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#METOO AND MASS INCARCERATION

Aya Gruber*

When I was a law student and an aspiring criminal lawyer, I always felt mired in a feminist defense attorney dilemma. On the one hand, I was intimately familiar with the harms of sexual assault and firmly believed that gender crimes reflected and reinforced women’s second-class status. On the other, I was involved in public defense and anti-incarceration work and had come to regard the prison as a primary site of violence, racism, and degradation in society. I faithfully studied and trained to represent indigent defendants against the awesome power of the state, but I did so with a nagging sense of dread at the prospect of defending batterers and rapists.¹

That sense quickly abated after I became a public defender and witnessed firsthand the prosecutorial machine processing domestic violence (DV) and sexual assault cases. I felt a sense of disillusionment that the feminist movement I so admired played such a distinct role in broadening and legitimizing the unconscionable penal state. As an academic, I was increasingly concerned that women’s criminal law activism had not made prosecution and punishment more feminist. It had made feminism more prosecutorial and punitive. Cases like the following involving my client Jamal and his girlfriend Britney made me lose faith in the possibility of feminist criminal “justice.” Subsequently, I continued to dread defending batterers, but I did so for other reasons completely.

I. JAMAL AND BRITNEY²

It is the year 2000. I am a junior public defender in Washington, D.C., standing in the early morning courthouse, already buzzing with activity. Uniformed D.C. metro police lounge in groups, swapping stories and laughing among the grim-faced, confused defendants and their wide-eyed children. Inscrutable U.S. Marshals with military crew cuts enter courtrooms, accompanied by young, gray-suited prosecutors. I wait for my client Jamal, who at nineteen is childlike to me, with his teen Disney-show face, neatly done-up plats, and cool Nike kicks. Because of his

* Professor of Law, University of Colorado Law School. This article is adapted from the Introduction to *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* (forthcoming 2020).

¹ I wrote a paper as a law student discussing this dilemma. See Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 205–07 (1997).

² I first relayed this narrative in Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 742, 742–47 (2007). I changed the name and characteristics of the actual people involved for privacy. The events up until the issuing of the civil protection order happened in Jamal’s case, and the post-trial events are an amalgam of events in that and other DV cases.

immature penchant for missing appointments, I have given him my home number—he is the only client who has ever gotten that number. Years later, I entertain a hazy memory of his 4:00 a.m. call to say, “What’s up,” just as I will have ephemeral recollections of the bright orange plastic chairs lining the D.C. Superior Court hallway and the smell of late-night sweat in the holding cells. Yes, Jamal will stick out in my mind, but not because his case is particularly outrageous or quirky. Jamal’s case is notable for its similarity to so many run-of-the-mill domestic violence cases that do not make headlines.

I am at the courthouse for the civil protection order (CPO) portion of Jamal’s case. Jamal was arrested ten days earlier after his eighteen-year-old girlfriend Britney reported that he punched her and threw a plate at her. Prosecutors have lately adopted the tactic of subpoenaing DV defendants to testify at these quasi-civil hearings, without notice to their attorneys. Much can be at stake with a CPO, such as loss of one’s home, expansive stay-away restrictions, alcohol abstention, and loss of parental rights for up to two years. Defendants often attend the hearings unrepresented, and if they refuse to testify there, judges summarily issue the onerous CPOs. Worse, some defendants take the stand and subject themselves to rigorous cross-examination, without ever consulting an attorney or understanding their right to remain silent. I am here to make sure that does not happen to Jamal.³

A few minutes before we enter the courtroom, Britney shuffles up. She is equally cute and colorful, squeezed into stretch jeans, with platform flip-flops, and yellow shoulder-length braids. She asks if I am Jamal’s attorney, and I reply in the affirmative. She says, “The other lady told me I have to be here, but I didn’t want to come.” She goes on to explain that she and Jamal live together with their baby in a project called Lincoln Heights—a place, incidentally, where a young man like Jamal is lucky to make it to age nineteen without a severe criminal record or drug habit. Britney tells me that she called the police only because “I was mad and wanted him out of the house.” Even if Britney prefers the police not to arrest, police have to do so under D.C.’s mandatory arrest law.⁴ Britney explains that she does not want to pursue charges and will not comply with a no-contact order. Then, in a more hushed tone, she asks, “What if I just leave and stay gone—will they drop the case?”

So here I am, straddling the line between zealous advocacy and obstruction of justice. The answer to Britney’s question is likely “yes,” given that judges routinely dismiss cases when victims fail to appear on the trial date. By this point in my life as a public defender, I am used to DV victims asking what will happen to their boyfriends in court, how they can spare them from jail, and the like. I could give Britney a realistic assessment of the DV court process, but I hesitate, recalling with distaste the time in law school a fellow defense clinic student advised his DV client

³ See D.C. Code Ann. § 16-1005(c) (West 2001) (CPO section of the D.C. Code that was in effect); DISTRICT OF COLUMBIA COURTS, FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS 143 (1992), reporting that 70 percent of respondents in protection order hearings are unrepresented.

⁴ See D.C. Code Ann. § 16-1031 (mandatory arrest statute).

and girlfriend to marry so that she could assert marital privilege and avoid testifying. I say, “I can’t tell you what to do,” but also mention that I can take her statement.

Just as I am finishing my sentence, a young woman rushes up and inserts herself between Jamal, Britney, and me. She is blonde, no more than twenty-four, with a hip haircut and an enormous diamond engagement ring. “Domestic violence clinic student,” I think to myself. She demands, “What are you doing talking to *my* victim, and why is your defendant near her? He’s violating the no-contact order!” From the DV advocates’ perspective, defense attorneys are extensions of abusive men, there to intimidate and coerce victims into lying or disappearing. I tell the advocate that Britney approached us to say that she wants to drop the case and stay with Jamal. The advocate replies, “I’m *sure* she told you that.”

Britney turns to the woman and protests, “I don’t want to be here, and she (pointing to me) said I could leave.” Yikes. I am thinking about a recent hubbub where a well-known defense attorney was frogmarched through the courthouse in handcuffs, accused of obstruction of justice for attempting to take a statement from a reticent sexual assault complainant. “No, I told her that I could not give any advice,” I reply defensively, “but as you can see, she does not want to pursue this case.” The advocate snaps, “We’ll see about that. Come on, Britney we need to talk, away from *them*.” With that, she leads Britney away through the sea of humanity gathered in the bustling hall. Ten minutes later, we are all seated at counsel table. I listen as the judge orders a renewable one-year CPO, including requirements that Jamal leave the apartment and have no contact with Britney or the baby. Britney keeps her eyes locked on the table below.

I never get to take the statement, but the day before Jamal’s criminal trial Britney calls to say she is not coming. She says she tried to tell the “domestic violence lady” to drop the case but could not reach her. True to her word, Britney is a no-show. Instead of moving to dismiss the case, however, the prosecutor says he is prepared to go forward on hearsay, specifically, Britney’s initial “excited utterances” to the police (a tactic generally regarded as unconstitutional after a 2004 Supreme Court decision).⁵ Jamal decides not to risk a jail sentence and agrees to a guilty plea and deferred sentencing. In D.C., first-time DV offenders can plead guilty to assault and have the sentencing hearing postponed for several months, during which they must pay fines, go on probation, and complete “rehabilitative” programs. If the defendant satisfies conditions and stays out of trouble, the case is dismissed. If he does not, he is immediately sentenced on the DV conviction. The judge defers Jamal’s sentencing for nine months, prescribing conditions including twenty-seven domestic violence classes and ten anger management classes, at eight dollars a pop.⁶

⁵ See *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

⁶ See Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 494 (2002), describing DV plea-bargaining process in DC.

A month later, I receive notice that Jamal has violated the terms of his probation. Apparently, Jamal was turned away from several of the mandated classes because he could not pay. We go to court, where the judge finds Jamal in violation, enters the DV conviction, and sentences Jamal to one hundred days in jail. Jamal serves his time, while Britney struggles to pay for the apartment and baby by herself. They never comply with the no-contact order. Jamal moves home after his release, but the couple eventually lose their eligibility for public housing because of Jamal's conviction. That conviction will be the first of several over the next couple of years, none for domestic violence. As for Britney, the last I hear, she is moving from place to place—and still with Jamal.

II. FEMINISM MEETS MASS INCARCERATION

There is much to say about Jamal's case and the feminist laws and policies that govern it. For now, I want to emphasize one particularly salient characteristic of the case: it is representative. Jamal is not a falsely accused victim of a biased system, and in fact, he likely did assault Britney. Britney is neither a liar nor a serially tortured battered wife, but a woman constrained by her race, gender, and circumstances to a less-than-ideal relationship. This is not a story of heroes and villains.

The characterology of Jamal's story is thus unusual in feminist storytelling. Popular feminist commentary on subjects like rape and trafficking often meticulously detail horrific cases of brutality and the utter trauma of victims. The focus on spectacular violence that "speaks for itself" also underlies the common feminist sensibility that injustice lies in the state's failure to adequately punish male offenders. However, simplistic cases of particularly brutal but easily avoidable gender violence are the exception. Crime-and-feminism cases are like Jamal and Britney's. They live in the interstices, in the spaces where the ideas of gender equality and social justice must constantly be reimagined and readjusted.

When compared to evocative stories of women's torture and death, Britney and Jamal's tale appears mundane. She was not injured; he faced a misdemeanor charge. But make no mistake. Britney, Jamal, and their baby suffered brutality—the brutal conditions of entrenched poverty, racial inequality, homelessness, and despair. Britney had called upon the police for aid in her domestic dispute with no clue of the unstoppable penal machine she would trigger. Jamal's criminal contacts put him in constant peril of incarceration and fomented his *civiliter mortuus*, his civil death. This is an American tragedy, representative of many cases touched by feminist reform. This is feminism's tragedy.

As a feminist, woman of color, defense attorney, and survivor, I have personally and professionally grappled with the issue of feminism's influence on criminal law for decades. With this article and accompanying book, I hope to engage the new generation of energized feminists. This group of contemporary thinkers, ranging from Generation Z students to younger millennials, entered adulthood during and after the media preoccupation with campus rape in the early 2010s. For clarity's

sake, I will call this group “millennial feminists” and their views “millennial feminism.” Millennial feminists came of age in an era of political engagement, sexual liberation, and mass incarceration and thus harbor a fresh perspective on DV and sexual assault. Millennial feminism exists, as I once did, in an uncomfortable equilibrium of distaste for gender crimes *and* punishments. On one side of the scale is a Black Lives Matter-informed belief that policing, prosecution, and incarceration are racist, unjust, and too widespread. This side abhors the practice of putting human bodies in cages. On the other is a #MeToo-informed preoccupation with men’s out-of-control sexuality and abuse of power. This side wants to get tough.

The puzzling result is that, today, those most vocal about prison reform are also often the most punitive about gendered offenses, even minor ones like over-the-clothes sexual contact. Despite a burgeoning political consensus that the U.S. incarcerates too many people, uses criminal law as the solution to too many problems, and maintains horrific prison conditions, feminists continue to champion novel penal laws and expanded carceral regimes to address the gender issues that appear on their radars. Invoking “sexual predators,” or even mentioning the name Harvey Weinstein or Brock Turner, stops conversations about eliminating pretrial detention, lowering sentences, and abolishing the inhumane sex offender registration system. Despite the vocal chorus against mandatory minimum prison sentences, in 2016, California enacted new mandatory minimums for sex offenses, and in 2017, Iowa enacted new mandatory minimums for domestic violence offenses.⁷ One is left to wonder how feminism became a legitimator of penalty in an era of declining faith in criminal punishment. How did the feminist antiviolence agenda become so tethered to the tough-on-crime position? How come gender crime gets a carve-out from or even veto over criminal justice reform?

This essay is adapted from the introduction to my new book, *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration*. The book analyzes complicated stories of feminist advocacy and penal reform in an effort to explain how we got here and suggest how we can do better. In past decades, feminists were rightly concerned about gender violence, and they made philosophical and strategic choices about how to address it. These were hard choices. They were contested choices. They were choices under conditions of uncertainty, political pressure, and cultural change. But it becomes clear that powerful feminist subgroups repeatedly chose criminal law. Their reform agendas expanded police and prosecutorial power, emphasized criminals’ threat to vulnerable women, diverted scarce resources to law enforcement, and ultimately made many feminists soldiers in the late twentieth-century war on crime. In the end, feminism shaped the modern criminal system just as participation in the criminal system shaped modern feminism.

⁷ Sex Crimes: Mandatory Prison Sentence, A.B. 2888, 2016 Leg., Reg. Sess. (Cal. 2016), <https://perma.cc/3CCG-NWZJ>; An Act Relating to the Criminal Offenses of Domestic Abuse and Unauthorized Placement of a Global Positioning Device, and Providing Penalties, H.F. 263, 87th Gen. Assembly (Iowa 2017), <https://www.legis.iowa.gov/perma/103020194268>.

Contemporary discourse often presumes that feminism is a unitary concept and that all feminists have similar core beliefs. For men on the far right, feminists are “#MeToo man-hating morons”—or so said an online comment about me after I wrote an op-ed on the Kavanaugh hearings.⁸ For many millennials and Gen-Z’ers, feminism is likewise a straightforward proposition—it is about preventing and punishing men’s bad sexual and intimate behavior. Most schools of feminism share the basic tenet that a person who belongs to the category “woman,” whether by biology or social construction, is vulnerable to unique discrimination that the law should remedy. However, feminist theory and practice have always been heterodox, encompassing a range of ideas about gender, biology, equality, state power, and economic distribution.

Certainly, not all feminist theories invoke or support criminal law, and not all those who favor unrestrained prosecution of gender crime are feminists. In the 1970s, as the battered women’s and antirape movements grew, different feminists with different commitments vied for control of the narrative and agenda. Some feminists prioritized formal equality, while others sought radical substantive justice. Some abhorred domesticity, while others celebrated motherhood. Some saw sexuality as a tool of patriarchy, while others regarded sex as radically liberating. Some feminists allied with state authorities, and indeed, some *were* state authorities. Others regarded the state as something to be rapidly torn down. In many ways, the feminist war on crime is a feminist civil war.

Throughout the 1980s and ’90s, powerful feminist groups identified lax policing of abusers and rapists as *the* gender justice issue, and feminism rapidly became “carceral,” meaning incarceration-centric. Sociologist Elizabeth Bernstein coined the term *carceral feminism* in 2007 to describe late twentieth-century feminism’s commitment to law and order and “drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals.”⁹ There were, to be sure, dissenting voices expressing alarm at feminism’s carceral drift, but they were muted by law-and-order messages from within and outside feminism. By the close of the millennium, the stalwart suit-wearing SVU prosecutor who throws the book at rapists had replaced the bra-burner as the symbol of women’s empowerment.

Then, around 2010, something profound happened. Enough evidence amassed to produce a liberal consensus that U.S. mass incarceration is one of the great human rights tragedies of our time. National and international human rights groups decried the inhumane conditions of U.S. prisons, now significantly maintained by for-profit corporations. The Supreme Court even weighed in, excoriating California for the conditions of its overcrowded prisons in the 2011 case *Brown v. Plata*.¹⁰ The Black Lives Matter movement and books like *The New Jim Crow* did much to publicize

⁸ Aya Gruber, *Corroboration Is Not Required*, THE HILL (Oct. 3, 2018), <https://perma.cc/J8R2-8GQ2>.

⁹ Elizabeth Bernstein, *The Sexual Politics of the ‘New Abolitionism,’* 18 DIFFERENCES: A J. OF FEMINIST CULTURAL STUD. 128–51 (2007).

¹⁰ *Brown v. Plata*, 563 U.S. 493, 502 (2011).

the endemically racialized nature of policing, prosecution, and punishment.¹¹ Although there was and remains public appetite for political law-and-order talk, the war on crime is not the bipartisan issue it once was. “Criminal justice reform” to soften the system’s sharp edges has become a uniting political issue. Liberals see decarceration as a humanitarian mandate, and conservatives view it within the frames of fiscal responsibility and liberty.¹²

In the 2010s, feminists increasingly questioned the movement’s historical embrace of criminal law. People listened when black feminist scholar Beth Richie argued that feminist criminal law reform helped create the “prison nation” that renders poor women of color particularly vulnerable to violence.¹³ Rape reformers began to describe prison not as a solution to but as a *site of* sexual violence. Victims’ advocates started to reconsider the dogma that harsh criminal punishment is invariably good for all victims. Professor and advocate Leigh Goodmark argued that the incarceration-separation model of DV reform reflects an “essentialist” construction of the battering victim as a helpless, middle-class woman, who necessarily benefits from state criminal intervention. The model therefore often disservices poor women of color.¹⁴

However, the 2010s also brought prolific media coverage of a campus rape “epidemic.” Female college students hoisted their mattresses in symbolic protest of rape, showing the “weight” rape puts on victims’ shoulders. Students agitated for reforms to campus rules and regulations to prevent and remedy student sexual assault.¹⁵ Protest rhetoric veered toward the punitive—punishing and exposing “serial rapists.” Still, many student activists did not want their fervor for campus reforms to put more people in jail. As society’s outrage over sexual assault grew, the question became whether millennial anti-incarceration sentiments could still steer law and policy makers away from the tempting solution of broadened criminalization.

And then the #MeToo tsunami washed over social media in 2017. By this time, the feminist protest movement initiated during the campus rape crisis had already grown exponentially in the wake of the election of Donald Trump, “groper-in-chief.” The public soon became entranced by the twenty-four-hour news cycle coverage of #MeToo’s “national reckoning,” lauded by the press as America’s “cultural revolution.” #MeToo’s messages are broad, diverse, and often conflicting. For

¹¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); see also Jennifer Chernega, *Black Lives Matter: Racialized Policing in the United States*, 14 COMP. AM. STUD. AN INT’L J. 234, 234–35 (2016).

¹² Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 273 (2018).

¹³ BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012).

¹⁴ LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 45 (2012).

¹⁵ Amanda Hess, *Emma Sulkowicz Inspired Students Across the Country to Carry Their Mattresses. Now What?*, SLATE: THE XX FACTOR, (Oct. 30, 2014), <https://perma.cc/9VFE-JRPC>.

many, the movement is about employment justice and workplace sexual harassment. For some, it is diffuse support for women's political and social empowerment. However, much of #MeToo discourse is punitive and carceral. The movement arose in the wake of explosive reports of movie mogul Harvey Weinstein's predatory abuse of Hollywood's brightest female stars, and one of its functions has been to label his and other powerful men's misconduct as "real" rape.¹⁶ #MeToo called on women to show solidarity through confessing sexual victimhood, and they did so by publicizing a range of experiences from the extreme (violent rape) to the seemingly mundane (wolf-whistling, overenthusiastic hugging).

As the #MeToo media storm over women's sexual victimization reached a fever pitch, feminism literally came into fashion. The 2017 Dior Spring show featured \$700 "We should all be feminists" T-shirts.¹⁷ Magazines such as *Teen Vogue*, once devoted to prettiness and proms, now extensively cover politics and protest.¹⁸ That pop culture purveyors have replaced articles on how to court a man with stories about how to bring a man to court is impressive and, in ways, positive. There are, however, real dangers of this reclamation of female political identity in a time of fear and anger around sex crimes. The #MeToo era reinvigorated the declining feminist inclination to fight sexism through strict law enforcement. "Zero tolerance"—more unforgiving than intolerance—resurfaced as women's political rallying cry.¹⁹ To be sure, it is natural, even instinctive, to advocate for more criminal enforcement in the face of rape crisis statistics and stories of abuser impunity. There is a deeply ingrained American punitive impulse, originating from the media and government's relentless focus on horrific criminality, that leads even progressive incarceration critics to advocate for strict prosecution of those whom they see as the worst of the worst (corporate CEOs, white supremacists).²⁰ However, in the rush to punish bad apples, real and imagined, we tend to forget that the criminal system is culturally ordered, technocratic, and beholden to specific political forces. Feminist criminal law reforms have always operated within the context of larger social phenomena, from slavery to sex panics.

Historians and critical race theorists have shown in exacting detail "the centrality of race to the political history of rape," as historian Estelle Freedman put

¹⁶ Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, THE NEW YORKER (Oct. 23, 2017), <https://perma.cc/3W52-F48U>.

¹⁷ Rachel Lubitz, *Dior Is Selling a Plain Cotton T-Shirt That Says 'We Should All Be Feminists' for \$710*, BUSINESS INSIDER (Mar. 17, 2017), <https://perma.cc/5RXL-9EXN>.

¹⁸ Samantha Cotter, *I'm Voting to Increase Sexual Assault Education in America*, TEEN VOGUE (Oct. 31, 2018), <https://perma.cc/2VKB-MXK5>.

¹⁹ Sheila Weller, *#MeToo's Generational Divide*, TIME (Mar. 12, 2018), <https://perma.cc/7PPU-8SD6>.

²⁰ See Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3222–23 (2015); Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961 (2014).

it.²¹ Rape law and policy enabled a lynching epidemic in the post-Civil War South. This pernicious race-rape connection persists. Candidate Donald Trump launched his campaign with racialized rape fearmongering, declaring that Mexican immigrants were rapists and promising to protect American women with a wall. Later, he justified his administration's horrific treatment of asylum seekers as deterrence of migrant caravans, where women were "raped at levels that nobody has ever seen before."²² Zero tolerance necessarily occurs against the backdrop of rape law's racist past and present.

Many #MeToo devotees know that the U.S. penal system is a site of racial and socioeconomic inequality. Nonetheless, in the zeal to fight sexual misconduct, millennial feminists abandon their liberal (in the double sense of "progressive" and "respecting individual rights") commitments. Their Bernie Sanders, AOC-style commitment to labor rights, for example, becomes a casualty in the battle against sexual harassment. In the avalanche of op-eds on #MeToo, one remains in the forefront of my consciousness. The *New York Times* published a piece by Elizabeth Nolan Brown, founder of "Feminists for Liberty," about the November 2017 ouster of newsman Matt Lauer for sexual harassment.²³ It asserts that corporate managers are particularly adept at handling sexual misconduct because they can summarily terminate employees in response to public pressure. #MeToo is thus 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 markets."²⁴

If past is prologue, there are costs to getting caught up in #MeToo's heady solidaristic moment—in the pleasure of a "reckoning" that inflicts pain on male oppressors. In the shadow of this cathartic letting, policy is forming, political players are adapting, and strange bedfellows are forming coalitions. Although feminists imagine that expanding punishment and contracting due process will get at the untouchable power brokers who appear immune from law, the distributional reality is not so neat. Rich and powerful men have the corrupt influence to evade even toughened laws, placing the burden of increased criminalization on the poor minorities who form the policed segment of the population. Today, many feminists regret that feminist law-and-order policies contributed to a carceral regime that disserves marginalized people, including women.

²¹ ESTELLE B. FREEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 2* (2013).

²² See 'Drug Dealers, Criminals, Rapists': *What Trump Thinks of Mexicans*, BBC NEWS (Aug. 31, 2016), <https://perma.cc/6L86-65JV> (rapist comment); Veronica Stracqualursi & Elizabeth Landers, *Trump Claims Female Migrants 'Are Raped at Levels That Nobody Has Ever Seen Before'*, CNN (Apr. 5, 2018), <https://perma.cc/Z77A-74D3> (caravan comment).

²³ Elizabeth Nolan Brown, *NBC Didn't Fire Matt Lauer. We Did.*, NEW YORK TIMES (Nov. 29, 2017), <https://perma.cc/NZ7D-Q3MU>.

²⁴ *Id.*

#MeToo in fact originally had little to do with law enforcement and was part of a grassroots program to aid women. 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 and wholeness of young women of color.”²⁵ Remarking that the “me too” mantra “started in the deepest, darkest place in my soul,” Burke recounts an emotional conversation in which a girl at a youth center confessed to being sexually abused by her stepfather: “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.”²⁶

Ten years later, the Weinstein story broke in a *New Yorker* article by Ronan Farrow, himself the scion of Hollywood royalty embroiled in sexual assault controversy.²⁷ Public thirst for stories about Harvey’s latest outrage proved insatiate, and the Twitterverse lit up with righteous condemnation of his abusiveness and of his perversity. Within this milieu, television star Alyssa Milano tweeted out her own “me too” message. It had a different, more empirical purpose: “If all the women who have been sexually harassed or assaulted wrote ‘Me too.’ as a status, we might give people a sense of the magnitude of the problem.”²⁸ This simple message connected idiosyncratic acts of Hollywood degradation among the most privileged to the experiences of every woman, transforming clickbait into a feminist political movement.

The tweet created a sense that sexual assault is utterly omnipresent. The first 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.”²⁹ Both types of conduct are objectionable, but they are extremely different. Attempts to differentiate among the credibility of allegations, the nature of the conduct described, or the historical context in which incidents occurred were shot down as victim-blaming, rape-culture arguments. Actor Matt Damon, who had a history of tone-deaf comments, made a reasonable #MeToo remark: “There’s a difference between patting someone on the butt and rape or child molestation. . . . Both of those behaviors need to be confronted and eradicated without question, but they shouldn’t be conflated.”³⁰ The comments were promptly met with social media disgust, and he was scolded to keep his Damonsplaining

²⁵ *Purpose*, JUST BE, INC., <https://perma.cc/PTX9-PFSE> (last visited Oct. 31, 2018).

²⁶ *The Inception*, JUST BE, INC., <https://perma.cc/KVE5-VCGW> (last visited Oct. 31, 2018).

²⁷ Farrow, *supra* note 16.

²⁸ Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017) <https://perma.cc/VG4P-S7WW> (“If you’ve been sexually harassed or assaulted, write ‘me too’ as a reply to this tweet.”).

²⁹ *See id.*

³⁰ Felicia Gans, *Matt Damon Faces Backlash after Saying There’s a ‘Spectrum’ When It Comes to Allegations of Sexual Misconduct*, BOSTON GLOBE, (Jan. 15, 2018), <https://perma.cc/3Y53-H24F> (internal quotations omitted).

mouth shut. Former girlfriend Minnie Driver elaborated, “The time right now is for men just to listen and not have an opinion”³¹ A chastened Damon made a vow to “get in the backseat and close my mouth for a while.”³²

Lost in this girl-versus-boy celeb fracas was Burke’s original intention to support the invisible, resourceless survivors. Also lost was Burke herself—Milano was initially credited for the catchphrase. Upset women of color on Twitter had to “out” Burke as the originator. Burke eventually responded, “In this instance, the celebrities who popularized the hashtag didn’t take a moment to see if there was work already being done [and] sisters still managed to get diminished or erased”³³ Burke’s hope that the public would focus on the work already being done on behalf of vulnerable women was in vain. The public’s appetite was still for salacious stories of rich and famous men tormenting their female (and male) ingénues. It showed little interest in women-of-color survivors who faced obstacles caused by entrenched racial discrimination and socioeconomic marginalization.

One by one the famous men fell. Accusations against them ranged from forcible rape to “creepy” behavior. Some accusations were anonymous, and some involved half-century-old events, but all were reported in titillating, repulsive detail. That men received discipline without due process gave women little pause. After all, many were public figures with plenty of money to cushion a demotion or termination. #MeToo supporters remained resolute as progressive darling Senator Al Franken resigned in December 2017, even though the accusations against him had the whiff of partisan opposition research and involved misconduct a universe apart from Weinstein’s. Some Democrats protested that instead of bringing needed perspective, progressives had made a political calculation to eat their own to maintain a useless moral high ground against Republicans, who would just write off allegations against conservative politicians as fake news. Meanwhile, a single accusation was enough for liberals to condemn their political heroes and artistic icons.³⁴

And then came the Aziz Ansari story.

III. “GRACE” AND AZIZ

The story appeared on Babe.net, a Rupert Murdoch-funded news-tabloid website dedicated to “girls who don’t give a fuck” and “the pettiest celebrity

³¹ Edward Helmore, *Minnie Driver: Men Like Matt Damon ‘Cannot Understand What Abuse Is Like,’* THE GUARDIAN (Dec. 17, 2017), <https://perma.cc/CN7B-NKX5>.

³² Martha Ross, *Maybe Matt Damon Has Finally Learned to Stop Saying Stupid Things about #MeToo and So Much Else,* MERCURY NEWS (Jan. 17, 2018), <https://perma.cc/X54E-4WJH> (internal quotations omitted).

³³ Zahara Hill, *A Black Woman Created the ‘Me Too’ Campaign against Sexual Assault 10 Years Ago,* EBONY (Oct. 18, 2017), <https://perma.cc/CJP2-CE89>.

³⁴ Naomi Alderman, *The Deep Confusion of the Post-Weinstein Moment,* NEW YORK TIMES (Nov. 6, 2017), <https://perma.cc/CLX5-ZKWF>.

drama.”³⁵ The site prides itself on its young staff—the average age is twenty-three and no reporter is over twenty-five—one of whom, Katie Way, broke the Ansari story.³⁶ Way, the author of such classics as “Here’s What Your Go-To Drunk Food Says about What Kind of Hoe You Are,” describes in chair-squirming yet ineloquent detail a sexual encounter between Ansari and twenty-two-year-old photographer “Grace.” The upshot of the story is that Ansari “violated” Grace by engaging in sexual contact despite her “verbal and non-verbal cues to indicate how uncomfortable and distressed she was.”³⁷

The story,³⁸ as told by Grace only, begins with her excitement at dating a celebrity and her hope that Ansari would be like his TV persona. The dinner itself was unremarkable. It is what happened afterward that Way considered newsworthy. The couple retired to Ansari’s house, where they started making out and undressing. When Ansari went to get a condom, Grace said, “Whoa, let’s relax for a sec, let’s chill.”³⁹ They went back to kissing and then engaged in various sexual activities, which Grace claimed followed her attempts to “move away from him.”⁴⁰ Grace told Ansari, “I don’t want to feel forced because then I’ll hate you, and I’d rather not hate you.”⁴¹ He replied, “Oh, of course, it’s only fun if we’re both having fun.”⁴² Grace, satisfied with the response, watched TV with Ansari, hoping “he might rub her back or play with her hair.”⁴³ Instead, Grace recounts, “He sat back and pointed to his penis and motioned for me to go down on him. And I did. I think I just felt really pressured.”⁴⁴ The foreplay escalated toward intercourse until Grace stated, “I really don’t think I’m going to do this,” and Ansari replied, “How about we just chill, but this time with our clothes on.”⁴⁵ They did. Eventually, Grace decided to leave, at which time Ansari hugged her and gave her a “gross,” “aggressive” good-bye kiss.⁴⁶ “I cried the whole ride home,” Grace laments.⁴⁷

³⁵ *Babe Is for Girls Who Don’t Give a Fuck*, BABE.NET, <https://babe.net/manifesto> (last visited Oct. 31, 2018).

³⁶ Kerry Flynn, *What Is Babe? Meet the Site That Published the Aziz Ansari Allegation*, MASHABLE (Jan. 15, 2018), <https://perma.cc/AE8T-BDMU>.

³⁷ Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE.NET, <https://perma.cc/GD5X-P3MH> (last visited Jan. 14, 2018).

³⁸ *Id.*

³⁹ *Id.* (internal quotations omitted).

⁴⁰ *Id.* (internal quotations omitted).

⁴¹ *Id.* (internal quotations omitted).

⁴² *Id.* (internal quotations omitted).

⁴³ *Id.*

⁴⁴ *Id.* (internal quotations omitted).

⁴⁵ *Id.* (internal quotations omitted).

⁴⁶ *Id.*

⁴⁷ *Id.* (internal quotations omitted).

The day after the sexual encounter, Grace “reached out to her friends, who helped her craft a message to tell Ansari how she felt about the date.”⁴⁸ It admonished Ansari for ignoring Grace’s “clear non-verbal cues” and expression to “slow it down.”⁴⁹ The following day, Ansari sent a text to Grace saying he enjoyed meeting her, which was met with Grace’s carefully crafted message. Ansari responded, “I’m so sad to hear this. All I can say is, it would never be my intention to make you or anyone feel the way you described. Clearly, I misread things in the moment and I’m truly sorry.”⁵⁰

The article unleashed a tempest of controversy. Some in the media took the article not so much as a criminal indictment of Ansari (though it accused him of “sexual assault”) as a comment on the woeful state of “normal” sexual encounters.⁵¹ Others like journalist Caitlin Flanagan advanced a racial critique. She declared the Babe article “3,000 words of revenge porn” and mused, “I thought it would take a little longer for the hit squad of privileged young white women to open fire on brown-skinned men.”⁵² Perhaps the most forceful critique came from HLN anchor Ashleigh Banfield, a vocal #MeToo cheerleader. Banfield objected that Grace’s characterization of botched sex as assault served to undermine the seriousness of rape and threaten the #MeToo movement. With her signature glare, Banfield looked into the camera and spoke directly to Grace: “You had an unpleasant date. And you didn’t leave. That is on you. And all the gains that have been achieved on your behalf and mine are now being compromised by allegations that are reckless and hollow.” She concluded, “The only sentence [Ansari] deserves is a bad case of blue balls, not a Hollywood blackball.”⁵³

HLN invited author Katie Way to be a guest on the network, but she declined through an invective-laden email, which Banfield read in part on air: “The way your colleague Ashleigh (?), someone I’m certain no one under the age of 45 has ever heard of, by the way, ripped into my source directly was one of the lowest, most despicable things I’ve ever seen in my entire life. Shame on her. Shame on HLN. I hope the [retweets] made that burgundy lipstick bad highlights second-wave feminist has-been feel really relevant for a little while.”⁵⁴ Way’s screed then took a

⁴⁸ *Id.* (internal quotations omitted).

⁴⁹ *Id.* (internal quotations omitted).

⁵⁰ *Id.* (internal quotations omitted).

⁵¹ Emily Stewart, *Aziz Ansari Responds to Sexual Misconduct Allegations against Him*, VOX (Jan. 15, 2018), <https://perma.cc/22MZ-EUQL>.

⁵² Caitlin Flanagan, *The Humiliation of Aziz Ansari*, THE ATLANTIC (Jan. 14, 2018), <https://perma.cc/9X5E-DDAS>.

⁵³ Ashleigh Banfield, *Banfield Slams Ansari Accuser in Open Letter*, CNN (Jan. 15, 2018), <https://perma.cc/6A2X-YPX3>.

⁵⁴ Maxwell Tani, *Read the Email the Writer behind the Aziz Ansari Sexual Misconduct Story Wrote Slamming an HLN Anchor Who Criticized Her*, BUSINESS INSIDER (Jan. 17, 2018), <https://perma.cc/B3FR-GJY9>.

Trumpian turn: “No woman my age would ever watch your network . . . [a]nd I will laugh the day you fold.”⁵⁵

Banfield warned that labeling this “bad date” where Grace “could have left” and wanted Ansari to be a “mind reader” as rape would make feminists look ridiculous.⁵⁶ Critics were indeed shocked at the suggestion that Ansari’s persistence was coercion and that he had to ensure Grace’s enthusiastic participation. They failed to realize the ship had sailed long ago.

IV. THE NEW WAR ON CRIME?

During the media storm over campus rape, the national rallying cry was “Only yes means yes.” Senator Kirsten Gillibrand, who built her political brand during the campus rape crisis, dismissed the Banfield-style “bad date” claim in 2014. Accused students, she said, “are not dates gone bad, or a good guy who had too much to drink,” but “repeat offenders” who should be “facing a prosecutor and a jail cell.”⁵⁷ College codes already specified that verbal persistence can be “coercion.” One administrator averred that asking more than *once* can be coercive.⁵⁸ Moreover, by the time of the Ansari story, the “Yes means yes” message, also known as “affirmative consent,” had been absorbed into university policy and criminal law. Affirmative consent’s express purpose is to intervene in Ansari-like scenarios by creating a determinate method of attributing responsibility for miscommunication. To determine whether it was rape when she says she didn’t want sex and he says he thought she did, just look for the “yes” (or its functional equivalent). Even sexual assault laws without an affirmative consent component do not require victims to say “no” or leave, as Banfield indicated.⁵⁹

This is all to say that the text of many current sexual assault statutes makes what Grace said Ansari did a *crime*.⁶⁰ Feminist criminal law scholars routinely argue that police and prosecutors should enforce affirmative consent laws to the letter, always believe victims, and refrain from weeding out cases before trial. Unlike a

⁵⁵ *Id.*

⁵⁶ Banfield, *supra* note 53.

⁵⁷ Kirsten Gillibrand, *We Will Not Allow These Crimes to Be Swept under the Rug Any Longer*, TIME (May 15, 2014), <https://perma.cc/CD4E-5TTE>.

⁵⁸ Doe v. Univ. of Denver, No. 16-CV-00152-PAB-KMT, 2018 WL 1304530 (D. Colo. Mar. 13, 2018) (deposition of Title IX investigator). See also *Administrative Guide: 1.7.3 Prohibited Sexual Conduct: Sexual Misconduct, Sexual Assault, Stalking, Relationship Violence, Violation of University or Court Directives, Student-on-Student Sexual Harassment and Retaliation*, STANFORD UNIVERSITY (Mar. 11, 2016), <https://perma.cc/N9BZ-JDMS> (defining consent and stating that “It is the responsibility of person(s) involved in sexual activity to ensure that he/she/they have the affirmative consent of the other . . .”).

⁵⁹ See generally Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016) (discussing affirmative consent).

⁶⁰ See, e.g., Wis. Stat. Ann. § 322.120 (West) (defining consent as “freely given agreement to the conduct at issue by a competent person.”).

celebrity, the poor men of color who come within the purview of this aggressive prosecution of overbroad rape laws will not garner Banfield-style public support. Ansari faced a career hitch, but these men, as Gillibrand demanded, will face a jail cell.

Some critics attribute the seismic shifts in sexual assault law and policy to public fascination with the sexuality of “privileged young white women.” In turn, they argue, young (white) feminists have embraced a neopuritanical stance toward sex, revoking the previous generation’s support for sexual liberation.⁶¹ To be sure, there is a sense that Gen-Z women think that sartorially challenged, poorly coiffed, “boomer” feminists-of-a-certain-age should keep their outdated sexual liberation to themselves. They should leave it to the younger generation to decide whether workplaces need to be “sanitized” of sexuality,⁶² whether sexual communication should be managed by apps, and how to understand the current “sex recession.” However, puritanism does not really capture the phenomenon. Babe.net prides itself on its irreverence toward sexual mores. Millennial feminists participate in “slut walks,” and, at the same time, characterize the actual commercial sex engaged in by marginalized women “modern-day slavery.”

This reasoning on sexuality can appear incoherent or alternatively female supremacist, delegating to men the criminal risks of casual, misguided, or subversive sex. I see it differently. The tension between over-the-top sexuality and intolerance for imperfect sex reflects contemporary feminists’ *struggle* to embrace sexual liberation while simultaneously critiquing a hazardous sexual terrain where the burdens of open sexuality fall disproportionately on women. Unfortunately, the existing criminal law discourse of devastating victimhood, righteous indignation, and punishment as “justice” provides a ready-made vocabulary for women’s unease with the disparate nature of sexual liberation. The existing criminal system provides a ready-made remedy in the form of prosecution, conviction, and prison. Condemnation of men’s newly branded criminal conduct and calls for just deserts multiply on social media until feminists’ thoughtful efforts to grapple with a complex issue appears as little more than pitchfork-bearing vengeance, demonstrating that #MeToo has lost its way.

Millennial feminists can yet articulate their complex beliefs about gender, sex, and violence outside of the criminal law framework. They need not adopt the refrain of some earlier feminists that sex is mostly something that heterosexual cisgender men weaponize to subordinate heterosexual cisgender women. They need not view policing, prosecution, and punishment as the most promising avenue toward gender equality. However, without an alternative, the criminal law discourse of evil men versus vulnerable women thrives, albeit uneasily, among this generation steeped in pluralism and keenly attuned to the complexities of gender, sex, and social power.

⁶¹ See, e.g., Mona Charen, *Real Message of #Metoo: The Sexual Revolution Has Not Been Kind to Women*, NAT’L REV. (Jan. 18, 2018), <https://perma.cc/6YDW-7L7Z>.

⁶² See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063 (2003).

There is an alternative framework for protesting gender violence without the individualist and punitive logic of criminal law. There is a path for moving past the current banality of simply protesting men's evil. Feminist law reform has historically been diverse, and the connection between the feminist antiviolence agenda and incarceration is not natural, inevitable, or desirable. To be clear, my point is not to criticize feminism as inherently punitive or, alternatively, to defend its role in mass incarceration as mere co-optation, but to diagnose. As I explain in depth in my book, many internal and external factors entangled feminism with mass incarceration. Some of the punitive outcomes were intended, and some were not. Some programs were co-opted, and some were not. In short, the feminist story is a rich one of simultaneous participation in and resistance to institutions of power. Feminist reforms exacerbated larger inequalities even as they produced gender justice in individual cases.

I suggest a “neofeminist”—as opposed to post- or nonfeminist—approach to gender harm and violence.⁶³ This approach holds that sexual misconduct and battering constitute pressing social problems that reflect and reinforce women's subordination and concedes that offenders' impunity exacts a social price. At the same time, neofeminism is acutely conscious that criminal law causes real injuries and views feminist participation in the penal system with a jaundiced eye. It is also mindful that gender is one of multiple intersecting sites of hierarchy, along with class, race, and economic status. Methodologically, neofeminism involves a “distributional” approach to law reform. Feminists all too often adopt backward-looking justifications, rehashing the details of the horrible crimes that provoked their reform efforts instead of looking ahead to how the laws will operate in the world as it exists: a world of racialized overpolicing and overimprisonment. Thus I propose the following as a basic tenet of modern feminist thought: Criminal law is a last, not first, resort.

These neofeminist principles and methodologies provide some guideposts to modern women's movements. Feminists should not propose new substantive offenses or higher sentences for existing gender crimes. Feminists should oppose mandatory arrest, prosecution, and incarceration. Feminists should ensure a strict line between college discipline and criminal sanction. Feminists should support sexuality education over sexual assault fearmongering. Feminists should stop characterizing violence as a function of evil men rather than social decay. Feminists should expend their capital on reforms that provide material aid to the women most vulnerable to violence. Feminists should topple powerful abusers through political action, not through allying with criminal authority that disproportionately harms the disempowered.

Here, I have posed many hard questions and do not pretend to provide easy answers. Instead, I seek to offer a theoretical, legal, and rhetorical tool kit to enable

⁶³ For a fuller explication of “neofeminism,” see Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325 (2013), and Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211 (2015).

those concerned about DV and rape to thoughtfully engage the tough issues. I hope my analysis can help free feminists to imagine new and noncarceral approaches to gender violence. I hope it will free criminal justice reformers and policy makers from the fear of offending an imagined carceral feminist sensibility and will remove one more barrier on the long road to unmaking mass incarceration. I hope it will help shift the winds so that feminism sails in the direction of greater justice, not only for women.

