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When We Breathe: Re-Envisioning Safety and Justice in a Post-Floyd Era

Aya Gruber*

Thank you so much for inviting me to give this lecture. I have heard about the “Bod Squad,” and had been looking forward to meeting in person, but alas our lives are on Zoom for the moment. Thank you, Dean Davies, Connie Bodiker, Amy Bodiker-Baskes, and Fred Isaac for making this event possible. I also want to express my gratitude to the incomparable Ohio State University (“OSU”) Law School criminal law faculty, including my friends Joshua Dressler, Douglas Berman, Ric Simmons, Amna Akbar, and Sean Hill. I am truly honored to give a talk in the name of David Bodiker, a fighter, a zealous defender, and tireless advocate of justice. And I am humbled to follow in the footsteps of my mentors and colleagues at the Public Defender Service, including James Forman Jr. and Jon Rapping, as well as one of my heroes Bryan Stevenson. Most of all, I want to thank all of you for joining me. At this tumultuous and critical moment in our history, where there are so many demands on your time, I am grateful that you took some time to be with me.

The viral video of police officer Derek Chauvin killing George Floyd stirred the conscience of the world. Chauvin was calm, collected, and in control while he pressed his knee on the neck of a dying man who was crying out for his mother. Meanwhile, the other officers casually waved away onlookers.¹ That heart-wrenching video—so sad in its apparent inevitability, so evil in its banality—broke something loose. Amid the many other pressing issues of inequity, including a sweeping pandemic that disproportionately kills people of color, a rise in authoritarianism, immigrant concentration

* I express my deepest gratitude to The Ohio State Law School, Dean Lincoln Davies, Connie and Amy Bodiker, and the “Bod Squad” for inviting me to give this lecture in the name of a great public defender, David H. Bodiker. I particularly thank Joshua Dressler, whose work has been in inspiration for years, and the rest of the singular criminal law faculty at Ohio State. Peter Selimos provided invaluable assistance in putting the talk into essay form. And, as the lecture indicts, my mother is a continuing inspiration. I dedicate this essay to the students, scholars, lawyers, and activists struggling for change and giving us reason for cautious optimism in this time of utter devastation that disproportionately impacts racial, socioeconomic, and sexual minorities. Fight on!

¹ Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html> [<https://perma.cc/KE2M-2SKN>].

campes on the Southern border, and open racism at the highest levels of government, that video was a turning point.² Finally, the masses connected to the suffocation of those in poor communities of color, and people of all races took to the streets and declared, “I can’t breathe.”

“I can’t breathe.” It is not just a phrase for these times. It is an echo of all the stories, past and present, of societal racism, government detention, and state and private violence. The stories I’m about to tell seem unrelated, but they are in fact united in their illustration of how embedded inequality and a zeal for incarceration have combined to deny too many Americans the most obvious, incontestable, and basic of rights: the right to breathe.

There was a man who hung out on Bay Street in Staten Island. Everyone in the neighborhood knew him as a gentle giant. He had six kids and did what he could to make ends meet. With a good head for numbers, he made his money by selling “loosies,” single black-market cigarettes at discount prices to passersby.³ You see, early in Mayor Michael Bloomberg’s term, his administration needed money to rebuild the business district after 9/11, but he had promised his affluent constituents not to raise taxes. So, Bloomberg raised funds, not by taxing the foreign real estate investors who made NYC unaffordable, but by raising taxes on cigarettes to \$6 of tax per pack.⁴ This made it profitable for people to sell cheap cigarettes from Virginia to the poorest of the poor in poor communities.⁵

The man was Eric Garner, and the police did not like that he sold loosies. New York was content to turn the other cheek on their billionaire offshore-account bearing residents, but it strictly enforced the tax laws against impoverished cigarette entrepreneurs like Garner.⁶ On a summer day in July 2014, Garner had just broken up a fight when he saw a gaggle of white police officers coming toward him. He was surprised that the officers bypassed the

² See EJ Dickson, *New Map Shows COVID-19 is Hitting People of Color Hardest*, ROLLING STONE (Apr. 2, 2020 12:22 PM), <https://www.rollingstone.com/culture/culture-news/covid19-coronavirus-pandemic-low-income-people-new-york-city-976670/> [<https://perma.cc/R6JR-DE3H>]; Amanda Taub, *The Rise of American Authoritarianism*, VOX (Mar. 1, 2016, 9:00 AM), <https://www.vox.com/2016/3/1/11127424/trumpauthoritarianism>, [<https://perma.cc/WL9G-37BQ>]; see Adam Serwer, *A Crime by Any Name*, THE ATLANTIC: IDEAS (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/border-facilities/593239/> [<https://perma.cc/W3MA-KSQY>]; see also Caroline Warnock, *Watch: Trump Tells Proud Boys ‘Stand Back & Stand By’*, HEAVY: POL. (Sept. 29, 2020, 11:54 PM), <https://heavy.com/news/trump-debate-proud-boys/> [<https://perma.cc/H5WD-3Y8K>].

³ MATT TAIBI, *I CAN’T BREATHE: A KILLING ON BAY STREET* 12–13 (2017).

⁴ *Id.* at 11, 39–40.

⁵ *Id.* at 40–41, 77–78.

⁶ *Id.* at 78–79.

people in the fight and made a beeline for him. He did not know that these officers were under a directive to clean up the streets from loogie-sellers and their associated riff-raff.⁷ Although the officers had not seen Garner engaging in any criminal behavior that day, they knew him by reputation. Garner, a Black man, normally erred on the side of submitting to the police. But not on this day. He hadn't done anything wrong and refused to submit to arbitrary arrest. That would be one of the first times—and the last time—Garner challenged police authority. The officer put him in that now-infamous chokehold. Down on the ground, Eric Garner, gentle giant and father of six, spent the last moments of his life under a tangle of white police bodies, pleading 11 times, “I can’t breathe.”⁸

There was a six-year-old girl who went from living in her family home on a farm in Fresno, California to living in a barbed-wire fence-surrounded barrack in Heart Mountain, Wyoming. She and the other Japanese kids detained there during World War II did not understand that they had been imprisoned for their race. They did, however, know that their lives took place behind guard stations and fences, and sometimes the white kids would yell insults at them from the free side of the divide. The Japanese kids would respond with their best comeback, “hakkujin ninjin,” which roughly translates to “Caucasian carrot.”⁹ These Japanese children, suffering in the arid plainlands nearly three-quarters of a century ago, were far better off than today’s immigrant children—toddlers and infants—who are languishing in makeshift detention camps, fainting in the heat of the Southern border, fearful of disease and sexual abuse, and crying out for their parents.¹⁰ Now, this little Japanese girl, Mariko Hirata, grew up and told her daughter vivid stories of “the camps.” I listened to my mother transfixed as she described how the oiled paper windows cast the living quarters in a perpetual half-light; how the communal showers were embarrassing and cold; and how that Wyoming dust would seep into every corner of the shed they called home, so bad that Mariko would complain to her mother that she couldn’t breathe.¹¹

There was a man in Detroit, a loving husband and father. After coronavirus began to tear through the state, he kept driving his public bus route, despite the lack of a mask mandate in Michigan. But he wore a mask

⁷ *Id.* at 112–13.

⁸ See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 2–3 (2017).

⁹ See Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 307–08 (2006) [hereinafter *Red Flag*].

¹⁰ See generally JACOB SOBOROFF, *SEPARATED: INSIDE AN AMERICAN TRAGEDY* (2020).

¹¹ *Red Flag*, *supra* note 9 at 308 (citing Pete Collins, *Justice Served by \$20,000 Payments to Internees*, MIAMI NEWS, Aug. 11, 1988, at 5A, 10A (quoting internee Marie Gruber)).

and unfailingly wiped down surfaces on his bus. Still, Jason Hargrove became worried when a maskless woman came on and started coughing. A few days later, he fell ill.¹² His wife Desha twice took him to doctors who sent Jason, a Black man, home without a COVID test, directing him to soothe himself with Tylenol.¹³ But Jason's condition deteriorated quickly and soon he couldn't breathe. It was only then that he was given a test and admitted to the hospital. African Americans are nearly five times more likely to be hospitalized for COVID-19 than whites.¹⁴ The hospital people shuffled Jason off to a COVID ward and sent Desha away. After calling and calling, she found out they had put Jason on a ventilator, but they assured her that he'd be fine. Desha called first thing in the morning. Initially, the hospital people couldn't find Jason's name, and then they couldn't find his chart. After an hour of giving her the run-around, they finally put a doctor on the phone. He told Desha it was over—Jason had already taken his last breath.¹⁵

And finally, there was a man in Ohio. He and two co-defendants were charged with murder in connection with a stabbing in a robbery gone wrong. The prosecution argued that the man, John Byrd, Jr., was the sole killer.¹⁶ They based this exclusively on the word of a jailhouse snitch who lied on the stand about promises from the prosecutor. Of the three co-defendants, only Byrd received the death penalty.¹⁷ Byrd, until his death, denied being the

¹² Abby Vesoulis, *My Husband Died Trying to Protect His Bus Passengers from Coronavirus*, TIME: HEROES OF THE FRONT LINES (Apr. 9, 2020, 7:23 AM), <https://time.com/collection/coronavirus-heroes/5816894/jason-hargrove-bus-driver-coronavirus/> [https://perma.cc/J2QD-UGA2]; Greg Jaffe & Annie Gowen, *The High Price of Keeping Detroit Moving*, WASH. POST (Apr. 13, 2020), <https://www.washingtonpost.com/graphics/2020/national/detroit-coronavirus/> [https://perma.cc/VT4Q-5PET].

¹³ Oralandar Brand-Williams, *Detroit Bus Driver's Widow: 'There's No Goodbyes. There's No Anything'*, DET. NEWS (Apr. 7, 2020, 7:34 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2020/04/06/detroit-bus-driver-widow-coronavirus/2955215001/> [https://perma.cc/8EXF-4YV4].

¹⁴ Brian P. Dunleavy, *Blacks, Poor at Greater Risk for Infection, Hospitalization with COVID-19*, UNITED PRESS INT'L: HEALTH NEWS (Sept. 25, 2020, 11:00 AM), https://www.upi.com/Health_News/2020/09/25/Blacks-poor-at-greater-risk-for-infection-hospitalization-with-COVID-19/7851601039973/ [https://perma.cc/DW55-NUS4].

¹⁵ Tiffanie Drayton, *1 in 3 Black Americans Know Someone Who Died of COVID 19.*, VOX: FIRST PERSON (Aug. 26, 2020, 8:30 AM), <https://www.vox.com/first-person/2020/8/26/21400035/coronavirus-covid-19-mortality-black-americans> [https://perma.cc/TX9E-CXUH].

¹⁶ See generally Death Penalty Record of John William Byrd, Jr., CLARK CNTY. PROSECUTOR, <http://www.clarkprosecutor.org/html/death/US/byrd760.htm> [https://perma.cc/V8YW-DRUZ].

¹⁷ Bob Fitakis & Martin Yant, *Still Looking for "The Truth"*, COLUMBUS DISPATCH (Jan. 31, 2002), available at <http://www.clarkprosecutor.org/html/death/US/byrd760.html> [https://perma.cc/V8YW-DRUZ].

killer and insisted that it was his co-defendant Brewer. Byrd's attorney, David Bodiker, obtained statements from Brewer admitting that he, not Byrd, had stabbed the victim.¹⁸ As Bodiker fought for Byrd's life, the prosecutors dragged the dedicated public defender through the mud, prompting Bodiker to lament, "This case has become focused not on John Byrd's innocence, but the conduct of his lawyers."¹⁹

Bodiker brought his objections to the prosecutor's conduct and his proof that Byrd was not the killer to every eligible tribunal over decades of time. Eventually, a Sixth Circuit panel ruled for the prosecution, approving its misdeeds.²⁰ By a slim margin, the Sixth Circuit refused to rehear the case en banc and upheld the death sentence. This prompted Judge Nathaniel Jones, joined by five others, to dissent that "the Court majority certifies a death sentence that the State of Ohio secured in contravention of the most fundamental imperatives of our constitutional order. This result is abhorrent to our Constitution."²¹ Even Arthur Schlesinger, Jr. weighed in on the case stating, "Capital punishment . . . 'should be reserved for cases where there is absolutely no shred or tremor of doubt The case of John Byrd is, to say the least, shrouded in doubt.'"²²

Resigned to his fate, Byrd said he wanted to be put to death by electric chair to show the barbarity of state-sponsored execution. Bodiker explained, "He doesn't want to go softly into that good night."²³ However, shortly before Byrd's execution date, Ohio banned the electric chair in favor of what *looked* like a more humane killing method: lethal injection. But looks can be deceiving, and that is almost the point of lethal injection.²⁴ On February 19,

¹⁸ John McCarthy, *Supreme Court Sets Feb. 19 Execution Date*, 19 NEWS (July 12, 2002, 4:11 AM), <https://www.cleveland19.com/story/618482/supreme-court-sets-feb-19-execution-date/> [<https://perma.cc/7R9X-47WB>].

¹⁹ *Defender Out of Byrd Case*, MORNING J. (Nov. 10, 2001), https://www.morningjournal.com/news/defender-out-of-byrd-case/article_3c027dc6-5629-5bf6-95ef-1683a3afa61d.html [<https://perma.cc/55XU-LKVM>].

²⁰ *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000).

²¹ *Byrd v. Collins*, 227 F.3d 756 (6th Cir. 2000) (Jones, J., dissenting).

²² Alan Johnson, *Governor Rejects Byrd's Request to Stop Execution*, COLUMBUS DISPATCH (Feb. 16, 2002), available at <http://www.clarkprosecutor.org/html/death/US/byrd760.htm> [<https://perma.cc/V8YW-DRUZ>].

²³ Robert E. Pierre, *Electrocution is Ohio Inmate's Choice*, WASH. POST (Sept. 11, 2001), <https://www.washingtonpost.com/archive/politics/2001/09/11/electrocution-is-ohio-inmates-choice/be62f76b-f229-4d90-844f-a75ac94231ab/> [<https://perma.cc/D3AU-LW7F>].

²⁴ John McCarthy, *Ohio Convicted Killer Byrd Executed*, MIDLAND REPORTER-TELEGRAM (Feb. 18, 2002, 6:00 PM), <https://www.mrt.com/news/article/Ohio-Convicted-Killer-Byrd-Executed-7776971.php> [<https://perma.cc/5S2H-38RL>].

2002, executioners strapped Byrd to a gurney and gave him a three-drug cocktail. The drug that kills you is potassium chloride. It causes agonizing pain until your heart stops. So, the state administers a painkiller, thiopental sodium, and hopes that it works. I say hopes because the state administers a third drug, pancuronium bromide. That drug, also quite painful, paralyzes the defendant and renders him motionless. As Justice Ginsburg noted in her *Baze v. Rees* dissent, because of the pancuronium bromide, “[e]ven if the inmate were conscious and in excruciating pain, there would be no visible indication.”²⁵ What reason could there be to paralyze the defendant and make it impossible to tell if the anesthesia is working? The reason is to make killing *appear* humane—to spare the audience from seeing the body twitch in the final throes of death.²⁶ So, Byrd was rendered paralyzed, and whether in peace or horrific pain, his lungs shut down, his heart stopped, and finally, he too could no longer breathe.

A story of brutal street policing, a story of racist mass detention, a story of health disparity, and a story of state-sanctioned killing—they all show how unfair economies, racial hierarchies, and pathological politics conspire to deny to many Americans the right to breathe. Today, we do not even have to tell stories. We just say names: Michael Brown, Tamir Rice, Laquan McDonald, Sandra Bland, Atiana Jefferson, Breonna Taylor, Elijah McClain, Daniel Prude. This list goes on and on, and then there are the unnamed hundreds of thousands of COVID victims—disproportionately people of color and disproportionately frontline workers. These stories, these names, these unnamed tragedies are the backdrop to the political uprisings around us. For many, Floyd’s killing was the event that made clear that the criminal system’s tendency to wound, control, and maintain the subordinate status of the worst-off is not a malfunction, but the system’s main function.

Theorist Michel Foucault has observed that for academics and policymakers, the perpetual question is why prisons “fail” to prevent crime, rehabilitate, and materially improve communities. The answer is invariably something about the failure of a given penal program and how another, newer, shinier one could do better. However, Foucault argues, “For the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well in producing . . . a

²⁵ *Baze v. Rees*, 553 U.S. 35, 119 (2008) (Ginsburg, J., dissenting).

²⁶ *Id.* at 57 (majority opinion) (“The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.”); *id.* at 58 (“If pancuronium is too cruel for animals, the argument goes, then it must be too cruel for the condemned inmate. Whatever rhetorical force the argument carries, it overlooks the States’ legitimate interest in providing for a quick, certain death.” (citation omitted)).

politically or economically less dangerous and on occasion usable—pathologized subject.”²⁷

Let me put it more plainly. Our prison system has succeeded at disenfranchising millions of voters, disproportionately Black Americans. Even after a slew of recent reforms, the system still disenfranchises 5.2 million Americans.²⁸ Our prison system has succeeded at maintaining a well-oiled cradle-to-prison pipeline.²⁹ Our prison system has succeeded in creating a penal archipelago of dark sites where society can tuck away its inconvenient truths—the unemployed, the mentally ill, the unhoused, and increasingly, political dissidents.³⁰ Their invisibility and silence perpetuate the prioritization of profits over people and punishment over problem-solving.

Similarly, the never-ending question of how the police can better reduce crime has spawned endless proposals of new techniques of management and surveillance that will *finally* “work” (broken-windows theory, hot-spot policing, facial recognition technology). Again, the problem is not that policing fails, but as OSU law professor Amna Akbar observes, “The problem is the institution of policing itself: its power, its origins in enslavement and indigenous dispossession, and its hold on how we conceive of public safety.”³¹ Indeed, the institution of American policing has been profoundly consistent and effective at disciplining race and space. In the post-Civil War South, for example, police forces were formed to aggressively enforce vagrancy and loitering laws and compel unemployed Black people into sharecropping arrangements that imposed a de facto form of enslavement.³²

²⁷ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 277 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1997).

²⁸ Brett Wilkins, *Nearly 5.2 Million Americans Will Be Disenfranchised in 2020 Election Due to Felony Convictions: Study*, COMMON DREAMS (Oct. 14, 2020), <https://www.commondreams.org/news/2020/10/14/nearly-52-million-americans-will-be-disenfranchised-2020-election-due-felony> [<https://perma.cc/8FST-X863>].

²⁹ Marian Wright Edelman, *The Cradle to Prison Pipeline: America’s New Apartheid*, HUFFPOST (May 25, 2011, 9:42 AM), https://www.huffpost.com/entry/the-cradle-to-prison-pipe_b_165163 [<https://perma.cc/RDC8-WK9P>].

³⁰ Foucault, *supra* note 27 at 297–301; BERNARD HARCOURT, *ILLUSION OF FREE MARKETS* (reprt. ed. 2012); RUTH WILSON GILMORE, *GOLDEN GULAG* (1st ed. 2007); JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007).

³¹ Amna A. Akbar, *How Defund and Disband Became the Demands*, N. Y. REV. OF BOOKS (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/> [<https://perma.cc/JS2A-9ZTD>].

³² Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities*, 53 *PHYLON* 42, 58–60 (2016); Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 *U. CHI. L. REV.* 1161, 1168 (1984).

Today, police draw blue lines around Black spaces—just as banks drew their red lines—designating certain places “high crime areas.” A 2019 study, the latest in a long line of research, concludes that officers’ “assessments of whether an area is high crime are nearly uncorrelated with actual crime rates [and] that the suspect’s race predicts whether an officer calls an area high crime.” It adds, “The racial composition of the area and the identity of the officer are stronger predictors of whether an officer calls an area high crime than the crime rate itself.”³³

Having confined people of color to discrete physical places, the police use aggressive tactics to keep them in their social “place.” The 2012 federal litigation over NYC’s racially disparate and ineffective stop-and-frisk program included a smoking-gun piece of evidence that revealed that racialized social control was always at the heart of the program. State Senator Eric Adams testified that during a 2010 discussion with Police Commissioner Raymond Kelly, Adams expressed concerns about the stop-and-frisk program’s racial disparities. Kelly responded that he focused on young Blacks and Hispanics “because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.” The senator was “amazed” that Kelly was “comfortable enough to say that.”³⁴

So, policing and prison and their adjacent policies and actors—collectively, what academics call the “carceral state”—have been successful at controlling out-groups and dominating space. But perhaps the greatest success of the carceral state has been the occupation of our collective imagination. Carceral logics have become so ingrained that we instinctively see criminal punishment as the key to addressing social harm, creating accountability, and providing justice. This punitive impulse is so strong that advocates and policymakers continue to jump to criminal lawmaking even as the United States for decades has had the dishonorable distinction of the most punitive nation on earth.

OSU law professor Joshua Dressler warned back in 2005 that for politicians, “it is always easier to appear to be tough on crime than to develop sensible penalties.” He continued, “This process of increasing penalties, and then increasing them some more, and then increasing them again...has been

³³ Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CAL. L. REV. 345, 345 (2019).

³⁴ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 606 (S.D.N.Y. 2013) (quoting 4/1 Tr. at 1585–89).

going on in the United States for at least the last quarter century in a manner that should put this country to shame.”³⁵

It is not just the size and racial disproportion of our prison system that is shameful, but also what goes on inside. This summer, coronavirus raged within Texas prisons, sickening over 23,000 imprisoned people and nearly 5,000 workers.³⁶ Hundreds of imprisoned people died, including dozens at the Wallace Pack Unit, a geriatric jail for the elderly, many of whom are disabled. Wallace inmates sued, resulting in a scathing district court order demanding that the Texas Department of Corrections (“DOC”) provide cleaning supplies so the janitors no longer had to share gloves, provide unlimited access to soap and water, and provide hand sanitizer to inmates using walkers, canes, and wheelchairs.³⁷ Last week the Fifth Circuit reversed the order.³⁸

This shameful state of affairs has failed to move many policymakers, including progressives, to reject criminalization as a preferred method of reform. It was therefore particularly prescient when OSU law professor Doug Berman stated in 2008, “Given the stunning and unprecedented expansion of modern American imprisonment rates . . . the problems and consequences of mass incarceration should become the new preeminent concern for progressives.”³⁹

When I say that the carceral state’s greatest success has been the colonization of the American mind, I include my own. Recently, I published a book entitled *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration*.⁴⁰ In writing it, I had to go back to my own torn feelings about being anti-incarceration and being a good feminist. As a law student, I felt stuck in a feminist-defense attorney dilemma. I faithfully studied and trained to represent indigent defendants

³⁵ Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 855 (2005).

³⁶ Jolie McCullough, *Federal Court Orders Texas Prison System to Provide Hand Sanitizer for Some Geriatric Inmates During Pandemic*, TX. TRIB. (Sept. 29, 2020, 4:00 PM), <https://www.texastribune.org/2020/09/29/texas-prisons-coronavirus-protections> [<https://perma.cc/WRZ8-ADFE>].

³⁷ *Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 5797881 at 1* (S.D. Tex. Sept. 29, 2020); *see also* *Valentine v. Collier*, 455 F. Supp. 3d 308, 311 (S.D. Tex. 2020).

³⁸ *Valentine v. Collier*, 978 F.3d 154 (5th Cir. 2020).

³⁹ Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL’Y REV. ONLINE 1, 2 (2008), http://www.hlpronline.com/Berman_HLPR_120808.pdf [<https://perma.cc/LR9Z-3WJ4>].

⁴⁰ AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* (2020) [hereinafter *FEMINIST WAR*].

against the awesome power of the state, but I did so with dread at the prospect of defending batterers and rapists. I wrote about this dilemma as a law student, and to my great surprise, Professor Dressler excerpted a portion of that paper in his casebook.⁴¹ And to this day, 20 years later, I still get questions about resolving the dilemma.

For me, the dilemma resolved quickly when I practiced in DC's specialized Domestic Violence court, a court feminism built, where prosecutors pursued cases unconditionally, judges were trained to take abuse seriously, and protection orders were automatic. Taking abuse seriously seems undeniably good, but, in practice, it wasn't so simple. I saw poor people of color in and out of a revolving door of incarceration. I saw prosecutors proceed with cases against women's wishes and judges refuse to lift stay-away orders, imposing de facto divorce on families. I saw immigrant women lamenting that their call for help triggered an unstoppable penal machine that made their spouse deportable.

Before practice, I had equated prosecution of abusers and rapists with gender justice, so much so that I worried more about representing a man accused of misdemeanor domestic abuse than a murderer. But experience showed me that the "carceral feminist"⁴² model produced far fewer gains for women and far more losses than I ever could have imagined.

As I noted, we have seen an unprecedented move toward consensus, on both sides of the political aisle, that the U.S. imprisons too many people, uses criminal law as the solution to too many problems, and that prisons themselves are sites of degradation. But recent years have also seen a surge of #MeToo activism championing zero tolerance for sexual assault and domestic violence ("DV"). The puzzling result is that many vocal prison critics and Black Lives Matter protesters are extremely punitive about gendered offenses, even minor ones like misdemeanor sexual contact. "What about rapists?" is a conversation stopper when it comes to bail and sentencing reform. And strangely, today, feminism is one of the few legitimators of penalty in an era of declining faith in criminal punishment.

My book analyzes the complicated stories of feminist advocacy and penal reform in an attempt to explain how we got here and suggest how we can do better. To be sure, feminism is an anti-subordination movement. As OSU law professor Martha Chamallas notes, it is "the belief that women are

⁴¹ 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 (1997).

⁴² Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES: J. OF FEMINIST CULTURAL STUD. 128, 143 (2007) (coining term "carceral feminism").

currently in a subordinate position in society and that the law often reflects and reinforces this subordination.”⁴³ As such, one would not expect it to embrace the penal system, which famed feminist Susan Schechter characterized as the embodiment of “domination based on race, class, and sex.”⁴⁴ And yet, what I discovered is that at critical moments, feminists repeatedly turned to criminal law. Feminism shaped the modern criminal system, just as participation in the criminal system shaped modern feminism.

Today, there is a “reckoning inside the Domestic-Violence movement,” as a recent headline in *The Nation* read,⁴⁵ and many are asking about alternatives to the carceral system. What’s interesting is that at the dawn of the battered women’s movement in the early 1970s, incarceration *was* the unlikely alternative. The original battered women’s movement was deeply anti-authoritarian, born of late 1960s Vietnam War protest radicalism. Shelter feminists within the movement advocated for nothing less than alternative egalitarian societies freed from the government’s dirty hands.⁴⁶ Anti-poverty feminists saw battering as a product of a cruel welfare system that drove single mothers into abusers’ arms.⁴⁷ Anti-patriarchy feminists traced abuse to sexist marriage norms and economic inequality.⁴⁸ The varied feminist proposals had nothing to do with criminal law. They included welfare reform, family law changes, and economic reforms, including housewife wages. Researchers outside of feminism traced abuse to social stressors and also rejected criminalization.⁴⁹ In fact, in the early days, hardly any experts endorsed strengthening criminal law. Many feminists even saw police as the war-mongering state incarnate. So how was it that by the early 1980s law enforcement was at the center of battered women activism?

A particularly influential group of lawyers and victim advocates conceptualized battering as a matter of individual violent men enabled by weak law enforcement. These legal feminists initiated successful lawsuits and lobbying campaigns to get police departments to adopt policies that largely prohibited police from resolving DV calls short of arrest and instead

⁴³ MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1 (2d ed. 2003).

⁴⁴ Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement* 177 (1982).

⁴⁵ Zoë Carpenter, *A Reckoning Inside the Domestic-Violence Movement*, THE NATION (Oct. 7, 2020), <https://www.thenation.com/article/society/domestic-violence-police/> [https://perma.cc/4STS-28QS].

⁴⁶ FEMINIST WAR, *supra* note 40, at 47–48.

⁴⁷ *Id.* at 46, 48–50.

⁴⁸ *Id.* at 50–59.

⁴⁹ *Id.* at 76–81.

encouraged or required police to arrest. One such lawsuit spelled the end of the Oakland Police Department's policy directing police to attempt to mediate *all* misdemeanor assaults before arresting.⁵⁰

Legal feminists drew on experiences with clients who told horror stories about brutal beatings and officer indifference. These were real clients facing real horror. However, they were also a specific subset of battered women who had already resolved to separate and they pleaded for police protection. Many other women, especially economically marginalized women, did not seek permanent separation. And women of color did not necessarily favor arrest. But, as researchers observe, from the time "institutions began to develop domestic violence programs, concerns of Black women were virtually ignored."⁵¹

Within short order, police welcomed mandatory arrest policies, which they saw as "getting them out of the social work business," as one criminologist remarked.⁵² In later years, the police's aversion to touchy-feely mediation became a *justification* for mandatory arrest. The Virginia legislature adopted mandatory arrest in the 1990s stating that the law should not "require the officer to serve as a counselor . . . It is unfair to the police officer for him to be required to do more than . . . prevent crime."⁵³

Currently, police respond to DV calls with all the brutality that they do for other calls. In 2008, Derek Chauvin, the officer who killed George Floyd, responded to a DV call by breaking into the bathroom where the unarmed African American suspect Ira Tolles was hiding and shooting Tolles twice in the stomach. Tolles told the *Daily Beast* that the shooting itself was a blur, but "I remember my baby mother screaming and crying."⁵⁴ On August 23 of this year, police in Kenosha, Wisconsin received a call from a woman who said her boyfriend wouldn't give her back her keys. That call culminated in Jacob Blake being shot in the back seven times as he tried to enter a car in

⁵⁰ *Id.* at 68–69, 75–76.

⁵¹ Robert L. Hampton et al., *Evaluating Domestic Violence Interventions for Black Women*, 16 J. OF AGGRESSION, MALTREATMENT & TRAUMA 330, 331–32 (2008).

⁵² U.S. COMM'N ON CIV. RTS., BATTERED WOMEN: ISSUES OF PUBLIC POLICY 49–52 (1978), <https://www.ncjrs.gov/pdffiles1/Digitization/53356NCJRS.pdf> [<https://perma.cc/EE3R-MFUW>] (remarks of Morton Bard).

⁵³ Joel Garner, *Evaluating the Effectiveness of Mandatory Arrest for Domestic Violence in Virginia*, WM. & MARY J. OF WOMEN & L. 223, 232 (1997) (quoting VIRGINIA COMMISSION ON FAMILY VIOLENCE PREVENTION, REPORT OF THE LAW ENFORCEMENT SUBCOMMITTEE 57 (1995)).

⁵⁴ Pilar Melendez, *Minneapolis Man: Cop Who Kneeled on George Floyd 'Tried to Kill Me' in 2008*, DAILY BEAST (May 29, 2020, 11:52 AM), <https://www.thedailybeast.com/minneapolis-man-alleges-derek-chauvin-tried-to-kill-him-before-he-kneeled-on-george-floyd> [<https://perma.cc/YE8H-JCWK>].

which his kids aged eight, five, and three were sitting. It was the eight-year-old's birthday.⁵⁵

While inviting police violence, the pro-arrest program did not do much to stop private violence. Initially, activists were emboldened by sociologist Lawrence Sherman's famous 1984 Minneapolis DV experiment. That study randomly assigned police to arrest, warn, or temporarily relocate DV suspects and found arrest most deterrent in a six-month period.⁵⁶ However, while feminists and the media were lauding the Minneapolis study, larger scale replication studies were already undermining the pro-arrest finding. In fact, some showed that mandatory arrest policies escalated violence among unemployed African American men.⁵⁷ By 1992, Sherman and company possessed enough data to proclaim, "mandatory arrest may make as much sense as fighting fire with gasoline."⁵⁸

The research showed other negative consequences of the carceral program. One study revealed that the mandatory arrest program made women more, not less, vulnerable to domestic homicide.⁵⁹ In addition, the reforms

⁵⁵ Rachel Sharp & Marlene Lenthag, *Dispatch Audio Reveals Cop Shot Jacob Blake Seven Times in the Back in Front of His Young Kids Less Than Three Minutes after Officers First Arrived on the Scene*, DAILY MAIL U.K. (Aug. 27, 2020, 5:07 PM), <https://www.dailymail.co.uk/news/article-8670727/Dispatch-audio-reveals-cop-shot-Jacob-Blake-three-minutes-officers-arrived-scene.html> [<https://perma.cc/4NE2-S2YX>]; Karma Allen & Sabina Ghebremedhin, *Family, Investigators and Police Offer Starkly Different Views of Jacob Blake in Wake Of Police Shooting*, ABC NEWS (Sept. 1, 2020, 7:01 AM), <https://abcnews.go.com/US/family-investigators-police-offer-starkly-views-jacob-blake/story?id=72675684>; Mark Guarino et al., *'My Son Matters': Jacob Blake's Family Calls for Officer's Arrest, Peaceful Protest*, WASH. POST (Aug. 25, 2020, 7:25 PM), <https://www.washingtonpost.com/nation/2020/08/25/jacob-blake-kenosha-police-shooting> [<https://perma.cc/D4S6-USUA>].

⁵⁶ LAWRENCE W. SHERMAN & RICHARD A. BERK, *THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT*, POLICE FOUNDATION REPORT 1-7 (1984) <https://www.policefoundation.org/wp-content/uploads/2015/07/Sherman-et-al.-1984-The-Minneapolis-Domestic-Violence-Experiment.pdf> [<https://perma.cc/4Y2T-6GSR>] (emphasis added) [hereinafter MINNEAPOLIS EXPERIMENT].

⁵⁷ See Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, 36 AM. BEHAVIORAL SCIENTIST 601, 603 (1993), available at <https://journals.sagepub.com/doi/pdf/10.1177/0002764293036005005> [<https://perma.cc/RUU2-T87W>]; Lawrence W. Sherman, *Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. OF CRIM. L. & CRIMINOLOGY 1 (1992); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. OF CRIM. L. & CRIMINOLOGY 137 (1992).

⁵⁸ LAWRENCE W. SHERMAN, JANELL D. SCHMIDT, AND DENNIS P. ROGAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 210 (1992).

⁵⁹ Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws* 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13186, 2007), <https://www.nber.org/papers/w13186.pdf> [<https://perma.cc/9M37-DGAB>].

increased arrests of men but also *multiplied* arrests of women.⁶⁰ For several years running, women have been the fastest growing segment of the prison population. Since the 90s, arrests of women for assault increased by thirty percent, which sociologists attribute to police not distinguishing between violence that does and doesn't merit arrest.⁶¹

Nevertheless, the mental commitment to criminal law solutions was hard to shake, and many feminists responded to the social science by declaring that DV law reform was not tough enough. Responding to studies that arrest increased violence among unemployed Black men, one activist, writing in 1992, observed, "That a few hours under arrest fails to deter the abusers who are generally considered to be society's failures is hardly surprising. In some subcultures of ghettoized people, where imprisonment is all too common, a few hours in jail may be seen as only minor irritation, or even a [rite] of passage." She concluded that for men of color, "the stakes may need to be higher, not lower."⁶²

So what can be done? Now is the time to think big. We could make modest reformatations or real transformations. We could, for example, require officers to give DV victims information on services as they violently arrest the suspects in front of their children, or we can put money toward the programs that help survivors obtain shelter, childcare, and other necessary services, like Washington State's Housing First program.⁶³ We can spend money on retraining police so they do not automatically kill mentally ill people or we can hire psychologists to answer the mental health calls made to the police, as Philadelphia has recently done.⁶⁴ Consider the aftermath of that New York City stop-and-frisk litigation I mentioned earlier. In the face of the stark evidence of the program's racist nature, the City could have

⁶⁰ Mekha Rajan & Kathy A. McCloskey, *Victims of Intimate Partner Violence: Arrest Rates Across Recent Studies*, 15 J. OF AGGRESSION, MALTREATMENT & TRAUMA 27, 37 (2007).

⁶¹ Meda Chesney-Lind, *Patriarchy, Crime, and Justice: Feminist Criminology in an Era of Backlash*, 1 FEMINIST CRIMINOLOGY 6, 14 (2006) (citing CRIME IN THE UNITED STATES, 2003, FED. BUREAU OF INVESTIGATION 275 (2004); LAWRENCE A. GREENFELD & TRACY L. SNELL, WOMEN OFFENDERS, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT 2-3 (1999) <https://www.bjs.gov/content/pub/pdf/wo.pdf> [<https://perma.cc/3VEU-M7RL>]; Jennifer Schwartz, Darrell Steffensmeier, & Ben Feldmeyer, *Assessing Trends in Women's Violence via Data Triangulation: Arrests, Convictions, Incarcerations, & Victim Reports*, 65 SOC. PROBS. 494 (2009).

⁶² Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. OF CRIM. L. & CRIMINOLOGY 46, 66 (1992).

⁶³ *Domestic Violence Housing First*, WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, <https://wscadv.org/projects/domestic-violence-housing-first> [<https://perma.cc/4D5F-8WGX>].

⁶⁴ Laura McCrystal, *Philly has Put a Behavioral Health Specialist in its 911 Call Center Amid Calls for Police Reform*, PHILA. INQUIRER (Oct. 9, 2020), <https://www.inquirer.com/news/police-mental-health-911-kenney-reform-behavioral-20201009.html> [<https://perma.cc/R5ZN-RY4V>].

funded even more expensive and ineffective body cams, implicit bias training, and data collection, or it could do what Mayor DeBlasio did when he assumed office. With the stroke of a pen, he ended stop-and-frisk. Stop-and-frisk stops went from a high of 686,000 in 2011 to 11,000 in 2017, a *ninety-eight percent* decrease.⁶⁵ Far from the city lapsing into anarchy, New York's 2017 crime rate was seventeen percent *lower* than its rate in 2011.⁶⁶

Finally, all of us can speak out. We can use our collective voice and make this critical moment into a sizable bend in the arc of the moral universe. We can write; we can protest; we can organize. Most crucially, we can vote. We don't all share the exact same vision of a better future, but we can all use our voices to move closer to a world that feels more just to each of us. For me, it is a world where every person who has suffocated under the weight of economic marginality, racial discrimination, and emotional despair can finally, and freely, breathe.

⁶⁵ *Annual Stop-and-Frisk Numbers*, N.Y. CIV. LIBS. UNION: STOP-AND-FRISK DATA, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/58HT-ZAFW>].

⁶⁶ I arrived at this percentage by adding up the felonies and misdemeanors of 2011 plus those of 2017 to calculate the change. See *Historical New York City Crime Data*, N.Y. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/stats/crime-statistics/historical.page> [<https://perma.cc/JFJ9-FDAH>].