

VICTIMS AND OFFENDERS
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INTRODUCTION

The criminal law is often assumed to be one of the less “gray” areas of the criminal law. Rather than nuanced relationships between complex parties, criminal law has good guys and bad guys. There is no dividing up the bundle of sticks (property law), balancing various interests and rights (constitutional law due process analysis), multi-factored tests (best interests of the child in family law). Instead victims and offenders are easily distinguished and merit radically different legal treatment.

This standard account does not, however, convey the whole picture. There are numerous contexts in which the binary of victim and offender is not so clear cut/has fuzzy edges. The designation of victims and offenders in these contexts is more about role policing than about culpability or harm-prevention.

I. THE VICTIM-OFFENDER OVERLAP

The victim-offender overlap is defined as “the link between victimization and the perpetration of crime and delinquency.”¹ Put simply, offending is victimogenic and vice versa.

A. *History of Victimology*

Historically, the victim was largely a private concept, and as punishment became more and more a public function, the victim had little to no formal standing.

The victims’ rights movement began in the 1970’s and, since then, both the concept/status of victimhood and the procedural rights and relief accorded victims have dramatically changed. Feminists played a role in this process by arguing that domestic violence, sex abuse, etc. should not be viewed as private family problems, but rather as public problems. Conservatives advocating for tougher crime policies at the same time also contributed to this transformation. They “began rhetorically to paint ‘the victim’ as a

¹ Jennifer M. Reingle, *The Victim-Offender Overlap*, in THE ENCYCLOPEDIA OF THEORETICAL CRIMINOLOGY 1-3.

sympathetic figure whose rights and interests could be used to counterbalance the defendant’s rights[.]”²

B. *Theory of V/O Overlap (and Gaps in the Theory)*

Criminologists have paid increasing attention in recent years to the victim-offender overlap. Most studies have focused on violent crimes, such as assault and homicide, the vast majority of which are committed by adolescent and young adult males.³ Accordingly, many of these studies focus on neighborhood and “cultural” factors which lead to high rates of victimization and offending in certain communities.⁴

Theories as to its causation and application to certain groups, however, remain lacking.⁵ The first is where the overlap is not sequential but rather for the same conduct or incident. A party’s conduct could be construed to make him a victim or an offender (perhaps to varying degrees). Second, is the role of police in designating, even constructing, victims and offenders.

Although the overlap plays out in gendered ways, its application to girls women is also undertheorized.⁶ Female offending is very different than male. Most women in the criminal justice system have been victimized in the past, usually at home, and women convicted of violence are overwhelmingly alleged to have harmed someone in their family (broadly defined)—a husband, partner, or child. Family roles accordingly function both as a major pathway into the criminal justice system for women, and as a significant site of their victimization.

² Lynne N. Henderson, *The Wrongs of Victims Rights*, 37 *Stan. L. Rev.* 937, 949 (1985).

³ See e.g. OJJDP 2002 study. Victimless crimes, such as prostitution, have also been not been much studied or theorized.

⁴ See e.g. Mark T. Berg et al, *The Victim-Offender Overlap in Context: Examining the Role of Neighborhood Street Culture*, 50 *Criminology* 359 (2012); Elijah Anderson, *Code of the Street* (1999).

⁵ Christopher J. Schreck & Eric A. Stewart, *The Victim Offender Overlap and Its Implication for Juvenile Justice*, in the *Oxford Handbook of Juvenile Crime and Juvenile Justice* (2011). Some researchers divide parties to a criminal incident into three categories, “pure victims, pure offenders, and victim-offenders.” See e.g. Marsh at 39.

⁶ There is a small number of recent efforts to research the V/O overlap in IPV cases. See *infra* at.

II. CONTEXTS

This Part will examine the victim/offender overlap in four contexts.

A. *Mutual Liability*

Historic mutual liability crimes such as adultery, sodomy and fornication were mostly based on sexual conduct. These crimes have been abolished in most jurisdictions, or are underenforced. Two crimes remain, also focusing on sexual conduct or conduct between intimate partners and family members: statutory rape between two minors and intimate partner violence (IPV).

1. Statutory Rape Between Two (or more) Minors

Originally a crime focused on paternal property interests in young girls’ chastity and concomitant marriageability, statutory rape continues to embody gender and sexuality norms more than perhaps any other crime.⁷

More recently, statutory rape laws are intended to protect young people from exploitation by adults. Nonetheless, prosecutions of otherwise consensual sexual encounters between two minors routinely occur. Illustrating this is an incident this winter in Brown Deer, Wisconsin. Four or five middle schoolers (13 yo) had a “sex” party, otherwise consensual sex, and filmed themselves. A teacher learned of this and called the police. All the youth involved were arrested and charged because, as the local police chief said, “We’re trying to send a clear message that this type of behavior isn’t going to be condoned by law enforcement, nor school officials, nor shouldn’t be by parents, really, when we’re talking kids that are middle-school age.”⁸

A handful of recent state high court cases reversed delinquency adjudications of statutory rape where

⁷ See discussion *infra*.

⁸ *Four Brown Deer Teens Facing Charges After “Sex Party,” Washington Times (Thursday, January 29, 2015)* <http://www.washingtontimes.com/news/2015/jan/29/4-brown-deer-teens-facing-charges-following-sex-pa/>

both the purported victim and purported offender were within the zone of the statute’s protection.⁹ In doing so, they identified a number of concerns including the inconsistency of prosecuting a juvenile for having sex with the purpose of the statutes to protect children largely from exploitative adults, and the risk of selective enforcement by police and prosecutors.

Courts found harms both where one child was designated the victim and one the offender, as in DB and G.T., and where both were labeled both in concurrent cases, such as ZC. “[I]s it even rational to assume that E.R. can be both a ‘child/victim’ and an ‘offender’ under the law? . . . If it [is] then prosecutors wield an extreme, unchecked power to bully very young children.” The ZC court also expressed this concern, finding the statute absurd “where no true perpetrator or victim exists [where both minors were charged]. And the State may not create a perpetrator and a victim through selective prosecution.”¹⁰ Finally, the G.T. court opined that charging a child within the age of the statute renders “every sexually active child under fourteen years of age a child abuse victim, perpetrator, or both.”¹¹

Numerous rationales support these conclusions. The prosecutions were inconsistent with legislative intent, given that the primary purpose of statutory rape statutes is to “protect the moral integrity of the child,”¹² primarily from adult exploiters, and that the statutes presume that children below a certain age cannot consent.¹³ Cases where only one child was charged, such as DB, raised concerns about discretion or

⁹ See *In re DB*, 129 Ohio St.3d 104 (2011) (striking as unconstitutionally vague Ohio’s statutory rape statute when applied to prosecute a 12-year-old boy for sex with an 11-year old-boy and also finding the statute as applied to the 12-year-old to violate equal protection); *In re ZC*, 165 P.3d 1206 (Utah 2007) (reversing a delinquency finding against a 13-year-old girl for statutory rape of a 12-year-old boy and vice versa, where each child was the victim in one case and the offender in another); *In re G.T.*, 758 A.2d 301 (Vt 2000) (reversing a delinquency adjudication against a 14-year-old boy for statutory rape of a 12-year-old girl). The DB and GT Courts both broadly held that statutory rape prosecutions are inapplicable where the alleged offender is also under the age of consent, i.e. a potential victim. 758 A.2d at 309; 129 Ohio St.3d at 108. The ZC Court limited its ruling to sexual encounters between two minors “where no true victim or perpetrator can be identified.”

¹⁰ See also ZC at 1213 n. 10

¹¹ 758 A.2d at 304.

¹² ER

¹³ For instance, one of the cases takes notice of the state’s “Romeo and Juliet” rendering statutory rape penalties less severe for those closer in age. See E.R. at xx. The prosecution of children for statutory rape would also chill young people from seeking reproductive health care and would require mandated child abuse reporters to report any

unfair enforcement, although these concerns were also expressed in all of the cases. Finally, cases such as ZC, where both children were charged raise the specter of overcriminalization, where neither is a “real” victim or “real” offender and the prosecutor is maximizing convictions by relying on a strict liability crime like statutory rape rather than proving what he was really concerned about, forcible rape. As the court put it, “In this situation, there is no discernible victim that the law seeks to protect, only culpable participants that the law seeks to punish.”¹⁴

Many states already treat adolescent statutory rape differently, with so-called “Romeo and Juliet” exceptions. Most, however, do not decriminalize this all together, but rather merely impose less severe penalties for those closer in age. Some states also do not include these exemptions as to same-sex sexual conduct (e.g. anal intercourse or sodomy).¹⁵

2. Intimate Partner Violence “Mutual Combat”

A fast-growing crime deemed one of mutual culpability is intimate partner violence (IPV) where both parties assault the other. These incidents represent a significant portion of IPV arrests and prosecutions. This pattern does not just occur when both parties assault in one incident. In contrast, victims in original IPV incidents, overwhelmingly women, in latter incidents “switch[] roles and bec[o]me IPV offenders in at least one subsequent criminal IPV incident.”¹⁶ A few of them “switched roles” on the fourth or fifth IPV report, having been designated victims on all of the prior ones.¹⁷ Similarly, women are frequently arrested for IPV even where they inflict much less serious injuries than men do or display indicia of victimhood/self-defense. IPV now represents a significant pathway into the criminal justice system for women.

voluntary sexual activity between minors. G.T., 758 A.2d at 307.

¹⁴ 165 P.3d at 1212.

¹⁵ See e.g. Alabama, California, Kentucky

¹⁶ See Muftic et al. at 13 (reporting findings that 26% of victims in the original IPV incident switched to offenders in later incidents).

¹⁷ Id. at 20.

Recently, a few researchers have looked at the V/O overlap in intimate partner violence.¹⁸ Some researchers posit a theory of “mutual combat” IPV with both parties in a relationship being equally culpable as offenders, and equally likely to be victims and offenders.¹⁹ Others, however, have found a gender disparity in the overlap, seeming to support theories that many women arrested for IPV have been the victims on prior reports and are acting defensively, and that even in mutual cases, most women inflict far less severe injuries.²⁰ Finally, there are more general findings that the large majority of girls and women involved in the criminal justice system have previously been victimized, which may contribute to their offending.²¹

This pattern reflects in part unintended consequences of feminists’ successful efforts to reframe family violence as a crime, of public not private concern.²² (Or perhaps they reflect the intended policies of some law enforcement and other decisionmakers?) As a result, many feminist scholars and activists are rethinking carceral approaches to family violence, and specific policies such as mandatory arrest policies.²³ Few courts, however, have explicitly recognized the problems with mutual restraining orders/arrests.²⁴

B. *Double-Sided Coin/Chameleon Conduct*

A second area where the victim/offender designation is problematic is conduct that, seen one way, can render the actor an offender, seen another way, can make her a victim.²⁵ This confusion—where the same acts are covered by multiple statutes with wildly varying results—reveals the contested nature of certain conduct, such as the commercial sex industry, and adolescent, particularly female adolescent, sexual activity.

¹⁸ See e.g. Erin Marsh, *Victim Offender Overlap in Intimate Partner Violence*, GSU (2011)

¹⁹ *Id.* at 26-27.

²⁰ Susan Miller, *Victims as Offenders: The Paradox of Women’s Violence in Relationships*;

²¹ Meda Chesney-Lind; *Correctional Association Statistics*.

²² Aya Gruber, *The Feminist War on Crime*.

²³ Leigh Goodmark. *When Is a Battered Woman Not a Battered Woman: When She Fights Back*

²⁴ But see *Murphy v. Okeke*, 951 A.2d 783, n. 9 (2008) (quoting the trial court dissent that “Mutual restraining orders are common, but very bad practice.”)

²⁵ The conduct becomes like the famous optical illusion drawings—seen one way the drawing is of a “beautiful young woman,” seen another way it depicts an “old hag.”

1. Prostitution and Trafficking/Sexual Abuse (if Minors)

Moreover, the conduct in these cases in almost all jurisdictions can and does lead to designation as either a victim or an offender, so police discretion plays a major role. Minors in the commercial sex industry are per se victims both under statutory rape laws and federal trafficking law (and with coercion, adults may be under federal and state trafficking laws). The majority of girls and young women in the commercial sex industry have a history of sexual or physical abuse, which is often connected to their entry into prostitution. Yet most continue to be identified only as offenders by police, courts and others. Identification as an offender erases victimhood. For instance, customers of prostituted minors are not prosecuted for statutory rape, but instead, if at all, on the much lighter charge of purchasing sex.

2. Sexting and Child Pornography

Minors are being prosecuted for sexting—taking and/or sending naked pictures of themselves—under child pornography laws intended to protect them, often incurring significant criminal penalties and stigma including registration as sex offenders.²⁶

C. A More Worthy Victim/Out-Victim

1. Maternal Failure to Protect

“Failure to protect” cases are where parents and caregivers are prosecuted for failing to protect their children from abuse by another. It is one of the very few areas of omissions liability, with the vast majority of those charged and convicted being women. In a comprehensive study of the interaction of family status and criminal law, scholars described these cases as “the most common scenario” where family status, almost

²⁶ See Amy Adele Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy and Consent* (2015) (collecting cases).

always motherhood, led to criminal liability. (They termed it a “family penalty”).²⁷

Even women who are themselves victims, either at the hands of the same abuser or as children, are more often deemed offenders. For instance, some courts have precluded expert testimony on battering in failure to protect trials. Women are often accused as offenders when they seek help for domestic violence or housing. Maternal status not only creates criminal liability but also leads to particularly harsh sanctions. As Naomi Cahn notes, “[b]ecause women are so closely identified with their children, they are treated particularly harshly for alleged crimes against [them].”²⁸ Fathers, on the other hand, are held to a much lower standard—the “draftees versus volunteers” family framework seeps into the criminal law. Indeed, numerous women found guilty of failure to protect are more severely punished than the person to be protected against—the abuser or murderer himself.²⁹

2. Child Pornography v. Sexual Abuse/Commercially Sexually Exploitation of Children (CSEC)

Courts and scholars have both documented that child pornography possessors are sentenced more harshly than those who actually abuse minors. This is particularly true in the case of the least “innocent” child abuse victims, commercially sexually exploited children.

D. *Missing Victims*

1. Drug Offenses

2.

²⁷ Collins et al, *Punishing Family Status*, 88 B.U. L REV 1327, 1370.

²⁸ Naomi Cahn, *Policing Women: Moral Arguments and the Dilemma of Criminalization*, 49 DEPAUL L. REV. 817, 818 (2000).

²⁹ See e.g. Collins et al at n. 20 (discussing a case where the mother was convicted of failing to protect her child for leaving him with her boyfriend, while the boyfriend was acquitted of all homicide charges).

III. TYPOLOGY OF VICTIMHOOD/DESIGNATING VICTIMS AND OFFENDERS

This Part will first outline the structural factors contributing to the problematic designation of victims and offenders in the contexts outlined above. It identifies inculpatory and exculpatory qualities. These qualities inform us as to what incites punishment and what pity. Identifying this typology of victimhood also reveals the extent to which punishment in certain contexts is unrelated to the criminal law purposes of desert and harm-prevention.³⁰

A. *Structural Factors*

1. Gatekeepers

Police have huge discretion to make this designation in the context outlined above, leading to great variation.³¹ Designation is also frequently based on factors unrelated to the definition of the offense. Researchers have found, for instance, that the following were statistically significant factors in police designation of a prostituted minor as a victim or an offender: (1) the minor’s cooperation with the police, (2) obvious pimp or john involvement, and (3) a report to the police rather than police observation of prostitution during, for instance, a sting.³² None of these factors, unlike age, or the conduct of exchanging sex for money, are relevant to the statutory definition of the offense. Similarly, a woman’s demeanor or failure to leave or prevent assault sometimes determine police response to assault within families.³³

Similarly, those arrested for statutory rape between adolescents are not necessarily those who are

³⁰ Cynthia Godsoe, *Protection as Punishment*, HOUS. L. REV. (forthcoming 2015) (outlining the expressed goals of punishment).

³¹ For instance, a Conn. Study found that different county police departments had wide ranging rates of dual arrest in IPV situations, ranging from 0 to 47%. Morash at 140.

³² Stephanie Halter, *Factors That Influence Police Conceptualizations of Girls Involved in Prostitution in Six U.S. Cities: Child Sexual Exploitation Victims or Delinquents*, 15 CHILD MALTREAT. 152, 156 (2010) (summarizing research finding that “police officers in the U.S. are inconsistent in their treatment of youth involved in prostitution.”). The vast majority of minors were categorized as one or the other, although police designated a few as both victim and offender. *Id.* at 154.

³³ See e.g. Morash

older or more culpable in other ways. Prosecutions are usually triggered by parents reporting children’s activity, rather than by law enforcement investigations.³⁴ Parents tend to report most often, and concomitantly, prosecutions proceed most often, against minors who do not conform to gender, racial, sexual or other norms.³⁵

Other contexts

2. Overcriminalization

The victim/offender designation problems are also driven by two characteristics of our criminal justice system: its incident-driven nature, and the overuse of the criminal law to solve social problems.

The Criminal response is incident-driven rather than context. So relevant information, e.g. history between the parties, a history of victimization, is not included.³⁶ Some police don’t feel that it is their “job” to look into the context.³⁷ The pressure is to designate more offenders than victims. To take my two examples, in prostitution, they don’t look at context of entry into the sex work, prior victimizations. E.g. IPV, mandatory, and sometimes dual, arrest policies have led to a huge increase in women being arrested because law enforcement over errs on side of offenders, not victims.

Overcriminalization is a significant problem in our society.³⁸ The V/O overlaps described here reflect this as the cumulative tendency is to over-identify offenders and deny the victimhood of all but the most “perfect” victims.

B. *Inculpatory Qualities*

The designation of Vs and Os by system actors more about role policing than about

³⁴ Michelle Oberman.

³⁵ See e.g. 129 Ohio St.3d at xx (noting the court’s concern that the prosecution there, and the underlying parental report, was based in part on the fact that the sexual activity was between two boys).

³⁶ But see some mandatory arrest state statutes requiring police to consider these factors.

³⁷ Miller at 142.

³⁸ Bill Stuntz.

culpability or harm-prevention. “In short, the image of the ‘victim’ has become a blameless, pure stereotype, with whom all can identify.”³⁹

1. Non-conformity to gender and other identity norms

Designation as a victim or offender is often based on race, class, sexual orientation and, particularly, gender stereotypes. For instance, one powerful stereotype is that girls are not supposed to be sexually active, even when victimized. Another is that women are not supposed to use violence to resist assault.⁴⁰ These stereotypes are intertwined with victim stereotypes—when women do not behave passively or chastely, they are neither feminine nor victimized. Accordingly, police are more likely to arrest non-conforming women and girls than men and boys, regardless of the context.

Statutory rape cases embody gender and sexuality norms more than almost any other crime.⁴¹ This concern was particularly clear in the most recent of this trio of cases, *In re DB*, where a 12-year-old boy was adjudicated delinquent for “anal sex” with an 11-year-old boy, in part because D.B. “always initiated” the sexual activity,⁴² and “every single time it was about D.B. being sexually gratified.”⁴³

Cases in each context reveal this pattern. For instance, a Pennsylvania district attorney prosecuted young women for child pornography for sexting, but not the boys who distributed the pictures, because the girls were behaving in a manner he deemed to be inappropriate and unfeminine.⁴⁴

One particularly robust stereotype is the mother as all-sacrificing caregiver. Liz Schneider has pointed out that this essentialist construct ignores “any social context and. . . any understanding of social, economic, or

³⁹ Henderson, *supra* note at 951.

⁴⁰ See e.g. Miller at 135 (reporting that police sometimes express the expectation that victims of IPV fight back, but then arrest them when they do without exploring self-defense/the context).

⁴¹ *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464 (1981).

⁴² 129 Ohio St.3d 104, 105 (2011) (also noting the court’s concern that the prosecution, and the underlying parental report, was based in part on the fact that the sexual activity was between two boys).

⁴³ Merit brief of Appellant D.B. (Aug. 24, 2010), 2010 WL 3498429 (Ohio).

⁴⁴ See *Miller v. Mitchell*, No. 09-2144, 2010 WL 935766 (3d Cir. Mar. 17, 2010) (enjoining a prosecution where the prosecutor threatened young girls with felony charges after they texted pictures of themselves in bathing suits and underwear in poses he deemed “provocative,” unless they participated in an education program he developed including a session on “what it means to be a girl in today’s society.”)

psychological constraints.”⁷ Women who do not meet this expectation are deemed unnatural, “monsters.” Women, particularly low- income women of color, are punished most severely for their deviation from white, middle-class norms.⁸ Dorothy Roberts has persuasively argued that the women most frequently punished are those who resist their gendered subservience, with the perverse result that those mothers who do not protect their children because they “appear pathetically weak or deranged” are treated more leniently.⁹

2. Sexual “Deviance”

Statutory rape between two boys (DB) or two girls (Florida case).

Those in prostitution/sex work not recognized as victims.

3. Refusal to Be Rescued

Victims who do not welcome help or express gratitude are often punished for their lack of gratitude. For instance, prostituted children who do not cooperate with police or who present as more “sullen” or “rude” are far more likely to be deemed to be offenders and denied help.⁴⁵

4. Relationship Between the Parties (Mother-Child)

See above re Collins et al study of family penalties.

More likely to be deemed offenders are women who do not conform to societal norms of femininity, particularly those who violate the fundamental role of self-sacrificing maternal care. In this fashion, a woman’s family status changes her criminal law status as a victim or offender and, more broadly, family law⁴⁶ and criminal law interact to police gender roles and impose a particular normative vision of family.

⁴⁵ Godsoe, Punishment as Protection, supra note

⁴⁶ I intend family law here to include both the law of parenthood and the child welfare system.

C. *Exculpatory Qualities*

1. Visible “Bad Guys”

Halter study of prostituted children cited above—police are more likely to designate a prostituted minor a victim when he/she names a pimp or other person.

2. Femininity

Although the iconic victim is a white girl (Kleinfeld), victims who do not meet those demographic or role expectations are transformed into offenders.⁴⁷

3. Purity/Innocence

4. Gratitude/obedience

5. Relationship Between the Parties (Intimate Partners/Male)

Battering. For instance, one trial court issued mutual orders of protection, despite strong evidence that the man severely beat his girlfriend who inflicted minor wounds on him in defense, stating that her behavior in yelling at him for cheating on her was “obsessive, beyond rationale” and may have “trigger[ed] [the] violence.”⁴⁸ Also reminiscent of the provocation defense.

IV. COSTS

The designation of victims and offenders brings numerous costs, both individual and societal.

⁴⁷ See e.g. Muftic et al. at 13 (reporting findings from their study that 26% of victims in the original IPV incident “switched roles and became IPV offenders in at least one subsequent criminal IPV incident.”) A few of them “switched roles” on the 4th or 5th IPV report, having been designated victims on all of the prior ones. Id. at 20.

⁴⁸ Murphy v. Okeke, 951 A.2d 783, 790 (2008).

A. *Individual*

- Non-recognition of harm to non-normative victims
 - While scholars have articulated valid criticisms of dominance or “victim” feminism, and its impact on violence against women, much of women’s victimhood continues to go unrecognized. I argue that the rigid binary of victim and offender obscures, even aggravates, violence against women.
- Lack of access to victims services, housing, immigration status, public assistance etc. For some of these, an applicant must have no convictions or even arrest history.
- Deters reporting of crimes and cooperation
- Impedes punishment of the “real”/more harmful offenders.

B. *Societal*

- It doesn’t reduce the harms of e.g. IPV or child abuse, or of prostitution/trafficking. Indeed, it arguably worsens it.
 - For instance, punishing mothers for failure to protect likely worsens the options for some children as removing their mothers may traumatize them or increase their exposure to harm.
 - Similarly, pursuing both parties as offenders in IPV often results in failing to prosecute either, even where there may be a big difference in harm caused by the respective parties.⁴⁹

⁴⁹ See e.g. Miller at 84 (quoting one prosecutor: “A lot of time with [IPV] cross-charges, we’ll nolle prosequere both of them because if we can’t go into court and sustain a charge, figure out who the aggressor was, who the first person was who did it, then we really can’t go forth on the charges.”)

- The overidentification of offenders masks the lack of a social-safety net for families, bolstering the myths that child abuse, family violence, and the prostitution of minors, are private problems. At the same time, the focus on norms justifies state surveillance of certain types of people and families, invariably those already marginalized.
- Finally, punishment for norms violations rather than for causing harm or moral desert raises legitimacy and fairness concerns about the criminal justice system.

V. TOWARDS A VICTIM/OFFENDER CONTINUUM

I will argue that the antipodal binary of victim and offender itself must be dismantled and call for a continuum of criminal liability for the offenses outlined above. This framework would recognize the complexity of this conduct, and of relationships between parties. It is as presumptions or affirmative defenses for parents who are themselves victimized. I will also suggest several concrete policy proposals to encourage child abuse prevention including the provision of services without a “litmus test” of worthy victimhood, and a level of amnesty for parents who seek help.

A. *Breaking Down the Binary*

1. What the Solution is Not—A Cult of Victimhood

The solution, however, is not to designate all V/Os in this context as victims. This approach (and relatedly the larger framework of dominance feminism,⁵⁰) can have significant negative impacts on those deemed to be victims, often girls and women. For instance, findings that women are “helpless” victims in

⁵⁰ Some argue that the women’s movement, particularly in criminal law, has been defined by victimhood, eg rape survivor, battered women.

failure to protect cases can harm these mothers in custody disputes. On a broader scale, positing trauma and victimhood at the core of female identity denies women autonomy and can be used to further subordinate them in the name of protection.⁵¹

Empowerment/survivor-led recovery

2. No On/Off Switch for Services

There should be no “litmus test” for victims of trafficking, family violence, etc. to receive services. This framework prevents many people who need assistance with e.g. housing from receiving it because they have been deemed an offender in some capacity.

It is important to note that it is not only law enforcement, prosecutors, and judges who need to move beyond the binary. Service providers and advocates also play a role by focusing on perfect victims, or decriminalization of certain conduct, rather than taking a more nuanced approach to victims who are also offenders.

3. Amnesty for Certain Offenders

For instance, battered women are sometimes prosecuted (in the child welfare or criminal systems) when they seek help for their partner’s domestic violence. Offering them amnesty would encourage reporting of abuse and also focus resources on punishing the true offenders.

Similar to amnesty programs recently enacted for college students seeking help for drugs or alcohol abuse.

⁵¹ Jeannie Suk, *the Criminal Law Comes Home*; Leigh Goodmark, *Maternalism*

B. *Fair Allocation of Blame and Punishment*

1. Limited Discretion of Gatekeepers

Right now, police and prosecutors have tremendous discretion in these contexts in designating victims and offenders. This has resulted in widely varying arrest and prosecution rates, i.e. selective enforcement, often based on an officer’s or prosecutor’s own biases—like a Rohrschach test.

For the criminal justice system to operate fairly, officers should be trained in the identification of victims and offenders, and their discretion should be curtailed.

2. A Continuum of Vs and Os

I will argue for a more nuanced approach to the existing binary, based on factors that bear on culpability or harm. These factors relate to the purposes of punishment, and can channel the inevitable discretion of first responders (police).

Preliminary factors might include:

- Motivation for the act;⁵²
- Context/history between the parties;
- Primary aggressor(?)⁵³
- Who is harmed?

⁵² Experts have diagrammed various types of IPV, including generalized violent behavior, frustration response behavior, and defensive behavior. Women overwhelmingly fall into the latter two categories, particularly defensive. In contrast, studies of men arrested on IPV charges have found a slight majority to fall into the first category. Scholars have called for recognition of this in the criminal statutes governing IPV. See e.g. Goodmark.

⁵³ Numerous states have these laws on the books in IPV.

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- Relatedly, who your V is (but treat parallel relationships equally, e.g. mothers and fathers)
- Past criminal justice involvement

Context matters—e.g. adolescent statutory rape I recommend complete decriminalization,⁵⁴ whereas for mutual IPV I recommend more scrutiny of the mutuality of the assault—i.e. was one party more harmed, acting defensively etc.

3. [I’m not sure where to put this] Anticipated Critiques

Is it blaming the victim by incorporating some kind of “contributory negligence” into the V-O relationship? No, because although we may deny it, the law on the books and in practice takes into account victim behavior and demographics all the time (Kleinfeld, Hessick)

CONCLUSION

⁵⁴ Godsoe, Offender-less Crimes (work in progress)