

Should Feminists be Worried about Impunity?

Rocío Lorca*

ABSTRACT

Ending the impunity of violence against women is a central part of the feminist agenda, but some are concerned that this focus on impunity has pushed feminism to become “carceral” by increasingly relying on criminal law and synergizing with the penal state. Whereas critics see this alignment with the carceral state as undermining the progressive ethos of feminism and ignoring other restorative possibilities, others argue that punishment is ultimately the only way to hold people responsible and address impunity in our current societal configuration.

This Article engages with this conversation by tracing the parallel history of the idea of impunity as it developed in the Latin American human rights and women’s rights movements. It argues that although the use of the idea of impunity was and continues to be hugely important in advancing the cause of women’s rights, it has fostered an alliance between feminism and penal institutions that has brought internal tensions, criticisms, and paradoxes. However, rather than argue that feminism should move away from a focus on impunity to address this, the Article offers a concept of impunity which is broader than an exemption from punishment, and where the means to address it go well beyond criminal law.

In light of the history reviewed, it is argued that impunity should be understood primarily as a failure of equality rather than a failure to prosecute and punish. This does not mean that impunity is disconnected from the enforcement of criminal law, but it does mean that a commitment against it need not yield a punitive agenda such as “carceral feminism.” In the conclusion, this Article lists a series of reasons for feminists to struggle for such a re-definition of impunity, and for keeping an anti-impunity norm at the center of their concerns. To address it, however, they should rely on a diversity of mechanisms and advocate for a moderate use of criminal justice.

* Hauser Global Scholar, New York University School of Law, and Associate Professor at University of Chile School of Law. Email: rocio.lorca@nyu.edu. This Article benefited from comments and suggestions made by Grannia de Burca, Liam Murphy, and all the participants in the Global/Emile Noel Fellows Forum at NYU 2022–2023. I am also very grateful to Gustavo Beade, Chris Burchard, Hadar Dancig-Rosenberg, Antony Duff, Michelle M. Dempsey, Lindsay Farmer, Douglas Husak, Nicola Lacey, Sandy Mason, Matt Matravers, Santiago Mollis, Hadassa Noorda, Mattia Pinto, and Rafi Reznik, all of whom gave me very valuable comments at the Virtual Workshop in the Political Turn(s) of Criminal Law. I would like to extend my gratitude also to the University of Chile’s School of Law for supporting my participation in the Hauser Global Program at NYU, and Diego Gil and his colleagues at the Catholic University of Chile’s School of Governance for valuable comments on a draft of this work. Finally, I would like to express my gratitude to the editors of the Harvard Human Rights Journal, who gave me incredibly helpful notes, and to David Barker, Francisco Bustos, Emily Kidd White, Hillary Nye, and Karin Loevy for conversations that encouraged me to write this piece.

INTRODUCTION

The word “impunity” first appeared in our legal vocabulary in the mid-1980s during the trials of the Argentine junta, the members of the military dictatorship that ruled Argentina between 1976 and 1983.¹ After the end of the totalitarian regimes that ruled most of South America in the 1970s and 1980s, many high-ranking officials responsible for orchestrating and carrying out massive human rights violations remained in positions of power and privilege. Moreover, they refused to provide valuable information to survivors of state violence who were still searching for their disappeared relatives.² The failure to uncover the truth and hold human rights violators accountable for their actions led to a shift in human rights activism and scholarship, where ending impunity became a central, if not primary, goal. In the beginning, this quest against impunity was mainly about restoring the rule of law and a culture of accountability where the brute force of totalitarian regimes had reigned. Soon, however, the idea of impunity was narrowed to a search for punishment.

The same has happened in the context of women’s rights, which has evolved in close relation to the development of human rights scholarship and activism. Ending impunity for violence against women has become central to the feminist agenda. It appears constantly in the official statements of feminist governments and in the protest banners and rallying cries of activists.³

1. Samuel Moyn, *Anti-Impunity as Deflection of Argument*, in *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 68, 69 (Karen Engle et al. eds., 1st ed. 2016). Like most South American countries during the 1970s and 1980s, Argentina had been ruled by a bloody military government that had used clandestine torture, executions, and disappearances as widespread mechanisms to deal with political opponents. With the return to democracy, those responsible for pervasive human rights violations were not called to account and often remained in positions of power and privilege. The trial of the Junta was the first effort in the region to bring human rights violators to justice. In this trial, nine members of the military government in Argentina were accused and five were convicted for the killing, kidnap, and torture of hundreds of people. For a more detailed account of this trial, see generally Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. MIAMI INTER-AM. L. REV. 491 (1987); Kathryn Sikkink, *From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights*, 50 LAT. AM. POL. SOC’Y 1 (2008). An account of the trial can also be found in the movie *ARGENTINA, 1985* (Amazon Studios 2022).

2. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 458–61 (1990) (explaining how successor governments to authoritarian regimes in various South American countries closed most avenues for accountability, mostly due to pressures from the military).

3. See, e.g., Iris Luarasi et al., *International women’s right experts call on States to bridge the gap of impunity for violence against women across the world* (Nov. 25, 2022), <https://rm.coe.int/final-ed-vaw-statement-november-2022-international-day-for-the-eliminat/1680a92280> [https://perma.cc/L599-W9DP] (a joint statement to bridge the gap of impunity for violence against women across the world, adopted by international and regional experts on violence against women and women’s rights, from European, global, Inter-American, and African institutions); ECON. COMM’N FOR LAT. AM. AND THE CARIBBEAN, ¡NI UNA MÁS! EL DERECHO A VIVIR UNA VIDA LIBRE DE VIOLENCIA EN AMÉRICA LATINA Y EL CARIBE 7–9 (2007). In Latin America, many feminist organizations against femicide and violence against women often express this fight as a fight against impunity with ideas such as “la impunidad mata” (impunity kills). See 25N CONTRA LA IMPUNIDAD: *La violencia sexual es violencia política*, NI UNA MENOS (Nov. 22, 2019), <https://niunamenos.org.ar/manifiestos/25n-la-impunidad-la-violencia-sexual-violencia-politica/> [https://perma.cc/US32-DRYN]; Daniel Uribe, *Basta de violencia institucional: ¡No más femicidios, ni impunidad!*, RED CHILENA CONTRA LA VIOLENCIA HACIA LAS MUJERES (Dec. 21, 2017),

Feminists have increasingly understood the quest against impunity as a quest for punishment. This focus on punishment has provoked criticism and resistance from within feminism itself. Critics argue that a focus on impunity has pushed feminism to become “carceral” by increasingly relying on criminal law and synergizing with the penal and neoliberal state. In their view, this focus on punitive justice betrays the progressive ethos of feminism and has several negative consequences. As a result, some critics have concluded that feminism should focus less on impunity.⁴ However, as this Article will argue, questioning the commitment against impunity in order to moderate the punitive turn in women’s rights advocacy may be “throwing the baby out with the bath water.”

Both proponents and critics of the turn to punishment share a particular understanding of what impunity is and how to address it. In this understanding, impunity is primarily a failure to punish and can only be addressed by expanding the scope and severity of prosecution and punishment.⁵ As a result, an anti-impunity agenda yields an inevitable alliance with penal populism and the carceral state. Some feminists seem willing to pay this cost, others do not.

<https://www.nomasviolenciacontramujeres.cl/basta-de-violencia-institucional-no-mas-femicidios-ni-impunidad/> [<https://perma.cc/KT75-3C32>]; *Impunidad en homicidio doloso y feminicidio 2022*, IMPUNIDAD CERO (Dec. 2022), <https://www.impunidadcero.org/articulo.php?id=175&t=impunidad-en-homicidio-doloso-y-feminicidio-2022> [<https://perma.cc/U8PN-LYQ2>]; *COMUNICADO | La impunidad mata a las mujeres : OCNF*, OBSERVATORIO CIUDADANO NACIONAL DEL FEMICIDIO (Mar. 7, 2023), <https://www.observatoriodefemicidiomexico.org/post/comunicado-la-impunidad-mata-a-las-mujeres-ocnf> [<https://perma.cc/Y4PB-2UZ8>].

4. See Karen Engle, *Feminist Governance and International Law: From Liberal to Carceral Feminism*, in *GOVERNANCE FEMINISM: NOTES FROM THE FIELD* 3, 12–13, 18 (Janet Halley et al. eds., 2019) (arguing that because the recognition of women’s rights as human rights crystallized through the recognition of sexual violence in conflict as an international crime, the feminist agenda became intertwined with the punitive and anti-impunity agenda of international criminal law. In her view this determined that women’s rights advocates ended up supporting “the expansion and strengthening of domestic criminal institutions”); AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* 9, 17 (2020) (criticizing dominant strands of feminism that have institutionally pushed forward the idea that justice is punishment, forgetting “that the criminal system is culturally ordered, technocratic, and beholden to specific political forces,” and advocating for a view in which criminal law is a last resort); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 *MICH. J. INT’L L.* 1, 58–62, 120–22 (2008) (showing how the campaign to fight against the impunity of sexual violence in conflict that was pursued by governance feminists at a global level imposed the ideological commitments of a certain strand of feminism that has promoted a carceral view of feminist power and a structuralist understanding of sexual subordination); KRISTIN BUMILLER, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE* 17–22, 34–35 (2008) (criticizing the feminist excessive reliance on law and order and criminal law policy, among other things, because it places the focus on the offender rather than the social and institutional structures that distribute power); Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 *SIGNS: J. WOMEN, CULTURE & SOC’Y* 45, 56–57 (2010) (describing an alliance “between feminism and the carceral state” where the focus becomes rape and domestic violence rather than social and economic empowerment, and showing how this alliance became part of the United States’ global human rights policy through militarized humanitarian interventions); Anette Bringedal Houge & Kjersti Lohne, *End Impunity! Reducing Conflict-Related Sexual Violence to a Problem of Law*, 51 *L. & SOC’Y REV.* 755, 772–77, 783 (2017) (criticizing the way in which ending impunity has become almost like a mantra for feminists, which has induced a turn to punishment that appears now as an end in itself, taking precedence over victims’ needs).

5. See *infra* Section I.A.

There is however a third possibility, developed in this Article, which proposes that the problem of impunity should be understood in a much broader sense than immunity from punishment, and the means of addressing it therefore go far beyond criminal law.

In the following pages, this Article argues that impunity is primarily about a failure of equality before the law. This does not mean that impunity is disconnected from the enforcement of criminal law, but it does mean that prosecution and punishment are not always a sufficient or even necessary means of addressing impunity. As a result, a commitment against impunity need not lead to a punitive agenda. Feminists could call for a diversity of mechanisms to address impunity and advocate for the minimal use of criminal justice.

This argument is not conceptual, that is, it is not about the correct definition of impunity. Rather, the arguments laid out in this Article are primarily normative: there are good reasons to rethink the concept of impunity and to continue to place it at the center of the feminist agenda. To formulate these reasons, the Article draws on both philosophical ideas and a brief history of the concept of impunity within the feminist movement.

Section I describes the punitive turn in women's rights advocacy and how this shift synchronized with a narrow construction of impunity by human rights advocates and institutions as a demand for punishment. The Article focuses primarily on Latin America, because the very idea of ending impunity emerged from Latin American human rights activists. Their collaboration with feminist advocates in the region sparked the creation of the first international instrument to directly address violence against women.⁶ This synergy is emblematic of trends that took place globally. Section II presents some of the criticisms raised against this punitive turn and the proposition that feminists should worry less about impunity. Section III reconsiders the concept of impunity being used by both "carceral feminists" and their critics, defending a different understanding in which impunity appears primarily as a failure of equality rather than a failure to punish, and where the struggle against impunity does not fully depend on punitive practices. Finally, Section IV offers reasons why feminists should reclaim the concept of impunity in the way the Article proposes and maintain their commitment against it.

I. THE PUNITIVE TURN IN WOMEN'S RIGHTS ADVOCACY

The fight against impunity, narrowly understood as a quest for prosecution and punishment, has become a central driving force for feminists—at least for those who occupy positions of political power.⁷ This has triggered a punitive

6. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 [hereinafter Belém do Pará Convention].

7. The Convention on the Elimination of All Forms of Discrimination against Women focuses on ending all forms of legal and practical inequalities against women and providing legal protection, but there is no mention of a duty to punish. States were expected to take "appropriate measures" to end discrimination against women and secure their equality with men in terms of their political, social, and civil

turn in their agenda, which has influenced the content and practices of domestic and international law.⁸ The story and features of this turn, however, cannot be fairly presented without looking at the more general punitive turn in human rights advocacy. These developments are intimately connected because a central strategy that feminists used to raise awareness and address violence against women was the articulation of women's rights as human rights.⁹ Treating violence against women as a human rights issue helped make the world more conscious of women's rights and the discrimination women suffered; it also entitled women's rights advocates to use the legal doctrines and enforcement policies that applied to human rights violations.¹⁰ A forceful condemnation of impunity, which entailed an absolute legal duty to prosecute and punish, was perhaps the most important of these doctrines.

rights, but the Convention was not committed to one measure in particular, such as punishment. This agnosticism about punishment changed when the international focus was placed on violence against women rather than discrimination in general. See Convention on the Elimination of All Forms of Discrimination Against Women Arts. 2–16, Dec. 18, 1979, 1249 U.N.T.S. 13. As soon as violence against women became a central issue of international law and global policy, the duty of the state to punish became central. Violence against women was first mentioned in the Vienna Declaration, adopted in 1992. In 1999, the General Assembly adopted the Declaration on the Elimination of Violence Against Women, where the central duty of the states was narrowed to prevent, investigate, and punish. The duty here is a specific duty to punish and not merely to sanction. See G.A. Res. 48/104, Arts. 4(c)–(d), (i) (Dec. 20, 1993). An even stronger standard was set in 1994 in the Belém do Pará Convention, the most ratified human rights instrument in the Inter-American system. See Belém do Pará Convention, *supra* note 6, Arts. 7–8. A few years later, this duty to punish was also established by the Council of Europe. See Convention on Preventing and Combating Violence Against Women and Domestic Violence Arts. 5, 45 Apr. 7, 2011, C.E.T.S. No. 210.

8. Engle, *supra* note 4, at 23; Houge & Lohne, *supra* note 4, at 771–72.

9. See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUMAN RIGHTS Q. 486, 489–93 (1990) (arguing that international human rights law had worked with a narrow concept of human rights, failing to identify the violence that women suffer, and defending the importance of recognizing women's rights as human rights to give women's rights an appropriate status and to induce important practical consequences for their protection). See also Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326, 329–30 (Rebecca J. Cook ed., 1994). Before becoming a judge of the Inter-American Court and the first woman to be its president, Cecilia Medina formulated many of the legal arguments that would allow Latin American feminists to use regional human rights institutions to promote their agenda. She argued that women should resort to human rights doctrines and institutions to pursue the struggle for their rights, because by making their struggle a part of the general struggle for human rights, the feminist agenda would obtain “the necessary force and legitimacy that will ultimately ensure its success.” See Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 257, 257 (Rebecca J. Cook ed., 1994). From a more general perspective, but also discussing the convenience of resorting to human rights institutions to advance women's rights in a moment when this was just starting to be explored, see Andrew Byrnes, *Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 189, 210–21 (Rebecca Cook ed., 1994). See also PATRICK WILLIAM KELLY, *SOVEREIGN EMERGENCIES: LATIN AMERICA AND THE MAKING OF GLOBAL HUMAN RIGHTS POLITICS* 279–87 (2018) (arguing that during the 1990s “the language and practice of human rights provided a framework in which feminists could operate—and on which they organized and expanded”—a “paradigm shift” that was largely possible thanks to Latin American feminists).

10. Bernstein, *supra* note 4, at 57; Engle, *supra* note 4, at 12–14; Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1119 (2015); Halley, *supra* note 4, at 62–67.

A. *Justice as Anti-Impunity; Anti-Impunity as Punishment*

In the early years of human rights advocacy (the 1960s to late 1980s), the overriding aim of the movement was to protect the fundamental rights of individuals (or groups) from state agents, particularly in authoritarian regimes.¹¹ Human rights activism at this time was primarily about denouncing states who oppressed their citizens and who did not abide by the standards of international human rights law. Activists acted mainly through non-governmental organizations that were politically and institutionally independent from states, such as Amnesty International or Human Rights Watch.¹²

Legal forms of individual accountability seem not to have been central to human rights activism during this period for at least two reasons. First, human rights violations were conceptually understood as a kind of wrongdoing where the relevant perpetrators were not individuals but states or state agencies.¹³ The collective nature of perpetrators made individual responsibility an insufficient tool to establish (and distribute) accountability.¹⁴ Second, practices

11. See Engle, *supra* note 10, at 1073–74; Barrie Sander, *The Anti-Impunity Mindset, in POWER IN INTERNATIONAL CRIMINAL JUSTICE* 325, 325–26 (Morten Bergsmo et al. eds., 2020). In 1961, the founder of Amnesty International, the British lawyer Peter Benenson, launched the “Appeal for Amnesty” campaign in the newspapers. The main target was the ways in which countries were using their criminal law institutions to limit the exercise of human rights, particularly the rights of those they called “Prisoners of Conscience.” See Peter Benenson, *The Forgotten Prisoners*, *THE OBSERVER* (May 28, 1961, 07:28 AM), <https://www.theguardian.com/uk/1961/may/28/fromthearchive.theguardian> [https://perma.cc/J8D8-SQ98]. For a more detailed history of the genesis of Amnesty International, see generally Tom Buchanan, “*The Truth Will Set You Free: The Making of Amnesty International*,” 37 *J. CONTEMP. HIST.* 575 (2002). One can see in the history of Amnesty International, as told on its own website, that a concern to protect the individual from the state was central during the first three decades of its existence. In its timeline there is a focus on the release of prisoners of conscience in the 1960s, then a campaign for ending torture in the 1970s, then on ending the death penalty in the 1980s. See *Who We Are*, AMNESTY INT’L (last visited Mar. 2, 2024), <https://www.amnesty.org/en/about-us> [https://perma.cc/PB37-67Z9]. This focus shifted in the 1990s, when the issue was no longer limiting the state repressive apparatus but calling it into action to secure individual accountability. See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 87–90, 98–109 (2011).

12. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 8–12 (2003); Engle, *supra* note 10, at 1073.

13. Engle, *supra* note 10, at 1073 (showing how states and not individuals were considered the main perpetrators of human rights violations). The very idea of human rights as universal entitlements that must be globally protected came as a response to the horrors committed by state agents during the Second World War. The institutional practices that emerged from this idea were not fundamentally systems of individual responsibility. The Nuremberg and Tokyo war tribunals have been largely considered political trials rather than genuine instances of individual accountability. As such, they did not represent a trend or a new focus on individual responsibility. See Moyn, *supra* note 1, at 72; JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 143–51, 170–90 (1986); Martti Koskeniemi, *Between Impunity and Show Trials*, 6 *MAX PLANCK Y.B. UNITED NATIONS L.* 1, 11–19, 32–35 (2002). This view changed with time, and today it is generally thought that individuals can also violate human rights and, in these cases, the duty of the state is to prevent, investigate, and sanction those rights violations. A landmark case in this regard was Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, (July 29, 1988) which is analyzed in the next Section. See also Mattia Pinto, *Historical Trends of Human Rights Gone Criminal*, 42 *HUM. RTS Q.* 729, 732–38 (2020) (arguing that human rights have increasingly been understood as victims’ rights, inviting a rhetoric of “victimhood” that demands penal interventions).

14. Many remain skeptical about this turn to the individual for both practical and normative reasons. Practical difficulties have to do with sustaining the responsibility of those who may be the intellectual engineers of human rights violations but are far removed from its execution (commanders or political leaders) as well as of those who execute these orders or parts of these orders in a coercive context, where

of individual accountability, such as criminal law, depended on state agencies, and human rights organizations did not trust them, let alone their penal systems, which had been the main site of human rights violations.¹⁵ As a result, they did not see punitive practices as a remedy for human rights violations, but rather as one of the mechanisms through which states systematically violated human rights.¹⁶

As Karen Engle has argued, this view shifted dramatically and quickly in the early 1990s, when a search for individual accountability became a priority.¹⁷ Within a decade, human rights advocates seemed to completely let go of their distrust of the penal state, instead embracing a view in which prosecution and punishment were essential for realizing rights.¹⁸ Two events are often cited to illustrate the culmination of this process. In 1998, with the detention of Augusto Pinochet (the dictator who ruled Chile between 1973 and 1989) in London, the idea of universal jurisdiction gained legitimacy as a mechanism

“disobeying an order can only be done with great risk to oneself.” See Alette Smeulers, *A Criminological Approach to the ICC’s Control Theory*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 379, 388 (Kevin Jon Heller et al. eds., 2020). Normative objections instead focus on the ways in which individual responsibility disguises the collective responsibility of states and political communities and prevents richer and more complete historical reckoning with atrocity. See CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 124–26 (2018); Gerry Simpson, *Men and abstract entities: individual responsibility and collective guilt in international criminal law*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 69, 93–100 (André Nollkaemper & Harmen van der Wilt eds., 2009); Koskenniemi, *supra* note 13, at 14 (arguing that using individual responsibility as a mechanism to respond to human rights violations operates as an “alibi” for societies, by offering a limited historical account of how and why human rights violations were committed, one which conveniently leaves out societies’ complicity); Laurel Fletcher, *A Wolf in Sheep’s Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT’L L.J. 447, 501–05 (2016) (showing how the turn to individual responsibility in international and transitional justice has created a sort of impunity for the state’s legal accountability); Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT’L L.J. 1, 37–38, 43 (2019) (arguing that there are legal, political, and justice-based reasons to not focus only on punishment and adversarial models of individual responsibility to respond to atrocity); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 181–205 (2007) (arguing for going beyond individual responsibility to deal with atrocity); George Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1537–43 (2002) (arguing for the importance of distributing guilt between offenders and societies to avoid unfairness and scapegoating, because in cases of atrocities, societies create a “climate of hate” that triggers or contributes to the final acts through which human rights are violated).

15. Engle, *supra* note 10, at 1073.

16. See Benenson, *supra* note 11.

17. There were important precedents on the use of individual responsibility as a response to atrocity, perhaps most famously the criminal convictions of agents of Nazi Germany in the Nuremberg Trials. But these experiences were circumscribed to political trials run by the winning allies of the war and did not trigger a trend in human rights advocacy. For a broader discussion of these trials and their significance, see SHKLAR, *supra* note 13, at 143–51; Koskenniemi, *supra* note 13, at 11–19, 32–35.

18. See Engle, *supra* note 10, at 1073–76; Max Pensky, *Amnesty on trial: impunity, accountability, and the norms of international law*, 1 ETHICS & GLOB. POL. 1, 6–9 (2008); Pinto, *supra* note 13, at 738–49; Sander, *supra* note 11, at 342–47; Hani Sayed, *The Regulatory Function of the Turn to Anti-Impunity in the Practice of International Human Rights Law*, 55 STAN. J. INT’L L. 1, 4–6 (2019). For considerations for and against punishment as a means to realizing rights, see Rocío Lorca, *The Presumption of Punishment: A Critical Review of Its Early Modern Origins*, 29 CAN. J. L. & JURIS. 385, 396–400 (2016); Rocío Lorca, *Could We Live Together Without Punishment? On the Exceptional Status of the Criminal Law*, 17 CRIM. L. & PHIL. 29, 30–34 (2023).

to ensure individual criminal responsibility for human rights violations.¹⁹ That same year, the General Assembly of the United Nations agreed to create the International Criminal Court, a permanent global court to enforce individual criminal responsibility for the most serious forms of human rights violations.²⁰ With a permanent international criminal court, prosecution and punishment would no longer depend exclusively on state-run agencies—or at least this was the hope at the time.²¹

As this punitive turn was taking place, human rights advocates and human rights bodies became less interested in controlling the penal state and in promoting the decriminalization of behaviors protected by human rights.²²

This turn to individual criminal accountability was accompanied by the idea that impunity was not only a grave injustice in itself but, more importantly, a central causal factor in human rights violations.²³ In 1991, Amnesty International, an institution established to campaign for the release of political prisoners and against cruel imprisonment, argued that the main threat to human rights was no longer the coercive power of the state but rather the “phenomenon of impunity.”²⁴ It argued that impunity, understood as the systematic failure to prosecute and punish, was “one of the main contributing factors” to the pattern of human rights violations that the world continued to witness, despite many positive legal and political developments.²⁵ According to Amnesty

19. Pinto, *supra* note 13, at 746; Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENGLAND L. REV. 311, 316–19 (2000).

20. Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 3, [hereinafter Rome Statute].

21. Experience has shown, however, that the International Criminal Court can hardly operate without the cooperation of states, and this has led the Court to sometimes synergize with the repressive apparatus of authoritarian states and prosecute the losing party of a conflict rather than both sides equally. See Rocío Lorca, *Impunity thick and thin: The International Criminal Court in the search for equality*, 35 LEIDEN J. INT'L L. 421, 430 (2022); Asad Kiyani, *Group-Based Differentiation and Local Repression: The Custom and Course of Selectivity*, 14 J. INT'L CRIM. JUST. 939, 948–51 (2016); Harmen van der Wilt, *Selectivity in International Criminal Law: Asymmetrical Enforcement as a Problem for Theories of Punishment*, in WHY PUNISH PERPETRATORS OF MASS ATROCITIES?: PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 305, 313–14 (Florian Jeßberger & Julia Geneuss eds., 2020).

22. Mattia Pinto, *Coercive Human Rights and the Forgotten History of the Council of Europe's Report on Decriminalisation*, 86 MODERN L. REV. 1077, 1117–18, 1129–32 (2023).

23. The idea of impunity as a contributing factor to human rights violations appears also in the reasoning of the Inter-American Court of Human Rights. In *Paniagua Morales et al. v. Guatemala*, the Court declared that “impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.” See *Paniagua Morales et al. v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 173 (Mar. 8, 1998). On some occasions, contributing to secure impunity has been considered to make an agent complicit in the unpunished crime. This was the rationale that Argentinean courts used to convict judges as primary accessories in the commission of hundreds of crimes of torture and forced disappearances. See Pablo Salinas, *Crímenes contra la humanidad. El Juicio a los jueces: Sentencia Condenatoria del Tribunal Oral Federal N° 1 de Mendoza (Argentina)*, JUECES PARA LA DEMOCRACIA 105, 116 (2019); Elizabeth Lowman, *Argentina sentences former judges for crimes against humanity*, JURIST (July 28, 2017), <https://www.jurist.org/news/2017/07/argentina-sentences-four-former-judges-for-crimes-against-humanity/> [<https://perma.cc/KTK8-6A9Q>].

24. See Amnesty Int'l, *Policy Statement on Impunity*, in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 219, 219 (Neil J. Kritz ed., 1995).

25. *Id.* at 219–21. In the policy statement, Amnesty International notes that the issue of impunity takes place in a context of positive developments, such as countries recovering their democratic regimes and adjusting their legislation to the standards of international human rights law.

International, governments and the international community had to confront this “phenomenon of impunity” and promote accountability by uncovering the truth about human rights violations and bringing perpetrators to justice.²⁶ These efforts soon became synonymous with prosecution and punishment.²⁷

This conception of impunity and accountability resulted in a punitive turn in human rights advocacy, comprising three central features. First, it entailed a re-interpretation of events of mass violence under the logic of individual responsibility, which triggered a rapid increase in the use of legal trials to address human rights violations.²⁸ Second, amnesties, pardons, statutes of limitations, and any other obstacle to prosecution and effective punishment (ideally imprisonment) were increasingly understood as anathema to justice and peace. Third, human rights bodies with no criminal jurisdiction started calling for prosecution and punishment as primary remedies in cases of human rights violations.²⁹ In other words, human rights institutions that had been designed to investigate and sanction human rights violations through non-criminal remedies, such as the Inter-American Court of Human Rights, started seeing their own institutional capacities to sanction as only complementary to a more important requirement of justice: punishment.³⁰

Several factors might explain this punitive turn. One such factor was an anti-impunity discourse, which propounded the idea that prosecution and punishment were the only means of addressing impunity.³¹ This narrow understanding, where punishment appears as the exclusive or indispensable remedy for impunity, largely developed through the legal discourses and doctrines of Latin-American human rights activists and organizations.³²

26. *Id.* at 221.

27. Engle, *supra* note 10, at 1077; Sander, *supra* note 11, at 330; Amnesty Int’l, *supra* note 24, at 219.

28. This increase in the use of trials has been called the “justice cascade” in human rights. It consists of a “rapid and dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (such as trials) on behalf of those norms.” On this cascade, criminal prosecutions have occupied most of the space. See Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANN. REV. L. SOC. SCI. 269, 270 (2013).

29. See Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT’L L. 1, 9 (2013).

30. *Id.* at 22–23.

31. For in-depth accounts, see Engle, *supra* note 10, at 1083–87, 1115–19; Pinto, *supra* note 13, at 738–49; Sander, *supra* note 11, at 327–33; SIKKINK, *supra* note 11, at 87–109; Sikkink & Kim, *supra* note 28, at 270–78.

32. The origins of a punitive turn can be traced back to the Nuremberg and Tokyo trials, as well as to some earlier instruments of international law that established duties to criminalize. See Pinto, *supra* note 13, at 738–43. But although those events and instruments were important steps toward individual accountability, they did not by themselves trigger a systematic turn to punishment of the magnitude that took place after the 1990s, nor did they focus on ending impunity as its main legitimating force as Latin American human rights organizations did. See Kathryn Sikkink, *Latin American Countries as Norm Protagonists of the Idea of International Human Rights*, 20 GLOB. GOVERNANCE 389, 390–92 (2014) (arguing more generally that Latin America has had a big and often unrecognized impact in the evolution of international human rights law); Sikkink & Kim, *supra* note 28, at 274 (showing how the justice cascade has been most pronounced in Latin America); Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT’L L. 1, 2–4 (2001); Kathryn Sikkink, *The Transnational Dimension of the Judicialization of Politics in Latin America*, in THE JUDICIALIZATION OF

B. *The Inter-American Court of Human Rights in the Making of a Punitive Human Rights Agenda*

After the epidemic of dictatorships that took hold of Latin-American countries during the 1970s and 80s, human rights activists, having previously articulated a strong anti-impunity discourse in their domestic legal battles, turned to the Inter-American system of human rights as a space to look for justice. Dissatisfied with the results of their transitional justice processes, which included truth commissions that operated as a mere façade and did not serve to advance truth or reconciliation, most activists sought justice that was not primarily restorative but punitive. They no longer believed that alternative forms of accountability, proper reparations, and truth could be achieved.³³ Perhaps they also did not see these as adequate or sufficient means to address the atrocities of the recent past.³⁴

POLITICS IN LATIN AMERICA 263, 264 (Rachel Sieder et al. eds., 1st ed. 2005) (arguing that although the turn to accountability has been more pronounced in Latin America, this was the result of an interaction between local, international, and transnational legal and political opportunities); George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 556 (2005) (arguing that the word “impunity” gained political and legal traction in Argentina in the 1980s, during the government of President Raúl Alfonsín); Moyn, *supra* note 1, at 69–71 (agreeing with Fletcher’s view that the use of the idea of impunity emerged in Argentina and with Sikkink in the sense that the turn to individual accountability emerged in Latin America); Huneus, *supra* note 29, at 2 (arguing that even though the Inter-American Court of Human Rights is not a criminal court, it has triggered many more criminal prosecutions than the International Criminal Court and at a much lower cost because it relies on domestic courts); SONIA CARDENAS, HUMAN RIGHTS IN LATIN AMERICA: A POLITICS OF TERROR AND HOPE 159 (2010) (arguing that because Latin America has been the region with most human rights trials in the world, its experience has had a great global impact); KELLY, *supra* note 9, at 3 (arguing that “(n)o single region of the world played a more pivotal role in these sweeping changes than the Americas, which were both the target of human rights advocacy and the site of a series of monumental developments for regional and global human-rights politics”).

33. CARDENAS, *supra* note 32, at 170 (describing how Latin American countries’ practices of transitional justice went from truth commissions to trials).

34. For activists, the search was not immediately about trial and punishment. The sense of outrage that mobilized their search for justice in international organizations or in foreign countries was not only that the agents of the repression were not made accountable, but that they remained in positions of power, enjoyed comfortable lives paid for by public funds, made money in the private sector, and moved in society like privileged members of an elite that was untouchable and beyond the reach of the laws. Cardenas describes this in this way: “In many cases, former torturers and abusive policemen continue to live alongside their victims, crossing each other on the street and seeing one another at movie theaters. In the higher echelons, abusive officers may still be in the government or military or pursuing lucrative careers in the private sector, while repressive leaders continue to live comfortable and undisturbed lives in their villas and clubs.” *See id.* at 160. Human rights activists had to address accountability in this context of impunity, and at the beginning of this search their options depended on their own strength and the strength of the military at a local level. But in most cases, the effort to create a context of accountability was done through truth commissions rather than trials. *See id.* at 161–68. Although Argentina started the journey of bringing agents of state repression to trial in the 1980s, its efforts were shut down politically until the early 2000s, when human rights advocates pushed prosecutions in many places in the region, engendering what Sikkink has called a “justice cascade.” *See id.* at 172–78, 182. This cascade of trials did not only take place in domestic courts of Latin American countries but also in foreign courts such as American and European courts, which found ways to judge some of these cases. *See id.* at 178–80. Kelly argues that Latin American human rights advocates “spurred criminal prosecutions throughout Latin America, not to mention the global push for an International Criminal Court” under a call to end impunity, and in this process they narrowed down their idea of justice, leaving behind the relevance of social and political

The Inter-American Court proved to be a good venue. Through a series of decisions, the Court formulated a strong anti-impunity norm as part of its definition of justice by establishing that prosecution and punishment were mandatory in addressing human rights violations.³⁵ This happened even though the Inter-American Court is not a criminal court and was not established to impose individual responsibility, let alone punitive sanctions.³⁶

The first case to give form to this doctrine was *Velásquez-Rodríguez v. Honduras* (1988), where the Court held that states not only have a negative duty not to violate human rights but also a positive duty to prevent human rights violations committed by private individuals, as well as to investigate, prosecute, and punish these crimes.³⁷ Although in *Velásquez-Rodríguez* the Inter-American Court ordered government compensation rather than prosecutions and punishment, by the late 2000s the Court had consolidated an anti-impunity doctrine that included such mandates. This doctrine can be summarized as follows:³⁸

- a) All broad amnesties or pardons for human rights violations (whether self-amnesties or not)³⁹ are illegal or contrary to the American Convention on Human Rights because they sustain impunity;⁴⁰

justice as part of a human rights agenda, and “monopolizing it to atone for past sins rather than addressing how best to improve the lives of citizens in the present and in the future.” See KELLY, *supra* note 9, at 291–92.

35. Engle, *supra* note 10, at 1080–87; Huneeus, *supra* note 29, at 8–9; Fernando Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. UNIV. INT’L L. REV. 195, 210–12 (2007).

36. The Inter-American Court was established in 1978 to adjudicate cases in which a state party to the American Convention on Human Rights may have breached the duties imposed by the treaty. Beyond its advisory functions, the Court can only decide contentious cases submitted to it by a state party or by the Inter-American Commission of Human Rights. It can only rule on cases regarding countries which have granted jurisdiction to the Court, and its powers consist of ordering states to ensure the enjoyment of the rights that have been violated or to remedy the breach by compensating the injured party. See American Convention on Human Rights Arts. 61–64, Nov. 22, 1969, 1144 U.N.T.S. 123.

37. Velásquez Rodríguez, 1988 Inter-Am. Ct. H.R. ¶¶ 174–79 (in this case, the Court found that Honduras violated the Inter-American Convention on Human Rights by failing to prevent, investigate, and punish the forced disappearance of Manfredo Velásquez Rodríguez, who was a university student and political activist when he was abducted in 1981. The Court found that Manfredo’s disappearance was part of a pattern of forced disappearances by the security forces of the Honduran government during the period 1981–1984).

38. For a more detailed account of the cases, see Basch, *supra* note 35, at 199–213; Engle, *supra* note 10, at 1079–87, 1091–1103; Oscar Parra, *La Jurisprudencia de la Corte Interamericana respecto a la lucha contra la impunidad: algunos avances y debates*, 13 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 5, 9–23 (2012).

39. Regular amnesties are relational acts where the agent deciding to pardon or shield someone from prosecution and punishment differs from the one being pardoned. In self-amnesties, instead, the regime that committed the otherwise punishable conduct pardons itself by establishing mechanisms that prevent it from being brought to justice. Self-amnesties are not only an abuse of power, but also contradict the relational logic of amnesty that could sustain its validity under a logic of pardon or grace. See JUAN PABLO MAÑALICH, *TERROR, PENA Y AMNISTÍA: EL DERECHO PENAL ANTE EL TERRORISMO DE ESTADO* 185–89 (2010).

40. Perhaps the most relevant cases here are *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 43 (Mar. 14, 2001); *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 115–22 (Sept. 26, 2006); *Gomes Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am.

- b) Procedural doctrines that block proper prosecution or punishment of human rights violations, such as statutes of limitations, are illegal or contrary to the American Convention on Human Rights because they sustain impunity;⁴¹
- c) Criminal investigations, prosecution, and punishment of human rights violations are mandatory and do not compromise truth, because truth is a central aim of criminal procedures;⁴² and,
- d) Criminal investigations, prosecutions, and punishment of human rights violations do not compromise peace or reconciliation, because peace requires justice, and justice requires individual criminal accountability.⁴³ The categorical way in which the Inter-American Court understands the duty to investigate, prosecute, and punish, suggests that, to the extent that peace and justice may be incompatible, the latter must be prioritized.⁴⁴

This doctrine of the Inter-American Court illustrates how the human rights agenda became a criminal justice agenda, and how impunity was narrowed to a criminal justice issue.⁴⁵ According to this doctrine, fighting impunity consists of removing all obstacles to punishment. These include limitations on holding a trial, alternatives to criminal responsibility, and any kind of exemption to the full execution of punishment.⁴⁶ This doctrine left restorative justice

Ct. H.R. (ser. C) No. 219, ¶¶ 134–36, 175 (Nov. 24, 2010); *Gelman v. Uruguay, Merits and Reparations, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 226, 239, 241–46 (Feb. 24, 2011).

41. Huneus, *supra* note 29, at 89; Parra, *supra* note 38, at 12.

42. Indeed, according to the Court, not prosecuting a crime entails a deprivation of a victim's "right to truth." See *Barrios Altos*, 2001 Inter-Am. Ct. H.R. ¶ 48; *Almonacid Arellano*, 2006 Inter-Am. Ct. H.R. ¶ 148; *Gomes Lund*, 2010 Inter-Am. Ct. H.R. ¶ 151; *Gelman*, 2011 Inter-Am. Ct. H.R. ¶ 199. See also, *Engle*, *supra* note 10, at 1098.

43. The Inter-American Court was capable of establishing a strong duty to prosecute and punish because its doctrine attempted to resolve the "justice v. peace/truth" conundrum, arguing that justice, peace, and truth are (generally) not incompatible. See *Gomes Lund*, 2010 Inter-Am. Ct. H.R. ¶ 151 and *Gelman*, 2011 Inter-Am. Ct. H.R. ¶ 199, both citing OFF. U.N. HIGH COMM'R HUM. RTS., RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES, at V, U.N. Sales No. E.09.XIV.1 (2009), https://www.ohchr.org/sites/default/files/Documents/Publications/Amnesties_en.pdf [<https://perma.cc/44N5-HXQK>]. See also *Engle*, *supra* note 10, at 1097–1102. This was part of a larger process in which most human rights institutions, lawyers, and scholars began to reject the idea that criminal justice, or justice more generally, could be in tension with peace or reconciliation. See *Pinto*, *supra* note 13, at 744–46.

44. Regarding the Court's formulation of an absolute duty to prosecute and punish, see *Barrios Altos*, 2001 Inter-Am. Ct. H.R. ¶¶ 43–48; *Almonacid-Arellano*, 2006 Inter-Am. Ct. H.R. ¶¶ 106–108, 145–150; *Gomes Lund*, 2010 Inter-Am. Ct. H.R. ¶¶ 147–171.

45. See *Engle*, *supra* note 10, at 1079–1112; *Houge & Lohne*, *supra* note 4, at 772–77; *Pinto*, *supra* note 13, at 744–46; *Sander*, *supra* note 11, at 328–33.

46. According to the Inter-American Court, non-punitive practices such as compensation or restorative justice can complement the duty to punish but not replace it. See *Huneus*, *supra* note 29, at 22–23 and 42; *Pinto*, *supra* note 13, at 747–48. A similar discussion has taken place regarding the jurisdiction of the International Criminal Court. Here the issue has been whether restorative justice mechanisms or truth and reconciliation panels can be seen as modes of accountability that could block the jurisdiction of the Court under the principle of complementarity, or whether they could grant a reason to not pursue a case under the "interests of justice" clause established in Article 53(1) of the Rome Statute. See *Minow*, *supra* note 14, at 18–19.

models, such as the South African Truth and Reconciliation Commission, as outliers in the effort to enforce human rights.⁴⁷

Arguably, the doctrine of the Inter-American Court was appropriate vis-à-vis the particularities of most of the situations that it was adjudicating. These were mostly cases in which *blanket* or unconditional amnesties had been used to secure a return to democracy.⁴⁸ Such amnesties had proven to be insurmountable obstacles to advancing truth and reconciliation, as well as any form of accountability. Unconditional amnesties pardon a whole set of offenders regardless of whether they provide information or participate in any kind of reparative or accountability practice. In such cases, the threat of punishment is completely off the table.⁴⁹ For example, Chile's 1978 amnesty law, passed during Pinochet's dictatorship, pardoned all crimes committed during the state of siege that began on the day of the Coup on September 11 of 1973 and ended on March 10 of 1978. The law did exempt certain crimes from pardon, but these were mostly common crimes, such as robbery, parricide, or drug trafficking, which were unrelated to the human rights violations committed by state agents.⁵⁰

According to Martha Minow, blanket amnesties do not serve processes of truth and accountability because a crucial element for their success is a real threat of prosecution and punishment for those who do not cooperate. Conditional amnesties, on the other hand, can be valuable for accountability, because securing cooperation requires that individual amnesties are at some point available.⁵¹ The Inter-American Court, however, went a step further by influencing the very definition of justice and by making its doctrine applicable also to *conditional* amnesties.⁵²

C. *From Coercive Human Rights to Coercive Women's Rights*

Over time, this punitive view of justice and its narrow conception of impunity took hold beyond Latin-American human rights law and was widely

47. See Engle, *supra* note 10, at 1087–91, 1111–12 (generally showing how human rights activists, scholars, and courts have turned to a categorical duty to prosecute and punish against the views that supported the South African model of transitional justice).

48. See Roht-Arriaza, *supra* note 2, at 458–61; Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L L. PROC. 313, 314–15 (1998).

49. On the distinction between conditional and blanket amnesties, see Helga Malmin Binningsbø & Ragnhild Nordås, *Conflict-Related Sexual Violence and the Perils of Impunity*, 66 J. CONFLICT RESOL. 1066, 1070 (2022); Minow, *supra* note 14, at 16, 30; Roht-Arriaza, *supra* note 48, at 313–15.

50. The Chilean Amnesty Law was established by decree. See Law No. 2191, Apr. 18, 1978, DIARIO OFICIAL (Chile).

51. See Minow, *supra* note 14, at 24–30. See also Sikkink & Kim, *supra* note 28, at 278–82; Tricia D. Olsen et al., *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RTS. Q. 980, 996–99 (2010). Sikkink and Kim suggest that possibly the most effective way of protecting human rights through accountability mechanisms is with a mix of amnesty and prosecution, because although trials help to limit repression, they are not “the panacea for human rights.” See Sikkink & Kim, *supra* note 28, at 282.

52. As others have argued, conditional amnesties can contribute to the effort to create accountability and prevent human rights violations. See Sikkink & Kim, *supra* note 28, at 282.

endorsed by women's rights advocates.⁵³ *Velásquez-Rodríguez v. Honduras*, the same case that produced the anti-impunity doctrine reviewed above, was also very important for feminists because the Inter-American Court dismissed the idea that only public agencies could violate human rights. The Court held that states have "a legal duty to take reasonable steps to prevent human rights violations[,] to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."⁵⁴ A failure to comply with these duties also holds "when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention."⁵⁵ This understanding paved the way for recognizing *private* violence against women—the most common and pervasive mode of gendered violence—as a human rights violation.⁵⁶ But probably the most important development in the Inter-American system regarding women's rights was the Court's understanding of violence against women as a specific or distinct category of human rights violation, and the extension of the anti-impunity doctrine to it in the late 2000s.⁵⁷

These ideas had already been articulated in the early 1990s by transnational feminists.⁵⁸ The view was that international human rights law had left women outside of the human rights agenda because it had mostly focused on the infringement of civil and political liberties by state agents. Women's rights, however, are more often harmed by private agents through their bodies and sexual freedom.⁵⁹ Against this background, Charlotte Bunch, among other feminists who were writing in those years, called for the recognition of

53. See generally Bernstein, *supra* note 4; Engle, *supra* note 4; Halley, *supra* note 4; Houge & Lohne, *supra* note 4.

54. Velásquez-Rodríguez, 1988 Inter-Am. Ct. H.R. ¶ 174.

55. *Id.* ¶ 176.

56. According to the World Health Organization, the most common form of violence that women suffer is intimate partner violence, which affects approximately one in every three women. See WORLD HEALTH ORGANIZATION, VIOLENCE AGAINST WOMEN PREVALENCE ESTIMATES, 2018: EXECUTIVE SUMMARY I–IX (2021).

57. See Elizabeth A.H. Abi-Mershed, *Due Diligence and the Fight against Gender-Based Violence in the Inter-American System*, in DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 127, 133–37 (Carin Benninger-Budel ed., 2009) (showing how the idea of impunity has constituted a central part of the concept of due diligence developed in the Inter-American system of human rights as a mechanism to measure state compliance with their international law obligations).

58. See Hilary Charlesworth, *What Are "Women's International Human Rights?"*, in HUMAN RIGHTS OF WOMEN, *supra* note 9, at 58, 69–71 (2012). The concern, however, had originated earlier. According to Kelly, Latin American feminists started drawing attention to violence against women as a particular form of human rights violation in the early 1980s in meetings they organized across the region to confront dictatorships while considering the specific position and point of view of women. See KELLY, *supra* note 9, at 279–82.

59. In the formulation proposed by Hillary Charlesworth, this was the result of the view that human rights issues are public and not private issues. See Charlesworth, *supra* note 58, at 68–69; see also Roth, *supra* note 9, at 329. Charlotte Bunch also argued in these same years that the human rights agenda had excluded women's rights because it had defined human rights as civil and political liberties that were directly infringed by the state. Since abuses committed against women were exercised mostly through their bodies, their sexual freedom, and their lives by the direct action of private agents, states were not considered responsible for protecting women's rights. See Bunch, *supra* note 9, at 488, 491–92.

women's rights as human rights, and violence against women as a specific kind of human rights violation, because "many violations of women's human rights are distinctly connected to being female—that is, women are discriminated against and abused on the basis of gender."⁶⁰ In her view, violence against women was a form of political violence because it had a distinct message, one of domination aimed at maintaining social hierarchies.⁶¹ As a result, to achieve women's rights and make states responsible for them, one needed to engage the responsibility of political institutions even when abuses were performed by private agents.⁶²

The Inter-American Court endorsed this view, but it took some time.⁶³ Despite deciding many cases concerning violence against women, the Inter-American Court had a gender-neutral approach to human rights violations well until the mid-2000s when it started shifting its perspective on women's rights.⁶⁴ This shift began with *Plan de Sánchez v. Guatemala* in 2004, followed by *Castro Castro Prison v. Perú* in 2006, and culminated with *Cotton Field v. Mexico* in 2009.⁶⁵ In the first two cases, the Court took a gender-sensitive approach by

60. Bunch, *supra* note 9, at 486.

61. *Id.* at 490–91.

62. *Id.* at 490–92; Mariana Prandini, *Violence against Women as a Translocal Category in the Jurisprudence of the Inter-American Court of Human Rights*, 8 REV. DIREITO PRÁX. 1507, 1514–15 (2017); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 165, 179–80 (2014) (showing how Latin American activists played a key role in advancing the view of women's rights as human rights).

63. Prandini, *supra* note 62, at 1510–12; Bunch, *supra* note 9, at 488; KECK & SIKKINK, *supra* note 62, at 165–79. Cecilia Medina, before becoming a judge in the Inter-American Court, harshly criticized the Commission and the Court for failing to promote the human rights of women despite their critical situation in the region. In her words, "the failure of the Inter-American supervisory organs to address the violation of women's human rights is often not the result of a lack of legal provisions, but of their reluctance to apply them." See Medina, *supra* note 9, at 270. She also urges women to "take a greater interest in controlling the membership of these organs." See *id.* at 271.

64. For example, in *Loayza-Tamayo v. Peru*, the first case decided by the Inter-American Court which involved sexual violence against women, the Court did not consider sexual violence as a specific form of human rights violation. Instead, it understood it as an instance of torture and sanctioned it as such. See *Loayza-Tamayo v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997); Karla Quintana, *Recognition of Women's Rights before the Inter-American Court of Human Rights*, 21 HARV. HUM. RTS. J. 301, 302 (2008); Patricia Palacios Zuluoaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17 TEX. J. WOMEN & L. 227, 262–73 (2007) (offering different explanations for why the Court had failed to address the human rights of women until the mid-2000s).

65. In 2009, the Court declared that it could decide cases by directly applying rules from the Belém do Pará Convention in *González et al. v. Mexico*. There, the Court decided it could apply Article 7 of the Convention, which established the states parties' duty to prevent, punish, and eradicate all forms of violence against women. There is no norm, however, that explicitly grants the Court the power to apply the Belém do Pará Convention. Article 12 enables individuals (or groups) to submit petitions to the Inter-American Commission of Human Rights (not the Court) for violations of Article 7 and orders the Commission to "consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights." In the *Cotton Field* case, the Court considered that Article 12 implicitly grants the Court jurisdiction because "the norms and procedures established by the American Convention on Human Rights" include the Commission's capacity to refer a case to the Court. For a more detailed discussion of this doctrine, see *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 35–77 (Nov. 16, 2009); Caroline Bettinger-Lopez, *The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case*, 15 CUNY L. REV. 315, 318–23 (2012); Ruth Rubio-Marín & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton*

identifying violence against women as a particular kind of harm and a form of discrimination, but without formulating a sanction and state duties specifically tailored to it.⁶⁶ In *Cotton Field v. Mexico*, the Court went further, providing not only a clearer articulation of violence against women as a distinct human rights violation but also arguing that this kind of violence required a distinct form of legal response.⁶⁷ To sustain this assertion, and to articulate the specific duties of state parties regarding violence against women, the Court argued that it had jurisdiction to directly apply Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (“Belém do Pará Convention”), even though the Convention did not explicitly grant these powers to the Court.⁶⁸ Article 7 of the Belém do Pará Convention established a series of measures that configured the standard of due diligence of state parties in their duty to “prevent, eradicate and punish” violence against women.⁶⁹ By applying Article 7, the Court consolidated the extension of its anti-impunity doctrine to violence against women, because this Article includes an explicit duty to punish.

The reasoning that the Inter-American Court used to adjudicate *Cotton Field* was very similar to the one it had used in state violence cases.⁷⁰ It also echoed the diagnosis that Amnesty International had advanced some years before, arguing that impunity is a central causal factor of human rights violations.⁷¹ But

Field Judgment, 33 HUM. RTS. Q. 1062, 1077–90 (2011); Ciara O’Connell, *Women’s Rights and the Inter-American System*, in INTERNATIONAL HUMAN RIGHTS OF WOMEN 139, 147 (Niamh Reilly ed., 2018); Rosa Celorio, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, 65 U. MIAMI L. REV. 819, 841–53 (2011).

66. See Celorio, *supra* note 65, at 842–45. In *Plan de Sánchez Massacre*, the Court explicitly recognized rape as a particular form of violence that should be repaired and that had been left in a space of impunity. See *Plan de Sánchez Massacre v. Guatemala, Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C.) No. 116, ¶ 49(19) (Nov. 19, 2004). In *Miguel Castro-Castro Prison*, the Court held for the first time that violence against women is a kind of discrimination. See *Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs*, Inter-Am. Ct. H.R. (ser. C.) No. 160, ¶ 303 (2006). According to Caroline Bettinger-López, it “laid the groundwork for a series of landmark decisions by the Inter-American Court and Commission that expanded and deepened the due diligence principle in the context of both state-sponsored and private acts” of violence against women. See Caroline Bettinger-López, *Violence Against Women: Normative Developments in the Inter-American Human Rights System*, in THE LEGAL PROTECTION OF WOMEN FROM VIOLENCE: NORMATIVE GAPS IN INTERNATIONAL LAW 166, 182 (Rashida Manjoo & Jackie Jones eds., 2018).

67. This was the first case in which the Inter-American Court decided on reparations using a gender perspective and determined that in cases of violence against women, which entailed structural discrimination, reparations could not just be about restitution or compensating the victims and their next of kin, but had to include “transformative redress” of the conditions that make the violence possible. See Rubio-Marín & Sandoval, *supra* note 65, at 1090; Juana Acosta-López, *The Cotton Field Case: Gender Perspective and Feminist Theories in the Inter-American Court of Human Rights Jurisprudence*, 21 REV. COLOMB. DERECHO INT. 17, 37 (2012); Celorio, *supra* note 65, at 848 (arguing that the *Cotton Field* case marked an important change in the Court’s gender jurisprudence, because it considered that reparations were to be determined in a different way from other human rights violations. In the case of violence against women, because it was the result of a structural pattern of discrimination, reparations had to include transformative redress, i.e., interventions that prevented violence against women in the future).

68. See Belém do Pará Convention, *supra* note 6; Rubio-Marín & Sandoval, *supra* note 65, at 1079, 1090–91.

69. Belém do Pará Convention, *supra* note 6, Art. 7.

70. See cases cited *supra* note 40.

71. See Amnesty Int’l, *supra* note 24.

unlike the cases that were discussed in the previous section, violence against women and the culture of impunity around it was not a mechanism to eradicate political opponents but an expression of the structural discrimination of women.⁷² The structural nature of violence against women allowed the Court to establish the responsibility of states.⁷³ Put briefly, in *Cotton Field*, the Court held that the epidemic of “femicides” in the city of Ciudad Juárez was the result of a culture of impunity and official indifference toward violence against women.⁷⁴ This understanding of impunity as a central factor for the violation of women’s human rights had an important impact on how the Court defined the duties of state parties.⁷⁵ From that moment on, due diligence regarding the realization of women’s human rights entailed not only a duty to prevent, investigate, and impose reparations or any other legal remedy to sanction violence against women, but also a categorical duty to punish.⁷⁶

Many reasons could explain this shift in the Court’s view about violence against women. Latin-American feminists as well as civil and human rights organizations had worked closely with the Inter-American Court and the Inter-American Commission of Human Rights before this decision.⁷⁷ This collaboration, along with feminists’ increasing demands for punishment at a domestic level framed under the Court’s anti-impunity doctrine, likely had an impact on the legal interpretations advanced by these human rights bodies.⁷⁸ It

72. See Patricia Palacios Zuloaga, *Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?*, 21 HUM. RTS. L. REV. 899, 930 (2021).

73. Acosta-López, *supra* note 67, at 29–32 (arguing that although this view was not new, it was the first time it was applied to a case about violence against women).

74. The Inter-American Court did not refer to these cases as “femicide” but called them “murder of women.” *See id.* at 33.

75. Due diligence is the legal concept that is used in the Inter-American system to establish whether states parties are following their duties. In the case of the human rights of women, the Belém do Pará Convention articulates due diligence through the duties of preventing, eradicating, and effectively punishing violence against women. For an analysis of the development of this standard in the case of violence against women, with a particular focus on the importance of impunity, see Abi-Mershed, *supra* note 57, at 133–35. *See also* O’Connell, *supra* note 65, at 146–47; Celorio, *supra* note 65, at 848–49; Alma Beltrán y Puga, *Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law*, 3 CREIGHTON INT’L & COMPAR. L.J. 158, 160–68 (2012).

76. The “due diligence” of states goes beyond this. It also includes an obligation to secure judicial impartiality, to treat victims and their families with dignity and respect, to offer reparations that include institutional transformations to prevent violence against women, to promote a change in cultural patterns that lead to the unequal treatment of women, and to focus on groups of women who are more vulnerable to violence. For an account of these duties, see Beltrán y Puga, *supra* note 75, at 169–70; Celorio, *supra* note 65, at 848–49.

77. O’Connell, *supra* note 65, at 145 (arguing that since the 1980s and 1990s “women’s rights movements began to use international human rights instruments in education campaigns to inform women and men about their rights, and actors began using international agreements to hold governments accountable and push for national policy and legislative reform,” and calling this process the “institutionalization of feminism” in Latin America).

78. *Id.* at 145–47 (arguing that there has been a “feminist appropriation” of the due diligence clause which is the result of the impact of civil society feminist actors on the Court rather than of the feminist nature of the Court itself). *See also* Bettinger-López, *supra* note 66, at 185–92 (discussing many of the cases of violence against women that have been decided by the Inter-American Court, and showing how they have impacted domestic regulation. She argues that the Inter-American human rights system is best equipped to address violence against women today). The main way in which the anti-impunity doctrine has been applied at the domestic level is through “conventionality control” doctrine. According to this

is also possible that the nature and facts of the cases themselves influenced the adoption of this new view, as well as changes in the composition of the bench.⁷⁹ What matters most for the argument here, however, is that in this shift the Court consolidated the synergy between feminist and human rights activism, a communion partly defined by the importance of punishment as a means to end impunity and to realize rights.

This synergy between feminists and human rights advocates also developed in the international regulation of conflict-related sexual violence.⁸⁰ Until 1993, humanitarian law had systematically overlooked sexual violence in conflict, but after extensive lobbying by women's rights advocates, conflict-related sexual violence was characterized as a human rights violation in the Vienna Declaration.⁸¹ This led to both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda recognizing rape as a crime against humanity and a war crime.⁸² With the emergence of the International Criminal Court, sexual violence in conflict became explicitly recognized in the definition of crimes against humanity and war crimes.⁸³ Global organizations such as Human Rights Watch and the United Nations Security Council adopted a similar doctrine, establishing that sexual violence in conflict cannot be resolved by forms of accountability other than prosecution and punishment and, as a consequence, amnesties must be excluded for these crimes.⁸⁴

A turn toward punitive justice was hard to avoid for both human rights and women's rights advocates.⁸⁵ There were not (and still are not) many alternative

doctrine, domestic judges can directly apply the American Convention on Human Rights and the Belém do Pará Convention in deciding cases and they can decide not to apply a domestic legal rule if they consider it contrary to the Convention (as interpreted by the Inter-American Court). The landmark case in the development of conventionality control is *Cabrera García and Montiel Flores v. México*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010). For an analysis of the conventionality control, see generally Jorge Contesse, *The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine*, 22 INT'L J. HUM. RTS. 1168, 1171–76 (2018); Eduardo Ferrer Mac-Gregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93, 93 (2015).

79. The Inter-American Court had comprised mostly men until then, but the appointment in 2002 of Cecilia Medina had a specific impact on this turning point. As an academic and activist, Medina was committed to advancing an understanding of women's rights as human rights. See Quintana, *supra* note 64, at 310–12; Palacios, *supra* note 64, at 267. See also Medina, *supra* note 9, at 269–70 (arguing about the importance of giving specific recognition to women's rights as a human rights issue).

80. See Engle, *supra* note 4, at 18; Bernstein, *supra* note 4, at 56–57; Houge & Lohne, *supra* note 4, at 758–59; Niamh Reilly, *How Ending Impunity for Conflict-Related Sexual Violence Overwhelmed the UN Women, Peace, and Security Agenda: A Discursive Genealogy*, 24 VIOLENCE AGAINST WOMEN 631, 634–35 (2018).

81. According to the Vienna Declaration, "(v)iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, particularly murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response." See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, § 2, ¶ 38, U.N. Doc. A/CONF.157/23 (June 25, 1993). See also Engle, *supra* note 4, at 12–18; Houge & Lohne, *supra* note 4, at 758–59.

82. Engle, *supra* note 4, at 20.

83. See Rome Statute, *supra* note 20, Arts. 7, 8; Engle, *supra* note 4, at 20.

84. See S.C. Res. 1820 (June 19, 2008); S.C. Res. 2106 (June 24, 2013).

85. See Engle, *supra* note 4, at 23 (arguing that to a great extent, the punitive turn was a "response to legitimate feminist concerns about human rights: its ideology was attached to a public-private distinction;

forms of accountability and enforcement in our legal systems and, from an expressive or symbolic point of view, punishment remains a central means for establishing wrongfulness and culpability, as well as recognizing harm.⁸⁶ It also seemed necessary for women's rights advocates to synergize with the human rights movement and borrow their legal discourses, practices, and doctrines to convey a sense of gravity and raise awareness of the seriousness of the abuses committed daily against women worldwide. In the case of Latin America, this was not an appropriation but rather the expansion of a doctrine that feminists themselves had helped develop in the fight for democracy.⁸⁷ Ultimately, human rights and women's rights advocates have supported each other in their own quest against impunity. However, this endeavor has entailed supporting a categorical duty to prosecute and punish, which has brought internal tensions, criticisms, and paradoxes.

II. CRITIQUES OF THE FEMINIST PUNITIVE TURN AND ITS ANTI-IMPUNITY NORM

There has been growing criticism over the punitive turn of the feminist agenda. Many perceive this turn to be, at least partially, a consequence of the feminist focus on ending impunity.⁸⁸ This turn to punishment has been called "carceral feminism," which is considered a dimension of what Janet Halley has described as "governance feminism." According to Halley, "governance feminism" consists of the different ways in which feminists have exercised their power through the state or state-like institutions, often reproducing social hierarchies, disempowering vulnerable women, and feeding neoliberal policies.⁸⁹ "Carceral feminism," in turn, is a concept coined by Elizabeth Bernstein

it was unable to see ways in which state inaction was indeed state action; its paradigmatic subject was male; it had a weak understanding of civil society and of broader forms of governance; it had little means of enforcement beyond naming and shaming; it failed to theorize gender and sexuality").

86. It is important to note, however, that the lack of alternatives to punishment has changed in recent years with an expansion of the use of restorative justice to address conflicts that otherwise would be fully processed by the criminal law system. Whether restorative justice is a good alternative to punishment to address violence against women is still debated within feminism. See C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 297–304 (2004); Donna Coker, *Restorative Justice, Navajo Peacemaking and Domestic Violence*, 10 THEORETICAL CRIMINOLOGY 67, 78–80 (2006).

87. Jane S. Jaquette, *Introduction to FEMINIST AGENDAS AND DEMOCRACY IN LATIN AMERICA* 1, 5 (Jane S. Jaquette ed., 2009) (arguing that during the 1980s and the 1990s women's rights organizations in Latin America had a very important role as the fight for democracy and this agenda brought them together, and that this allowed them to put gender issues on the political agenda once democracies were re-established). See also Beltrán y Puga, *supra* note 75, at 159–60 (arguing that the struggles for democracy in Latin America brought both a recognition of women's rights as human rights and determined feminists to rely on a rights-based strategy to advance their agenda).

88. Many of the criticisms that will be reviewed in this Section are indeed discussed as the result of a focus on impunity in human rights and women's rights advocacy. See generally Sander, *supra* note 11; Engle, *supra* note 10; Houge & Lohne, *supra* note 4.

89. JANET HALLEY ET AL., *GOVERNANCE FEMINISM: AN INTRODUCTION* ix–xiii (2018); AMIA SRINIVASAN, *THE RIGHT TO SEX: FEMINISM IN THE TWENTY-FIRST CENTURY* 160–61 (First American ed. 2021) (arguing that in "governance feminism" the focus is placed not so much on the punitive agenda of feminists but on the ways in which feminism has used its power to reproduce social hierarchies and at

that refers to a particular alliance between “governance feminists” and penal institutions.⁹⁰ According to Bernstein, this alliance crystallizes around a feminist agenda focused on sexual and domestic violence, oblivious to issues of distributive justice and the social empowerment of women. In her view, carceral feminism developed largely through human rights policies.⁹¹

There are many criticisms of “carceral feminism,” some more nuanced than others. This Section presents critiques that are most directly connected to the question of impunity. The purpose is not to argue for or against “carceral” feminism, but rather to point to why some scholars argue against placing the anti-impunity norm at the center of the feminist agenda.⁹²

A. *From the Social Structure to the Individual Agent: A Neoliberal Turn?*

According to some critiques, the feminist turn to punishment replaced the focus on the redistribution of power with a focus on individual offenders, consolidating the “illusion” that women’s rights are primarily vulnerable to “bad individuals” rather than to unfair distributions of resources and power.⁹³ In the context of international law, the focus on the offender promoted by the anti-impunity norm has hindered both structural solutions to violence against women and a condemnation of political and economic arrangements that facilitate those crimes.⁹⁴ The tendency to focus on the individual also disguises the extent to which societies at large are responsible for human rights violations.⁹⁵ In Amia Srinivasan’s words, the implication of feminism in the reproduction of the “carceral state” has given “cover to the governing class in its refusal to

times even make things worse for the most vulnerable women, and that “governance feminism” has done this partly by relying almost exclusively on the criminal law). See also Acosta-López, *supra* note 67, at 43 (discussing how this was the view of feminism that was embraced by the Inter-American Court in its decisions about violence against women since 2009).

90. Janet E. Halley, *Where in the Legal Order Have Feminists Gained Inclusion?*, in GOVERNANCE FEMINISM: AN INTRODUCTION, 3, 5 (Janet Halley et al. eds., 2018).

91. Bernstein, *supra* note 4, at 53–56; SRINIVASAN, *supra* note 89, at 168–69. Bernstein is mostly looking at American human rights policies and she argues that these have helped in “spreading the paradigm of feminism-as-crime-control across the globe.” See Bernstein, *supra* note 4, at 57.

92. For views that clearly see the anti-impunity norm as partially responsible for the punitive turn in women’s rights advocacy, see generally Engle, *supra* note 4; Houge & Lohne, *supra* note 4.

93. See Bernstein, *supra* note 4, at 56; SRINIVASAN, *supra* note 89, at 163; BUMILLER, *supra* note 4, at 1–15. Discussing the punitive turn in human rights more generally, Engle refers to this problem as one of “individualization and decontextualization.” See Engle, *supra* note 10, at 1120. According to Sander, in the context of systematic human rights violations, a focus on individuals can obscure not only structural injustices but also indirect ways in which groups and communities contribute to harm. This is the case, for example, of bystander responsibility, which becomes invisible by our focus on the individual offender who physically causes the harm. See Sander, *supra* note 11, at 345–46.

94. Reilly, *supra* note 80, at 645 (arguing that the focus on conflict-related sexual violence has overshadowed other important issues and aspects of gender justice that should also be addressed globally, such as women’s political participation); Vasuki Nesiiah, *Doing History with Impunity*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 95, 111 (Karen Engle et al. eds., 1st ed. 2016) (arguing that a focus on individual culpability has proliferated a politics of accountability where “the structural arrangements of trade and aid that facilitate conditions of life and debt that should be criminal” are tolerated and legitimized, and how we focus on “the petty warlord recruiting children to fight resource wars and their proxy battles rather than the global corporate CEO profiting from those same resource wars and exploited child combatants”).

95. Koskeniemi, *supra* note 13, at 14.

tackle the deepest causes of most crime: poverty, racial domination, borders, caste.”⁹⁶ This has distracted feminists from demanding systemic and economic policies that would have a greater impact on the realization of women’s rights.⁹⁷ Criminal interventions not only do not address structural violence and inequalities but can even strengthen them.⁹⁸

Some have framed this critique as a neoliberal turn in feminism. According to Wendy Brown, neoliberalism is not only a radicalization of free market principles where competition must be the sole rule of the market and welfare policies must be severely restricted, but also and most importantly, it represents an expansion of market rationality to all dimensions of life.⁹⁹ Neoliberalism subjects all the political and personal dimensions of social action to an economic or instrumental rationality organized under the logic of profitability, undermining the principled nature and practice of democracy.¹⁰⁰ From this critical understanding of neoliberalism, some feminists argue that by focusing on the individual wrongs committed against women rather than on their social and economic empowerment, “carceral feminists” have implicitly endorsed a neoliberal rationality, promoting the expansion of the state’s punitive presence at the cost of welfare policies.¹⁰¹ Elizabeth Bernstein, for example, has argued that even the feminist demands that appeal to social structure have fallen prey to this punitive turn as they have come to see carceral policies as “the preminent vehicles for social justice.”¹⁰²

The identification of punishment with neoliberalism has encountered some resistance from feminist scholars who consider the abolitionist proposals that sometimes underlie anti-carceral feminism to also suffer from a neoliberal malady. In their view, abolitionism would also represent a neoliberal turn as

96. SRINIVASAN, *supra* note 89, at 163.

97. For a description of this critique, see Clare McGlynn, *Challenging anti-carceral feminism: Criminalization, justice and continuum thinking*, 93 WOMEN’S STUD. INT’L F. 1, 2 (2022). In the context of international law, Reilly has argued that although a focus on conflict-related sexual violence may have helped in terms of raising awareness, it has come at the cost of other important interests for women such as promoting their participation and preventing and sanctioning non-sexual forms of violence against them. See Reilly, *supra* note 80, at 635.

98. Nesiiah, *supra* note 94, at 112–13; Sander, *supra* note 11, at 347.

99. See generally Wendy Brown, *Neo-Liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1 (2003).

100. In Brown’s view, “[t]he extension of market rationality to every sphere, and especially the reduction of moral and political judgement to a cost/benefit calculus, would represent precisely the evisceration of substantive values by instrumental rationality that Weber predicted as the future of a disenchanted world. Thinking and judging are reduced to instrumental calculation in this ‘polar night of icy darkness’—there is no morality, no faith, no heroism, indeed no meaning outside the market.” This undermines democracy because it makes the moral values and the principles of constitutional liberalism contingent on their efficacy and profitability. See *id.*

101. See generally Bernstein, *supra* note 4, at 56–57; Engle, *supra* note 4, at 18–19. For an account of an alliance between Latin American feminists and the neoliberal state, see Silvana Tapia Tapia, *Feminism and Penal Expansion: The Role of Rights-Based Criminal Law in Post-Neoliberal Ecuador*, 26 FEM. LEGAL STUD. 285, 286–88 (2018).

102. Bernstein, *supra* note 4, at 65 (arguing that within a neoliberal logic “the consumer and the carceral are increasingly seen as the preminent vehicles for social justice”).

it would entail placing violence against women back into the private realm.¹⁰³ Whether the punitive turn is neoliberal or not, however, seems inconsequential to the central point of the critique, namely that a turn to punishment obscures how societies are liable for the violation of women's rights, which raises the question of whether feminism should continue to place the anti-impunity norm at the center of their agenda.

B. Many Costs and Few Gains: Feminism and Mass Imprisonment

A change in focus from the structural to the individual has, according to some, sealed an alliance between feminists and the "carceral state" that has made women's rights advocacy complicit in the global growth of incarceration, such as in the phenomenon of American mass imprisonment.¹⁰⁴ By turning to punishment in the endeavor against impunity, women's rights advocates supported law-and-order policies that not only led to an increase in prison populations but also risked important principles of modern criminal law by sponsoring punishments that are too severe or disproportionate and campaigning against well-established procedural rights.¹⁰⁵

Some critiques present this synergy between feminism and incarceration as an intentional move pushed forward by feminists, whereas others consider this alignment to be an unforeseen consequence of a legitimate effort to raise awareness about violence against women and demand that it be seen as a serious public wrong.¹⁰⁶ However it happened, this alignment has created a paradox for feminism because it has contributed to undermining the very rights it sought to protect.¹⁰⁷ Incarceration is one of the areas where human rights violations abound, and an increasing part of the population subjected to the

103. Amy Masson, *A Critique of Anti-Carceral Feminism*, 21 J. INT'L WOMEN'S STUD. 64, 68–70 (2020) (describing this view but arguing that anti-carceral feminists are taking a neoliberal attitude themselves by suggesting that we replace criminal justice with private forms of justice, placing violence against women back into the private realm). A similar point is made by Lise Gotell who argues that renouncing the criminal law risks a turn to re-privatizing sexual violence. See Lise Gotell, *Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism*, in RAPE JUSTICE: BEYOND THE CRIMINAL LAW 53, 54 (Anastasia Powell et al. eds., 2015).

104. For an account of the synergy between "governance feminism" and the punitive state, and particularly an argument that feminism has been complicit in American mass imprisonment, see BETH RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* 99–124 (2012); GRUBER, *supra* note 4, at 96–101; MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 97–114 (2006). Although the critique has been particularly pressed against American feminist policies, the growing alignment between feminism and the punitive state goes well beyond those borders. See Engle, *supra* note 4, at 21; Tapia Tapia, *supra* note 101, at 289–90.

105. See GOTTSCHALK, *supra* note 104, at 97–114. For a formulation of this particular critique to some of the penal policies advanced by feminists, see GRUBER, *supra* note 4, at 44–45, 75, 82, 112–20.

106. For an analysis of these different views about the alignment between feminist and law-and-order policies, and arguing for a more nuanced approach to this issue, see Anna Terwiel, *What Is Carceral Feminism?*, 48 POL. THEORY 421, 433–34 (2020). In Latin America, for example, the feminist movement was created as part of the resistance to authoritarian regimes and as such it was "anti-state" and had a view of its activism as autonomous from political institutions, particularly the coercive apparatus of the state. See Jaquette, *supra* note 87, at 5.

107. See Engle, *supra* note 10, at 1124–26.

excesses and abuses of contemporary penal practices are women.¹⁰⁸ To make things worse, the expansion of criminal law to address violence against women does not seem to have entailed a decrease in this violence nor a wider realization of women's rights, which were important ends that feminism hoped to achieve with its turn to punishment.¹⁰⁹ Although the expansion of punishment has carried clear costs to women and societies at large, its benefits have been much less evident.¹¹⁰

C. *Speaking in the Name of Another: Silencing the Voices and Interests of Victims*

Another critique accuses the anti-impunity and carceral trends in feminism of being indifferent to the interests of victims of violence.¹¹¹ The duty to address impunity with punishment has, at times, taken precedence over the prevention of harm and has limited the exploration of more valuable alternative remedies for individual victims or groups.¹¹² By focusing on prosecution and punishment as the only way to address impunity and violence, feminists may be hindering victims' access to reparations, not only because they consider alternative forms of justice as secondary but also because they subordinate reparations to expanding criminal law's selective reach.¹¹³ Only those victims

108. According to the World Female Imprisonment List of 2022, there has been a sixty percent increase in the global female prison population since 2000. See Helen Fair & Roy Walmsley, *World Female Imprisonment List (fifth edition)*, INST. FOR CRIME & JUST. POL'Y RSCH. 2 (2022). According to a report of the Prison Policy Initiative, although there has been a decrease in the American prison population, this has mostly affected the male population. See Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [<https://perma.cc/CYC8-967E>].

109. Preventing and eradicating violence against women is not the only aim that can explain and support the turn to punishment. However, prevention does appear as a central expectation in the feminist demand that the world recognize violence against women as a kind of human rights violation, and that states punish this kind of violence to address impunity and fulfill their duty of protecting women's rights. For a more detailed account of this expectation, see *supra* Section I.C.

110. There are different dimensions of the inefficacy of criminal law for a feminist agenda. On the one hand, there is the issue of whether the expansion of criminal accountability has translated into a decrease in violence against women and many remain skeptical of this. See GRUBER, *supra* note 4, at 87–93; Binningsbø & Nordås, *supra* note 49, at 1082; Houge & Lohne, *supra* note 4, at 778–80; Reilly, *supra* note 80, at 635; Uma Chakravarti, *From the Home to the Borders: Violence Against Women, Impunity and Resistance*, 50 SOC. CHANGE 199, 212 (2020); Preeti Pratishruti Dash, *Feminism and Its Discontents: Punishing Sexual Violence in India*, 28 INDIAN J. GENDER STUD. 7, 9 (2021). On the other hand, there is the view that turning to punishment has not helped at a symbolic or cultural level to trigger the kind of social change that feminism originally sought, see Terwiel, *supra* note 106, at 432–33; GOTTSCHALK, *supra* note 104, at 97–114. Finally, part of the problem of inefficacy in criminal law is one of expectations, where the criminal law is supposed to provide certain experiences or results that is not well suited to do, such as being a safe space for victims of violence. See Houge & Lohne, *supra* note 4, at 776–77.

111. According to McGlynn, women understand justice in different ways and often are presented with criminal justice as the only alternative. She argues that as a consequence we should address violence against women by offering more than one response and being ready to engage in radical reform, without giving up fully on the criminal law and public forms of accountability. See McGlynn, *supra* note 97, at 3–5.

112. Houge & Lohne, *supra* note 4, at 757–58, 770–72. Regarding how a fight against impunity narrowly understood can create new kinds of and spaces for impunity, see Lorca, *supra* note 21, at 429–30; Nesiiah, *supra* note 94, at 112–13.

113. Engle, *supra* note 10, at 1123–24.

capable of presenting a criminal case are seen as having sufficient entitlement to demand reparations as a complement to criminal justice.¹¹⁴

In Latin America, scholars have criticized the anti-impunity focus on punishment for obscuring important features of the victims that go beyond their identities as women, and that are relevant to determining methods that could better serve their interests.¹¹⁵ The Inter-American Court's main concern in cases of violence against women is that this violence expresses structural discrimination against *women*, but in most of these cases victims are not just women but also young, poor, and often immigrants.¹¹⁶ These features are frequently obscured by the universalistic discourses brought into the legal field by feminist lawyers and scholars, leaving behind the perspective of the actual victims.¹¹⁷

In terms of conceptions of justice, “carceral feminists” have been accused of occupying the perspective of “survivors,” speaking in their name as though the form of accountability they seek is always punitive, and thereby silencing the diverse ways that victims or survivors perceive justice and criminalization.¹¹⁸ For example, in some Latin-American countries, indigenous women have been barred from dealing with their conflicts through alternative forums of justice, which may be more meaningful to them than recourse through criminal law.¹¹⁹

Finally, a focus on prosecution and punishment obscures history and limits victims' access to truth. This is a consequence of the intrinsic limitations of the criminal trial, which privileges certain themes and voices over others, offering a narrow frame for narrating history and sharing experiences. The voices which will be heard are usually restricted to those who may say something useful for convicting or acquitting the accused.¹²⁰ The rules of the criminal trial are designed to protect the rights of the accused and establish whether a specific crime took place, rather than to reconstruct a more complex narration of a historical event.¹²¹ According to Karen Engle, the focus on impunity also hinders

114. *Id.*

115. Acosta-López, *supra* note 67, at 47.

116. *Id.* at 46–47.

117. *Id.* at 49–51; Reilly, *supra* note 80, at 635; Andrea Durbach & Louise Chappell, *Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations*, 16 INT'L FEMINIST J. POL. 543, 548–49 (2014).

118. For many victims and survivors, neither retribution nor incarceration attends to their needs or their sense of justice. See McGlynn, *supra* note 97, at 3–5; Clare McGlynn & Nicole Westmarland, *Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 SOC. & LEGAL STUD. 179, 180–82 (2019); Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 597 (2005); Daniela Bolívar et al., *Uncovering Justice Interests of Victims of Serious Crimes: A Cross-Sectional Study*, 19 VICTIMS & OFFENDERS 1, 14–18 (2022).

119. Tapia Tapia, *supra* note 101, at 286–88, 293–94.

120. About the limitation of criminal trials for narrating human experiences, see generally Koskeniemi, *supra* note 13, at 12–19; David J. Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* 8–9 (Georgetown L. Sch. Working Paper, 2008); Maximo Langer, *The Archipelago and the Wheel: The Universal Jurisdiction and the International Criminal Court Regimes*, in THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS 204, 217–18 (Martha Minow et al. eds., 2015); Nesiiah, *supra* note 94, at 100.

121. Langer, *supra* note 120, at 217–18.

our access to truth by restricting the sources of history that are acceptable and available.¹²²

D. *Are these Criticisms Fair?*

Many of these criticisms may have been overstated. It is unlikely that any women's rights advocate would squarely fit the description of being a "carceral feminist" and even if they did, it is not clear that they had as great of an impact on policy-making as the critiques assume.¹²³ At the same time, those who criticize the critique tend to overstate how much anyone who objects to the feminist punitive turn is also an advocate for abolitionism.¹²⁴ In reality, most feminist discourses fall somewhere in between, neither endorsing an exclusive reliance on the penal state nor a complete abolition of punitive practices.¹²⁵ Whether the criticisms reviewed in this section are fair or not, all of them point to real problems that should worry us, and explain why some have shown skepticism about the importance of the anti-impunity norm. Even if the objections *are* overstated, they should make us wonder whether we should temper our commitment to end impunity.

III. REDEFINING IMPUNITY

A struggle against impunity has supported the punitive turn, mostly because it has been captured by the view that impunity's only antidote is prosecution and punishment.¹²⁶ It is not clear, however, that this is the best way to see things. Any plausible conception or definition of impunity will be connected to a failure to enforce criminal laws.¹²⁷ Given the rhetorical force of the concept and how it has been used, any plausible account would agree that impunity is not *just* about failing to enforce a criminal statute, but also points

122. Acceptability would be determined by the interest in establishing individual criminal responsibility, although the problem is availability, given the concealment of relevant materials due to fear of liability. See Engle, *supra* note 10, at 1126–27.

123. Gotell, *supra* note 103, at 60; Terwiel, *supra* note 106, at 427–30.

124. Masson, *supra* note 103, at 70; McGlynn, *supra* note 97, at 7.

125. Not even Aya Gruber, who has raised some of the stronger and more complete critiques to "carceral feminism," advocates for abolition. See GRUBER, *supra* note 4, at 192–93 (arguing for a "neofeminist" approach which questions criminalization as a good policy for gender justice, but without suggesting that we should instead completely dismantle the criminal law system); McGlynn, *supra* note 97, at 7 (arguing that feminists need the criminal law but that there are ways to use it without being carceral or punitive). See also Masson, *supra* note 103, at 70 (arguing that we should reject the neoliberal and neoconservative ethos of the "carceral state" but being careful not to return to private forms of conflict resolution).

126. See generally Engle, *supra* note 10; Engle, *supra* note 4; Moyn, *supra* note 1; Nesiah, *supra* note 94; Houge & Lohne, *supra* note 4; Sander, *supra* note 11. As discussed above, this understanding of impunity is not arbitrary; it is sustained by a view of violence against women as mostly a set of violations realized by male perpetrators over vulnerable women. It is also sustained by a more general view, according to which criminal justice is capable of deterring individuals who exercise violence, expressing condemnation, and attending to the needs of victims. See Sander, *supra* note 11, at 328–29.

127. Mostly because this is the literal meaning of the word. Impunity comes from the Latin *impunitas*, which means "without (*in*) punishment (*poena*)."
See *impunity (n.)*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/impunity> [https://perma.cc/6H5H-L5MP].

to some important problem facing a legal and political order. Disagreement ensues when we try to establish what kind of problem this is and the adequate means for addressing it.

Elsewhere I have argued that we can understand the problem of impunity in two different ways.¹²⁸ First, we may consider that the problem with impunity is that sometimes a lack of prosecution and punishment entails a relevant failure in promoting the values of the criminal law (retributive, instrumental, expressive, etc.). Second, we may consider that the problem with impunity is that sometimes a lack of prosecution and punishment expresses not only a failure to promote the values of the criminal law but also, and more importantly, a serious failure in equality before the law.¹²⁹ If we take this latter conception, which represents a better understanding of impunity, an anti-impunity norm should not yield a carceral or punitive agenda.

A. *Thin Impunity: A Quest for Punishment*

In the first concept mentioned above, which I call a “thin” or “narrow” conception of impunity, fighting impunity is a “criminal justice” endeavor. As such, we can only address it by expanding the reach of prosecution and punishment.¹³⁰ In short, we can only see value in enforcing an anti-impunity norm if, at the same time, we see value in penal practices. This conception of impunity, however, is not convincing, at least not as the kind of impunity that was and should be at the heart of the feminist and human rights agenda.

Crimes go unpunished all the time and in large numbers.¹³¹ We may worry when this undermines the pursuit of some of the ends of punishment such as retribution or deterrence but, by itself, it seems unreasonable to claim that this phenomenon should trigger exceptional practices such as claiming

128. See generally Lorca, *supra* note 21.

129. *Id.* at 422, 424.

130. In my view, it is also a thin understanding of impunity that goes beyond punishment and concerns a failure to bring people to answer before a criminal court. See Max Pensky, *Impunity: A Philosophical Analysis*, in *PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW: FOUNDATIONAL CONCEPTS* 241, 249–51 (Morten Bergsmo & Emiliano J. Buis eds., 2019).

131. Every criminal law system has economic and even technological limitations that would make it impossible to punish most of the crimes that are committed. Studies suggest that around forty percent of crimes might not even be reported, and from those that are reported, only a fraction will be investigated, prosecuted, and brought to trial. See Terry L. Penney, *Dark Figure of Crime (Problems of Estimation)*, in *THE ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 535, 536 (Jay S. Albanese ed., 2014). There is, to be sure, a general punitive attitude in the public, but this is surely not the attitude that moves human rights or feminist advocates. Besides, many studies show that the public perception of the relationship between crime and punishment is less punitive than what polls or the news media often represent. See ROBERTO GARGARELLA, *CASTIGAR AL PRÓJIMO: POR UNA REFUNDACIÓN DEMOCRÁTICA DEL DERECHO PENAL* 189–93 (2016); Julian V. Roberts, *Public Opinion and Sentencing Policy*, in *REFORM AND PUNISHMENT* 18, 19–21, 29–31 (Sue Rex & Michael Tonry eds., 2012); Julian V. Roberts & Ross Hastings, *Public Opinion and Crime Prevention: A Review of International Trends*, in *THE OXFORD HANDBOOK OF CRIME PREVENTION*, 487, 490–93 (David P. Farrington & Brandon C. Welsh eds., 2012); Gerry Johnstone, *Penal Policy Making: Elitist, Populist or Participatory?*, 2 *PUNISHMENT & SOC'Y* 161, 164–66 (2000). Moreover, the public's support for punitive policies may not lie on a punitive instinct but rather in how the fears and anxieties of contemporary life are channeled by our political institutions. See DAVID GARLAND, *THE CULTURE OF CONTROL* 141–45 (2001).

universal or transnational jurisdiction, getting rid of “hindrances” to prosecution such as the statute of limitations or *res judicata*, or prohibiting mercy, amnesties, or any other form of pardon. When feminist and human rights advocates argue for these measures to confront unpunished crime (justifiably or not), it is not solely because the ends of punishment are being frustrated. Something else is going on. Crimes that constitute human rights violations and women’s rights violations are not just any kind of crime. They are unique partly because they result from the abuse of a structure of asymmetric and unchecked power, which explains why they are systematically unprosecuted and unpunished.¹³² This suggests that the common element that configures the situation of impunity in these cases, which has historically triggered the demand for exceptional measures, is independent of the value that we attribute to punishment as a specific social and legal practice. It also suggests that what sustains the importance of the anti-impunity norm is a concern with equality and the rule of law.

B. *Thick Impunity: A Quest for Equality*

In the second conception, which I call a “thick” or “broad” notion of impunity, fighting impunity is primarily an issue of “political justice.” What determines impunity is not just a relevant number of unpunished or unprosecuted crimes, but a failure to prosecute and punish that directly correlates with a serious failure in equality before the law. This kind of impunity may demand that we prosecute and punish, but this may also be unnecessary, insufficient, or counterproductive. Because a fight against this kind of impunity is not concerned with criminal justice per se, it can be endorsed by criminal law skeptics as much as by those who see internal value in penal practices. For example, someone who does not believe that punishment is *prima facie* justifiable might think that equality demands that we punish white-collar crime as long as we punish petty theft, which is typically committed by those with fewer resources.¹³³

There are two paradigmatic ways in which inequality before the law can configure a notion of impunity understood in this “thick” conception. First, a failure to prosecute and punish certain kinds of crimes or certain groups of people can express how some offenders are privileged and, as a consequence, *beyond* the reach of the law. Examples of this are failures to prosecute white-collar crime and human rights violations committed by state agents in authoritarian regimes.¹³⁴ Second, a failure to prosecute and punish certain kinds

132. See Alejandro Chehtman, *A Theory of International Crimes: Conceptual and Normative Issues*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 317, 329–40 (Kevin Jon Heller et. al eds., 2020).

133. About the relationship between petty crime and poverty, see Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 71, 77–85, 91–92 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

134. The concept of white-collar crime was developed and is well explained in Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOCIO. REV. 1–12 (1940).

of crimes or people can illustrate how some victims are less important than others in the eyes of the law. The problem here is not that the offender is privileged but rather that the victim does not count as an equal due to structural discrimination. In this second case, the victim has fallen *below* the reach of the law.¹³⁵ The Inter-American Court's understanding of violence against women, as a kind of human rights violation that results from structural discrimination, is a good example of this second case.¹³⁶

In both cases, unpunished crime demonstrates how the law bends to power by leaving some individuals beyond or below its reach. For both victims and society at large, this phenomenon upsets our ideal of legality as well as the experience of living under the rule of law.¹³⁷ We value the experience of living in a social and political order that strives to realize the ideal that no one is above or below the reach of the law.¹³⁸ And although privilege and discrimination show up persistently in many areas of the law, it seems particularly troubling when they systematically affect *criminal* law, which regulates the more basic or minimal expectations of mutual respect in our social behavior.¹³⁹ We have high expectations that even the most privileged people abide by it and that even the most underprivileged are protected by it.¹⁴⁰ When this expectation is systematically frustrated, the law ceases to appear as a structure that can promote our rights and protect them from abuse, and instead becomes a mere disguise for power.¹⁴¹

135. The boundaries between these two ways in which impunity correlates with inequality are not so sharp. Poor and generally underprivileged men may appear to be privileged against women in the context of the enforcement of domestic violence statutes. But it is helpful to distinguish these two kinds of thick impunity because they point to different dimensions of inequality, i.e., privilege and discrimination. Consequently, the role of punishment and other mechanisms for addressing impunity may be different for each case.

136. As discussed above, violence against women, as a kind of human rights violation, refers to a particular kind of violence that results from systematic discrimination against women, such as the femicides of Ciudad Juárez that pushed the Inter-American Court to expand its anti-impunity doctrine to violence against women. See *supra* Section I.C. See generally Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281 (1991); Karen Musalo, Elisabeth Pellegrin & S. Shawn Roberts, *Crimes without Punishment: Violence against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161 (2010); Medina, *supra* note 9; Quintana, *supra* note 64; Palacios Zuloaga, *supra* note 72; Charlesworth, *supra* note 58; Bunch, *supra* note 9; Roth, *supra* note 9. Another example may be the racial bias with which self-defense is applied in some jurisdictions. See generally Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119 (2008).

137. SHKLAR, *supra* note 13, at 109, 113–18; JOHN RAWLS, A THEORY OF JUSTICE 236, 239 (Harv. Univ. Press 2005) (1971); see generally Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

138. See RAWLS, *supra* note 137, at 239–43; Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315, 317–20 (2011); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 157–58 (2002). Montesquieu's main defense of separating legislative, judicial, and executive power was precisely to avoid the existence of an agency that was beyond the reach of the law. See Charles de Montesquieu, MONTESQUIEU: THE SPIRIT OF THE LAWS 156–57 (Anne M. Cohler et al. eds., Cambridge Univ. Press. 1989) (1748). Against this view, Hobbes considered that the sovereign could not be subjected to the law. See Thomas Hobbes, LEVIATHAN xxix, 213 (Edwin Curley ed., Hackett Publ'g. Co. 1994) (1668).

139. Antony Duff, *Responsibility, Citizenship, and Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 125, 127–30 (Antony Duff & Stuart P. Green eds., 1996).

140. Lorca, *supra* note 21, at 427.

141. For the idea of law as a structure to shield our rights from brute power, see Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 1 (2000); Lorca, *supra* note 21, at 426–27; Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601,

C. *What is the Role of Criminal Law in Ending the Impunity of Violence Against Women?*

If a failure of equality before the law is central to what impunity is and why we care about it, it is not clear that criminal law will always be the best means to address it. Legal and political institutions can contribute to ending impunity by restoring or enhancing the reach of legality and accountability in other ways. The legal system must show that no one under its jurisdiction is beyond or below its reach, and using criminal law will be necessary when there is no other way to restore this expectation. However, when there *are* alternative means of accountability that are less harmful than prosecution and punishment, we should prefer these if their use does not create or reproduce inequalities.

Seeing impunity in this way will not entail punishment having no role in enforcing an anti-impunity norm, but it should moderate the turn to punishment and illuminate the importance of non-penal interventions in creating accountability. In the case of a women's rights agenda, this view of impunity leads to three types of considerations.

First, such a view will not sustain doctrines like the one advanced by the Inter-American Court, where alternative forms of accountability such as restorative justice can never replace prosecution and punishment.¹⁴² Sometimes accountability will be better served if we renounce punishment or at least if we do not shut down completely the possibility of amnesties or pardons.¹⁴³ This is so because sometimes criminal justice undermines access to truth, reparations, or redress for women, which may constitute more meaningful forms of accountability for them and their communities.¹⁴⁴ As long as we continue to use punishment as the central tool of accountability for serious harm, using restorative justice is challenging from an equality perspective, as it could imply that crimes dealt with only through restorative justice are less serious. However, taking equality as the central standard in the fight against impunity provides a wider range of options, as the fairness of using restorative justice as an alternative to punishment will depend on context and meaning rather than

1604–08 (1986). Kahn argues that in international law, and international criminal law in particular, the fight against impunity has been to a great extent an effort to replace the “language of power” with the “language of law.” In a similar way, David Luban has argued that the very idea of international criminal law and the creation of a permanent court was to create a new context for individual rights, where they are less vulnerable to the whims of power and instead protected by the structure of legal institutions. See David Luban, *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, 11 J. INT'L CRIM. JUST. 505, 509 (2013).

142. See *supra* Section I.B.

143. See Minow, *supra* note 14, at 43; John Braithwaite, *Many Doors to International Criminal Justice*, 23 NEW CRIM. L. REV. 1, 20–26 (2020); Binningsbø & Nordås, *supra* note 49, at 1081–82 (arguing that the path to accountability for human rights violations does not always depend on punishment, but rather on accommodating the specific demands of justice in each case); Moyn, *supra* note 1, at 86–87; Nesiha, *supra* note 94, at 111–13; Engle, *supra* note 4, at 1118–19.

144. See McGlynn, *supra* note 97, at 3–5 (arguing that women seek different kinds of justice and that to address violence against women we must be more attentive to women's needs and be ready to engage in radical reforms).

on an absolute or categorical obligation. This may not lead us to abolish punishment, but it opens up a wider space of possibility and exploration.

Second, an anti-impunity norm centered around rectifying inequalities requires that we strengthen—rather than weaken—our institutional culture and our commitment to the rule of law.¹⁴⁵ Consequently, a fight against impunity should not sustain penal practices that are extremely severe or imposed with disregard for procedural rights, because this would be at odds with the values of legality.¹⁴⁶ In other words, when fighting impunity *does* call for a punitive intervention, this should be a moderated one, lest we risk putting “law out of office.”¹⁴⁷ In the case of the feminist movement, this last issue could provide a useful stance to evaluate informal sanctions such as online shaming, doxing, and cancellations as means to address impunity.

Third, from the point of view of fostering accountability and equal enforcement of the law, punishing is not always better than not punishing—it depends on how we punish as well as on who is being punished and who is not.¹⁴⁸ For example, in the realm of international crimes, a fixation on punishment has sometimes pushed international criminal courts to synergize with abusive political regimes, securing the impunity of many to obtain the punishment of a few.¹⁴⁹ Feminism should remain attentive to this problem. A focus on punishment to address impunity could at times entail condoning or tolerating the violence that takes place within and around penal institutions.¹⁵⁰ Likewise, a focus on the individual may secure the impunity of collective agents, leaving societies unaccountable for their responsibility in maintaining the structures

145. Certain accounts of retribution or even deterrence may also demand respect for procedural rights as well as proportionality and moderation. To that extent, impunity understood in a narrow way need not lead to an excess of severity. This will depend, however, on the understanding of retribution one defends. And when it comes to purely instrumental accounts of punishment, the relevance of proportionality and procedural rights becomes less clear.

146. See Lorca, *supra* note 21, at 426–28.

147. The idea of throwing law out of office is taken from Bacon’s famous essay “On Revenge.” On the connection between legitimate punishment and the values of legality, see Rocío Lorca, *Punishing the Poor and the Limits of Legality*, 18 *LAW, CULTURE & HUMAN*. 424, 426–31 (2022); Lorca, *supra* note 21, at 426–28.

148. Kiyani, *supra* note 21, at 955–56; Lorca, *supra* note 21, at 430–31; Sander, *supra* note 11, at 342–44.

149. Kiyani, *supra* note 21, at 949; Lorca, *supra* note 21, at 428–31; Nesiha, *supra* note 94, at 100, 111–13.

150. Regarding how the struggle against impunity tends to hide a double standard, see Nesiha, *supra* note 94, at 100. In the case of the use of criminal law to fight the impunity of sexual violence, this double standard is determined by the indifference to the amount of violence (including sexual) that incarceration enables. This has been one of the central arguments in contemporary abolitionist discourse in the United States. The idea is that the criminal law is selective because it concerns itself with certain forms of violence but ignores the violence suffered by those subjected to its punishments, making certain lives seem less valuable than others. See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007); Mariame Kaba, *From “Me Too” to “All of Us”*: *Organizing to End Sexual Violence, Without Prisons*, IN *THESE TIMES* (Oct. 17, 2017), <https://inthesetimes.com/article/incarceration-sexual-assault-me-too-rape-culture-organizing-resistance> [https://perma.cc/5F8G-Z6MD].

that reproduce violence against women.¹⁵¹ If violence against women is a systematic and serious violation of human rights resulting from structural discrimination and the generalized acceptance of gender-based violence, as the Inter-American Court has stated, a focus on punishment jeopardizes our ability to address the problem in all its dimensions and to invest in interventions that more directly address inequalities, recognition, and non-repetition.¹⁵²

IV. CONCLUSION: SHOULD FEMINISTS STRUGGLE FOR REDEFINING IMPUNITY?

The punitive turn in women's rights advocacy is not the result of a commitment against impunity but of a certain understanding of what impunity is and how it should be addressed. The concerns raised by critics of the anti-impunity norm reproduce a narrow understanding of impunity that focuses primarily on the values of punishment. As an alternative, this Article proposes a conception of impunity that calls for advancing equality rather than only criminal justice. Under this conception, a commitment against impunity should not yield a punitive agenda such as "carceral feminism" but could accommodate different forms of doing justice and holding each other accountable.¹⁵³

What guides this "definitional struggle" for a more open conception of impunity is not a search for the "real" meaning of the word. The aim of this Article is to propose a plausible alternative meaning because how we define impunity has important implications. We could, of course, just focus on these implications and decide what we want to do in the face of violence against women regardless of whether we call our project "ending impunity" or not.¹⁵⁴ Some critics of "carceral feminism" are aware that impunity has been narrowly defined and that it could be understood in a way that does not yield a punitive

151. I am grateful to Michelle Dempsey for pointing out this issue to me in a presentation of an earlier draft of this paper in "The Virtual Workshop on the Political Turns in Criminal Law." See Nesiha, *supra* note 94, at 111–13 (arguing how, in the context of human rights law, the anti-impunity struggle and its focus on individual accountability has secured the impunity and lack of accountability of those who profit from the social arrangements that make human rights violations possible, such as many war criminals and criminal regimes).

152. I thank Naomi Roht-Arriaza for raising this point and pressing me on the issue that all resources seem to be going into trials, leaving other interventions for a time that never comes.

153. As Minow has argued, justice and criminal justice do not fully overlap because justice can be achieved in ways other than prosecuting and punishing, such as restorative justice. She advocates for interpreting the Rome Statute as not being so narrowly focused on criminal accountability as a means of justice, because this would ignore the idea of "last resort" that informed the International Criminal Court since its inception. Also, in her view, the more we narrow our conception of justice, the harder it becomes to believe that peace and justice are not at odds. Justice is much more clearly compatible with peace when it can encompass different forms of accountability. See Minow, *supra* note 14, at 19, 37–39.

154. To be clear, we can directly discuss the values of punishment, accountability, and equality before the law without having to organize (and perhaps obscure) them under a given definition of impunity. I am grateful to Liam Murphy for pressing me on this point in his comment to an earlier draft in the Hauser Global Program's Forum at New York University. Regarding conceptual debates in legal and political philosophy, see generally LIAM B. MURPHY, *WHAT MAKES LAW* 61–63 (2014).

agenda,¹⁵⁵ but they seem willing to concede the term “impunity” to those who advocate only prosecution and punishment. Although this seems reasonable, there is a point in trying to revise the concept of impunity, and the struggle over the concept is important for several reasons.

First, impunity understood as I propose here points to a specific kind of issue that cannot be easily conveyed with any other term. It makes sense to retain the word and argue for its thicker meaning, not only because of its specificity but also because this meaning is not alien to the history and common use of the term. The history that was presented earlier in this Article shows that the endeavor against impunity grew out of a context of abuse of power and structural discrimination. This offers a dimension of the phenomenon that has been progressively obscured by the imposition of a thin understanding.¹⁵⁶

Second, because impunity has been historically connected to abuses of power or structures of political inequality, the term carries a strong rhetorical force.¹⁵⁷ This rhetorical force is important because it mobilizes institutional change and provides *prima facie* legitimacy to policies that are sometimes hard to push forward or justify. There is no reason to allow a narrow definition, which has obscured an important part of why we worry about impunity, to be the bearer of all that rhetorical force.

A third reason to struggle for the concept is that the term (and its rhetorical force) has been co-opted by a certain view of justice that narrows our possibilities of achieving a “culture of accountability” and realizing victims’ rights.¹⁵⁸ A thick understanding of impunity would allow us to advance accountability more diversely and effectively, which seems more consistent with and constructive to a feminist agenda.

A fourth and final reason is that the concept of impunity, unlike other political concepts such as “democracy” or “liberty,” does not point to a general ideal and is not itself a normative standard, but points to a specific problem that needs to be addressed. The conceptual struggle for impunity is thus more consequential and manageable than the conceptual struggle for democracy or liberty. By deliberating what impunity is we are more directly deliberating how we must address it, and the options are few.¹⁵⁹

155. See ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, at 3–5 (Karen Engle et al. eds., 1st ed. 2016); Nesiah, *supra* note 94, at 96–100, Engle, *supra* note 10, at 1119.

156. For discussions on different ways of understanding impunity, see Nesiah, *supra* note 94, at 104–13; Tony Reeves, *Impunity and Hope*, 32 *RATIO JURIS* 415, 431–35 (2019); Jorge Viñuales, *Impunity: Elements for an Empirical Concept*, 25 *MINN. J. L. & INEQ.* 115, 121–23 (2017); Patricio Nazareno, *Impunity Reconsidered: International Law, Domestic Politics, and the Pursuit of Justice*, 33 *HARV. HUM. RTS. J.* 173, 176–78 (2020).

157. See Moyn, *supra* note 1, at 69–71 (arguing that the rhetoric of anti-impunity has precluded many inquiries because it is presented as requiring no justification); Nesiah, *supra* note 94, at 96–100 (showing that while the rhetorical force of anti-impunity was developed in response to war crimes and abuses of power and structures of political violence, it has served to obscure those very structures under a fixation with individual responsibility).

158. See *supra* Section II.C; and Minow, *supra* note 14, at 39; Engle, *supra* note 10, at 1123–24.

159. I am grateful to Lindsay Farmer for pointing out the issue about the kind of concept impunity is. I am not sure I explored all the possibilities that the idea of a “technical concept” had to offer, but I hope to have gotten part of the point.

Surrendering the concept, and “the moral high ground that comes from being a defender” of impunity,¹⁶⁰ is not convenient for a feminist agenda.¹⁶¹ Legal and political concepts change over time, and we struggle with these changes because they determine different policy implications.¹⁶² In the case of impunity, the concept has drifted toward a narrow view of accountability as prosecution and punishment. This Article proposes that we consciously move away from the punitive stance toward a more general concern with accountability and equality before the law. If we allow the concept of impunity to shift back from criminal justice to political justice, criminal law will become one among many means for addressing impunity, which is a better way to move forward.

160. Jack M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 874 (1992). I am grateful to Oren Tamir for suggesting this piece to me at the Hauser Scholars Forum at New York University.

161. Perhaps what this Article does offer is an instrumental concept of impunity. Instrumental understandings are not about what something is but, as Liam Murphy says, “about what it would be best for it to be.” For these to work, instrumental concepts must preserve “much of the meaning the word has in ordinary use, but extends or refines it for the sake of certain ends.” See MURPHY, *supra* note 154, at 74. To a certain extent, legal and political concepts are always instrumental, or they should be. This Article’s account is not, however, what Balkin calls “theoretical opportunism,” i.e., “unashamedly offering different and even inconsistent sets of standards or principles to justify one’s actions in different contexts,” because what this Article offers is conceptually and historically more consistent than the conceptual status quo. See Balkin, *supra* note 160, at 881.

162. Balkin, *supra* note 160, at 870–73.

