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## Criminal Justice and the Mattering of Lives

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# CRIMINAL JUSTICE AND THE MATTERING OF LIVES

Deborah Tuerkheimer\*

LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA. By *James Forman Jr.* New York: Farrar, Straus, and Giroux. 2017. P. 239. \$27.

## INTRODUCTION

These are confusing times for criminal justice reformers. Although opposition to mass incarceration runs deep and wide,<sup>1</sup> the conventional wisdom advances solutions that are woefully inadequate.<sup>2</sup> The state-by-state picture presents in similarly ambiguous fashion, with several jurisdictions moving to adopt less draconian punishment regimes,<sup>3</sup> while elsewhere, harsher sentences gain ground.<sup>4</sup> And just as local prosecutors who embrace progressive platforms of change are winning election in increasing numbers,<sup>5</sup>

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\* Class of 1940 Research Professor, Northwestern University Pritzker School of Law. I am grateful to Paul Butler, James Forman Jr., Justin Murray, Janice Nadler, and Max Schanzenbach for insightful comments on earlier drafts. Tom Gaylord, Faculty Services and Scholarly Communications Librarian, contributed outstanding research assistance, and the Northwestern University Pritzker School of Law Faculty Research Program furnished generous financial support.

1. See Matt Ford, *Can Bipartisanship End Mass Incarceration?*, ATLANTIC (Feb. 25, 2015), <https://www.theatlantic.com/politics/archive/2015/02/can-bipartisanship-end-mass-incarceration/386012/> [<https://perma.cc/7M28-Z52X>] (describing how “opposition to mass incarceration has gone mainstream”).

2. See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017) (challenging conventional wisdom among criminal justice reformers).

3. See Nicole D. Porter, *State Advances in Criminal Justice Reform, 2016*, SENT’G PROJECT (Jan. 19, 2017), <http://www.sentencingproject.org/publications/state-advances-criminal-justice-reform-2016/> [<https://perma.cc/V3BT-NDZE>].

4. See, e.g., Steve Esack, *State House Reinstates Get-Tough-on-Crime Mandatory Minimum Prison Sentences*, MORNING CALL (Apr. 12, 2017, 9:48 PM), <http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-mandatory-minimum-prison-sentence-0405-20170405-story.html> [<http://perma.cc/5MLC-FANK>]; Jamison Pfeifer, *Lawmakers Propose Harsher Gun Sentences, Tiptoe Around “Mandatory Minimums”*, CHI. MAG. (Feb. 1, 2017), <http://www.chicagomag.com/city-life/January-2017/IL-Repeat-Offender-Law/> [<https://perma.cc/N2Y4-QRPT>].

5. See David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017), <https://lawreview.law.ucdavis.edu/online/vol50/Sklansky.pdf> [<https://perma.cc/CK57-4KUU>] (“Over the past few years . . . a growing number of chief prosecutors have won office by pledging a more balanced approach to criminal justice—more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration.”).

Jeff Sessions, our chief law enforcement officer, promises a return to the tough-on-crime policies of old.<sup>6</sup> All told, the current landscape is characterized by considerable flux—meaning that this is a pivotal juncture for criminal justice reform. In order to move forward, the ambition of a newly reconstructed justice system must be defined.

Against this backdrop we can fully appreciate the contribution of James Forman's<sup>7</sup> extraordinary book, *Locking Up Our Own: Crime and Punishment in Black America*. Forman tells the gripping origin story of increasingly punitive responses to crime in Washington, D.C., while relating these particulars to corresponding trends in urban centers across the nation. Forman's story focuses on African American actors—politicians, judges, prosecutors, police officers, and ordinary citizens—normally left out of standard accounts of the growth of the carceral state. Placing their lives front and center, Forman compassionately chronicles the devastation inflicted by crime, and then by punishment, on black, largely poor communities. This is a masterful recounting of how the very communities eventually ravaged by mass incarceration possessed a stake—an understandable, legitimate stake—in catalyzing a criminal justice response to crimes against them, and how this effort resulted in terrible unintended consequences.

Part I summarizes Forman's depiction of this tragedy and its connection to “a central paradox of the African American experience: the simultaneous over- and under-policing of crime” (p. 35). Without giving short shrift to either dimension of this paradox, Forman lays bare the ways in which black community members' experiences of crime during the 1970s and '80s were inexorably linked to structural inequalities—primarily race and class. As Forman demonstrates, these marginalized citizens were undervalued; they endured *too little* by way of a state response to their crime victimization, along with *too much* of a state response when it came to their punishment for crime perpetration.

Forman's tale resonates with a long, shameful history of states failing to protect vulnerable populations from violence, placing in stark relief the “mattering” of certain lives more than others. Since Reconstruction, subordinated communities have endeavored to harness the criminal justice system toward recognition that their lives have worth. These efforts persist to this day, making Forman's insights regarding the effects of underenforcement especially salient to ongoing contests over whose lives matter.

Part II explores three areas in which legally marginalized groups currently struggle for state recognition of their injuries: gun violence, sexual violence, and hate crimes. These case studies in the overlook of harm reveal a close nexus between criminal law enforcement and the relative valuation of communities, including the individuals that comprise them. Over time, claims for protection on behalf of these groups have generated moves to

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6. Rebecca R. Ruiz, *Sessions to Toughen Rules on Prosecuting Drug Crimes*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/jeff-sessions-sentencing-criminal-justice.html> (on file with the *Michigan Law Review*).

7. James Forman Jr. is a Professor of Law at Yale Law School.

ratchet up criminal law sanctions. Yet, as has become terribly clear, incarceration and its effects reflect and perpetuate inequality—meaning that increased sanctions are the wrong default outlet for equality-based demands on the state by crime victims. Some outlet is essential. Yet an insistence on the redress of violence against vulnerable populations must be reconciled with the need to curb the overincarceration of vulnerable populations.

Part III offers a conceptual framework for future reform efforts that, by centering structural inequality, aspires to concurrently rectify the over- and underenforcement of crime highlighted by Forman’s historical account. I will refer to this inversion of the traditional criminal justice paradigm as an antisubordination approach to criminal justice—one that expressly contemplates the complex array of societal forces that construct the meaning of crime and punishment, from the perspectives of both victim and perpetrator. An antisubordination frame not only makes salient the interplay between crime and entrenched social inequalities;<sup>8</sup> it also presses for a state response that alleviates, rather than exacerbates, the disempowerment of vulnerable populations.

This approach is very much in keeping with urgent calls to decarcerate and scale back the collateral consequences of conviction.<sup>9</sup> But by reckoning with the need to correct for underenforcement as well, the suggested framework seeks to refine and enrich conventional overenforcement critiques. I argue that this move has real consequences, not just for theory, but also for work on the ground, where legislatures and—most importantly—prosecutors can apply antisubordination principles to advance criminal justice.

#### I. THE PARADOX OF OVER- AND UNDERENFORCEMENT: LESSONS FROM THE PAST

Forman’s inquiry into how a majority-black population in Washington, D.C., came to incarcerate “so many of its own” (p. 9) begins with a revealing personal anecdote. Forman, who worked as a public defender in the District, was seeking probation for a fifteen-year-old boy who had pleaded guilty to a gun possession charge. At sentencing, the long-serving judge, an African American man, delivered a lecture for which he had become somewhat famous, declaring to the adolescent: “Dr. King didn’t march and die so that you could be a fool, so that you could be out on the street, getting high, carrying a gun, and robbing people. No, young man, that was not his dream. That was not his dream at all” (p. 4). The judge ordered Forman’s client to serve six months in juvenile detention, where he would join an incarcerated population almost entirely comprised of African American men and boys (p. 6).

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8. Crime can be both a “*product* of oppression” and a “*tool* of oppression.” Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CANADIAN J.L. & JURIS. 23, 32 (1998).

9. See *infra* notes 108–117 and accompanying text.

Like the judge, everyone in the courtroom that day, including the prosecutor, was black, as were the police chief, the mayor, the chief prosecutor, and the judge for whom the courthouse building was named; so too were most of the jurors and the lawmakers themselves (pp. 8–9). This was emblematic of a larger pattern: in the District of Columbia, over the course of four decades, blacks played a largely overlooked role in shaping the criminal justice system (p. 10). As Forman notes, “African Americans have *always* viewed the protection of black lives as a civil rights issue, whether the threat comes from police officers or street criminals” (p. 11). By chronicling the influence of black leaders on the tough-on-crime movement, Forman manages to explain the appeal of punitive policies that, with the passage of time, have wreaked particular havoc on low-income African American communities.<sup>10</sup>

Forman’s account begins in the mid-1970s, when a white D.C. councilman by the name of David Clarke mounted an effort to decriminalize marijuana possession (pp. 20–25). But despite marshaling powerful evidence of the racially discriminatory impact of marijuana laws, Clarke was unsuccessful in his attempt at reform (pp. 20–22, 43). The opposition to decriminalization was led by Douglas Moore, an African American councilman who had “campaign[ed] as a champion of the city’s black poor, promoting self-determination and control of local institutions and actively opposing efforts by white outsiders to tell D.C.’s blacks how to govern themselves” (pp. 34–35). With a heroin epidemic that began in the 1960s scourging the city’s poor black neighborhoods, Moore argued that marijuana decriminalization “would only hinder blacks’ attempt to achieve equality. In his eyes, marijuana use was both a symptom of racial oppression . . . and, just as important, a cause” (p. 36).

Moore’s view—which, again, later prevailed—was consistent with the 1968 Kerner Commission findings “that many blacks believed ‘the police maintain[ed] a much less rigorous standard of law enforcement in the ghetto, tolerating illegal activities like drug addiction, prostitution, and street violence that they would not tolerate elsewhere.’”<sup>11</sup> One of the many reasons for the defeat of marijuana decriminalization was the sense “among the black community’s most dogged defenders” (p. 44) that if they did not protect themselves against growing drug addiction and rising crime rates, no one would.

African Americans bore the brunt of a crime wave sweeping D.C. and much of the nation (p. 50). Handguns made the crisis lethal, threatening black communities—especially the poor among them—in ways that made the turn to criminal law irresistible (p. 50). Anger at the toll of gun violence, alongside a sense that judges and prosecutors were too rarely imposing jail time or enough of it, generated a push, not only for gun control measures,

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10. Forman separately chronicles the cumulative effects of aggressive and often unlawful policing in black communities. Chapter 5.

11. P. 35 (quoting OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 161 (1968)).

but also for mandatory minimum sentences for gun infractions (pp. 60–61). As the city's largest black newspaper editorialized, in order to repair "an environment of fear and fright," the courts "should take harsher views on convicted offenders and mete out tough and longtime sentences."<sup>12</sup>

When the city passed its gun control law in 1975, black leaders were able to claim "a civil rights triumph," having finally made good on a promise to "provide police protection to a community so long denied it" (p. 73). Over a decade earlier, civil rights icon Ella Baker had proclaimed, "Until the killing of black men, black mothers' sons, becomes as important to the rest of the country as the killing of a white mother's son—we who believe in freedom cannot rest until this happens" (pp. 73–74). Forman observes that, with passage of a punitive gun law, lawmakers "could reasonably declare that, at least in D.C., the killing of black men mattered" (p. 74).

In cities outside the District of Columbia, including Atlanta, Detroit, and Chicago, African American lawmakers, with the support of their constituents, were similarly enacting mandatory minimums and longer sentences for gun crimes (pp. 74–75). Although black leaders tried pushing for a variety of measures to address the root causes of violence—an attempt Forman calls "an all-of-the-above strategy that combined increasing criminal penalties with attacking inequality" (p. 76)—what emerged in the 1970s was a strictly punitive approach that, ever since, has defined our nation's response to complicated inner-city problems. As Forman aptly describes the result of this heavy reliance on incarceration:

Prohibiting gun possession in majority-black communities like D.C., while failing to curb the vibrant national gun market or to address crime's root causes, has led to the worst of all possible worlds. Guns—and gun violence—saturate our inner cities, while the people who go to prison for possessing guns are overwhelmingly black and brown. (p. 77)

Needless to say, this worst-case scenario was unanticipated by black leaders and activists who championed a more robust criminal justice response to the drugs and violence in their communities. In the early 1980s, when D.C. continued to ramp up its mandatory sentencing regime,<sup>13</sup> the perceived worst shortcomings of the system were too little policing (or "lackadaisical street-level enforcement") (p. 126) and a court system primed for excessive leniency (or "revolving door justice") (p. 127). With respect to this latter problem, many black commentators noted that "the revolving door was discriminatory: it spun fastest for the criminals who victimized blacks" (p. 128). In the face of these obstacles, it seemed wise to limit the discretion of prosecutors and judges; the idea, in essence, was to conscript those disinterested in the plight of black victims so that even members of marginalized communities would receive the law's protection.

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12. P. 61 (quoting Editorial, *Black Crime and 'Ills of Society'*, WASH. AFRO-AM., June 14, 1975).

13. Forman notes that similar dynamics were unfolding in cities around the country. See p. 134.

In the book's epilogue, Forman reflects on passage of the ensuing decades—"forty years of increasingly punitive criminal justice policies" (p. 217). Shootings and homicides have fallen dramatically since the turn of the century (for reasons that are very much contested), although they remain too common in neighborhoods populated by the poorest African Americans (p. 218). While the drop in crime has provided lawmakers in D.C. and elsewhere with good cause to reconsider their stance on punitive criminal justice policies, "the war on crime's accumulated impact on black America turned the opportunity into an imperative" (p. 218). As just one indication of a shift in perspective, in 2014, the District of Columbia passed a measure to decriminalize marijuana (p. 217). The legislation is markedly similar to the failed 1975 proposal that ushered in a new era of punishment (p. 217).

Whether we stand on the brink of yet another criminal justice transformation remains to be seen.<sup>14</sup> Forman notes that mass incarceration "was *constructed* incrementally, and it may have to be dismantled the same way" (p. 238). However piecemeal, this undertaking would benefit greatly from a conceptual framework that—like Forman's truly outstanding historical account—puts overenforcement and underenforcement in conversation.

## II. CASE STUDIES IN UNDERENFORCEMENT

We live in an era of terribly excessive criminal law enforcement.<sup>15</sup> At the same time, certain vulnerable populations confront a criminal justice system largely unreceptive to their suffering when they are victimized by crime. In these communities, much like those Forman describes, the state's failure to respond to violence is often perceived as a hallmark of inferior citizenship status, and rightly so. In the cases studies that follow—of gun violence, sexual violence, and hate crimes—insistence on a responsive criminal justice system can best be understood as a demand by those who live in neglected communities for the law's equal protection. Regardless of how to best channel this demand (a subject to which we will return),<sup>16</sup> efforts to catalyze criminal justice should be seen as representing legitimate declarations of worth.

### A. Gun Violence

African American men are killed by police officers at rates vastly greater than their white counterparts.<sup>17</sup> According to one recent analysis, black men between the ages of fifteen and nineteen were twenty-one times more likely

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14. Forman cautions against reforms that promote leniency exclusively for nonviolent drug offenders—not simply because such reforms will not do enough to reduce the prison population, but also since those who bear the legal label "violent" may also deserve mercy. Pp. 228–31.

15. See *infra* notes 108–111 and accompanying text.

16. See *infra* Part III.

17. See, e.g., Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 COLUM. L. REV. 1235, 1246–48 (2017).

to be killed by the police than white men in the same age cohort.<sup>18</sup> Moreover, since 2000, police officer killings, along with their visibility, have increased.<sup>19</sup>

Yet police officers are rarely held to account for the deaths of black men and women.<sup>20</sup> To name just a few of the many recent high-profile killings that have gone unpunished<sup>21</sup>: the police officer who shot Philando Castile was acquitted; neither police officer involved in the shooting of Tamir Rice was ever indicted; the officer who shot Natasha McKenna faced no charges; three officers who shot Sean Bell were acquitted; the officer who strangled Eric Garner avoided prosecution; and the officer who shot Michael Brown in Ferguson, Missouri, escaped a grand jury indictment.<sup>22</sup>

These and other police killings with impunity have sparked protest locally and around the nation.<sup>23</sup> Apart from expressing outrage at the deaths themselves, activists have consistently pressed for the killers to be brought to justice.<sup>24</sup> This mission is central to the #BlackLivesMatter movement, which broadly “seeks once and for all to place black Americans on a level of human equality with whites.”<sup>25</sup> The criminal justice system’s failure to respond to the victimization of African American citizens is critical to this push for equality.<sup>26</sup> Indeed, #BlackLivesMatter began as a “call to action” following

18. Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <https://www.propublica.org/article/deadly-force-in-black-and-white> [https://perma.cc/MLZ2-EYGM].

19. See Fagan & Richman, *supra* note 17, at 1245 (observing the proliferation of citizen and police videos of killings).

20. See KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 3 (2016) (decrying that “it is virtually impossible to punish—let alone indict, jail, or prosecute—police for [their] criminal behavior”).

21. *Id.* at 2.

22. Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016, 3:45 PM), <http://beta.latimes.com/nation/la-na-police-deaths-20160707-snap-htmstory.html> [http://perma.cc/RGF8-2R54]; Justin Jouvenal, *Prosecutor Will Not Pursue Charges in Death of Mentally Ill Inmate in Va.*, WASH. POST (Sept. 8, 2015), [https://www.washingtonpost.com/local/crime/prosecutor-will-not-pursue-charges-in-death-of-mentally-ill-inmate-in-va/2015/09/08/ff2ecf7a-564f-11e5-b8c9-944725fcd3b9\\_story.html?utm\\_term=.7c4ef46ed950](https://www.washingtonpost.com/local/crime/prosecutor-will-not-pursue-charges-in-death-of-mentally-ill-inmate-in-va/2015/09/08/ff2ecf7a-564f-11e5-b8c9-944725fcd3b9_story.html?utm_term=.7c4ef46ed950) [http://perma.cc/3RWS-W2ZR]; Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <http://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> (on file with the *Michigan Law Review*).

23. TAYLOR, *supra* note 20, at 2.

24. To this end, “#BLM has called on the attorney general to release the names of police who have killed Black people over the last five years ‘so they can be brought to justice—if they haven’t already.’” *Id.* at 181. Similarly, local community activism in response to new police killings has focused on the need for justice. *Id.* at 180.

25. CHRISTOPHER J. LEBRON, THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA, at xii (2017). For the platform of a coalition advancing the Movement for Black Lives, see *Platform, MOVEMENT FOR BLACK LIVES*, <https://policy.m4bl.org/platform/> [https://perma.cc/2LKN-LDTJ].

26. LEBRON, *supra* note 25, at xi.



the 2013 acquittal of George Zimmerman for the death of Trayvon Martin.<sup>27</sup> In his seminal work on the movement's intellectual origins, Christopher J. Lebron notes that "it was the death and failure of our justice system to account for the unnecessary death of a black American that prompted three women to offer these three basic and urgent words to the American people: black lives matter."<sup>28</sup> The mattering of these lives, as Lebron explains, dictates that they are "not candidates for cursory or careless or hateful or negligible elimination."<sup>29</sup> He adds, "American democracy cannot claim for itself the title of a liberal, well-ordered democracy so long as blacks are so often killed with impunity by private citizens and state agents . . ."<sup>30</sup>

Impunity for police officers who kill African Americans arguably constitutes the most powerful expression of the state's disregard for the value of black lives. But far more commonplace than police killings are killings of African Americans by their fellow citizens.<sup>31</sup> Here too, where crime breaks unevenly on the backs of vulnerable populations,<sup>32</sup> we see striking levels of underenforcement,<sup>33</sup> also reflecting the state's devaluation of black lives.

Gun violence disproportionately harms black men<sup>34</sup> in vulnerable communities.<sup>35</sup> According to a 2015 study of gun violence in America, "murder inequality . . . is stark" and "marked by intense racial disparities."<sup>36</sup> St. Louis, which has the highest per capita gun-murder rate of any large city in the country, presents a fairly typical pattern: a "rigid racial boundary . . . carves the city in two," separating those areas with many gun homicides and few homicides.<sup>37</sup> In Baltimore, where gun homicides spiked to their highest levels ever in 2015, 92% of gun-murder victims were black men.<sup>38</sup> That same year, Chicago had the most gun homicides of any city.<sup>39</sup> African Americans were 80% of homicide victims, despite the fact that they constitute a third of

27. *Id.*

28. *Id.*

29. *Id.* at xii.

30. *Id.* at 143.

31. See David Cole, *The Cops and Race and Gangs—and Murder*, N.Y. REV. BOOKS, Apr. 7, 2016, at 42, 44 (noting that "[b]y far the leading cause of death for black males aged between fifteen and thirty-four years old is homicide, and the vast majority of those deaths are not at the hands of the police").

32. See *infra* notes 35–42 and accompanying text.

33. See *infra* notes 43–51 and accompanying text.

34. See Aliza Aufrichtig et al., *Want to Fix Gun Violence in America? Go Local.*, GUARDIAN (Jan. 9, 2017), <https://www.theguardian.com/us-news/ng-interactive/2017/jan/09/special-report-fixing-gun-violence-in-america> [<https://perma.cc/NFX3-5TXQ>].

35. *Id.*

36. *Id.* "Gun violence is a regressive tax that falls heaviest on neighborhoods already struggling with poverty, unemployment, and failing schools. The unequal burden of violence is also marked by intense racial disparities." *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

the city's population,<sup>40</sup> and black men aged fifteen to thirty-four—just 4% of Chicago's residents—were over half of the homicide victims.<sup>41</sup> (These same communities also suffer from a concentration of nonlethal gun violence: on one city block alone, at least fifteen people were shot in a year.)<sup>42</sup>

Yet shooters are rarely brought to justice; in fact, most gun violence perpetrators with black victims never even enter the criminal justice system.<sup>43</sup> In Chicago, the likelihood of an arrest—or “clearance rate”—fell in 2016 to 26% for homicides and 5% for shootings.<sup>44</sup> The problem is particularly acute in neighborhoods like West Englewood, which is comprised of a largely black population with a median income slightly above half the national average.<sup>45</sup> As of August 2016, only two of twenty-four killings in the neighborhood that year had been cleared by arrest.<sup>46</sup> The state senator whose district includes West Englewood described the unsolved homicides as evidencing a “‘lack of commitment and follow-up’ by homicide detectives”: “It’s a cyclical tsunami, all stemming from . . . a systemic disregard and disrespect for constituents that police take a pledge to serve and protect.”<sup>47</sup> On the block where fifteen people were shot in a year, no arrests were made in connection with any of the incidents.<sup>48</sup>

Similar patterns of race-based underenforcement have been documented in Los Angeles, where homicide clearance rates averaged 38% for the period between 1994 and 2006,<sup>49</sup> and New York City, where the 2013 clearance rate for homicides involving a white victim was 86%, compared to a

40. UNIV. OF CHI. CRIME LAB, *GUN VIOLENCE IN CHICAGO*, 2016, at 13 (2017), <http://urbanlabs.uchicago.edu/projects/gun-violence-in-chicago-2016> [https://perma.cc/ZGD2-94T5].

41. *Id.*

42. Safia Samee Ali, *The Chicago Block Where 15 People Were Shot in the Last Year Alone*, NBC NEWS (Dec. 12, 2016, 7:30 AM), <http://www.nbcnews.com/news/us-news/chicago-block-where-15-people-were-shot-last-year-alone-n691031> [https://perma.cc/QT9B-28TR].

43. See, e.g., Sarah Ryley et al., *Tale of Two Cities*, N.Y. DAILY NEWS (Jan. 5, 2014, 2:00 AM), <http://www.nydailynews.com/new-york/nyc-crime/forgotten-record-murder-rate-cases-unsolved-article-1.1566572> (on file with the *Michigan Law Review*).

44. UNIV. OF CHI. CRIME LAB, *supra* note 40, at 23. Researchers note that “[t]his decrease in the clearance rate is unlikely to have been what caused the [2016] surge in gun violence initially, but it may have accelerated this phenomenon, for example by fueling a cycle of retaliatory violence.” *Id.*; see Kimbriell Kelly et al., *As Killings Surge, Chicago Police Solve Fewer Homicides*, WASH. POST (Nov. 5, 2016), [https://www.washingtonpost.com/investigations/as-killings-surge-chicago-police-solve-fewer-homicides/2016/11/05/55e5af84-8c0d-11e6-875e-2c1bfe943b66\\_story.html](https://www.washingtonpost.com/investigations/as-killings-surge-chicago-police-solve-fewer-homicides/2016/11/05/55e5af84-8c0d-11e6-875e-2c1bfe943b66_story.html) [https://perma.cc/F6LQ-8MC4].

45. See Kelly et al., *supra* note 44.

46. See *id.*

47. *Id.* (quoting Illinois state senator Jacqueline Y. Collins).

48. Ali, *supra* note 42.

49. Fagan & Richman, *supra* note 17, at 1279–80 (citing California Department of Justice statistics). See generally JILL LEOVY, *GHETTOSIDE: INVESTIGATING A HOMICIDE EPIDEMIC* (2015) (chronicling the inadequacy of police responses to gun violence in Los Angeles).

45% clearance rate for homicides involving a black victim.<sup>50</sup> (The nationwide clearance rate for homicides is over 61%.<sup>51</sup>)

Low clearance rates—along with the resulting lack of accountability—can fairly be interpreted as a devaluation of black victims.<sup>52</sup> When violent crime goes unpunished, affected community members legitimately perceive state neglect as a reflection of unequal status.<sup>53</sup> In the words of a mother whose eighteen-year-old son was murdered in a shooting that remains unsolved, “A lot of these kids are dying for no . . . reason, and no one seems to care. Our children’s lives matter, just like white children’s lives matter.”<sup>54</sup>

### B. Sexual Violence

Victims of sexual assault—a population comprised of more than 90% women<sup>55</sup>—confront a criminal justice system largely unreceptive to their claims.<sup>56</sup> In the main, sexual assault allegations are treated with skepticism at every stage of the criminal process,<sup>57</sup> resulting in an extraordinary rate of case attrition. According to estimates, just six out of every thousand rapists is punished with incarceration.<sup>58</sup>

50. See Ryley et al., *supra* note 43; see also Edwin Rios & Kai Wright, *Black Deaths Matter*, MOTHER JONES, <http://www.motherjones.com/politics/2015/06/chester-gun-violence-black-deaths-matter/> [<https://perma.cc/R2HL-CTJB>] (explaining that in predominantly minority communities, clearance rates for murders and nonfatal shootings can fall to single digits).

51. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2015: OFFENSES CLEARED 2 (2016), [https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/clearances/clearancetopic\\_final.pdf](https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/clearances/clearancetopic_final.pdf) [<https://perma.cc/6EZE-QN72>].

52. See LEOVY, *supra* note 49, at 8 (arguing that the state’s epic failure to arrest, much less punish, perpetrators is a “root cause” of violence, “effectively [making] black lives cheap”).

53. See Fagan & Richman, *supra* note 17, at 1291 (“Police abuse and impunity go hand in hand [in high-homicide communities] to create deeply felt cynicism among residents.”).

54. Aamer Madhani, *At End of Bloody Year in Chicago, Too Few Murders Solved*, USA TODAY (Dec. 30, 2016, 5:30 PM), <https://www.usatoday.com/story/news/2016/12/30/chicago-murders-clearance-rate-2016/96009878/> [<https://perma.cc/Q9RU-6HTN>].

55. U.S. DEP’T OF JUSTICE, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 5 (2015), <http://www.justice.gov/opa/file/799476/download> [<https://perma.cc/AM2U-6NKA>] (suggesting that levels of transgender victimization are high); see MICHAEL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 240655, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, at 3 (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [<https://perma.cc/Z5LP-JQH6>].

56. See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–99 (2016) (discussing the sexual violence enforcement gap).

57. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 17–20 (2017).

58. See *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://rainn.org/statistics/criminal-justice-system> [<https://perma.cc/252V-DYVL>] (providing estimates based on recent FBI and DOJ figures).

A majority of sexual assault victims never even relate the occurrence of the crime to law enforcement officials.<sup>59</sup> One reason is the predictability of a nonresponse. Among nonstudents, nearly one in five surveyed did not report the crime because “police would not or could not do anything to help.”<sup>60</sup> Other studies further indicate that sexual assault survivors are foregoing reliance on the criminal justice system in anticipation of how their case will be (mis)treated.<sup>61</sup> The sexual assault enforcement gap is particularly wide in cases involving women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers.<sup>62</sup> Moreover, as compared to cases involving strangers, nonstranger rape—the vast majority of rape<sup>63</sup>—is typically met with greater incredulity.<sup>64</sup>

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59. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 210346, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> [<https://perma.cc/MJ78-T6JK>] (reporting that, among rape victims, 19.1% of adult women and 12.9% of adult men reported to police).

60. See SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248471, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 9 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/9JR5-3NH7>].

61. Kimberly Hefling, *Justice Department: Majority of Campus Sexual Assault Goes Unreported to Police*, PBS NEWSHOUR (Dec. 11, 2014, 1:30 PM), <http://www.pbs.org/newshour/run-down/four-five-acts-campus-sexual-assault-go-unreported-police/> [<https://perma.cc/J3BJ-XS7G>].

62. See generally AM. CIVIL LIBERTIES UNION, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING (2015), [https://www.aclu.org/sites/default/files/field\\_document/2015.10.20\\_report\\_-\\_responses\\_from\\_the\\_field.pdf](https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf) [<https://perma.cc/4SCE-7SS6>].

63. MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 17–18 (2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) [<https://perma.cc/3NWA-6AUR>] (stating that half of women rape victims were raped by an intimate partner and 40% by an acquaintance).

64. See, e.g., CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: FINAL REPORT 134–39 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf> [<https://perma.cc/7699-A3X9>].

Police failures to investigate sexual assault claims have been well documented.<sup>65</sup> Across the nation, from cities that include Los Angeles,<sup>66</sup> Baltimore,<sup>67</sup> St. Louis,<sup>68</sup> New Orleans,<sup>69</sup> New York City,<sup>70</sup> and Missoula, Montana,<sup>71</sup> poor handling of rape cases by police is rampant.<sup>72</sup>

A 2015 study of the policing of sexual assault in Detroit provides granular evidence of gender bias in case processing.<sup>73</sup> In the most thorough examination of untested (or “shelved”) rape kits to date, researchers discovered that cases involving nonstrangers, in which suspect identity was not an issue, were typically not considered worthy of investigation. Contrary to conventional wisdom, police officers repeatedly indicated that the failure to submit a rape kit for testing was reflective of a decision *not* to pursue the case, rather than a decision to pursue it without additional corroboration. The kits were shelved not because the case was perceived as sufficiently strong that the cost of testing was unjustified, but because the allegations had already been disregarded.<sup>74</sup>

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65. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1233 (1997) (“[T]he unfounding rate for rape is roughly four times higher than for other major crimes.”).

66. See generally SPOHN & TELLIS, *supra* note 64.

67. See Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010, 10:27 AM), <http://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html> [<https://perma.cc/QW6B-6YLP>] (reporting that, from 2003 to 2010, police detectives investigated only four of ten emergency rape calls).

68. See Jeremy Kohler, *What Rape: Abused by the System*, ST. LOUIS POST-DISPATCH, Aug. 28, 2005, at A1 (reporting on the police practice of diverting rape complaints from formal processing channels).

69. See Laura Maggi, *NOPD Downgrading of Rape Reports Raises Questions*, TIMES-PICAYUNE (July 11, 2009, 9:02 PM), [http://www.nola.com/news/index.ssf/2009/07/nopd\\_downgrading\\_of\\_rape\\_repor.html](http://www.nola.com/news/index.ssf/2009/07/nopd_downgrading_of_rape_repor.html) [<https://perma.cc/7E4U-WLNS>] (reporting that a majority of reported rapes were classified as noncriminal).

70. See John Eligon, *Panel Seeks More Police Training on Sex Crimes*, N.Y. TIMES (June 2, 2010), <http://www.nytimes.com/2010/06/03/nyregion/03rape.html?pagewanted=all> (on file with the *Michigan Law Review*) (reporting that the number of forcible rape complaints deemed unfounded had dramatically increased and that the category of sex crimes classified as misdemeanors had grown by 6%).

71. See U.S. Dep’t of Justice, *Opinion Letter on the Missoula Police Department* (May 15, 2013), [http://www.justice.gov/crt/about/spl/documents/missoulapdfind\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf) [<https://perma.cc/3XW5-FBR8>] (summarizing the Justice Department’s findings of gender discrimination in policing sexual assault).

72. See Erin Alberty & Janelle Stecklein, *Study: Most Cases in Salt Lake County Never Prosecuted*, SALT LAKE TRIB. (Jan. 7, 2014, 9:48 AM), <http://archive.sltrib.com/article.php?id=57323282&itype=CMSID> [<https://perma.cc/YJE7-24AF>] (reporting on an audit of 270 rape cases in Salt Lake County showing that 6% were prosecuted).

73. REBECCA CAMPBELL ET AL., *THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT* (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf> [<https://perma.cc/5RES-FZAW>].

74. *Id.* at 137.

This default to doubt in sexual assault cases is a feature not only of police investigation, but also of prosecutorial decisionmaking<sup>75</sup> and jury deliberation.<sup>76</sup> In sum, the underenforcement of rape law leaves most victims without criminal justice recourse.<sup>77</sup> For generations, sexual assault survivors and activists have fought the limits of rape law and its subordinating impact on women.<sup>78</sup> Over time, the aim of these reform efforts has varied, from redefining the crime to encompass nonforcible, nonconsensual sexual conduct; to eliminating unique procedural requirements that make rape specially difficult to prove in court; to revising evidentiary rules that generally allow the admission of a victim's prior sexual history; to reframing the legal meaning of consent; to attacking law enforcement biases that constrain effective enforcement. Notwithstanding the seemingly disparate nature of these reforms, underlying each one is this insight: the state's failure to punish sexual violence undermines women's equal citizenship.<sup>79</sup> An intersectional approach accounts for the multitudinous ways that bias confronts victims.<sup>80</sup>

Because “[r]ape is a crime of gender inequality,”<sup>81</sup> a nonresponsive criminal justice system diminishes women's worth, profoundly deepening the injury of the original violation. Work on the part of survivors and activists to catalyze an effective criminal justice response can best be understood as a demand for equal protection and the corresponding value it confers on members of vulnerable groups.

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75. See Tuerkheimer, *supra* note 57, at 17–20 (discussing “credibility discounting” in sex crimes prosecution).

76. See Deborah Tuerkheimer, *The Deck Is Stacked Against Every Sexual Assault Victim in America. The Cosby Case Is No Different.*, SLATE (June 18, 2017, 12:24 PM), [http://www.slate.com/blogs/xx\\_factor/2017/06/18/the\\_cosby\\_case\\_is\\_another\\_example\\_of\\_credibility\\_discounting\\_in\\_sexual\\_assault.html](http://www.slate.com/blogs/xx_factor/2017/06/18/the_cosby_case_is_another_example_of_credibility_discounting_in_sexual_assault.html) [<https://perma.cc/7HFL-CJ64>].

77. See Tuerkheimer, *supra* note 56, at 1299–1309, 1334–35 (arguing that discriminatory police responses to sexual violence may violate the original meaning of the Equal Protection Clause).

78. See generally ESTELLE B. FREEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION* 1–2 (2013).

79. See *id.* at 11.

80. See *supra* note 62 and accompanying text; see also JENNIFER C. NASH, *BRANDEIS UNIV. FEMINIST SEXUAL ETHICS PROJECT, BLACK WOMEN AND RAPE: A REVIEW OF THE LITERATURE* 1 (2009), <https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/nash2009.pdf> [<https://perma.cc/WKC2-VGPP>]; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1242–44 (1991).

81. Catharine A. MacKinnon, *Rape Redefined*, 10 *HARV. L. & POL'Y REV.* 431, 431 (2016).

## C. Hate Crimes

Hate crimes, which have newly captivated the public,<sup>82</sup> are on the rise.<sup>83</sup> Nearly 6,000 hate crimes were recorded in 2015, representing a 7% uptick overall and a 67% increase in crimes against Muslims in particular.<sup>84</sup> The largest portion of hate crimes were motivated by racial bias (60%),<sup>85</sup> followed by religious bias (20%) and antigay bias (18%).<sup>86</sup> Those at greatest risk for victimization were transgender people—especially trans women of color<sup>87</sup>—and members of the LGBT community.<sup>88</sup> Reports from around the country suggest that hate crimes are continuing to climb,<sup>89</sup> with a notable

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82. See Albert Samaha, *What Makes a Crime a Hate Crime*, BUZZFEED (Mar. 7, 2017, 6:21 PM), <https://www.buzzfeed.com/albertsamaha/hate-crimes-are-harder-to-prove-than-people-realize> [https://perma.cc/6RNT-Z93B] (describing this as “a moment of heightened public interest in potential hate crimes”). According to the Department of Justice, 90% of hate crimes reported from 2011 to 2015 involved violence. MADELINE MASUCCI & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 250653, HATE CRIME VICTIMIZATION, 2004–2015, at 3 (2017), <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf> [https://perma.cc/3GEC-MY75].

83. FBI, *This Week: Hate Crime Statistics, 2015*, FED. BUREAU INVESTIGATION (Nov. 14, 2016), <https://www.fbi.gov/audio-repository/ftw-podcast-hate-crime-statistics-2015-111416.mp3/view> [https://perma.cc/9NE9-JU24] (reporting a 53% increase in multiple-bias incidents and a 6.5% increase in single-bias incidents as compared to the previous year); see Harbani Ahuja, *The Vicious Cycle of Hate: Systemic Flaws in Hate Crime Documentation in the United States and the Impact on Minority Communities*, 37 CARDOZO L. REV. 1867, 1875–81 (2016) (observing that local police departments are under no obligation to report the relevant information to the FBI, and noting that the Department of Justice estimates that the average annual incidence of hate crimes is forty-one times more than the figures suggested by the FBI).

84. See Brandon E. Patterson, *Hate Crimes Against Muslims Spiked 67 Percent Last Year*, MOTHER JONES (Nov. 18, 2016, 10:23 PM), <http://www.motherjones.com/politics/2016/11/heres-what-we-know-about-hate-crimes-us/> [https://perma.cc/2GU7-XANP].

85. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, HATE CRIME STATISTICS, 2015: VICTIMS 1 (2016), [https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final.pdf) [https://perma.cc/F24T-7F8M]; see MASUCCI & LANGTON, *supra* note 82, at 6 (depicting demographic characteristics of violent hate crime victims).

86. FED. BUREAU OF INVESTIGATION, *supra* note 85, at 1.

87. See Patterson, *supra* note 84.

88. See Haeyoun Park & Iaryna Mykhyalshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> (on file with the *Michigan Law Review*); see also Brandon E. Patterson, *Jeff Sessions Fought Against Hate Crime Protections for LGBT Victims*, MOTHER JONES (Nov. 22, 2016, 11:00 AM), <http://www.motherjones.com/politics/2016/11/jeff-sessions-hate-crime-law/> [https://perma.cc/436Y-2AU3].

89. See, e.g., Zak Koeske, *Hate Crimes in Chicago Rose 20 Percent in 2016, Marking 5-Year High, Police Data Show*, CHI. TRIB. (Mar. 14, 2017), <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-hate-crimes-increase-st-0305-20170303-story.html> [https://perma.cc/M82W-4MRX]; James Queally, *With Hate Crimes Rising, L.A. Law Enforcement Vows to Crack Down*, L.A. TIMES (Nov. 23, 2016, 2:30 PM), <http://www.latimes.com/local/lanow/la-me-ln-police-hate-crimes-20161123-story.html> [https://perma.cc/NWQ2-VUXH]. See generally Audra D.S. Burch, *Spread of Hate Crimes Has Lawmakers Seeking Harsher Penalties*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/hate-crimes-legislation.html> (on file with the *Michigan Law Review*).

spike following the presidential election.<sup>90</sup> Moreover, these numbers vastly understate the scope of the problem, since a majority of victims opt not to make a complaint to the police. According to the Department of Justice, from 2011 to 2015, over 50% of hate crimes went unreported to police.<sup>91</sup> Gay, lesbian, and transgender victims report at a substantially lower rate—10%.<sup>92</sup>

Even when, against the odds, a victim makes a police report, the criminal justice process is usually truncated. Among violent hate crimes, only a fraction (10%) of those reported to law enforcement result in an arrest.<sup>93</sup> (This means that police make arrests in approximately 4% of violent hate crimes, reported and unreported.)<sup>94</sup> When an arrest is made, prosecutors commonly decline to pursue hate crime charges, instead proceeding under the statutes that apply generally to violent crime,<sup>95</sup> or not at all.<sup>96</sup>

Victims—along with members of their communities—tend to experience hate crimes as inexorably linked with group membership.<sup>97</sup> Hate crimes not only hurt a particular victim, they subordinate members of the vulnerable group or groups to which the victim belongs. This civil rights dimension was the impetus for the movement to pass hate crimes legislation.<sup>98</sup> These

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90. See Jack Jenkins, *ThinkProgress Has Been Tracking Hate Since Trump's Election. Here's What We Found*, THINKPROGRESS (Feb. 10, 2017, 1:44 PM), <https://thinkprogress.org/think-progress-has-been-tracking-hate-since-trumps-election-here-s-what-we-found-e0288ed69869/> [<https://perma.cc/F3NE-CTP9>]; see Benjamin Wallace-Wells, *Taking Stock of Hate Under Trump*, NEW YORKER (Mar. 14, 2017), <https://www.newyorker.com/news/benjamin-wallace-wells/taking-stock-of-hate-under-trump> [<https://perma.cc/SDQ7-W49H>].

91. MASUCCI & LANGTON, *supra* note 82, at 5.

92. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 884 (2014) (citing GLEN KERCHER ET AL., CRIME VICTIMS' INST., HATE CRIMES 18 (2008), <http://www.crimevictimsinstitute.org/documents/Hate%20Crimes%20Final.pdf> [<https://perma.cc/8GWP-UTZF>]); see Mary Emily O'Hara, *Trans Women of Color Face an Epidemic of Violence and Murder*, VICE (Nov. 20, 2014, 6:06 PM), [https://www.vice.com/en\\_us/article/vdpnxx/trans-women-of-color-face-an-epidemic-of-violence-and-murder-673](https://www.vice.com/en_us/article/vdpnxx/trans-women-of-color-face-an-epidemic-of-violence-and-murder-673) [<https://perma.cc/VZW2-UJ45>].

93. MASUCCI & LANGTON, *supra* note 82, at 5. Violent nonhate crimes reported to police were nearly three times more likely to lead to an arrest. *Id.*

94. *Id.*

95. See Eisenberg, *supra* note 92, at 888.

96. See Brandon E. Patterson, *Hate Crimes Are Rising but Don't Expect Them to Be Prosecuted*, MOTHER JONES (Nov. 25, 2016, 4:47 PM), <http://www.motherjones.com/politics/2016/11/heres-why-hate-crimes-are-so-hard-prosecute/> [<https://perma.cc/3B8K-8DZ9>] (finding that federal prosecutors proceeded “with just 13 percent of hate crime cases referred” in a five-year period).

97. See VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 27–32 (2001).

98. See Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 701–02 (2017) (describing a “movement consisting of different racial, ethnic, religious, and sexual minority groups that pushed ‘hate crime’ to the fore of public discussion starting in the 1980s”).



laws, which nearly all jurisdictions have adopted,<sup>99</sup> seek to align the state with victims whom the violent act has subordinated, by specifically validating the vulnerable trait, thereby blunting the act's disempowering effects.

By contrast, the underenforcement of hate crime laws compounds the subordinating effects of the violence. An unpunished hate crime expresses a devaluation of the victim—not only by the perpetrator, but also by the state.<sup>100</sup> If the successful prosecution of a hate crime is viewed as validating the victim's life and identity,<sup>101</sup> a perceived criminal justice failure accomplishes the exact opposite.

This helps to explain the current debate over “Blue Lives Matter” bills, which define offenses against police and first responders as hate crimes. In the past year, fourteen states have introduced this type of legislation;<sup>102</sup> in Louisiana and Kentucky, the bills have passed.<sup>103</sup> To the laws' supporters, police officers targeted for violence “merely because they're police officers, out of hatred,” fit squarely into the hate crime paradigm.<sup>104</sup> By contrast, civil rights activists and members of highly policed communities see “Blue Lives Matter” bills as thinly disguised efforts to undermine #BlackLivesMatter.<sup>105</sup>

“Blue Lives Matter” opponents strongly resist moves to increase the state's valuation of police lives at the expense of those whose worth (as measured by the state) continues to be diminished. As one advocate put it, if the state “wants to send a message that black lives don't matter unless they're cops, this is the best way to do it.”<sup>106</sup> In essence, the polarized reactions to

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99. A marked increase in hate crimes has led to a spate of new legislation in states across the nation. Joseph De Avila & Jon Kamp, *States Move to Strengthen Laws in Response to Rise in Hate Crimes*, WALL STREET J. (Mar. 23, 2017), <https://www.wsj.com/articles/states-move-to-strengthen-laws-in-response-to-rise-in-hate-crimes-1490301718> (on file with the *Michigan Law Review*).

100. See Ryan Katz, *Hate Crime Law Results in Few Convictions and Lots of Disappointment*, PROPUBLICA (Apr. 10, 2017, 12:22 PM), <http://www.propublica.org/article/hate-crime-law-results-in-few-convictions-and-lots-of-disappointment> [<https://perma.cc/9HCY-WLV6>] (reporting that, according to district attorney Kim Ogg, the “small numbers” of successful hate crimes prosecutions statewide “meant Texas was failing its minority residents”).

101. See Cristina Marcos, *Congressional Black Caucus Calls on Trump Administration to Invest in Prosecuting Hate Crimes*, HILL (June 20, 2017), <http://thehill.com/policy/national-security/338609-black-caucus-calls-on-trump-administration-to-invest-in-prosecuting> [<https://perma.cc/5WQG-3UFE>] (quoting the Congressional Black Caucus chairman as insisting, “Surely there is no greater cause of a government than to protect the lives of its citizens, particularly those uniquely vulnerable to hate, intolerance, and violence”).

102. Julia Craven, *32 Blue Lives Matter Bills Have Been Introduced Across 14 States This Year*, HUFFINGTON POST (Mar. 1, 2017, 5:47 AM), [https://www.huffingtonpost.com/entry/blue-black-lives-matter-police-bills-states\\_us\\_58b61488e4b0780bac2e31b8](https://www.huffingtonpost.com/entry/blue-black-lives-matter-police-bills-states_us_58b61488e4b0780bac2e31b8) [<https://perma.cc/B838-GQWD>].

103. Collier Myerson, *The Case Against ‘Blue Lives Matter’ Bills*, NATION (May 23, 2017), <https://www.thenation.com/article/case-blue-lives-matter-bills/> [<https://perma.cc/WR6J-TUKZ>].

104. *Id.* (quoting a senior advisor at the Fraternal Order of Police).

105. *Id.*

106. *Id.* (quoting Vince Warren, executive director at the Center for Constitutional Rights).

“Blue Lives Matter” bills reflect a pitched contest over whose lives warrant special state validation. For the vulnerable, such validation is a needed corrective to our vastly unequal social terrain.

### III. AN ANTISUBORDINATION THEORY OF CRIMINAL JUSTICE

On first glance, claims made on behalf of vulnerable populations for a more robust state response to their victimization might seem in tension with efforts to dismantle the carceral state. I argue here just the opposite—the underenforcement and overenforcement critiques are of a piece. This insight can best be captured by importing equal protection norms to criminal justice.<sup>107</sup> As I am conceiving it, an *antisubordination* theory of criminal justice takes aim at both the devastation of mass incarceration and the neglect of injuries to subordinated communities. This approach demands that the state attend to harms to citizens whose injuries have traditionally been overlooked—*whether* those citizens are crime perpetrators or crime victims. Surplus punishment for crime and a failure of redress for victimization are different mechanisms of disempowerment, to be sure; but each reflects and perpetuates systemic disregard for the lives of those least fortunate among us. For the state to mete out justice, it must upend longstanding priorities so that those who have long been disadvantaged by the system can finally be served by it.

Without purporting to elaborate on the full implications of this inversion, I will offer a few general observations about what such a conceptual shift might entail. A starting point should be fairly obvious: we incarcerate far too many people for far too long with effects that are far too lasting, with these excesses suffered especially by people of color. Our criminal justice system operates as a new racial caste system—a “set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position, effectively creating a second-class citizenship.”<sup>108</sup> This is precisely the concern central to antisubordination theories of equal protection, which seek to unravel a system of unequal citizenship (or, at bare minimum, not to further entrench it).<sup>109</sup>

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107. I make this claim despite a Supreme Court jurisprudence that functionally severs the connection between equal protection and criminal justice. *See, e.g.,* *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that a defendant must produce evidence that similarly situated defendants of another race were not charged in order to obtain discovery on a selective prosecution claim); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that racial bias in sentencing cannot be challenged on equal protection grounds absent evidence of conscious discriminatory intent).

108. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 185 (rev. ed. 2012). For an overview of how this subordination is accomplished, see *id.* at 185–87. *See also* Paul Butler, *The System is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419 (2016); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 *Nw. U. L. Rev.* 1597 (2017).

109. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 157, 160 (1976).

Transplanted to the criminal justice context, this understanding of equal protection directs that the state should incarcerate only when and to the extent necessary to vindicate identifiable antistatist norms.<sup>110</sup> In a similar vein, the state should work to minimize the collateral consequences of conviction, which effectively function to solidify second-class status,<sup>111</sup> unless those consequences can be justified as essential to the protection of vulnerable populations.

A good deal of recent scholarship focuses on ways to dismantle the carceral state.<sup>112</sup> My point here is not to rehearse those recommendations but, rather, to underscore how an antistatist approach readily incorporates them. For instance, rethinking the treatment of drug offense is not enough; other kinds of crimes—even those currently classified as “violent”—must also be addressed differently and with greater nuance. Overall, reforms should move us in the direction of reducing the number of people behind bars: fewer low-level prosecutions,<sup>113</sup> less frequent incarceration,<sup>114</sup> shorter terms for those who are sentenced to prison,<sup>115</sup> greater use of parole,<sup>116</sup> and a ratcheting down of collateral consequences.<sup>117</sup> Those convicted

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110. This would be considered the optimal level of enforcement. Applying the framework of republican theory, which is fundamentally concerned with promoting the ideal of freedom as nondomination, political theorist Philip Pettit has made a similar observation. Philip Pettit, *Republican Theory and Criminal Punishment*, 9 UTILITAS 59, 73 (1997). Republicans

will support an argument for criminalization only so far as criminalization is not likely to do more harm than good to the cause of non-domination. . . . There will be no point in criminalizing something in order to reduce domination, if the very act of criminalization itself facilitates more domination than it removes.

*Id.* at 67–68.

111. Michelle Alexander observes that people convicted of felonies “become members of an undercaste—an enormous population of predominantly black and brown people who . . . are denied basic rights and privileges of American citizenship and are permanently relegated to an inferior status.” ALEXANDER, *supra* note 108, at 187.

112. See, e.g., ALEXANDER, *supra* note 108; MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); MARC MORJÉ HOWARD, UNUSUALLY CRUEL: PRISONS, PUNISHMENT, AND THE REAL AMERICAN EXCEPTIONALISM (2017); PFAFF, *supra* note 2.

113. See Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He’ll Target Marijuana*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html> (on file with the *Michigan Law Review*) (describing the Brooklyn district attorney’s decision not to prosecute most low-level marijuana offenses); James C. McKinley Jr., *For Manhattan Fare-Beaters, One-Way Ticket to Court May Be Over*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html> (on file with the *Michigan Law Review*) (reporting that the Manhattan district attorney would no longer prosecute turnstile jumping as a matter of course).

114. See, e.g., Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1081–83 (2016) (calling for the expanded use of diversionary programs).

115. See PFAFF, *supra* note 2, at 196–202.

116. See HOWARD, *supra* note 112, at 107–30.

117. See *supra* note 111 and accompanying text.

of crimes are often among the most disenfranchised in our society; the state's response should embody this recognition.

Just as it demands movement toward less incarceration, an antistubordination approach to criminal justice requires special commitment to the redress of violence suffered by subordinated populations. This is because violence against socially disempowered victims furthers their subordination.<sup>118</sup> As vulnerable populations widely perceive, the state's response to violence against them constitutes an expression of their worth as citizens.<sup>119</sup> An inadequate response by the criminal justice system affirms the expressive message of the perpetrator's violence,<sup>120</sup> making the state complicit in the subordinating act itself.<sup>121</sup>

Conversely, if the state's response is adequate, it can mitigate the subordinating effects of the crime. The state can demonstrate its commitment to equality by condemning practices that most profoundly undermine it. Detering and punishing certain kinds of crime—those most impacting vulnerable populations—should be priorities.<sup>122</sup> Proper definition of the wrong,

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118. Philip Pettit notes that

when someone commits a crime they typically present themselves as dominators of the victim: they act in a way that suggests a belief that they can interfere on an arbitrary basis with that person. . . . If the offender gets away with the crime, and if the victim's protection against the sort of offence in question is not increased, then the crime proves that the denial is warranted: the victim is indeed dominated by the offender and by those who are relevantly similar to the offender.

Pettit, *supra* note 110, at 68.

119. For empirical evidence of the expressive significance of criminal law, see Kenworthy Bilz, *Testing the Expressive Theory of Punishment* 13 J. EMPIRICAL LEGAL STUD. 358 (2016).

120. See Pettit, *supra* note 110, at 68.

121. Hampton, *supra* note 8, at 42–43 (observing that the state's failure to respond effectively to violence “amounts to an acquiescence in that violence and a refusal to affirm the value of equality that is supposedly the foundation of the polity”).

122. Even under the status quo, the exercise of discretion is baked into every stage of the criminal process. See Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 905 & n.2 (1962).

backed by effective enforcement,<sup>123</sup> can advance both deterrent and expressive ends.<sup>124</sup> Punishment as a measure of accountability matters too,<sup>125</sup> although the need for accountability must be balanced against the imperative that sentencing be sparing and merciful, with long-term imprisonment a last resort.<sup>126</sup>

Aligning the state's response with the interests of subordinated communities will take different shapes depending upon the crime at issue. With that said, certain patterns emerge when we contemplate correcting underenforcement across seemingly disparate domains.

Let us briefly return to our case studies, beginning with gun violence. Those who reside in communities where such violence is rampant need protection; greater deterrence can be expected to result from the enhanced accountability of shooters, which in turn requires not only the dedication of law enforcement resources but also the community's trust of police and prosecutors.<sup>127</sup> Increasing clearance rates is not, however, simply a mechanism of deterrence; it also signifies that the lives of those injured or taken by gun violence matter.

Sexual violence allegations often go nowhere because police officers deem a complaint unworthy of pursuit.<sup>128</sup> Victims are entitled to a system free of gender bias—a system that treats the harm of sexual assault as real and worthy of redress, even when the parties are known to one another. This requires dramatic improvements in the policing and prosecution of sexual

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123. The relationships between law enforcement, community safety, and punishment are complex. Law enforcement, as defined by some form of criminal justice accountability, can promote community safety; yet criminal justice accountability is not the only—or the most effective—means of protecting communities. Likewise, the imposition of harsh punishment is not the only—or the most effective—mechanism of law enforcement. An antisubordination theory of criminal justice disaggregates these concepts, recognizing that a failure to do so results in the further disempowerment of vulnerable communities.

124. For an argument that retribution, rather than deterrence, may demand a reduction in the severity of drug sentences, see Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999).

125. The function of accountability has been aptly described as follows: “The very fact that the offender is apprehended and made accountable for what they did is already a vindication of the victim’s position; it shows that the offender did not have the assumed, even vaunted, capacity to interfere: interference carried a cost.” Pettit, *supra* note 110, at 75.

126. See Hampton, *supra* note 8, at 39 (observing that “a ‘proportionate’ punishment . . . is one that has the right expressive content, consistent with the wrongdoer’s own human dignity”); see also Bilz, *supra* note 119, at 363 (noting that expressive punishment theory need not dictate “hard treatment”).

127. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 79–88 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/UP9W-4NV9>] (documenting how law enforcement practices “have generated great distrust of Ferguson law enforcement, especially among African Americans,” and “made policing less effective, more difficult, and more likely to discriminate”).

128. See *supra* notes 65–74 and accompanying text.

violence, along with the continuing elimination of archaic definitional requirements that leave most nonstranger rape beyond the reach of criminal law.

A recalibrated response to hate crimes similarly requires changes in the domains of both law enforcement and crime definition: increasing community trust of law enforcement officers, a greater institutional commitment to solving crime, and a systemic insistence on accountability for the subordinating injury. In sum, an antisubordination approach not only protects vulnerable populations up front, it also mitigates the disempowering effects of crime when, despite best efforts, deterrence fails.

Before closing, a word on operationalization is in order. Given the contours of equal protection jurisprudence,<sup>129</sup> appellate courts are rather unlikely to advance an antisubordination theory of criminal justice. Sentencing judges are better able to do so, and lawmakers can certainly effectuate antisubordination norms by setting appropriate boundaries for punishment and by defining the parameters of crime. But prosecutors possess the ultimate power to recast the pursuit of criminal justice as an antisubordination mandate.<sup>130</sup> In a new era of prosecution,<sup>131</sup> a theoretical intervention that foregrounds (in)equality holds potential—not simply to shore up the conceptual foundations of “progressive prosecution,” but to transform the very meaning of criminal justice.

#### CONCLUSION

James Forman’s powerful rendition of the underenforcement–overenforcement paradox could not have arrived at a more opportune moment. Despite growing opposition to mass incarceration, too little thought has been given to the ideals that ought to animate a new system of crime and punishment. Forman’s account is both vivid testament to the need to protect vulnerable communities from violence and sobering reminder of how vulnerable communities can be wrecked by an overly punitive response to crime.<sup>132</sup>

Here I have proposed an approach to this dilemma that harmonizes the overenforcement critique and its less visible corollary, the attack on underenforcement. Difficult questions of implementation remain. Even so, reorienting the criminal law toward antisubordination is itself a mark of progress, for it surfaces the inquiries worth pursuing while anchoring these inquiries in a particular understanding of justice.

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129. See *supra* note 107 and accompanying text.

130. See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480–91 (2016).

131. See *supra* note 5 and accompanying text.

132. Although the vulnerable communities experiencing over- and underenforcement may be one and the same, as in much of Forman’s history, they are not always. Either way, structural inequalities are the central concern of an antisubordination theory, which views such inequalities as multidimensional and intersectional.

A criminal justice system that is unresponsive to marginalized communities' need for redress of violence affords unequal protection; our system of mass incarceration and its collateral effects perpetuate unequal citizenship. An antistatutory theory of criminal justice targets these failings simultaneously, insisting that the state's response to crime account for social inequalities so as not to compound them.