOSTA cut off the internet as a conduit for sex workers to connect with clients just as the NYPD ramped up arrests of people for “loitering for the purposes of prostitution.”<sup>526</sup> Between January and October 2018, arrests of this type increased 180% from the previous year.<sup>527</sup> At the time of the loitering arrest surge, the NYPD was already battling a class-action lawsuit filed by the Legal Aid Society that alleged, among other things, that between 2012 and 2015, the police arrested women, 85% of whom were Black or Latina, based on their appearance, including clothing style and transgender looks.<sup>528</sup> According to the suit, the police, by their own account, arrested plaintiff Tiffaney Grissom for hanging out at a place “frequented by people engaged in prostitution” and wearing “tight short shorts [and a] tight tank top.”<sup>529</sup> Failing to accept the gender on Ms. Grissom’s identification, arresting officer Bryan Pocalyko “repeatedly probed Ms. Grissom with questions relating to her gender and her sex organs.”<sup>530</sup> The complaint continues:

When Ms. Grissom answered Defendant Pocalyko’s questions by maintaining that she was a woman, Defendant Pocalyko unlawfully ordered Ms. Grissom to be strip-searched by a female police officer even though she was not suspected of possessing any drugs or contraband. The female officer took Ms. Grissom into a bathroom and ordered her to lift her shirt, shakeout her bra and pull her shorts down. This search was for the purpose of confirming whether or not she was female, as her identification indicated.<sup>531</sup>

Sex-work criminalization efforts, which have frequently united feminists and conservative moralists, have a long and ignoble history in the United States from late-nineteenth-century crusades against “yellow slavery” and “white slavery” to recent racialized anti-trafficking raids.<sup>532</sup> In the 1870s, amid fears of “yellow peril,” media, politicians, and citizens denounced immigrant Chinese women as innately inculcated to sexual slavery, carriers of “exotic” diseases, corruptors

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526. BLUNT & WOLF, *supra* note 524, at 2.

527. Emma Whitford, *There’s No Such Thing as a Low-Level Arrest When You’re Undocumented*, JEZEBEL (Dec. 19, 2018), <https://jezebel.com/theres-no-such-thing-as-a-low-level-arrest-when-youre-u-1831205673> [<https://perma.cc/W475-6WX2>]; Press Release, The Legal Aid Society & Cleary Gottlieb, The Legal Aid Society and Cleary Gottlieb Challenge the Constitutionality of New York’s Loitering for Prostitution Law (Sept. 30, 2016), <https://orgs.law.columbia.edu/otpoc/sites/default/files/content/LAS-Cleary-Gottlieb-Challenge-the-Constitutionality-of-New-Yorks-Loitering-for-Prostitution-Law-Press-Release-9.30.16.pdf> [<https://perma.cc/BNV6-MRX3>].

528. See The Legal Aid Society & Cleary Gottlieb, *supra* note 527, at 1.

529. Complaint at 49, *D.H. v. City of New York*, 309 F. Supp. 3d 52 (S.D.N.Y. 2018) (No. 16 Civ. 7698) (quoting arresting officer).

530. *Id.* at 48.

531. *Id.* The NYPD settled the lawsuit in 2019, and in 2021, the New York legislature repealed the loitering for prostitution law. Kate Mogulescu, *Your Cervix Is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk*, 74 U. MIAMI L. REV. CAVEAT 68, 78 (2020); Jimmy Vielkind, *New York Repeal of Anti-Prostitution Loitering Statute Is Approved*, WALL ST. J. (Feb 2, 2021, 6:56 PM), <https://www.wsj.com/articles/new-york-repeal-of-anti-prostitution-loitering-statute-passed-by-lawmakers-11612303523> [<https://perma.cc/A6Z6-BVPT>].

532. GRUBER, *supra* note 10, at 28–32.

of white men, and producers of “degenerate hybrids.”<sup>533</sup> These sentiments, along with feminist objections to “yellow slavery,” spurred numerous anti-immigration efforts that culminated in the first federal immigration law, the 1875 Page Act, which forbid “the importation . . . of women for the purposes of prostitution.”<sup>534</sup> Sponsor Horace Page lamented that America was China’s “cesspool” because it sent “the lowest and most depraved of her subjects” and vowed to “send the brazen harlot who openly flaunts her wickedness in the faces of our wives and daughters back to her native country.”<sup>535</sup> Historian Eithne Luibhéid notes that enforcement “strategies, which were pioneered on Chinese women because of fears about their sexuality, gradually became extended to every immigrant who sought to enter America.”<sup>536</sup>

Fast forward to the #MeToo era. In early 2019, the press had a field day when Florida police arrested the billionaire owner of the New England Patriots, Robert Kraft, for receiving sexual services from two women at the Orchids of Asia Day Spa.<sup>537</sup> Detective Andrew Sharp became suspicious of Orchids after he read postings about the spa on [www.rubmaps.com](http://www.rubmaps.com).<sup>538</sup> Without probable cause, Sharp directed a health inspector to search the spa.<sup>539</sup> The inspector interviewed the women and took pictures of a refrigerator where the staff kept snacks.<sup>540</sup> Sharp regarded the fridge as smoking-gun evidence that women were enslaved and living in the spa.<sup>541</sup> He directed officers to pull over the men leaving Orchids for traffic infractions and question them.<sup>542</sup> After several men admitted to sexual activity like manual stimulation,<sup>543</sup> Sharp obtained a “sneak and peek” warrant for the spa.<sup>544</sup> The police faked a bomb scare so they could evacuate the spa and install video cameras inside.<sup>545</sup> For five days, officers monitored and recorded activities inside the spa in real-time.<sup>546</sup>

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533. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 693 n.330 (2005); REPORT OF THE JOINT SPECIAL COMMITTEE TO INVESTIGATE CHINESE IMMIGRATION, S. REP. 689, at 14–15, 651–52 (2d Sess. 1877).

534. Page Act, ch. 141, § 3, 18 Stat. 477 (1875) (repealed 1974).

535. 43 CONG. REC. app. 44 (1875).

536. EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 32 (2002).

537. See, e.g., Patricia Mazzei, Kevin Draper & Mark Leibovich, *Patriots Owner Robert Kraft Charged in Florida Prostitution Investigation*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/sports/robert-kraft-jupiter-orchids-arrest.html> [<https://perma.cc/XB7B-E8CZ>].

538. Complaint at 3, *Doe v. Town of Jupiter Police Department*, No. 9:19-cv-80513-DMM (S.D. Fla. 2019) (detailing these facts in a class action privacy suit by spa customers).

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.* at 4.

543. *Id.*

544. *Id.* at 5.

545. *Id.*

546. *Id.*; see also Terry Spencer, *Customers Videotaped at Orchids of Asia Spa File Class-Action Lawsuit*, CBS BOS. (Apr. 22, 2019, 3:20 PM), <https://www.cbsnews.com/boston/news/robert-kraft-new-england-patriots-customers-videotaped-jupiter-florida-orchids-asia-spa-file-class-action-lawsuit/> [<https://perma.cc/N9K3-MX26>].

The state charged twenty-five men with misdemeanor solicitation charges and promptly offered them no-jail-time pleas.<sup>547</sup> All those cases were eventually dropped.<sup>548</sup> Also arrested and charged were four women who worked at the spa: the owner, fifty-eight-year-old old grandmother Hua Zhang, the thirty-nine-year-old manager Lei Wang, forty-three-year-old Lei Chen, and fifty-eight-year-old Shen Mingbi, who gave Kraft the hand job and whose face was splashed across the news.<sup>549</sup> Announcing the charges in a televised press conference, State Attorney for Palm Beach Dave Aronberg stated that human trafficking is “modern day slavery” and “evil in our midst.”<sup>550</sup> “[T]he cold reality,” he lamented, is “that many prostitutes in cases like this [have been] lured into this country with promises of a better life.”<sup>551</sup> When pressed by the media, however, he admitted that the case did not involve trafficking.<sup>552</sup> An assistant state attorney later confirmed in court, “[t]here is no human trafficking that arises out of this investigation.”<sup>553</sup>

The four Orchids employees were hit with an array of felony and misdemeanor charges related to prostitution and profiteering.<sup>554</sup> The women faced a maximum of fifteen years for the felonies and up to a year for each of the misdemeanors (Zhang and Wang were charged with twenty-six).<sup>555</sup> Unable to post bail immediately, Wang spent six weeks in jail, where inmates asked if it was really her on TV.<sup>556</sup> All the women had various bank accounts and assets frozen for possible forfeiture.<sup>557</sup> Zhang’s lawyer, Tama Kudman, attributed her client’s

547. Ken Belson, *Robert Kraft and Others Ask to Have Evidence Kept Private in Florida Case*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/sports/robert-kraft-prostitution-charges.html> [https://perma.cc/8M3V-YGPJ]; see generally Daniel Moritz-Rabson, *Sex Worker Advocates Livid About ‘Pretext of Rescue’ After Authorities Arrest Women Related to Robert Kraft Investigation*, NEWSWEEK (Apr. 26, 2019, 5:36 PM), <https://www.newsweek.com/sex-workers-livid-arrests-linked-kraft-probe-1406814> [https://perma.cc/8USY-L9BS].

548. Matt Bonesteel, *Robert Kraft Dodged Charges from Prostitution Sting. The Orchids of Asia Employees Did Not*, WASH. POST (Dec. 3, 2020, 11:27 AM), <https://www.washingtonpost.com/sports/2020/12/03/robert-kraft-prostitution-sting/> [https://perma.cc/DS3R-ZQPZ].

549. Diana Moskovitz & Hallie Lieberman, *When the Robert Kraft Case Fell Apart, the Women Were Left to Pay the Price*, DEADSPIN (June 20, 2019, 11:57 AM), <https://deadspin.com/when-the-robert-kraft-case-fell-apart-the-women-were-1-1834857778> [https://perma.cc/T83P-LNF4].

550. Marc Freeman, *‘Bungled from the Beginning’: How Robert Kraft’s Sex Sting Was Marred by Cops’ Misssteps*, S. FLA. SUN SENTINEL (May 18, 2019, 11:31 AM), <https://www.sun-sentinel.com/local/palm-beach/fl-ne-cb-robert-kraft-spa-cases-failings-20190518-gqduneejvcq3lykburpemy35a-story.html> [https://perma.cc/C463-FJMS]; Palm Beach Post, *Video: State Attorney Filing Charges Against Robert Kraft and 24 Men in Jupiter Spa Investigation*, YOUTUBE (Feb. 25, 2019, 2:59 PM), <https://youtu.be/tISLgKHGIYI> [https://perma.cc/QDE9-BWLJ].

551. Palm Beach Post, *supra* note 550.

552. Ruth Brown, *Prosecutors Concede No Human Trafficking in Kraft Spa Case*, N.Y. POST (Apr. 12, 2019, 4:21 PM), <https://nypost.com/2019/04/12/prosecutors-concede-no-human-trafficking-in-kraft-spa-case/> [https://perma.cc/SMV7-KTWE].

553. *Id.* This did not stop the case from serving as the impetus for Florida “antitrafficking” legislation that included establishing a “John” registry. Lulu Ramadan, *New Florida Law Targets Sex Trade and Trafficking at Spas and Hotels*, DAILY COMMERCIAL (Aug. 14, 2019, 12:26 PM), <https://www.dailycommercial.com/story/news/state/2019/08/14/new-florida-law-targets-sex-trade-and-trafficking-at-spas-and-hotels/4468569007/> [https://perma.cc/N8YD-AGXT].

554. Moskovitz & Lieberman, *supra* note 549.

555. *Id.*

556. *Id.*

557. *Id.*

excessively harsh treatment to racial “stereotypes” of helpless trafficked Asian women, adding that Orchids employees, in fact, “were in their 30s and 40s” and “held multiple massage and cosmetology licenses.”<sup>558</sup> By December 2020, the men’s cases had been dismissed, and the Chinese women had pled guilty to an array of prostitution charges and been sentenced to time-served, probation, regular STD testing, and hefty \$5,000 fines (Shen Mingbi was also ordered to pay \$20,000 to the Jupiter police department). The discourse of saving victimized women from evil had dried up.<sup>559</sup> Prosecutor Aaronberg continued to defend the operation and women’s prosecution, but his tune had changed: “Orchids of Asia day spa was a notorious brothel in a family shopping center right next to a game room that attracted children.”<sup>560</sup>

The numerous new laws that target commercial sexual activity in the bid to stop the “epidemic” of sex trafficking all present the risks detailed in the discussion of FOSTA and Orchids.<sup>561</sup> These new anti-trafficking laws rode in on a wave of disgust spurred by spectacular #MeToo rhetoric that combined 1990s-style repulsion for monstrous predators with female-liberationist sentiments.<sup>562</sup> They adopt the zero-tolerance “new abolitionist” stance that it is better to use every available governmental tool to stamp out the sex-work industry than to consider larger distributional consequences and the voices of stakeholders, including sex workers and trafficked women.<sup>563</sup>

As for other new laws, feminist advocates have secured a slew of laws covering ostensibly new sexual misconduct (online and technology-aided offenses) and existing misconduct that drew new interest (stealthling, exposure).<sup>564</sup> States

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558. *Id.*

559. Luke Kenton, *Florida Masseur Charged in Massage Parlor Sting Involving Robert Kraft Is Ordered to Pay \$31,500*, DAILYMAIL.COM (Dec. 3, 2020, 1:41 PM), <https://www.dailymail.co.uk/news/article-9015135/Florida-masseur-charged-massage-parlor-sting-involving-Robert-Kraft-ordered-pay-31-500.html> [<https://perma.cc/KW94-U3UB>].

560. Tom Winter, *Robert Kraft Prostitution Charges Dropped by Florida Prosecutors*, NBC NEWS (Sept. 24, 2020, 12:08 PM), <https://www.nbcnews.com/news/crime-courts/robert-kraft-prostitution-charges-dropped-florida-prosecutors-n1240964> [<https://perma.cc/9SUS-3XLN>].

561. *See supra* note 508 and accompanying text (listing laws).

562. *See supra* notes 512–31 and accompanying text (discussing rhetoric around FOSTA).

563. Bernstein, *supra* note 34, at 144; *see supra* notes 523–31 and accompanying text (discussing women who identified as trafficked opposing FOSTA); Alexander Cheves, *Congress Is Preparing to Harm Queer Sex Workers Like Me*, ADVOCATE (Mar. 6, 2018, 9:34 AM), <https://www.advocate.com/commentary/2018/3/06/congress-preparing-harm-queer-sex-workers-me> [<https://perma.cc/RD22-3K5F>] (“I don’t see the movement advocating for sex workers and porn performers. If anything, I see an aggressive movement against us—one that worryingly crosses party lines.”).

564. *See* *Stealthling Act of 2022*, *supra* note 510. States have increased penalties and arrests for existing indecent exposure statutes, *see*, for example, 2019 Alaska Sess. Laws ch. 4, § 11.41.458 (making exposed masturbation in the presence of a person a felony offense); FLA. STAT. § 800.03 (2020) (elevating repeat indecent exposure offenses to felonies and authorizing warrantless arrests for officers with probable cause to believe that indecent exposure has occurred); and created new crimes for video voyeurism, *see* H.B. 222 Act no. 186, 2021 Reg. Sess. (La. 2021) (creating a two-year minimum sentence for video voyeurism involving a child under seventeen); S.B. 26, 2019 Reg. Sess. (Ala. 2019) (creating video voyeurism as a misdemeanor offense for adult subjects and a felony offense for subjects under eighteen).

passed at a rapid pace laws against, among other things, “upskirting,”<sup>565</sup> sharing unwanted intimate photos of oneself,<sup>566</sup> and distributing intimate photos of others.<sup>567</sup> Some of these laws are drawn very broadly and give the state the authority to punish, alongside clearly wrongful actors (unrepentant revenge pornographers who seek to profit off of women’s shame and misery), less egregious actors (those who snap photos jokingly; teens who show friends “sexts”).<sup>568</sup> But proponents have rarely grappled with how these laws and the state penal power they create will be distributed.<sup>569</sup> For example, one might predict that increased penalties for lewdness and indecent exposure will have a particularly negative effect on sex workers and LGBTQ unhoused youth who, according to experts, suffer under these sexual disorder laws in a “unique and troubling fashion.”<sup>570</sup> Criminalizing unsolicited nude photographs portends to impact women whose sex-work businesses involve email advertising<sup>571</sup> and juveniles who frequently show “sexts” to their friends.<sup>572</sup> One might also consider whether police, who search

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565. See, e.g., S.B. 57, 2018 Reg. Sess. (Ala. 2018) (proposing a video voyeurism law to punish upskirting). Though this version of the bill died in the House, Alabama passed a video voyeurism law the following year. ALA. CODE § 13A-11-41 (2019). See also S.B. 331, 112th Gen. Assemb. (Tenn. 2021) (creating the crime of video voyeurism to punish upskirting); S.B. 521, Reg. Sess. (Penn. 2021) (proposing increased penalties for Pennsylvania’s upskirting laws).

566. S.B. 53 ch. 504, 2022 Reg. Sess. (Cal. 2022) (creating a civil cause of action against “cyber flashers” in California); H.B. 2789, 86th Legis. Gen. Assemb. (Tex. 2019) (criminalizing electronic transmission of unwanted sexual material in Texas); S.B. 493, 2022 Reg. Sess. (Va. 2022) (criminalizing “cyber flashers” and creating a civil cause of action); H.B. 296, 2021 Sess. (N.H. 2021) (a bill proposing criminalization of cyber flashing that has passed the New Hampshire Senate but has yet to be enacted).

567. Currently, forty-eight states have laws that prohibit such distribution in some form. Nicole Prebeck, *State Revenge Porn Laws*, FINDLAW (Dec. 8, 2022), <https://www.findlaw.com/criminal/criminal-charges/revenge-porn-laws-by-state.html> [<https://perma.cc/46RW-ZFNN>]; *Nonconsensual Pornography Laws*, CYBER C.R. INITIATIVE (2023), <https://cybercivilrights.org/nonconsensual-pornography-laws/> [<https://perma.cc/96NQ-MCZ2>]. Post-#MeToo laws have created new offenses and strengthened offenses in states and territories including California, Florida, Kentucky, New York, Virginia, Puerto Rico, South Dakota, Tennessee, Connecticut, Louisiana, Nebraska, Maine, and Missouri. There are many other new substantive offenses.

568. See Prebeck, *supra* note 567.

569. See Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), <https://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/> [<https://perma.cc/ED4U-3N NX>] (arguing that criminal laws are “redundant” because the open and notorious porn sites had already shut down and civil litigation was proving effective). One advocate for digital image distribution laws makes an argument similar to affirmative consent proponents’ that the law mostly won’t have severe carceral consequences. Mary Anne Franks, *“Revenge Porn” Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1302 (2017) (“Criminalization is not synonymous with incarceration, and incarceration is not synonymous with mandatory minimums or lengthy sentences.”).

570. Libby Adler, *Life at the Corner of Poverty and Sexual Abjection: Lewdness, Indecency, and LGBTQ Youth*, reprinted in RESEARCH HANDBOOK ON GENDER, SEXUALITY, AND LAW 84 (Chris Ashford ed., 2020).

571. Jennie Pearson, Andrea Krusi, Shira Goldenberg, Ranji Mangat & Sharnelle Jenkins-Thompson, *Impacts of Criminalization and Punitive Regulation of Online Sex Work and Pornography: The Need for Sex Workers’ Voices*, CTR. FOR GENDER & SEXUAL HEALTH EQUITY (Mar. 2021), <https://www.ourcommons.ca/Content/Committee/432/ETHI/Brief/BR11222725/br-external/Jointly3-e.pdf> [<https://perma.cc/S5PW-NGGD>].

572. There have been controversial arrests of such teens under strict child pornography laws that have produced public outcry. In some states, a teen who merely sends a nude photo to another teen may be arrested for child pornography. See Paul Woolverton, *Sexting Charges Dismissed for Fayetteville Teenager*, FAYETTEVILLE OBS. (July 7, 2016, 12:54 PM), <https://www.fayobserver.com/story/news/crime/2016/07/07/sexting-charges-dismissed-for-fayetteville/22320237007/> [<https://perma.cc/55DW-RWM7>] (explaining the charges against two

drug and other arrestees' cellphones (public defenders call this a "routine phone dump") look for evidence that the arrestee showed a nude of his girlfriend to a friend or sent a nude of himself, enabling prosecutors to add a dreaded sex-crime charge and induce pleas.<sup>573</sup>

Of course, the more narrowly drawn these new crimes are, the less the chance they will be distributed to the wrong people and produce unintended consequences. And, indeed, many existing laws are narrow, for example, some of the "revenge porn" laws require that the person who distributes intimate images have a specific intent to harass or cause distress.<sup>574</sup> Nevertheless, when it comes to image distribution, feminist advocates have championed extremely broad prohibitions.<sup>575</sup> Professor Mary Anne Franks, a driving force behind laws criminalizing intimate image distribution, offers a "model" law that requires no such intent to harm. It makes it a crime to "disclose an image of another, identifiable person whose intimate parts [naked genitals, pubic area, anus, or female postpubescent nipple] are exposed or who is engaged in a sexual act with knowledge of or reckless disregard for the fact that the person depicted did not consent to such disclosure."<sup>576</sup> This model forms the basis of the pending federal Stopping Harmful Image Exploitation and Limiting Distribution Act, which, if passed, would make any such disclosure, even to a single person, a five-year felony.<sup>577</sup>

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sixteen-year-olds who sent nude photos to each other). One might surmise that with the lesser penalties of the new laws, police and prosecutors have less to fear when arresting and prosecuting teens.

573. This does not come from my imagination but from public defenders who told me that this is, in fact, happening. There are several cases of cell phone dumps leading to the discovery of actionable child pornography. *See, e.g., State v. Arivett*, 483 P.3d 29, 31 (2021); *United States v. Deschambault*, No. 19-cr-00146-JAW-1, 2022 WL 2916052, at \*1 (D. Me. July 25, 2022); Franks, *supra* note 590, at 1303, dismisses the notion that such laws may have racially disparate effects because "the limited available information on perpetrator demographics suggests that nonconsensual pornography is largely committed by white, middle-class men."

574. *See, e.g., N.H. REV. STAT. ANN. § 644:9-a(II)* (2016) (requiring intent to harass, coerce, threaten, or intimidate); *VA. CODE ANN. § 18.2-386.2(A)* (2014) (requiring intent to coerce, harass, or intimidate); *CAL. PENAL CODE § 647(4)(A)* (West 2023) (requiring knowledge that distribution of sexually explicit images would cause emotional distress to the depicted).

575. In 2014, Arizona passed an extremely broad revenge porn law, which the ACLU and a coalition of press organizations quickly challenged in federal court. Sarah Cascone, *Artists and ACLU Fight Arizona's 'Revenge Porn' Law*, ARTNET NEWS (Sept. 24, 2014), <https://news.artnet.com/art-world/artists-and-aclu-fight-arizonas-revenge-porn-law-112038> [<https://perma.cc/V874-6SAZ>]; Tommy Collison, *Why It's So Hard to Make a Law Against Revenge Porn*, MEDIUM (Aug. 5, 2018), <https://medium.com/@tommycollison/why-its-so-hard-to-make-a-law-against-revenge-porn-d692713c7048> [<https://perma.cc/GYN3-A2SY>] ("Arizona passed a law in 2014 that criminalized the sharing of nude photos of another person—a law with implications far, far beyond revenge porn. The same law would have criminalized the Pulitzer-winning "Napalm Girl" photograph from the Vietnam War, photos of the abuse at Abu Ghraib, or images of mothers breastfeeding."). After some controversy, the law was later amended to require "intent to harm, harass, intimidate, threaten or coerce the depicted person." *ARIZ. REV. STAT. ANN. § 13-1425* (2022).

576. *CCRI Model State Law*, CYBER C.R. INITIATIVE (2021), <http://cybercivilrights.org/wp-content/uploads/2021/10/CCRI-Model-State-Law-for-NCP.pdf> [<https://perma.cc/SY7Y-QRJ2>] (emphasis added).

577. Stopping Harmful Image Exploitation and Limiting Distribution ("SHIELD") Act of 2019, H.R. 2896 § 2(a), 116th Cong. (1st Sess. 2019). Because of federal jurisdiction issues, the SHIELD Act requires that the defendant use "means or facility of interstate or foreign commerce." Several state laws are similarly broad. *See, e.g., IDAHO CODE ANN. § 18-6605* (West 2022) (covering distributors of sexually explicit images when they "knew or reasonably should have known that the person depicted in the image did not consent to the dissemination, publication or sale of the image"); *MINN. STAT. § 617.261* (2022) (criminalizing intentional distribution of

Now that the progressive critique of mass incarceration is familiar territory, feminist advocates of broadly drawn criminal laws cannot simply ignore it.<sup>578</sup> As a result, feminist advocates do mention the problems of mass incarceration, but they advance a simple argument to make all of them go away. The argument, which embodies an ideal of equitable distribution of carceral power, goes like this: the mass-incarceration system, broken, racist, and ineffective though it may be, subjects plenty of people, including low-level offenders, to punishment, and it is not going away any time soon.<sup>579</sup> Thus, failing to criminalize harms to women sends the message that women's interests are not important.<sup>580</sup> Feminist activists, instead of seizing the opportunity to address these newly identified or publicized transgressions in a new way, are content to characterize participating in the existing inequity-producing carceral system as an exercise of gender equality in itself.

This is a familiar argument. In the 1970s, battered women's activists, many of whom were vocal critics of policing and had been subjected to state violence as civil rights protesters, faced the question of whether to embrace the carceral system as a way to address domestic violence. Famed activist Susan Schechter explained, "while we wanted to activate police protection for the abused wherever possible, we were hesitant to support the extension of discretionary powers of arrest so open to abuse, particularly against Third World and low-income people."<sup>581</sup> Still, she ended up supporting the pro-arrest program on the simple ground that "criminal sanctions are one of the only tools [women] have to attempt to stop abuse."<sup>582</sup> After the domestic violence arrest program took off,

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sexually explicit images when the actor "knows or reasonably should know" that the depicted does not consent to such dissemination).

578. Citron & Franks, *supra* note 34, at 362 ("While we share general concerns about overcriminalization and overincarceration, rejecting the criminalization of serious harms is not the way to address those concerns.")

579. Similar to FOSTA, there is the question of whether image distribution and the like will just go further underground. *Supra* Section V.D; *see also* Victoria Law, *Will Revenge Porn Laws Actually Stop Revenge Porn?*, DAILY DOT (May 30, 2021, 8:55 AM), <https://www.dailydot.com/unclick/revenge-porn-laws-jennifer-lawrence-celebgate/> [<https://perma.cc/3AYH-BKSQ>]. Moreover, given the recognized problem that it is hard to get rid of images, it is striking that there has not been a push for a ban-the-box style rule that prohibits employers from firing people because of the existence of nude photos on the web. *See* Liam Stack, *Sex, Revenge Porn and Webcams: The Firing of a TV Weatherman*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/2022/09/28/nyregion/erick-adame-ny-weatherman-fired-scandal.html> [<https://perma.cc/B3H8-UD7L>] (gay meteorologist fired under "morals clause" for intimate images sent to station as revenge). One might argue that the criminal law shields employers from responsibility for their bad behavior. *See supra* notes 7, 127, 363 and accompanying text (discussing neoliberality and criminal law).

580. *See* Citron & Franks, *supra* note 34, at 362 ("Only the shallowest of thinkers would suggest that the question whether nonconsensual pornography should be criminalized—indeed, whether any conduct should be criminalized—should turn on something as contingent and arbitrary as the number of existing laws. Rather, the question of criminalization should be a question about the seriousness of the harm caused and whether such harm is . . . a harm to both individuals and society . . ."); *see also* Clare McGlynn, *Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking*, 93 WOMEN'S STUD. INT'L F. 1, 7 (2022) (failing to enact new laws "privileg[es] existing criminal offences and harms [and] risks reinforcing current criminal law categories and conventions which fail to understand and recognise women's experiences").

581. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 178 (1982).

582. *Id.* at 176.

researchers discovered that arrests often did not deter violence and instead increased it, especially within poor minority communities.<sup>583</sup>

Still, feminists insisted women get an equal share of the failed carceral state. Responding to the studies, one prominent activist opined that domestic violence criminalization's failure to deter does not matter because "our entire justice system fails to deter the majority of socially marginal criminals from committing *any* crime" and yet it "chooses to continue to respond to burglars, armed robbers, drug dealers and muggers even though deterrence is rarely achieved."<sup>584</sup> Advocates maintained that mandatory arrest policies were "[m]andat[ory] equal protection" because they "redistributed" the good of "police service . . . on a more egalitarian basis."<sup>585</sup> As this suggests, the equality-of-carcerality argument makes sense only if one presumes that the American penal system, contrary to so much evidence and thoughtful analysis, is a good to be distributed more broadly and equally rather than an institution of inequality, hierarchy, and pain that should be shrunk and rejected in favor of better alternatives.

## VI. CONCLUSION

So why pick on #MeToo? Why not confine our critical gaze to the conservative moralists who want to jail trans kids and nonviolent drug offenders? Here is my answer: American mass incarceration was built on myths: colonial myths about "savages," myths about benevolent policing, myths about immigrants, and myths about the causes of crimes. I see #MeToo rapidly becoming one of our great American stories. It is a tale Americans will tell themselves and their kids about progress, women's empowerment, and justice. #MeToo became history, even as it was still evolving. There is much truth in the great American #MeToo story, just as there are truths in the stories about the nation's noble founding fathers and of hero cops saving us from evil criminals. But the conventional #MeToo story is not the whole story, and neither is the one I tell. My hope is that this tale becomes a part of the #MeToo libretto and serves as a caution. #MeToo and similar progressive crusades against impunity, no less than conservative ones, reinforce a pernicious faith in the carceral state, trigger popular punitiveness, and exacerbate the problems of mass incarceration. If analysts fail to grapple with the problems of progressive carceral movements like #MeToo, or worse, take the ostrich approach and spare the movements from appropriate scrutiny, advocates will continue to default to criminal laws only to later decry their "unintended consequences."

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583. Sherman et al., *supra* note 365, at 139.

584. Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 213 (1992).

585. 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).