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CAN YOU BE A FEMINIST AND A CRIMINAL DEFENSE LAWYER?

Abbe Smith*

INTRODUCTION

Young people in the current cultural generation seem to like the word "literally." They use it often and with great feeling, though not necessarily accurately. Law students will exclaim, for example, that the length of reading assignments is "literally killing them." Young public defenders will complain that judges and prosecutors are "literally driving them crazy." My son sometimes claims that he is "literally starving to death." I can't help replying to each, "Well, maybe not *literally*."

But the answer to the question I pose in this Essay is literally self-evident, for I am both a feminist and a criminal defense lawyer. I have been both of these things for more than thirty years. So yes, of course, one can be a feminist and a criminal defense lawyer: here I am.

Moreover, I have answered this question many times in nearly everything I have written since becoming a law professor. Both my scholarly[1] and more popular writing[2] are from the experience and perspective of a feminist criminal defense lawyer.

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1. *See, e.g.*, ABBE SMITH, GUILTY PEOPLE (2020); ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY (2008) [hereinafter SMITH, CASE OF A LIFETIME]; Abbe Smith, *Representing Rapists: The Cruelty of Cross-Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255 (2016) [hereinafter Smith, *Representing Rapists*]; Abbe Smith & Ilene Seidman, *Lawyers for the Abused, Lawyers for the Accused: An Interfaith Marriage*, 47 LOY. L. REV. 415 (2001); Abbe Smith, *On Representing a Victim of Crime*, *in* LAW STORIES (Gary Bellow & Martha Minow eds., 1996); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of a Sensitive New Age Public Defender*, 28 HARV. C.R-C.L. L. REV. 1 (1993).

2. *See, e.g.*, Abbe Smith, *How Can You Defend Harvey Weinstein? Duty.*, WASH. POST (Mar. 20, 2019), https://www.washingtonpost.com/opinions/how-can-anyone-defend-harvey-weinstein-duty/2019/03/20/25f6c920-4759-11e9-90f0-0ccfeec87a61_story.html; Abbe Smith, *How Can You Represent Those People? Hillary Clinton and Other Feminist Lawyers are Right to Defend Alleged Rapists*, SLATE (April 23, 2015) [hereinafter Smith, *Hillary Clinton and Other Feminist Lawyers are Right to Defend Alleged Rapists*], http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/hillary_clinton_defended_an_alleged_rapists_feminist_lawyers_are_right_to.html; Abbe Smith, *Would* You *Defend Him? What Motivates a Lawyer to Defend a Tsarnaev, a Castro or a Zimmerman?* WASH. POST (July 28, 2013), https://www.washingtonpost.com/opinions/what-motivates-a-lawyer-to-defend-a-tsarnaev-a-castro-or-a-zimmerman/2013/07/25/e81737e8-f2e5-11e2-ae43-b31dc363c3bf_story.html.

The fact that I am a feminist is interwoven into the way I practice criminal law and how I think about it.

It would be nice to end this project here. Pithy legal scholarship is virtually unheard of in the twenty-first century.[3] But the question about feminism and criminal defense seems to keep coming up, lately with new urgency because of heightened awareness about sexual assault.

Consider, for example, the renewed media focus on Hillary Clinton's representation of an alleged child rapist in Arkansas in 1975 in the lead-up to the 2016 presidential election. Commentators wondered how Clinton, who had dedicated much of her professional life to advocating for women and children, could have defended such a criminal.[4] A meme about the case, in which Clinton is said to have "volunteered" to "free" a rapist she "knew . . . was guilty" and then "laughed about it," went viral, even though these claims were false.[5] The truth was that Clinton was appointed to represent an indigent criminal defendant accused of child rape (though whether she volunteered or was appointed should be of no moment), litigated the case well, and obtained a favorable plea.[6]

The Clinton kerfuffle was mere foreshadowing. A year later came the seismic cultural shift of the #MeToo movement against sexual assault and harassment. Fueled by multiple sexual abuse allegations against Hollywood producer Harvey Weinstein in 2017 and similar allegations against other celebrities soon thereafter,[7] women who had been abused by powerful men—often in secrecy, protected by others, with the men seemingly immune from consequences—were suddenly bringing them down. It was miraculous and empowering, and the sides were clearly drawn: either stand by your sisters at this crucial cultural moment or defend the bad guys.

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3. *See* Eric Segall, *The Future of Lengthy Law Review Scholarship*, DORF ON LAW (Apr. 9, 2018), http://www.dorfonlaw.org/2018/04/the-future-of-lengthy-law-review.html (referring to the "lengthy, footnote heavy, and often wildly theoretical law review articles[s] . . . published every year, most of which die in a vacuum").

4. *See* Amy Chozick, *Clinton Defends Her Handling of a Rape Case in 1975*, N.Y. TIMES (July 7, 2014), http://www.nytimes.com/2014/07/08/us/08clinton.html (reporting that Clinton said she took the case at the request of both a prosecutor and judge out of "professional duty"); *see also* MODEL RULES OF PROF'L CONDUCT r. 6.2 (AM. BAR ASS'N 2018) ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause.").

5. Kim Lacapria & David Mikkelson, *Did Hillary Clinton Free a Child Rapist?* SNOPES (May 2, 2016), https://www.snopes.com/fact-check/hillary-clinton-freed-child-rapist-laughed-about-it/ (reporting about a false meme about the case that went viral).

6. *Id.*; *see also* Smith, *Hillary Clinton and Other Feminist Lawyers are Right to Defend Alleged Rapists*, *supra* note 2.

7. *See generally* JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT (2019) (New York Times reporters recounting their investigation into sexual harassment and assault allegations against Harvey Weinstein); RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS (2019) (New Yorker Magazine reporter recounting his investigation into Weinstein); *see also* Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 29, 2019), https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken (noting the "allegations of egregious sexual misconduct" against Weinstein, followed by similar allegations against Louis C.K., Mark Halperin, Charlie Rose, Matt Lauer, Russell Simmons, and John Conyers, all of which resulted in "serious repercussions").

Many feminists seemed to embrace the credo of the #MeToo movement: "Believe Women," no matter what.[8] As *New Yorker* writer Jane Mayer notes, now that "women's accusations of sexual discrimination and harassment are finally being taken seriously, after years of belittlement and dismissal," some find it "offensive" to even "subject accusers to scrutiny."[9] Apparently, if you are a #MeToo supporter, every allegation of sexual assault is true.

This is especially troubling in a criminal context. Even when the stakes are at their highest, not only must we stand by all women accusers, not question their accounts, and never take a man's word over a woman's, but apparently we must regard every purported instance of sexual abuse as equally heinous and equally worthy of the harshest criminal punishment.[10] Hence, according to the #MeToo view embraced by many feminists, neither due process nor the principle of proportionality[11] applies to sex cases.

In this Essay, I will not talk about the importance of defending factually innocent men criminally accused of sexual assault.[12] This should not be controversial for anyone, feminist or not.[13] Nor will I discuss the long and ugly history of black men being falsely accused of rape in this country, usually by white women.[14] The

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8. *See* Monica Hesse, *Do We Really 'Believe Women'? How the Kavanaugh Accusation Will Put a Slogan to the Test*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/lifestyle/style/do-we-really-believe-women-how-the-kavanaugh-accusation-will-put-a-slogan-to-the-test/2018/09/16/c8a7405e-b9f2-11e8-a8aa-860695e7f3fc_story.html (noting that "shortly after #MeToo spread as a hashtag and shorthand, a companion phrase also emerged: 'Believe women'").

9. Mayer, *The Case of Al Franken*, *supra* note 7.

10. *But see* Coker v. Georgia, 433 U.S. 584, 584 (1977) (holding that the death penalty for rape violates the Eighth Amendment's ban on cruel and unusual punishment as grossly disproportionate to the crime).

11. *See generally* AHARON BARAK. PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012) (discussing proportionality as a general constitutional matter); *see also* John Deigh, *Punishment and Proportionality*, 33 CRIM. JUST. ETHICS 185 (2014) (arguing that proportional punishment means that the offender receive the minimal amount of pain or loss necessary to preserve social order); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018) (critically examining misdemeanor punishment from the perspective of proportionality); Judith Lichtenberg, *How US Prisons Violate Three Principles of Criminal Justice*, BIG THINK (Mar. 16, 2018), https://bigthink.com/aeon-ideas/how-us-prisons-violate-three-principles-of-criminal-justice (arguing that the US has violated core principles of criminal justice, including proportionality, in its current approach to criminal punishment).

12. *See, e.g.*, WHEN THEY SEE US (Netflix 2019) (devastating four-part television miniseries about the wrongful prosecution and imprisonment of five innocent young black men for the rape of a white jogger in Central Park in 1989); THE CENTRAL PARK FIVE (Sundance Selects/PBS 2012) (documentary about the same case). These films are essential watching for anyone concerned about criminal justice in the United States.

13. *See generally* SMITH, CASE OF A LIFETIME, *supra* note 1 (the author recounting her representation of an innocent woman who served 28 years in prison); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 180 (1983) (noting how "grueling" and important defending the innocent is); Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 2 (2010) (pointing out that, inevitably, if uncharacteristically, defense lawyers care about innocence).

14. For a riveting account of one such case, see GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2012) (recounting the true story of four young black men accused of raping a white woman in Lake County, Florida, in 1949). *See also* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 2007) (recounting the true story of nine young black men ranging in age from twelve to nineteen accused of raping two white women in northeastern Alabama in 1931).

vestiges of Jim Crow persist;[15] race and rape have always been deeply intertwined in our criminal legal system and ought to be of concern to all lawyers and non-lawyers, feminist or not.[16]

Instead, I will try to identify and address the hard questions for feminist criminal defense lawyers today, in both theory and practice. I focus on sex cases because these cases seem to provoke the most conflict for young feminists. In so doing, I first discuss the obligations of feminism in a time of over-criminalization and mass incarceration,[17] as well as the obligations of criminal defenders in a time of heightened awareness about sexual assault and sexual violence, and how to reconcile these things. I then use two cases—the Brock Turner (Stanford swimmer case) and a more typical case not in the public eye (involving an African American man serving a lengthy sentence for rape)—in order to make more concrete how a feminist defender might think about these kinds of cases.

As I note above, this Essay is in many ways what I have been writing about my entire academic career. It is the "feminist subset" of the Cocktail Party Question: How Can You Represent Those People?[18] It is also an exhortation to young feminists contemplating a career in criminal law to become defenders rather than prosecutors,[19] and perhaps a little vindication for those feminist defenders who have been doing the work for years.[20] More and more women seem to be entering law

15. In many ways, the Central Park Five can be seen as a latter-day version of the Scottsboro Boys. *See* WHEN THEY SEE US, *supra* note 12; THE CENTRAL PARK FIVE, *supra* note 12.

16. For important discussions of the interconnectedness of race and rape, see Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598–601 (1990) (pointing out that, historically, rape was something that happened to white women, not black women, and it "signified the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by 'crying rape'), by white women"); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 362–69 (1993) (discussing the racialized meaning of rape); Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 103 (1983) (discussing rape and race from a feminist perspective and noting that the "history of rape in this country has focused on the rape of white women by Black men").

17. *See generally* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html (reporting that the American criminal justice system holds almost 2.3 million people in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories). If you include the 4.4 million people on parole or probation in the US, the grand total of people under the control of the criminal legal system is 6.7 million. *Id*. People of color, especially African Americans, are disproportionately represented in our nation's prisons and jails. While African Americans are only 13 percent of US residents, they make up 40% of the incarcerated population. *Id*. Contrary to what many people think, incarcerated drug offenders are not the reason we have mass incarceration; the main driver is "violent" state crime—which includes a wide variety of offenses, some of which are not very violent at all. *Id*.

18. *See generally* HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman eds., 2013) (collection of essays by criminal lawyers and legal academics answering the "Cocktail Party Question").

19. *See* Linda Hirshman, *Remember that the Prosecution of the Central Park Five Failed Women, Too*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/opinion/central-park-five.html (noting that the "Manhattan district attorney's sex crimes unit was . . . a potent expression of the feminist movement" during the wrongful prosecution of the Central Park Five).

20. I think of feminist defenders like Cris Arguedes, Barbara Babcock, Blair Berk, Jennifer Brown, Judy Clarke, Angela J. Davis, Alison Flaum; Nancy Gertner, Aya Gruber, Carey Haughwout, Vida Johnson, Holly

school interested in criminal defense, and many public defender offices are nearing equal numbers of men and women.[21] I wanted to give these women defenders something that explicitly answers this question.

I. "FEMINISM" IN A TIME OF MASS INCARCERATION

Feminism is not one-dimensional. It is a movement, an ideology, and a method. Its most basic aim is to achieve gender equality, but this is a simplistic rendering of feminism. Feminism includes a range of socio-political movements and ideologies that seek to define and achieve the political, economic, social, and personal equality of the sexes.[22] Feminist theory seeks to understand the nature of gender inequality—and the nature of gender itself—by examining women's (and men's) social roles and lived experience.[23] Taking women's lived experience seriously is also a key feminist method.[24] There is liberal feminism, radical feminism, Marxist-feminism, post-modern feminism, critical race feminism, and intersectional feminism.[25] In the United States, feminism came in different waves. The first wave was the movement for women's suffrage in the nineteenth and twentieth centuries.[26] The second wave was the women's liberation movement for legal and social equality in the 1960s.[27] The third wave started in the early 1990s and focused on diversity, individual variability, intersectionality, and queer theory.[28]

Maguigan, Patricia McInerney, Erin Murphy, Cookie Ridolfi, Michele Roberts, Ann Roan, Jill Paperno, Cookie Polan, Catherine Roraback, Maureen Rowley, Alison Siegler, Shelley Stark, Robin Steinberg, Phyllis Subin, and Ellen Yaroshefsky, among others.

21. I could find no empirical support for this assertion, but it reflects my experience and that of others in the public defense community. *See* Phyllis Subin, *Have Gender Bias and the Glass Ceiling Been Shattered in the #Me Too Era?*, NAT'L ASS'N FOR PUB. DEF. (Nov. 26, 2019), https://www.publicdefenders.us/ev_calendar_day.asp?date=11/26/ 2019&eventid=162 (discussing women in public defense in the recent past and today).

22. *See generally* Catharine A. Mackinnon, Difference and Dominance: On Sex Discrimination (Oct. 24, 1984), *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Sandra Harding, *The Instability of the Analytical Categories of Feminist Theory*, 11 SIGNS 645 (1986); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Wendy W. Williams, *Notes From A First Generation*, 1989 U. CHI. LEGAL F. 99, 99–113.

23. *See* Harding, *The Instability of the Analytical Categories of Feminist Theory*, *supra* note 22, at 646–47; West, *Jurisprudence and Gender*, *supra* note 22, at 28.

24. *See generally* FEMINISM IN OUR TIME: THE ESSENTIAL WRITINGS, WORLD WAR II TO THE PRESENT (Miriam Schnier ed., 1994) (historically informed sourcebook by prominent feminist historian on the intellectual and political underpinnings of contemporary feminism); THE ESSENTIAL FEMINIST READER (Estelle B. Freedman ed., 2007) (similar feminist sourcebook but with a broader international focus).

25. *See generally* NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM (1989); RORY C. DICKER, A HISTORY OF U.S. FEMINISMS (2016).

26. *See generally* COTT, *supra* note 25; DICKER, *supra* note 25.

27. *See generally* DICKER, *supra* note 25; JUDITH EVANS, FEMINIST THEORY TODAY: AN INTRODUCTION TO SECOND WAVE FEMINISM (1995); ESTELLE FREEDMAN, NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN (2002).

28. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) (prominent philosopher and gender theorist discussing feminism).

The fourth wave started around 2012 and focused on "rape culture," which helped give rise to the #MeToo movement.[29]

Feminism that is one-dimensional, or one-issue-oriented, is problematic. It has historically been too white, too middle-class, too economic rights-driven, and too victims' rights-driven. The victims' rights focus has morphed into what is now called "carceral feminism," which regards increased policing, prosecution, and imprisonment as the primary solution to violence against women.[30] This brand of feminism too often embraces criminal punishment as the answer to a variety of complex and entrenched social problems and, sadly, has contributed to mass incarceration.[31]

I prefer, instead, the activists and commentators who reject carceral feminism and are developing a deeply feminist approach to crime and punishment. This approach includes restorative justice and a focus on institutional and cultural responsibility for gendered violence, rather than individual punishment.[32] These

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29. *See, e.g.*, Melanie Dellplain, *Can a Feminist Defend a Rapist?: The Ethics of Legal Representation*, 31 GEO. J. LEGAL ETHICS 583, 593–600 (2018) (summarizing modern feminist thinking on sexual assault).

30. *See generally* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020) (critiquing carceral feminism, which refers to the feminist embrace of the criminal legal system to solve or curtail gender-based violence).

31. *See* Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1354 (2013) (critiquing the reliance of second wave feminists on criminal law and criminal punishment to address male violence); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 659 (2009) (same); *see also* Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 57 (2010) (same); Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELBOURNE J. INT'L L. 78 (2008) (same); Genevieve LeBaron & Adrienne Roberts, *Toward a Feminist Political Economy of Capitalism and Carcerality*, 36 SIGNS 19, 21 (2010) (same).

32. *See* KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE (2008) (arguing that the U.S. criminal legal system and social welfare apparatus appropriated the feminist movement against sexual violence, stifling women's autonomy, producing over-criminalization, and propagating the "black stranger" rape narrative); LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018) (arguing that the criminal legal system harms rather than helps those who are subjected to abuse and violence in their homes and communities and urging a restorative justice approach); GRUBER, *supra* note 30 (arguing that feminists should redirect their efforts from crime control and punishment toward challenging structures that subordinate women and other disadvantaged minorities); BETH RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012) (arguing that black women face particular peril because of the ways that race and culture have not been sufficiently considered in the analysis of the causes and consequences of gender violence); *see also* Victoria Law, *Against Carceral Feminism*, JACOBIN MAG. (Oct. 17, 2014), https://www.jacobinmag.com/2014/10/against-carceral-feminism/ (arguing that relying on state violence—including the Violence Against Women Act—to curb domestic violence only ends up harming the most marginalized women); Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminists Criminal Law Reform Strategies*, 36 OSGOOD HALL L.J. 151, 158 (1998) (noting that a punitive, retribution-driven agenda now constitutes the public face of the women's movement and arguing that feminists have been co-opted by the New Right); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1553 (2014) [hereinafter McLeod, *Regulating Sexual Harm*] (arguing that criminal regulation of "sexual harm" in the U.S. is overbroad, overly harsh, and neglects the most prevalent forms of vulnerability to sexual assault within families, schools, churches, prisons, and the military, and proposing an alternative reform framework focusing on institutional, structural, and social dynamics).

feminists are concerned about both victims and perpetrators of crime, recognizing that these labels are overly binary, and the lines sometimes porous.[33] They understand that the cycle of violence runs deep; trauma is a chief contributor; childhood experiences like abuse, neglect, and witnessing violence play a significant role in whether a person will bring violence home; and prison often produces more trauma.[34]

One of these activists is a student of mine, Stefanie Mundhenk Harrelson, who was raped by someone she considered a friend while an undergraduate at Baylor University.[35] Her path is not as extraordinary as one might think.[36] She wanted two things in the aftermath of her attack: to heal from the physical and emotional trauma, and for her rapist not to assault anyone else.[37] She initially thought the best way to accomplish these goals was through the criminal legal system.[38] But she was told by the local police department that no "sane" prosecutor would ever go forward with the case because she had no eyewitnesses and the accused was claiming consent.[39] The University's internal disciplinary process was even worse, reinforcing at every turn the message that the female student was not sufficiently credible to uphold such an accusation.[40] The accused male student was never held to account, and there was no moment of reckoning or "closure" for anyone involved.[41]

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33. *See* Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U. L. REV. 367–94 (2005) (using the story of convicted murderer Aileen Wuornos to discuss the often porous line between victims and perpetrators).

34. *See* Leigh Goodmark, *How Not to Stop Domestic Violence*, N.Y. TIMES, July 24, 2019, at A27.

35. *See* Stefanie Mundhenk Harrelson, *I Was Sexually Assaulted. And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*., APPEAL (July 18, 2019), https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me/.

36. One notable rape victim who became an activist for criminal justice reform is Jennifer Thompson-Cannino, who was raped at knifepoint by a stranger when she was a college student in North Carolina in 1984. As a result of a suggestive photo display, she identified an innocent man named Ronald Cotton as her rapist. He was subsequently tried, convicted, and imprisoned for eleven years for the crime. Cotton was released when a DNA test proved that another man had committed the rape. *See* JENNIFER THOMPSON-CANNINO & RONALD COTTON, PICKING COTTON: OUR MEMOIR OF REDEMPTION AND INJUSTICE (2008). Another is Carey Houghwout, the Chief Public Defender in Palm Beach County, FL, who was also raped at knifepoint by a stranger while a college student. Haughwout worried about the incompetence of police officers who "plodded about" in the aftermath of her attack, likely destroying the crime scene. Anxiety turned to anger a few weeks later when police tried to pressure her into identifying someone from a lineup after she insisted that none of the men there resembled her attacker. *See* Daphne Duret et al., *Sharp Contrast Stands Out in Public Defenders Carey Houghwoutt and Diamond Litty*, PALM BEACH POST (Dec. 4, 2018), https://www.palmbeachpost.com/news/20181129/sharp-contrast-stands-out-in-public-defenders-carey-haughwout-and-diamond-litty.

37. *See* Harrelson, *supra* note 35.

38. I generally use the term "criminal legal system" instead of the more conventional "criminal justice system," because there is hardly any justice in our criminal system.

39. *See* Harrelson, *supra* note 35.

40. *See generally* Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399 (2019) (documenting the degree to which women survivors of intimate violence face a Gaslight-style gauntlet of doubt, disbelief, and outright dismissal of their stories).

41. *See* Harrelson, *supra* note 35 (noting that, after the male student was found "not responsible" for the assault, she was initially given lip service and then blown off by the university president).

Harrelson is now a critic of conventional adversarial approaches to crime and an advocate for restorative justice. She includes rape among the crimes that would be better addressed in an alternative system that "center[s] the needs of victims."[42] She believes that even if we could increase the historically low prosecution rates for rape—which her own experience with the police illustrates—we would still not serve the interests of victims. The "carceral machine," as she calls it, only produces trauma—to both victims and perpetrators.[43] Victims suffer because the criminal legal process operates to deny them the power and control they need to heal largely by limiting their ability to make choices about when, how, and with whom to share their story. Perpetrators suffer when justice is defined only by how many years they must spend in a cage and not by their ability to acknowledge responsibility, take action to repair the harm, and change.[44]

Harrelson speaks hopefully of restorative justice as a way of re-conceptualizing how we respond to criminal wrongdoing. Instead of regarding crime in narrow terms as a violation of law requiring punishment, restorative justice regards crime as an infliction of harm best redressed by bringing together those who have caused the harm and those who have experienced it to create a meaningful plan of repair.[45]

Kathleen Daly, one of the first feminists to study restorative justice,[46] is also optimistic about its promise. But she cautions that there is no single definition for what restorative justice means and no consensus on what practices should be included within its reach.[47] Moreover, there is disagreement about whether restorative justice should be viewed as a process, an outcome, or a set of values, and whether it might exist within established criminal justice systems.[48]

Daly identifies the core elements of restorative justice as:

- Deal[ing] with the penalty (or post-penalty), not fact-finding phase of the criminal process;
- Involv[ing] a face-to-face meeting with an admitted offender and victim and their supporters, although it may also take indirect forms;
- Envision[ing] a more active role for victim participation in justice decisions;
- [Employing] an informal process that draws on the knowledge and active participation of lay persons (typically those most affected by an offence),

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *See generally* CRIMINOLOGY AT THE CROSSROADS: FEMINIST READINGS IN CRIME AND JUSTICE (Kathleen Daly & Lisa Maher eds., 1998) (a collection of feminist work in criminology by prominent scholars); *see also* Kathleen Daly & Hennessey Hayes, *Restorative Justice and Conferencing in Australia*, 186 TRENDS & ISSUES CRIME & CRIM. JUST. (2001) (discussing restorative justice).
47. Kathleen Daly, *The Limits of Restorative Justice*, *in* HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE (Dennis Sullivan & Larry Tifft eds., 2006), http://www.antoniocasella.eu/restorative/Daly_2005.pdf; *see also* Daly & Hayes, *supra* note 46.
48. Daly, *supra* note 47.

but there are rules circumscribing the behavior of meeting members and limits on what they can decide in setting a penalty;
- Aim[ing] to hold offenders accountable for their behavior, while at the same time not stigmatizing them, and in this way it is hoped that there will be a reduction in future offending; and
- Aim[ing] to assist victims in recovering from crime [by playing a more central role in the restorative justice process and making use of other community resources].[49]

A comprehensive discussion of restorative justice is beyond the scope of this Essay. But a growing number of feminists seeking an alternative to lengthy incarceration have embraced it, even for crimes of violence against women.[50]

Feminists concerned about mass incarceration and its disproportionate impact on minority communities have also become active in the prison abolition movement. The most prominent are Ruth Wilson Gilmore,[51] Angela Y. Davis,[52] and Beth Ritchie,[53] three scholars who identify as "black, radical, feminist intellectuals."[54]

Gilmore, an influential figure in the movement,[55] explains the basic premise of prison abolition in distinctly feminist terms. She believes if we as a society lived in

49. *Id.*

50. *See, e.g.*, FANIA DAVIS, THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND US SOCIAL TRANSFORMATION (2019) (writing about restorative justice); LINDA MILLS, VIOLENT PARTNERS: A BREAKTHROUGH PLAN FOR ENDING THE CYCLE OF ABUSE (2008) [hereinafter MILLS, VIOLENT PARTNERS] (arguing for a healing-centered approach to intimate abuse that recognizes the complexity of violence); LINDA MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE (2003) [hereinafter MILLS, INSULT TO INJURY] (addressing the complex dynamics of intimate abuse and incorporating restorative justice methods that focus on healing and transformation rather than shame or punishment); Daly, *The Limits of Restorative Justice*, *supra* note 47; Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice*? N.Y. TIMES MAG., (Jan. 4, 2013), https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html (describing the life and work of Sujatha Baliga, a former public defender who had been sexually abused by her father and who directs a restorative justice project at the National Council on Crime and Delinquency in Oakland, CA).

51. *See generally* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (analyzing the political economy of mass incarceration in California).

52. *See generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) (arguing that, like the social movements that led to the end of slavery, de jure segregation, and the convict-lease system, it is time for an abolition movement to end the prison system); ANGELA Y. DAVIS AS TOLD TO EDUARDO MENDIETA & CHAD KAUTZER, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE (2005) [hereinafter DAVIS, ABOLITION DEMOCRACY] (interviewing Davis on prison abolition and other matters of political and social justice).

53. *See, e.g.*, Beth E. Richie, *Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257 (2015) (arguing that ending gender violence is consistent with prison abolition); Beth E. Ritchie, *How Anti-violence Activism Taught Me to Become a Prison Abolitionist*, FEMINIST WIRE (June 21, 2014), https://www.thefeministwire.com/2014/01/how-anti-violence-activism-taught-me-to-become-a-prison-abolitionist/ (embracing the "feminist prison abolition project" as the best way to undo the harm that state violence has perpetrated and empower communities to redress gendered violence).

54. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (April 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html.

55. *Id.*

a way that consistently reflected how precious life is, there would be considerably less violent crime.[56] "[W]here life is precious, life *is* precious," she says.[57] Instead, when we "behave in a punitive and violent and life-annihilating way toward people who hurt people," we perpetuate the problem.[58] If only we lived up to our values, people who were tempted to resort to violence would learn that "behaving in a violent and life-annihilating way is not a solution."[59]

Prison abolition as a movement is provocative because it sounds *absolute*—no prison for anyone, ever, no matter how dangerous they are. But, in practice, it is both a long-term aspirational goal and on-the-ground social policy that "call[s] for government investment in jobs, education, housing, and health care."[60] Abolition means not just closing prisons, but reinvigorating the vital systems of support that have frayed in many communities, furthering inequality and despair.[61] It is a "theory of change."[62]

Feminist legal scholars like Allegra McLeod have also advanced this fundamentally radical theory of change, which "presents a formidable challenge to existing ideas of legal justice."[63] McLeod writes:

> Whereas reformist efforts aim to redress extreme abuse or dysfunction in the criminal process without further destabilizing existing legal and social systems—often by trading reduced severity for certain "nonviolent offenders" in exchange for increased punitiveness toward others—abolitionist measures recognize justice as attainable only through a more thorough transformation of our political, social, and economic lives. To realize justice in abolitionist terms thus entails a holistic engagement with the structural conditions that give rise to suffering, as well as the interpersonal dynamics involved in violence . . . Whereas conventional accounts of legal justice emphasize the administration of justice through individualized adjudication and corresponding punishment or remuneration . . . abolitionist justice offers a more compelling and material effort to realize justice—one where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence.[64]

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56. *Id.*
57. *Id.* (quoting Ruth Wilson Gilmore).
58. *Id.*
59. *Id.* (quoting Ruth Wilson Gilmore).
60. *Id.*
61. *See id.*
62. *Id.* (quoting Michelle Alexander).
63. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019); *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (bringing prison abolition into conversation with criminal justice theory).
64. McLeod, *Envisioning Abolition Democracy*, *supra* note 63, at 1616.

Other prominent feminist legal scholars have expressed support for prison abolition as well.[65] There might be a scholarly movement afoot.

Feminists who have rejected carceral feminism for restorative justice or prison abolition understand that the cycle of sexual violence often begins in our most cherished institutions: family, church, schools, and the military.[66] It is an institutional, and not merely individual, problem. They also understand that overcriminalization and mass incarceration disproportionately burden women of color, whether from their own rising incarceration numbers[67] or the numbers of their sons, brothers, husbands, and fathers in the system.[68]

This is the kind of feminism I ascribe to as a defender: a feminism that is mindful of the enormous and violent power of the state;[69] one that understands that the causes of crime are complex and deep;[70] and one that believes our worst, most repressive institutions can and must be changed.[71]

II. CRIMINAL DEFENSE AND SEXUAL ASSAULT IN THE #METOO ERA

Criminal defense is much easier to define and far less multi-faceted than feminism. This is because the professional obligations of criminal defense lawyers are

65. *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017) (arguing for a radical rethinking of criminal law enforcement in the U.S. and endorsing the prison abolition movement); Dorothy Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017) (arguing that making criminal law democratic—and fully inclusive of black people—requires an abolitionist approach that will dismantle the criminal law's anti-democratic aspects entirely and reconstitute the criminal justice system without them); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1623–24 (2017) (expressing support for prison abolition and otherwise "[d]ismantling the American carceral state").

66. *See* McLeod, *Regulating Sexual Harm*, *supra* note 32.

67. Data shows that women in jails are the fastest growing population within the justice system, skyrocketing nearly 1,300 percent (from fewer than 8000 in 1970 to 110,000 in 2014). *See Women Behind Bars*, VERA INST. JUST. (June 21, 2016), https://www.vera.org/the-human-toll-of-jail/inmate-turned-advocate/women-behind-bars.

68. *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prison*, SENT'G PROJECT (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

69. *See generally* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1995) (examining law's violence); ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT (2014) (examining the violence and cruelty of punishment in America); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Random House 1977) (arguing that prison has become part of a larger "carceral system" that has become an all-encompassing sovereign institution in modern society).

70. *See, e.g.*, MILLS, VIOLENT PARTNERS, *supra* note 50; MILLS, INSULT TO INJURY, *supra* note 50; *see also* Kathleen Daly & Meda Chesney-Lind, *Feminism and Criminology*, 5 JUST. Q. 497 (1988) (laying out the promise of feminist inquiry for rethinking problems of crime and justice and in building theories on gender and crime, understanding men's violence toward women, and addressing gender inequality in the criminal justice system).

71. *See* DAVIS, ARE PRISONS OBSOLETE?, *supra* note 52; DAVIS, ABOLITION DEMOCRACY, *supra* note 52; GILMORE, *supra* note 51.

rule-driven and largely unambiguous.[72] A criminal defense lawyer is obligated as a matter of ethics to zealously pursue the client's interest within the bounds of law.[73]

The clear lines are an appealing part of criminal defense for me. Once I undertake a case, I must act at all times in a client-centered way. As Lord Brougham famously declared—with a feminist tweaking of early nineteenth century pronouns:

> [A]n advocate, in the discharge of [her] duty, knows but one person in all the world, and that person is [her] client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to [herself], is [her] first and only duty; and in performing this duty [she] must not regard the alarm, the torments, the destruction which [she] may bring upon others.[74]

Of course, the question of whether or not to take on a case is a decision lawyers can freely make in this country[75]—except for public defenders and other court-appointed lawyers, who make this fundamental moral decision when they become indigent criminal defense lawyers. I consider myself a lifelong public defender as a matter of experience, inclination, and identity.[76] As a defender, it is not for me to judge my client or the crime charged; my life's work compels me to stand between my poor client and the ire of others.[77] There is usually more than enough hostility to go around when a person is accused of crime.

Because a private lawyer makes a choice about the clients he or she represents, the decision to represent an alleged sex offender is open to scrutiny. I don't think there is anything wrong with this, or with having to explain why one undertakes a controversial case generally.[78] Lawyers have an obligation to

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72. *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N, 2018) (the ethical rules governing the legal profession).

73. *See id.* r. 1.3 cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

74. 2 THE TRIAL AT LARGE OF HER MAJESTY CAROLINE AMELIA ELIZABETH, QUEEN OF GREAT BRITAIN, IN THE HOUSE OF LORDS, ON CHARGES OF ADULTEROUS INTERCOURSE 2–3 (Manchester, J. Gleave, Deansgate 1821).

75. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 3.05 (5th ed. 2016) (discussing lawyer autonomy in taking cases).

76. I came of age professionally as a trial lawyer at the Defender Association of Philadelphia. My colleagues there remain my favorite lawyers.

77. I can't help but be reminded of one of Pope Francis's best lines from early in his reign as pope—"Who am I to judge?"—which was said in response to a question on gay Catholics. As Francis said, "If someone is gay and he searches for the Lord and has good will, who am I to judge?" Rachel Donadio, *On Gay Priests, Pope Francis Asks, 'Who Am I to Judge?'*, N.Y. TIMES (July 29, 2013), https://www.nytimes.com/2013/07/30/world/europe/pope-francis-gay-priests.html.

78. For an interesting exchange about whether lawyers should have to publicly justify their choice of clients, see Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV 111, 111–12 & n.6

educate the public about law.[79]

Take, for example, Harvard College Dean Ronald Sullivan's decision to join Harvey Weinstein's defense team in 2019, which provoked an enormous outcry by Harvard students, resulting in Sullivan's removal as dean.[80] Sullivan agreed to represent Weinstein notwithstanding the fact that Weinstein was facing multiple accusations of sexual assault and had become the public face of #MeToo. Indeed, these factors may have drawn Sullivan to the case.[81] In addition to the cachet—and cash—of a high-profile case, when the mob gathers, defense lawyers often step up.[82]

Sullivan's rationale for taking the case was not exactly feminist. It was more a reflection of how he sees himself as a criminal lawyer. In response to a reporter's question about why he decided to represent Weinstein, Sullivan replied: "I have been a criminal-defense lawyer since I started as a public defender in Washington, D.C. in the mid-nineties. I represent any number of people charged with crimes across the country."[83] When asked about whether he had concerns about representing people accused of sexual misconduct, "because the defense . . . so often takes the form of disputing women's stories, making women out to be liars, [and] calling their credibility into question," Sullivan was coy: "A hypothetical case could have that potential. I do not see that sort of conflict in this case. And that's as far I can go," he replied. When pressed about whether it bothered him that "these types of accusations are often responded to in this way," he gave a lawyerly non-answer:

> It's hard to answer that in the abstract. It's unethical for a lawyer to make that sort of insinuation without a good-faith basis. So, if the question is whether

(1995) (summarizing a debate between Freedman and Professor Michael E. Tigar). That debate centered on Professor Tigar's representation of an accused Nazi death camp guard. *See id*.

79. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N, 2018) ("As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

80. *See* Jan Ransom & Michael Gold, *'Whose Side Are You On?': Harvard Dean Representing Weinstein is Hit With Graffiti and Protests*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/nyregion/harvard-dean-harvey-weinstein.html (reporting about the student outcry over Sullivan representing Weinstein); Kate Taylor, *Harvard's First Black Faculty Deans Let Go Amid Uproar Over Harvey Weinstein Defense*, N.Y. TIMES (May 11, 2019), https://www.nytimes.com/2019/05/11/us/ronald-sullivan-harvard.html (reporting that Ronald Sullivan and his wife Stephanie Robinson would not be reappointed as Deans of Harvard's Winthrop House).

81. *See* Isaac Chotiner, *A Harvard Law School Professor Defends His Decision to Represent Harvey Weinstein*, NEW YORKER (Mar. 7, 2019), https://www.newyorker.com/news/q-and-a/a-harvard-law-school-professor-defends-his-decision-to-represent-harvey-weinstein (Sullivan, in an interview, suggesting that he took Weinstein's case because it raised important issues about the "rule of law" and because Weinstein is an especially unpopular criminal defendant). Sullivan stated: "I have represented people, both indigent and non-indigent, who are accused of very serious crimes. I think the system as a whole is better for such representation." *Id*. Sullivan did not deny that he was being paid a substantial fee. *See id*.

82. *See generally* DAVID MCCULLOUGH, JOHN ADAMS 66–68 (2001) (recounting John Adam's defense of British soldiers in the aftermath of the Boston Massacre).

83. Chotiner, *supra* note 81.

> one can willy-nilly attack credibility of complainants, that answer is no. There are a range of potential defenses in any sort of case, including sexual-assault cases, all of which do not rely on contesting credibility of complainants. Some clearly do, but others do not.[84]

When the mob started coming after Sullivan—a privileged, highly educated, Ivy League mob that should have known better[85]—I was among those who expressed support for him. I argued that it is especially important to have good counsel when the accused is a social pariah, as Weinstein has become, and when the stakes are high, as they are in all sex cases.[86] I identified myself as a feminist criminal defense lawyer. I acknowledged that sexual assault and harassment are serious problems on college campuses.[87]

One of Weinstein's initial lawyers, Blair Berk, identifies as a feminist criminal lawyer.[88] She is concerned about the criminalization of (bad) sex, the infantilization of women said to be "coerced" by powerful men, and the #MeToo slogan, "Believe Women."[89] She rejects the idea that "there [is] a sex that by definition only ever speaks the truth."[90] When asked whether she had any qualms about "representing men accused of doing horrible things to women," Berk replied that she is proud of what she does "as a woman, a feminist, and a criminal attorney," and that her "first love is the Constitution."[91]

Donna Rotunno, the lead lawyer at Weinstein's trial, also calls herself a feminist.[92] She, too, worries about the excesses of #MeToo, the "cultural pendulum swinging too far," and the demise of "due process . . . and the presumption of innocence."[93]

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84. *Id.*

85. *See* Ransom & Gold, *supra* note 80.

86. *See* Abbe Smith, *How Can You Defend Harvey Weinstein? Duty.*, *supra* note 2 (explaining why it was important for Sullivan to represent the non-indigent Weinstein).

87. *Id.*

88. Maria Perez, *Harvey Weinstein Lawyer: As a Woman and as a Feminist I'm Very Proud of What I Do*, NEWSWEEK (June 20, 2018), https://www.newsweek.com/blair-berk-harvey-weinstein-feminism-me-too-movement-987003 (Blair Berk, who represented Harvey Weinstein from 2017-2018, discussing her choice to represent him).

89. *Id.*

90. *Id.*

91. *Id.*

92. Ed Pilkington, *Donna Rotunno: The legal Rottweiler leading Harvey Weinstein's defense*," THE GUARDIAN (Feb. 9, 2020), https://www.theguardian.com/film/2020/feb/09/donna-rotunno-lawyer-leading-harvey-weinsteins-defense (noting that Rotunno calls herself the "ultimate feminist").

93. Jan Ransom, *She's Harvey Weinstein's Lawyer, and She Thinks #MeToo is "Dangerous*," N.Y. TIMES (Jan. 14, 2020), https://www.nytimes.com/2020/01/14/nyregion/weinstein-woman-metoo.html. Rotunno lost credibility as a feminist when she was asked in an interview for the *New York Times* podcast, *The Daily*, whether she had ever been sexually assaulted and she replied, "I have not. Because I would never put myself in that position." Meghan Twohey, *A Question That Almost Went Unasked*: *Our interview with the woman defending Harvey Weinstein*. THE DAILY NEWSLETTER, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/podcasts/daily-newsletter-weinstein-trial-coronavirus.html.

I do not know whether I would have represented Weinstein had I been asked. In more than three decades of criminal law practice, I have never turned down a court-appointed case based on the nature of the alleged crime. But that is in the context of indigent defense; the fact that my clients are poor is a motivator for me. If I had been appointed to represent Weinstein, I have no doubt I would have been able to represent him zealously. But I am a salaried law professor with no need for a big pay day. I prefer to expend my energy on criminal defendants who might not otherwise have competent counsel.

Of course, the individual motivations of criminal defense lawyers who identify as feminists vary. There are more than enough motivations to go around.[94] But some cases challenge even the most committed feminist defenders, and cases involving alleged sexual or physical violence against women are a prime example.[95] These cases can be challenging on many levels.[96]

In a previous article, I candidly discuss the challenges in "representing rapists" as a feminist.[97] But I also argue that criminal defense, even on behalf of those accused or convicted of rape, is consonant with feminism.[98] One example I cite is the amicus brief[99] filed by a number of feminist organizations in *Coker v. Georgia*.[100] The organizations on the brief were the American Civil Liberties Union; the Center for Constitutional Rights; the National Organization for Women Legal Defense and Education Fund; the Women's Law Project; the Center for Women Policy Studies; the Women's Legal Defense Fund; and Equal Rights Advocates, Inc.[101] The first listed author is now-United States Supreme Court Justice Ruth Bader Ginsburg.[102]

The brief points to the racist and sexist history of rape prosecutions in arguing against the death penalty for rape and "firmly rejected the notion that destruction of men's lives served to protect and honor women."[103] The same thinking applies outside the death penalty context to the relentless caging, shunning, and shaming of sex offenders.[104]

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94. *See* HOW CAN YOU REPRESENT THOSE PEOPLE?, *supra* note 18 (14 essayists, half of whom are women, share their motivations for doing criminal defense work); Babcock, *supra* note 13, at 177–79 (offering a classic list of motivations for criminal defenders).

95. I often say that representing rapists and racists are the two toughest challenges in criminal defense.

96. *See generally* Smith, *Representing Rapists*, *supra* note 1, at 303 (the author candidly discussing the personal and professional challenges of defending men accused of sexual assault).

97. *See id*. at 309.

98. *Id*. at 300 ("One can be a feminist—in a deep and broad sense—and defend people who are accused or convicted of sex crimes.").

99. Brief for the American Civil Liberties Union et al. as Amici Curae Supporting Petitioner, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-7544), 1976 WL 181482.

100. 433 U.S. 584, 600 (1977) (holding that capital punishment for rape violates the Eighth Amendment).

101. Brief for the American Civil Liberties Union et al. as Amici Curae Supporting Petitioner, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-7544), 1976 WL 181482.

102. *See id*.

103. *Id*. at 9.

104. *See* Smith, *Representing Rapists*, *supra* note 1, at 257–64 (discussing the harsh punishment of all criminal offenders in the United States, including sex offenders).

But feminist criminal defenders must also recognize the persistent culture of disbelief and outright misogyny when it comes to rape and sexual assault—and other crimes against women as well—no matter the current traction of the #MeToo movement.[105] Rape complainants (the vast majority of whom are women) are doubted and dismissed from the minute they engage with law enforcement because police and prosecutors don't believe them.[106] This means that most rape cases do not make it anywhere near a courtroom to ultimately be defended by a feminist criminal defense lawyer.[107]

In a disturbing and powerful piece of journalism in *The Atlantic* magazine, Barbara Bradley Hagerty reveals law enforcement's utter failure to effectively pursue rape cases.[108] The statistics are distressing. In forty-nine out of fifty alleged rape cases, the assailant goes free.[109] The police distrust women who report being raped, fail to conduct a meaningful investigation, fail to test rape kits (especially "acquaintance rape" kits), and leave cases of serious sexual assault to rot.[110] Some rapists go on to rape again.[111] As Hagerty remarks, "rape—more than murder, more than robbery or assault, is by far the easiest violent crime to get away with."[112]

It is important to note that defense lawyers have nothing to do with this grim reality. We are not the initial stumbling block for rape complainants. Whatever defense lawyers do in the course of a rape *trial*—constructing a defense theory, making evidentiary arguments, conducting cross-examination[113]—these trials are extremely rare, having little to do with criminal defense lawyers.[114]

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105. *See* Epstein & Goodman, *supra* note 40.

106. Of course, male rape victims are also disbelieved. *See* Dave Philipps, *Six Men Tell Their Stories of Sexual Assault in the Military*, N.Y. TIMES (Sept. 10, 2019), https://www.nytimes.com/interactive/2019/09/10/us/men-military-sexual-assault.html (recounting haunting incidents of male rape in the U.S. military).

107. *See generally* Barbara Bradley Hagerty, *An Epidemic of Disbelief: What New Research Reveals About Sexual Predators, and Why Police Fail to Catch Them*, ATLANTIC (July 22, 2019), https://www.theatlantic.com/magazine/archive/2019/08/an-epidemic-of-disbelief/592807/; *see also* Epstein & Goodman, *supra* note 40.

108. Hagerty, *supra* note 107.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* The disrespect for women that underlies ineffective law enforcement in this context is stunning:

> [T]he skepticism shown by police and prosecutors—who are not juries, after all—is extraordinary. Officials don't talk about their methods publicly, and rarely reveal their thinking, much less their motives or biases. But two cities—Detroit and Los Angeles—allowed researchers to read thousands of pages of police reports and to interview detectives and prosecutors. What the researchers found is a subterranean river of chauvinism, where the fate of a rape case usually depends on the detective's or (less often) prosecutor's view of the victim—not the alleged perpetrator.

Id.

113. *See* Smith, *Representing Rapists*, *supra* note 1, at 290 ("[W]ithout mincing words, what defense lawyers do at trial on behalf of factually guilty rapists is impugn *the very character of a truthful person who has been badly victimized*.")

114. Sadly, trials of any kind are becoming increasingly rare in American courtrooms. *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (Justice Kennedy, writing for the majority, referring to "the reality that criminal justice today is for the most part a system of pleas, not a system of trials").

The culture of disbelief goes well beyond criminal law enforcement. No matter how credible the allegations of sexual misconduct, from Anita Hill to Christine Blasey-Ford,[115] there is simply never enough "corroboration" of women's credible accounts.[116] This also includes lesser-known allegations (though they should not be) by women like Colonel Kathryn A. Spletstoser, a twenty-eight-year Army officer with four combat tours in Iraq and Afghanistan, who accused General John E. Hyten, President Donald Trump's nominee for vice chairman of the Joint Chiefs of Staff, of multiple instances of unwanted touching.[117] Even though there was "no evidence that she lied," an Air Force investigation found no evidence to corroborate Colonel Spletstoser's accusations.[118]

Just because feminist defense lawyers defend the accused does not mean we have nothing to say about this awful reality. There is nothing to stop us from being outspoken about the deeply sexist and racist history of rape investigation and prosecution in this country.[119] There is nothing to stop us from demanding that serious sexual assault cases be pursued and arrests made. Feminist criminal defense lawyers can also cheer on the progressive social change accompanying #MeToo: a broader awareness of the impact of sexual assault and harassment and the need for accountability. Maybe not while we are defending someone charged with a sex crime, but certainly in our off-hours.

But we must also call out the excesses of #MeToo—of feminism run amok. We should never simply "take a woman's word" when she accuses a fellow citizen of a serious crime. There needs to be due process. Not every instance of alleged sexual misconduct is the same. Some misconduct is worse than other misconduct, more damaging and dangerous. To suggest otherwise insults those who have

115. *See* Danielle Tcholakian, *That Was Then, This Is Too*, VICE (Oct. 4, 2018), https://www.vice.com/en_us/article/pa9m39/from-anita-hill-to-christine-blasey-ford-that-was-then-this-is-too (trenchantly analyzing how far we have *not* come since Anita Hill was discredited in 1991); *see also* Mikayla Bouchard & Marisa Schwartz Taylor, *Flashback: The Anita Hill Hearings Compared to Today*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/anita-hill-kavanaugh-hearings.html (comparing the handling of Anita Hill's allegations against Supreme Court candidate Clarence Thomas in 1991 with Christine Blasey-Ford's allegations against Supreme Court candidate Brett Kavanaugh in 2018); Margaret Talbot, *On the Attack*, NEW YORKER (Oct. 1, 2018), https://www.newyorker.com/podcast/comment/on-the-attack (noting that "in certain ways, Ford's experience was just as bad as Hill's, and maybe worse.").

116. *See* Talbot, *supra* note 115; Tcholakian, *supra* note 115.

117. Helene Cooper, *Two Prominent Women Defend General Against Sexual Assault Claim*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/us/politics/john-hyten-kathryn-spletstoser.html (reporting that Colonel Spletstoser was not allowed to testify in a public hearing, but two women supporting the General were); Helene Cooper, *'I Have a Moral Responsibility to Come Forward': Colonel Accuses Top Military Nominee of Assault*, N.Y. TIMES (July 26, 2019), https://www.nytimes.com/2019/07/26/us/politics/hyten-assault-joint-chiefs.html (reporting that, in addition to other incidents of unwanted touching, Colonel Spletstoser recounted that General Hyten once entered her hotel room to talk and reached for her hand; she became alarmed and stood up, he then stood up too and "pulled her to him and kissed her on the lips while pressing himself against her, then ejaculated, getting semen on his sweatpants and on her yoga pants").

118. Cooper, *Two Prominent Women Defend General Against Sexual Assault Claim*, *supra* note 117.

119. *See generally* Hagerty, *supra* note 107. For a thoughtful examination of the under-investigation and prosecution of murder cases involving young African American male victims, see JILL LOEVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015).

experienced serious sexual violence and makes a mockery of the struggle to end it.[120] Not everyone needs to be locked away forever. And not every sex offender is the same. Each one has a story and many have the capacity to learn, change, and make amends.

It goes without saying that having concerns about due process, proportionality, and the individual nature of sex offending does not mean that those concerned are apologists for men who commit sex crimes or other crimes against women. Feminist defenders can and should raise broad institutional objections and defend individual clients—occasionally "apologizing" for them—without abandoning their other core commitments.

III. FEMINIST CRIMINAL DEFENSE ILLUSTRATED: BROCK TURNER AND CALVIN WILLIAMS

A. *Brock Turner*

The Brock Turner "rape" case[121] captivated much of the national press when the case was reported in early 2015.[122] I have spoken about the case several times in a

120. *See* Kimberly Yam, *Aziz Ansari Addresses Sexual Misconduct Scandal in New Netflix Special*, HUFFPOST, (July 9, 2019), https://www.huffpost.com/entry/aziz-ansari-sexual-misconduct-netflix_n_5d24ef4ae4b0583e48287b94 (recounting allegations of sexual misconduct against comic Aziz Ansari by a woman who said she felt pressured to engage in sex with Ansari despite "verbal and non-verbal cues to indicate how uncomfortable and distressed she was," and who later texted Ansari to say that "it may have seemed okay. But I didn't feel good at all," which Ansari addresses in a 2019 Netflix special); Jason Zinoman, *Aziz Ansari Addresses Sexual Misconduct Accusation in 'Right Now'*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/arts/television/aziz-ansari-netflix.html (same). Ansari maintained that he believed the entire sexual encounter was consensual and "felt terrible that this person felt this way." *Id.*

121. The Turner case is generally known as the "Stanford swimmer rape case," even though this is a misnomer. There was no rape as a matter of conventional criminal law—or under California law at the time—because there was no sexual intercourse. Turner's pants were never removed and the evidence was that he had touched Miller's genitals with his fingers after removing her underwear. *See* Daniel Victor, *Brock Turner Wanted Only 'Outercourse,' Lawyer Argues in Appeal*, N.Y. TIMES (July 26, 2018), https://www.nytimes.com/2018/07/26/us/brock-turner-victim-outercourse-appeal.html.

122. For an excellent account of the Turner case, Stanford law professor Michelle Dauber's crucial role in it, and the recall and removal of the sentencing judge Aaron Persky, see Julia Ioffe, *When the Punishment Feels like a Crime: Brock Turner's Twisted Legacy—and a Stanford Professor's Relentless Pursuit of Justice*, HUFFPOST: HIGHLINE (June 1, 2018), https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber/. Regarding Dauber's role in the case, the article explains:

> For instance, Barbara Babcock, who in 1972 became the first woman appointed to teach at Stanford Law School, questioned whether Emily Doe really had a problem with Turner's sentence. She pointed out that Emily Doe had told the female probation officer she didn't want Turner to "rot in jail." Emily had explained in court that these words had been "slimmed down to distortion and taken out of context," but Babcock perceived a more malign influence: "Michele got ahold of her."
>
> Emily Doe's statement, too, was the subject of fevered speculation among the anti-recall crowd. "I can't prove it, but I think Dauber wrote the victim letter," [LaDoris] Cordell told [Ioffe]. Babcock echoed her suspicion. "It's so sophisticated for someone who was so young," she said. Persky's lawyer, a fellow Stanford alum named Jim McManis, was also sure that Emily hadn't written the statement. "A person whose identity I am not at liberty to disclose says that it was written by a professional battered women's advocate," McManis explained. "I can't verify it, but the person who told me this, I value her judgment."

colleague's criminal law course during a class on proportionality and have had numerous conversations about it with young women in their twenties and early thirties. On every occasion, the perspective I offered about both the crime and the punishment inevitably incited objection, outcry, and even anguish. The case seems to be a powerful touchstone for a certain cohort of women. This is why I have chosen to talk about this case here.

Stanford University freshman and varsity swimming team member Brock Turner, then nineteen, and a recent college graduate now known as Chanel Miller,[123] then twenty-two, attended a fraternity party on the Stanford campus on January 17, 2015.[124] Miller went to the party with her younger sister.[125] Turner was there with friends from the swimming team.[126] The party featured heavy alcohol use, and both Turner and Miller were intoxicated when they encountered one another.[127] Accounts diverge at this point. Because of how intoxicated Miller was—her blood alcohol level was three times the legal limit—she had no recollection of what happened between her and Turner.[128] Turner maintained that he and Miller had kissed at the party and were on their way to his room when they both slipped and tumbled to the ground on a dirt path, which happened to be behind a dumpster—an oft-repeated fact.[129] While on the ground, the two resumed kissing and fondling, and after asking and obtaining permission, Turner touched, or "fingered," Miller's genitals.[130] According to Turner, he believed Miller was enjoying what he

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Id. Dauber denies this, however, and the reporter says the letter sounds like Emily Doe. Persky declined Ioffe's request for an interview, "but in an emotional conversation with The Associated Press, he said he had no regrets about how he had handled the Turner case, and accused the recall campaign of reducing a complex criminal case to a hashtag." *Id*.

123. *See generally* CHANEL MILLER, KNOW MY NAME: A MEMOIR (2019) (describing Ms. Miller's experience as the victim of the crime). Ms. Miller revealed her identity when she decided to write a book about the case.

124. Tracey Kaplan & Jacqueline Lee, *Jury Finds Former Stanford Athlete Guilty of Sex Assault on Unconscious Woman*, E. BAY TIMES (Aug. 15, 2016), https://www.eastbaytimes.com/2016/03/30/jury-finds-former-stanford-athlete-guilty-of-sex-assault-on-unconscious-woman/.

125. Elena Kadvany, *Trial Begins in Stanford Sex-Assault Case*, PALO ALTO ONLINE, (Mar. 17, 2016), https://www.paloaltoonline.com/news/2016/03/17/trial-begins-in-stanford-sex-assault-case.

126. Elena Kadvany, *Character Witnesses Defend Brock Turner*, PALO ALTO ONLINE (Mar. 28, 2016), https://www.paloaltoonline.com/news/2016/03/25/character-witnesses-defend-brock-turner.

127. Kadvany, *Trial Begins in Stanford Sex-Assault Case*, *supra* note 125.

128. *Id*.

129. *See* Ioffe, *supra* note 121. The dumpster—which seemed a random detail of the incident's location, rather than the intended destination for nefarious conduct—added a sinister element to the allegations.

130. *See* Emily Bazelon, *Why the Stanford Rape Trial Actually Represents Progress*, N.Y. TIMES MAG. (June 9, 2016), https://www.nytimes.com/2016/06/09/magazine/why-the-stanford-rape-conviction-actually-represents-progress.html; Brock Turner Probation Report at 6, People v. Turner, No. B1577162 (Cal. Super. Ct. June 2, 2016), https://www.nytimes.com/interactive/2016/06/12/us/document-SentencingPacket.html; Ioffe, *supra* note 121; Kaplan & Lee, *supra* note 124 (reporting that Turner testified that he kissed and fondled Miller and asked her if she wanted him to touch her genitals, to which she replied "yes").

was doing.[131] There was no evidence of sexual intercourse, just "digital penetration,"[132] to the extent there was penetration at all.[133]

In the early morning hours of January 18th, two male Stanford graduate students from Sweden, who were riding bicycles, came upon the pair.[134] They observed a man on top of an inert woman outside the Kappa Alpha fraternity house, thrusting against her.[135] When they got off their bicycles, they saw that the woman's skirt was up and she was wearing no underwear.[136] Turner was fully clothed.[137] Turner tried to run away, but they stopped him and called the police.[138] The woman was "completely unresponsive," was taken to a hospital, and woke up about three hours later.[139] She had pine needles in her hair and around her genital area.[140]

Turner was booked on two charges—attempted rape and digital penetration with a foreign object—and was released on $150,000 bail.[141] Nine days later, the Santa Clara County District Attorney's Office filed five felony charges against Turner: rape of an intoxicated person, rape of an unconscious person, sexual penetration by a foreign object of an intoxicated woman, sexual penetration by a foreign object of an unconscious woman, and assault with intent to commit rape.[142] On February 2, 2016, Turner was arraigned and pled not guilty to all charges.[143] The next month, two of the charges were dropped: rape of an unconscious person and rape of an intoxicated person.[144] The case proceeded to trial on three felonies.[145]

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131. Bazelon, *supra* note 130; Brock Turner Probation Report, *supra* note 130, at 11; Ioffe, *supra* note 121; Kaplan & Lee, *supra* note 124.

132. Digital penetration means "fingering," or penetration by a finger.

133. *Swedish Grad Students Who Pinned Down Stanford Sex Offender Speak Out*, L.A. TIMES (June 8, 2016) [hereinafter *Swedish Grad Students*], https://www.latimes.com/local/lanow/la-me-ln-stanford-rape-witnesses-20160607-snap-htmlstory.html.

134. *Id.*

135. Kaplan & Lee, *supra* note 124.

136. Kadvany, *Trial Begins in Stanford Sex-Assault Case*, *supra* note 125.

137. *Id.*

138. *Swedish Grad Students*, *supra* note 133.

139. Ray Sanchez, *Stanford Rape Case: Inside the Court Documents*, CNN (June 11, 2016) [hereinafter Sanchez, *Stanford Rape Case*], https://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/index.html; *accord* Ioffe, *supra* note 121.

140. *See* Sanchez, *Stanford Rape Case*, *supra* note 139.

141. *See* Incident Report and Felony Complaint, People v. Turner, No. B1577162 (Cal. Super. Ct. Feb. 2, 2015), http://www.documentcloud.org/documents/1532973-complaint-brock-turner.html; Elena Kadvany, *Stanford University Student Arrested for Attempted Rape*, PALO ALTO ONLINE (Jan. 27, 2015), https://www.paloaltoonline.com/news/2015/01/27/stanford-university-student-arrested-for-attempted-rape.

142. Elena Kadvany, *Stanford University Swimmer Faces Felony Sex-Assault Charges*, PALO ALTO ONLINE (Jan. 28, 2015), https://www.paloaltoonline.com/news/2015/01/28/stanford-university-swimmer-faces-felony-sex-assault-charges (reporting the new charges and explaining that the Stanford Department of Public Safety conducted an investigation and sent its findings to the district attorney for review, Stanford University launched a separate Title IX investigation into the incident, and Turner voluntarily withdrew from Stanford).

143. Elena Kadvany, *Former Stanford Swimmer Pleads Not Guilty to Sexual-Assault Charges*, PALO ALTO ONLINE (Feb. 2, 2015), https://www.paloaltoonline.com/news/2015/02/02/former-stanford-swimmer-pleads-not-guilty-to-sexual-assault-charges.

144. Kadvany, *Trial Begins in Stanford Sex-Assault Case*, *supra* note 125.

145. *Id.*

The trial was hard fought. Miller, her sister, two eyewitnesses, medical experts, the defendant, and several character witnesses testified over a period of eight days.[146] The jury deliberated for more than a day before finding Turner guilty of all three charges on March 30, 2016.[147] When the verdict was read, Turner looked down in dismay and his mother "wailed."[148]

Prior to sentencing, the probation department conducted a presentence investigation, during which a probation officer investigator spoke to Miller about the impact of the crime on her and what she wanted to happen to Turner.[149] Miller told the probation officer that both the crime and the trial were hurtful to her, but she did not want Turner's life to be "over" as a result of his conviction.[150] She also said she didn't think he needed a lengthy prison sentence.[151] According to the report, Miller also told the investigator that she wanted Turner "to be ordered to participate in counseling to ensure something like this never happens again."[152]

The report included Turner's sex offender risk assessment score on a standard risk assessment instrument, the Static-99R, which placed him in the low-moderate risk category for reoffending.[153] Deputy Probation Officer Monica Lassettre, who wrote the report, acknowledged the vulnerability of the complainant due to intoxication.[154] But, in recommending a short jail sentence and probation, she also cited Turner's "lack of a criminal history, his youthful age, and his expressed remorse and empathy toward the victim," and that "this 20-year-old offender is now a lifetime sex registrant, his future prospects will likely be highly impacted as a result of his convictions, and he surrendered a hard-earned swimming scholarship."[155]

On June 2, Judge Persky sentenced Turner to six months in jail and three years of probation, registration as a sex offender for life, completion of a sex-offender

146. *See* Jacqueline Lee, *Woman Testifies Against Brock Turner for Sex Assault*, MERCURY NEWS (June 3, 2017), https://www.mercurynews.com/2016/03/18/woman-testifies-against-former-stanford-all-star-swimmer-accused-of-sexually-assaulting-her/; Elena Kadvany, *Prosecution, Defense Strategies Emerge in Stanford Sexual-Assault Case*, PALO ALTO ONLINE (Mar. 21, 2016), https://www.paloaltoonline.com/news/2016/03/21/prosecution-defense-strategies-emerge-in-stanford-sexual-assault-case.

147. Kaplan & Lee, *supra* note 124.

148. *Id.*

149. Brock Turner Probation Report, *supra* note 130, at 5–6. Miller later disputed some of what was attributed to her in the report as "slimmed down to distortion" and "taken out of context." Jacqueline Lee, *Brock Turner Case: Probation Department Report Spared Scrutiny*, MERCURY NEWS (June 3, 2017) [hereinafter Lee, *Probation Report Spared Scrutiny*], https://www.mercurynews.com/2016/06/15/brock-turner-case-probation-departments-report-spared-scrutiny/.

150. Lee, *Probation Report Spared Scrutiny*, *supra* note 149.

151. *Id.*

152. Brock Turner Probation Report, *supra* note 130, at 6.

153. *Id.* at 8–9. "Static-99R is a ten item actuarial assessment instrument created by R. Karl Hanson, Ph.D. and David Thornton, Ph.D. for use with adult male sexual offenders who are at least eighteen years of age at time of release to the community." STATIC-99, http://www.static99.org/ (last visited Feb. 26, 2020). Turner scored a "3." Brock Turner Probation Report, *supra* note 130, at 9.

154. Lee, *Probation Report Spared Scrutiny*, *supra* note 149.

155. *Id.*

management program, and prohibited him from consuming alcohol during probation.[156]

Although Judge Aaron Persky's sentence was consistent with the probation officer's recommendation, it prompted widespread outcry as overly lenient, sparking an ultimately successful recall campaign.[157] A poorly worded sentencing letter by the defendant's father did not help. He wrote that his son's "life w[ould] never be the one that he dreamed about and worked so hard to achieve. . . . That is a steep price to pay for 20 minutes of action out of his 20 plus years of life."[158] A lengthy but powerful victim impact statement by Miller went viral in response,[159] with CNN's Ashleigh Banfield spending half of her show doing a live reading of the statement.[160] On June 6, 2018, California voters removed Judge Persky as a result of a recall movement led by Stanford law professor Michele Dauber.[161]

Much could be said about the disturbing recall campaign against Judge Persky. Many commentators, even those critical of Persky's sentence, voiced concerns about the dangers of the recall.[162] Professor Paul Butler put it well: "The message sent by a recall would be that before an elected judge hands down a sentence, she should think about how popular her decision will be with the public."[163]

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156. Elena Kadvany, *Brock Turner Sentenced to Six Months in County Jail, Three-Year Probation*, PALO ALTO ONLINE (June 2, 2016), https://www.paloaltoonline.com/news/2016/06/02/brock-turner-sentenced-to-six-months-in-county-jail-three-year-probation.

157. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html.

158. Michael E. Miller, *'A Steep Price to Pay for 20 Minutes of Action' : Dad Defends Stanford Sex Offender*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/

159. *Id.*

160. Chris White, *CNN's Ashleigh Banfield Gets Emotional Reading Sex Assault Victim's Letter On-Air*, L. & CRIME (June 6, 2016), https://lawandcrime.com/high-profile/cnns-ashleigh-banfield-spends-half-of-show-reading-powerful-rape-victim-letter/.

161. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html.

162. *See, e.g.*, Paul Butler, Opinion, *Judicial Recall Will Inevitably Lead to Harsher Sentences*, N.Y. TIMES: ROOM FOR DEBATE (July 11, 2016), https://www.nytimes.com/roomfordebate/2016/06/08/should-an-unpopular-sentence-in-the-stanford-rape-case-cost-a-judge-his-job/judicial-recall-will-inevitably-lead-to-harsher-sentences (arguing that, though he believed Persky's sentence was too light, and the victim impact statement "brilliant" and moving, judicial recall based on one mistake is misguided); Editorial, *The Case Against the Recall of Judge Persky*, S.F. CHRON. (Feb. 11, 2018), https://www.sfchronicle.com/opinion/editorials/article/Editorial-The-case-against-the-recall-of-Judge-12587849.php (calling the recall effort "ill-advised and dangerous" and noting that "[n]either justice for defendants nor the concept of judicial independence is served if judges are guided by their anticipation of public reaction instead of the letter of the law"); Mark Joseph Stern, *This is How Mass Incarceration Happens*, SLATE (Jan. 16, 2018), https://slate.com/news-and-politics/2018/01/the-dangerous-misguided-campaign-to-recall-the-judge-who-sentenced-brock-turner.html (arguing that the campaign to recall Persky is "well-intentioned," but "incredibly dangerous" and will eventually harm poor minority defendants); *see also* Bob Egelko, *Persky Warns Against the Dangers of Recalling Judges as He Fights to Keep His Job*, S.F. CHRON. (May 8, 2018), https://www.sfchronicle.com/bayarea/article/Persky-warns-against-the-dangers-of-recalling-12898536.php (Judge Persky arguing that voters should remove judges who are crooked or inept, but not because they disagree with their rulings).

163. Butler, *supra* note 162.

Consideration of the popularity of a sentence would inevitably lead to harsher punishment because, politically, it is safer for a judge to throw the book at a convicted criminal rather than give him a break—even when giving him a break is the right thing to do. The people who would suffer most from this punitiveness would not be white boys at frat parties. Almost seventy percent of the people in prison in California are Latino and African-American.[164] Those groups bear the brunt of zealous punishment.[165] Do we really want to live in a world in which perceived "leniency" by a judge leads to removal from the bench?[166]

Judge Persky's sentence is sound from the perspective of a feminist defender who believes that criminal punishment should be proportionate to the crime. A sentence should not inflict more harm on an offender (and his family and community) than is absolutely necessary. The sentencing should reflect individual circumstances with an eye towards an offender's rehabilitation and return to society. I believe the victim impact statement in this case is the kind of honest confrontation that could lead to a productive reckoning between the victim and her assailant, along the lines of restorative justice.

1. Proportionality

In discussing proportionality here, I do not mean to minimize the offense or suggest it is not criminal. But this was a case of digital penetration, not "rape" as it is commonly understood. Under some circumstances, digital penetration or penetration with an object can be as violent, intrusive, and traumatic as penetration by a penis.[167] And forcible oral sex can be as violent, intrusive, and

164. *See id.*

165. *Id.*

166. *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (discussing the politics of elected judges and the impact on judicial decision-making in capital cases); Dan Levine & Kristina Cooke, *Special Report: Elected Judges More Likely to Affirm Death Sentences, Analysis Finds*, REUTERS (Sept. 22, 2015), https://www.reuters.com/article/usa-deathpenalty-judges-idUSL1N11S0ZN20150922 (documenting that elected judges are significantly more likely to affirm death sentences than appointed judges).

167. *See, e.g.*, ALICE SEBOLD, LUCKY (1999) (a searing memoir about being raped while a freshman at Syracuse University). Sebold writes:

> He reached out and grabbed them—my breasts—in his two hands. He plied them and squeezed them, manipulating them right down to my ribs. Twisting. I hope that to say this hurt isn't necessary here.
>
> "Please don't do this, please," I said.
>
> . . .
>
> "Lie down."
>
> I did. Shaking, I crawled over and lay face up against the cold ground. He pulled my underpants off me roughly and bundled them into his hand. He threw them away from me and into a corner where I lost sight of them.
>
> I watched him as he unzipped his pants and let them fall around his ankles.

traumatic as forcible vaginal penetration.[168]

However, crimes involving penetration by a penis ought to be punished more severely than crimes involving digital penetration because (1) generally speaking, penetration by penis is a more serious and invasive act; (2) penetration by penis is more likely to cause sexually transmitted disease; (3) vaginal penetration by penis can cause pregnancy; and (4) digital penetration of a woman's genitals covers a range of conduct, some of which is "penetrative" only in the broadest sense.

This last point requires clarification. Women's genitals are physically complicated. California law defines sexual penetration as "the act of causing penetration, *however slight*, of the genital or anal opening of any person" when done for the purpose of sexual abuse, arousal, or gratification.[169] This means that there need not be vaginal penetration—merely touching of the labia—in order for there to be penetration.[170]

In the Turner case, there was no evidence of vaginal penetration. The physical evidence, medical evidence, and defendant's statements were that Turner stroked (or "fingered") the complainant's genitals. Because the case became known as the "Stanford Swimmer Rape Case," many people have no idea that the case involved the use of fingers, not a penis, and likely only the penetration of the outer genitalia.

> He lay down on top of me and started humping. . . .
>
> He worked away on me, reaching down to work with his penis.
>
> I stared right into his eyes. I was too afraid not to. If I shut my eyes, I believed, I would disappear. To make it through, I had to be present the whole time.
>
> He called me bitch. He told me I was dry.
>
> "I'm sorry," I said—I never stopped apologizing. . . .
>
> "Stop looking at me," he said. "Shut your eyes. Stop shaking."
>
> "I can't."
>
> "Stop it or you'll be sorry."
>
> I did. My focus became acute. I stared harder than ever at him. He began to knead his fist against the opening of my vagina. Inserted his fingers into it, three or four at a time. Something tore. I began to bleed there. I was wet now.
>
> It made him excited. He was intrigued. As he worked his whole fist up into my vagina and pumped it, I went into my brain.

Id. at 16–17.

168. *See generally* SUSAN J. BRISON, AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF (2002) (recounting Brison's experience being repeatedly choked and struck in the head in the course of being orally raped); *see also* Lisa Taddeo, *The Specific Horror of Unwanted Oral Sex*, N.Y. TIMES, Feb. 13, 2020, https://www.nytimes.com/2020/02/13/opinion/harvey-weinstein-trial.html (recounting a disturbing incident of unwanted oral sex and comparing it to some of the allegations against Harvey Weinstein).

169. CAL. PENAL CODE § 289(k)(1) (West 2019) (emphasis added).

170. People v. Quintana, 108 Cal. Rptr. 2d 235, 242 (Cal. Ct. App. 2001) (finding that penetration of the labia majora was sufficient to prove penetration).

2. The Sentence Should Not Inflict More Harm Than is Necessary

Turner's counsel asked for a four-month county jail sentence followed by a lengthy period of probation.[171] Prosecutors asked for a six-year prison sentence.[172] It is important to note that Judge Persky's sentence of six months in jail also included lifetime registration as a sex offender.[173]

Critics of Persky's sentence might ask themselves whether it would really make a difference—to Turner, the victim, or the community—if a teen with no prior criminal record who had never before been incarcerated was caged in a state prison rather than the county jail. They should also have to explain why, if several months in jail is enough to teach this particular young man a lesson, a fifty-month sentence is necessary.

In our no-sentence-is-too-long approach to criminal justice, we forget that any period of incarceration is traumatic for the person locked up—especially someone who has never been incarcerated before. A little goes a long way. We forget, too, that it is not just the individual who "does time" in jail or prison—his family, friends, and community often feel the weight of a loved one's incarceration.[174]

The only problem I have with the length of Turner's sentence is that my poor black and brown clients rarely receive such a reasonable sentence.[175]

Whatever one thinks of the number of months Turner served, lifetime sex offender registration is a stringent and stigmatizing sanction.[176] Even though there was no proof that Turner posed a serious threat of reoffending, he had to register as a sex offender and abide by strict rules, including residency and work restrictions and notifying the authorities whenever he moves, for the rest of his life.[177] Any hope that Turner might serve his sentence, and thereby discharge his debt to society and return to normal life, is futile. This lifetime requirement will keep his name and face in the public view forever through an easily accessible internet database that often includes offenders' addresses and photographs.[178] This sanction,

171. Kadvany, *Brock Turner Sentenced to Six Months in County Jail, Three-Year Probation*, *supra* note 156.

172. *Id*. (reporting that the prosecutor called Turner a "predator," noted the "global ramifications" of the case, and asked for a state prison sentence).

173. *Id*.

174. *See* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 77–78 (2013).

175. *Cf*. Kate Taylor, *By Turns Tearful and Stoic, Felicity Huffman Gets 14-Day Prison Sentence*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/09/13/us/felicity-huffman-sentencing.html (reporting about the first sentencing in the nation's largest college admissions scandal and quoting David Singleton, executive director of the Ohio Justice and Policy Center, who noted that "there's a different justice system" if you are rich and white, but "[s]ending Felicity Huffman to jail is not going to solve that problem").

176. Although sex offender registration is not considered "punishment," Judge Persky noted at sentencing that it was "part of the price Turner will pay." Tracey Kaplan, *Brock Turner: A Sex Offender for Life, He Faces Stringent Rules*, E. BAY TIMES (Sept. 5, 2016), https://www.eastbaytimes.com/2016/09/02/brock-turner-a-sex-offender-for-life-he-faces-stringent-rules/. California and South Carolina are the only states that require all sex offenders to register for life. *Id*.

177. *See* CAL. PENAL CODE § 290(b) (West 2019).

178. Kaplan, *supra* note 176.

rendering an errant teen a pariah for life, will do more damage than good and do little to enhance "public safety."

3. Individual Circumstances

Immaturity, alcohol, and sex are a toxic mix. I do not mean to suggest that alcohol excuses Turner's conduct here. But it was a factor in this case, as was Turner's age. Both of these were acknowledged in the judge's sentencing remarks and in the probation report upon which his comments were based.[179]

At sentencing, Persky said that determining a proper sentence here was "difficult."[180] He acknowledged the "physical and devastating emotional injury" to the victim.[181] But the judge focused on traditional sentencing factors, such as Turner's lack of any prior record, his youth, that he was unarmed during the crime, that he said he would accept the court's sentence and comply with the terms of probation, and he would not be a danger to others if not imprisoned.[182] He said the role alcohol played in the assault was "not an excuse" but was "a factor that, when trying to assess moral culpability in this situation, is mitigating."[183] He added that a prison sentence would have "a severe impact" and "adverse collateral consequences" on Turner.[184]

Turner's genuine remorse was also a factor at sentencing.[185] Turner told the probation officer who drafted the presentence report:

> Having imposed suffering on someone else and causing someone else pain—I mean, I can barely live with myself. I can't even get out of bed in the morning. I think about it every second of every day. Her [the victim] having to go through the justice system because of my actions just . . . it's unforgiveable. . . .
>
> . . . I wish I could just take it back. I didn't even deserve to talk with her, to interact with her. I can't believe I imposed such suffering on her and I'm so sorry.[186]

This was a young man capable of learning from his alcohol-fueled mistakes, and of changing. There were good reasons for a several-month jail sentence followed by probation.

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179. *See* Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, ATLANTIC (June 17, 2016), https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/; Brock Turner Probation Report, *supra* note 130, at 12.

180. Koren, *supra* note 179.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Brock Turner Probation Report, *supra* note 130, at 7 (first alteration and first ellipsis in original).

4. An Opportunity for Restorative Justice

Although the victim later indicated that the presentence/probation report did not accurately reflect her experience,[187] her words show that she might have been a good candidate for a restorative justice approach. Here is how she talked about the case to the probation officer who wrote the report:

> I still feel a lot of anger because of what he put me through at trial. I want him to be sorry and express remorse. He attacked my personal life in whatever way possible and in the end, it didn't work. I don't experience joy from this. I don't feel like I won anything. It was just the anger of hearing what he said in Court. It was devastating. I want him to know it hurt me, but I don't want his life to be over. I want him to be punished, but as a human, I just want him to get better. I don't want him to feel like his life is over and I don't want him to rot away in jail; he doesn't need to be behind bars.[188]

According to the probation report, the victim wanted Turner to receive counseling and no longer reside in the Bay Area.[189]

Imagine if, instead of an adversarial trial, during which the victim felt undermined and unheard, there had been an alternative proceeding that put her at the center. She could have had her say, confronting Turner verbally, telling him everything that is in her victim impact statement. What if she had had a hand in crafting what Turner would have to do in order for him to one day be welcomed back to the community?

Why is it so hard to contemplate such a proceeding in a case involving a young person who made a bad mistake—even if the mistake was a sexual assault? The stakes were high for Turner at trial, the consequences permanent. He will wear scarlet letter R (for rapist) evermore. It is no wonder Turner's trial lawyer litigated the case hard. I would have done so, too.

I do not know whether the victim in the Turner case will also be permanently scarred. I hope not. I hope Ms. Miller finds what she needs to get past this episode and have a full and happy life.[190] I also do not think it is a helpful feminist narrative to say that a woman's life is forever ruined by a sexual assault. This gives way too much power to perpetrators of sexual assault and buys into old sexist tropes (as in the archaic use of "ruined").

What would a feminist defender do in the Brock Turner case if there were no viable alternatives to trial and her client did not want to be convicted of a lifetime registration felony sex offense? *Everything she could lawfully do to achieve an*

187. *See* Elena Kadvany, *Stanford Sex-Assault Victim: 'You Took Away My Worth,'* PALO ALTO ONLINE (June 3, 2016), https://www.paloaltoonline.com/news/2016/06/03/stanford-sex-assault-victim-you-took-away-my-worth (reporting the released impact statement in full); *see also* MILLER, *supra* note 123.

188. Brock Turner Probation Report, *supra* note 130, at 5.

189. *Id*. at 6.

190. She seems to have a strong support network. *See generally* MILLER, *supra* note 123.

acquittal. Even if the defender felt bad about it, she would have to figure out a way to deal with it.

The one thing a feminist defender could not do is apologize to the complainant. To do so would be narcissistic. Complainants get to hate defense counsel; it's the least we can do for them.

But I confess that lately, after the trial and sentencing are over, I have approached and praised a few sexual assault and domestic violence survivors on their powerful victim impact statements. Maybe I'm losing my criminal defense bearings, but the women I approached seemed to appreciate the kind words.

B. *Calvin Williams*

As I was writing this Essay, I attended and testified at a re-sentencing hearing for a long-serving prisoner I will call Calvin Williams. The clinic I direct, Georgetown's Criminal Defense & Prisoner Advocacy Clinic, conducts a weekly legal research and writing class for lifers at a Maryland prison and Mr. Williams is one of the facilitators for the class on the "inside."[191] I have come to know Mr. Williams well and could not think more highly of him. He is an extraordinary person: a self-taught intellectual, a man of faith, a modest but inspiring leader, a loyal and generous friend, and a gentle soul. He has found meaning in mentoring others and doing what he can to provide hope in a bleak place.

When he was in his early twenties, Williams was involved in the illegal drug trade. So were most of the people he knew in his ravaged urban neighborhood. There were turf wars. In the course of one such war, he went to the home of a woman he knew who was connected to a rival drug dealer, said he "wanted pussy," and forced her to have sexual intercourse at gunpoint. He went to trial and was convicted of armed rape and sentenced to life.

Williams has now served more than thirty years. He is deeply remorseful about his crime. His re-sentencing was the result of a compromise with the State of Maryland in lieu of pursuing a post-conviction appeal. Several witnesses testified at the hearing, including a forensic psychologist who found that Williams presents no danger to the community, two men who served time with Williams and now help former prisoners reenter society, family members, Williams, and me. Although the victim was contacted, she declined to appear or submit a victim impact statement. She had given a statement to a defense investigator that she believed Williams had served enough time and had no objection to his release.

The courtroom was packed with Williams' family and friends. It was moving to see so many people who loved him. His mother was dignified and self-possessed. I was struck by this because I am a mother too. The thought of my son being incarcerated is unbearable.

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191. *Criminal Defense and Prisoner Advocacy Clinic Info Sheet*, GEO. U. L. CTR. (2019), https://www.law.georgetown.edu/wp-content/uploads/2019/02/CDPAC-Info-Sheet-2019.pdf.

Defense counsel included a young lawyer who had met Williams when he was a Georgetown law student, and members of his law firm, including a senior partner. The prosecutor was out of central casting: a steely woman of a certain age who brooked no dissent. She had been a sex crimes prosecutor for much of her career. Her cross-examination of every single witness focused on the crime. "Mr. Williams held a gun to the victim's head, did he not?" "This must have been terrifying?" "He then raped her at gunpoint?" "She has probably relived the rape over and over—there's no end of *her* punishment, is there?"

I resisted this last suggestion. "I don't know the victim, so I can't say," I said. "I surely hope she has gotten past what happened to her those many years ago. I find people are often more resilient than we may think." This didn't sit well with the prosecutor. "Have you ever represented a rape victim," she inquired. "Yes," I said, "many times." She looked incredulous. I explained that a substantial number of women who end up in the criminal legal system have been physically and sexually abused, and that I have also handled a number of "battered women's self-defense cases," in which rape was a feature of the domestic violence my clients had suffered. "I don't agree that every woman who has been raped is *ruined* for life," I said. "Different women react differently; it depends on the woman and the circumstances."

Unfortunately, the judge agreed with the prosecutor. "But rape is the very worst thing that can happen to a woman—a traumatic, life-altering event—don't you agree, Ms. Smith?" It was an opportunity to offer my point of view. I told the judge that I considered myself a lifelong feminist, I took sexual assault seriously, but no, I did not agree with that statement and didn't think it was helpful to women. "Your Honor," I said, "I accept that this was a serious crime that needed to be punished. But Mr. Williams has paid for his crime with more than three decades of his life."

Part of me wished the victim were there to say she is okay now. But maybe she would not have said that.

One of the men who had served time with Williams and now worked with returning citizens, had the best reply to the prosecutor. "The crime doesn't change," he told her. "But the person does."

Williams was humble and thoughtful and moving on the stand. He said everything there was to say. No one could doubt his sincerity.

The judge reduced Williams' sentence from life in prison to sixty years. Williams was relieved; he now has a meaningful chance at parole. I was deeply disappointed. Only in America is a "reduction" to sixty years in prison good news.

I couldn't help thinking something was terribly wrong with the prosecutor's approach to the hearing and, especially, her inability to recognize Williams' transformation while in prison. She was the opposition, period. No doubt she considered herself an important "voice" for the victim (who may not have felt the same way the prosecutor did) and for all women who have been sexually abused. But this is exactly what is wrong with this kind of prosecutorial feminism: there is only blame, no belief in redemption, and never, ever, any forgiveness.

CONCLUSION

A feminist perspective at its most inclusive and incisive has much to offer in an era of mass incarceration. A criminal defense perspective, with its commitment to due process, proportionality, and individualized justice, also has much to offer in the #MeToo era. Contrary to the "feminist cocktail party question," together, feminism and criminal defense make perfect sense.

Of course you can be a feminist and a criminal defense lawyer. The real question is: knowing what we know about our deeply flawed and endlessly punitive criminal legal system, can you, and should you, be a feminist and a *prosecutor*?