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## The Progressive Love Affair with the Carceral State

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# THE PROGRESSIVE LOVE AFFAIR WITH THE CARCERAL STATE

*Kate Levine\**

THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION. By *Aya Gruber*. Oakland: University of California Press. 2020. Pp. xii, 288. Cloth, \$29.95; paper, \$24.95.

## INTRODUCTION



Famed feminist attorney Gloria Allred, pictured above, has a wide smile as she holds up a sign displaying the sentence given to movie mogul and sexual offender Harvey Weinstein.<sup>1</sup> Jurors found him guilty of rape and other charges in February 2020.<sup>2</sup> Twenty plus three, the years Weinstein will spend in prison in New York, represents justice to Allred and many of her progressive, feminist allies. But more “justice” may be in store for this perfect villain. The Los

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\* Professor, Benjamin N. Cardozo School of Law. For conversations and comments on drafts, thanks to Eisha Jain, Benjamin Levin, Jamelia Morgan, Anna Roberts, Jocelyn Simonson, and the participants in the Criminal Justice Ethics Schmooze and the Junior Faculty Workshop at Cardozo.

1. ‘*This Is What Justice Looks Like*’— *Gloria Allred on Weinstein Sentence*, METRO, <https://metro.co.uk/video/this-justice-looks-like-gloria-allred-weinstein-sentence-2128374>.

2. Dan Mangan, *Harvey Weinstein Sentenced to 23 Years in Prison for Rape and Sex Assault in Case That Sparked ‘MeToo’ Movement*, CNBC (Mar. 11, 2020, 2:27 PM), <https://www.cnbc.com/2020/03/11/harvey-weinstein-sentenced-in-prison-for-sex-assault.html> [perma.cc/7GDF-CDAT].

Angeles district attorney obtained an indictment against Weinstein in July 2021; the case is expected to go to trial later this year.<sup>3</sup> Allred may then believe that justice equals decades more behind bars, likely a symbolic “victory” for Weinstein’s accusers and their #MeToo supporters, as Weinstein is an unhealthy man in his late sixties.<sup>4</sup>

Harvey Weinstein really is the progressive left’s perfect villain. He is a wealthy, unattractive, white, cis, hetero male who worked in Hollywood—the picture of privilege without a sympathetic veneer. His alleged offenses against too many women to name<sup>5</sup> are an ugly display of patriarchy’s continued grip on the economic advancement of women. Their choice—submit to his sexual assaults or give up dreams of a Hollywood career—is a familiar, too-bad-to-be-true saga that has already become a feature film and will likely spawn dozens more.<sup>6</sup> You’d be hard-pressed to find many progressives who don’t share Allred’s sentiments. Indeed, the Weinstein trial and sentence is something of a crowning glory for neoliberal feminism’s most recent pas de deux with the carceral state.<sup>7</sup>

The numerous iterations of the role criminal law has played in the feminist movement’s development and its impact in the expansion of the carceral state is the topic of Professor Aya Gruber’s timely book, *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration*.<sup>8</sup> Gruber is a longtime critic of progressive criminal lawmaking in general<sup>9</sup> and the criminal law’s attempt to regulate sex in particular.<sup>10</sup> In *The Feminist War on Crime*, Gruber has expanded the reach and breadth of her scholarship with

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3. Dominic Patten, *Harvey Weinstein’s L.A. Rape Case Heads To 2022 Trial as Rose McGowan RICO Lawsuit Dismissed*, DEADLINE (Dec. 7, 2021, 2:15 PM), <https://deadline.com/2021/12/harvey-weinstein-rape-trial-rose-mcgowan-case-dismissed-1234886366> [perma.cc/4UN8-RCAY].

4. Jean Casarez, Chloe Melas & Holly Yan, *Harvey Weinstein Is Still Hospitalized. Here’s What His Attorneys Say About His Chronic Health Issues*, CNN (Feb. 25, 2020, 2:51 PM), <https://www.cnn.com/2020/02/25/us/weinstein-rikers-hospital/index.html> [perma.cc/XG6V-95JL].

5. *Harvey Weinstein Scandal: Who Has Accused Him of What?*, BBC (Jan. 10, 2019), <https://www.bbc.com/news/entertainment-arts-41580010> [perma.cc/7SUD-DLYZ] (noting dozens of accusers).

6. Maria Fontoura, *‘The Assistant’ Is About Harvey Weinstein—and Much More*, ROLLING STONE (Aug. 30, 2019, 7:03 PM), <https://www.rollingstone.com/movies/movie-features/assistant-movie-harvey-weinstein-metoo-877660> [perma.cc/N2EC-4E99].

7. See *Full Coverage: Harvey Weinstein Is Found Guilty of Rape*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html> [perma.cc/ZQ8P-EK5W] (“For many, the trial was a crucial test in the effort to hold powerful men accountable for sexual harassment in the workplace.”).

8. Aya Gruber is a professor of law at the University of Colorado Law School.

9. See, e.g., Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018); Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIA. L. REV. 961 (2014); Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129 (2014).

10. See, e.g., Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016); Aya Gruber, *Anti-rape Culture*, 64 U. KAN. L. REV. 1027 (2016); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

a concise yet thorough look at the development of mainstream feminism's reliance on criminal law to combat problems ranging from domestic abuse to rape and sexual assault and workplace to college campus harassment.

Along the way, Gruber shows us that this partnership was not inevitable. Indeed, in each wave of the feminist movement, there existed intersectional, race- and gender-conscious, and holistic pockets of feminist organizing (pp. 46–50). These feminists saw what the carceral state could do to not only marginalized poor men of color but women of color too, the alleged beneficiaries of these “protections.”<sup>11</sup> Despite these lessons, the carceral feminist movement continues to this day (pp. 199–204).

Gruber lays out a cogent case for her thesis that the carceral partnership between mainly white, upper-middle-class feminists and law enforcement is an underappreciated and deeply problematic current that runs through numerous waves of feminism. We see this current run from early twentieth-century feminists who advocated for “the criminal regulation of drunkenness and lust” (p. 25) to the 1970s second-wave feminists who ushered in mandatory arrest and prosecution measures for domestic violence (pp. 66–67). And we see it in the millennial era's #MeToo movement, which has harnessed the fury of women assaulted and mistreated on campuses and in work settings to advocate for more criminal law and harsher sentencing for sexual offenses.

Gruber is no fan of these criminalization projects, but she absolutely *is* a feminist. Unlike the mainstream feminists portrayed in her book, however, Gruber views the carceral state as antithetical to advancing the safety and security of all women.<sup>12</sup> Thus, one of Gruber's aims is to encourage “[m]illennial feminists [to] take the policing and prison abolition movement seriously” (p. 199). In this way, her book illustrates a larger obstacle to combatting our American addiction to incarceration. Progressives often speak out of both sides of their mouths when it comes to mass incarceration. They decry the overuse of the criminal legal system and the brutality, racism, and inhumanity of the carceral state. Yet when it comes to people that progressives themselves identify as villains—employers,<sup>13</sup> police,<sup>14</sup> those who commit “hate crimes,”<sup>15</sup>

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11. See *infra* Part I.

12. Pp. 7–8 (finding that mass incarceration actually makes women of color more vulnerable to violence).

13. Ben Levin, *Rethinking Wage Theft Criminalization*, ONLABOR (Apr. 13, 2018), <https://onlabor.org/rethinking-wage-theft-criminalization> [perma.cc/8LRY-PV74] (observing that there has been a growing push in Australia for harsher prison sentences for wage-theft offenses). Levin argues, however, that progressives and workers' rights activists might actually advance inequality and marginalization by attempting to criminalize financial abuses in the workplace. *Id.*

14. Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1001–02 (2021).

15. Rob Kuznia, *As Hate Crime Laws Expand, Who to Exclude as Victims?*, WASH. POST (Sept. 10, 2019), [https://www.washingtonpost.com/national/as-hate-crime-laws-expand-who-to-exclude-as-victims/2019/09/03/796fe814-bd30-11e9-a5c6-1e74f7ec4a93\\_story.html](https://www.washingtonpost.com/national/as-hate-crime-laws-expand-who-to-exclude-as-victims/2019/09/03/796fe814-bd30-11e9-a5c6-1e74f7ec4a93_story.html) [perma.cc/N9WB-4XQG] (noting the growing list of victims many states want to add to the list of “hate crimes”).

and white-collar or wealthy offenders<sup>16</sup>—they advocate vociferously for new criminal laws, more prosecutions, and harsh individual sentences.<sup>17</sup> Even if one agrees with progressives' list of villains, Gruber shows that for feminism's targets, it is not generally the Harvey Weinsteins who end up incarcerated, but rather poor, young men (and women) of color.<sup>18</sup>

This Review affirms and expands on Gruber's argument about carceral feminism to encompass progressives' prison appetite more broadly. Part I looks at Gruber's book through an "abolitionist stance" (p. 200), a phrase Gruber uses to describe her approach to feminism. Using mandatory domestic-violence arrests as the example, it highlights Gruber's argument about the partnership between feminism and the carceral state. Specifically, it explains how feminism loses its intersectional appeal when it relies on the criminal legal system, and how feminism's connection to carceral solutions problematically buoys the criminal legal system. Part II expands on Gruber's thesis. It illustrates other left-leaning movements' continuous reliance on the criminal legal system by focusing on progressives' carceral solutions to police violence and hate crimes. Finally, Part III examines Gruber's reference to a noncriminal arena—the campus rape reform movement—to question whether an abolitionist stance is theoretically and rhetorically diminished by its link to other types of accountability mechanisms. Should the nascent prison abolition movement entangle itself with other struggles? Does connecting the dehumanization of imprisonment to other potentially unfair punitive responses, whether civil or administrative and public or private, risk losing the clarity of the prison abolitionist movement's narrative and sense of crisis? Because these questions intersect with numerous abolitionist projects, they may be useful beyond the context of this Review.

Gruber's book is a lucid and well-crafted contribution to the criminal law literature. When placed in the context of the larger progressive love affair with the carceral state, it is easy to see the urgency for more rigorous work like *The Feminist War on Crime* that uncovers the lesser-known facets of our societal addiction to criminal law and punishment.

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16. E.g., Vanessa Romo, *Actress Felicity Huffman Sentenced to 14 Days in College Admissions Scandal*, NPR (Sept. 13, 2019, 4:45 PM), <https://www.npr.org/2019/09/13/759256335/actress-felicity-huffman-sentenced-to-14-days-in-college-admissions-scandal> [perma.cc/7WXN-DPC9] (quoting a professor who believes all deserve to "serve time" because a drug defendant would receive such a sentence).

17. See sources cited *supra* notes 13–15.

18. P. 57 ("Studies confirm that people of color are, in fact, disproportionately involved in the ever-expanding, ever-harsher DV carceral system.").

## I. FEMINISM'S LESSONS FOR ABOLITIONISTS

Gruber acknowledges her abolitionist streak only at the end of *The Feminist War on Crime*, when she advises young feminists to “adopt an unconditional stance against criminalization, no matter the issue.”<sup>19</sup> An abolitionist stance, according to Gruber, means fighting “against policing, prosecution, and punishment as the preferred solution to gender inequality” (p. 199). While she does not explicitly mention abolition until the conclusion of the book, early on Gruber lays out a neofeminist manifesto that could apply to almost any group seeking justice without incarceration. She writes:

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 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. (p. 18)

In other words, Gruber's goal is not to lead the way for this neofeminist movement or a more global abolitionist project; instead, her book contributes lessons to both of these movements.<sup>20</sup> The book is useful for those fighting the carceral state because it cautions individuals to be mindful of how the criminal legal system can swallow up progressive movements, even as the movement's members advocate for decarceration in other spheres.

This Part will present some of *The Feminist War on Crime* through an abolitionist stance. Gruber shows how, time and again, mainstream feminism partners with the criminal legal system.<sup>21</sup> She argues that this carceral partnership means ignoring smaller, more intersectional (less white) movements that seek to end prison-backed solutions to gender violence (pp. 52–59). Despite the whiteness of many mainstream feminists, they justify their partnership with the criminal legal system by claiming that increased criminalization will lead to racial, gender, and wealth equality. This is ironic because the criminal legal system does much to maintain white, wealthy, heteropatriarchal dominance.<sup>22</sup> Indeed, feminist reliance on the criminal legal system sustains and

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19. P. 197; see also p. 5 (identifying these young feminists as “ranging from generation-Z students to younger millennials, [who] entered adulthood during and after the media preoccupation with campus rape in the early 2010s”).

20. For an in-depth discussion of Gruber's book and feminism, see I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449 (2021) (reviewing *The Feminist War on Crime*).

21. See, e.g., p. 45 (“[I]n a few short years, the battered women's movement transformed from a radical antiauthoritarian movement into a propolicing, proprosecution lobby.”).

22. Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1363 (2013) (discussing the “prevalence of patriarchy within the criminal justice system and society at large”).

legitimizes the criminal legal system writ large, however unintended this may be.<sup>23</sup>

Gruber cites numerous historical examples of the partnership described above, but among the starkest is the movement for the mandatory arrest of men accused of domestic violence (DV). This push toward nondiscretionary arrests began in the 1970s when mediation, rather than arrest, was the preferred solution to first-time DV calls (p. 68). Feminists presented courts with “victims whose cases had specific characteristics: there was extreme violence; the victim wanted the police to arrest the abuser; and the officers told the victim they had no authority to arrest, or worse, defended the abuser” (p. 69). These were glaring tableaux that suggested police were not taking DV seriously in a zero-sum game between violent abusers and helpless victims. Of course, as with other carceral-feminist pictures, this one ignored the varied and complicated situations that made up DV complaints. It silenced the “many antiarrest and arrest-ambivalent victims,”<sup>24</sup> particularly the nonwhite women who, for numerous reasons, would have preferred less carceral solutions in certain instances.<sup>25</sup>

This successful mainstream feminist campaign led police departments to require automatic arrests for both felony and misdemeanor DV situations (p. 70). It also crowded out other less carceral responses to DV calls. For example, a once “distinctly feminist” program for NYPD officers known as the “Family Crisis Intervention Unit” trained a small group of officers in de-escalation and mediation practices, “orienting police identity away from aggressive enforcer toward peacemaker.”<sup>26</sup> The training led to modest successes: less violence against police responding to calls, fewer arrests, and better relations with the community. These successes also led police departments to employ conflict resolution training (p. 74). But a decade later, after the feminist push for mandatory arrest, such programs waned (p. 75). Arrest and prosecution,

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23. Levine, *supra* note 14, at 1006–07 (warning against progressive support for criminal legal solutions).

24. P. 70; see also Margo Lindauer & Emily Postman, *Beyond Non-violent Offenses: Criminal Justice Reform and Intimate Partner Violence in the Age of Progressive Prosecution*, 16 STAN. J. C.R. & C.L. 457, 461 (2021) (“While the ‘tough on crime’ policies DV advocates sought to enact have often been justified in the name of both prototypical and specific (and usually white) victims of high-profile violent crimes, historically there has been very little empirical research into the actual needs and desires of victims writ large. . . . Indeed, seventy-five percent of crime victims surveyed believed that prison would be more likely to make people commit crimes than rehabilitate them.”); Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 402 (2015) (“[M]anipulation of evidence rules works to the detriment of some complainants by overriding the explanations and experiences of those whose lived realities do not fit within the prevailing narrative of domestic violence. . . .” (footnote omitted)).

25. P. 87 (“[B]lack feminists[] . . . warn[ed that] . . . mandatory arrest policies put minority women at disproportionate risk of future violence, homelessness, financial ruin, deportation, and their own incarceration.”).

26. Pp. 73–75 (emphasis omitted). The program was born during antipolice activism in the 1960s. Pp. 73–75.

an easy and seemingly effective solution, stopped a potentially transformative set of alternatives from taking hold.

One of the biggest problems with feminism's partnership with the carceral state is how it exacerbates the racist nature of the criminal legal system. As *The Feminist War on Crime* makes clear, alternatives to carceral feminism—largely organized by Black women—were subsequently ignored or passed over for carceral programs supported by white women (p. 87). What is worse, white feminists often used racial equality to defend criminal legal solutions. Advocates of mandatory DV arrests argued that these policies benefited men of color because they “require the police to arrest every suspect and thereby prevent racist police officers from disproportionately arresting [B]lack men” (p. 86). Not surprisingly, their claims have proven untrue in the intervening fifty years.<sup>27</sup> Arrest advocates also argued that such policies would confer more protection on Black women, thus supporting their fight for equal treatment (pp. 86–87). These claims were also untrue.<sup>28</sup> For example, one study showed that “African-American victims of domestic violence are disproportionately likely to die after partner arrests relative to white victims . . . . The magnitude of the disparity strongly indicates that mandatory arrest laws, however well-intentioned, can create a racially discriminatory impact on victims” (p. 92). While mandatory arrest efforts were praised for making strides in women's equality, they have been accompanied by setbacks for racial and socioeconomic equality.

Notwithstanding the harmful effects of feminism's partnership with the police, mandatory arrests in DV cases remain the standard in about half of the states in which they were enacted.<sup>29</sup> Indeed, these arrests prevail “despite increasing sociological evidence and scholarly commentary [beginning] in the 1980s and 1990s” that they do not affect the rates of domestic abuse or help

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27. See p. 86 & 227 n.127 (suggesting that “mandatory arrest policies disproportionately increase arrests of [B]lack men.”).

28. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1454–55 (2012) (“[A]s many women of color predicted, mandatory arrest policies appear to have done little to protect women of color against domestic violence. Indeed, some studies seem to suggest that the policies have inadvertently increased the risks of serious injury or death for some victims of domestic violence, including a heightened risk of mortality for Black women in particular. Beyond the heightened risk of death, research suggests that women of color are more likely to be arrested themselves for behavior that may be consistent with self-defense but interpreted through the lens of stereotypes as overly aggressive.” (footnotes omitted)).

29. Amy M. Zelcer, Note, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Triecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 AM. CRIM. L. REV. 541, 546 (2014) (“[T]wenty-nine states mandate arrest when there is probable cause to believe that the batterer has violated a protective order. Twenty-one states and the District of Columbia mandate arrest in cases of domestic violence, regardless of whether a protective order has been violated.” (footnotes omitted)). Additionally, Gruber notes that “forty-nine states and the District of Columbia exempt DV misdemeanors from th[e] rule” that police cannot make warrantless misdemeanor arrests that do not occur in their presence, a rule that was in play in most states prior to the feminist drive for mandatory DV arrests. P. 75.



complainants (p. 68). This kind of evidence continues to roll in<sup>30</sup> and has been the basis for criticism from legal scholars and activists. But like all criminal law and policy, mandatory DV arrests are very difficult to dislodge once enacted.<sup>31</sup>

Carceral feminists' support for mandatory arrests also "shored up the coercive arrest model of policing in an era of declining faith in the model's legitimacy" (p. 68). In other words, the movement propped up the criminal legal system. Feminists' DV advocacy in the 1970s continues to hamper reform in *other* areas of law and policy today. For example, in 2019, scholar Leigh Goodmark noted that "[c]oncerns about intimate partner violence threatened the campaign for pretrial bail and discovery reform in New York State."<sup>32</sup> A bill that would impact the procedural rights of almost all defendants nearly failed to pass because of concerns about how it might impact DV complaints.

Feminism's influence on criminal law leads directly to long-term harms of progressive reliance on the criminal legal system. First, a given progressive movement's dependence on the criminal legal system may make it harder to find noncarceral and potentially more effective solutions to that specific problem. Second, it may also legitimize the criminal legal system more broadly, particularly as it comes from the same groups often advocating *against* the overuse of criminal law. Thus, considering that many progressive causes are currently engaged with and reliant on criminal legal system solutions, it becomes easier to see both the difficulty of tearing down the carceral state and left-leaning progressives' contribution to this intractability.<sup>33</sup> Gruber's feminist history serves as a lesson and a warning to today's progressive movements to not fall prey to legitimizing the criminal legal system.

## II. THE PROGRESSIVE MOVEMENT'S RELIANCE ON THE CARCERAL STATE

*The Feminist War on Crime* highlights one of the central tensions of the feminist movement's partnership with the carceral state: while many feminists, particularly millennial feminists, advocate for decarceration for certain

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30. Lindauer & Postman, *supra* note 24, at 459 ("While first-time arrests have been shown to reduce recurrence of domestic violence to some degree, arrests have diminishing returns on repeat offenses, because 'the majority of arrested abusers who are high risk will re-abuse regardless of prosecution.' Some studies show marginal decreases in re-offenses, while others show no measurable change in behavior at all." (footnotes omitted)); Leigh Goodmark, Opinion, *Stop Treating Domestic Violence Differently from Other Crimes*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/opinion/domestic-violence-criminal-justice-reform-too.html> [perma.cc/USA3-8FKT] ("[A]rrests have modest effects on deterrence in some places, no effect in others, and can actually spur violence.").

31. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 591 (2001) ("One of the pathologies of criminal lawmaking is the difficulty of repealing criminal statutes . . .").

32. Goodmark, *supra* note 30.

33. See generally NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014) (arguing that racial prejudice and punitive carceral expansion in the criminal justice system are rooted in liberal policymaking).

crimes,<sup>34</sup> they also advocate for more police, more prosecutions, and more prison for those accused of “gender crime.”<sup>35</sup> Gruber refers to this tension as a “carve-out from or even veto over criminal justice reform” (p. 6), noting that millennial feminists will “carry a mattress one day and raise a fist at a Black Lives Matter protest the next” (p. 169). These feminists do not seem to recognize the inconsistency with advocating for both the criminal punishment of alleged sex abusers and the decarceration of other groups.

This tension that Gruber illustrates so well in the context of feminism is rife within numerous other progressive movements. Indeed, another person at that same Black Lives Matter protest advocating for an end to incarceration<sup>36</sup> might be outside the courthouse the very next day, insisting that violent police officers be prosecuted.<sup>37</sup> On a policy level, the politician who calls for an end to mass incarceration will, without any reflection, turn around and advocate for new and harsher penal laws against those accused of race-motivated cruelty toward Asian Americans.<sup>38</sup>

Like gender crime, there are other crimes that might individually be seen as worthy of a carve-out from the progressive left’s stated aversion to the carceral state: police brutality, hate crimes, animal abuse, white-collar crime, political corruption, and employer crime.<sup>39</sup> But this Part argues that in the

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34. See p. 5; Rebecca Goldstein, *The Politics of Decarceration*, 129 *YALE L.J.* 446, 476 (2019) (reviewing RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019)) (“[M]illennials, who came of age ‘in a period of urban resurgence and a reduction in the aggressive war on drugs against black communities . . . [exhibit] very different penal behaviors and sensibilities, both at the personal and political level.’” (alterations in original)).

35. P. 170 (“[P]lenty of feminists . . . remain committed not just to upholding the existing feminist crime control regimes and closing ‘loopholes’ in them but also to creating new ones—new antitrafficking laws, revenge-porn laws, laws against hosting prostitution ads, laws against coercive control in relationships, laws against stealth condom removal.”).

36. *End the War on Black Communities*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-the-war-on-black-communities> [perma.cc/3528-X8MS] (calling for an end to “policing, mass criminalization, incarceration, and deportation”).

37. Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419, 1438 (2016) (“In Ferguson, for example, people allied with the Movement for Black Lives were among the strongest voices for prosecution of Officer Wilson and for the intervention of the U.S. Department of Justice in the police department.”).

38. The COVID-19 Hate Crimes Act, Pub. L. No. 117-13, 135 Stat. 265 (2021) (codified in scattered sections of 34 U.S.C.), which provides funding to streamline prosecution of hate crimes against Asian Americans, passed the Senate 94-1. See 167 *CONG. REC.* S2148 (daily ed. Apr. 22, 2021); see also *infra* notes 66–68 and accompanying text. Many of these senators have also strongly condemned mass incarceration, including Cory Booker and Richard Durbin, both of whom have been particularly vocal about criminal justice reform. See, e.g., Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, *N.Y. TIMES* (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [perma.cc/9BSR-74LZ].

39. See *supra* notes 14–16; see also Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 *MINN. L. REV.* 1415, 1438 (2021) (“There are different flavors of prosecutorial progressivism and different sets of prosecutorial progressive priorities: those focused on crimes committed by powerful defendants (e.g., white-collar crime, political corruption, or police violence) . . .”); *id.* at 1449 (arguing that the desire to prosecute powerful defendants is “fundamentally at odds with a broader decarceral or abolitionist project, not just because it treats the

aggregate, the progressive instinct to use the criminal legal system to solve these social problems does not cohere with an abolitionist stance. Ensuring that progressives are aware of their attachment to prisons and that abolitionists pay attention to the obstacles posed by this love affair among their allies is crucial to understanding why even moderate, but certainly radical, reduction in the criminal legal system is difficult to attain. This Review will look only at police brutality and hate crimes. Still, the arguments are equally applicable to progressive movements that partner with the carceral state to achieve their goals.

### A. Police Crimes

Police officers who commit violence against citizens are, like those accused of gender crimes, targeted by progressives for more and prolonged incarceration. And similar to the feminist movement around gender crimes, much of the energy behind ending police violence has focused on the prosecution and incarceration of individual offenders. Activists, scholars, and progressive media organizations drive this effort to ensure that police officers are prosecuted and convicted for their violent crimes through protest,<sup>40</sup> scholarship,<sup>41</sup> and media attention.<sup>42</sup> One of the primary justifications for this movement is to equalize the criminal legal treatment of police and ordinary citizens.<sup>43</sup>

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criminal system as fundamentally legitimate, but also because it is inherently rooted in a belief that prosecutors need to prosecute more” (emphasis omitted)); Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250, 251 (2021) (noting that many animal rights lawyers have adopted “the mindset that social problems are solved through criminal law”).

40. See, e.g., Patty Nieberg & Colleen Slevin, *Activists See Hope After Charges in Elijah McClain’s Death*, AP NEWS (Sept. 2, 2021), <https://apnews.com/article/police-reform-2ca9cc708896be8bda5368fd36aeceae> [perma.cc/635E-BJLS] (“‘Our hope has been renewed,’ said Candice Bailey, an activist in the city of Aurora who has been a liaison between the community and police and has led demonstrations over the death of McClain, a 23-year-old Black man who was put into a chokehold and injected with a powerful sedative in 2019.”).

41. See *infra* notes 43–45.

42. The media accounts of leniency against police officers are voluminous. See, e.g., Mark Berman, *When Police Kill People, They Are Rarely Prosecuted and Hard to Convict*, WASH. POST (Apr. 4, 2021), <https://www.washingtonpost.com/nation/2021/04/04/when-police-kill-people-they-are-rarely-prosecuted-hard-convict> [perma.cc/Q4E4-9QCZ]; German Lopez, *Police Officers Are Prosecuted for Murder in Less than 2 Percent of Fatal Shootings*, VOX (Apr. 2, 2021, 11:30 AM), <https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter> [perma.cc/24CU-U6E4]; Emma Tucker, Mark Morales & Priya Krishnakumar, *Why It’s Rare for Police Officers to Be Convicted of Murder*, CNN (Apr. 21, 2021, 12:32 AM), <https://www.cnn.com/2021/04/20/us/police-convicted-murder-rare-chauvin/index.html> [perma.cc/T88D-SXQB]; *Why Police Usually Aren’t Convicted in Murder Trials*, NPR (Mar. 8, 2021, 4:22 PM), <https://www.npr.org/2021/03/08/974941363/why-police-usually-arent-convicted-in-murder-trials> [perma.cc/NE2Y-ZP9C]; Amelia Thomson-DeVaux, Nathaniel Rakich & Likhitha Butchiredygar, *Why It’s So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (June 4, 2020, 6:00 AM), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct> [perma.cc/LU8U-PXEH].

43. See generally Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (explaining how comparisons of police and civilian treatment almost always favor solutions that treat the police as harshly as civilians rather than ratcheting down the harsh treatment of civilians).

Yet, at every turn and with only minor exceptions, progressives look to ratchet up the punishment of police rather than ratchet down the treatment of other people caught in the criminal legal machine.<sup>44</sup>

This one-way ratchet toward a more punitive criminal legal system takes several forms. Many critique prosecutors by accusing them of not charging police officers enough<sup>45</sup> and presenting weak cases to grand juries.<sup>46</sup> The unsurprising result is that progressive prosecutors run on platforms promising more police prosecutions; others have poured resources into and grand-standed about their records on charging the police with crimes.<sup>47</sup>

Additionally, as they did in response to feminist advocacy,<sup>48</sup> states are considering whether to change or have previously changed their procedural and substantive laws to make it easier to prosecute the police.<sup>49</sup> Based on the feminist movement's legitimization of systematic arrests, we can predict that

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44. See Levine, *supra* note 14; see also Hadar Aviram, Essay, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 201–02 (2020) (discussing progressive desire to turn criminal law on the powerful, including police).

45. See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 764–68 (2016) (noting that prosecutors are criticized for the time and care put into decisions about whether to prosecute police); Rebecca Roiphe, *The Duty to Charge in Police Use of Excessive Force Cases*, 65 CLEV. ST. L. REV. 503, 505 (2017); Colin Taylor Ross, Note, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755 (2016); Rachel Barkow, Opinion, *Prosecutors Need to Treat Police Shootings Like a Threat to Public Safety*, WASH. POST (Mar. 13, 2019), <https://www.washingtonpost.com/opinions/2019/03/13/prosecutors-need-treat-police-shootings-like-threat-public-safety> [perma.cc/J5M8-UH2U].

46. Scholars have suggested changing the grand jury process or abolishing it altogether. E.g., Roger A. Fairfax, Jr., Essay, *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 826 (2015) (“As a result of widespread outrage in the wake of . . . high-profile cases, politicians, pundits, scholars, and lawyers alike have renewed calls for an end to the grand jury in the United States.”); Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 424; Claire P. Donohue, Essay, *Article 32 Hearings: A Road Map for Grand Jury Reform*, 59 HOW. L.J. 469, 478–79 (2016). California has taken those suggestions to heart, abolishing the grand jury for police shootings. Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES (Aug. 13, 2015), <https://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases> [perma.cc/XRE6-6]S6].

47. Levine, *supra* note 14, at 1012–15.

48. Pp. 142–45 (discussing rape shield laws and other victim-protective evidentiary rules).

49. See, e.g., CAL. PENAL CODE § 835a(c) (West Supp. 2022) (“[A] peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary . . . [t]o defend against an imminent threat of death or serious bodily injury to the officer or to another person.”); Vivian Ho, *California Adopts Country’s Strictest Law to Curb Police Killings*, GUARDIAN (Aug. 19, 2019, 6:13 PM), <https://www.theguardian.com/us-news/2019/aug/19/california-use-of-force-law-stephon-clark> [perma.cc/4Z9Y-2LLB]; see also Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 639 (“Prosecutors may also be concerned about bringing charges when the chances of success are very small. Current law contributes to this concern by favoring the officer at almost every step of the way. My model statute tries to be more balanced than current law, giving prosecutors a better chance at securing a conviction in cases where a conviction is appropriate.” (footnotes omitted)).

changes to law and procedure will affect not only police officers but other defendants. Indeed, one author has already connected changes that make it easier to convict police claiming self-defense to defendants accused of “private violence.”<sup>50</sup>

Those advocating for harsher laws and penalties against police often allege that ratcheting up systemic toughness will lead to fairer execution of laws. This position is reminiscent of the argument that mandatory arrests in DV cases would equalize treatment between white men and men of color and confer more protection on Black women.<sup>51</sup> In the police context, one author called for an easier path to death sentences, claiming that “[t]he relationship of capital punishment to civil rights is not only possible but fully in force today through the federal criminal law of civil rights enforcement. Moreover, there are compelling reasons for maintaining, or even strengthening, those connections.”<sup>52</sup> This argument is specious in light of the death penalty’s well-known racist application.<sup>53</sup> Yet, just like feminists who argued for more arrests as a form of racial equalization, we see the same faulty logic at play in the argument to punish police more harshly: make it easier to sentence police to death, and maybe you will save Black lives or more white people will be put to death, thus equalizing the penalty’s reach. In its grimmest form, the criminal legal system is being employed to tell Black people that they can and should rely on it to save them.

The police prosecution movement also drowns out noncarceral and potentially more far-reaching solutions to police violence. Consider the Minneapolis police department in the wake of the murder of George Floyd. Initially, there was tremendous support behind defunding the police.<sup>54</sup> Under a defunded system, Derek Chauvin would not have been in a position to arrest, brutalize, or kill George Floyd for allegedly presenting a fake \$20 bill. Moreover, the violence that thousands of people experience daily, often for no or minor crimes, would have likely decreased.<sup>55</sup> But as the city, state, and country

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50. Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1650 (2019).

51. See *supra* text accompanying notes 27–28.

52. J. Richard Broughton, Essay, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1631, 1641 (2018).

53. See CAP. PUNISHMENT PROJECT, ACLU, [https://www.prisonpolicy.org/scans/aclu\\_dp\\_factsheet4.pdf](https://www.prisonpolicy.org/scans/aclu_dp_factsheet4.pdf) [perma.cc/A4XC-Y6VV] (“The odds of receiving a death sentence are nearly four times higher if the defendant is black than if he or she is white.”).

54. See, e.g., Matt Sepic, *A Year After George Floyd’s Death, Plans for Minneapolis Police Reform Have Softened*, NPR (May 25, 2021, 5:20 PM), <https://www.npr.org/2021/05/25/1000298293/a-year-after-george-floyds-death-plans-for-minneapolis-police-reform-have-soften> [perma.cc/NQR6-7JHP] (“Last June, a veto-proof majority of Minneapolis City Council members pledged to defund and dismantle the police department.”).

55. See Levine, *supra* note 14, at 1053 (arguing that police violence is systemic and widespread and likely to be reduced only by reducing citizen-police interaction); see also Amna A. Akbar, Opinion, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html> [perma.cc/Q4F4-GN94] (“The demand for defunding suggests, as the police and prison abolitionist Rachel Herzing often says, that the only way to reduce police violence is to reduce police officers’ opportunities for contact with the public.”).

focused its attention and resources on the prosecution of Chauvin and the other officers involved in Floyd's killing,<sup>56</sup> the mainstream<sup>57</sup> force behind the defund movement all but died.<sup>58</sup> The city council that had promised to dismantle the police<sup>59</sup> quietly scuttled that assurance in favor of a ballot referendum that was defeated in November 2021.<sup>60</sup> And while some stated that incarceration for Chauvin was "not enough" justice,<sup>61</sup> it appears that, for many, it is. Since the Chauvin conviction, there has been scant focus on systemic solutions to police brutality in Minneapolis.<sup>62</sup> This is particularly true as far as government or national media attention is concerned.

The organized movement to prosecute police is quite young. It remains to be seen how successful it will be and how influential new criminal law policies will become. But the similarities to carceral feminism's influence on the criminal legal system should give pause to those committed to an abolitionist stance. In this way, Gruber's depiction of feminism's carceral history can be widened to tell a deeply troubling story about the obstacles that progressives have constructed against major decarceration efforts.

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56. See Jon Blistein, *Three Ex-cops Convicted of Violating George Floyd's Civil Rights*, ROLLING STONE (Feb. 24, 2022, 5:46 PM), <https://www.rollingstone.com/culture/culture-news/george-floyd-civil-rights-federal-trial-verdict-guilty-1312411> [perma.cc/7WXN-EEGL].

57. On the other hand, activists are still behind the defunding of the Minneapolis police department. See *Vote Yes on Question 2!*, YES 4 MINNEAPOLIS, <https://yes4minneapolis.org> [perma.cc/DS7F-UAF3].

58. See Samantha Michaels, "Defund the Police" Was a Rallying Cry in 2020. Minneapolis Is About to Vote on What That Means, MOTHER JONES (Aug. 19, 2021), <https://www.motherjones.com/crime-justice/2021/08/defund-the-police-minneapolis-public-safety-organizers-frey-policing> [perma.cc/SFZ6-ZSTH] (showing that only 18 percent of people support the defund movement).

59. Sean Collins, *Minneapolis Vowed to Dismantle Its Police Department. Is Change Finally Coming?*, VOX (Apr. 6, 2021, 8:30 AM), <https://www.vox.com/22360315/minneapolis-defund-police-chauvin-trial-george-floyd> [perma.cc/X3RY-JGK4] ("[T]he council unanimously passed a resolution on June 12[, 2020,] that laid out a plan for beginning 'a year long process of community engagement, research, and structural change to create a transformative new model for cultivating safety.'").

60. *Id.*; *Minneapolis, Minnesota, Question 2, Replace Police Department with Department of Public Safety Initiative (November 2021)*, BALLOTPEDIA, [https://ballotpedia.org/Minneapolis,\\_Minnesota,\\_Question\\_2,\\_Replace\\_Police\\_Department\\_with\\_Department\\_of\\_Public\\_Safety\\_Initiative\\_\(November\\_2021\)](https://ballotpedia.org/Minneapolis,_Minnesota,_Question_2,_Replace_Police_Department_with_Department_of_Public_Safety_Initiative_(November_2021)) [perma.cc/TS2S-6BQZ].

61. E.g., Derecka Purnell, Opinion, *Celebrating Derek Chauvin's Conviction Is Not Enough. We Want to Live*, GUARDIAN (Apr. 21, 2021, 11:30 AM), <https://www.theguardian.com/commentisfree/2021/apr/21/derek-chauvin-conviction-limits-george-floyd-death> [perma.cc/XCF3-3PT7].

62. Like Gruber, I describe a relational rather than a causal story here. It is not clear that Chauvin's trial and conviction caused the lack of interest in the defund movement. But just as mandatory arrests may have scuttled mediation training for police, the carceral answer to Floyd's death could have scuttled more grassroots, less systemically powerful movements to reduce or replace the Minneapolis police force.

B. *Hate Crimes*

Hate crimes, or crimes motivated by bias against someone's race, religion, or sexual orientation,<sup>63</sup> are another area in which progressives vocally support new carceral laws and increases in carceral penalties. In 2020 and 2021, a rise in anti-Asian sentiment and violence that resulted from Donald Trump's race-baiting rhetoric drew national attention.<sup>64</sup>

As with so many high-salience societal problems, the first, and likely only, political move has been to funnel resources to police and prosecutors to charge more people with hate crimes.<sup>65</sup> But perhaps more surprisingly, the ACLU, a progressive organization known more for protesting the harshness of the criminal legal system than promoting its expansion, gave its full support to the "Stop Asian Hate" legislation passed with little opposition in Congress that will accelerate the prosecution of certain hate crimes.<sup>66</sup> A statement by the ACLU claims that more resources to police and prosecutors will "bring[] us one step closer to addressing white supremacist violence."<sup>67</sup> Its stance indicates that progressive organizations are willing to support the criminal legal system when it purports to remedy bias no matter the long-term impact on incarceration.

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63. The federal government defines a "Hate Crime" as "a crime motivated by bias against race, color, religion, national origin, sexual orientation, gender, gender identity, or disability." It has a separate category for "Bias or Hate Incident," or "[a]cts of prejudice that are not crimes and do not involve violence, threats, or property damage." *Learn About Hate Crimes*, U.S. DEP'T OF JUST., <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> [perma.cc/NYW6-25LP].

64. See Weiyi Cai, Audra D.S. Burch & Jugal K. Patel, *Swelling Anti-Asian Violence: Who Is Being Attacked Where*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/interactive/2021/04/03/us/anti-asian-attacks.html> [perma.cc/PGB6-7MDG]; Katie Rogers, Lara Jakes & Ana Swanson, *Trump Defends Using 'Chinese Virus' Label, Ignoring Growing Criticism*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2020/03/18/us/politics/china-virus.html> [perma.cc/VCF6-LKTJ]; Colby Itkowitz, *Trump Again Uses Racially Insensitive Term to Describe Coronavirus*, WASH. POST (June 23, 2020), [https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html) [perma.cc/JP5E-MZDB]; John Haltiwanger, *Republicans Are Using Racism Against China to Try to Distract from Trump's Disastrous Coronavirus Response*, INSIDER (Mar. 19, 2020, 3:23 PM), <https://www.businessinsider.com/trump-using-racism-against-china-to-distract-from-coronavirus-failures-2020-3> [perma.cc/C8Z3-PB2R].

65. See Barbara Sprunt, *Here's What the New Hate Crimes Law Aims to Do as Attacks on Asian Americans Rise*, NPR (May 20, 2021, 4:32 PM), <https://www.npr.org/2021/05/20/998599775/biden-to-sign-the-covid-19-hate-crimes-bill-as-anti-asian-american-attacks-rise> [perma.cc/SU99-56Y2]. Laudably, some Asian American activist groups have opposed such measures. Chalay Chalmkraivuth & Heena Sharma, *Policing Won't Stop Anti-Asian Violence—Solidarity Will*, NATION (July 20, 2021), <https://www.thenation.com/article/activism/police-hate-crimes-anti-asian-violence-abolition> [perma.cc/76ZW-UNJZ].

66. *ACLU Comment on COVID-19 Hate Crimes Act Being Signed into Law*, ACLU (May 20, 2021), <https://www.aclu.org/press-releases/aclu-comment-covid-19-hate-crimes-act-being-signed-law> [perma.cc/2639-NBD3]. The legislation aims to streamline the process of reporting hate crimes and to accelerate the prosecution of hate crimes related to COVID-19. See COVID-19 Hate Crimes Act, Pub. L. No. 117-13, 135 Stat. 265 (2021) (codified in scattered sections of 34 U.S.C.).

67. *ACLU Comment on COVID-19 Hate Crimes Act Being Signed into Law*, *supra* note 66.

Progressives are advocating for harsher criminal law and penalties at the state level too. One prominent example is in Atlanta, where the Fulton County district attorney is seeking the death penalty for a man charged with killing eight people, many of Asian descent, at spas in the Atlanta area.<sup>68</sup> Voters elected District Attorney Fani Willis, who ran on a progressive prosecution platform, in November 2020.<sup>69</sup> She made a campaign promise not to seek the death penalty, stating “I cannot foresee a case (in which) I would seek death, as I believe that life without parole is an appropriate remedy.”<sup>70</sup> Less than a year after her election, however, a death penalty case stemming from the alleged bias-motivated killing of Asians during a time of intense focus on hate crimes presented itself.<sup>71</sup> In a move mirroring carceral feminists, Willis stated that her decision was rooted in a racial and economic equality struggle. According to Willis, she had to bring death penalty charges in order to show victims that “it does not matter your ethnicity, it does not matter what side of the tracks you come from, it does not matter your wealth, you will be treated as an individual with value.”<sup>72</sup> But this statement ignores the reality that the criminal legal system is an enormous driver of these inequalities.<sup>73</sup>

Instead, sentiments like Willis’s push progressives to embrace hate crime legislation or prosecutions in various areas. Take another recent example: progressive organizations and scholars alike supported the adoption of hate crime legislation in Georgia after the alleged race-motivated killing of Ahmaud Arbery.<sup>74</sup> More broadly, a review of recent scholarship suggests that hate crimes continue to be ripe areas for progressive scholars that rely on the carceral state

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68. Nicholas Bogel-Burroughs, *Atlanta Spa Shootings Were Hate Crimes, Prosecutor Says*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/11/us/atlanta-spa-shootings-hate-crimes.html> [perma.cc/D5AF-2V3A].

69. *Fani Willis*, BALLOTPEdia, [https://ballotpedia.org/Fani\\_Willis](https://ballotpedia.org/Fani_Willis) [perma.cc/FVLA-FYJG]; see Janell Ross, *Atlanta’s First Black Female District Attorney Is at the Center of America’s Converging Crises*, TIME (Sept. 28, 2021, 10:38 AM), <https://time.com/6099301/fani-willis-atlanta> [perma.cc/8P3S-THA5] (describing Fani Willis as a progressive prosecutor).

70. Bill Rankin, *Fulton DA, Two Challengers Commit to Not Seeking the Death Penalty*, ATLANTA J.-CONST. (May 28, 2020), <https://www.ajc.com/news/local/fulton-two-challengers-commit-not-seeking-the-death-penalty/7sfZRVL5ngc3eRf9Xo2MgJ> [perma.cc/55TV-2GEL]. From an abolitionist perspective, life without parole is also an unacceptable sentence.

71. See Bogel-Burroughs, *supra* note 68.

72. *Id.*

73. See *supra* Part I (describing how mandatory arrests furthered the racial divide).

74. See Ekow N. Yankah, *Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement*, 53 ARIZ. ST. L.J. 681, 682–83 (2021) (approving of the passage of Georgia’s hate crime statute but lamenting that it only encompasses intentional rather than “reckless racism”); Kristen Clarke (@KristenClarkeJD), TWITTER (June 23, 2020, 8:35 PM), <https://twitter.com/kristenclarkejd/status/1275588345809297411> [perma.cc/F9KC-JGTB] (tweet by Assistant Attorney General for Civil Rights Kristen Clarke celebrating passage of Georgia hate crime legislation). The ACLU and NAACP of Georgia both supported the bill initially but withdrew support after “first responders” were added to the list of potential hate crime victims. *Support Flips After Police Added to Georgia Hate Crime Bill*, WABE (June 22, 2020), <https://www.wabe.org/support-flips-after-police-added-to-georgia-hate-crimes-bill> [perma.cc/4TW5-WX7J].



when formulating their ideological projects.<sup>75</sup> Some scholars lament what they perceive as the underenforcement of existing hate crime laws;<sup>76</sup> others advocate for expanding hate crime categories for certain types of sex crimes, online harassment, and hate speech.<sup>77</sup> Just as feminism's carceral forays have been described as civil rights projects or as equalizing gender rights, carceral solutions to hate crimes are presented as efforts that balance the rights of people of color, LGBTQ people, and other marginalized groups. But as we see from the feminist partnership with the criminal legal system, the distributional effects operate on poor people of color. Thus, it is not hard to imagine the actual distributional effect of more criminalization.<sup>78</sup>

The feminist partnership with the carceral state described so lucidly by Gruber can be expanded to show how progressive movements see the criminal legal system as the solution to the abuses they hope to stop. A new picture emerges for prison abolitionists. Previously, they had to take stock of those who shared few of their political commitments raising obstacles to decarceration. Now they must consider that those standing next to them at a protest for abortion rights or racial equality also advocate for more prison. It is a central but overlooked problem for both the progressive sense of identity as decarceral and the prison abolitionist allyship with progressives that progressive commitment to decarceration does not run deep. Gruber's counsel to neofeminists can and should be extended to other well-meaning but criminal-solution-reliant progressives.

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75. See Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1399–400 (2019) ("Liberal activists likewise capitalized on the war on crime to enact new hate crimes laws. . . . [T]he alliance with law-and-order politics . . . reinforced mass incarceration, including that of women and minorities, limited due process and privacy protections for defendants, displaced radical interpretations of the underlying problems, and diverted attention from alternative social, economic, or nonlegal reforms." (footnotes omitted)).

76. See Jeannine Bell, *The Hidden Fences Shaping Resegregation*, 54 HARV. C.R.-C.L. L. REV. 813, 821–22 (2019) (describing underenforcement of hate crime laws against "anti-integrationist" acts); Sarah Doan-Minh, *Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence*, 30 HASTINGS WOMEN'S L.J. 167, 182–83 (2019) (claiming that prosecutors' reluctance to charge rape as a hate crime "minimize[es] the seriousness of the crime, and thereby invok[es] the stereotype that rape is not . . . a worthwhile crime to prosecute").

77. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1945 & n.500 (2019) (advocating for making sexual-privacy invasions and cyberstalking hate crimes); Stephanie J. Beach, *Hashtag Hate: The Need for Regulating Malignant Rhetoric Online*, 44 VT. L. REV. 129, 156–57 (2019) (calling for certain types of hate speech to be considered hate crimes); Doan-Minh, *supra* note 76, at 181 (lamenting that not enough hate crime laws cover sexual orientation or gender identity and pushing for the addition of "corrective rape" as a category of hate crime).

78. Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crime Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 152–53 (2020) ("[M]any fear that, given pervasive biases within criminal legal systems, hate crimes enhancements may disproportionately affect people of color or others from marginalized groups."); MICHAEL GERMAN & EMMANUEL MAULEÓN, BRENNAN CTR. FOR JUST., FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES 14 (2019), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Far\\_Right\\_Violence.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Far_Right_Violence.pdf) [perma.cc/UT44-VERX] (showing that Black men are overrepresented as hate crime offenders).

## III. HOW WIDE SHOULD THE ABOLITIONIST STANCE BE?

In its last several chapters, *The Feminist War on Crime* turns from criminal law to the “carceral logic” in handling sexual assault claims between college students. Gruber convincingly argues that moral panic, victimhood tropes, and overblown, often-incorrect data have led to a problematic and one-sided view for adjudicating campus sexual assault claims (pp. 164–69). She also highlights feminist involvement in creating the current culture of fear and individual blame, racially uneven punishment, and unnuanced rule administration on college campuses. Moreover, she connects these problems to similar pathologies that plague the administration of the criminal legal system. Gruber views the campus debate as central to her project to decriminalize gender crimes and as indicative of more criminal punitiveness. In this Part, I start a conversation about whether connections between criminal and other forms of adjudication and punishment are helpful to the neo-abolitionist movement. I then ask broader questions: Does the neo-abolitionist movement need these connections? Do they help it? Is it extricable or not? A good deal of emerging scholarship suggests that reducing the carceral state must be bound with other forms of activism. I think this conclusion is worthy of discussion.

Gruber briefly explores how the path to campus punitiveness originated. The campus rape reform movement began to occupy the attention of feminists in 2010 (p. 151). By 2011, the Obama administration responded with a now famous “Dear Colleague” letter (DCL), explaining how universities should interpret Title IX, the federal legislation that regulates gender discrimination on campuses.<sup>79</sup> Gruber says the DCL is at base a “catalogu[e] [of] the rights *not* due to the accused” (p. 153). She writes:

Schools cannot send sexual assault cases to mediation, they cannot use a standard higher than preponderance of the evidence, and they cannot allow face-to-face confrontation. The letter’s general message is that the accused’s “due process rights” are not grounds to “restrict or unnecessarily delay the Title IX protections for the complainant.”<sup>80</sup>

As legal scholars did,<sup>81</sup> one can immediately see the connection between this letter and carceral logic: it takes away process rights from an accused campus assaulter to ease the process of adjudication for the victim and encourage women to report (pp. 153–54). The government demonstrated its seriousness

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79. OFF. FOR C.R., U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (2011) [hereinafter DEAR COLLEAGUE LETTER], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [perma.cc/G7GN-GQ7Y].

80. P. 153 (quoting DEAR COLLEAGUE LETTER, *supra* note 79).

81. See, e.g., Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 373 (2016) (“Title IX policy is quickly coming to replicate, rather than diverge from, the standard criminal justice model.”).

of purpose when it opened over five hundred investigations under Title IX between 2011 and 2021.<sup>82</sup>

Like numerous criminalization projects, the campus rape movement was driven by a moral panic<sup>83</sup> that responded to high-salience events and media embellishment rather than any change in actual data about sexual assault on campus.<sup>84</sup> The movement ignored evidence suggesting that another, less punitive path—namely, addressing the strong connection between intoxication of students and sexual assault—would reduce sexual assault on campus. As Gruber writes, “[T]his public health purpose was lost as activists used the study [suggesting most sexual assaults happened between drunk students] as a ‘call to action’ not to address drinking but to punish rapists” (p. 159).

Gruber persuasively argues that the campus rape reform movement informs and reflects the criminal legal system. She tells us that “[t]he punitive logics intensified by the campus rape crisis . . . have already affected criminal law and policy,” citing prosecutors’ growing use of “trauma-informed” prosecutions, language that originated on campuses (p. 170). And she counsels that it is “naive to believe that this radical redefinition of rape and consent remains safely ensconced within campus codes and administrative publications” (p. 175). There is no doubt that Gruber’s concern over the punitive turn in campus sexual assault adjudication and its connection to carceral feminism is justified.

Where the question about campus rape versus criminal sanction becomes a bit murkier in Gruber’s telling, at least from an abolitionist stance, is in her dismissal of the attempt to separate the punishment of campus discipline from criminal punishment. She believes that it is “disingenuous[.]” to say, as some college administrators and supporters of the DCL do, that dismissal from university is far less severe than sending a person to prison (pp. 166–67). And she finds it “strange” that “political liberals” support less-than-rigorous evidence for campus assaults (p. 166).

Gruber is particularly critical of “liberal” Colorado Governor Jared Polis’s use of an “inverse Blackstone ratio” to make the point that that it might be fine to dismiss ten students even if only “one or two did it” (p. 166). This sentiment initially strikes as a harsh and terrible way to adjudicate campus sexual assault complaints. But on the other hand, the “Blackstone ratio”—that it is better that ten guilty men go free than for one innocent to suffer—was uttered in the context of *criminal* punishment.<sup>85</sup> There is no immediate reason that the ratio must

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82. *Title IX: Tracking Sexual Assault Investigations*, CHRON. OF HIGHER EDUC., <http://projects.chronicle.com/titleix> [perma.cc/MM2V-G3UF]; see also *supra* Part I (discussing mandatory arrests).

83. P. 162; see also Cortney E. Lollar, *Invoking Criminal Equity’s Roots*, 107 VA. L. REV. 495, 547–48 (2021) (“In the context of criminal laws, moral panics are well-documented . . . Legislators then pass punitive laws that feed off of community fear . . .”).

84. P. 158 (stating that “media, government, and activist discourse” have created a false sense that female students “are at constant risk of falling prey to a serial rapist” despite evidence that women are safer on campus than ever before).

85. 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

apply in civil, administrative, or other contexts. Indeed, the ratio aligns with the belief that the deprivation of liberty is the most severe legal punishment that can be imposed, short of death.<sup>86</sup> This principle—the criminal legal system’s deprivation of humanity—drives the “abolitionist stance” as I understand it.<sup>87</sup>

An abolitionist stance toward the carceral state encompasses sentences of incarceration and criminal legal mechanisms, like policing and bail, which precede and sometimes go along with prison terms. The prison abolition stance gets much of its vitality and, I believe, its persuasive utility from the argument that the criminal legal system generally—and prison in particular—is uniquely futile and cruel.<sup>88</sup> The violence, isolation, degradation, and hopelessness that attend jail and prison sentences are not comparable to other types of accountability measures.<sup>89</sup> And if caging a person is recognized as an extreme and inhumane punishment, then it is not justice, and (almost)<sup>90</sup> no one deserves it.<sup>91</sup> Moreover, theories of punishment such as moral desert or deterrence do not justify the continued use (and overuse) of prisons.<sup>92</sup>

It is useful then to consider whether there is an advantage to maintaining the rhetorical purity of an abolitionist stance that focuses just on the carceral state to the exclusion of punitive frameworks that, in certain ways, may be linked to it. A potential concern with Gruber’s connection of campus discipline to incarceration is that it muddles the prison abolitionist stance, both as a theory and as a strategy for ending the carceral state as we know it. Gruber never says

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86. Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1088 (2015).

87. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172–73 (2015) (“Prisons are places of intense brutality, violence, and dehumanization.”).

88. See Levine, *supra* note 14, at 1025 (“Perhaps the central tenet of a prison abolitionist ethic is the ‘rejection of the moral legitimacy of confining people in cages.’ This notion views prisons, as currently constituted, as a form of torture, and the caging of human beings as a fundamentally problematic response to bad actions even if it functions to deter crime.” (footnotes omitted)).

89. See *id.*; see also *supra* Part II.

90. Many abolitionists acknowledge that there may be a place for incapacitation of “the dangerous few” but argue that this concept should be sorted out once we free the many. *E.g.*, McLeod, *supra* note 87, at 1171 (“[T]he question of the dangerous few ought not to eclipse or overwhelm the urgency of a thorough consideration of abolitionist analyses . . .”).

91. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1646 (2019) (“Justice, for abolitionists, is grounded in paying careful attention to experienced harm and its aftermath, addressing the needs of survivors, and holding people who have perpetrated harm accountable in ways that do not degrade but seek to reintegrate, while understanding the root causes of wrongdoing and working to address them.”).

92. *Id.* at 1638 (“Various justifications for criminal arrest, criminal prosecution, and criminal punishment vie for dominance in legal theory, with some embracing retributivism, others advocating deterrence-based rationales, and still others focused on the community’s expression of shared norms. But the realities of the criminal legal process are starkly at odds with these theoretical justifications. Instead, criminal prosecution generally fails to address the needs of survivors of harm. It also degrades and brutalizes those subject to prosecution. All the while, the criminal legal system neglects the underlying causes of the problems at hand so that they are almost certain to occur again.” (footnotes omitted)).

the two are the same or that we must view college expulsion as similar to incarceration. But a question arises from her chapters on the “carceral logic” of college rape reform: If one is willing to advocate for the abolition of carceral gender movements, must one also be willing to insist that college administrators treat administrative discipline as akin to incarceration? In other words, if due process rights owed to the college accused should be identical to those of the criminal defendant, does that not suggest that the punishment is also similar? It is unclear whether Gruber would answer these questions in the affirmative. But I wonder if there is theoretical and rhetorical value in an apparent “no,” or more specifically, maintaining that a deprivation of liberty is uniquely bad.

This query did not begin with Gruber’s book. Abolition activists<sup>93</sup> and legal scholars who support prison abolition find the idea of abolition bound up with broader social movements and societally transformative goals.<sup>94</sup> For example, some link the abolition of the carceral state to the elimination of evictions<sup>95</sup> and, more generally, to capitalism writ large.<sup>96</sup> Again, it is not clear that these abolitionists believe that issues like housing insecurity, poverty driven by capital, and dismissal from education are circumstances as severe as incarceration. Instead, they may believe prison abolition is only possible, theoretically and practically, with the abolition of other practices and economic models. But implicit is a *suggestion* that incarceration is not an unusual punishment deserving of exceptional treatment.

These movements and rhetoric beg the question of whether prison abolition relies on the abolition of rent, the protection of students accused of campus assault, and the reordering of our system of government. It is possible that it does. But it is also possible that an abolitionist message suffers when its message, “prison and jails are exceptionally dehumanizing,” lacks clarity.

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93. See Kandist Mallett, *When We Say ‘Abolish,’ We Mean More than Just Police*, REFINERY29 (June 17, 2021, 3:47 PM), <https://www.refinery29.com/en-us/2021/06/10498692/abolish-the-police-and-more> [perma.cc/73UH-VQXJ] (“Often when we think of abolition, we just think of abolishing the police or the prison system. And while those are definitely components of abolition, they are not all that needs to be abolished.”); Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019) (“[M]ovements that refer to themselves as abolitionist are working to dismantle a wide range of systems, institutions, and practices beyond criminal punishment (such as ‘the wage system, animal and earth exploitation, [and] racialized, gendered, and sexualized violence’) and forms of oppression beyond white supremacy (such as ‘patriarchy, capitalism, heteronormativity, ableism, colonialism,’ imperialism, and militarism).” (alterations in original) (footnotes omitted)); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 469 (2018) (“[T]he [abolitionist] movement demands criminal law reforms that do more than delimit the fiscal, social, and governance footprint of incarceration and policing, but challenge and undermine capitalism, white supremacy, and patriarchy.”).

94. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1785 (2020) (“Ending our reliance on prisons and police requires a radical and capacious path focused on transforming structures of our world and our relationships to each other.”).

95. See Krystle Okafor & Sophie House, *Housing Policy Needs Abolition Too*, SHELTERFORCE (Jan. 14, 2021), <https://shelterforce.org/2021/01/14/housing-policy-needs-abolition-too> [perma.cc/2VLW-38EQ] (arguing that abolition be extended to “housing justice”).

96. Akbar, *supra* note 94.

Given the scope of this Review, I can only raise this question in connection with *The Feminist War on Crime* and suggest that it may be a worthy topic for future work. Just as Gruber asks whether carceral feminism begins on campus, this Review questions if prison abolition needs or benefits from connection to other types of discipline and deprivation.<sup>97</sup>

#### CONCLUSION

*The Feminist War on Crime* is necessary reading for those interested in feminism or the carceral state. It is of particular value to those working to envision and create a world without police, jails, and prisons. While it has many insights beyond those mentioned here, it teaches an invaluable lesson to abolitionists who hope to rely on progressive politicians and groups as allies in the fight against the carceral state. The criminal legal system remains an addictive “solution” for progressives engaged in work on behalf of those denied their rights, and sometimes their humanity, by our heteropatriarchal, white-dominant society. As I have argued, breaking this addiction is central to the work of radical decarceration. And as the saying goes, admitting you have a problem is the first step toward recovery.

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97. I have not formed an opinion on this matter, other than to note that while many abolitionists feel that their projects are global and beyond the criminal legal system, few seem to push back against this idea. I think the conversation is worth having because it will force abolitionists to strengthen and clarify their rhetoric.