

The Critique of Carceral Feminism

Aya Gruber[†]

Few scholarly arguments incense self-identified feminists—especially prominent ones—as much as the claim that feminism contributed to the racist, inhumane, and overbroad American penal system. Over the years, scholars from outside and within feminism have offered various historical, philosophical, and genealogical analyses of the feminist movement’s relationship to mass incarceration.¹ These writings assert that powerful feminist ideologies and groups contributed materially to the growth of the criminal punishment system and served as powerful legitimators of penal authority in the last several decades. Critics of “carceral feminism” argue that feminists collaborated with the carceral state, often unintentionally, by among other things cementing raced and gendered narratives of crime victimhood, giving bipartisan credence to policing and prosecution programs, reinforcing the notion that the criminal system “works,” and bolstering the neoliberal precept that violence stems from individual choices rather than structural conditions.²

Critics’ detailed and thoughtful analyses of the feminism-penal state alliance are too expansive to repeat here, and I have written elsewhere on the topic, including in a 2020 book, *The Feminist War on Crime: The*

[†] Ira C. Rothgerber Professor of Constitutional Law and Criminal Justice, University of Colorado Law School. I thank the wonderful editors at the *Yale Journal of Law and Feminism* for organizing this timely symposium and for a thoughtful edit.

¹ See, e.g., Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 219 (2018); Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES 128, 128-51 (2007); Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 46-47 (2010); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012); LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE* (2018); Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335 (2006); JUDITH LEVINE & ERICA R. MEINERS, *THE FEMINIST AND THE SEX OFFENDER, CONFRONTING SEXUAL HARM, ENDING STATE VIOLENCE* (2020); KRISTIN BUMILLER, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE* (2008); Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014), www.jacobinmag.com/2014/10/against-carceral-feminism [<https://perma.cc/EA8G-QGJU>].

² See Bernstein, *The Sexual Politics of the “New Abolitionism,”* *supra* note 1 (coining the phrase “carceral feminism”). See generally sources cited *supra* note 1; AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* (2020) [hereinafter FEMINIST WAR].

*Unexpected Role of Women's Liberation in Mass Incarceration.*³ Nevertheless, I venture that collectively these critiques express a pretty blasphemous message: the late nineteenth-century feminist antiviolence movement was neither unconditionally opposed to violence nor unconditionally feminist. This message directly conflicts with a deeply ingrained instinct that, when it comes to violence against women, criminalization *is* gender justice.

I can personally attest to the strength of the instinct that women's empowerment can be achieved one incarcerated man at a time. I have always retained an anticarceral disposition and a strong skepticism of government detention, likely from hearing stories from my mother about her childhood experiences in a World War II Japanese detention camp. Still, when I was a budding public defender, I so strongly equated gender justice with punishing batterers and rapists that I was more concerned about representing a man charged with misdemeanor domestic violence than a person charged with murder. It took practicing in a specialized domestic violence court to realize that the feminist corner of the carceral state was still the carceral state: a revolving door of incarceration, collateral consequences, and further marginalization that disproportionately impacted poor people of color.⁴

Given this deeply ingrained punitive instinct, it is no wonder that many feminists reject, and are offended by, the claim that feminist reform fueled mass incarceration. Feminists frequently defend the criminalization agenda by asserting that feminist criminal laws and policies have contributed negligibly to America's imprisonment crisis.⁵ Others deny that anti-gender-violence activists ever embraced criminalization in the first place and maintain that the unforeseen carceral consequences resulted from prosecutors and other state actors "coopting" feminists' programs.⁶ Some argue that the critics of carceral feminism are sexists who blame mass incarceration on progressive women instead of the many conservative male actors who intentionally and enthusiastically blueprinted and constructed the penal state.

³ FEMINIST WAR, *supra* note 2.

⁴ *See id.* at 3–5 (describing practicing in DV Court).

⁵ According to Janet Halley, feminism frequently "wages power without owning it. Feminism then has governance capacity to change social life, but it also avoids acknowledging the full range of its effects." SPLIT DECISIONS 33 (2006). *See also* FEMINIST WAR, *supra* note 2, at 170–71 (discussing the "drop in the bucket" argument). Many liberals, not just feminists, seek to attribute mass incarceration nearly exclusively to the imprisonment of "nonviolent drug offenders." *See infra* note 29 and accompanying text.

⁶ *See, e.g.,* LISE GOTELL, *A Critical Look at State Discourse on "Violence Against Women": Some Implications for Feminist Politics and Women's Citizenship*, in WOMEN AND POLITICAL REPRESENTATION IN CANADA 40 (Manon Tremblay & Caroline Andrew eds., 1998) ("[F]eminism can take credit for constructing a discourse that has raised consciousness of men's 'violence against women' as a political problem, [but] government recognition of 'violence' has been marked by the appropriation and transformation of feminist discourses."). *See* FEMINIST WAR, *supra* note 2, at 67–93 (discussing "cooptation" argument).

Indeed, the more vituperative attacks characterize critics of feminism as misogynistic men's-rights activists with female faces.⁷

In this brief Essay, I place such defenses against the carceral-feminism critique in the context of a larger resistance to analyses that focus on liberal actors' role in erecting the carceral state. Indeed, some analyses of mass incarceration—ones that focus solely on progressives' enemies like avowed racists, staunch conservatives, and prison profiteers—go down easy, while others are hard to swallow. I will then turn to why it is nevertheless important for feminists to have the uncomfortable carceral-feminism conversation.

Critiques of mass-incarceration range from moderate and reformist to radical and abolitionist. Moderate critics largely understand the American criminal system to have the benign purpose of punishing wrongdoers, but they critique the system as too broad, punitive, and unequal.⁸ For them, racialized mass incarceration is compelling evidence that the criminal apparatus is malfunctioning. In turn, the key to ending mass incarceration lies in fixing the malfunctions—lack of defense attorneys, plea bargaining, overcriminalization of drugs, overzealous street policing, war-on-crime-era sentences—to restore the penal system to some preferred equilibrium.⁹

Radical commentators reject the idea that the carceral state has a pristine core that may yet be restored. They understand the penal state as an institution driven by complex power dynamics and conclude that the system's primary historical function has been to serve the agendas of the state and powerful private actors and maintain racial and other hierarchies.¹⁰

⁷ See, e.g., Josephine Bartosch, *Putting Women Last*, CRITIC MAG. (May 25, 2021), <https://thecritic.co.uk/issues/june-2021/putting-women-last> (“[T]he anti-carceral justice movement has become a Trojan Horse through which dangerous ideas, such as the full decriminalisation of the sex industry, are exported across the world”); *id.* (quoting Jen Isaakson) (“It is quite ironic that the same groups who believe they have a superior politics of justice than our bourgeois legal system . . . actively collud[e] with abusive men to escape accountability”); Lise Gotell & Emily Dutton, *Sexual Violence in the ‘Manosphere’: Antifeminist Men’s Rights Discourses on Rape*, 5 INT’L J. FOR CRIME, JUST. & SOC. DEMOCRACY 65, 69 (lumping female critics of carceral feminism together with sexist men’s rights activists as the “backlash” to feminist antirape gains); Clare McGlynn, *Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking*, 93 WOMEN’S STUD. INT’L F. 6 (2022) (calling my suggestion that gendered offenses range from minor to egregious “a worrying hierarchy of harm” that “reinforce[s] concerning myths”).

⁸ See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262 (2018) (noting the “belief that the criminal law has an important and legitimate function, but that it has exceeded that function”).

⁹ See *id.* (describing these as “overincarceration” rather than “mass incarceration” critiques). See also RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007) (distinguishing between reforms to the existing system and “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization”); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1208 (2015) (contrasting this “moderate reformist framework” with the radical “abolitionist ethic”).

¹⁰ See, e.g., Loïc Wacquant, *From Slavery to Mass Incarceration*, 13 NEW LEFT REV. 41 (2002); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003). See also McLeod, *supra* note 9, at 1207 (the “abolitionist ethic centers on how caging or confining human beings in a hierarchically structured, depersonalizing environment developed through historical practices of overt racial subordination tends inherently toward violence and degradation”); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1576 (2019) (“Contemporary reformist approaches to addressing

Criminal codes' deceptive appearance as neutral prohibitions of objectively wrongful behavior, critics argue, hides that the system does not target conduct, but people. Rape and murder are unquestionably wrongful. Yet in the nineteenth century, a white slaver raping a Black woman or murdering a Black person was outside the criminal system's purview, while a Black man's "attempted rape" of a white woman, which might be a consensual affair, a whistle, or nothing, warranted hanging.¹¹ The criminal system, through substantive law and procedural practice, controlled not wrongful behavior but racial status.

Scholars also complicate the seemingly incontestable notion that the American policing and prison system exists because crime exists. Organized police forces came into being and proliferated in response not to rising crime rates but to profound challenges to the prevailing social, racial, and economic order—such as emancipation, unionization in the industrial era, urbanization, and integration.¹² Slave patrols reorganized as police forces in the postbellum era to arrest Black people for petty "Black code" or "pig law" offenses to send them back into the plantation fields.¹³ At the turn of the century, Northern industrial cities formed police forces to control striking immigrant workers agitating for better working and living conditions in company towns.¹⁴ Accordingly, racialized mass incarceration is not a malfunction, but the efficient functioning of a criminal system created to maintain elite monopolies on power and violence.¹⁵

Moderate critics, by contrast, frequently take a shorter view and identify the late twentieth century as the pivotal period when the penal system went off the rails. These critics tend to highlight the role in mass incarceration of illiberal actors like opportunistic politicians exploiting crime fears, racist voters swayed by the "Southern strategy," overzealous plea-bargain-loving

the apparent overreach and scandalous excesses of the carceral state—characterized by calls to end 'police brutality' and 'mass incarceration'—fail to recognize that the very logics of the overlapping criminal justice and policing regimes systemically perpetuate racial, sexual, gender, colonial, and class violence through carceral power.").

¹¹ See generally DANIELLE MAGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* (2010); Danielle McGuire, "It Was Like All of Us Had Been Raped": *Sexual Violence, Community Mobilization, and the African American Freedom Struggle*, 91 J. AMER. HIST. 906 (2004); FEMINIST WAR, *supra* note 2, at 32–40.

¹² See Aya Gruber, *Policing and "Bluelining"*, 58 HOUS. L. REV. 867, 874 (2021); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2257–59 (1998); Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 160 (2001); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 33–34, 51 (1976); SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915*, at 32–34, 46 (2d ed. 2017).

¹³ Stewart, *supra* note 12, at 2257–59; Bass, *supra* note 12, at 160; Cohen, *supra* note 12, at 33–34, 51.

¹⁴ HARRING, *supra* note 12, at 32–34.

¹⁵ See Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1457–62 (2016); Rodriguez, *supra* note 10.

prosecutors, racist cops, and even pearl-clutching “security moms.”¹⁶ For all their differences, the radical institutional and moderate mass-incarceration critiques both frequently feature a cast of conservative villains who progressives would abhor even if mass incarceration never existed: corporate exploiters, unscrupulous prosecutors, and moral majoritarians. Moderate critics focus on more recent actors like Lee Atwater and Ronald Reagan, while radical institutionalist critics often highlight the bad actors of antiquity, including Jim Crow racists and anti-labor industrialists.¹⁷

In recent times, some analysts have complicated the story of modern mass incarceration by examining a decidedly less villainous set of carceral architects.¹⁸ James Forman, Jr., for example, tells a counterintuitive story highlighting Washington D.C.’s Black community’s leadership’s role in securing the extremely harsh drug laws during in the late twentieth century—laws that ended up contributing significantly to racial disparities in the imprisoned and policed population.¹⁹ Naomi Murakawa traces the penal expansion to late-twentieth-century liberal Democrats who focused on due process, police modernization, and efficiency. Ever loyal to the idea that racialized policing and revolving-door imprisonment were malfunctions fixable by procedural tweaks, Murakawa argues, liberal reformers shored up a penal system designed to warehouse the vulnerable at the precise moment when other political forces drove its exponential growth.²⁰ And Elizabeth Hinton provides a compelling account that Lyndon B. Johnson’s ostensibly progressive war on poverty created the carceral discourses and ideologies that blueprinted mass incarceration.²¹

Analyses—and perhaps none so more than the critique of carceral feminism—that lay some responsibility for mass incarceration at the feet of well-intentioned liberals and minority groups tend to offend progressives—and delight conservatives. Liberal respondents highlight the negative potential for critics of carceral progressivism to have right-wing bedfellows. A few academics warned that Forman’s analysis could be fodder for conservative denials that anti-Black racism is a major driver of mass incarceration.²² Similarly, one might charge that the critique of carceral

¹⁶ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); André Douglas Pond Cummings & Steven A. Ramirez, *Roadmap for Anti-Racism: First Unwind the War on Drugs Now*, 96 TUL. L. REV. 469 (2022).

¹⁷ Wacquant, *supra* note 10; Rodríguez, *supra* note 10.

¹⁸ See, e.g., JAMES FORMAN, JR. *LOCKING UP OUR OWN* (2017); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT* (2014); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* (2016); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199 (2020); Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225 (2022).

¹⁹ FORMAN JR., *supra* note 18, at 9-14.

²⁰ MURAKAWA, *supra* note 18, at x. See also Rodríguez, *supra* note 10.

²¹ HINTON, *supra* note 18, at x.

²² See, e.g., W. Carbadó & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1980 (2018). However, I tentatively searched for such appropriation of Forman’s work by the right and could not find it.

feminism is embraced by men who decry the unfairness and authoritarianism of “wokes” and “feminazis.”²³

However, any progressive internal critique can produce an “enemy of my enemy” bedfellow, even when the critic makes very clear that they harbor no sympathy for the right-wing point of view. To be sure, Forman, Murakawa, and Hinton neither paint the community leaders and liberal reformers at the center of their inquiries as bad actors nor claim that these groups were solely or primarily responsible for mass incarceration.²⁴ Likewise, critics of carceral feminism do not paint feminist criminal law reformers as the driving cause of mass incarceration and make clear that the point is not to blame but to understand the carceral dynamics at play to enrich feminist theorizing and activism.²⁵ Nevertheless, these hedges often prove unsatisfactory to affronted progressives, especially those for whom hanging the albatross of racist mass incarceration around the neck of conservatives is *the point*.²⁶

A peculiar modern dynamic contributes to this unhelpful response to internal critique. Within contemporary discourse on justice, race, and other charged topics, progressives increasingly require interlocutors and subjects to be morally pure, as defined by the popular left discourse of the day.²⁷ A person who has ever engaged in harmful, misguided, or insensitive past acts or held views outré in the contemporary mindset can fall on the “bad actor” side of the ledger, regardless of how much they contributed to justice or how many good ideas they have.²⁸ It is no wonder that progressives with social-justice-based identities live in fear of being called out for missteps, failed policy choices, or ideas that look bad in hindsight. Now that fighting racist mass incarceration is a top priority of the left, progressive discourse has begun to divide people into bad incarcerators and good anticarceral actors.²⁹

²³ See Gotell & Dutton, *supra* note 7. Cf. Sara Ahmed, *The Complainer as Carceral Feminist*, FEMINISTKILLJOYS (June 8, 2022), <https://feministkilljoys.com/2022/06/08/the-complainer-as-carceral-feminist> [<https://perma.cc/M4CX-9R72>] (asserting that “support [for abuse of women] is being enacted by the use of critical feminist language”). As with Forman’s critique, I had a hard time finding men’s rights activists who embrace anti-carceral feminist theory.

²⁴ FORMAN JR., *supra* note 18, at 10-11; MURAKAWA, *supra* note 18, at 9-19; HINTON, *supra* note 18, at 12-22.

²⁵ See, e.g., FEMINIST WAR, *supra* note 2, at 16-18.

²⁶ Many critics of anticarceral feminism articulate a straw-person version of the critique of carceral feminism. The critique, they say, identifies feminists as the sole of primary cause of mass incarceration solely and ignores the nuance and contestation within feminism over carceral programs. See, e.g., Gotell & Dutton, *supra* note 7; McGlynn, *supra* note 7.

²⁷ Michael Powell, *A Black Marxist Scholar Wanted to Talk About Race. It Ignited a Fury*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/us/adolph-reed-controversy.html> [<https://perma.cc/7HS3-T79G>].

²⁸ Vivian Ho, *San Francisco to Remove Names of Washington and Lincoln from Schools*, THE GUARDIAN (Jan. 27, 2021), <https://www.theguardian.com/us-news/2021/jan/27/san-francisco-schools-george-washington-abraham-lincoln-dianne-feinstein> [<https://perma.cc/M5AD-9CFE>].

²⁹ On Twitter, it is common to see people label others “carceral feminists.” See Jennifer C. Nash & Samantha Pinto, *New Genealogy of “Intelligent Rage,” or Other Ways to Think About White Women in Feminism*, 46 SIGNS (Summer 2021) (white women who “horrendously serv[e] as instruments to delegitimize and/or incarcerate Black bodies serve, in the contemporary popular imagination, as bad

A feminist called-out for being carceral (and thus nefarious and racist) has just two unproductive options: fall on the sword and perform penance for being an incarcerator or fight like hell against the charge of being carceral.³⁰ We should reject this religious-like division of the left into the virtuous, penitent, and irredeemable. Otherwise, internal critique will always spark defensiveness, and would-be critics will cabin their analyses to avoid alienating or hurting their fellow progressive travelers.

Given that the current deck is stacked so firmly against internal critique and complexity in social justice activism, perhaps it would be wiser for critics to focus exclusively on conservative bad guys' role in mass incarceration. However, critiques of that cast of characters are already legion, and limiting critical scholarship in such a manner creates a misimpression that only "bad" right-wing agendas underwrite mass incarceration.³¹ This, in turn, leads to a misinformed account of our current state of penal affairs and how to change it. For example, liberal commentators frequently attribute mass incarceration to the racist 1980s war on drugs and, in turn, inaccurately characterize it as a product of the overimprisonment of "nonviolent drug offenders."³² In fact, most incarcerated people are there for acts the law classifies as "violent."³³ Indeed, whether a law and society deems a given behavior "violent" in the first place is the outcome of complex political, racial, and ideological forces.³⁴

Liberals also trace mass incarceration to tough-on-crime prosecutors, judges, and legislators and accordingly hold that procedural tweaks like more public defenders will solve the problem. However, the institutional advantages enjoyed by the police and prosecutors simply cannot be overcome by an overall increase in the number of defenders.³⁵ And, as Murakawa warns, commentary that focuses on incremental reforms without consistently reminding the reader that the reforms are part of a death-by-a-thousand-cuts strategy to dismantle the current mass-incarceration system can end up legitimizing and strengthening it.³⁶

objects to rage against"); Ahmed, *supra* note 23 (describing being labeled a "carceral feminist" and "an all-powerful, punishing and vindictive person").

³⁰ See Nash & Pinto, *supra* note 29, at 892-93 (problematizing white women's tendency to respond to critiques of "white feminism" through performative penance).

³¹ See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 23 (2012) [hereinafter *Beyond Jim Crow*] ("[T]he Jim Crow analogy, by highlighting the role of politicians seeking to exploit racial fears while minimizing other social factors, oversimplifies the origins of mass incarceration.").

³² See *id.* See also Devon Kurtz, *The Myth of the Nonviolent Drug Offender*, CITY J. (Oct. 20, 2022), www.city-journal.org/myth-of-the-nonviolent-drug-offender [https://perma.cc/RGT6-B27G].

³³ *Beyond Jim Crow*, *supra* note 31, at 47.

³⁴ See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011). See also DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021).

³⁵ See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013); Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 444 (2022).

³⁶ MURAKAWA, *supra* note 18 at 18.

Consequently, to end or meaningfully reform a penal system that has garnered worldwide humanitarian condemnation, analysts must train their critical gaze on *all* the ideologies, strategies, and programs that contributed to it, including—or especially—those that claim the mantle of social justice. To take it back to feminism: for well over a century, American feminists have spearheaded efforts to secure new criminal laws and penal regimes, including laws criminalizing vice and alcohol, sex work, sexual abuse and misconduct, and domestic and family violence. These laws and their accompanying enforcement regimes continue to contribute significantly, not negligibly, to mass incarceration.³⁷ Take sex crimes, for example. According to the DOJ Bureau of Justice Statistics, in 2020, people detained for rape/sexual assault constituted 13.7 percent of the total population of people imprisoned in state correctional facilities.³⁸ That’s roughly equal to the people imprisoned on *all* drug offenses, including possession and distribution (14 percent) or all property offenses, including burglary and theft (15 percent).³⁹ Moreover, among the people imprisoned for rape, 39 percent were white, 25 percent were Latinx, and 20 percent were Black, in a country with a population that is 60 percent white, 18 percent Latinx, and 12 percent Black.⁴⁰ Sex crime policy has significantly expanded the surveilled population and continues to do so. Sex offenders receive particularly lengthy probation and parole terms and onerous collateral conditions, including placement on sex offender registries for life.⁴¹

The DOJ does not offer a breakdown of assault statistics, so it is difficult to determine the percentage of the incarcerated population imprisoned on domestic violence (DV) charges. Nevertheless, evidence indicates that the feminist DV program broadened the mass of the American carceral archipelago.⁴² It is a sad irony familiar to criminal law scholars that U.S. incarceration skyrocketed in the middle of a thirty-year crime decline.⁴³ What many people do not realize is that arrest numbers generally declined along with crime numbers, but owing to sentencing policy, the prison (but not necessarily jail) population steadily increased. As violent crime rates dropped, so did arrests for them. DV rates also fell, but, owing to feminist

³⁷ See generally FEMINIST WAR, *supra* note 2.

³⁸ U.S. DEP’T OF JUST., PRISONERS IN 2020 – STATISTICAL TABLES (2021).

³⁹ *Id.* For whites, Asians, American Indians, and Hispanics, the sex offender population exceeded the drug offender population. *Id.*

⁴⁰ *Id.*

⁴¹ For critiques of sex offender registration and notification requirements, see LEVINE & MEINERS, *supra* note 1, at 50-52; Wayne A. Logan, *Challenging the Punitiveness of “New-Generation” SORN Laws*, 21 NEW CRIM. L. REV. 426, 454-57 (2018); Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 369-70 (2006).

⁴² See *infra* notes 44-47 and accompanying text.

⁴³ See Dana Goldstein, *Yes, Mr. President, Incarceration Rates Have Dropped . . .*, MARSHALL PROJ. (Jan. 21, 2015), <https://www.themarshallproject.org/2015/01/21/yes-mr-president-incarceration-rates-have-dropped> [https://perma.cc/SA28-N72R] (figure 1-1).

reform, DV arrests did not.⁴⁴ Indeed, in modern times, an assault is much more likely to result in incarceration if the police deem it to be domestic.⁴⁵ Women, it appears, have borne the brunt of this police management of domesticity. Pro-arrest policies increased arrests of men and *multiplied* arrests of women.⁴⁶ Over the past decade, the number of women arrested for assault increased by thirty percent, which experts attribute not to women becoming more violent but to police no longer distinguishing between violence that does and does not warrant arrest.⁴⁷

Feminist carceral efforts are not a thing of the past. The promise of criminal punishment remains appealing, and activists yet harbor the belief that they can recruit carceral institutions to feminist ends. Feminists engage in gender-crime exceptionalism, where they carve crimes of feminist concern out of the larger critiques of the penal state.⁴⁸ Elsewhere, progressives reject tough-on-crime pundits' insistence that intense policing, prosecutorial advantages, and long sentences secure safety and justice and articulate various institutional, penological, and empirical arguments for why these conservative commenters are wrong (for example, prison is criminogenic; criminal sanctions do not get at the root of the problem; the system targets minorities, not the worst offenders; etc.).⁴⁹ However, when it comes to ostensibly feminist issues like sexual misconduct and domestic violence, the arguments that progressives painstakingly developed in other contexts go out the window. Instead, the presumption is that tough-on-crime policies produce safety and justice for women and the operators of our penal apparatus enforce these policies in a fair and nonracist manner.⁵⁰ Today, feminist advocates

⁴⁴ Jennifer Truman & Rachel Morgan, *Nonfatal Domestic Violence, 2003-2012*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT. 3 (April 2014), [<https://perma.cc/L2D3-JEXM7>]; *UCR Domestic Violence*, FLA. DEP'T OF LAW ENF'T (2017) [<https://perma.cc/TWR3-5V8G>].

⁴⁵ David Hirschel et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases*, U.S. DEP'T OF JUST. 61 tbl.4:32 (2007), [<https://perma.cc/RM6L-WBD5>] (describing a comprehensive nationwide arrest study showing that police arrested in 48 percent of intimate partner violence cases, 34.6 percent of stranger violence cases, and 28.1 percent of non-domestic relations violence cases and that the assault victim being an intimate partner raised the chance of conviction by 67 percent).

⁴⁶ Mekha Rajan & Kathy A. McCloskey, *Victims of Intimate Partner Violence: Arrest Rates Across Recent Studies*, 15 J. AGGRESSION, MALTREATMENT & TRAUMA 27 (2007); Andrea D. Lyon, *Be Careful What You Wish for: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 298 (1999).

⁴⁷ Jennifer Schwartz, Darrell Steffensmeier & Ben Feldmeyer, *Assessing Trends in Women's Violence via Data Triangulation: Arrests, Convictions, Incarcerations, & Victim Reports*, 65 SOC. PROBLEMS 494 (2009).

⁴⁸ FEMINIST WAR, *supra* note 2, at 6 (introducing the idea of a progressive carceral carve-out); Levine, *supra* note 18, at 1232-33 (utilizing carve-out frame).

⁴⁹ See generally McLeod, *supra* note 9, at 1199-1206 (outlining critiques of formal penal-theory justifications of the American carceral state) & nn.222-52 and sources cited therein.

⁵⁰ See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 362 (2014) (expressing "general concerns" about mass incarceration but stating that "only the shallowest of thinkers" support "the notion that our society should not criminalize certain behavior because too many other kinds of behavior are already criminalized" and calling criminal law "essential" because it sends a "clear message to potential perpetrators").

continue to find success in broadening existing criminal laws, minting new ones, and strengthening the hand of police and prosecutors.⁵¹

It is sad to think of feminism as one of the last liberal legitimators of the penal state in an era of declining faith in criminal law. A self-reflective understanding of carceral feminism remains an important part of the progressive fight against mass incarceration. Scholars and activists must be able to confront and understand how feminists' important equity agenda became entangled in carceral politics and policies, or feminism will be fated to repeatedly produce unintended consequences.

⁵¹ See FEMINIST WAR, *supra* note 2, at 111-128, 179-190 (cataloguing such contemporary efforts).

DIRECTIONS FORWARD