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## Connecting State Violence and Anti-Violence: An Examination of the Impact of VAWA and Hate Crimes Legislation on Asian American Communities

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# Connecting State Violence and Anti-Violence: An Examination of the Impact of VAWA and Hate Crimes Legislation on Asian American Communities

Pooja Gehi and Soniya Munshi<sup>†</sup>

*In the United States, the dominant approach to responding to various forms of interpersonal violence, such as intimate violence or bias attacks, supports and expands the state apparatus of incarceration. For communities of color and LGBTQ (lesbian, gay, bisexual, trans, and queer) communities who are already at risk for institutional violence, solutions that are built on a foundation of criminalization become a source of violence as they intensify policing mechanisms. These uneasy dynamics can be examined through a closer look at legislation intended to protect survivors of intimate violence and hate crimes. Analyzing the emergence of legislative responses to violence that is committed against people who are marginalized because of their race, religion, ethnicity, nationality, gender, sexual orientation, gender identity, and disability provides an insight into systematized sociopolitical institutions, such as the state incarceration apparatus. Legislation that addresses “violence against women” and “hate crimes” are used both against and in “protection of” Asian American communities and offer illustrative examples of the relationship between individualized violence and state violence.*

*In this Article, we examine how these legislative acts exclude, neglect, and punish survivors who deviate from the parameters of the “model minority victim.” Next, we examine the impact of these different legal*

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*remedies—how they expand state criminalization of immigrant communities and perpetuate negative stereotypes of people of color, and how they rely on the criminal-legal infrastructure in the United States for “safety” and “punishment” and serve to build the perpetually expanding prison system. Finally, we examine the potential for transformative justice strategies as a response to individualized violence that do not rely on the state. We look at the ways in which state-based responses to violence contribute to race-based discrimination and fail to encourage solidarity among people of color. Instead, we propose a shift away from state-based responses to community-based responses that identify all forms of violence whether personal, political, state, or systemic.*

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As a teacher, I believe that no one person teaches us our belief system. The roots of hate are complex. What I do believe is that a community must come together to create an environment that fosters a nurturing and safe environment for all who live, work, and contribute to its everyday life.

—Columbia University Professor Prabhjot Singh,  
after experiencing a racially-motivated assault<sup>1</sup>

#### INTRODUCTION

When Professor Prabhjot Singh, a Sikh man, was assaulted near his home in uptown Manhattan in September 2013, he heard the group of over a dozen men who attacked him saying, “get Osama” and “terrorists.”

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1. Professor Prabhjot Singh, the victim of an alleged hate crime against Sikhs in New York on September 21, 2013, calls for education, not incarceration, in response to being attacked because of his appearance as a “terrorist.” Paul Brandeis Raushenbush, *Prabhjot Singh, Sikh Columbia Professor, Attacked in Possible Hate Crime*, HUFFINGTON POST (Sept. 22, 2013, 3:58 PM), [http://www.huffingtonpost.com/2013/09/22/prabhjot-singh-sikh-columbia-hate-crime\\_n\\_3972449.html](http://www.huffingtonpost.com/2013/09/22/prabhjot-singh-sikh-columbia-hate-crime_n_3972449.html).

Despite having to undergo several procedures to treat displaced teeth and a fractured jaw, Singh's response was to call for the education of his assailants to build understanding across race and culture.<sup>2</sup> Professor Singh places his experience in a wider context when he states,

I also see an incredibly socially engaged group of teenagers, kids in their 20s, 30s, who are not only addressing Sikh issues but see it as a broader palette of social justice questions — whether it's around immigration, safety in communities, bullying, gun violence — and I really see what feels to me to be a kind of renaissance of awareness that we are part of a country that itself is grappling with a lot of dissonance and really a need for social healing.<sup>3</sup>

This response is an exception to the norm, distinct from punishment-based strategies of prosecution and incarceration. Although Singh recognizes that hate violence against Sikh and other communities has grown tremendously during the “War on Terror,” he looks beyond simply punishing his attackers for wrongdoing and instead calls for a deeper assessment of the roots of the attitudes that precipitated the attack. Singh's call for a process based on transformation, not criminalization,<sup>4</sup> moves away from conventional approaches that utilize the criminal-legal system to respond to the “problem” of arbitrary violence enacted at the interpersonal level. This criminal-legal system dominates many societal narratives about the way “justice” is served in the United States. As such, it is often perceived as the best, and often only, potential response when violence has occurred. The criminal-legal system's approach recognizes an effective response as one that identifies a victim—deserving of state protection—and a perpetrator—deserving of state punishment. This dominant approach to responding to various forms of interpersonal violence, such as intimate violence or bias attacks, supports and expands the state apparatus of incarceration. For communities of color and LGBTQ<sup>5</sup> communities who are already at risk for institutional violence, solutions that are built on a foundation of criminalization become a source of violence as they intensify policing mechanisms.

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2. Traci G. Lee, *Sikh Professor Survives Hate Attack*, “*This is not the Harlem I Know*,” MSNBC (last updated Oct. 3, 2013, 4:55 AM), <http://www.msnbc.com/martin-bashir/sikh-professor-survives-hate-attack>.

3. Colleen McKown, *Dr. Prabhjot Singh on Sikh Americans: Every Moment You're an Ambassador*, ALJAZEERA AMERICA (Jan. 21, 2013), <http://america.aljazeera.com/watch/shows/consider-this/Consider-This-blog/2014/1/17/q-and-a-with-dr-prabhjotsingh.html>.

4. In an op-ed piece written to the *New York Times*, Prabhjot Singh and Simran Jeet Singh argue for better tracking of anti-Sikh violence through provisions that are already made available through hate crimes legislation in order to obtain more data and to develop a better understanding of anti-Sikh violence that is distinct from violence based on misrecognition of Muslims. Simran Jeet Singh and Prabhjot Singh, Op-Ed., *How Hate Gets Counted*, N.Y. TIMES (Aug. 24, 2012), <http://www.nytimes.com/2012/08/24/opinion/do-american-sikhs-count.html>.

5. LGBTQ is shorthand for Lesbian, Gay, Bisexual, Transgender and/or Queer.

These uneasy dynamics can be examined by looking closely at legislation that is intended to protect survivors of intimate violence and hate crimes. Analyzing the emergence of legislative responses to violence that is committed against people who are marginalized because of their race, religion, ethnicity, nationality, gender, sexual orientation, gender identity, and disability provides insight into systematized sociopolitical institutions such as the state incarceration apparatus.<sup>6</sup> Legislation that addresses “violence against women” and “hate crimes” are illustrative examples of the relationship between individualized violence and state violence. Legislation that addresses “violence against women” such as the Violence Against Women Act (“VAWA”), and “hate crimes” such as the Civil Rights Act of 1968<sup>7</sup> share underlying logic through their use of technical solutions based on law-and-order frameworks focused on relief from the immediate conditions of violence. Both VAWA and hate crimes legislation offer certain remedies, ranging from increased penalty enhancements for perpetrators of hate crimes to increased access to public benefits and immigration status for domestic violence survivors. Here we show that the mechanisms that offer protection from violence are co-constitutive with mechanisms that facilitate violence. Instead of seeing this as a contradiction or irony, we follow Critical Ethnic Studies scholar Professor Chandan Reddy,<sup>8</sup> who argues that U.S. political modernity depends upon notions of freedom from violence, yet this “freedom” is produced through the authorization and institutionalization of state violence against people who are perceived to be non-normative, particularly through race and sexuality.<sup>9</sup> The state protection from arbitrary violence that U.S. citizens rely on is produced through the state’s enactment of violence against those who are situated outside cultural boundaries, deviating from racial and sexual norms.

Consequently, both VAWA and the Civil Rights Act of 1968 symbolically and legally represent a form of “justice” for individual survivors, simultaneously reproducing systemic violence, racism, sexism, homophobia, transphobia, and stereotypes about model minority immigrants. Both also rely on the state for retribution while the state

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6. Race, religion, ethnicity, nationality, gender, sexual orientation, gender identity, and disability are categories that have been designated as “protected identities” through federal hate crimes legislation and the Violence Against Women Act (VAWA). 18 U.S.C. § 245(b)(2), Pub. L. No. 103-322 (1994). It is in no way an exhaustive list of identity-based characteristics that could or should be included.

7. Pub. L. No. 90-284, 82 Stat. 73, (enacted April 11, 1968) (providing equal housing opportunities regardless of race, creed, or national origin, and making it a federal crime to “by force or by threat of force, injure, intimidate, or interfere with anyone . . . by reason of their race, color, religion, or national origin.” Since then, additions and additional protected groups have been made to the Civil Rights Act, and most states have their own hate crimes bills).

8. See generally CHANDAN REDDY, FREEDOM WITH VIOLENCE: RACE, SEXUALITY AND THE U.S. STATE (2011).

9. See *id.* at 1–54.

simultaneously perpetuates harm against “others” and “survivors,” domestically and abroad. In this Article, we examine how these legislative acts exclude, neglect, and punish survivors who exceed the parameters of the “model minority victim.” Next, we examine the impact of these different legal remedies—how they expand state criminalization of immigrant communities and perpetuate negative stereotypes of people of color, and how they rely on the criminal-legal infrastructure in the United States for “safety” and “punishment” and serve to build the perpetually expanding prison industrial complex.<sup>10</sup> Finally, we examine the potential for transformative justice strategies<sup>11</sup> as a response to individualized violence that do not rely on the state. We look at the ways in which state-based responses to violence contribute to race-based discrimination and fail to encourage solidarity among people of color. Instead, we propose a shift away from state-based responses towards community-based responses that identify all forms of violence whether personal, political, state, or systemic.

The relationship between individualized violence and state violence is

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10. The “prison industrial complex” is a term that has gained popularity with activists and academics over the last decade to describe a connection between racism, prisons, capitalism, and incentives to over-police specific communities. *See generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84–85 (2003) [hereinafter DAVIS, PRISONS OBSOLETE] (expressing concern about the increase in prison privatization and capital, linking it to the history and legacy of slavery in the United States). For figures on the relationship between race and incarceration rate, see generally *Race and Incarceration in the United States: Human Rights Watch Briefing*, HUMAN RIGHTS WATCH (Feb. 27, 2002), <http://www.hrw.org/legacy/backgrounder/usa/race/pdf/race-bck.pdf>. For various statistics on the criminal justice system, see generally Peter Wagner, *Prison Index: Taking the Pulse of the Crime Control Industry*, WESTERN PRISON PROJECT & THE PRISON POLICY INITIATIVE (2003), <http://www.prisonpolicy.org/prisonindex.html>. *See also* Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998, 12:00 PM), [http://colorlines.com/archives/1998/09/masked\\_racism\\_reflections\\_on\\_the\\_prison\\_industrial\\_complex.html](http://colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html).

11. “Transformative justice” refers to strategies to resist violence and create accountability without relying on the criminal-legal system. Philly Stands Up, an organization that practices transformative justice principles, explains:

Transformative Justice has no one definition. It is a way of practicing alternative justice which acknowledges individual experiences and identities and works to actively resist the state’s criminal injustice system. Transformative Justice recognizes that oppression is at the root of all forms of harm, abuse and assault. As a practice it therefore aims to address and confront those oppressions on all levels and treats this concept as an integral part to accountability and healing.

*What is Transformative Justice*, PHILLY STANDS UP!, <http://www.phillystandsup.com/tj.html> (last visited Mar. 16, 2014); *see also* generationFIVE, *Towards a Liberatory Justice: Why a Liberatory Response to Violence is Necessary for a Just World*, RESIST, <http://www.resistinc.org/newsletters/articles/towards-transformative-justice> (last visited Mar. 16, 2014); *Law Enforcement Violence Against Women of Color & Transgender People of Color: A Critical Intersection of Gender Violence & State Violence*, INCITE! WOMEN OF COLOR AGAINST VIOLENCE (last visited Mar. 16, 2014), [http://www.incite-national.org/sites/default/files/incite\\_files/resource\\_docs/3696\\_toolkit-final.pdf](http://www.incite-national.org/sites/default/files/incite_files/resource_docs/3696_toolkit-final.pdf); *see generally* THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES (Ching-In Chen et al. eds., 2011). There are many community-based practices and organizations that have long-practiced transformative justice. Much of the literature comes from a critical lens of anti-violence which criminalizes poor people and people of color rather than promoting genuine safety.

of dire concern to communities of color, including Asian American communities. While the Civil Rights Act of 1968 is intended to protect African Americans from racially motivated hate-based violence, racially motivated state violence has, if anything, increased since that time. Recent studies show that one-third of African American males will go to prison at some point in their lives.<sup>12</sup> Ironically, many of them, among other people of color, are handed down harsher sentences for committing hate violence against white people—regardless of proof of bias motivation.<sup>13</sup> Already, the United States incarcerates more people per capita than any other nation in the world.<sup>14</sup> One out of every thirty-two people in the United States live under the supervision of the criminal punishment system.<sup>15</sup> African American people are six times as likely to be incarcerated as white people;<sup>16</sup> Latin people are twice as likely to be incarcerated as white people;<sup>17</sup> LGBTQ, youth, and poor people are also at greatly increased risk for incarceration under the criminal-punishment system.<sup>18</sup>

People of Asian descent, although also criminalized, have been largely invisible in discussions of the United States prison industrial complex. This lack of visibility perpetuates the model minority stereotype while critiquing the supposedly “more criminal” races. Notably, Professor Vijay Prashad

12. BRUCE DRAKE, *Incarceration Gap Widens Between Whites and Blacks*, PEW RESEARCH CENTER, <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/> (last cited Sept. 6, 2013) (discussing that black men were more than six times as likely as white men to be incarcerated in 2010 according to the Bureau of Justice Statistics); see also DAVIS, *PRISONS OBSOLETE*, *supra* note 10 (discussing the connections between slavery and the modern-day prison population).

13. See, e.g., DEAN SPADE, *Methodologies of Trans Resistance*, in *A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES* 237–61 (George E. Haggerty & Molly McGarry eds., 2007); see generally Katherine Whitlock, *In a Time of Broken Bones: A Call to Dialogue on Hate Violence and the Limitations of Hate Crimes Legislation* (Rachael Kamel ed. 2001), available at <http://srp.org/files/Broken%20Bones-1.pdf> (discussing the ways in which hate crimes legislation furthers the slavery to prison pipeline); Lisa A. Crooms, “Everywhere There’s War”: A Racial Realist’s Reconsideration of Hate Crimes Statutes, 1 *GEO. J. GENDER & L.* 41, 43 (1999) (“Can we, in good conscience, support criminal measures in a context where criminalization of the oppressed and conditional constitutional rights are commonplace?”); HATE CRIME STATISTICS 2010, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/index> (last visited Mar. 16, 2014) (finding that more than eighteen percent of race-based hate crimes are anti-white crimes, that over eighteen percent of people who have committed hate crimes are black, and that some hate crimes are anti-heterosexual).

14. See generally RUTH WILSON GILMORE, *THE GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); DAVIS, *PRISONS OBSOLETE* *supra* note 10; LOÏC WACQUANT, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *PUNISHMENT & SOC’Y* 95 (2001).

15. Robert Longley, *1 out of 32 Americans Under Correctional Supervision*, ABOUT, <http://usgovinfo.about.com/cs/censusstatistic/a/aainjail.htm> (last visited Mar. 17, 2014).

16. *King’s Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CENTER (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#incarceration-rate>.

17. *Id.*

18. See generally JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* xii (2011).

explains that to the extent that blacks constitute, in W.E.B. DuBois' famous formulation,<sup>19</sup> a categorical "problem" for the racial formation of the United States, Asians (and for Prashad, South Asians in particular) embody a "solution." Prashad writes:

Many folks feel, it seems, that to make positive statements about what they consider to be a race is just fine . . . . These are not only statements of admiration. Apart from being condescending, such gestures remind me that I am to be the perpetual solution to what is seen as the crisis of black America. I am to be a weapon in the war against black America. These strategic separations are harmful not only to black and Latino criminalized communities but also to Asian communities who do not fit the "model minority" stereotypes of good immigrants.<sup>20</sup>

People of color and LGBTQ people disproportionately face interpersonal or intimate violence. VAWA and hate crime legislation, however, position those people to seek protection from such violence through the criminal legal system—the same system that is also disproportionately filled with those people.<sup>21</sup> People of color—including Asian American people, LGBTQ people, poor people, and people with disabilities—are also disproportionately present in immigration detention centers.<sup>22</sup> And as criminal and immigration laws have become increasingly

19. See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 19 (2008).

20. VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* 4, 6 (2000).

21. Both the right and left oppose hate crimes legislation for different reasons. In addition to the over-reliance on systemic corruption as a means towards justice, for example, Leslie Moran argues that "the gay and lesbian demand for law reform feeds a law and order politics of retribution and revenge that may be implicated in the promotion, institutionalization, and legitimation of hate." Leslie J. Moran, *The Emotional Dimensions of Lesbian and Gay Demands for Hate Crime Reform*, 49 MCGILL L.J. 925, 925 (2004). Sociologist Yvonne Zylan has also criticized hate crime laws from a queer perspective. Zylan argues that the discourse created by anti-bias criminal laws is dangerous because it reinforces "the very social dynamics that may create the impetus for such crimes in the first place." Yvonne Zylan, *Passions We Like. . . and Those We Don't: Anti-Gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body*, 16 MICH. J. GENDER & L. 1, 2 (2009). Zylan starts with the premise that law creates a discourse that contains a "power to constitute social reality." *Id.* Therefore, antigay hate crime laws both doctrinally and through argument in court legitimate a limiting narrative about the dominant bodily sex binary (male and female), gender binary (masculine and feminine), and sexual orientation binary (heterosexual and homosexual). *Id.* The conservative right also generally opposes hate crimes legislation because it erases freedom of speech and interferes with religious exemptions. See, e.g., William Eskerage, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 696 (2011) (explaining that "[s]ince 1988, the Southern Baptist Convention has adopted no fewer than ten resolutions supporting discrimination against gay people in employment, marriage, and education, and opposing hate crimes legislation").

22. See, e.g., Maddie Taterka, *7 Massive Injustices LGBTQ Immigrants Face In The Detention System*, AUTOSTRADDLE (Dec. 4, 2013, 8:00 AM) (discussing the mistreatment of LGBT immigrants in immigration detention) (citing Sharita Gruberg, *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention*, CENTER FOR AMERICAN PROGRESS (Nov. 25, 2013), <http://www.americanprogress.org/issues/immigration/report/2013/11/25/79987/dignity-denied-lgbt-immigrants-in-u-s-immigration-detention>); see also Christopher Petrella & Josh Begley, *The Color of Corporate Corrections: Overrepresentation of People of Color in the Private Prison Industry*, PRISON LEGAL NEWS (Nov. 25, 2013), <https://www.prisonlegalnews.org/displayArticle.aspx?articleid=24883>.

intertwined, this presence is not coincidental.<sup>23</sup> The ways in which difference—whether by race, disability, sexuality, or gender—is criminalized by local law enforcement is now also increasingly tied to immigration enforcement. Since 1996, minor criminal convictions in the United States have resulted in the mass deportation of immigrants across the nation.<sup>24</sup> The consequences of criminal convictions have multiplied for immigrant communities since September 11, 2001, paving the way for the “War on Terror,” Arizona Senate Bill 1070, Section 287(g) and subsequent copycat legislation, Secure Communities<sup>25</sup> and the indefinite detention provision—all of which allow (and sometimes mandate) local law enforcement to implement immigration laws.<sup>26</sup>

VAWA and hate crimes legislation are used both against and in “protection of” Asian American communities. For example, there is much scholarship about hate violence perpetrated on Arab and South Asian people after 9/11 and in conjunction with the “War on Terror.”<sup>27</sup> This violence, however, is both as personal as it is state-sanctioned, promoted, and executed. As a “fix” for hate violence that is personally inflicted, invoking hate crimes legislation in prosecution relies on the same system that is deporting and bombing Arab and South Asian men domestically and

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23. Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357 (2012); see also Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL’Y & L. 411, 419–21 (2010) (connecting Japanese internment to the today’s “War on Terror”: “Presumed to be enemy aliens or shadowy fifth columns, prone to using their insider status to benefit the Japanese emperor, the Japanese residing in America simply could not be trusted to abide by the magic of citizenship—whether bestowed by birth or acquired through naturalization—and its attendant ceremony of loyalty to the United States. The parallels to the experience of Muslim Americans are striking. These linkages between immigrant identity and disavowal of the law take us into the modern moment, where immigration law and criminal ideologies are intertwined.”) (citing Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006)).

24. See generally Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (using the term “crimmigration law” to critique the arbitrary temporal gauges the criminal law and immigration law rely on to evaluate who should be included or expelled from society).

25. See *infra* Part IV.

26. See, e.g., Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 560 (2004) (explaining the ways in which post-September 11th immigration legislation has affected the policing of all immigrant communities in the United States: “Following the events of September 11, 2001, law enforcement efforts initially focused on men of Middle Eastern descent and those hailing from Muslim countries suspected of having ties to al Qaeda, the terrorist organization held responsible for the attacks. Within a short period of time anti-terrorism measures impacted the lives of all immigrants, especially the undocumented. Increasingly, many of them were criminalized, with immigration law becoming an integral and vital tool of law enforcement efforts.”).

27. See, e.g., Inderpal Grewal, *Transnational America: Race, Gender and Citizenship after 9/11*, SOCIAL IDENTITIES: JOURNAL FOR THE STUDY OF RACE, NATION AND CULTURE 9(4) (2003); Muneer Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Sunaina Maira, *Youth Culture, Citizenship and Globalization: South Asian Muslim Youth in the United States After September 11*, COMPARATIVE STUDIES OF SOUTH ASIA, AFRICA AND THE MIDDLE EAST 24 (1), 221–35 (2004).

abroad.<sup>28</sup> In domestic violence cases, similar dynamics exist—the same system that is tasked with “protecting” some immigrant survivors of violence is also furthering the criminalization of immigrant communities more generally.<sup>29</sup> Similarly, as the Civil Rights Act of 1968 is intended to protect African Americans from hate violence—or rather—severely punish the Ku Klux Klan, U.S. law enforcement is profiling and killing African American men on a daily basis.<sup>30</sup>

## I. LEGISLATIVE HISTORY

### A. *Background of the Violence Against Women Act*

The passage of the Violence Against Women Act (“VAWA”) was a huge legislative victory for the anti-violence movement, as it successfully indicated that the state had responded to the demand that it value the lives of women and other survivors of violence.<sup>31</sup> VAWA was passed as part of the Violent Crime Control and Law Enforcement Act and effectively cemented the relationship between the anti-violence movement and a crime control infrastructure that grew from the vacuum created by the disappearing social welfare state. Winning this legislation fundamentally shifted approaches to gender-based violence. As “the movement’s strategic approaches converged with conservative public policies that are consistent with a prison nation,” Beth Richie argues, “questions of race and class got lost in the battle to win mainstream support and resources for victim services.”<sup>32</sup>

When it was enacted, VAWA established the Office on Violence Against Women housed in the Department of Justice, created the National Domestic Violence Hotline, increased criminal penalties for perpetrating acts of domestic violence, and created funding streams for shelters, service providers, law enforcement, and prosecutorial efforts.<sup>33</sup> Additionally,

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28. See Chris Hedges, *War is a Hate Crime*, TRUTHDIG (October 26 2009), [http://www.truthdig.com/report/item/20091026\\_war\\_is\\_a\\_hate\\_crime](http://www.truthdig.com/report/item/20091026_war_is_a_hate_crime) (discussing the fact that the Mathew Shepherd and James Byrd, Jr. Hate Crimes Prevention Act is written into a federal Department of Defense bill that increases funds for the wars in Iraq and Afghanistan by \$130 billion dollars).

29. See generally Rupaleem Bhuyan, *The Production of the “Battered Immigrant” in Public Policy and Domestic Violence Advocacy*, 23 J. INTERPERSONAL VIOLENCE 153 (2008).

30. Tim Wise, *Of Hate Crimes, Big and Small*, RACE AND HISTORY (Aug. 12, 1999), <http://www.raceandhistory.com/historicalviews/08121999.htm>; see also Jenée Desmond-Harris, *Beyond Trayvon: Black and Unarmed*, THE ROOT (June 8, 2013, 5:00 PM), [http://www.theroot.com/photos/2013/06/unarmed\\_black\\_men\\_shot\\_by\\_police\\_20\\_sad\\_stories.html](http://www.theroot.com/photos/2013/06/unarmed_black_men_shot_by_police_20_sad_stories.html) (explaining that the 2012 shooting of unarmed African American Trayvon Martin is “nothing new” in relation to policing).

31. See generally BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012). For a discussion about the strategies utilized by the anti-violence movement and the consequences of state intervention, see *id.* at 65–98.

32. *Id.* at 19.

33. Priya Kandaswamy, *“You Trade in a Man for the Man”: Domestic Violence and the U.S. Welfare State*, 62 AM. Q. 253, 258 (2010).

VAWA directed money towards building relationships specifically between nonprofit organizations and law enforcement.<sup>34</sup> The institutionalization of criminalization as a primary intervention strategy continues to spread through VAWA despite two decades of inconsistent empirical research about the effectiveness of these strategies in incidents of domestic violence.<sup>35</sup> Meanwhile, the crime bill under which VAWA was housed allocated almost \$10 billion for new prison construction, expanded the death penalty to apply to cases involving more than fifty federal crimes, and added a mandate for life imprisonment for three federal violent offenses (“three strikes, you’re out”), among other prison expansions.<sup>36</sup>

VAWA was passed alongside other legislative initiatives in the United States that expose the neoliberal restructuring of social welfare<sup>37</sup> and the role of the state, as well as neoliberal investments in personal responsibility, self-sufficiency, and social control.<sup>38</sup> Two years after the passage of VAWA,<sup>39</sup> three other major pieces of legislation were passed: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”),<sup>40</sup> the Illegal Immigration Reform and Immigrant

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34. A key dimension of the Violence Against Women Act (VAWA), for example, was its embrace of mandatory arrest policies along with federal support to encourage local police departments to process domestic assault complaints aggressively. The promise of expanding resources to support mandatory arrest policies seemed to present a win-win situation for some domestic violence advocates who understood the problem primarily in terms of the state’s underprotection of women who were subject to battery. *See, e.g.*, Radha Iyengar & Lindsay Sabik, *The Dangerous Shortage of Domestic Violence Services*, 28 HEALTH AFF. 1052 (2009); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).

35. *See generally* Iyengar & Sabik, *supra* note 34.

36. *See generally* MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); Mimi E. Kim, *Challenging the Pursuit of Criminalisation in an Era of Mass Incarceration: The Limitations of Social Work Responses to Domestic Violence in the USA*, 1 BRIT. J. SOC. WORK 1 (2012).

37. Here, we look to David Harvey’s formulation of neoliberalism as a system of “accumulation by dispossession” which is made up of four components: (1) the privatization and commodification of public goods; (2) financialization, through which anything can be turned into a tool of economic speculation; (3) crisis management; and (4) state redistribution through which the state is responsible for the unequal and upward distribution of wealth. Sherry Ortner, *On Neoliberalism*, ANTHROPOLOGY OF THIS CENTURY (May 2011), <http://aotcpress.com/articles/neoliberalism>; *see also* DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007).

38. The juxtaposition of legislative enactments that specifically provide relief and support to domestic violence survivors at the same time that immigration restrictions are increasing is not limited to this moment in the mid-1990s. As re-authorizations of VAWA occur at the time of this writing, repressive immigration legislation is being implemented, especially that which reconfigures the relationship between law enforcement and immigration enforcement. *See, e.g.*, Anil Kalhan, *Immigration Policing and Federalism through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105 (2013); Christopher Strunk & Helga Leitner, *Resisting Federal-Local Immigration Enforcement Partnerships: Redefining “Secure Communities” and Public Safety*, 1 TERRITORY POL. GOVERNANCE 62 (2013).

39. Violence Against Women Act of 1994, Pub. L. No. 103-322 (codified in various sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.).

40. Personal Responsibility And Work Opportunity Reconciliation Act Of 1996, Pub. L. No. 104-193, 110 Stat. 2105(codified as amended in various sections of 8 U.S.C. and 42 U.S.C.).

Responsibility Act of 1996 (“IIRIRA”),<sup>41</sup> and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>42</sup>

Each of these acts serve to produce different criteria that create internally differentiated immigrant populations—where some are offered freedom while others are subjected to repression and punishment.<sup>43</sup> For example, the combination of AEDPA and IIRIRA effectively amended the Immigration and Nationality Act of 1952 and further criminalized immigrants through a series of disciplinary and regulatory technologies.<sup>44</sup> Such technologies included “re-characterizing,” which increased the types of crimes that constituted aggravated felonies for immigration purposes.<sup>45</sup> This simultaneously removed legal barriers that protected immigrants from deportation and erected barriers to post-deportation admission, thereby intensifying border control.<sup>46</sup> Although these acts primarily affected immigrants who were interacting with the criminal legal system and/or were in the United States without authorization, their reach extended even to potentially legal immigrants.<sup>47</sup> Meanwhile, VAWA employed the logic of exception to protect some immigrant survivors of violence from the vortex of criminalization. For example, as part of VAWA, some immigrant survivors of domestic violence became eligible for specific immigration remedies, such as self-petition or U-visa mechanisms. These remedies furthered neoliberal ideals<sup>48</sup> of a good, cost-effective, self-reliant citizenry

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41. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 309 (codified in 8 U.S.C. § 1101(a)(43) (2012)).

42. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles and sections of the U.S. Code).

43. Feminist scholars have critiqued the paradox of expressed governmental commitment to the welfare of survivors of domestic violence at the same time that the welfare state is being dismantled. These scholars have similarly critiqued the government’s attempt to address the welfare of immigrant survivors at the same time that it further institutionalizes state repression of immigrants. See generally Rupaleem Bhuyan, *The Production of the “Battered Immigrant” in Public Policy and Domestic Violence Advocacy*, 23 J. INTERPERSONAL VIOLENCE 153 (2008); Gwendolyn Mink, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, in WOMEN, THE STATE, AND WELFARE 93 (1990).

44. “Technology” here is used to mean a modality of power, including social policies. See generally Soniya Munshi, *Negotiating Violence, Navigating Neoliberalism: Domestic Violence Advocacy Efforts in South Asian Communities in post-9/11 New York City* (2013) (unpublished PhD dissertation, the City University of New York Graduate Center) (on file with author).

45. *Id.* at 38.

46. AEDPA and IIRIRA did not necessarily depart from the historical practices of restriction, exclusion, and criminalization of immigrants achieved through domestic legislation. But the acts were passed during a time of developing neoliberal transnational economic agreements, such as the passage of the North American Free Trade Agreement in 1994. See generally Matthew Coleman, *A Geopolitics of Engagement: Neoliberalism, the War on Terrorism, and the Reconfiguration of U.S. Immigration Enforcement*, 12 GEOPOLITICS 607 (2007).

47. Changes to legal immigration provisions include exclusion of individuals from immigrant visas due to their being deemed likely to become a public charge due to age, health, or education. See *IIRIRA 96: A Summary of the New Immigration Bill*, VISALAW (1996), <http://www.visalaw.com/96nov/3nov96.html>.

48. See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007).

in which uncooperative immigrants would be disciplined and excluded but cooperative immigrants whose victimization is recognizable by the state are subject to exception.

The passage of VAWA, PROWRA, and AEDPA/IIRIRA exposed the contradictions of simultaneous gains and losses in freedoms, creating populations of immigrant survivors differentiated by their eligibility for state protection. Advocacy efforts on behalf of domestic violence survivors resulted in remedial gestures to ameliorate the harshness of these contradictions. For example, PROWRA included a Family Violence Option (“FVO”) through which eligible domestic survivors would be able to gain exemptions from work requirements and the sixty-month lifetime limit.<sup>49</sup> IIRIRA preserved the immigration remedies available to domestic violence survivors under VAWA and included other exemptions.<sup>50</sup> The exemption mechanism served to discursively construct the domestic violence survivor as worthy of exception from otherwise repressive technologies. VAWA legal regulations vary, but what they have in common is an investment in survivors who are convincingly worthy, powerless, in need of state protection, and willing to remake themselves into self-sufficient and autonomous citizens. Previous state-sponsored remedies for women relied upon moral discourses to determine worthiness; within the context of neoliberal governance, morality, and deservedness, is the potential to be both financially independent and willing to be under the regulation of the government.

### B. Background of Contemporary Hate-Crime Legislation

Contemporary hate crime legislation, like VAWA, operates from similar foundational logic, although it emerges from its historical function as a legal response against violence towards African Americans during, before, and after the civil war. Such laws were first codified after anti-lynching activists lobbied for deeper consequences for widespread Ku Klux Klan lynching of African Americans.<sup>51</sup> A hate crime or bias-motivated crime refers to an act in which the perpetrator of the crime intentionally selects the victim because of his or her membership in a certain group.<sup>52</sup>

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49. See Kandaswamy, *supra* note 33, at 258 for a fuller discussion about the construction of eligibility.

50. Leslye E. Orloff et al., *Ensuring that Battered Immigrant Who Seek Help from the Justice System Are Not Reported to the INS, in* SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN. A “HOW TO” MANUAL FOR BATTERED WOMEN’S ADVOCATES AND SERVICE PROVIDERS (Leslye E. Orloff & Rachel Little eds., 1999).

51. See generally Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564 (1998). See also VALERIE JENNESS & RYKEN GRATTET, *MAKING A HATE CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT* (2001) (explaining the history and origin of hate crimes legislation in the United States).

52. See generally Rebecca Stotzer, *Comparison of Hate Crime Rates Across Protected and Unprotected Groups*, WILLIAMS INSTITUTE (2007).

The United States passed its first “hate crimes legislation” after the Civil War, when the lynching of African Americans was pervasive throughout the nation.<sup>53</sup> It was a strategy to deter the growing number of racially-motivated crimes being committed predominantly by the Reconstruction Era Ku Klux Klan and allow the federal government to “legally intercede” when a state would not.<sup>54</sup> The codification of this federal legislation was specifically in response to states’ refusal to intervene in race-based hate violence.<sup>55</sup> This foreshadowed the modern era of hate crime legislation beginning in 1968 with the passage of a federal statute,<sup>56</sup> part of the Civil Rights Act, which made it illegal to “by force or by threat of force, injure, intimidate, or interfere with anyone who is engaged in six specified protected activities, by reason of their race, color, religion, or national origin.” Pursuant to the statute, “[t]he prosecution of such crimes must be certified by the U.S. Attorney General.”<sup>57</sup> Federal hate crime legislation continues to be part of the Civil Rights Act and has been expanded upon and amended over the decades.

Since the federal implementation of hate crimes legislation, states have adopted their own version of similar legislation.<sup>58</sup> The first state-based hate crime statute, California’s Section 190.2, was passed in 1978 and provided for penalty enhancement in cases where murder was motivated by prejudice against four “protected status” categories: race, religion, color, and national origin—setting the stage for added punitive measures for a defendant in a case where a prosecutor determines that hate violence

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53. THOMAS STREISSGUTH, HATE CRIMES (2nd ed. 2009). See e.g., Katherine Whitlock, *In a Time of Broken Bones: A Call to Dialogue on Hate Violence and the Limitations of Hate Crimes Legislation* (Rachael Kamel ed. 2001), available at <http://srtp.org/files/Broken%20Bones-1.pdf>; Maroney, *supra* note 51.

54. See generally STREISSGUTH, *supra* note 53, at 9. See also Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER SOC. POL’Y & L. 63, 67 (1993) (explaining that The Ku Klux Klan Act of 1871 was the first iteration of what later became the part of the Civil Rights Act. Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1985–1986 (1988)).

55. Maroney, *supra* note 51, at 565 (“Thus defined, the category [hate crimes] encompasses a wide range of historical practices, such as the many individual acts of violence against African Americans used strategically to cement slavery’s power base. Historically, such crimes have been actively encouraged, passively condoned, or simply ignored by systems of governance, especially the criminal justice system. For example, lynching, practiced disproportionately against blacks, was for years an integral aspect of administration of criminal justice, one that was often sanctioned.”).

56. Federally Protected Activities, 18 U.S.C. § 245 (2006).

57. *Id.*

58. Currently forty-five out of fifty states and the District of Columbia have adopted a version of hate crimes laws that differ in scope and mechanics. Some create sentencing enhancements for hate crime perpetrators while others criminalize hate crimes. See generally *A Guide to State Level Advocacy Following Enactment of the Mathew Shepherd and James Byrd, Jr. Hate Crimes Prevention Act*, HUMAN RIGHTS CAMPAIGN (Jul. 20, 2011), [http://www.hrc.org/files/assets/resources/Hate\\_Crimes\\_Guide\\_FINAL.pdf](http://www.hrc.org/files/assets/resources/Hate_Crimes_Guide_FINAL.pdf) (listing each state that has a hate crimes law with a particular focus on states that currently do and do not consider sexual orientation and/or gender identity to be a protected category).

occurred.<sup>59</sup> Washington state included ancestry in a statute passed in 1981.<sup>60</sup> Alaska included creed and sex in 1982 and later disability, sexual orientation, and ethnicity.<sup>61</sup> In the 1990s, some state laws began to include age, marital status, membership in the armed forces, and membership in civil rights organizations as covered groups.<sup>62</sup> Notably, VAWA contained a provision<sup>63</sup> which allowed victims of gender-motivated hate crimes to seek “compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate,” but the U.S. Supreme Court ruled in *United States v. Morrison*<sup>64</sup> that the provision is unconstitutional. State and federal lobby groups continue to push for additional protected categorical groups—for instance, gender identity and expression is one current key focus.<sup>65</sup>

In October 2009, President Obama expanded the scope of the 1968 Civil Rights Act and signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law.<sup>66</sup> This law makes it a federal hate crime to assault people based on sexual orientation, gender, and gender identity, in addition to the original characteristics of race, religion, or national origin. In support of this goal, the law expands the authority of the Department of Justice to prosecute such crimes in collaboration with or in place of local authorities. The law also provides major increases in funding for the U.S. Department of Justice and local law enforcement for prosecuting these crimes—including special additional resources to go toward prosecution of youth for hate crimes.<sup>67</sup>

Hate crime legislation and VAWA are two forms of federal- and state-based protections that are simultaneously constructed around goals of access and increasing criminalization. As VAWA provides benefits for “good” immigrant survivors, it also creates actual and symbolic barriers for

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59. Cal. Penal Code § 190.2 (West 2014).

60. STREISSGUTH, *supra* note 53, at 20–21.

61. *Id.*

62. *Id.*

63. 42 U.S.C. § 13981 (1994).

64. *Id.* (struck down as unconstitutional in *United States v. Morrison*, 529 U.S. 598 (2000)); see also Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 GEO. J. GENDER & L. 43 (2013).

65. In New York, the Gender Employment Non-Discrimination Act (“GENDA”) would extend the New York State Human Rights Law to ban discrimination on the basis of gender identity and expression as well. Similarly, it would add gender identity and expression to these same categories already included in New York’s hate crimes law. For an overview, see *Gender Expression Non-Discrimination Act*, EMPIRE STATE PRIDE AGENDA (last visited Mar. 17, 2014), <http://www.prideagenda.org/igniting-equality/current-legislation/gender-expression-non-discrimination-act> (last visited Mar. 16, 2014) (explaining “GENDA has passed the Assembly six times with a bipartisan majority, yet our State Senate refuses to bring the bill to the floor for a vote”).

66. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249.

67. *Id.*; see also Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1 (2012).

undeserving or “bad” immigrants. Hate crimes legislation, on the other hand, allows “good” survivors of hate violence to access more “justice” through the criminal-legal system by punishing the “bad” perpetrator. Both laws, however, are applied with discretion. In VAWA, a survivor must fit each of the extremely specific requirements set out in the bill. Hate crimes legislation is applied to the prosecution of a case upon judicial discretion. The end result in both, however, is that certain survivors are “protected” or “gain more justice,” while perpetrators are constructed as monstrous<sup>68</sup>—often through a racialized lens.<sup>69</sup>

## II. PRODUCING “MODEL MINORITY VICTIMS OF VIOLENCE”

Legislative responses to both intimate violence and hate crimes, are predicated upon similar logic—eligibility to be recognized as a “victim” of a crime means that you need to be eligible as a citizen worthy of protection by the state.<sup>70</sup> For Asian American communities, the juxtaposition of these rules alongside other forms of race-based repressive immigration policies has served to differentiate immigrant populations in terms of value. State and social responses to violence perpetuate these value judgments that are already embedded in immigration policy.

Revisions to the Immigration and Nationality Act in 1965 arose from civil rights-oriented legislative dictates that called for the elimination of race-based exclusions in immigration policy.<sup>71</sup> Along with labor priorities for “highly-skilled” foreign workers that could address the needs of both U.S. social welfare programs (e.g., newly-established Medicare and Medicaid programs) and Cold War competitiveness (e.g., aerospace and weapons development), immigration reform facilitated the entry of new middle-class professional immigrants, mostly from Asia, into the country.<sup>72</sup> This wave of Asian immigrants after 1965 was folded into the race-based construct of “model minorities,” a term coined by sociologist William Petersen in 1966 and made popular by media outlets such as *The New York Times* and *U.S. News & World Report*.<sup>73</sup> Petersen initially used this term to

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68. See generally Jasbir K. Puar & Amit S. Rai, *Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots*, 20 SOC. TEXT 117 (2002).

69. See generally Rupaleem Bhuyan, *The Production of the “Battered Immigrant” in Public Policy and Domestic Violence Advocacy*, 23 J. INTERPERSONAL VIOLENCE 153 (2008); KATHERINE WITLOCK, IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ON HATE VIOLENCE AND THE LIMITATIONS OF HATE CRIMES LEGISLATION (Rachael Kamel ed., 2001).

70. See generally MONISHA DAS GUPTA, UNRULY IMMIGRANTS: RIGHTS, ACTIVISM, AND TRANSNATIONAL SOUTH ASIAN POLITICS IN THE UNITED STATES (2006).

71. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

72. See DAS GUPTA, *supra* note 70.

73. See William Petersen, *Success Story, Japanese American Style*, N.Y. TIMES MAGAZINE, Jan. 9, 1966, at 21 (“By any criterion of good citizenship that we choose, the Japanese Americans are better than any other group in our society including native-born whites.”); *Success Story of One Minority Group in U.S.*, U.S. NEWS & WORLD REPORT, Dec. 26, 1966, at 73–76.

contrast Japanese and Chinese Americans with African Americans. While government and mainstream media portrayed African American communities as pathologically dependent on welfare, they portrayed Asian immigrants as self-sufficient, without need for state-supplied social welfare provisions or civil rights. As noted earlier, scholars, such as Professor Vijay Prashad, have argued that this contrast fails to address the role that state policy plays in constructing the socioeconomic positions of different communities, thus serving anti-black racism.<sup>74</sup> Meanwhile, however, new Asian communities during this wave of immigration occupied a “racially ambiguous identity . . . [but] were amenable to be represented as nonblack, though also definitely not white.”<sup>75</sup>

For decades, activists and organizers in Asian American communities have worked to disrupt model minority mythology and to articulate the vulnerabilities to individuals and the institutional violence that Asian American communities face.<sup>76</sup> These efforts have, in large part, effectively generated awareness of domestic violence and other social problems that afflict “model minority” communities.<sup>77</sup> However, much of the anti-violence work in Asian American communities has been in the context of hegemonic feminism<sup>78</sup> that has held the well being of middle-class white women as its central concern and has looked to the state for solutions. The refusal of Asian women to be invisible has called into question the assumptions that this form of feminism has made about what domestic violence looks like, its roots, and the best approaches for social change. Interventions by Asian American anti-violence advocates have mostly focused on a politics of inclusion<sup>79</sup> to expand the analytical framework and practice to include Asian American experiences. The insertion of difference into the liberal feminist discourse—and not the deconstruction of the fundamental premise of this framework, which develops from the centrality of the white middle-class heterosexual cisgender woman subject—happens

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74. See generally VIJAY PRASHAD, *UNCLE SWAMI: SOUTH ASIANS IN AMERICA TODAY* (2012); PRASHAD, *supra* note 20.

75. DAS GUPTA, *supra* note 70, at 34; see also PRASHAD, *supra* note 20 (discussing the racial position of South Asian immigrants).

76. See, e.g., Shamita Das Dasgupta & Sujata Warrier, *In the Footsteps of “Arundhati”: Asian Indian Women’s Experience of Domestic Violence in the United States*, *VIOLENCE AGAINST WOMEN*, Sept. 1996, at 238; MARGARET ABRAHAM, *SPEAKING THE UNSPEAKABLE: MARITAL VIOLENCE AGAINST SOUTH ASIAN IMMIGRANTS IN THE UNITED STATES* (2000); Rhea V. Almeida & Ken Dolan-Delvecchio, *Addressing Culture in Batterers Intervention: The Asian Indian Community as an Illustrative Example*, *VIOLENCE AGAINST WOMEN*, June 1999, at 654.

77. See Dasgupta & Warrier, *supra* note 76; see also bibliographies available through the Asian Pacific Islander Institute on Domestic Violence, available at <http://www.apiidv.org/resources/bibliographies.php>.

78. For a discussion of hegemonic feminism, see generally HESTER EISENSTEIN, *FEMINISM SEDUCED: HOW GLOBAL ELITES USE WOMEN’S LABOR AND IDEAS TO EXPLOIT THE WORLD* (2010).

79. See Andrea Smith, *Beyond the Politics of Inclusion: Violence Against Women of Color and Human Rights*, 4 *MERIDIANS* 120, 120, available at <http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/meridians/v004/4.2smith.html>.

through the pathway of culture and cultural difference. They have also utilized what Professor Gayatri Spivak calls “strategic essentialism,”<sup>80</sup> or a temporary acceptance of an essentialist position of articulation and action. In the context of anti-violence work, this approach has served to articulate the Asian American survivor whose experience with domestic violence is the focal point of injury or harm. If it were not for the experience of domestic violence, this survivor would otherwise conform to the experiences and expectations of the model minority myth. Her needs, then, are produced because of the lack of safety and protection in the context of her intimate relationship, not because of the failure of the state or other institutional forces.

But what about Asians who are not considered model minorities to begin with because they do not have the exterior presentations of success, class, professionalism, or education? We see an elision of intragroup differences here among women of color in the intersections of race, class, and gender.<sup>81</sup> With this in mind, we the authors are working on teasing out other intertwined elements of gender identity, sexuality, immigration status, class, and disability—the complexities that preclude entry into the category of model minority victim. Usually, this kind of work in Asian American communities has been more about creating access by removing obstacles for communities that can pass for model minority than about exploring what domestic violence looks like in more structurally marginalized communities. As a result, there has been an emphasis on issues such as cultural and linguistic barriers and access. Professor Kimberlé Crenshaw’s groundbreaking article, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” raises this concern by addressing the limitations for battered immigrant women who do not have the access or resources, for example, to get necessary evidence to support waivers against deportation.<sup>82</sup> Reform seeks to improve access, but what about the survivors who are denied access because of structural barriers, whether they are undocumented, have a police record, or a history of mental illness? The assumption that underlies much anti-violence work is that the evidence will favor the survivor and that access to the legal system to present the evidence is the main concern. But the problem and solution are not so simple. Access is not determined only by culture or language per se, but rather, is tied to eligibility factors that determine who can be

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80. See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg eds., 1988), available at [http://www.maldura.unipd.it/dllags/docentianglo/materiali\\_oboe\\_lm/2581\\_001.pdf](http://www.maldura.unipd.it/dllags/docentianglo/materiali_oboe_lm/2581_001.pdf). Spivak has since denounced the term “strategic essentialism.” See also Linda Alcoff, *The Problem of Speaking for Others*, *CULTURAL CRITIQUE*, Winter 1991–1992, at 5 (broadly discussing the epistemological and metaphysical issues of speaking for others).

81. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1993).

82. *Id.* at 1248.

considered a survivor of violence.<sup>83</sup>

Because Asian Americans are stereotyped as a “model minority,” their experiences, class differences, and other struggles are erased in narratives about these communities. Nevertheless, the state relies on this model minority concept to justify and implement its legislation and determine who is seen as an appropriate survivor eligible for protection from the state.<sup>84</sup>

Like VAWA, hate crimes legislation also presents a state-based neoliberal response to violence that relies on the criminal-legal system for justice to prevail. Rather than looking to systemic, institutionalized causes of violence, hate crimes legislation punishes “bad individuals” who perpetuate violence against individuals of certain identities. This frame sets up a similar, singular dichotomy to that of VAWA that positions deserving survivors against undeserving perpetrators. In its implementation, however, hate crimes legislation often results in punishing individuals who are part of the broader group that it intends to theoretically protect.<sup>85</sup> This, like VAWA, is due to the fact that hate crimes legislation relies on the same mechanisms—including criminalization, investing in prisons, strengthening law enforcement and judicial discretion—for its results. Additionally, hate crimes legislation also relies on a model minority narrative that erases difference and sustains colonial constructions of racism.

#### A. “Battered Immigrant Women” and the Neoliberal Paradigm

VAWA produces “battered immigrant women”<sup>86</sup> by turning

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83. *See id.*

84. *See id.* at 117 (explaining how deviations from gender norms selectively changes legislative justifications and statutory treatment); *see also* Chris K. Iijima, *Reparations and the “Model Minority” Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385, 410–13 (1998) (explaining that “model minority” status is used as a “carrot” to encourage Asians to succumb to the dominant racial hierarchy in exchange for an incremental increase in status thus preventing solidarity amongst people of color).

85. *See* Tim Wise, *Of Hate Crimes, Big and Small*, RACE AND HISTORY (Aug. 12, 2000), <http://www.raceandhistory.com/historicalviews/08121999.htm>; Morgan Bassichis, Alexander Lee & Dean Spade, *Building an Abolitionist Trans and Queer Movement with Everything We’ve Got*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 15 (Eric A. Stanley & Nat Smith eds., 2011); Michael Bronski, Ann Pellegrini & Michael Amico, *Hate Crime Laws Don’t Prevent Violence Against LGBT People: So Why Do Many LGBT People, and Others, Feel So Deeply About the Need to Have Them?*, THE NATION (Oct. 2, 2013), <http://www.thenation.com/article/176437/hate-crime-laws-dont-prevent-violence-against-lgbt-people>. *See generally* WITLOCK, *supra* note 69; Jane Spade & Craig Willse, *Confronting the Limits of Gay + Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (2000).

86. Here, I use the term “battered immigrant women” to refer to women who have migrated to the United States, following the analysis put forth by Rupaleem Bhuyan about the distinction that is made between battered immigrant and nonimmigrant women by the state, counter to the work that community-based groups do to work in immigrant communities with survivors of all immigration statuses and histories. *See* DAS GUPTA, *supra* note 66 (discussing advocacy and citizenship status). Through this ethnographic study of feminist, queer, and labor community-based organizations in the northeast United States, Das Gupta explores creative strategies used to articulate claims to rights for

immigrant survivors into neoliberal citizens<sup>87</sup> who enact “the civic duty of the individual to reduce his or her burden on society, and instead build up his or her own human capital.”<sup>88</sup> VAWA eligibility requires someone to demonstrate both the capacity to transition from a position of powerlessness to a self-reliant household head with entrepreneurial spirit and a willingness to privilege the individual relationship with the state over any other relationships and identities that emerge from ties to family and community.<sup>89</sup> “Battered immigrant women” distance themselves from the threats of criminality or terrorism represented by their abusers.

In contrast to “dangerous” or “illegal” immigrants, “battered immigrant women” are safe entities; the state has nothing to fear from them as they are essentially like “puppy dogs.”<sup>90</sup> In exchange for being disciplined into neoliberal citizenship and then subjected to state welfare regulations, the authority of social service agencies, and the purview of the criminal legal system,<sup>91</sup> “battered immigrant women” are offered the promise of freedom.<sup>92</sup>

The specific complications faced by immigrant survivors of violence first emerged as a concern in public policy discourse in 1990 in response to the Immigration Marriage Fraud Amendments (“IMFA”) of 1986,<sup>93</sup> passed within a context of public concern about illegal immigration.<sup>94</sup> The IMFA established a two-year conditional status on Green Cards issued to people through sponsorship by their U.S. citizen or legal permanent resident (“LPR”) spouse. Previously, Green Cards obtained through marriage were permanently issued; post-IMFA, conditional status expired after a two-year waiting period if the then-named Immigration and Naturalization Service (“INS”) was convinced that the marriage was a legitimate, “good faith” marriage. Although spousal immigration sponsorship is rooted in a legacy of coverture and produces structured dependence,<sup>95</sup> this policy change

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immigrants who do not have secure citizenship status. These efforts disrupt, and transcend, the link between citizenship and rights, offering instead a paradigm of mobile citizenship, based on the experience of being migrants and not based on national membership.

87. See RUPALEEM BHUYAN, DISCIPLINING THROUGH THE PROMISE OF “FREEDOM”: THE PRODUCTION OF THE BATTERED IMMIGRANT WOMAN IN PUBLIC POLICY AND DOMESTIC VIOLENCE ADVOCACY (2006); Susan Berger, *(Un)Worthy: Latina Battered Immigrants Under VAWA and the Construction of Neoliberal Subjects*, in CITIZENSHIP STUDIES 201 (2009).

88. AIHWA ONG, BUDDHA IS HIDING: REFUGEES, CITIZENSHIP, THE NEW AMERICA 12 (2003).

89. See BHUYAN, *supra* note 87; Berger, *supra* note 87.

90. See Berger, *supra* note 87, at 206 (citing J. Dinnerstein, *Options for Immigrant Victims of Domestic Violence*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK (American Immigration Lawyers Assoc. ed., 2008)).

91. See generally KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE (2008) (discussing how battered immigrant women are disciplined and subject to various government systems).

92. BHUYAN, *supra* note 87.

93. See *id.*

94. *Id.*

95. See generally ABRAHAM, *supra* note 76 (discussing the history of coverture in immigration

directly empowered abusive partners with a specific modality to exert control over their spouses. The two-year waiting period placed some immigrant domestic violence survivors in a bind: if they left their marriage for safety reasons within those first two conditional years, they risked losing their Green Card. They would then likely need to choose between either (1) returning to their natal country as divorcees or (2) staying in the United States, undocumented, and at risk for deportation.<sup>96</sup> Anti-violence activists in immigrant communities called attention to this IMFA-created intersection of institutional and interpersonal violence. The new regulations “reproduce[d] structural inequalities that increase vulnerability to abuse, while empowering abusers in their efforts to exert power over their victims/survivors.”<sup>97</sup> IMFA exposed the intertwining of the violence caused by state policies and the violence of intimate abuse.

Advocacy efforts contributed to the creation of a battered spouse waiver in the Immigration Act of 1990.<sup>98</sup> This waiver exempted survivors of domestic violence from the conditional two-year period if they could demonstrate that they entered their marriage in “good faith,” experienced violence in the relationship, and would experience hardship if deported to their home country.<sup>99</sup> Congress provided that all petitioners who met the requirements would be granted a waiver (i.e., there were no caps or quotas) unless, of course, they were found to be a threat to national security.<sup>100</sup> The battered spouse waiver, then, offered an opening for survivors impacted by the IMFA,<sup>101</sup> and the policy recognition of immigration abuse as a dynamic of domestic violence set a precedent in advocacy and legal discourse.

But the gap between congressional intent and the INS evidentiary requirements for the battered spouse waiver presented a challenge for immigrant survivors who neither had access to the documents that could prove the legality of their marriage nor access to the professional evaluations that were necessary to demonstrate that emotional abuse had occurred. The waiver also did not offer any relief for immigrants whose spouses refused to file for the conditional Green Card in the first place. Anti-violence advocates pressed for more effective remedies, ultimately

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policy).

96. See *id.*; Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL’Y & L. 95 (2002).

97. BHUYAN, *supra* note 87, at 48.

98. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

99. The original IMFA did contain a waiver of conditional status, available at the discretion of the Attorney General. But the evidentiary requirements included a demonstration that the marriage was entered in good faith as well as had ended for good cause, which were often difficult for survivors to show without state validation that domestic violence could have been a good cause to end of the marriage. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

100. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, §601(a)(3)(D)(iv) (1990).

101. See ABRAHAM, *supra* note 76.

securing attention to these dynamics of immigration control through VAWA's recognition of "battered immigrant women."<sup>102</sup>

The first authorization of VAWA included immigration remedies for "battered immigrant women" collectively grouped under Subtitle G of the Act.<sup>103</sup> These remedies were available to immigrant survivors who could demonstrate that they (or their children) were subject to extreme cruelty during their good-faith marriages to LPRs or U.S. citizens. This included: (1) a self-petition for a permanent Green Card and (2) a cancellation of removal, through which an undocumented survivor could suspend deportation proceedings.<sup>104</sup> The battered spouse waiver also remained available to eligible immigrants. In addition to these criteria, VAWA-eligible survivors needed to show that they had "good moral character," an evaluation made through a review of criminal history.<sup>105</sup>

Later authorizations of VAWA improved the efficiency of the provisions and removed obstacles that prevented eligible survivors from accessing available relief. For instance, the next version of VAWA<sup>106</sup> relieved some of the evidentiary responsibilities placed on survivors by providing that changes to an abusive partner's status (e.g., death, loss of immigration status) would not adversely impact the survivor's application. It clarified and revised the "good moral character" requirements to exempt criminal histories that resulted from the abuse (e.g., self-defense and coerced activity).<sup>107</sup> It also removed the requirement that the applicant demonstrate she would experience hardship if deported.<sup>108</sup>

The remedies have been won in part because they do not challenge the dismantling and restructuring of social welfare or restrictive immigration policy. These forms of immigration relief do not expand or create new immigration provisions for immigrant survivors of violence. They simply remove the obstacles that are presented at the interpersonal level by addressing the barriers that emerge from an abusive partner's refusal to cooperate. Immigrant survivors who self-petition, apply for a battered spouse waiver, or request a cancellation of removal are already potentially en route to legal permanent residence by virtue of their marriage to a U.S. citizen or legal permanent resident.<sup>109</sup>

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102. *See id.*

103. Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections under VAWA I & II*, 17 BERKELEY J. GENDER L. & JUST. 137, 137–38 (2013).

104. *T-Visa Laws for Trafficking Victims*, WOMENSLAW.ORG (May 6, 2013), [http://www.womenslaw.org/laws\\_state\\_type.php?id=13636&state\\_code=US](http://www.womenslaw.org/laws_state_type.php?id=13636&state_code=US).

105. Sally Kinoshita, *Analyzing Good Moral Character and Inadmissibility Issues in VAWA Cases*, ASISTA (Fall 2008), [http://www.asistahelp.org/documents/resources/12\\_9203B40A60B82.pdf](http://www.asistahelp.org/documents/resources/12_9203B40A60B82.pdf).

106. VAWA was reauthorized in 2000. *See Violence Against Women Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

107. Kwong, *supra* note 103, at 148.

108. *Id.* at 144.

109. *See* Shana W. Chen, *The Immigrant Women of the Violence Against Women Act: The Role of the Asian American Consciousness in the Legislative Process*, 1 GEO J. GENDER & L. 823, 824–32

The next authorization of VAWA in 2000 widened the parameters of inclusion for immigrant survivors of violence. This version created special visas, such as the U-visa,<sup>110</sup> designed for immigrant crime victims who have experienced substantial physical or mental abuse and are willing to cooperate with criminal legal investigation or prosecution of the perpetrator(s); cooperation is verified through certification from a government official.

The U-visa protects people with insecure immigration status from deportation by providing them with a temporary visa and work authorization.<sup>111</sup> After three years, the Attorney General has discretionary power to grant permanent residence if the adjustment of status can be justified on humanitarian grounds, family unity, or if it is in the public interest.<sup>112</sup> If at any point a U-visa holder is found to be unreasonably uncooperative with a criminal investigation or prosecution, she is ineligible to adjust her status to permanent resident.<sup>113</sup> Regulations for the implementation of the U-visa were not issued until 2007.<sup>114</sup> Since 2007, U-visa holders have also been eligible for some public benefits; before then, they were barred from receiving any form of public assistance.<sup>115</sup> In the case of the U-visa, the immigration status of the perpetrator(s) of violence is not relevant; the survivor of violence does not become eligible for the visa because of her relationship to someone who is a U.S. citizen or legal permanent resident. Her eligibility is based on her willingness to offer evidence to the state to strengthen its ability to prosecute. In other words, she demonstrates that she is not a threat through her disassociation with that threat.

The U-visa, therefore, adds another dimension to the technologies of population racism<sup>116</sup> enacted by VAWA by delinking the eligibility criteria

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(2000). Unmarried survivors who have parented a child with a U.S. citizen or LPR are also eligible.

110. The T-visa was also created in 2000; it is similar to the U-visa in structure but is specifically for people who have been trafficked and it does not include any pathway to permanent residence. Some domestic violence survivors have applied for this visa on the grounds that they were labor- or sex-trafficked, but as it is generally not applicable in cases of intimate abuse, we do not take it up in this Article.

111. See Violence Against Women Act of 2000, Pub. L. No. 106-386 § 1513, October 28, 2000, 114 Stat. 1464, 1533-37.

112. *Id.*

113. *Id.*

114. See New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, Interim Rule, 72 Fed. Reg. 53,014 (Sept. 17, 2007).

115. *Id.*

116. Patricia Ticineto Clough & Craig Willse, *Gendered Security/National Security: Political Branding and Population Racism*, 28 SOC. TEXT 45 (2010). Biopolitics is centrally focused on the proliferation of vitality, and the growth and improvement of life of the population; as such, death also plays an important role. Death, either through the power to kill or to let die, is enacted by the biopolitical project through state racism, or the legitimated death of populations that are marked to be harmful to the larger population or the larger body of the nation. See MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE 1975-1976 (Mauro Bertani &

from the victim-perpetrator *relationship*. Unlike the “battered immigrant woman” who was abused in the context of an ongoing relationship that was sufficiently long that a legal marriage could take place, the U-visa applicant can become eligible in a flash—the length of a violent incident. The violent incident *itself*, provided the victim is willing to participate in the criminal legal prosecution, proffers eligibility. Similarly, the victim can become ineligible just as quickly—simple refusal to cooperate with prosecutors precludes U-visa eligibility.

U-visa applicants are also inherently associated with crime and risk because they become eligible only through their victimization. They can distance themselves from being read as a threat through the application, but if they lose eligibility, they also slip towards the unworthy end of the spectrum of risk: the dependent, criminal, or terrorist threat. The U-visa creates flexibility in which the logics of inclusion are tenuous, requiring a continuous re-assessment and ongoing demonstration of worth.

Becoming VAWA-eligible also means becoming subject to state power. For example, although the designation of “battered immigrant women” is created through VAWA, it circulates in other realms of state governance. For example, in 1996, the U.S. welfare system was dismantled and replaced with Temporary Assistance for Needy Families (“TANF”).<sup>117</sup> Undocumented people and nonimmigrant visa holders were cut off from all benefits except emergency medical care, and recent legal immigrants were blocked from accessing public benefits during their first five years of residence. TANF also instituted a lifetime sixty-month limit and work requirements for all recipients of public assistance. Yet, TANF also offered states the option of adopting a Family Violence Option (“FVO”) for domestic violence survivors, which relaxes work requirements and “stops the clock” on the sixty-month lifetime limit on public assistance.<sup>118</sup> Qualified immigrants who meet VAWA’s “battered immigrant woman” standard can apply for the FVO.<sup>119</sup> U-visa holders are not eligible for the

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Alessandro Fontana eds., David Macey trans., 1997). Clough and Willse reinterpret Foucault’s concept of state racism as population racism, which involves a “manipulation of life capacities [and] vitality” at the population-level. Clough & Willse, *supra*, at 50. Clough and Willse use this term in order to emphasize the distributions of populations, and within populations, with respect to life capacities. They also prefer to use this term because in its de-emphasis on the state, it opens up the possibility of the everyday pervasive ways in which this racism operates and circulates in nonstate sites of power, and as well. In neoliberalism, an ordinary deployment of population racism occurs through technical solutions—including legislative initiatives such as VAWA—that bring together economy and governance for the primary function of evaluating and managing of risk to the population. *See also* Patricia T. Clough, *The Affective Turn: Political Economy and the Biomediated Body*, 25 THEORY, CULTURE & SOC’Y 1 (2008); Patricia Ticineto Clough, *The New Empiricism: Affect and Sociological Method*, 12 EUR. J. SOC. THEORY 43 (2009).

117. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996).

118. 42 U.S.C. § 602(a)(7) (1996).

119. Leslye E. Orloff. *Access to Public Benefits for Battered Women and Children*, 33

FVO. The regulations have changed since the visa was created. As of 2010, U-visa holders are eligible for some select public benefits<sup>120</sup> but do not have the same level of access as “battered immigrant women.” Immigrant survivors of domestic violence who are ineligible for consideration as “battered immigrant women” are excluded from the FVO, and generally are limited in the forms of public assistance that they can receive.

In summary, while VAWA provides some survivors of violence with some relief from otherwise harsh immigration and welfare policies, it does so only by shoring up the prison industrial complex; ensuring that survivors cooperate with law enforcement and comply with narrow narratives about violence; reinforcing the dichotomy between “deserving” and “undeserving” immigrants, poor people, and survivors; and focusing on interpersonal violence rather than state and institutional violence. These policies do not undermine the hierarchies between citizens and immigrants, the rich and the poor, or white and racialized persons, and do not redistribute resources and power in a more just way. In a sense, VAWA creates another disciplinary mechanism both relying on and reproducing a “model minority” framework. Similar tensions emerge in state policies regarding another form of interpersonal violence: hate crimes.

### III. CRIMINALIZATION

#### A. *Increased Vulnerability to Violence Enacted by the State and Institutions*

Criminal legal interventions can increase the vulnerability of survivors and perpetrators labeled by the state by further exposing them to risks of institutional violence. These risks are, of course, greatest for people who already have precarious relationships with the state, such as poor women of color, undocumented immigrant women, LGBTQ survivors, and people who engage in sex work and other survival economies.<sup>121</sup> For example, in cases of domestic violence, mandatory arrest and prosecution policies can lead to dual arrests or survivor arrests when law enforcement agents cannot identify (or misidentify) the perpetrator of violence.<sup>122</sup>

Similarly, violence that is labeled as “hate violence” removes space for complexities and context including instances of self-defense. This is especially true when already “othered” individuals defend themselves against an often bias-motivated attacker. Rather than consider all parties to be a survivor and/or perpetrator of violence, the U.S. criminal legal system

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CLEARINGHOUSE REV. 237 (1999–2000).

120. See New York Anti-Trafficking Network, IMMIGRATION RELIEF FOR CRIME VICTIMS: THE U VISA MANUAL MARCH 2010, available at <http://aaldef.org/docs/U-Visa-Manual.pdf>

121. See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000).

122. See ABRAHAM, *supra* note 76.

quickly creates a victim/perpetrator binary narrative. More often than not, the labeled perpetrator is also a person living at the intersections of oppression—poor women of color, undocumented immigrant women, LGBTQ survivors, and people who engage in sex work and other survival economies (e.g., low-income transgender women who are immigrants).<sup>123</sup> Like marginalized survivors of domestic violence, marginalized survivors of hate violence often do not benefit from the laws that are intended to protect or help them.<sup>124</sup> In instances of violence, the dominant narrative—that of the least oppressed party—is likely to prevail.

Domestic violence arrests and prosecution can have adverse consequences for survivors. In addition to potential jail time, an arrest can cause retaliation from her abuser, family, and community; jeopardize her employment; adversely affect access to public benefits; and it can adversely affect child custody agreements.<sup>125</sup> These policies also produce impacts when the abusive person is arrested without the survivor's consent. Survivors of violence may not want their abusive partners arrested for reasons as varying and complicated as love, fear, economic interdependence or dependence, mobility interdependence or dependence, fear of retaliation, shame or embarrassment, and immigration status dependence.<sup>126</sup> Criminal legal responses to domestic violence can also open up a home to further state intervention and surveillance, such as involvement of child protective services.<sup>127</sup> These state agents can abuse their power; for example, rampant incidents of sexual violence perpetrated by law and immigration enforcement officials against survivors of color have been documented.<sup>128</sup>

For Asian immigrant survivors, additional repercussions may impact

123. WITLOCK, *supra* note 69.

124. See e.g., DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* 13 (2011) (explaining that access to certain privileges that help determine the distribution of life chances—such as whiteness, perceived able-bodiedness, employment, and immigration status—often offer some individuals degrees of buffering from violence faced by people of color, people with disabilities, immigrants, indigenous people, prisoners, youth in foster care and the homeless—with a specific focus on the implementation and execution of hate crimes legislation and nondiscrimination laws).

125. This dynamic is discussed more fully below. See Part IV.B, *infra*, for specific examples.

126. See ABRAHAM, *supra* note 76; Coker, *supra* note 121 (discussing the implications of arrests for survivors of violence).

127. Sue Osthoff, *But, Gertrude, I Beg to Differ, a Hit Is Not a Hit Is Not a Hit: When Battered Women Are Arrested for Assaulting Their Partners*, 8 *VIOLENCE AGAINST WOMEN* 1521 (2002); see also Coker, *supra* note 121; Donna Coker, *Race, Poverty, and the Crime-Centered Response to Domestic Violence: A Comment on Linda Mills's Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 10 *VIOLENCE AGAINST WOMEN* 1331 (2004); Mimi E. Kim, *Challenging the Pursuit of Criminalisation in an Era of Mass Incarceration: The Limitations of Social Work Responses to Domestic Violence in the USA*, 10 *BRIT. J. SOC. WORK* 1331 (2012).

128. See Julianne Hing, *Anti-Immigrant Fever Ignites Violence Against Women*, *COLORLINES* (Mar. 27, 2008, 2:24 PM), [http://colorlines.com/archives/2008/03/antiimmigrant\\_fever\\_feeds\\_viol.html](http://colorlines.com/archives/2008/03/antiimmigrant_fever_feeds_viol.html).

her or her partner's immigration status, as well as her ability to access immigration remedies available through the Violence Against Women Act. Arrest can potentially cue deportation proceedings, especially because a domestic violence conviction is currently a deportable offense (made possible through IIRIRA in 1996). The post-9/11 reconfiguration of immigration services and enforcement, now folded under the jurisdiction of the Department of Homeland Security, has heightened these risks. Specific policy initiatives that have facilitated the direct relationship between law enforcement and immigration enforcement further already-existing dilemmas for immigrant survivors of violence. For example, Section 287(g) is a federal initiative that empowered state law enforcement agencies to serve as immigration enforcement agents, adversely affecting survivors with temporary or no immigration status.<sup>129</sup> If called to a scene of a domestic violence crime with Section 287(g) jurisdiction, police officers would be able to question all parties about their immigration status and, if the parties are without status, initiate enforcement action against them. Even though Section 287(g) was created as part of IIRIRA in 1996, it was dormant until Florida signed an agreement in 2002 as part of its anti-terrorism initiative. Currently, U.S. Immigration and Customs Enforcement ("ICE") has 287(g) agreements with thirty-six law enforcement agencies in nineteen states.<sup>130</sup>

The Obama administration suspended the 287(g) program in June 2012.<sup>131</sup> As an indirect consequence, other programs have grown, such as Secure Communities,<sup>132</sup> described by the Department of Homeland Security as a "simple and common-sense way to carry out ICE's priorities."<sup>133</sup> Through this information-sharing initiative, an arrest for any reason entails mandatory fingerprinting at the time that the person is booked into jail to check arrest records across FBI databases.<sup>134</sup> In addition, the prints are now also forwarded to the immigration databases at the U.S.

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129. See 8 U.S.C. § 1357(g) (2006).

130. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (last visited Mar. 17, 2014), <http://www.ice.gov/news/library/factsheets/287g.htm>.

131. Statement by the President on the Supreme Court's Ruling on *Arizona v. the United States*, THE WHITE HOUSE (June 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/25/statement-president-supreme-court-s-ruling-arizona-v-united-states>.

132. See *FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec 21, 2012), <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm#statement>.

133. *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Mar. 17, 2014).

134. Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES, May 11, 2012, at A1, available at [http://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html?\\_r=0](http://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html?_r=0).

Department of Homeland Security.<sup>135</sup> If the person is found to be potentially deportable because he or she is without legal status or because of a criminal record, ICE can initiate enforcement action.<sup>136</sup>

For South Asians, the post-9/11 climate, as well as the broader context of both rising interpersonal and institutional targeting and the domestic and transnational consequences of the “War on Terror,” has led survivors in these communities to be less comfortable with talking about violence in the intimate realm.<sup>137</sup> Women’s everyday safety in the home became less of a priority as communities focused on protection from outside violence, furthering dynamics of community insularity and isolation, and increasing the invisibility of domestic violence. According to community-based groups, survivors of violence indicated that they were more afraid to engage with law enforcement due to heightened fears of deportation or harassment.<sup>138</sup> These fears, based on both perceptions and actual changes in policing and surveillance policies and practices, exacerbated existing barriers to mainstream social services and relevant legal and immigration resources.<sup>139</sup>

### B. *Reliance on the State and the Effects on Interpersonal Relationships*

The impact of criminalization as the solution to domestic and hate violence transcends the sphere of the criminal-legal system. For example, to be read as a “domestic violence victim” by state and quasi-state institutions, a survivor of violence often needs official verification of her experience. Many services and remedies that are available to survivors of domestic violence require documentation, which proves violence occurred. This documentation is most directly attained through police or medical reports, which means that only certain forms of violence (e.g., physical violence) are more legible to the state, which produces hegemonic understandings of the dynamics of domestic violence.

How criminalization of domestic violence produces sociocultural understandings of the dynamics of intimate violence<sup>140</sup> is perhaps a more

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135. *Id.*

136. For an excellent explanation of how Secure Communities is implemented, see *How Does S-Comm Work?*, IMMIGRANT DEFENSE PROJECT (last visited Mar. 17, 2014), <http://immigrantdefenseproject.org/wp-content/uploads/2011/02/20130520-SComm-one-pager.pdf>.

137. See Maunica Sthanki, *The Aftermath of September 11: An Anti-Domestic Violence Perspective*, in BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA 70–72 (Shamita Das Dasgupta ed., 2007).

138. *Id.* at 72.

139. See Soniya Munshi, *Multiplicities of Violence: Responses to September 11 from South Asian Women’s Organizations*, 4 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 419–436 (2011); see also *id.* at 72–74.

140. See Madelaine Adelman, *The Battering State: Towards a Political Economy of Domestic Violence*, 4 J. POVERTY 47–50 (2004). See also Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence*, 23 GENDER AND SOC’Y

pronounced concern than the barriers posted by social service evidentiary requirements. Specifically, the logics of criminalization necessitate a binary relationship between a victim and perpetrator in which the best, most effective solutions require the two to be separated from one another. This means that, for instance, even if a survivor wants to bypass the criminal legal system by obtaining a civil order for protection, either she is required to include an explicit no-contact clause, or, alternatively, such an understanding becomes implicit in the terms. Even civil protection orders, then, open up criminal law control in the domestic realm, prohibiting or punishing intimate relationships. Violations of civil restraining orders are criminally prosecutable, so the goal of successful criminal enforcement is the end of the intimate relationship. Some jurisdictions have practices of conducting surprise visits at homes where there has been an incident of domestic violence, making the home a continued site of surveillance in which the mere presence of the abusive partner is a violation.<sup>141</sup> Because many survivors want to continue the relationship, they routinely violate their own restraining orders, which, consequently, harm their credibility as victims.<sup>142</sup> Similarly, many domestic violence shelter policies assume that the survivor wants to be separated from the abusive person, and behavior such as calling the person who caused harm can be seen as an indication that the survivor is not yet ready to leave, rendering her potentially dangerous to others in the shelter because of her contact with someone who has been violent.<sup>143</sup>

Criminalization shapes cultural ideas about good cooperative victims<sup>144</sup> and monstrous criminals who enact violence, unlike “respectable citizens.”<sup>145</sup> Scholar-activist Mimi Kim argues that these ideas depend upon and produce a fetishization of safety, where the goal of attaining a conventional understanding of “safety” becomes prioritized above all other factors such as emotional attachment and economic needs.<sup>146</sup> These classifications of victim and perpetrator are overlaid by frameworks of citizen and terrorist, where cultural as well as legal citizenship is attained

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145, 273–81 (2009); Mimi E. Kim, *Challenging the Pursuit of Criminalisation in an Era of Mass Incarceration: The Limitations of Social Work Responses to Domestic Violence in the USA*, 43 BRIT. J. OF SOC. WORK 1276–93 (2013).

141. See also JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2011).

142. Kim, *supra* note 140.

143. See Coker, *supra* note 121, at 1018 (“It is a cruel trap when the state’s legal interventions rest on the presumption that women who are ‘serious’ about ending domestic violence will leave their partner while, at the same time, reducing dramatically the availability of public assistance that makes leaving somewhat possible.”).

144. See Bumiller, *supra* note 140.

145. See Adelman, *supra* note 140, at 49 (“The criminalization model has carved out a deviant rather than normative stance toward battering—it is something criminals do, not otherwise respectable citizens”).

146. See Kim, *supra* note 140, at 1281–82.

through disassociation with the dangerous, disloyal terrorist, criminal, or abusive partner.

The political and cultural implications that stem from legitimizing criminalization as a tool to address intimate violence are vast. They transcend the anti-violence movement and create models for other social movements that are working on forms of everyday violence (e.g., hate crimes). Charging an act of violence perpetrated by an individual against another individual as a hate crime carries with it a legitimization of victimhood assigned by the state. Hate crimes legislation continues to be a symbolic recognition of discrimination and violence that is motivated by “hate” for and against specific identity based groups as more and more identities are added to the enumerated protected groups.<sup>147</sup> Prosecuting a crime as a “hate crime” erases the potential to recognize complexities, including systemic violence, intersecting identities and sometimes, even self-defense.

Hate crime legislation and a demand for more inclusive laws with harsher penalties for perpetrators continue to grow separately but parallel to a growing resistance to the criminal legal system.<sup>148</sup> Staggering statistics abound, the prison industrial complex, its connection to the “Jim Crow South,”<sup>149</sup> and the ways in which vulnerable groups experience disproportionate violence and criminalization by the state also extends to a critique of hate crimes legislation and its reliance on penalty enhancements to ensure “justice.”<sup>150</sup> Hate crimes legislation, like VAWA, relies on and expands a system that is inherently rooted in systemic violence, discrimination, and contradiction. Hate crime laws serve only to expand and increase the power of the same unjust and corrupt criminal punishment system.<sup>151</sup> Evidence demonstrates that hate crimes legislation, like other

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147. One example of proposed state legislation is the Gender Identity Non Discrimination Act of New York (GENDA), a bill that includes gender identity and expression as a protected category from discrimination in the workplace and in public accommodations while simultaneously linking it to the New York penal code that enhances penalties for hate crimes. Although this bill has passed in the Assembly for several years in a row, it continues to be blocked by the Senate. There is mixed support for the bill in transgender communities ranging from a critique about the use of the criminal legal system for protection to an insistence on gender identity and expression being included so that “trans people are not left behind.” *SRLP announces Non Support of the Gender Employment Non Discrimination Act*, SYLVIA RIVERA LAW PROJECT (April 6, 2009), <http://srlp.org/genda/>.

148. See generally Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). See also David Cole, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

148. DAVIS, *PRISONS OBSOLETE*, *supra* note 10.

149. See generally, WITLOCK, *supra* note 69; see also Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, *CHICANO-LATINO L. REV.* 38–52 (2000) (If a crime is charged as a “hate crime” in a state with hate crimes legislation, automatic penalty enhancements are implied. This means that if a person has been charged with a hate crime and is facing one year of prison, his or her minimum sentence will automatically be increased).

151. See, e.g., *A Compilation of Critiques of Hate Crimes*, *AGAINST EQUALITY* (last visited Mar. 17, 2014), <http://www.againstequality.org/wp-content/uploads/2009/10/critiques-on-hate-crimes.pdf>.

criminal punishment laws, is used unequally and improperly against marginalized communities.<sup>152</sup> Also, like VAWA, hate crimes legislation relies on the narrative of the “perfect victim” and “monstrous perpetrator” and follows the same logic behind the unnuanced stereotype of the model minority. These laws, bills, and regulations increase the staggering incarceration rates of people of color, poor people, LGBTQ people and youth within a system that is inherently and deeply racist, homophobic, transphobic, and classist. One key factor in the individual and systemic discrimination perpetuated by hate crimes legislation is the enormous amount of power prosecutors have in their discretion.<sup>153</sup> Because a prosecutor decides who is a “perpetrator” of hate violence and who is a “survivor” of hate violence, there is an added reliance upon a system that is inherently unjust to create justice. As Professor Angela Davis explains:

In some smaller offices, typically state and county prosecutor offices, the decisions concerning whether to charge and what to charge become routine. Police officers arrest a suspect, recommend a charge, and, if there is probable cause and supporting evidence, the prosecutor formalizes the charges by filing an information or seeking an indictment through the grand jury process. In other offices, prosecutors exercise discretion in a variety of ways. They may decline to bring charges, bring only charges that they believe they can prove, or “inflate” the charges—convincing a grand jury to indict a defendant for more and greater charges than they can establish.<sup>154</sup>

The decision to forego charges may be based on a range of considerations including the triviality of the offense, perceived lack of victim credibility, lack of worthiness, or lack of suffering.<sup>155</sup> The decision may also be based on considerations of fairness and justice in a particular case. In some instances, the decision to forego or bring charges may be the result of a prosecutor’s bias toward or against a particular defendant or victim.<sup>156</sup> In all cases, however, the decision to forego charges is entirely within the discretion of the prosecutor.<sup>157</sup>

The prosecutor’s decision to charge a crime as a “hate crime” is often influenced by community or political pressure. The persuasiveness of

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152. WITLOCK, *supra* note 69, at 8 (“In every area of criminal justice policy, penalty enhancements, like mandatory minimum sentences, three-strikes laws, and similar measures, are applied in an unjust and disproportionate way against people of color and the poor. As a result, over the past thirty years, penalty enhancements have fueled a broad social process of mass incarceration, falling most heavily on communities of color, particularly youth. Further, law enforcement authorities, such as police or prison guards, are themselves frequent perpetrators of hate crimes, a systemic reality that is neither acknowledged nor addressed by current hate crimes legislation.”).

153. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 395, 463–64 (2001).

154. *Id.* at 409.

155. *Id.*

156. *Id.* at 410.

157. *Id.*

outside pressure, however, is largely dependent on the identities of the survivor and perpetrator. For example, white and wealthy survivors of “hate violence” are more likely to have their judicial demands recognized than poor people and people of color.<sup>158</sup> For people living at the intersection of multiple identities,<sup>159</sup> the prosecutorial recognition of violence as hate violence is even less likely. While political and community pressure might influence a decision to charge a crime as a “hate crime,” institutionalized discrimination, racism, homophobia, and transphobia trump so-called “justice” in many instances. For example, in the case of the “New Jersey 4,”<sup>160</sup> a group of young queer women of color were incarcerated for defending themselves against the homophobic attacks and slurs of a straight, white man, who accused them of committing a “hate crime” against him.<sup>161</sup> It is all too easy for a prejudice-motivated attack to become a fight for survival, and for that fight to be turned against oppressed communities.

Studies also show that hate crime laws and other “get tough on crime” measures do not deter or prevent violence.<sup>162</sup> Increased incarceration does not deter others from committing violent acts motivated by hate, nor does it rehabilitate those who have committed past acts of hate or make anyone safer.<sup>163</sup> In fact, studies have shown that incarceration reproduces violence, racism, and homophobia.<sup>164</sup> Communities of color, which are

158. See generally, MOGUL, RITCHIE & WHITLOCK, *supra* note 18.

159. “[T]he intersection of racism and sexism factors into black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.” Kimberley Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991). For example, a wealthy, white lesbian who is attacked by a person using homophobic epithets is far more likely to have their case recognized and charged as a hate crime than an undocumented, lesbian, Asian immigrant who engages in sex work even if she has also been attacked by a person using homophobic epithets. The opposite is true as well. An undocumented, lesbian Asian immigrant who engages in sex work for her living is far more likely to be charged with committing a hate crime against someone else than a white, wealthy lesbian, regardless of the circumstances. This victim/perpetrator stereotype follows a hierarchical valuing of what constitutes a deserving life similar to VAWA.

160. See *Intersectional Injustice*, FREE THE NEW JERSEY 4, <http://freenj4.wordpress.com/intersectional-injustice/>.

161. Anemona Hartocollis, *Four Women Are Convicted in Attack on Man in Village*, N.Y. TIMES, Apr. 19, 2007, at B3, available at <http://www.nytimes.com/2007/04/19/nyregion/19attack.html>.

162. See *Do Hate Crime Laws Work?*, SOCIALIST WORKER (2009), <http://socialistworker.org/2009/08/10/do-hate-crime-laws-work> (“In 1999, some 21 states and the District of Columbia had hate-crimes laws on the books. Today, 45 states have enacted hate-crime laws in some form or other. Yet the trend has not been a lowering of hate crimes. In 2006, 7,722 hate-crime incidents were reported to the Federal Bureau of Investigation in 2006—an 8 percent increase from 2005.”).

163. See, e.g., Joel Waldfoegel, *The Irrational 18-Year-Old Criminal: Evidence that Prison Does not Deter Crime*, SLATE (Jan. 30, 2007), [http://www.slate.com/articles/business/the\\_dismal\\_science/2007/01/the\\_irrational\\_18yearold\\_criminal.html](http://www.slate.com/articles/business/the_dismal_science/2007/01/the_irrational_18yearold_criminal.html).

164. See, e.g., Coretta Phillips, *Reading Difference Differently? Identity, Epistemology and Prison Ethnography*, 50 BRIT. J. OF CRIMINOLOGY 360, 360–378 (2010).

disproportionately profiled, arrested and detained by police, caught in systems of poverty and detention, and face extreme violence in prisons, jails, and detention centers, reveals that the state is a main perpetrator of violence against already marginalized communities.

One recent example of the complicated intersections of hate-violence, homophobia, race, xenophobia, and the criminal-legal system can be seen in the case of Dharun Ravi.<sup>165</sup> In 2010, Ravi, an eighteen-year-old South Asian student at Rutgers University, used a webcam to stream footage of his 18-year-old, white, gay, male roommate, Tyler Clementi, engaging in a sexual encounter with another male. After the first incident, Ravi used Twitter<sup>166</sup> to encourage others to watch a second viewing, though the viewing ultimately was not streamed. That same day, Clementi lodged complaints with the resident assistant and other officials, requesting a room change. The next day, Clementi committed suicide. Ravi and his friend, Molly Wei, were tried and convicted of fifteen counts of crimes including invasion of privacy, attempted invasion of privacy, tampering with evidence, witness tampering, hindering apprehension or prosecution, and finally bias intimidation, a hate crime charge that carries a potential penalty of ten years.<sup>167</sup> Though not a United States citizen, Ravi was a legal permanent resident.<sup>168</sup> Conviction for an aggravated felony would render him deportable under immigration law.<sup>169</sup>

165. For an overview of the story of this case, see Ian Parker, *The Story of A Suicide*, THE NEW YORKER (Feb. 6, 2012), [http://www.newyorker.com/reporting/2012/02/06/120206fa\\_fact\\_parker?currentPage=all](http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker?currentPage=all).

166. Twitter is a social media platform used to broadcast short messages and Internet links. See Andrew Moore, *A Conversation with Twitter Co-Founder Jack Dorsey*, THE DAILY ANCHOR (Feb. 12, 2012), <http://www.thedailyanchor.com/2009/02/12/a-conversation-with-twitter-co-founder-jack-dorsey/>.

167. Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1, available at <http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=all&r=0>.

168. Kate Zernike, *Rutgers Case Will Not Spur Deportation, Officials Say*, N.Y. TIMES, June 19, 2012, available at <http://www.nytimes.com/2012/06/19/nyregion/officials-will-not-look-to-deport-dharun-ravi-over-rutgers-case.html>.

169. 8 U.S.C. § 1227(a)(2)(i) (2006). Pursuant to IIRIRA, two convictions for a crime involving moral turpitude and one conviction for an aggravated felony are grounds for deportation from the United States. A “crime of moral turpitude” is a term used in immigration law and applied broadly to state criminal laws. Crimes involving “moral turpitude” include crimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses), crimes in which bodily harm is caused or threatened by an intentional or willful act, or crimes in which serious bodily harm is caused or threatened by an act of recklessness (such as murder, rape, and certain manslaughter and assault offenses), and most sex offenses. See Manuel D. Vargas, *Immigration Consequences of New York Criminal Convictions*, COL. L. SCH. BLOGS FOUR CS (Nov. 8, 2011), <http://blogs.law.columbia.edu/4cs/immigration/>. This applies to immigrants who are legal permanent residents (“LPRs”) or “green card” holders. “The first version of 8 U.S.C. § 1101(a)(43) defined ‘aggravated felony’ as murder, drug trafficking, and firearms trafficking.” See Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, THE CHAMPION (Aug. 4, 1997), <http://www.nacdl.org/CHAMPION/ARTICLES/97aug04.htm>. Over the years, additional crimes were incorporated. The Immigration Act of 1990 added “crime[s] of violence” (as defined in Section 16 of

The case stirred up a considerable amount of controversy emerging from both reductive identity politics as well as more transformative approaches to healing and justice. LGBTQ advocates and supporters from around the country rallied, calling for Ravi's conviction and consequent deportation. Within days of Clementi's death, Garden State Equality, a New Jersey LGBTQ advocacy group, demanded that Ravi and Wei be prosecuted for hate crimes and given the maximum possible sentence.<sup>170</sup> Campus Pride, a national group for LGBTQ students, advocated for their immediate expulsion, without any hearing or other process.<sup>171</sup> Indian communities rallied as well to save Ravi from prison time, challenging the possibility that he could be held accountable in this situation. Peter Kothari, a long-time Indian community advocate stated, "It is ironical that the bias law, which was passed by the New Jersey legislature after the infamous 'dot buster hate crime' in which an Indian's life was lost, should be applied to another Indian, who was not charged with causing death to his roommate, Clementi, who committed suicide after Ravi's spying episode."<sup>172</sup> As journalist Sandip Roy notes, Kothari's comments imply that "[i]t was as if bias can only go one way and Indians can only be its victims."<sup>173</sup> Meanwhile, the mainstream media replicated oversimplified binaries, juxtaposing "culture" and "criminality" to understand Ravi's motivations.<sup>174</sup>

Despite the binary backlash, efforts emerged to address the complexity of the situation, the limitations of the punishment paradigm, and the need for education and healing in the aftermath of this traumatic event. For example, a New Brunswick, New Jersey-based queer-centric social justice group, Queering the Air, organized under the banner of "justice, not vengeance" in response to the racist and xenophobic

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Title 18, excluding a purely political offense), which imposes at least five years imprisonment, regardless of any suspension." *Id.* "Section 321(a)(3) of the IIRIRA amends 1101(a)(43) . . . by striking 'at least five years' each place it appears and inserting 'at least one year.'" *Id.* As a result, virtually all felony offenses are "aggravated felonies" for the purpose of immigration law and only one conviction triggers mandatory deportation for immigrants.

170. See Carlin Miller, *Tyler Clementi Suicide: Lawyer Confirms Student's Suicide, Molly Wei and Dharun Ravi Face Charges for Sex Tape*, CBS NEWS (Sept. 30, 2010 2:03 PM), <http://www.cbsnews.com/news/tyler-clementi-suicide-lawyer-confirms-students-suicide-molly-wei-and-dharun-ravi-face-charges-for-sex-tape/>.

171. Katherine Franke, *Queering the Air: Rutgers Queer Community Responds Thoughtfully to Clementi's Suicide*, GENDER & SEXUALITY L. BLOG (Oct. 21, 2010), <http://blogs.law.columbia.edu/genderandsexualitylawblog/2010/10/21/queering-the-air-rutgers-queer-community-responds-thoughtfully-to-clementis-suicide/>.

172. Sandip Roy, *Shame on You, Dharun Ravi: The Boy Who Can't Say Sorry*, FIRSTPOST (May 23, 2012), <http://www.firstpost.com/world/shame-on-you-dharun-ravi-the-boy-who-cant-say-sorry-318667.html>.

173. *Id.*

174. See, e.g., Arun Venugopal, *Criminal or Cultural: South Asian Community Weighs in on Dharun Ravi* (WNYC radio broadcast Mar. 14, 2012), available at <http://www.wnyc.org/story/192059-south-asians-ponder-dharun-ravi-case/>.

judgments levied on Ravi and Wei and aimed to talk more broadly about issues of campus safety. An organization-issued press release articulated their position:

While we do not condone the actions that Ravi and Wei are alleged to have taken, neither can we stand aside and watch the Rutgers community lay the entire blame for Clementi's death on two eighteen-year-olds. It is especially ugly that comments about the pair have cast aspersions on their race, ethnicity, and citizenship. We note the criminal justice system has historically been tainted by such prejudice.<sup>175</sup>

South Asian LGBTQ communities also engaged in the intersectional complexity by denouncing homophobia and the perception that homophobia is an inherently cultural attitude as well as challenging the institutional racism and xenophobia of the U.S. criminal-legal system. A spokesperson from the South Asian Lesbian Gay Association of New York City ("SALGA") stated,

Our first thought was that it's become a big deal because Ravi is South Asian, and it seemed race-related at least from this perspective. There was no media attention on the bullies in other recent cases of young gay suicides, only on the victims. It seemed like Ravi was being scapegoated.<sup>176</sup>

Others, such as Richard Kim, encouraged a multidirectional reading of bias and stereotyping, noting that Clementi wrote messages to an Asian friend from high school about his new roommate: "My roommates name is Dharun/ I got an azn!"<sup>177</sup> After meeting Ravi's parents, Clementi wrote the same friend back, saying they seemed "sooo Indian first gen americanish" and "defs own a dunkin."<sup>178</sup> While being clear that he is not making a "boys will be boys argument," Kim interprets these dynamics as "a story of two boys, one more vulnerable than the other, trying to navigate—badly and without much guidance—the vicissitudes of close encounters of the freshman kind."<sup>179</sup> As Mashuq Deen, a member of SALGA states, "In fighting bullying what you want is people to see each other and understand eachothers' [sic] differences and see how we can talk about it instead of punching someone or making fun of someone."<sup>180</sup>

The case of Dharun Ravi is indicative of the ways in which relying on

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175. Franke, *supra* note 171 (quoting a press release by Queering the Air).

176. Paul Schindler, *Was the Rutgers Bully Scapegoated?*, GAY CITY NEWS (Mar. 29, 2012), <http://gaycitynews.com/was-the-rutgers-bully-scapegoated/>.

177. Richard Kim, *The Tyler Clementi and Dharun Ravi We Will Never Know*, THE NATION (Mar. 19, 2012, 6:09 PM), <http://www.thenation.com/blog/166902/tyler-clementi-and-dharun-ravi-we-will-never-know>.

178. *Id.*

179. *Id.*

180. Sarah Jacob, *Apology Rejected as Dharun Ravi Starts Jail*, NDTV (June 1, 2012, 9:18 PM), <http://www.ndtv.com/article/world/apology-rejected-as-dharun-ravi-starts-jail-221013>.

criminalization for “justice to prevail” oversimplifies a case that is far more complicated than one bad hate-perpetrator and one good survivor. Ravi’s conviction of a hate violence crime has served to perpetuate stereotypes about racism and homophobia.<sup>181</sup> That Ravi, a young man from India, was publically shamed as a monstrous perpetrator cannot be separated from the fact that South Asian and Arab men are continually persecuted in the ongoing “War on Terror” in the United States. Although Ravi did perpetrate harm against Clementi, it is compelling to consider the criminal and legal results if the situation had been reversed. Would hate violence against a South Asian young man be legitimized in the same way if he were queer and had multiple criminal convictions? Regardless of the answer, the criminalization and deportation of one eighteen-year-old immigrant is unlikely to end homophobia and more likely to perpetuate structural racism and xenophobia.

#### IV. AWARENESS AND ALTERNATIVES TO INSTITUTIONALIZED RESPONSES

Our goal is not ending violence. It’s liberation.

—Beth Richie

##### A. *INCITE! Women of Color Against Violence*

One of the most vital forms of dissent against this dominant trend towards criminalization was made visible through the formation of INCITE! Women of Color Against Violence in 2000, a national network of radical feminists of color working to end violence against women, gender nonconforming, and trans people of color.<sup>182</sup> INCITE! organized after an inaugural gathering that addressed the intersections of racism, sexism, classism, homophobia, and other forms of interpersonal and institutional violence and centered women of color in its analysis and practice. The following year, in collaboration with the prison abolitionist organization Critical Resistance, INCITE! released a statement, *Gender Violence and the Prison Industrial Complex*,<sup>183</sup> articulating cross-movement attention to the consequences of criminalization of domestic and sexual violence. This statement is grounded in an understanding that criminalization does not work to protect survivors of color from violence. It articulates, as above, that criminalization has had adverse impacts on women of color by further exposing them to institutional violence, and that increased policing and prosecution has not led to decreases in domestic violence.<sup>184</sup> INCITE! and

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181. See Roy, *supra* note 172.

182. For more information about INCITE!, visit their webpage at <http://www.incite-national.org>.

183. The statement was revised in 2004 to attend to gender identity and expression, the inadequacy of a binary system of understanding gender, and the violence experienced by trans and gender nonconforming people of color. *Gender Violence and the Prison Industrial Complex*, INCITE! (last visited Mar. 15, 2014), <http://www.incite-national.org/page/incite-critical-resistance-statement>.

184. *Id.*

Critical Resistance argue that the strategy of criminalization has also shifted power to the state at the expense of collective and creative organization to address violence.<sup>185</sup> This state-based model renders these forms of violence as individual problems, detached from the broader conditions that produce violence in the first place.<sup>186</sup> This characterization has also served to disconnect anti-violence movements from other social movements that may address inequities of power in a more holistic way.<sup>187</sup> The joint statement does not romanticize other movements, however, and calls for the prison abolition movement, in particular, to take responsibility to develop strategies that keep survivors safe and hold abusive people accountable without utilizing the criminal legal system.<sup>188</sup>

### B. Community-Based Interventions

In more recent years, we have seen a rising visibility of work around community-based interventions that do not rely on the state for responses to violence. One example is the work of Creative Interventions, a San Francisco Bay Area-based resource center that works from the premise that those most impacted by violence—survivors, families, and communities—are the ones who best know both the conditions of violence and the strategies that will allow for transformation.<sup>189</sup> Working with organizational partners that are based in immigrant communities—Shimtuh in Korean communities, Narika in South Asian communities, Asian Women’s Shelter, and La Clinica de la Raza—Creative Interventions recently released the Creative Interventions Toolkit: a Practical Guide to Stop Interpersonal Violence.<sup>190</sup> This free, online-accessible resource offers tools and strategies to help build everyday responses to violence in communities without utilizing the state. With the development of accessible tools and momentum around these conversations, anti-violence efforts are beginning to intentionally incorporate these strategies into their work.

For example, Sakhi For South Asian Women, an organization based in New York City,<sup>191</sup> has taken on a project to implement transformative justice strategies in its work. Based on the experience of the limitations and harms to survivors from the criminal-legal system, Sakhi has begun to formally consider supporting the construction of community capacity to engage in responses to violence, without utilizing the state and potentially

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See *Community-Based Interventions Project*, CREATIVE INTERVENTIONS (last visited Mar. 15, 2014), <http://www.creative-interventions.org/about/ci-projects/community-based-interventions-project/>.

190. The Creative Interventions Toolkit and additional information about the organization is available at <http://www.creative-interventions.org/tools/toolkit/>.

191. For more information about Sakhi’s work, visit <http://www.sakhi.org>.

bypassing or minimally working with nonprofit organizations as well.<sup>192</sup>

The New York City-based coalition Anti-Violence Advocates Against Deportation<sup>193</sup> offers another example of a community-based intervention. This initiative is a subgroup of a larger coalition, the New York State Working Group Against Deportation,<sup>194</sup> that has been working to resist Secure Communities<sup>195</sup> and other deportation programs in New York. This coalition is an innovative collaboration as it directly takes on the deeper links that have fused remedies for violence with criminalization. This group emerged from the voices of anti-violence advocates who first argued that the implementation of Secure Communities would deter immigrant survivors of domestic violence from reporting their abusers because they are afraid of deportation or other immigration-related consequences. Although this argument was a successful one that followed the goals of anti-violence advocacy in its attention to the specific needs of survivors of violence,<sup>196</sup> immigrant rights advocates outside of the domestic violence sphere pushed for inclusion of other marginalized immigrant communities. By expanding the perception of who is harmed by Secure Communities beyond domestic survivors (“model minority victims”), the Anti-Violence Advocates Against Deportation has included narratives about low-income transgender immigrants, immigrants who trade sex for money, and youth and immigrants with extensive criminal convictions.<sup>197</sup> This coalition is pushing for a shift in how anti-violence groups respond to repressive legislation. In the past, with VAWA or IIRIRA, the anti-violence strategy has been to carve out exceptions for domestic violence survivors, creating categories of deserving and undeserving victims of violence. Now, however, the strategy is moving “margin to center,” as bell hooks would say.<sup>198</sup> If Secure Communities is bad for domestic violence survivors, then

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192. *Id.*

193. *Building Truly Secure Communities*, ANTI-VIOLENCE ADVOC. AGAINST DEPORTATION (last visited Mar. 15, 2014), <http://newyorkagainstdeportation.files.wordpress.com/2011/04/ava-points-of-unity-may-2012-v2.pdf>.

194. *About*, NEW YORK STATE WORKING GROUP AGAINST DEPORTATION (last visited Mar. 15, 2014), <http://newyorkagainstdeportation.wordpress.com/about/>.

195. *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (last visited Mar. 15, 2014), [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities). *See also Fact Sheet*, *supra* note 130.

196. *See* Elise Foley, *New York Quits Secure Communities Immigration Enforcement Program*, Andrew Cuomo Announces, HUFFINGTON POST (June 1, 2011, 6:20 PM), [http://www.huffingtonpost.com/2011/06/01/new-york-quits-secure-communities\\_n\\_869969.html](http://www.huffingtonpost.com/2011/06/01/new-york-quits-secure-communities_n_869969.html). *See also* Albor Ruiz, *Pres. Obama Makes Deportation His Main Policy by Imposing Secure Communities on States*, DAILY NEWS (Aug. 10, 2011, 4:00 AM), <http://www.nydailynews.com/new-york/brooklyn/pres-obama-deportation-main-policy-imposing-secure-communities-states-article-1.945389> (describing New York immigrant advocacy groups' response to the implementation of Secure Communities).

197. *Anti-Violence Advocates Against Deportation*, N.Y. ST. WORKING GROUP AGAINST DEPORTATION, <http://newyorkagainstdeportation.wordpress.com/anti-violence-advocates-against-deportation/>.

198. *See generally* BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984).

it is bad for everybody. This logic disrupts the exceptionalism that underlies earlier legislative acts and instead calls for a centering of vulnerability and risk. It also centers an understanding of the interaction between interpersonal and state violence by addressing how domestic violence survivors are at risk for state violence through the implementation of Secure Communities. With education and personal storytelling about the ways in which criminalization disproportionately targets those who are most marginalized, safety through reliance on the state and law enforcement has become an unacceptable option. The Anti-Violence Advocates Against Deportation's strategy works to ensure that the experiences of survivors who are least protected are in the center.

#### CONCLUSION

Building critical awareness and developing alternative responses to interpersonal violence are essential to creating conditions of genuine safety. In contrast, solutions built on a foundation of criminalization become a source of violence that enhances policing mechanisms and the prison industrial complex. Traditional approaches, such as hate crime legislation and VAWA, create more vulnerability and risk for those in precarious relationships with the state. VAWA clears a viable path to citizenship for only those undocumented immigrant survivors of domestic violence with access to resources, while hate crime legislation has yet to yield any proven benefits for marginalized survivors of hate violence.

We recommend a shift away from state-based solutions towards community-based solutions. Rather than funneling money and resources into remedies that address violence through criminalization, we ask for better strategies for safety and survival for all communities. Through building solidarity among all people and moving away from the model minority narrative, we hope for resources to sustain liberation without prosecution, policing, imprisonment, racism, xenophobia, sexism, transphobia, homophobia, and ableism. The billions of dollars spent on policing, immigration enforcement, and wars abroad could and should be used instead for people to have their basic survival needs met (welfare, housing, healthcare, food) and toward better jobs, security and anti-oppression education. In deconstructing the victim/perpetrator binary and decreasing criminalization, we can generate access to services, mutual aid, and support for healing all survivors of violence.