

## **“PRO-MINORITY” CRIMINALIZATION AND THE TRANSFORMATION OF VISIONS OF CITIZENSHIP IN CONTEMPORARY LIBERAL DEMOCRACIES: A CRITIQUE**

Ely Aharonson\*

*In this article, I offer a critique of contemporary trends in “pro-minority” criminalization policy, defined as criminal offenses that are specifically designed to protect women and minorities. I show that, in the late 1970s, a new paradigm emerged for thinking about the role of criminalization in minimizing patterns of social inequality. I trace the historical processes that led to the emergence of this new paradigm and discuss its inherent limitations in meeting its stated aims. The discussion shows that these limitations are rooted in the embedding of contemporary “pro-minority” criminalization policy within the broader frameworks of neoliberal policymaking, and in the inherent flaws of the new vision of citizenship upon which these models rest. I argue that the potential contribution of criminalization to the alleviation of social inequalities can only be realized within a vision of citizenship that is radically different from the one endorsed by neoliberal governments over the last three decades.*

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\*Lecturer, University of Haifa, Israel. I am grateful to professors Nicola Lacey, Robert Reiner, Jonathan Simon, and Peter Ramsay for their invaluable comments on an earlier draft of this paper, and for their precious advice and encouragement. The paper was presented at the LSE symposium on Citizenship and Criminalisation in Contemporary Perspective. I am grateful to the participants in this symposium for their illuminating comments and suggestions. The paper was completed while I was a visiting scholar at the Center for the Study of Law and Society, University of California, Berkeley, from whose rich intellectual life I benefited immensely.

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## INTRODUCTION

Over the last decades, social movements around the globe have increasingly resorted to criminalization campaigns as primary instruments for promoting greater social equality. Some of these campaigns have yielded a variety of new offenses specifically aimed at protecting women and minority groups (including hate crime, hate speech, stalking, and sexual harassment). Other campaigns have brought about radical reforms to pre-existing "pro-minority" offenses such as rape and domestic violence. This paper develops a critique of the role played by "pro-minority" criminalization in the political landscape of contemporary liberal democracies.<sup>1</sup> The theoretical stance of "critique," it should be emphasised, is not aimed at dismissing the merits of the social practice under scrutiny.<sup>2</sup> Rather, critique provides a form of inquiry that attempts to decipher the conditions of existence upon which a particular practice relies (such as its underlying normative assumptions or its modes of institutionalization) and to pinpoint the ways in which these conditions constrain its suitability to achieve its manifested aims.<sup>3</sup> Accordingly, my aim in offering a critique of "pro-minority" criminalization is neither to advocate the decriminalization of the conducts regulated under these new legal regimes nor to contest their harmfulness and wrongfulness. Rather, my goal is to utilize the explanatory and critical insights enabled by the theoretical stance of "critique" to identify the root causes (both conceptual and institutional) of their limited success in meeting their intended aims. By inquiring into their underlying assumptions regarding the desirable and feasible role of

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1. I use the term "pro-minority" criminalization to refer to criminal policies that are specifically designed to protect women and minorities. The term "pro-minority" seeks to depict the conventional way in which participants in this social practice represent the nature of such projects rather than to propose an evaluative claim. Indeed, one of the major goals of this paper is to rethink the extent to which such policies indeed serve the interests of their assumed beneficiaries.

2. Throughout the history of modern political and social thought, the theoretical stance of "critique" was employed not only for deconstructing the normative ideals of the Enlightenment and the institutional practices of the modern nation-state (the genres of critique epitomized by the work of Nietzsche, Foucault, and Althusser), but it was also used for reconstructing alternative modes of understanding and institutionalizing these ideals (as in the work of Kant and Habermas).

3. Wendy Brown & Janet Halley, Introduction, in *Left Critique of Left Legalism* (Wendy Brown & Janet Halley eds., 2002).

criminal law in tackling social inequality, I wish to contribute to our understanding of the structural ideological and institutional impediments that hinder the success of these new criminal categories in solidifying the protection of minority groups and in facilitating wider social reforms.

The new offenses of “pro-minority” criminalization have attracted lively scholarly debates in diverse areas of scholarship, including philosophical,<sup>4</sup> sociological,<sup>5</sup> historical,<sup>6</sup> and criminological<sup>7</sup> inquiry. However, the current literature has focused mainly on studying the structure and functioning of each of these new regimes of criminal regulation separately. Relatively little systematic work has been undertaken to probe the underlying ideas and common institutional features shared among these criminalization regimes.<sup>8</sup> My aim in this paper is to trace these shared patterns and to consider their interrelationships with concurrent political and social trends that have revolutionized how the idea of citizenship has been framed and institutionalized in contemporary liberal democracies. This historical contextualization will reveal that the transformative potential of various regimes of “pro-minority” criminalization (spanning distinctive patterns of social inequality, including gender, race, ethnicity, and sexuality) is bounded by a shared set of institutional and ideological constraints. These constraints are intrinsic to the new model of citizenship that has come to dominate the political culture of contemporary liberal democracies.

The historical thesis developed in this paper is that the post-1980 expansion of the scope and range of “pro-minority” criminalization reforms is rooted in the convergence between two momentous—and, in many respects, counterpoised—historical processes. The first process is the reformulation of the ideal of egalitarian citizenship following the decline of postwar welfarist ideology and the rise of the politics of recognition as a

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4. See, e.g., Heidi Hurd & Michael Moore, *Punishing Hatred and Prejudice*, 56 *Stan. L. Rev.* 1081 (2003).

5. See, e.g., James Jacobs & Kimberly Potter, *Hate Crime and Identity Politics* (1998); A. Saguy, *What is Sexual Harassment? From Capitol Hill to the Sorbonne* (2003).

6. See, e.g., Reva Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 *Yale L.J.* 2117 (1996); Orit Kamir, *Every Breath You Take: Stalking Narratives and the Law* (2001).

7. Jeannine Bell, *Policing Hatred: Law Enforcement, Civil Rights and Hate Crime* (2004).

8. For two notable exceptions, see Stanley Cohen, *The Object of Criminology: Reflections on the New Criminalization*, in *Against Criminology*, at 235 (1988); Mariana Valverde, *Identity Politics and the Law in the United States*, 25 *Feminist Stud.* 345 (1999).

salient model of progressive reform. The second process involves the intensified reliance of neoliberal governments on criminalization as a medium for political communication and regulation. In Section I, I will briefly characterize these two processes. In Section II, I will identify the dominant ideas and modes of institutional design that have reshaped "pro-minority" criminalization regimes since the early 1980s. I will then show that these dominant ideas and institutional arrangements have instilled many of the exclusionary elements of the politics of recognition and of the contemporary politics of crime into the ideological and institutional frameworks through which we now think about the possible contribution of criminalization to alleviating social inequalities. In particular, these exclusionary elements reflect the insulation of the politics of recognition from a broader vision of redistributive economic reform and its resonance with the populist creeds that suffuse the contemporary politics of crime. This observation will serve as the basis for an analysis, developed in Section III, of the main limitations of contemporary "pro-minority" criminalization policies in serving their intended empowering and transformative aims. The paper concludes by arguing that the promise of criminalization as a potential engine of egalitarian reform can only be realized within ideological and institutional frameworks that are radically different from those institutionalized by neoliberal governments over the last three decades.

### **I. "PRO-MINORITY" CRIMINALIZATION AND THE TRANSFORMATION OF POLITICAL CULTURE IN LATE-MODERN LIBERAL DEMOCRACIES**

Criminalization policies are always embedded within a broader network of the ideas and institutions that conjointly govern individual conduct and produce cultural meanings. Thus, the dramatic shifts that took place in recent decades in the policies and discourses of "pro-minority" criminalization reflect broader political, cultural, and institutional changes experienced by various liberal democracies during this period. Two large-scale historical processes were particularly influential in reshaping the contours of "pro-minority" criminalization: the reformulation of the ideal of egalitarian citizenship, and the increasing salience of crime as an issue of public concern and political mobilization. In this section, I will introduce a brief outline of these two processes.

### A. The Reformulation of the Ideal of Egalitarian Citizenship: From Redistribution to Recognition

The first historical process that transformed political discourses and legal policies related to minority victimization was the reformulation of the ideal of egalitarian citizenship in liberal democracies. Throughout the postwar decades, the dominant frameworks of egalitarian political reform focused on the alleviation of socioeconomic disparities. Although the institutionalization of these ideas took a much more extensive scale in Europe, policymakers on both sides of the Atlantic placed particular emphasis on the central role of government in counterbalancing and mitigating the polarizing tendencies of modern industrial capitalism.<sup>9</sup> As classically argued by T.H. Marshall, the postwar institutionalization of this egalitarian framework completed the gradual formation of a tripartite system of rights (civil, political, and social) that comprised the modern vision of citizenship.<sup>10</sup> For Marshall, the major catalyst for the development of the modern concept of citizenship was provided by the effort to reduce the significance of class as an impediment to equal membership in the polity (an effort driven by both ethical and pragmatic motivations to reconcile capitalism with democratization). Distinctively, in the late-modern era, as argued by Nancy Fraser, group identity (mobilized under the banners of gender, sexuality, race, and ethnicity) has supplanted class interest as the primary basis of political mobilization. Correspondingly, demands for recognition (of the distinct experiences and needs of members of these groups) have come to overshadow demands for economic redistribution.<sup>11</sup>

The post-1980s proliferation of “pro-minority” criminalization reforms was enabled by their salient place on the agenda of the politics of recognition. At the same time, I would argue, the intrinsic limitations of the politics of recognition in addressing the symbiosis between patterns of economic deprivation and patterns of cultural marginalization have impeded the suitability of these reforms to attenuate the predicament of minority victims. On the one hand, the defocusing of class has made room for the politicization of various nonmaterial forms of social harm to which minority groups are disproportionately subjected. It also allowed groups

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9. Daniel T. Rodgers, *Atlantic Crossing: Social Politics in a Progressive Era* (2000).

10. T.H. Marshall, *Citizenship and Social Class* (1992).

11. Nancy Fraser, *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (1997).

that were traditionally excluded from meaningful participation in criminal justice policymaking with new opportunities for mobilization. Consequently, since the 1970s, the criminal law has been operating within a rapidly changing cultural climate in which the legitimacy of various social practices hitherto conceived as noncoercive had been called into question.<sup>12</sup> The reform of criminalization policies served as both a mirror and a motor of the struggle of progressive social movements to delegitimize traditional racist, homophobic, and sexist norms. Drawing on a dominant view that perceives criminal law as a medium through which societies construct collective values and forge social solidarities,<sup>13</sup> social movements have intensified their strategic recourse to criminalization campaigns in order to gain official recognition of the entitlement of minority groups to equal concern and respect.

However, the proliferation of the politics of recognition over the last three decades has concurred with the marked exacerbation of wealth and income disparities in virtually all postindustrial societies. It is arguable that the predominance of the politics of recognition on the political agenda of progressive social movements has served, in the words of Nancy Fraser, "less to supplement, complicate and enrich redistributive struggles than to marginalize, eclipse and displace them."<sup>14</sup> Placed within this context, the mushrooming of "pro-minority" criminalization reforms epitomizes the transformative process by which liberal democracies have become, at one and the same time, increasingly concerned with particular forms of minority victimization (that is, forms of interpersonal violence through which individual bigots seek to reaffirm racist, sexist, and homophobic norms) and less inclined to alleviate the structural economic and demographic conditions within which such patterns of victimization thrive. As I will show in Section III, the fact that contemporary "pro-minority" criminalization policies are insulated from a broader vision of socioeconomic egalitarian reform has considerably compromised their capability to minimize victimization and to serve as a vehicle of political empowerment.

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12. Bernard Harcourt, *The Collapse of the Harm Principle*, 90 *J. Crim. L. & Criminology* 100 (1999).

13. Joel Feinberg, *The Expressive Function of Punishment*, in *A Reader on Punishment* 77 (R.A. Duff and D. Garland eds., 1994).

14. Nancy Fraser, *Rethinking Recognition*, 3 *New Left Rev.* 107 (2000).

### B. The Increasing Salience of Crime as an Issue of Public Concern and Political Mobilization

The recent flourishing of “pro-minority” criminal legislation was also driven by another defining trend of the political culture of late-modern societies: the emergence of crime as a major focus of public concern and political mobilization.<sup>15</sup> Until the 1970s, crime policymaking was effectively monopolized by professional experts and administrators.<sup>16</sup> Over the last three decades, however, with the growing influence of victim rights movements,<sup>17</sup> and the increasing salience of crime as an issue of fierce partisan competition through which politicians appeal to floating median voters,<sup>18</sup> this constellation had been radically transformed. Potentially, these developments appear to be conducive to the democratization of criminal justice policymaking and to a fuller representation of perspectives that were traditionally muted by ostensibly gender- and color-blind criminological theories and enforcement policies. However, in practice, the forms of grassroots and electoral mobilization that have gained prominence in contemporary crime policy debates have been widely criticized for their populist and authoritative aspects.<sup>19</sup>

The detrimental consequences of this transition have been most pronounced in the United States of America, where an inexorable combination of penal populism, “tough” policymaking, and public anxiety about crime have fomented a staggering fivefold increase in the prison population between 1975 and 2002.<sup>20</sup> In a less extreme yet deeply troubling manner, the problem of over-criminalization and excessive penalization is unmistakably felt in many other liberal democracies. In England and

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15. David Garland, *The Culture of Control* (2001); Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008); Robert Reiner, *Law and Order: An Honest Citizen's Guide to Crime and Control* (2007); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007).

16. Garland, *supra* n. 15, at 34.

17. Paul Rock, *Constructing Victims' Rights: The Home Office, New Labour, and Victims* (2004); Markus Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002).

18. Lacey, *supra* n. 15, at 66.

19. Garland, *supra* n. 15, at 9–14.

20. Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* 1 (2006).

Wales, although recorded levels of crime have been declining since the mid-1990s, not less than three thousand new criminal offenses were introduced by the New Labour government between 1997 and 2006,<sup>21</sup> and imprisonment rates increased by nearly 60 percent during this period.<sup>22</sup> In the Netherlands, the traditional beacon of penal moderation, the rates of imprisonment increased eightfold between 1975 and 2006.<sup>23</sup>

The burden of this increasing use of criminalization as an instrument of social ordering fell disproportionately on poor ethnic and racial minorities. Current figures from the United Kingdom indicate that the incarceration rates among ethnic minorities is more than triple their proportion of the general population, and that 74 percent of the imprisoned population were either unemployed or employed at the lowest occupational levels before their arrest.<sup>24</sup> Hence, this trend has served to counteract much of the inclusionary promise made possible by the remarkable development of support structures for civil rights mobilization in contemporary liberal democracies,<sup>25</sup> as well as by other extensions of the egalitarian struggles of the 1960s. The tendency to "demonize the criminal, and to act out popular fears and resentments"<sup>26</sup> rendered anticrime policy a legitimate outlet for giving vent to popular outcry against the allegedly "disruptive" consequences of civil rights reformism and of multicultural integrationist efforts.<sup>27</sup>

In summary, in this section, I depicted the two large-scale historical processes that led to the proliferation of activism and policymaking around the problem of minority victimization over recent decades. The underlying purpose of this exposition was to show that each of these two processes entail both inclusionary and exclusionary elements. As I will now move to demonstrate, some of the major paradoxes and unintended consequences of "pro-minority" criminalization policies are rooted in how

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21. Lacey, *supra* n. 15, at 177.

22. *Id.*

23. *Id.* at 145.

24. Reiner, *supra* n. 15, at 56.

25. Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (1998).

26. Garland, *supra* n. 15, at 137.

27. For a comparative analysis of American and European strands of exclusionary uses of criminalization and penalization, see Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (2008).



they incorporated many of these exclusionary elements, and installed them into dominant modes of institutionalizing the role of the state in tackling social inequality.

## II. "PRO-MINORITY" CRIMINALIZATION IN CONTEMPORARY LIBERAL DEMOCRACIES: DISTINCTIVE FEATURES AND THEIR CONDITIONS OF EXISTENCE

The idea of enacting criminal categories that are specifically aimed at protecting women and minorities is not a recent innovation. The origins of such legislation hark back to the early stages of the evolution of modern criminal law. For example, domestic violence was firstly statutorily criminalized in the mid-nineteenth century, when the common law approach that recognized the husband's right and duty to "rule and chastise" his wife so long as he used a "rod not thicker than his thumb" was formally repealed.<sup>28</sup> Wife beating was firstly statutorily criminalized in England in 1853 by the Act for the Better Prevention of Aggravated Assaults upon Women and Children.<sup>29</sup> The origins of hate crime legislation go back to the early nineteenth century, when criminal legislation specifically designed to protect slaves was enacted by antebellum Southern legislatures.<sup>30</sup> To be sure, long after the formal enactment of such legislation, *de facto* immunity for perpetrators of domestic and racist violence continued to prevail. These criminal categories were meagerly enforced in light of a combination of constraining legal doctrines (such as the constitutional restrictions on legal intervention in domestic violence on the ground of "family privacy") and the discriminatory exercise of discretion by agents of the criminal justice system.<sup>31</sup> Yet it might be misleading to portray the relationship between the past and present of "pro-minority" criminalization

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28. Lisa Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 *Harv. L. Rev.* 550, 557 (1999).

29. Martin Weiner, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* 157 (2004); this legislative model was adopted by American legislatures over subsequent decades. See Elizabeth Pleck, *Domestic Tyranny* 63 (2004).

30. Eugene Genovese, *Roll, Jordan, Roll: The World Slaves Made* 37-40 (1976).

31. Siegel, *supra* n. 6.

in Whiggish terms. Despite notable reforms in official policies, recent empirical studies reveal the persistence of conspicuously low rates of reporting, prosecutions, and convictions for virtually all categories of "pro-minority" offenses.<sup>32</sup> An analysis of the evidence reveals strong reasons to suspect that the translation of criminal law "in books" into crime enforcement "in action" continues to be systematically hampered by institutional factors rooted in long-standing legacies of racism and sexism.<sup>33</sup>

Although it is important to steer clear of overstating the extent to which current regimes of "pro-minority" criminalization are immune to the institutional shortcomings that obstructed the equal protection of women and minorities in the past, it remains possible to observe some distinctive features in how contemporary regimes of this sort frame the role of criminalization in tackling social inequalities. Over the last decades, the evolution of criminalization policies for governing racist, sexist, and homophobic violence has followed a similar trajectory. Until the early 1980s, "pro-minority" criminal categories focused on the prevention of physical violence. From then on, such categories have increasingly attempted to delegitimize deep-seated sexist, homophobic, and racist norms. This role is often presented as a self-standing justifying aim for the enactment of new categories, independently of whether they are likely to make a significant contribution to minimizing the occurrence of such conducts. In this section, I will discuss the nature of this paradigm shift and its historical conditions of existence.

#### **A. The Reshaping of Progressive Thinking about the Role of Criminal Law in Tackling Social Inequality**

The new regimes of "pro-minority" criminalization that emerged in the early 1980s in the United States reflected new ideas that gained currency among progressive scholars and activists at that particular historical moment. These ideas were associated with the critique offered by second-wave feminists and critical race theorists regarding the suitability of legal liberalism to provide

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32. Frances Heidensohn & Loraine Gelsthorpe, *Gender and Crime*, in *Oxford Handbook of Criminology* 381, 397 (Mike Maguire, Rod Morgan, & Robert Reiner eds., 2007); Coretta Phillips & Ben Bowling, *Ethnicities, Racism, Crime, and Criminal Justice*, in Maguire et al. eds., 421, 426.

33. See, e.g., Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. Pa. L. Rev. 2151, 2158 (1995).

minority groups with a satisfactory measure of legal protection. For instance, the anti-hate speech campaign showed how the liberal creed of nonintervention in the “free market of ideas” (underpinned by an analytically flawed distinction between speech and act) served to legitimate widespread social practices that play constitutive roles in reinforcing racist, sexist, and homophobic norms.<sup>34</sup> Likewise, the feminist campaign against domestic violence effectively called into question the sustainability of the liberal distinction between the public and the private spheres, and demystified the traditional imagery of the family home as a safe and protective environment.<sup>35</sup>

The concerns raised by second-wave progressive thinkers echoed a long tradition of external critiques of legal liberalism. This tradition harks back to Marx’s early reflections on the limitations of piecemeal legalistic reforms within a pervasively stratified social order.<sup>36</sup> However, in contrast with the traditional Marxist reluctance to pursue such reforms as long as the conditions for a revolutionary reconstruction of the social order are unripe, second-wave feminists devised a new strategic model of legal reform. This model rested upon a shift of focus from demanding the abolition of *de jure* obstacles to equal participation in political and social life (such as disenfranchisement, segregation, or ban on homosexual conduct) to calling upon the state to intervene to alleviate *de facto* manifestations of persisting discrimination under conditions of formal equality. It contested the fundamental premises of “equality as sameness” and legal impartiality around which earlier generations of progressive reformers had mobilized. As an alternative, this new model aimed to implant within the law the capacity to demystify a range of social practices constitutive of our patriarchal and racist culture and traditionally sheltered by liberal jurisprudence. As emphasized in the programmatic texts that set the agenda of this new wave of “pro-minority” criminalization campaigns (such as Catharine MacKinnon’s work on sexual violence<sup>37</sup> and Mary Matsuda’s work on hate speech<sup>38</sup>), the legal recognition of the harmfulness of such

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34. Catharine MacKinnon, *Equality and Speech*, in *Only Words* 69 (1993).

35. Jenny Suk, *Criminal Law Comes Home*, 116 *Yale L.J.* 5, 5–7 (2006).

36. Karl Marx, *Capital*, Vol. I (1976 [1867]).

37. Catharine MacKinnon, *Rape: On Coercion and Consent*, in *Toward a Feminist Theory of the State* 171 (1991).

38. Mary Matsuda, *Public Responses to Racist Speech: Considering the Victim’s Story*, 87 *Mich. L. Rev.* 2320 (1990).

practices was expected to grant credibility to victims' narratives of their experiences. In turn, it was hoped that such recognition would counterpoise the power of pervasive patriarchal and racist cultural norms to trivialize the harmfulness caused by these forms of conduct.

Consequently, the new criminal categories enacted since the early 1980s are more extensive vis-à-vis earlier offenses tackling sexist, racist, and homophobic violence in two main respects. First, these new offenses encompass not only the physical harm but also the emotional harm suffered by the direct victim.<sup>39</sup> For example, in English law, the recent scything of assault as the underlying precondition for offenses against the person in the stalking cases<sup>40</sup> and the constant expansion of legislation criminalizing the incitement of hatred into new areas of social antagonism (most recently, sexual orientation)<sup>41</sup> provide two primary examples. Second, the reasoning underlying such offenses tends to encompass the vicarious emotional injury that these conducts cause to all members of the minority community. For example, one of the most common rationales of hate crime legislation suggests that bigotry-motivated perpetrators are liable to enhanced penalties because, in addition to harming their direct victim, they also inflict emotional harm on other members of the victim's community.<sup>42</sup>

Leaving aside the controversy over the empirical validity of these arguments,<sup>43</sup> my concern in this paper is with identifying the conditions that facilitated their endorsement by policymakers in that particular historical moment. I would argue that these conditions were created as a result of the central place captured by the symbolic figure of the crime victim in contemporary public debates about social harm.<sup>44</sup> As David Garland notes, the victim has become a "representative character, whose experience is taken to be common and collective" so that "whoever speaks on behalf of the victim speaks on behalf of us all."<sup>45</sup> This mode of representation neatly befitted the MacKinnonite creed of feminist jurisprudence, which placed women's vulnerability to sexual objectification and exploitation at

39. Celia Wells, *The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection*, *Crim. L. Rev.* 503 (2004).

40. *R v. Ireland* [1997] 4 All E.R. 225; *R v. Burstow* [1998] 1 Cr App R 177.

41. *Criminal Justice Act 2003* (c. 44) s. 146.

42. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

43. Jacobs & Potter, *supra* n. 5, ch. 4.

44. Simon, *supra* n. 15, ch. 3.

45. Garland, *supra* n. 15, at 11.

the core of their collective identity and as the most focal object of feminist activism.<sup>46</sup> However, the need to conform to the representational logic of criminal law while framing the collective needs of minority groups has some attendant costs. As shown in Section III of this paper, these costs include the prioritization of penal “solutions” vis-à-vis other policy mechanisms for reducing social harm, an excessive focus on social harms that can be reconstructed through the offender-victim formula, and the reinforcement of disempowering stereotypes and the aggravation of the sense of ontological insecurity experienced by women and minorities themselves.

### **B. The New Modes of Institutionalizing “Pro-Minority” Criminalization**

Contemporary “pro-minority” criminalization policies depart from the legal regimes through which problems of minority victimization had previously been tackled not only in their reliance on a new set of ideas but also in how these ideas are being institutionalized. The transformation of these policies over the last three decades proceeded along two complementary trajectories. First, social movements have attempted to establish mechanisms for identifying and responding to minority victimization across various institutions of civil society by creating a continuum of disciplinary, tort, and criminal instruments of responsibility-attribution. For example, policies for combating sexual harassment are now routinely employed in the workplace,<sup>47</sup> and hate speech codes are enforced in schools and campuses.<sup>48</sup> Second, “pro-minority” criminalization campaigns attempted to mobilize tougher penal responses to patterns of minority victimization in order to enhance the deterrent and incapacitative effects of preexisting legal regimes.

This twofold transformation nests neatly into the broader reconfiguration of the landscape of crime control in late-modern societies. This reconfiguration entails, on the one hand, an increasing diffusion of responsibilities for identifying and responding to crime among institutions of civil society, governmental bureaucracies, and commercial providers of private security

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46. Catharine MacKinnon, *Consciousness Raising*, in *Toward a Feminist Theory of the State* 83 (1991).

47. Vicky Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683 (1998).

48. Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation* (2005).

products, and on the other hand, an expansion of the regulatory reach of official crime control institutions into new spheres of regulation, buttressed by a toughening in penal severity.<sup>49</sup> The incorporation of "pro-minority" enforcement practices into this reconfigured landscape of crime control had double-edged effects regarding the achievability of the egalitarian goals pursued by these campaigns. From one perspective, as the history of under-enforcement of "pro-minority" criminal legislation demonstrates all too well, the enactment of legal rules ascribing criminal responsibility remains futile in the absence of effective mechanisms to compel individuals (victims, witnesses, and crime control officials) to classify potentially prosecutable conducts as crimes and to facilitate their processing by the criminal justice system. At the same time, when such policies are routinely adopted by governmental and nongovernmental institutions and organizations, their application gradually comes to reflect the interests and priorities of these institutions rather than the original concerns of their initiators. It is this dynamic of cooptation that led Nietzsche to observe that "liberal institutions cease to be liberal as soon as they are attained."<sup>50</sup> Nietzsche's observation seems to be corroborated by many recent studies regarding the implementation of such policies. For example, in her analysis of the various disciplinary functions played by sexual harassment schemes in regulating workers' conduct (ranging from managerial strategies for optimizing employee productivity to the regulation of non-heterosexual expressions), Vicky Schultz has shown how employers effectively expropriated these policies for furthering capitalist and conservative values.<sup>51</sup>

The problem of cooptation becomes even more troubling when "pro-minority" policies are harnessed to extend the regulatory reach of the state's police power and to legitimize problematic trends in penal policy. Notably, major reforms in this field were designed in accordance with highly problematic (yet politically popular) strands in criminal justice policymaking. For instance, the design of hate crime policies echoes the

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49. Ian Loader & Richard Sparks, *Contemporary Landscapes of Crime, Order and Control: Governance, Risk and Globalization*, in *Oxford Handbook of Criminology* 78 (Mike Maguire, Rod Morgan, & Robert Reiner eds., 2007).

50. Friedrich Nietzsche, *Twilight of the Idols*, in *The Portable Nietzsche* 541 (W. Kaufman ed. & trans., 1976).

51. Schultz, *supra* n. 47.

broader model of determinate sentencing reform, a legislative trend whereby, in the words of David Garland, “legislatures are becoming more ‘hands on,’ more directive, more concerned to subject penal decision-making to the discipline of party politics and short-term political calculation.”<sup>52</sup> New modes of domestic violence enforcement (mandatory arrests and “no drop” prosecutions) replicate broader strategies of zero-tolerance policing. These modes of institutionalization originally emerged in the United States, but they have been increasingly adopted by other legal systems over the last two decades in light of broader trends toward cross-national policy convergence in criminal justice policymaking. As I will now move to show, the degree to which “pro-minority” criminalization policies came to be embedded within these broader strategies and rationalities of crime control has generated a cluster of obstacles to their ability to advance their intended inclusionary goals.

### **III. RETHINKING THE SUITABILITY OF “PRO-MINORITY” CRIMINALIZATION TO STIMULATE PROGRESSIVE SOCIAL CHANGE: A CRITIQUE**

After depicting the normative underpinnings and the institutional patterns of existing “pro-minority” criminalization policies, we can now move to develop a more systematic account of the structural limitations of these policies. The following discussion can be described as an internal critique in the sense that it shares the ultimate goals pursued by these campaigns yet raises a cluster of concerns regarding the achievability of those goals. These concerns are informed by the analysis of the ideological and institutional features of existing “pro-minority” criminalization regimes, as developed in the previous sections.

#### **A. The Role of “Pro-Minority” Criminalization in Legitimizing Forms of Exclusion Embedded within the Neoliberal Model of Public Policy**

The increasing investment of progressive social movements in mobilizing “pro-minority” criminalization reforms is underpinned by a belief in the suitability of such campaigns as vehicles of political empowerment. These

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52. Garland, *supra* n. 15.

campaigns are often perceived as tactical means for attracting public attention to the broader patterns of discrimination and deprivation to which these communities are subjected. The increasing salience of crime as an issue of media coverage and electoral mobilization has provided progressive movements with favorable opportunities for such mobilization. However, in a political culture in which "governing through crime" seems to overshadow alternative modes of reconstructing and acting upon social problems,<sup>53</sup> the salience of such campaigns may divert public attention away from structural patterns of social marginalization that cannot be effectively framed in terms of crime (for example, those that cannot be attributed to the intentional activities of an individual perpetrator, or cannot be policed effectively).<sup>54</sup>

The claim that "pro-minority" legal reforms may reinforce broader structures of social inequality is far from new. What deserves special attention today is the study of the distinct challenges of legitimation faced by the new configuration of politics in contemporary liberal democracies, and the functions played by "pro-minority" criminalization policies in tackling these challenges. In this context, the increasing alacrity of legislatures to reassert the commitment of the state to eliminating insecurities caused by bigotry-motivated offenders resonates with what Zygmunt Bauman described as a "transfer of anxiety," in which the retreat of governments from regulating the large-scale systems of harm production built into contemporary modes of capitalist production has increased the amount of political capital invested in crime policymaking. For Bauman, this process stems from the functionality of law and order politics as a "highly dramatic, tangible and visible" symbol of governmental competence.<sup>55</sup> These symbolic qualities render criminalization an effective tool for reinforcing public trust in the power of government to maintain order and security in an era in which the actual regulatory capacities of governments have been eroded significantly.<sup>56</sup>

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53. Simon, *supra* n. 15, at 4.

54. Paddy Hillyard & Steve Tombs, *Beyond Criminology?*, in *Beyond Criminology: Taking Harm Seriously* (Paddy Hillyard, Christina Pantazis, Steve Tombs, & Dave Gordon eds., 2004).

55. Zygmunt Bauman, *Social Uses of Law and Order*, in *Criminology and Social Theory* 23, 37 (David Garland & Richard Sparks eds., 2000).

56. See also David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 *Brit. J. Criminology* 445 (1996).



The decline in governments' regulatory capacities was brought about by a combination of technological developments, ideological shifts, and policy choices.<sup>57</sup> The demise of Keynesianism and the rise of neoliberal governance of poverty and social marginality have exposed the lower socioeconomic strata (in which racial and ethnic minorities are disproportionately represented) to aggravated conditions of economic insecurity and social exclusion.<sup>58</sup> To the extent that the media and political resonance of the prolific campaigns against hate crime, hate speech, and stalking had adversely served to divert public attention from the more consequential mechanisms of harm production to which poor women and ethnic minorities are disproportionately exposed within the structure of the post-Keynesian economy, the proliferation of "pro-minority" criminalization played a double-edged function in shaping the agenda of egalitarian social reform.

#### B. Displacing Nonpunitive Responses to Minority Victimization?

The second pitfall of the current salience of "pro-minority" criminalization as a focus of progressive activism is that criminal legislation may displace more effective and comprehensive policy responses to the problem of minority victimization. As Nicola Lacey and her colleagues point out, although "empirical evidence suggests that the reductive effects of criminal processes . . . are meagre, and casts doubt on the validity of characterising criminal law primarily in instrumental terms . . . [n]onetheless, it may be that a widespread *belief* in the instrumental efficacy and necessity of criminal law is something which typically underpins its existence."<sup>59</sup> In the current political epoch, in which electoral incentives to conform to a "tough on crime" posture have become decisive, politicians are increasingly inclined to opt for expressive (and excessive) penal responses to problems of minority victimization, even when criminological research warns against the futility or even the counterproductiveness of such policies.<sup>60</sup> At the same time, the development of welfarist responses, which

57. Reiner, *supra* n. 15, at 3–6.

58. William Julius Wilson, *The Truly Disadvantaged: Inner City, The Underclass, and Public Policy* (1990).

59. Nicola Lacey, Celia Wells, & Oliver Quick, *Reconstructing Criminal Law: Text and Material* 10 (3rd ed., 2003).

60. Lacey, *supra* n. 15, at 75.

may be more capable of reducing the socioeconomic factors that cultivate patterns of minority victimization, has been considerably constrained by the political decline of social-democratic welfarism.

The enactment of new criminal legislation is perceived by policymakers as being less costly in fiscal terms and more effective in reassuring the public that a firm governmental response has been taken. However, the actual suitability of penal-centered policies to reduce the occurrence of minority victimization is highly questionable. Recorded rates of both victimization and offending in most categories of criminality (including categories of minority victimization) are considerably higher in poor urban areas, where economic exclusion and cultural disintegration breed interpersonal violence and impede victims from resorting to criminal justice agencies.<sup>61</sup> This implies that a comprehensive policy framework for tackling patterns of minority victimization should integrate both instruments that alleviate socioeconomic criminogenic conditions as well as instruments that deter and incapacitate individual perpetrators. Although there is still a considerable degree of cross-national differentiation in the extent to which policymakers are incentivized (electorally) and capable (institutionally) of shaping "pro-minority" criminalization policies in ways that maintain this delicate balance between penal and welfarist responses,<sup>62</sup> the global diffusion of neoliberal models of policymaking has pushed toward prioritizing the former as the lynchpin of policymaking in this field.

For example, the dynamics of displacement are noticeable in the transformation of domestic violence policy over the last three decades. The reform of policing, trial procedure, and doctrinal arrangements that had traditionally precluded the legal system from holding husbands accountable for abusing their wives has been a salient issue of feminist concern since the 1970s. However, as shown by feminist critics of the dominant sexual victimization agenda, the increasing penalization of domestic violence has been embedded within a broader shift from welfarist to penal-centered governance of marginalized populations.<sup>63</sup> This shift has

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61. John Lea & Jock Young, *What Is to be Done about Law and Order?* (1984); J.Q. Wilson, *More than Just Race: Being Black and Poor in the Inner City* 27 (2009).

62. Lacey, *supra* n. 15.

63. Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated The Feminist Movement Against Sexual Violence* (2008); Linda Mills, *Insult to Injury: Rethinking Our Responses to Intimate Abuse* (2003).

generated two major pitfalls: the first stems from the counterproductive effects of excessive reliance on penalization as a putative solution to complex social problems; the second derives from the underdevelopment of welfare responses to these problems. Regarding the former, studies demonstrate that, because of their inflexible design, mandatory-arrest domestic violence policies expose battered women who fail to live up to the image of the “ideal victim” (as a “weak, respectable, and innocent person harmed by the big, bad stranger”)<sup>64</sup> to a higher risk of arrests and bureaucratic intrusion. Particularly with regard to victims who are poor and belong to racial minorities, these policies often result in dual arrests (and in risking victims’ probation or parole status).<sup>65</sup> Moreover, the installation of mandatory schemes of processing suspected cases of domestic violence across governmental and civil society institutions frequently results in victims being subjected to stricter surveillance by welfare bureaucracies, as when the psychological harm suffered by victims of domestic abuse is taken to indicate their unfitness for motherhood.<sup>66</sup>

At the same time, the increasing conditionality of eligibility for welfare under neoliberal policies has reduced the availability to battered women of a wide range of social services necessary for tackling the socioeconomic dimensions of this problem. This lack of focus on developing nonpenal forms of redress seems misguided given the fact that recorded rates of domestic violence are considerably higher among populations that suffer from poverty and social marginalization.<sup>67</sup> Recent ethnographic research suggests that prevailing patterns of domestic violence are fomented by the destabilizing impacts of shifts in the political economy on family and community structures in poor inner-city areas. Tackling these root causes of domestic violence necessitates the integration of various policy instruments capable of attenuating these problems of economic deprivation and cultural disintegration, rather than simply increasing the severity of penal responses. It is highly questionable whether such policies can be adequately

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64. Carolyn Hoyle & Lucia Zedner, *Victims, Victimization, and Criminal Justice*, in *Oxford Handbook of Criminology* 461, 464 (Mike Maguire, Rod Morgan, & Robert Reiner eds., 4th ed., 2007).

65. Donna Coker, *Race, Poverty, and Crime-Centred Responses to Domestic Violence*, 10 *Violence Against Women* 1331 (2004).

66. Bumiller, *supra* n. 63, at 131.

67. *Id.* at 80.

developed within the prevailing institutional frameworks of welfare and crime governance.

### C. The Over-Production of Fear of Crime?

One of the major goals of "pro-minority" criminalization campaigns is to provide women and minorities with a greater sense of personal safety. Proponents of such campaigns hope that, by spotlighting the enhanced vulnerability of women and minorities to victimization, they can initiate policy responses that would gradually alleviate their sense of ontological insecurity. However, our assessment of the achievability of this goal must take into account the insights provided by the sociological literature on fear of crime with regard to the anxiety-inducing effects of law-and-order crusades.<sup>68</sup> Within this context, "pro-minority" criminalization may be prone to foster what Lucia Zedner has pinpointed as one of the paradoxes of the pursuit of security: its tendency to increase anxiety while promising reassurance.<sup>69</sup> As Zedner notes, "given that the pursuit of security . . . aims to improve quality of life by increasing individual and collective perceptions of safety, it is a deep irony that, by alerting citizens to risk and scattering the world with visible reminders of the threat of crime, it tends to increase subjective insecurity."<sup>70</sup>

One of the major sources of this paradox lies in the ambiguity inherent in the neoliberal approach to fear of crime. On the one hand, fear of crime is regarded as a setback that should be curtailed through strategies of actuarial risk management, situational crime prevention, and the intensification of penal interventions.<sup>71</sup> At the same time, it is acknowledged that—when contained at certain levels—fear of crime plays a "constructive" role in inducing individuals to take precautionary measures and to adopt prudential strategies for apprehending risk and minimizing their vulnerability to victimization.<sup>72</sup> This neoliberal creed can be rationalized as an adaptive strategy whereby crime policymakers both recognize and maneuver the basic

68. C. Hale, *Fear of Crime: A Review of the Literature*, 4 *Int'l. Rev. Victimology* 79 (1996).

69. Lucia Zedner, *Too Much Security?*, *Int'l J. Soc. Law* 155, 163–66 (2003).

70. *Id.* at 163.

71. Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *The Futures of Criminology* 173 (David Nelken ed., 1994).

72. Garland, *supra* n. 15, at 125.

notion that the effectiveness of formal crime control processes crucially depends on the operation of informal controls across civil society.<sup>73</sup> However, these campaigns inevitably produce some attendant costs on their assumed beneficiaries, not least because the pursuit of such strategies is so heavily colonized by political and commercial actors who magnify the level of risk and overplay the extent to which tougher penalties or private security products are indeed capable of removing these threats.

To the extent that the political momentum of “pro-minority” criminalization campaigns was facilitated by the salience of fear of crime in contemporary popular and political culture, these campaigns may have shaped dominant perceptions of the threats to which women and minorities are exposed in a highly problematic manner. As argued by feminist criminological literature, by specifically targeting women while communicating the pervasiveness of threats and inducing them to adopt risk-averse measures, such campaigns might have inflated individual anxieties to a level that induces self-imposed abstinence from ordinary activities.<sup>74</sup> As David Garland notes, governments’ efforts to “responsibilize” citizens by prodding them to minimize their vulnerability to the risk of victimization serves not only as a rational strategy for supplementing the scarce institutional resources of official policing apparatuses (as noted above) but also as a convenient apologetic whereby governments legitimate their insufficient achievements in preventing such harms by tacitly ascribing them to individuals’ failure to take adequate precautionary measures.<sup>75</sup>

Some sites of feminist, queer, and critical-race mobilization around problems of victimization are more prone than others to produce, on balance, excessive degrees of anxiety. For example, Wendy Brown has argued that the tendency of such campaigns to frame a vision of progressive reform that revolves around the legal recognition of women’s and minorities’ status as injury bearers may generate forms of individual and group consciousness fully invested in reiterating their own powerlessness.<sup>76</sup> In turn, the widespread internalization of this stance of asserting one’s powerlessness might

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73. *Id.* at 131.

74. Elizabeth A. Stanko, *Safety Talk: Conceptualising Women’s Risk Assessment as a “Technology of the Soul”* 1(4) *Theoretical Criminology* 479 (1998).

75. Garland, *supra* n. 15, at 131.

76. Wendy Brown, *States of Injury*, at 27 (1995).

reinforce the very same assumptions of patriarchal paternalism that feminist struggles sought to eradicate. As Kristin Bumiller has argued, the penal-centered agenda of domestic violence campaigns have unwittingly reproduced traditional notions of women's dependency on male protection within the symbolic domain in which the political relationship between women and the state is being imagined.<sup>77</sup> In this context too, "pro-minority" criminalization functions, in Jonathan Simon's phrasing, as a "spiral of knowledge and power that enables, empowers and produces as much as it represses, incarcerates and stigmatizes."<sup>78</sup>

## CONCLUSION

In this paper, I depicted the contours of the criminalization regimes through which some major problems of minority victimization are being enforced and penalized in contemporary liberal democracies, and traced their ideological and institutional conditions of existence. This investigation allowed the identification of a cluster of structural limitations that compromise the suitability of these criminalization regimes to fulfil their intended goals as vehicles of harm reduction, political empowerment, and cultural transformation. I have shown that some of the shared drawbacks of these regimes are rooted in the structural transition that crystallized in the early 1980s between two radically different models of thinking about the role of the state in tackling crime and inequality. In the postwar era, both criminal justice policymaking and egalitarian struggles were embedded within the social democratic vision of citizenship, which prioritized redistributive and welfarist policies as the paramount vehicles of social reform. I have demonstrated how various symptoms of the demise of the postwar vision of citizenship (including the proliferation of the politics of recognition and of victim-rights mobilization, and the institutional shifts associated with the implementation of neoliberal models of economic and criminal governance) created conditions that simultaneously facilitated the enactment of new forms of "pro-minority" criminal legislation and constrained the ability of such legislation to stimulate progressive social change.

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77. Bumiller, *supra* n. 63, at 96–97.

78. Simon, *supra* n. 15, at 191.

This contextualization of the inherent limitations of contemporary “pro-minority” criminalization policies highlights the historical contingency of their current predicaments. This analysis has recognized the emancipatory potential that is latent in the success of social movements to induce greater public awareness of forms of minority victimization traditionally ignored by policymakers. However, I have demonstrated that such potential can only be realized within ideological and institutional structures radically different from those that prevailed in the late-modern liberal democracies of the last three decades. The current crisis of neoliberalism opens new possibilities for the reconfiguration of these structures. Although it is too early to specify the new forms to be taken by penal and welfarist policies and discourses even in the near future, it is possible to envision the future decline of some of the major creeds of neoliberal ideology (not least, the resistance to state-sponsored intervention in economic and labor relations). If such structural transitions will indeed crystallize, “pro-minority” criminalization would not necessarily play the same counterproductive functions it performed over the last decades. The success of liberal democracies in moving toward a fuller realization of the egalitarian ideals pursued by this legislation will crucially depend on their ability to integrate those ideals into a wider vision of progressive reform. This vision must be informed by a more holistic understanding of the relationships between socio-economic deprivation, cultural marginalization, and victimization.