

## ARTICLES

### SPEAKING FEMICIDE

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*Femicide is typically defined as the killing of a woman because she is a woman. It has been the subject of mass protests in cities from Buenos Aires to Paris and in some places has made the leap to law as a crime unto itself or basis for a sentencing enhancement in homicide cases. Proponents of the label of femicide seek to bring attention to gendered violence against women and end a culture of tolerance and impunity for such violence. Meanwhile, in the United States, it is neither legislated nor discussed.*

*This Article explores the concept of femicide and asks what the United States can learn from places where the idea has more purchase, and what these places can learn from us. It assesses our closest domestic analogues—violence against women (VAW) and hate crimes—and concludes that they have not met their promises of bringing attention to gendered violence against women and have failed to connect to the broader language of human rights as a way of understanding and addressing the phenomenon.*

*The Article argues that while femicide statutes are likely not the answer in the United States, we have much to learn from countries that “speak femicide,” including the importance of putting gender front and center, the utility of harnessing human rights language and institutions to combat the problem of gendered violence, and the need for more nuanced and complete data on the gendered killing of women. Femicide statutes and prosecutions elsewhere may give us ideas for identifying and proving the gendered dimensions of violence, which has proven difficult in the context of American hate crimes. And, from*

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\* Professor, Willamette University, College of Law. Many thanks to the Feminist Legal Theory Collaborative Research Network of Law & Society for the opportunity to vet and improve the ideas and, in particular, to Yiran Zhang and Nancy Chi Cantalupo for their insightful comments. As always, I am grateful to Mary Rumsey for invaluable research assistance.

*us, countries fighting femicide with femicide laws may draw the lessons that it takes more than a statute to make change and that a strictly carceral approach to VAW comes at a cost. We need to learn from one another how to develop approaches that include people of all genders and acknowledge intersecting aspects of a person's identity that may compound violence, without dropping gender from the picture altogether.*

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## INTRODUCTION

Men sometimes kill women<sup>1</sup> *because* they are women. Sometimes, as may be the case with the recent horrific killings in Atlanta, men kill women because they are women *and* because of other aspects of their identity—race, sexual orientation, national origin, disability, the list goes on.<sup>2</sup> But also, because they are women. This gendered killing of women has a name—femicide.

Despite decades of struggle to combat violence against women (VAW), femicide remains a serious problem in the United States.<sup>3</sup> Recently, the violence includes public, showy murders—a young white man kills eight people and seven women (six of whom were Asian women) in Atlanta “to eliminate his ‘temptation’”;<sup>4</sup> an “anti-feminist” lawyer allegedly sets out to murder a Latina federal judge in New Jersey

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1. In this Article, unless otherwise specified, I use the term “women” to connote all female-identifying people and “men” to connote all male-identifying people.

2. See, e.g., Bridget Read, *Asian Women Are Facing a Terrifying Rise in Hate Incidents*, CUT (Mar. 17, 2021), <https://www.thecut.com/2021/03/asian-women-are-facing-a-terrifying-rise-in-hate-incidents.html> [<https://perma.cc/JNS2-J2UH>] (lamenting the public attacks on people of Asian descent during the pandemic intersecting with racist, xenophobic, and misogynist beliefs which manifested in the massacre of six Asian women in Atlanta); Karel Blondeel et al., *Violence Motivated by Perception of Sexual Orientation and Gender Identity: A Systemic Review*, 96 BULLETIN OF THE WORLD HEALTH ORGANIZATION [WHO] 29 (2018) (relying on United Nations reports and international studies and articles to demonstrate both sexual orientation and gender identity contribute to increased violence against female-identifying people); Mari Koistinen et al., *Five Facts to Know About Violence Against Women and Girls with Disabilities*, WORLD BANK BLOGS (Dec. 5, 2019), <https://blogs.worldbank.org/sustainablecities/five-facts-know-about-violence-against-women-and-girls-disabilities> [<https://perma.cc/7P2W-92A7>] (noting that women with disabilities may experience up to ten percent more violence than women without disabilities).

3. See, e.g., LISA N. SACCO, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 1–2 (2019) [hereinafter CRS VAWA] (recounting the timeline of American legislation to address violence against women starting with the Family Violence Prevention and Services Act in 1984 and concluding with the thrice reauthorized Violence Against Women Act first passed in 1994); Sally F. Goldfarb, “No Civilized System of Justice”: *The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 504, 507 (2000) (noting that the “federal government’s most ambitious attempt” to address violence against woman was the Violence Against Women Act passed as Congress’s attempt to correct a history of inadequate state and federal attempts to remedy gender-based violence).

4. Richard Fausset et al., *The Suspect in the Spa Attacks Has Been Charged with Eight Counts of Murder, in 8 Dead in Atlanta Spa Shootings, with Fears of Anti-Asian Bias*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth/the-suspect-in-the-spa-attacks-has-been-charged-with-eight-counts-of-murder> [<https://perma.cc/UNC5-M9UL>].

and leaves her son dead;<sup>5</sup> self-described incels<sup>6</sup> open fire on women at yoga<sup>7</sup> and fitness studios;<sup>8</sup> attacks on transgender women continue at alarming rates.<sup>9</sup> Meanwhile domestic violence, the brunt of which is borne by women, has skyrocketed during COVID-19 lockdowns as women are stuck inside with their abusers.<sup>10</sup>

Femicide is one of the leading causes of death for women.<sup>11</sup> Nevertheless, we conceptualize the killing of women differently in different regions. In a number of countries, in particular in Latin America and Europe, the term femicide is in wide use to describe the gendered killing of women.<sup>12</sup> International bodies now routinely use

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5. Nicole Hong et al., *'Anti-Feminist' Lawyer Is Suspect in Killing of Son of Federal Judge in N.J.*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/20/nyregion/es-ther-salas.html> [<https://perma.cc/TJ33-E2YE>].

6. See, e.g., Shaila Dewan, *Experts Warn of a Rise in Hate Crimes Motivated by 'Male Supremacy,' in 8 Dead in Atlanta Spa Shootings, with Fears of Anti-Asian Bias*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth/experts-warn-of-a-rise-in-hate-crimes-motivated-by-male-supremacy> [<https://perma.cc/JM45-2RT3>] (noting that many social media platforms have banned involuntary celibates (incels) for threatening violence against women).

7. Steve Hendrix, *How Male Supremacy Fueled Scott Paul Beierle's Incel Attack on Florida Yoga Studio*, WASH. POST (June 7, 2019), <https://www.washingtonpost.com/graphics/2019/local/yoga-shooting-incel-attack-fueled-by-male-supremacy/> [<https://perma.cc/V3GT-NX8S>].

8. Sean D. Hamill, *Blog Details Shooter's Frustration*, N.Y. TIMES (Aug. 5, 2009), <https://www.nytimes.com/2009/08/06/us/06shoot.html?searchResultPosition=2> [<https://perma.cc/ZK2V-JGDC>].

9. See *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> [<https://perma.cc/GK88-7ZXC>] (stressing that since the inception of recording in 2013 the highest total of violent fatalities suffered by transgender people was in 2020 with 2021 already at eighty percent of that total by September).

10. See Jeffrey Kluger, *Domestic Violence is a Pandemic Within the COVID-19 Pandemic*, TIME (Feb. 3, 2021, 11:15 AM), <https://time.com/5928539/domestic-violence-covid-19> [<https://perma.cc/N85N-TA75>] (asserting that COVID-19 exacerbates domestic violence leading to a worldwide increase in 2020).

11. ACADEMIC COUNCIL ON THE UNITED NATIONS SYSTEM (ACUNS), *FEMICIDE: A GLOBAL ISSUE THAT DEMANDS ACTION* 106 (Simona Domazetoska, Michael Platzer, & Gejsi Plaku, eds. 2014) [hereinafter ACUNS REPORT] (stating that “[f]emicide is the leading cause of death for women globally”).

12. See generally *FEMICIDE ACROSS EUROPE: THEORY, RESEARCH, AND PREVENTION* 9–10, 20–21 (Shalva Weil, Consuelo Corradi & Marceline Naudi eds., 2018) (observing that Latin American legislatures use the term femicide and some European countries recognize the Vienna Declaration of femicide and, in both cases, the term is defined as gender based violence that is committed against women because they are women); Enrique Echeburúa et al., *Assessing Risk Markers in Intimate Partner Femicide and Severe Violence: A New Assessment Instrument*, 24 J. INTERPERSONAL VIOLENCE 925, 933–34 (2009)

the term to describe the gendered killing of women.<sup>13</sup> In Latin America, femicide has made the leap to law—either as a stand-alone crime or as a means of aggravating homicides.<sup>14</sup> The Organisation for Economic Co-operation and Development (OECD) has even called on any Latin American states that have not yet done so to update their laws to include femicide provisions criminalizing the gendered killing of women as a way of “contain[ing] and address[ing]” femicide.<sup>15</sup>

Meanwhile, in the United States, the term is almost absent from caselaw and scholarship, unless it is talking about violence done to women elsewhere.<sup>16</sup> This Article seeks to understand why. What is femicide or feminicide? And why do we not speak of it in the United States other than in narrow circles of arcane feminist theory or, occasionally, in speaking of VAW in other countries?<sup>17</sup> Are we post-

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(evaluating and recommending tools to identify risk factors which can culminate in femicide); *Addressing Femicide in the Context of Rampant Violence Against Women in Latin America*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD] (Mar. 2020), <https://www.oecd.org/gender/data/addressing-femicide-in-the-context-of-rampant-violence-against-women-in-latin-america.htm> [https://perma.cc/5JJV-2K7P] (emphasizing that eighteen Latin American and Caribbean countries recognize femicide as a problem and have taken steps to strength laws and implement preventative mechanisms).

13. See, e.g., *Femicide, Understanding and Addressing Violence Against Women*, WORLD HEALTH ORGANIZATION [WHO], WHO/RHR/12.38 (2012), [https://apps.who.int/iris/bitstream/handle/10665/77421/WHO\\_RHR\\_12.38\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf?sequence=1) [https://perma.cc/55B9-UEYP]; *UN Women Statement: Confronting Femicide—The Reality of Intimate Partner Violence*, UN WOMEN (Nov. 13, 2019), <https://www.unwomen.org/en/news/stories/2019/11/statement-un-women-confronting-femicide-reality-of-intimate-partner-violence> [https://perma.cc/V69M-SCWU].

14. See *infra* Section I.B (discussing Latin American femicide laws).

15. *Addressing Femicide in the Context of Rampant Violence Against Women in Latin America*, *supra* note 12 (advising governments to adopt policy recommendations, including updating their laws to classify the “intentional killing of a woman based on her gender as feminicide, femicide or aggravated homicide due to gender”).

16. See *infra* notes 157–60 and accompanying text (explaining that the U.S. legal system does not use the term “femicide”). A rare exception where a scholar uses the term femicide in relation to American law appears in the work of Israeli scholar, Hava Dayan. Dayan’s work has explored American criminal law doctrines that operate to the detriment of women in situations of intimate partner violence. HAVA DAYAN, *FEMICIDE AND THE LAW: AMERICAN CRIMINAL DOCTRINES* (2018) [hereinafter DAYAN, *FEMICIDE AND THE LAW*]; see also Hava Dayan, *Assaultive Femicide and the American Felony-Murder Rule*, 21 BERKELEY J. CRIM. L. 1, 3 (2016) (arguing against the expansion of the principle of merger to include non-homicidal offenses such as assault).

17. A few exceptions appeared in op-eds in the wake of the Atlanta shootings. See, e.g., Hayes Brown, Opinion, *Were the Atlanta Shootings a Case of Femicide?*, MSNBC (Mar. 18, 2021, 5:26 PM), <https://www.msnbc.com/opinion/were-atlanta-shootings-case-femicide->

femicide? Does the term lack resonance because we do not have as grave a problem with the gendered killing of women—our killing is kept at socially acceptable levels? (If so, we have a pretty high tolerance for gendered killing. According to Women Count USA, some two-thousand women are killed each year by men they know.)<sup>18</sup> Or is this just a matter of legal translation—do we simply address femicide in different terms, such as through the lens of hate crimes or VAW?

This Article moves from an exploration of femicide theory to a comparative evaluation of laws. Part I explores the theoretical origin of the term femicide, its use in international human rights and public health circles, and its codification into law in a number of Latin American states. Part II then attempts to identify analogues in the United States and examines commonalities and differences. In particular, Part II explores the rubrics of VAW and hate crimes, as well as the feminist critique of the doctrines of heat of passion and extreme emotional disturbance. In theory, these rubrics occupy much of what is meant by femicide and thus obviate the need for any kind of femicide legislation. The reality may be somewhat different. Although VAW has gotten a lot of traction, the same is not true of gendered hate crimes against women. Even the very agencies charged with prosecuting hate crimes appear to have trouble conceiving of hate crimes against cisgender women based on gender.<sup>19</sup> As the Anti-Defamation League has noted, in the United States, “as virulent white supremacists make their hatred known, we immediately and rightly call them extremists. We have not been nearly as unequivocal in our condemnation when it

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n1261448 [https://perma.cc/FR9A-4PN7]; Marilyn Katz, *Make No Mistake: The Atlanta Massacre Was a Hate Crime*, CHI. SUN TIMES (Mar. 29, 2021, 5:55 PM), <https://chicago.suntimes.com/2021/3/29/22357020/atlanta-spa-massacre-misogyny-femicide-hate-crimes-marilyn-katz> [https://perma.cc/464Q-FPDB].

18. According to Women Count USA, some two-thousand women are killed each year by men they know. See Mickey Z., *What if I Told You 2,000 Women Per Year Are Murdered by Men They Know? (Interview with Dawn Wilcox)*, COUNTERCURRENTS.ORG (Apr. 9, 2017), <https://countercurrents.org/2017/04/what-if-i-told-you-2000-women-per-year-are-murdered-by-men-they-know-interview-with-dawn-wilcox> [https://perma.cc/8X5U-3NS8] (criticizing a lack of media attention of the issue, saying “no one except feminists and domestic violence activists seems to speak out or care”).

19. See *Few Federal Hate Crime Referrals Result in Prosecution*, TRAC REPORTS (Aug. 12, 2019), <https://trac.syr.edu/tracreports/crim/569> [https://perma.cc/ZR4Q-ANLG] (describing the disparity between criminal referrals to prosecutors for hate crimes and actual charges being filed).

comes to men who express violent anger toward and loathing for women.”<sup>20</sup>

Finally, Part III attempts to draw some lessons on what those who “speak” femicide and those who do not could learn from one another. For the United States, most importantly, we could learn from our southern neighbors and friends overseas that, although we need to recognize and address the intersectional nature of prejudice and violence—racism and discrimination against LGBTQ+ persons complicate and compound gendered violence—we should perhaps not be quite so quick to de-gender VAW altogether. Moreover, the Latin American experience suggests that there is value to be gained in connecting with the language and institutions of human rights and in gathering nuanced data to understand the problem. In return, the United States experience offers the lesson that crimes on the books mean nothing without the understanding of police and prosecutors (and even victims) of the gendered nature of violence and that a predominantly carceral approach to VAW is not without costs.

### I. WHAT IS FEMICIDE?

The term “femicide” first appeared in feminist literature of the 1970s and has since migrated to law.<sup>21</sup> It has widely varying purchase around the world. Whereas it is little discussed in the United States and has not made its way into any statutes, the concept has taken off in other countries, most notably in Latin America. In recent years, a number of Latin American countries have written femicide into their criminal codes, albeit in a variety of ways. This Part explains the theoretical origins of femicide and feminicide and the ways in which it has appeared in the law of several Latin American countries.

#### A. *Femicide in Theory*

“Femicide” first surfaced as a concept in feminist scholarship. Diana Russell, the social psychologist most associated with the term, first used the term in 1976 to describe the misogynistic killing of women.<sup>22</sup> In later writings, Russell embraced a slightly different definition of

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20. ANTI-DEFAMATION LEAGUE, WHEN WOMEN ARE THE ENEMY: THE INTERSECTION OF MISOGYNY AND WHITE SUPREMACY 5 (2018).

21. See generally FEMICIDE: THE POLITICS OF WOMAN KILLING xiv (Jill Radford & Diana E.H. Russell eds., 1992) (providing an example of the early use of “femicide”).

22. Diana E.H. Russell, *Preface to FEMICIDE: THE POLITICS OF WOMAN KILLING*, *supra* note 21, at xiv.

femicide as “the killing of females by males *because* they are female.”<sup>23</sup> Russell explained that the term was a way of bringing attention to the phenomenon and catalyzing activism: “[e]stablishing a word that signifies the killing of females is an important step toward making known this ultimate form of violence against women. Naming an injustice, and thereby providing a means of thinking about it, usually precedes the creation of a movement against it.”<sup>24</sup>

Other feminist scholars embraced the term. Jill Radford, with whom Russell collaborated on a book on the topic, described femicide as “the misogynous killing of women by men, . . . a form of sexual violence.”<sup>25</sup> In the same volume, Jane Caputi and Russell describe femicide as “sexist terrorism”; “[l]ike rape, most murders of women by husbands, lovers, fathers, acquaintances, and strangers are not the products of some inexplicable deviance. They are femicides, the most extreme form of sexist terrorism, motivated by hatred, contempt, pleasure, or a sense of ownership of women.”<sup>26</sup> Scholars also have used the term femicide to describe female infanticide.<sup>27</sup>

Although the idea of femicide originated in the realm of sociological and anthropological theory, discussions of femicide were never far from the law. First, the word itself seems consciously selected to invoke comparisons to genocide, often described as the “crime of crimes.”<sup>28</sup> And Russell first used the term femicide to refer to misogynist murder in testifying before the International Tribunal on Crimes against

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23. Katharine Q. Seelye, *Diana Russell, Who Studied Violence Against Women, Dies at 81*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/obituaries/diana-russell-dead.html> [https://perma.cc/4G26-3MJB].

24. Russell, *supra* note 22, at xiv.

25. Jill Radford, *Introduction to FEMICIDE: THE POLITICS OF WOMAN KILLING*, *supra* note 21, at 3.

26. Jane Caputi & Diana E.H. Russell, *Femicide: Sexist Terrorism Against Women*, in *FEMICIDE: THE POLITICS OF WOMAN KILLING*, *supra* note 21, at 13, 15.

27. Marielouise Janssen-Jurreit, *Female Genocide*, in *FEMICIDE: THE POLITICS OF WOMAN KILLING*, *supra* note 21, at 6–69 (arguing that historians and ethnologists have viewed “female infanticide only as a measure of population policy” and that it instead should be seen “an expression of male power”).

28. See, e.g., Shalva Weil, *Making Femicide Visible*, 64 CURRENT SOCIO. 1124, 1130 (2016); Prosecutor v. Krstić, Case No: IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen to Judgement, ¶ 95 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (“Genocide is the ‘crime of crimes’. The Appeals Chamber has said, correctly, that it ‘is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent.’”).



Women (ITCW), a truth commission-like setting whose name likewise seemed an intentional effort to invoke the Nuremberg trials.<sup>29</sup>

Feminist scholars also used the term as a way to critique criminal law. In particular, they decried the defense of “provocation” as a misogynist and asymmetrical doctrine that, in practice, excuses men (and only men), at least partly, for the murder of women by blaming the woman.<sup>30</sup> Further, these feminist scholars critiqued the state (or states) for failing to protect women from domestic violence and rape, in particular marital rape.<sup>31</sup>

The concept of femicide is used as a way of connecting gendered killing of women to human rights. As Patricia Laurenzo Copello has explained: “[f]emicide, thus, has a political dimension that presents gender-inspired women killing as one of the most serious attacks on human rights that threatens women’s moral integrity, liberty, and, of course, life.”<sup>32</sup>

Nevertheless, in the Anglo-American world, femicide never really took off as a *legal* concept, and its currency in even the theoretical debate has waned. As Russell acknowledged in 1992:

Unfortunately, few are familiar with the word even now; more troubling, misogyny is rarely recognized as a factor in many cases of woman killing. The reality of femicide is implicitly denied by the

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29. Russell, *supra* note 22, at xiv; *see also* CRIMES AGAINST WOMEN: PROCEEDINGS OF THE INTERNATIONAL TRIBUNAL (Diana E.H. Russell & Nicole Van de Ven eds., 1984) (“We must realize that a lot of homicide is in fact femicide.”).

30. *See* Sue Lees, *Naggers, Whores, and Libbers: Provoking Men to Kill*, in FEMICIDE: THE POLITICS OF WOMAN KILLING, *supra* note 21, at 268 (“No such license to kill is given to women who stand trial for male murder since the basis of the defense rests on the idea that a ‘reasonable man’ can be provoked into killing by insubordination on the part of a woman. In other words, the woman provokes her own death.”); *see also* Jill Radford, *Where Do We Go from Here?*, in FEMICIDE: THE POLITICS OF WOMAN KILLING, *supra* note 21, at 352 (lamenting the ways in which “[w]oman-blaming explanations” like the provocation defense have become “a credible part of mainstream discourse, even encoded in law”).

31. *See* Radford, *supra* note 30, at 352 (noting that a theme of their anthology on femicide “is the failure of the state through its law enforcement and judicial system to offer women protection from femicide”).

32. Patricia Laurenzo Copello, *Apuntes Sobre El Femicidio [Notes About Femicide]*, 8 REVISTA DE DERECHO PENAL Y CRIMINOLOGÍA 119, 122 (2012) (Spain) (footnote omitted) (orig. “El femicidio tiene, pues, una dimensión política que presenta la muerte de mujeres por razón de género como uno de los ataques más graves a los derechos humanos que atenta contra su integridad moral, su libertad y, por supuesto, su vida”) (English translation provided by the author).

common view of feminists and nonfeminists that rape and battery are the most extreme forms of violence against women.<sup>33</sup>

By contrast, the concept has gained momentum in other parts of the world. A great deal has been written about femicide in Europe,<sup>34</sup> India,<sup>35</sup> Canada,<sup>36</sup> the Middle East,<sup>37</sup> and Latin America,<sup>38</sup> among other places. The label femicide is attached to a variety of practices, including female infanticide, dowry killings, honor killings, intimate partner violence (IPV), and non-IPV.<sup>39</sup>

Latin American feminist scholars and activists have expanded on the Anglo-American conception of femicide and tweaked it to address the contexts and challenges faced in their societies.<sup>40</sup> Femicide goes by two

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33. Russell, *supra* note 22, at xiv.

34. See, e.g., FEMICIDE ACROSS EUROPE: THEORY, RESEARCH, AND PREVENTION, *supra* note 12, at 2 (providing an interdisciplinary study into femicide in several European nations based on qualitative and quantitative data and the impact of femicide prevention programs); Rosie Blunt, *Femicide: The Murders Giving Europe a Wake-up Call*, BBC NEWS (Sept. 7, 2019), <https://www.bbc.com/news/world-europe-49586759> [<https://perma.cc/DH2W-7T8R>] (describing various European countries' responses to violence against women).

35. See, e.g., Shalva Weil & Nishi Mitra vom Berg, *Femicide of Girls in Contemporary India*, 34 *EXÆQUO* 31, 35 (2016) (Port.) (“Femicide of girls in India falls into several categories. Some of these categories overlap, but they are heuristically useful in order to analyze sociologically the Indian situation: Female Foeticide[;] Female Infanticide[;] Dowry murder femicides[;] Femicides by intimate partners[;] ‘Honor’-related killings[;] Other ‘stranger’ femicides.”); RASHMI DUBE BHATNAGAR, RENU DUBE & REENA DUBE, *FEMALE INFANTICIDE IN INDIA: A FEMINIST CULTURAL HISTORY 1* (2005) (discussing historical shifts in the practice and discourse of female infanticide in India).

36. See, e.g., CANADIAN FEMICIDE OBSERVATORY FOR JUST. & ACCOUNTABILITY, #CALLITFEMICIDE: UNDERSTANDING SEX/GENDER-RELATED KILLINGS OF WOMEN AND GIRLS IN CANADA 7 (2020) (describing the steps Canada has taken to document femicide).

37. See, e.g., Lee Yaron & Bar Peleg, *Israelis Protest Femicide After Uptick in Violence Against Women During Coronavirus Lockdown*, HAARETZ (May 6, 2020), <https://www.haaretz.com/israel-news/.premium-israelis-protest-femicide-after-uptick-in-violence-against-women-during-coronavirus-1.8823809> [<https://perma.cc/F9D2-MJF7>] (“Women carried signs in Hebrew with the slogan ‘We will not be silent,’ along with death notices with the names of the five female murder victims.”); AZZA CHARARA BAYDOUN, *KAFA (ENOUGH) VIOLENCE & EXPLOITATION, CASES OF FEMICIDE BEFORE LEBANESE COURTS* (Mona Abu Ryyan ed., 2011) (explaining how cases of femicide are tried in Lebanese Courts).

38. See *infra* notes 40–52 and accompanying text.

39. See, e.g., Weil & Berg, *supra* note 35, at 35.

40. See GRACIELA ATENCIO, *FEMINICIDIO.NET, FEMINICIDIO-FEMICIDIO: UN PARADIGMA PARA EL ANÁLISIS DE LA VIOLENCIA DE GÉNERO* 3 (2011), <https://feminicidio.net/wp->

names in Spanish, *femicidio* and *feminicidio*. Some use the terms interchangeably,<sup>41</sup> but others distinguish between them, with the former meaning the killing of women because they are women and the latter the phenomenon of the gendered killing of women in a context of state impunity.<sup>42</sup> In the past decade, femicide has been the subject of significant feminist mobilization, as evidenced by a spate of massive demonstrations in Latin America and Europe.<sup>43</sup>

The label of *feminicidio* (feminicide) first surfaced in conjunction with the rash of brutal killings of women and girls in Ciudad Juárez, and the Mexican government's failure to do anything about it.<sup>44</sup> The feminist anthropologist and Mexican legislator, Marcela la Garde y de los Ríos, a leading voice in the movement to combat femicide in Latin America, coined the term "*feminicidio*" to capture not only the

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content/uploads/2020/06/paradigma-feminicidio.pdf [https://perma.cc/MU33-5EBQ] (describing the long-standing academic debate over the use of the terms "*femicidio*" and "*feminicidio*" in Latin America).

41. See, e.g., Ade Vanessa Offiong, *Explainer: What Is Femicide and How Bad Is It Globally?*, CNN, <https://www.cnn.com/2021/09/30/world/femicide-explainer-as-equals-intl-cmd/index.html> [https://perma.cc/69G4-45LD] ("Femicide, also known as feminicide, is the most extreme form of gender-based violence (GBV) and is defined as the 'intentional murder of women because they are women.'"); cf. *id.* at 3 (arguing that the terms are complementary and serve to broaden the concept of femicide-feminicide).

42. See *id.*

43. Elisabeth Jay Friedman & Constanza Tabbush, *#NiUnaMenos: Not One Woman Less, Not One More Death!*, NACLA (Nov. 1, 2016), <https://nacla.org/news/2016/11/01/niunamenos-not-one-woman-less-not-one-more-death> [https://perma.cc/3U27-YVPV] (reporting that "[o]n October 19, hundreds of thousands of women across Argentina braved a torrential downpour to participate in two extraordinary protests: an unprecedented women's strike and a massive demonstration against femicide (*femicidio*)—that is, the killing of cis-gender and transwomen because of their gender" and noting that "[r]eports found that in addition to at least 138 separate protests that took place in Argentina, there were 25 protests in Chile, seven in Bolivia, five in Mexico, two in Uruguay, two in Honduras, and others in the capital cities of Paraguay, Ecuador, Costa Rica, El Salvador, Guatemala, and beyond"); Natalie Alcoba & Charis McGowan, *#NiUnaMenos Five Years On: Latin America as Deadly as Ever for Women, Say Activists*, GUARDIAN (June 4, 2020, 5:15 PM), <https://www.theguardian.com/global-development/2020/jun/04/niunamenos-five-years-on-latin-america-as-deadly-as-ever-for-women-say-activists> [https://perma.cc/H63N-NZQX] (discussing continuing protests in Latin America by women's groups); Hillary Margolis, *In a Year of Pandemic and Pain, Women Fight Back*, HUM. RTS. WATCH (Nov. 27, 2020, 11:00 AM), <https://www.hrw.org/news/2020/11/27/year-pandemic-and-pain-women-fight-back#> [https://perma.cc/VG5U-WZEG] (explaining that European women's rights groups have protested the surge in domestic violence).

44. See ATENCIO, *supra* note 40, at 4–5.

gendered killing of women, but also the broader phenomenon of “crimes against and the disappearances of women.”<sup>45</sup> She situates feminicidio in the rhetoric of international criminal law (ICL), arguing that feminicidio should be considered a crime against humanity and genocide against women that “occurs when the historical conditions generate social practices that allow for violent attempts against the integrity, health, liberties, and lives of girls and women.”<sup>46</sup> Other commentators have suggested categories within femicide, including intimate feminicide; child feminicide; familial feminicide; feminicide of stigmatized occupations; systematic sexual feminicide; organized systematic sexual feminicide; and unorganized systematic sexual feminicide.<sup>47</sup>

As Dora Munévar has observed, the feminist response to femicide has focused on three key strategies: “naming, raising awareness, and conceptualizing.”<sup>48</sup> Feminists have emphasized the need for data collection to achieve these ends. Another leading voice against femicide, the Mexican sociologist Julia Monárrez, has emphasized the importance of data collection to understand and address femicide in Mexico.<sup>49</sup>

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45. Marcela la Garde y de los Ríos, *Preface: Feminist Keys for Understanding Feminicide to TERRORIZING WOMEN: FEMINICIDE IN THE AMÉRICAS* xv-xvi (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010); see also ATENCIO, *supra* note 40, at 3 (describing the evolution of femicide as a concept in Latin America).

46. La Garde y de los Ríos, *supra* note 45, at xv-xvi; see also ATENCIO, *supra* note 40, at 3 (discussing the prevalence of gender-based violence against women and impunity for it in Latin America).

47. Adriana Carmona López et al., *Feminicide in Latin America in the Movement for Women's Human Rights*, in *TERRORIZING WOMEN: FEMINICIDE IN THE AMÉRICAS*, *supra* note 45, at 158-59.

48. Dora Inés Munévar M., *Delito de femicidio. Muerte violenta de mujeres por razones de género [Femicide: Violent Deaths of Women as Gender-Specific Crime]*, 14 *REVISTA ESTUDIOS SOCIO-JURÍDICOS* 135, 143 (2012) (Colom.) (“De entre los entramados de esta composición estructural, emerge el potencial contestatario de un trabajo teórico-político orientado a problematizar las estructuras sociales, que suele recurrir a tres verbos muy presentes por configurar los fundamentos de acciones en clave feminista: *nominar*, *visibilizar* y *conceptualizar*.”) (trans. “Within the framework of this structural makeup, there emerges the responsive potential of a theoretical-political work directed at problematizing social structures, which tends to turn to three verbs very central to constructing the basis for feminist actions: name, bring attention to (‘visibilize’), and conceptualize.”) (English translation provided by the author).

49. ATENCIO, *supra* note 40, at 4 (citing Julia E. Monárrez Fragoso, *Las diversas representaciones del feminicidio y los asesinatos de mujeres en Ciudad Juárez, 1993-2005*, in JULIA E. MONÁRREZ FRAGOSO ET AL., *VIOLENCIA CONTRA LAS MUJERES E INSEGURIDAD CIUDADANA EN CIUDAD JUÁREZ* 363-64 (2010)).

Likewise, Ana Carcedo and Monserrat Sagot, sociologists and activists, have flagged the need for better data collection in Costa Rica.<sup>50</sup>

As with Russell and Radford's work on femicide, Latin American commentators on feminicide tend to come at the issue from the lens of radical feminism, as in, with a focus on structural inequalities.<sup>51</sup> Adriana Carmona López and her co-authors contextualize these structural inequalities by arguing that, in Mexico, for example, "[s]tructural factors mediating violence against women include unemployment, extreme poverty, disintegration of the rural economy, and social polarization imposed by the neoliberal economic model."<sup>52</sup> The conceptualization of feminicide, thus, has included a larger consideration of the underlying social and structural inequalities that lead to VAW and girls and the role of the state in perpetuating these inequalities.

### B. *Latin American Femicide Laws*

In the last fifteen years, almost all Latin American countries have taken femicide or feminicide from theory to law.<sup>53</sup> Although not every country's femicide provision uses the word "femicide" or "feminicide" in the legislative text,<sup>54</sup> currently all but one Latin American country

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50. Munévar, *supra* note 48, at 148–49 (describing the efforts of these feminist scholars to name, make visible, and conceptualize the damage done through VAW in Costa Rica and noting their criticism of the "great voids of information" and the insufficiency of data on violent death of women from official sources).

51. See Carmona López, *supra* note 47, at 159 (observing that Mercedes Olivera "has attributed the cause of the feminicides in Ciudad Juárez to a context of structural violence produced by the neoliberal system and the institutionalization of patriarchal power throughout the Mexican nation"); see also ACUNS REPORT, *supra* note 11, at 25 (quoting Marcia V. J. Kran, Director of the Research and Right to Development Division of the Office of the High Commissioner for Human Rights) ("The concept of gender-motivated killings of women is linked to the existence of a system of structural discrimination against women.").

52. Carmona López, *supra* note 47, at 159 (adding that "[a]lcoholism, narcocorruption, ungovernability, impunity, and the insecurity that make the daily lives of men and women in Mexico stressful are also components of sexist violence").

53. See *Femicide and International Women's Rights: An Epidemic of Violence in Latin America*, GLOB. AMS., <https://theglobalamericans.org/reports/femicide-international-womens-rights> [<https://perma.cc/ST5M-4XQR>] (providing a chart with a summary of the femicide legislation in each country); see also Munévar, *supra* note 48, at 156–57 (noting the incorporation of femicide as an aggravating factor in homicide or an autonomous crime within various Latin American statutes).

54. See Patsilí Toledo, *Femicídio*, 8 SISTEMA PENAL & VIOLÊNCIA 77, 84 (2016) (Braz.) (citing Law No. 26.791, Dec. 11, 2012, [32.542] B.O. 1 (Arg.)) (noting that in

and several Caribbean countries have laws criminalizing some form of femicide.<sup>55</sup> As Mercedes Pérez Manzano notes, although there are significant “differences among context and sub-types when it comes to describing femicides, there are three main types [of femicide] that are usually included in VAW legislation as prototypes of violence against women: misogyny, an attack on the sexual autonomy of the victim, and the existence of a current or prior relationship.”<sup>56</sup>

Despite differences between the types, there is a common thread to the initiatives—to bring attention to the problem or, literally, to “make the problem visible.”<sup>57</sup> As scholar Silvana Tapia Tapia describes, in Ecuador, for example, despite disagreement among feminists as to whether the enactment of a crime of “femicide” would make matters better or worse for women, most hailed the passage of the statute as a victory for women because it would “make the problem visible.”<sup>58</sup>

A number of femicide statutes draw directly from femicide theory by describing femicide as the killing of a woman because she is a woman. The Guatemalan femicide law, for example, defines the *term* femicide as “the violent death of a woman, brought about in the context of

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Argentina the legislative text addresses situations that fall within the typical definition of femicide without using the word “femicide”).

55. *Femicide and International Women’s Rights: An Epidemic of Violence in Latin America*, *supra* note 53 (providing details on provisions addressing femicide in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Paraguay, and Venezuela). The report notes that although Uruguay does not have a criminal provision for “femicide,” a 2016 law on gender-based violence “established specialized courts and a Gender Violence Observatory” and that “[t]here are specialized units in police stations throughout the country, as well as specific protocols that agents must respect.” *Id.*

56. Mercedes Pérez Manzano, *La caracterización del feminicidio de la pareja o expareja y los delitos de odio discriminatorio [Partner or Former Partner Femicide’s Characterization and Discriminatory Hate Crimes]*, 81 DERECHO PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERÚ [DERECHO PUCP] 163, 167 (2018) (footnote omitted) (orig. “Aunque son muchas las particularidades a la hora de describir los contextos o subtipos de feminicidio, hay tres casos que se incluyen de forma mayoritaria en las legislaciones como prototípicos de la violencia de género contra la mujer: la misoginia, el atentado previo a la libertad sexual de la víctima y la existencia, actual o previa, de una relación de pareja.”) (English translation provided by the author).

57. See Silvana Tapia Tapia, *Feminism and Penal Expansion: The Role of Rights-Based Criminal Law in Post-Neoliberal Ecuador*, 26 FEMINIST LEGAL STUD. 285, 296 (2018); see also Munévar, *supra* note 48, at 140–43.

58. *Id.* (alternations in original) (citation omitted) (noting that there was significant support for Ecuador’s femicide offense, notwithstanding the existing category of hate crimes, due to its “symbolic power”).

unequal power relations between men and women, in an exercise of gendered power against women.”<sup>59</sup>

However, the Guatemalan law defines the *crime* of femicide in more detail. First, the perpetrator, defined in apparently gender neutral terms as “whoever,” must “bring about the death of a woman, due to her condition as a woman.”<sup>60</sup> Second, the crime must be committed “in the context of unequal power relations between men and women” and involve the “bringing about of the death of a woman.”<sup>61</sup> Finally, the perpetrator must bring about the death of a woman in certain enumerated circumstances. These circumstances include:

- a. Having tried unsuccessfully to establish or reestablish a relationship as a couple or one of intimacy with the victim.
- b. Maintaining at the time of the commission of the acts, or having maintained with the victim familial or conjugal relations or of cohabitation or intimacy or dating, friendship, companionship or work relationship.
- c. As a result of repeated showings of violence against the victim.
- d. As a result of group rituals whether using arms or not.
- e. Degrading the corpse of a victim for the satisfaction of sexual instincts, or committing acts of genital mutilation or any other type of mutilation.
- f. Out of misogyny.
- g. When the act is committed in the presence of the victim’s children.
- h. When any of the aggravating circumstances set out in Art. 132 of the Penal Code is present.<sup>62</sup>

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59. Decree 22-2008, May 7, 2008, 27 DIARIO DE CENTRO AMÉRICA 2 (Guat.) (orig. “Muerte violenta de una mujer, ocasionada en el contexto de las relaciones desiguales de poder entre hombres y mujeres, en ejercicio del poder de género en contra de las mujeres.”) (English translation provided by the author).

60. *Id.* at 3 (orig. “Artículo 6. Femicidio. Comete el delito de femicidio quien, en el marco de las relaciones desiguales de poder entre hombres y mujeres, diere muerte a una mujer, por su condición de mujer, valiéndose de cualquiera de las siguientes circunstancias: . . .”) (English translation provided by the author).

61. *Id.* (English translation provided by the author).

62. *Id.* (orig. “a. Haber pretendido infructuosamente establecer o restablecer una relación de pareja o de intimidad con la víctima. b. Mantener en la época en que se perpetre el hecho, o haber mantenido con la víctima relaciones familiares, conyugales, de convivencia, de intimidad o noviazgo, amistad, compañerismo o relación laboral. c. Como resultado de la reiterada manifestación de violencia en contra de la víctima. d. Como resultado de ritos grupales usando o no armas de cualquier tipo. e. En menosprecio del cuerpo de la víctima para satisfacción de instintos sexuales, o cometiendo actos de mutilación genital o cualquier otro tipo de mutilación. f. Por misoginia. g. Cuando el hecho se cometa en presencia de las hijas o hijos de la víctima. h. Concurriendo cualquiera de las circunstancias de calificación contempladas en el artículo 132 del Código Penal.”) (English translation provided by the author).

Thus, the crime of femicide is more restricted than it might appear at first blush.

The same is true in Peru. The femicide provision introduces in broad terms a perpetrator of femicide as “he who kills a woman for her condition as such.”<sup>63</sup> However, the provision restricts the crime to killings committed in certain contexts: familial relations, coercion, harassment, sexual harassment, abuse of power, or discrimination.<sup>64</sup> Some femicide statutes are narrower still. For example, the Costa Rican femicide law restricts the crime to killings that occurred in a marriage.<sup>65</sup>

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63. Law No. 30.068, Jul. 18, 2013, EL PERUANO 499530 (Peru) (orig. “Artículo 108°-A. [del Código Penal]- Femicidio: Será reprimido con pena privativa de libertad no menor de quince años el que mata a una mujer por su condición de tal, en cualquiera de los siguientes contextos: . . .”) (English translation provided by the author). See generally Ysabel Navarro Navarro & Teresa Viviano, *Femicidio*, OBSERVATORIO NACIONAL DE LA VIOLENCIA CONTRA LAS MUJERES Y LOS INTEGRANTES DEL GRUPO FAMILIAR (Jan. 26, 2018), [https://observatorioviolencia.pe/mv\\_femicidio](https://observatorioviolencia.pe/mv_femicidio) [<https://perma.cc/KK5K-J7C7>] (describing the circumstances under which the killing of a woman is considered femicide).

64. Law No. 30.068 (Peru) (orig. “[E]n cualquiera de los siguientes contextos: 1. Violencia familiar; 2. Coacción, hostigamiento o acoso sexual; 3. Abuso de poder, confianza o de cualquier otra posición o relación que le confiera autoridad al agente; 4. Cualquier forma de discriminación contra la mujer, independientemente de que exista o haya existido una relación conyugal o de convivencia con el agente. La pena privativa de libertad será no menor de veinticinco años, cuando concurra cualquiera de las siguientes circunstancias agravantes: 1. Si la víctima era menor de edad; 2. Si la víctima se encontraba en estado de gestación; 3. Si la víctima se encontraba bajo cuidado o responsabilidad del agente; 4. Si la víctima fue sometida previamente a violación sexual o actos de mutilación; 5. Si al momento de cometerse el delito, la víctima padeciera cualquier tipo de discapacidad; 6. Si la víctima fue sometida para fines de trata de personas; 7. Cuando hubiera concurrido cualquiera de las circunstancias agravantes establecidas en el artículo 108. La pena será de cadena perpetua cuando concurran dos o más circunstancias agravantes.”) (trans. “In any of the following contexts: 1. Domestic violence; Coercion, harassment or sexual harassment; 3. Abuse of power, trust or any other position or relationship that confers authority on the agent; 4. Any form of discrimination against women, independently of whether there exists or has existed a conjugal relationship or cohabiting relationship with the agent; 4. If the victim was previously subjected to rape or acts of mutilation; 5. If at the moment the crime was committed, the victim suffered from any type of disability; 6. If the victim was subjected for the purpose of human trafficking; 7. When there has occurred any of the aggravating circumstances established in article 108 [the provision on aggravated homicide]. The penalty will be life imprisonment when there are two or more aggravating circumstances occurring.”) (English translation provided by the author).

65. Law No. 8589, May 30, 2007, 103 LA GACETA 2, 2 (Costa Rica) (stating that the marriage need not have been made formal).



Femicide statutes have changed over time within states. Some countries have moved from the broad to the more specific. In 2008 Colombia introduced legislation adding a form of aggravated homicide (and thus increasing the punishment) where the “kill[ing] was of a woman for the fact of being a woman.”<sup>66</sup> The Supreme Court later added some content to the definition, calling femicide: “causing the death of a woman for the fact of being a woman, when the violent act producing the death is determined by the subordination and discrimination against the victim, from which a situation of extreme vulnerability resulted.”<sup>67</sup> In 2015, the legislature introduced a new stand-alone offense of femicide, but limited the offense to certain defined circumstances, including familial or intimate relationships, using the body or life of the woman as a sexual instrumentality, abuse of power, committing the crime to terrorize or humiliate an enemy, prior violence or threats of violence in the domestic sphere, or when the victim has been isolated prior to her death.<sup>68</sup>

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66. Toledo, *supra* note 54, at 84 (orig. “[E]l homicidio de una mujer ‘por el hecho de ser mujer’ . . . .”) (English translation provided by the author).

67. *Id.* (citing Law No. 26.791, Dec. 11, 2012, [32.543] B.O. 1 (Arg.)) (orig. “[S]e causa la muerte a una mujer por el hecho de ser mujer, cuando el acto violento que la produce está determinado por la subordinación y discriminación de que es víctima, de lo cual resulta una situación de extrema vulnerabilidad.”) (English translation provided by the author).

68. L. 1761, julio 6, 2015, 49565 DIARIO OFICIAL [D.O.] 19 (Colom.) (“*Feminicidio*. Quien causare la muerte a una mujer, por su condición de ser mujer o por motivos de su identidad de género o en donde haya concurrido o antecedido cualquiera de las siguientes circunstancias, incurrirá en prisión de doscientos cincuenta (250) meses a quinientos (500) meses. a) Tener o haber tenido una relación familiar, íntima o, de convivencia con la víctima, de amistad, de compañerismo o de trabajo y ser perpetrador de un ciclo de violencia física, sexual, psicológica o patrimonial que antecedió el crimen contra ella. b) Ejercer sobre el cuerpo y la vida de la mujer actos de instrumentalización de género o sexual o acciones de opresión y dominio sobre sus decisiones vitales y su sexualidad. c) Cometer el delito en aprovechamiento de las relaciones de poder ejercidas sobre la mujer, expresado en la jerarquización personal, económica, sexual, militar, política o sociocultural. d) Cometer el delito para generar terror o humillación a quien se considere enemigo. e) Que existan antecedentes o indicios de cualquier tipo de violencia o amenaza en el ámbito doméstico, familiar, laboral o escolar por parte del sujeto activo en contra de la víctima o de violencia de género cometida por el autor contra la víctima, independientemente de que el hecho haya sido denunciado o no. f) Que la víctima haya sido incomunicada o privada de su libertad de locomoción, cualquiera que sea el tiempo previo a la muerte de aquella.”) (trans. “Femicide. Whoever causes the death of a woman, due to her condition of being a woman or for reasons of her gender identity or where any of the following circumstances has occurred or preceded, will incur a prison sentence from two

Likewise, Nicaragua moved from a broad definition to a narrower one, after a conservative backlash.<sup>69</sup> A 2012 femicide law, which “was noteworthy for its emphasis on ‘the unequal power relations between men and women,’” encountered an immediate legal and social backlash as an attack on family values.<sup>70</sup> By July 2014, it was narrowed by presidential decree to a (deadly) crime “committed by a man in the framework of interpersonal relations.”<sup>71</sup>

Chile went the opposite direction and moved from a narrow definition to a broader one. Until 2020, Chile was another example of a country that restricted femicide to intimate partner homicide.<sup>72</sup>

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hundred and fifty (250) months to five hundred (500) months. a) Having or having had a domestic relationship, intimate or cohabiting relationship with the victim, friendship, companionship or work relationship and being the perpetrator of a cycle of physical, sexual, psychological or patrimonial relationship that preceded the crime against her. b) Exercising on the body and the life of the woman acts of gender or sexual instrumentalization or actions of oppression and domination over her vital decisions and her sexuality. c) Committing the crime in taking advantage of the power relations exercised over women, expressed in the personal, economic, sexual, military, political or sociocultural hierarchy. d) Committing the crime to generate terror or humiliation to whoever considers himself an enemy. e) That there is a history or evidence of any type of violence or threat in the domestic, family, work or school environment by the active subject against the victim or of gender violence committed by the perpetrator against the victim, regardless of whether the fact has been denounced or not. f) That the victim has been held incommunicado or deprived of his freedom of movement, whatever the time prior to the death of the victim.”) (English translation provided by the author).

69. See Paulina García-Del Moral & Pamela Neumann, *The Making and Unmaking of Femicidio/Femicidio Laws in Mexico and Nicaragua*, 53 LAW & SOC'Y REV. 452, 470 (2019) (discussing reforms during 2013 and 2014 which undermined Nicaragua's Law 779).

70. *Id.* at 472 (contrasting the reception of Nicaragua's Law 779 to Mexico's law).

71. *Id.* at 473.

72. CÓD. PEN. Art. 390 (emphasis added) (“El que, conociendo las relaciones que los ligan, mate a su padre, madre o hijo, a cualquier otro de sus ascendientes o descendientes o a quien es o ha sido su cónyuge o su conviviente, será castigado, como parricida, con la pena de presidio mayor en su grado máximo a presidio perpetuo calificado.”) (trans. “He who, knowing the relationships that binds them, kills his father, mother or child, any other ascendants or descendants, or *who is or has been his spouse or partner*, will be punished, as parricide, with a penalty of fifteen to twenty years imprisonment to life imprisonment.”) (English translation provided by the author); CÓD. PEN. Ley N° 20.480 (“Si la víctima del delito descrito en el inciso precedente es o ha sido la cónyuge o la conviviente de su autor, el delito tendrá el nombre de femicidio.”) (trans. “If the victim of the crime described in the preceding subsection is or has been a spouse or partner of the perpetrator, the crime shall have the name of femicide.”) (English translation provided by the author).

Chile's first femicide law, passed in 2010, defined femicide as the killing of an intimate partner.<sup>73</sup> In the face of significant criticism for the narrowness of its definition,<sup>74</sup> in 2020, the government introduced legislation known as the Ley Gabriela,<sup>75</sup> which defined along with the existing category of intimate femicide a broader category of gender-based femicide.<sup>76</sup> Both types of femicide carry a sentence of fifteen

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73. See CÓD. PEN. Ley N° 20.480; see also Ainhoa Montserrat Vázquez Mejías, *Femicidio en Chile, más que un problema de clasificación [Femicide in Chile, More than a Classification Problem]*, 17 URVIO, REVISTA LATINOAMERICANA DE ESTUDIOS DE SEGURIDAD 36, 38 (2015) (Ecuador) (criticizing the definition of femicide as the killing of an intimate partner as too narrow); Emanuele Corn, *La revolución tímida. El tipo de femicidio introducido en Chile por la Ley N°20.480 desde una perspectiva comparada*, 21 REVISTA DE DERECHO UNIVERSIDAD CATÓLICA DEL NORTE 103, 107 (2014) (analyzing the definition of femicide and its relation to "parricidio," the killing of a relative).

74. See, e.g., Vázquez Mejías, *supra* note 73, at 39 (arguing that the law, by covering only intimate partner femicide, seems designed not to protect women but instead the heteronormative institution of "family"). The Dominican Republic has a similarly narrow definition of femicide, and Costa Rica's definition is even more limited and includes within femicide only killings committed by current intimate partners. Patsilí Toledo, *Criminalising Femicide in Latin American Countries—Legal Power Working for Women?*, in CONTESTING FEMICIDE: FEMINISM AND THE POWER OF LAW REVISITED 43–44 (Adrian Howe & Daniela Alaattinoğlu eds., 2019) (noting that these femicide statutes faced criticism from "feminist activists for their reductionist view of gender-based violence and killings of women").

75. Law No. 21.212, Marzo 2, 2020, DIARIO OFICIAL [D.O.] (Chile). See generally *Ley Gabriela, un paso relevante para enfrentar la violencia contra la mujer [The Gabriela Law: A Relevant Step to Confront Violence Against Women]*, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS (May 8, 2020), <https://www.minjusticia.gob.cl/ley-gabriela-un-paso-relevante-para-enfrentar-la-violencia-contra-la-mujer> [<https://perma.cc/JN9N-PZ73>].

76. Law No. 21.212 (Chile) ("Artículo 390 bis. - El hombre que matare a una mujer que es o ha sido su cónyuge o conviviente, o con quien tiene o ha tenido un hijo en común, será sancionado con la pena de presidio mayor en su grado máximo a presidio perpetuo calificado. La misma pena se impondrá al hombre que matare a una mujer en razón de tener o haber tenido con ella una relación de pareja de carácter sentimental o sexual sin convivencia.") (trans. "The man who kills a woman who is or has been a spouse or partner, or who has or has had a child in common, will be imprisoned in its maximum grade to life imprisonment. The same punishment will be imposed on a man who kills a woman because of having or having had a relationship with her of sentimental or sexual nature without living together.") (English translation provided by the author); see also *Ley Gabriela, un paso relevante para enfrentar la violencia contra la mujer*, *supra* note 75; *Chile promulga la ley que considera femicidio todo crimen por motivo de género*, EFE (Mar. 2, 2020), <https://www.efe.com/efe/america/sociedad/chile-promulga-la-ley-que-considera-femicidio-todo-crimen-por-motivo-de-genero/20000013-4186435> [<https://perma.cc/GU6U-DZSE>] ("La nueva legislación introduce dos conceptos en el Código Penal: el 'femicidio por causa de género', para casos que se dan fuera de una relación afectiva y a manos de desconocidos solo por el

years (presidio mayor en su grado máximo)<sup>77</sup> to life imprisonment (perpetuo).<sup>78</sup>

The new Chilean law specifies a list of circumstances in which the killing of a woman will be deemed to be motivated by gender. These include when the killing:

- 1) stems from refusing the perpetrator a sentimental or sexual relationship;
- 2) stems from the victim having engaged in prostitution or other occupation of a sexual nature;
- 3) the offense was committed after having used sexual violence against the victim . . . ;
- 4) was motivated by sexual orientation, gender identity, or gender expression of the victim; [or]
- 5) was committed in any type of situation in which there are circumstances of obvious subordination due to unequal power relations between the victim and perpetrator, or was motivated by an evident intent to discriminate.<sup>79</sup>

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hecho de ser mujer, y el ‘femicidio íntimo’, para parejas que no convivían y mantenían relaciones intermitentes. Las penas irán de los 15 años a los 40 y se contemplan agravantes especiales, como por ejemplo que la víctima sea menor de edad, se encuentre embarazada o el crimen se cometa delante de sus hijos.”) (trans. “The new legislation introduces two concepts into the penal code: ‘femicide caused by gender’, for cases that happen outside of intimate relationships and perpetrated by an unknown for the fact that the victim is a woman, and ‘intimate femicide’, for couples who did not live together and maintain intermittent relations. The sentence will be from 15 years to 40 years and aggravating factors will be considered, for example that the victim is a minor, is pregnant or that the crime was committed before their children.”) (English translation provided by the author).

77. “Presidio mayor en su grado máximo” is a sentence from fifteen years and a day to twenty years. A. González, *Presidio Mayor*, ENCICLOPEDIA JURÍDICA ONLINE (Chile), <https://chile.leyderecho.org/presidio-mayor> [<https://perma.cc/8XM8-AVFM>].

78. CÓD. PEN. Art. 390 ter. (“El hombre que matare a una mujer en razón de su género será sancionado con la pena de presidio mayor en su grado máximo a presidio perpetuo.”) (trans. “The man who kills a woman by reason of her gender will face a sentence ranging from fifteen years to life imprisonment.”) (English translation provided by the author).

79. *Id.* (orig. “Se considerará que existe razón de género cuando la muerte se produzca en alguna de las siguientes circunstancias: 1. - Ser consecuencia de la negativa a establecer con el autor una relación de carácter sentimental o sexual. 2. - Ser consecuencia de que la víctima ejerza o haya ejercido la prostitución, u otra ocupación u oficio de carácter sexual. 3. - Haberse cometido el delito tras haber ejercido contra la víctima cualquier forma de violencia sexual, sin perjuicio de lo dispuesto en el artículo 372 bis. 4. - Haberse realizado con motivo de la orientación sexual, identidad de género o expresión de género de la víctima. 5. - Haberse cometido en cualquier tipo de situación en la que se den circunstancias de manifiesta subordinación por las relaciones desiguales de poder entre el agresor y la víctima, o

The statute likewise recognizes the following aggravating circumstances for the crime of femicide:

- 1) the victim was pregnant; 2) the victim was a girl or adolescent younger than eighteen years old, an elderly woman or a woman with a disability . . . ; 3) the crime was done in the presence of the victim's parents or children; 4) the crime was done in the context of the perpetrator's habitual physical or psychological violence against the victim.<sup>80</sup>

Finally, the statute provides that the judge may not consider provocation as a mitigating circumstance in a femicide case.<sup>81</sup>

Argentina does not have a stand-alone offense of femicide, but it has a variety of ways of turning homicide into aggravated homicide that would constitute femicide by many definitions.<sup>82</sup> These aggravators include broad and narrow conceptions of femicide.<sup>83</sup> First, the statute includes killing as a hate crime, including on the basis of gender identity or expression or sexual orientation.<sup>84</sup> It also considers

motivada por una evidente intención de discriminación.”) (English translation provided by the author).

80. CÓD. PEN. Art. 390 quáter. (orig. “Son circunstancias agravantes de responsabilidad penal para el delito de femicidio, las siguientes: 1. Encontrarse la víctima embarazada. 2. Ser la víctima una niña o una adolescente menor de dieciocho años de edad, una mujer adulta mayor o una mujer en situación de discapacidad . . . . 3. Ejecutarlo en presencia de ascendientes o descendientes de la víctima. 4. Ejecutarlo en el contexto de violencia física o psicológica habitual del hechor contra la víctima.”) (English translation provided by the author).

81. CÓD. PEN. Art. 390 quinquies. (“Tratándose del delito de femicidio, el juez no podrá aplicar la circunstancia atenuante de responsabilidad penal prevista en el N° 5 del artículo 11.”) (trans. “In the case of the crime of femicide, the judge may not apply attenuating circumstances of criminal responsibility provided for in N° 5 of Article 11.”) (English translation provided by the author). Section 5 of Article 11 normally considers heat of passion or provocation to be an attenuating circumstance. CÓD. PEN. Art. 11 (“Son circunstancias atenuantes: . . . 5.º La de obrar por estímulos tan poderosos que naturalmente hayan producido arrebató y obcecación.”).

82. Law No. 26.791, Dec. 11, 2012, [32.543] B.O. 1 (Arg.) (“Artículo 80 [del Código Penal]: Se impondrá reclusión perpetua o prisión perpetua, pudiendo aplicarse lo dispuesto en el artículo 52, al que matare: . . .”) (trans. “Article 80 [of the Penal Code]: Life imprisonment or confinement will be imposed on anyone . . . who kills: [in the following circumstances . . .]”) (English translation provided by the author).

83. See Law No. 26.791 (Arg.).

84. Law No. 26.791 (Arg.) (“Artículo 80(4º) [del Código Penal]: Por placer, codicia, odio racial, religioso, de género o a la orientación sexual, identidad de género o su expresión.”) (trans. “Article 80 (4) [of the Penal Code]: For pleasure, lust or hate based on race, region, gender, sexual orientation, gender identity or expression.”) (English translation provided by the author).

homicide committed in the context of familial relationships (broadened in 2014 to include nonmarital relationships) to be aggravated homicide.<sup>85</sup> This provision is gender neutral.<sup>86</sup>

Finally, there are two remaining aggravating circumstances that the Prosecution Unit Specializing in Violence Against Women (“VAW Unit”) of the Public Prosecutor’s office categorizes using the term “femicide.” The form of aggravated homicide that the unit labels “femicide” is the killing “of a woman when the act is done by a man and involves gender violence.”<sup>87</sup> The VAW Unit explains that:

This type is characterized by its differentiated formulation in function of the gender of the active subject and of the passive object: it deals with its own crime that can only be committed by a man against a woman. Moreover, it includes gender violence as a defining element of the crime, to encompass all the homicides of women perpetrated by men that reflect the inequality of the structural power between both groups.<sup>88</sup>

So, this form of femicide—the only one the VAW Unit calls “femicide”<sup>89</sup>—can only be committed by a man against a woman.<sup>90</sup> This

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85. Law No. 26.791 (Arg.) (“Artículo 80 (1°) [del Código Penal]: A su ascendiente, descendiente, cónyuge, ex cónyuge, o a la persona con quien mantiene o ha mantenido una relación de pareja, mediar o no convivencia.”) (trans. “Article 80 (1) [of the Penal Code]: Their ascendant, descendant, spouse, espouse, or person with whom they maintain or have maintained a relationship with, living together or not.”) (English translation provided by the author).

86. UNIDAD FISCAL ESPECIALIZADA EN VIOLENCIA CONTRA LAS MUJERES (UFEM), HOMICIDIOS AGRAVADOS POR RAZONES DE GÉNERO: FEMICIDIOS Y CRÍMENES DE ODIOS-ANÁLISIS DE LA APLICACIÓN DE LA LEY 26.791 (2016) [hereinafter ANALISIS DE LA APLICACIÓN DE LA LEY 26.791].

87. Law No. 26.791 (Arg.) (orig. “Artículo 80 (11°) [del Código Penal]: A una mujer cuando el hecho sea perpetrado por un hombre y mediar violencia de género.”) (English translation provided by the author); *see also* ANALISIS DE LA APLICACIÓN DE LA LEY 26.791, *supra* note 86, at 8.

88. ANALISIS DE LA APLICACIÓN DE LA LEY 26.791, *supra* note 86, at 8 (orig. “Este tipo se caracteriza por su formulación diferenciada en función del género del sujeto activo y del sujeto pasivo: se trata de un delito propio que sólo puede cometer un varón contra una mujer. Además, incluye la violencia de género como elemento definitorio del delito, para comprender todos los homicidios de mujeres perpetrados por varones que reflejan la desigualdad de poder estructural existente entre ambos grupos.”) (English translation provided by the author).

89. *See id.*

90. Law No. 26.791 (Arg.) (orig. “Artículo 80 (11°) [del Código Penal]: A una mujer cuando el hecho sea perpetrado por un hombre y mediar violencia de género.”) (English translation provided by the author); *see also* Toledo, *supra* note 54, at 85.

ground for aggravated homicide has caused the most confusion over the meaning of “gender violence.”<sup>91</sup> The separation of gender violence and violence based on gendered hate in the statute suggests that they are somehow distinct, but it is not clear how. Patsilí Toledo notes that case law and scholarship has clarified little and has failed to contribute to a more nuanced understanding of femicide.<sup>92</sup>

Finally, the statute makes killing “*with the purpose of causing suffering in a person with whom one maintains or has maintained*” a familial relationship<sup>93</sup> aggravated homicide.<sup>94</sup> The VAW Unit calls this form of homicide “associated femicide.” They explain “its inclusion attempts to approach a death perpetrated by a femicide to punish or psychologically destroy a woman over whom one asserts domination.”<sup>95</sup> They note, though, that this ground is also gender neutral as to the perpetrator.<sup>96</sup>

Mexico, like the United States, is a federal system and therefore has a variety of femicide laws, including a federal law and various state laws.<sup>97</sup> In addition to criminalizing the killing of women “for gender reasons,” the federal law addresses the impunity aspect of “feminicidio” by criminalizing state negligence in the administration of justice and providing a penalty of three to eight years imprisonment, fines, and a potential ban from holding public office.<sup>98</sup>

In her article on femicide, Toledo argues that, countries with narrower provisions restricted to femicides in the IPV context have

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91. See Toledo, *supra* note 54, at 86 (noting that the term tends to be interpreted to mean “violence against women” but, per the Belém do Pará Convention, ought to be a broader term meaning violence against those who do not conform to gender roles).

92. *Id.* at 89 (arguing that the conduct described in each of these provisions constitutes femicide and that “artificial distinctions” threaten to “impede recognizing femicide in all its magnitude and the violence upon which it is based”) (English translation provided by the author).

93. The requisite “relationship” is defined by reference in Section 1.

94. Law No. 26.791 (Arg.) (orig. “Artículo 80 (12°) [del Código Penal]: Con el propósito de causar sufrimiento a una persona con la que se mantiene o ha mantenido una relación en los términos del inciso 1°.”) (English translation provided by the author).

95. ANALISIS DE LA APLICACIÓN DE LA LEY 26.791, *supra* note 86, at 9 (orig. “Su inclusión pretendió abarcar la muerte perpetrada por un femicida para castigar o destruir psíquicamente a una mujer sobre la cual ejerce la dominación.”) (English translation provided by the author).

96. See *supra* note 86, at 9.

97. See García-Del Moral & Neumann, *supra* note 69, at 461.

98. *Id.* at 465–66.

generally seen more use of their femicide provisions.<sup>99</sup> Moreover, in countries with broader provisions, courts have tended to apply them most in IPV contexts.<sup>100</sup> This tendency seems to reflect a degree of judicial or prosecutorial discomfort with the broader, femicide theory-driven definitions of the crime.

Along with laws criminalizing femicide, several countries have introduced other measures designed to help to understand the problem and craft better responses. In many instances, these measures are part of broader legal reforms addressing VAW generally, not only fatal violence.<sup>101</sup> In Chile, for example, a government agency keeps a record of femicides.<sup>102</sup> Peru, likewise, has created a femicide registry that records deaths in the context of “intimate femicide, non-intimate femicide and femicide not based on relationships.”<sup>103</sup> In 2015, the Supreme Court of Argentina created a national femicide registry tasked with collecting data on killings of women, including trans women.<sup>104</sup>

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99. See Toledo, *supra* note 54, at 83.

100. See *id.* at 84.

101. In Guatemala, for example, the law criminalizing femicide addresses other forms of VAW and includes a variety of crimes, including psychological and economic violence. It also provides for reparations and sets out obligations of the state to provide access to information, training of state functionaries, and to provide legal assistance to victims. Ley contra el Femicidio y otras Formas de Violencia Contra la Mujer, Decree 22-2008, May 7, 2008, 27 DIARIO DE CENTRO AMÉRICA 2 (Guat.); see also Sydney Bay, Comment, *Criminalization Is Not the Only Way: Guatemala’s Law Against Femicide and Other Forms of Violence Against Women and the Rates of Femicide in Guatemala*, 30 WASH. INT’L. L. REV. 369, 381 (2021) (describing Decree 22-2008’s VAW protections).

102. Cf. Vásquez Mejías, *supra* note 73, at 40 (noting that one of the problems with Chile’s narrow femicide definition at the time was that only “intimate femicides” were counted).

103. *Femicide and International Women’s Rights: An Epidemic of Violence in Latin America*, *supra* note 53 (noting that the Peruvian registry is “seen as a best-practice model for improved research processes and evidence for better decision-making as femicide now is part of the country’s criminal code”).

104. In 2021, Argentina created a Council on Femicide made up of members of different government ministries with a mission of ensuring prevention, investigation, punishment, assistance and reparation for femicides. Decree 123/2021, Feb. 21, 2021, [34.591] B.O. 6, 10 (Arg.) (“El Consejo se crea con el fin de establecer un ámbito de trabajo interinstitucional que garantice un abordaje integral, eficaz . . . en materia de prevención, investigación, sanción, asistencia y reparación de los femicidios, travesticidios y transfemicidios y de otras violencias extremas.”) (trans. “The Council is created with the goal to establish an inter-institutional workspace that guarantees a comprehensive and effective approach . . . in matters of prevention, investigation, punishment, assistance and reparation of femicides, killings of transvestites, and



Some countries have attempted to improve the criminal justice response to the killing of women through specialized personnel, courts, and procedures. Peru has created specialized units to investigate and prosecute feminicides.<sup>105</sup> Guatemala has created specialized courts to address femicide and VAW.<sup>106</sup> Meanwhile, Ecuador has specialized procedures for VAW baked into its 2008 constitution.<sup>107</sup>

The trajectories of law reform have differed significantly from country to country,<sup>108</sup> but these national initiatives are a product not only of local feminist activism,<sup>109</sup> but also significant transnational and regional efforts to combat VAW.<sup>110</sup> Regional human rights institutions have highlighted the problem of femicide and shamed states for failing to

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killings of transgender persons and other acts of extreme violence.”) (English translation provided by the author). Although the Council addresses killings of women and transgender people alike, it is worth noting that the announcement suggests that killings of transgender women may not fall within the category of femicide.

105. See Isabel Kennon & Grace Valdevitt, *Women Protest for Their Lives: Fighting Femicide in Latin America*, ATLANTIC COUNCIL (Feb. 24, 2020), <https://www.atlanticcouncil.org/content-series/diversity-equity-inclusion/women-protest-for-their-lives-fighting-femicide-in-latin-america> [<https://perma.cc/S65A-XVSL>] (citing DECRETO SUPREMO No. 008-2016-MIMP, July 26, 2016, Normas Legales (Peru)).

106. See U.N. WOMEN, GUATEMALA CASE STUDY: ADVANCES IN AND CHALLENGES FOR SPECIALIZED JUSTICE, REGIONAL ASSESSMENT OF ACCESS TO JUSTICE AS A PREVENTIVE MECHANISM TO END VIOLENCE AGAINST WOMEN 2011–2015 5 (2016) (describing the 2008 Guatemalan decree that criminalized femicide as leading to a “major paradigm shift compared to the predecessor law” and the creation of judicial organs specialized in the field of femicide).

107. Tapia Tapia, *supra* note 57, at 291 (“[Ecuador’s] 2008 Constitution prescribes a specialised process for VAW (Art. 81), meant to prosecute family violence, sexual offences, and other crimes against ‘groups of priority attention.’”).

108. See *e.g.*, García-Del Moral & Neumann, *supra* note 69, at 454 (comparing the process for getting femicide laws enacted in Mexico versus Nicaragua and the differing forms of resistance to the laws).

109. Munévar, *supra* note 48, at 151 (stating that Latin American activists have “adopted” the concept and succeeded in getting it incorporated into laws).

110. See Tapia Tapia, *supra* note 57, at 290–91 (“International agencies like the United Nations (UN) and the Organisation of American States (OAS) have successfully disseminated rights-based approaches to VAW in Latin America since the 1970s, which effectively docked in mainstream feminist practices. In fact, these approaches facilitated a ‘boom’ of domestic violence laws in Latin America throughout the 1990s . . .”). Tapia Tapia specifically discusses Ecuador’s 2008 Constitution which, despite its incorporation of indigenous justice principles in some areas, preserved this rights-based framework and emphasis on a criminal law response in the area of VAW. *Id.*

prevent VAW and to investigate and punish offenders.<sup>111</sup> In the landmark *Cotton Field*<sup>112</sup> case, the Inter American Court of Human Rights faulted the Mexican government for failing to prevent, investigate, and prosecute people responsible for femicides. Mexico thereby “violated the obligation not to discriminate,” as well as the victim’s right to life, personal integrity, and liberty, among other rights.<sup>113</sup> This case, which counted on key Mexican feminist activists as expert witnesses, represented one of the “political opportunities” that galvanized law reform in Mexico and throughout Latin America.<sup>114</sup>

The last few decades have seen a flurry of transnational agreements, conferences, reports, and frameworks on the issue of VAW.<sup>115</sup> In 1994, a number of Organization of American States (OAS) states adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Belém do Pará Convention”).<sup>116</sup> Almost all Latin American states, unlike the United States, participate in the Convention on the Elimination of All Forms

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111. See generally U.N. WOMEN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN 4 (2012), [https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/handbook-for-legislation-on-violence-against-women/UNW\\_Legislation-Handbook-pdf.pdf](https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/handbook-for-legislation-on-violence-against-women/UNW_Legislation-Handbook-pdf.pdf) [https://perma.cc/8TCQ-NU2H] (noting that states can be held responsible for private acts and may be required to provide compensation).

112. *González v. Mexico (Cotton Field)*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

113. *Id.* ¶ 402–04.

114. See García-Del Moral & Neumann, *supra* note 69, at 468 (citations omitted) (“Subsequent [femicide] proposals emerged in a context of new political opportunities, particularly: (1) the judgment of the IACtHR in the case of *González and Others ‘Cotton Field’ v. Mexico* of November 2009; (2) three European Parliament pronouncements condemning Mexico for its ongoing resistance to address *feminicidio*; (3) the 2005 CEDAW Committee inquiry and the 2006 CEDAW Country Report, which explicitly urged the Mexican government to criminalize *feminicidio*; and (4) the MESECVI admonishment of state parties to criminalize *feminicidio*. The ‘*Cotton Field*’ judgment is emblematic of the transnationalization of local feminist activism against *feminicidio* and its importance cannot be underestimated.”).

115. See, e.g., CAMILO BERNAL SARMIENTO ET AL., U.N. WOMEN, LATIN AMERICAN MODEL PROTOCOL FOR THE INVESTIGATION OF GENDER-RELATED KILLINGS OF WOMEN (FEMICIDE/FEMINICIDE) (Françoise Roth & Alejandro Valencia Villa eds., 2014), [https://eurogender.eige.europa.eu/system/files/events-files/latin\\_american\\_protocol\\_for\\_investigation\\_of\\_femicide.pdf](https://eurogender.eige.europa.eu/system/files/events-files/latin_american_protocol_for_investigation_of_femicide.pdf) [https://perma.cc/7HQD-42T9]; ACUNS REPORT, *supra* note 11.

116. Organization of American States, 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].

of Discrimination Against Women (CEDAW).<sup>117</sup> Both of these instruments approach VAW through the lens of structural feminism.<sup>118</sup>

United Nations (U.N.) organs likewise have been involved in trying to support reforms geared at fighting VAW in Latin American countries. The Office of the High Commissioner for Human Rights (OHCHR) has worked in specific countries to help develop femicide laws.<sup>119</sup> In 2012, U.N. Women created a Handbook for Legislation on Violence Against Women.<sup>120</sup> In 2014, U.N. Women and the OHCHR jointly established the “Latin American Model Protocol for the investigation of gender-related killings of women.”<sup>121</sup> The goal of the Model Protocol was to:

Provide general guidance and lines of actions to improve the practice of public servants working in the justice system, forensic experts, and other specialized personnel during the investigation and prosecution of gender-related killings of women in order to hold the responsible parties accountable and provide reparations for the victims.

Promote the incorporation of a gender perspective in the action of the institutions in charge of investigating and punishing killings of women, as well as providing reparations for the victims, including the police, prosecutors’ offices, forensic institutions, and other judicial entities.

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117. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, arts. 1, 2, (Dec. 18, 1979) [hereinafter CEDAW Convention].

118. See Lorena P. A. Sosa, *Inter-American Case Law on Femicide: Obscuring Intersections?*, 35 NETH. Q. HUM. RTS. 85, 91 (2017) (internal citations omitted) (noting that “[t]he OAS instrument addressing women specifically, the Belém do Pará Convention, positions VAW as a violation of human rights and confirms the patriarchal root of VAW, similarly to General Recommendation (GR) 19 of the CEDAW Committee and the Declaration on the Elimination of Violence against Women (DEVAW)”); see also Friedman & Tabbush, *supra* note 43 (“[Feminist] activism pressured the Inter-American Commission on Women to take up the issue of gender violence, eventually transforming it into the Organization of American States’ vanguard [Belém do Pará Convention] in 1994. Its mission statement takes an overtly feminist perspective, locating violence against women within ‘the historically unequal power relations between women and men,’ and insists that states work to prevent violence wherever it takes place.”).

119. ACUNS REPORT, *supra* note 11, at 24 (noting that OHCHR has been involved in helping to develop femicide laws in El Salvador, Bolivia, and Mexico, has supported the elaboration of the Protocol for the Investigation of Femicide in El Salvador, and is monitoring decisions from the Guatemalan femicide tribunals).

120. See U.N. WOMEN, HANDBOOK, *supra* note 111.

121. See *Femicide and International Women’s Rights: An Epidemic of Violence in Latin America*, *supra* note 53.

Offer practical tools to guarantee the rights of victims, survivors, and their families. These tools take into consideration the witnesses, experts, organizations, complainants, and other persons that may intervene in the proceedings.<sup>122</sup>

U.N. Women and the Follow-up Mechanism to the Belém do Pará Convention subsequently did a report examining Latin American femicide laws and proposing a model femicide law.<sup>123</sup>

International human rights agreements on women's rights tend to come at the issue from a structural feminist viewpoint. The Istanbul Convention, for example, provides:

“[V]iolence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>124</sup>

The Belém do Pará do Para Convention explicitly links VAW to unequal power relations between women and men.<sup>125</sup>

Initiatives directed at femicide appear to share this structural feminist lens. The Introduction to U.N. Women's model femicide law, for example, situates femicide in patriarchy and systemic oppression of women.<sup>126</sup> It defines patriarchy as:

[T]he system of power relationships existing within society, that permeates and determines how women and men interact, favors men and devalues and degrades women in practically all cultures, and is reflected in how the political, economic, social, and religious institutions are dominated by men.<sup>127</sup>

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122. BERNAL SARMIENTO ET AL., *supra* note 115, at 4 (emphasis and internal citations omitted).

123. See ALICIA DEUS & DIANA GONZALEZ, U.N. WOMEN, ANALYSIS OF FEMICIDE/FEMINICIDE LEGISLATION IN LATIN AMERICA AND THE CARIBBEAN AND A PROPOSAL FOR A MODEL LAW (2018).

124. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, art. 3(a), April 12, 2011, C.E.T.S. No. 210.

125. Belém do Pará Convention, *supra* note 116, pmbl. (“Concerned that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men.”).

126. DEUS & GONZALEZ, *supra* note 123, at 12 (describing the normalization of femicide in “practically all cultures” and attributing it to patriarchal societies that favor men and devalue and degrade women).

127. *Id.*

The gendered killing of women “has been normalized and made invisible over many millennia.”<sup>128</sup> And, according to the U.N. Women’s model law, patriarchy is to blame:

In recent years, the advance of feminist movements has forced the recognition of these crimes as part of the structure of the dominant system, including the systematic discrimination, oppression, and violence against women, whose violent deaths are the most extreme consequence.<sup>129</sup>

Thus, like the feminist scholars fleshing out the idea of femicide and feminicide, the international organizations supporting and promoting femicide legislation in Latin America do so through the lens of structural feminism.

Many femicide laws likewise echoed this structural feminist framing of femicide. The introduction to the Guatemalan femicide law attributed the problem of femicide to “unequal power relations between men and women”:

[T]he problem of violence and discrimination against women, girls, and teenagers that has dominated [Guatemala] has been worsened with killing and impunity, based on the existing unequal power relations between men and women, in the social, economic, legal, political, cultural and familial spheres, which has necessitated a law of prevention and criminalization.<sup>130</sup>

Thus, the Guatemalan law frames femicide as both a symptom and a cause of unequal power relations.

Femicide laws also have been touted as a tool for protecting human rights, including the right to life and personal integrity and ensuring that the states comply with obligations to investigate and punish offenders. The introduction to Guatemala’s femicide law emphasizes the “right of Guatemalan women to the recognition, enjoyment, exercise and protection of all human rights and the liberties consecrated in the Political Constitution of the Republic and

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128. *Id.*

129. *Id.*

130. Ley contra el Femicidio y otras Formas de Violencia Contra la Mujer, Decree 22-2008, May 7, 2008, 27 DIARIO DE CENTRO AMÉRICA 2 (Guat.) (orig. “[E]l problema de violencia y discriminación en contra de las mujeres, niñas y adolescentes que ha imperado en el país se ha agravado con el asesinato y la impunidad, debido a las relaciones desiguales de poder existentes entre hombres y mujeres, en el campo social, económico, jurídico, político, cultural y familiar, por lo que se hace necesario una ley de prevención y penalización.”) (English translation provided by the author).

international human rights instruments.”<sup>131</sup> Likewise, in Ecuador, “the legal foundation of the criminalisation of VAW was to protect the right to a life free of violence, which is constitutive of the human right to personal integrity.”<sup>132</sup> Mexico’s femicide law likewise labels femicide as “a product of the violation of [women’s] human rights.”<sup>133</sup>

Although *gendered* killing is the primary focus of femicide,<sup>134</sup> there is increasingly a recognition that gender is not the only relevant aspect of identity. The Inter-American Commission has highlighted the need for an intersectional perspective on femicide—a recognition that race, socioeconomic status, age, status as a migrant, gender identity and other aspects of identity intersect with gender and may make certain women more vulnerable to violence.<sup>135</sup>

Although most femicide scholars seem to agree that structural inequalities between men and women in Latin America (and

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131. *Id.* (orig. “[L]as mujeres guatemaltecas tienen derecho al reconocimiento, goce, ejercicio y protección de todos los derechos humanos y las libertades consagradas en la Constitución Política de la República e instrumentos internacionales en materia de derechos humanos . . .”) (English translation provided by the author).

132. Tapia Tapia, *supra* note 57, at 296 (noting that “criminalisation was thus presented by government-aligned lawmakers as evidence of the regime’s commitment to protect women”).

133. Lorenzo Copello, *supra* note 32, at 122 n.13 (noting that Mexico’s law defined femicide as a violation of women’s human rights and a product of misogynistic behaviors and state impunity) (orig. “[P]roducto de la violación de sus derechos humanos . . .”) (English translation provided by the author).

134. Munévar, *supra* note 48, at 151 (“[L]a incorporación de aportes ofrecidos por las teorías feministas no solo ha sido indispensable para develar que en las bases de este tipo de violencia de género se halla la desigualdad social vivida por las mujeres respecto de los hombres, sino que continúa siendo un imperativo ético para tomar conciencia política de que la muerte violenta de una mujer, el femicidio, se produce por el hecho de ser mujer y por tener cuerpo de mujer, y es un acto ejecutado por hombres”) (trans. “[T]he incorporation of the insights offered by feminist theories has not only been indispensable to reveal that among the reasons for this type of gender violence is the social inequality lived by women with respect to men, but also that it continues to be an ethical imperative to take political consciousness that the violent death of a woman, femicide, results from the fact of being a woman or having the body of a woman, and is an act executed by men.”) (English translation provided by the author).

135. *See* Sosa, *supra* note 118, at 92 (reviewing Inter-American caselaw on femicide and concluding that the Court has focused predominantly on gender and given varying degrees of attention to intersecting aspects of identity but noting that the Inter-American commission has emphasized the need for an intersectional perspective); *see also* Jackeline Aparecida Ferreira Romio, *Femicidio na Cidade* [Femicide in the City], 2 REVISTA LATINO-AMERICANO DE GEOGRAFIA E GÊNERO 15 (2011) (Braz.) (flagging that Black women make up a disproportionate percentage of femicide victims in Brazil).

throughout the world) are central to femicide,<sup>136</sup> it is important to note that femicide occurs in widely varying contexts in different Latin American countries. In most countries IPV is responsible for most femicides, but the types and proportions of femicides outside of the IPV context vary widely throughout the region.<sup>137</sup> In Guatemala, for example, some have argued that femicides and rampant VAW are a legacy of the country's civil war.<sup>138</sup> By contrast, in Mexico, reporting indicates that organized crime is responsible for the majority of femicides.<sup>139</sup>

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136. A blog post of the Mexican Government's Comisión Nacional para Prevenir y Erradicar la Violencia Contra las Mujeres (CONAVIM) [National Commission to Prevent and Eradicate Violence against Women] defines "machismo" in terms of gender polarization, discrimination, and degradation, saying: "El machismo se compone de ciertas conductas, comportamientos y creencias que promueven, reproducen y refuerzan diversas formas discriminatorias contra las mujeres. Se construye a través de la polarización de los roles y estereotipos que definen lo masculino de lo femenino. Su principal característica es la degradación de lo femenino; su mayor forma de expresión, la violencia en cualquiera de sus tipos y modalidades en contra de las mujeres." *¿Sabes qué es el #Machismo?*, COMISIÓN NACIONAL PARA PREVENIR Y ERRADICAR LA VIOLENCIA CONTRA LAS MUJERES BLOG (Apr. 4, 2016), <https://www.gob.mx/conavim/articulos/sabes-que-es-el-machismo?idiom=es> (emphasis omitted) (trans. "Machismo is made up of certain conduct, behaviors and beliefs that promote, reproduce, and reinforce various forms of discrimination against women. It is built through the polarization of the roles and stereotypes that define the masculine from the feminine. Its main characteristic is the degradation of the feminine; its greatest form of expression, violence in any of its types and forms against women.") (English translation provided by the author).

137. Toledo, *supra* note 74, at 43.

138. GUATEMALA HUM. RTS. COMM'N, GUATEMALA'S FEMICIDE LAW: PROGRESS AGAINST IMPUNITY? 4 (2009), [https://www.ghrc-usa.org/Publications/Femicide\\_Law\\_Progress\\_AgainstImpunity.pdf](https://www.ghrc-usa.org/Publications/Femicide_Law_Progress_AgainstImpunity.pdf) [<https://perma.cc/V9GQ-9233>] ("Congresswoman Alba Maldonado said it is impossible not to relate the violence during the internal conflict with the current wave of brutal murders of women, given that thousands of men were trained to commit acts of gendered violence and subsequently reintegrated into society. Evidence supports this, as the rise of violence against women in the last decade, including rape, dismemberment, and techniques of torture and mutilation, is reminiscent of tactics used during the war. The wartime practice of stigmatizing and blaming the victim emerges in today's investigative process, whereby many victims are dismissed as prostitutes, gang members, or criminals, unworthy of investigation.").

139. *Feminicidios en México: el 63% de los asesinatos de mujeres fueron cometidos por el crimen organizado* [Femicides in Mexico: 63% of Murders of Women Were Committed by Organized Crime], INFOBAE (July 8, 2020), <https://www.infobae.com/america/mexico/2020/07/09/feminicidios-en-mexico-el-63-de-los-asesinatos-de-mujeres-fueron-cometidos-por-el-crimen-organizado> [<https://perma.cc/MR5S-6PAV>] (analyzing press reports of murders of women in Mexico).

For all the enthusiasm for femicide laws in the international community and even domestically, the laws have their critics. The criticisms range from the legal to the practical to the philosophical or political. The legal pushback includes concerns over the constitutionality and legality of laws (and the difficulty of mapping a sociological theory onto law), as well as questions on the sorts of evidence that can be used to show a gender motivation.<sup>140</sup> The practical concerns relate to resources—where is the money coming from and, if it is not coming, what is the use of a law without the resources to enforce it?<sup>141</sup> Philosophical or political concerns include anti-colonial and anti-neo-liberal arguments that the laws reify and contribute to the carceral state.<sup>142</sup>

Even at the outset, among feminists, there was disagreement over the wisdom of creating femicide laws. Tapia Tapia has noted that in Ecuador, for example, there was a division between government-aligned feminists (oficialistas) and NGO-based feminists (opositoras) on femicide.<sup>143</sup> The former supported femicide legislation, whereas the latter feared that the legislation, in fact, would interfere with women's access to justice.<sup>144</sup>

Among criminal law practitioners and academics, there are concerns about fairness and legality. Some find the asymmetrical penalties unfair: “[s]ome lawyers find it absurd that a jealous husband who kills his wife will get decades more jail time than one who kills her male lover.”<sup>145</sup> This issue also can be stated in constitutional or human rights terms as a violation of equal protection.<sup>146</sup> Others voice concerns that

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140. See *infra* notes 143–50.

141. See *infra* notes 143–58.

142. See *infra* notes 143–58.

143. Tapia Tapia, *supra* note 57, at 287.

144. *Id.* (“Elements of this penal expansion can be linked to feminist-sponsored legal reform . . . . The new Ecuadorian Penal Code criminalised ‘violence against women and members of the nuclear family’, which had previously constituted a misdemeanour, and ‘femicide’, a form of murder aggravated by the victim’s gender within unequal power relationships. The Parliamentary Group for Women’s Rights, many of whose members were aligned with the government, promoted the reforms. However, spokeswomen from local and transnational non-governmental organisations (NGOs) questioned the reforms, arguing that treating domestic violence as a more serious offence would negatively impact on women’s access to justice.”) (internal citations omitted).

145. *Crime in Latin America: Special Victims*, ECONOMIST, Mar. 7, 2020, at 41.

146. See Toledo, *supra* note 54, at 83 (commenting on resistance to femicide and feminicide laws because their sanctions are more severe than gender neutral crimes like homicide or parricide and stating that practitioners believe the laws violate the formal equality of traditional criminal laws).



the provisions, at least in their broadest forms, violate legality norms due to their imprecision.<sup>147</sup>

Other critics argue that the offenses, particularly when framed broadly, raise difficult issues of proof.<sup>148</sup> It is far from obvious the sorts of proof that will suffice to show that a person killed a woman “for being a woman” or “based on her condition as such”<sup>149</sup> Misgivings about issues of proof appear to have led prosecutors to avoid relying on femicide provisions in favor of other crimes.<sup>150</sup>

Resource arguments also figure prominently. Critics note that, notwithstanding femicide laws, resources and training often remain inadequate.<sup>151</sup> In Mexico, the attorney-general, Alejandro Gertz Manero, has suggested the law be repealed because it creates too much work for investigators.<sup>152</sup> In Guatemala, even supporters of the law have noted the distance between its promise and the reality on the ground.<sup>153</sup> Specialized family courts are only available in eleven of twenty-two departments, and the only twenty-four-hour court and hotline is in Guatemala City.<sup>154</sup> Thus, many outside of the capital do not benefit from these resources.<sup>155</sup>

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147. *Id.* at 83–84 (stating that it is difficult to prove the elements of femicide and femicide because they are imprecise, and therefore, practitioners prefer to pursue traditional charges like homicide).

148. *See* Section I.B (discussing examples of Latin American femicide provisions and the differing ways in which countries define the crime).

149. *See supra* note 66 and accompanying text (quoting a Columbian statute that defines femicide as the kill[ing] . . . of a woman for the fact of being a woman”) (English translation provided by the author); *see also* Law No. 30.068, Jul. 18, 2013, EL PERUANO 499530 (Peru) (defining femicide broadly as a man “kill[ing] a woman for her condition as such”) (English translation provided by the author).

150. *See Crime in Latin America: Special Victims, supra* note 145 (“A survey of prosecutors in Peru found that many deemed it too hard to prove that a murderer had been motivated by misogyny. Some misclassified femicides as ordinary homicides because they thought that would make it easier to win convictions.”); *see also* Toledo, *supra* note 74, at 45 (“Laws criminalising femicide often use words or expression that are very difficult for legal practitioners, prosecutors and the judiciary to interpret and apply.”).

151. *Crime in Latin America: Special Victims, supra* note 145 (“Investigators of femicide cases have no more training and resources than do others . . . and so are no more successful at winning convictions.”).

152. *See id.* (explaining that many prosecutors are critics of femicide statutes because “it [is] too hard to prove that a murderer [was] motivated by misogyny”).

153. Bay, *supra* note 101, at 386–87.

154. *See id.*

155. *See id.*

Even those who believe that fighting VAW is worth the commitment of resources voice the concern that femicide laws are a way of papering over problems. Tapia Tapia has argued that states can point to the passage of a statute as a way of showing that they are protecting women's human rights without actually making any meaningful progress.<sup>156</sup>

In sum, statutes making femicide a crime or a way of making homicide into aggravated homicide are widespread in Latin America. The passage of femicide laws seems to have drawn attention to the widespread problem of the gendered killing of women and impunity for the same. Legal definitions of the crime of femicide vary from state to state (and even within states) with respect to specificity and required circumstances. Although statutes are gender-specific as to the victim, they vary on whether the perpetrator must be a man. States often have accompanied the laws with specialized police units, courts, or government bodies tasked with collecting data. It is still early to draw any firm conclusions on their efficacy, but a lack of resources combined with a lack of buy in from at least some relevant players appears to have limited their impact to date.

## II. UNITED STATES ANALOGUES?

In the United States, the term femicide is not widely known. The only mentions of femicide in case law address the problem of femicide in other countries, typically in the context of asylum claims<sup>157</sup> or in a

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156. Tapia Tapia, *supra* note 57, at 296 (arguing that in Ecuador “penal expansion was shown as evidence of compliance with international human rights instruments”); *see also* Bay, *supra* note 101, at 371, 395–96 (arguing that prevention and community support need to play a bigger role in Guatemala’s response to femicide).

157. *See, e.g.*, Tovar v. Lynch, 674 F. App’x 691, 693 (9th Cir. 2017) (“Even taken together with other evidence of violence against women in Guatemala, the femicide statistics don’t push Rivera over the threshold required for asylum eligibility. Rivera ‘simply recounts generalized conditions in [Guatemala] that fail to demonstrate that her predicament is appreciably different from the dangers faced by her fellow citizens,’ and this isn’t sufficient to establish materially changed circumstances.”) (citing Najmabadi v. Holder, 597 F.3d 983, 990 (9th Cir. 2010)); Inestroza-Antonelli v. Barr, 954 F.3d 813, 820–21 & n.1 (5th Cir. 2020) (Jones, J., dissenting) (arguing that the majority was wrong in concluding that gender based violence had gotten worse in Honduras and quibbling with the figures drawn from U.N. reports, arguing that they including all killings of women and not only gender based killings); Hernandez-Garcia v. Barr, 930 F.3d 915, 920–21 (7th Cir. 2019) (internal citation omitted) (“We realize that Guatemala is unfortunately beset with violent crime, including a shocking level of violence against women, but those general conditions do not alone suffice to satisfy Hernandez-Garcia’s burden.”).

citation to a single study on guns and risk assessment.<sup>158</sup> American legal scholars likewise pay it little to no attention. As with caselaw, American legal scholarship largely ignores femicide. With very few exceptions,<sup>159</sup> scholarship on femicide addresses the phenomenon in other countries.<sup>160</sup>

This Part looks at the United States. First, it looks at the scale of the American problem. It then explores the two rubrics in American law that seem most analogous to Latin American femicide laws—VAW and hate crimes. Given the United States’ federal system,<sup>161</sup> approaches to VAW are inherently somewhat diffuse,<sup>162</sup> but the federal Violence Against Women Act<sup>163</sup> (VAWA) statute nevertheless has shaped American approaches to VAW across the nation. One of the main thrusts of VAWA has been to make VAW more than just a private

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158. See, e.g., *United States v. Skoien*, 614 F.3d 638, 643–44 (7th Cir. 2010) (en banc) (stating the proposition “[t]hat firearms cause injury or death in domestic situations . . .”); *McDonald v. City of Chicago*, 561 U.S. 742, 924, 942 (2010) (Breyer, J., dissenting) (citing Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003)) (listing as a resource on gun violence with the parenthetical “noting that an abusive partner’s access to a firearm increases the risk of homicide eightfold for women in physically abusive relationship”).

159. See *infra* note 165 (discussing recent scholarship by the Israeli academic Hava Dayan using the term femicide in an exploration of the American criminal law doctrines of provocation, felony murder, and self-defense); see also Adriana Núñez Ortiz, *Un problema sin fronteras: una vista comparativa del trato de feminicidio en Puerto Rico y otros países hispanos [A Problem Without Borders: A Comparative View of Femicide’s Treatment in Puerto Rico and Other Hispanic Countries]*, 89 REV. JUR. U.PR 299, 311–10, 319–20 (2020) (discussing recent legislation in Puerto Rico and comparing it to femicide statutes throughout Latin American and in Spain).

160. See, e.g., Mensah Adinkrah, *Intimate Partner Femicide—Suicides in Ghana: Victims, Offenders, and Incident Characteristics*, 20 VIOLENCE AGAINST WOMEN 1078, 1078–79 (2014) (discussing the causes and context of intimate partner femicide-suicides in Ghana and appearing to define a femicide as the homicide of a female: “intimate partner homicide–suicides with female homicide victims—hereafter referred to as intimate partner femicide”).

161. See, e.g., *United States v. Morrison*, 529 U.S. 598, 607, 617–19, 627 (2000) (striking down the civil remedy provision of VAWA based on a lack of connection to interstate commerce).

162. April Paredes et al., *Domestic Violence*, 19 GEO. J. GENDER & L. 265, 267 (2018) (“At the state level, laws relating to domestic violence are found in both the criminal and civil realms. There is no uniform codification of criminal domestic law (or civil domestic law) and thus, states vary significantly in their statutory organization of criminal domestic violence law.”).

163. 34 U.S.C. § 12291.

concern and to ensure prosecution of domestic violence (DV) cases.<sup>164</sup> DV cases that result in death enter the picture as the most extreme and serious manifestation of VAW.<sup>165</sup> Despite its title, *Violence Against Women*, in recent years, VAW initiatives often deemphasized gender.

Another rubric of American law that seems analogous to aspects of Latin American femicide laws is hate crimes. President Joseph R. Biden, Jr. has said that he will “call on the Justice Department to increasingly focus on prosecuting hate crimes.”<sup>166</sup> It is unclear, however, whether a drive for more vigorous hate crimes prosecutions will include hate crimes directed at women. To date, prosecutions for hate crimes against cisgender women based on gender appear exceedingly rare.<sup>167</sup> Perhaps tellingly, although the U.S. Department of Justice’s (DOJ) website offers a long list of actual and hypothetical hate crimes along a variety of vectors, it describes not a single case, real or hypothetical, involving a hate crime against a cisgender woman based on “gender”<sup>168</sup> bias.<sup>169</sup> Even the agency charged with prosecuting

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164. CRS VAWA, *supra* note 3, at 2–3, 6.

165. Dayan contends that the “prevailing view” DV and assaultive killings of women in the intimate femicide context are different beasts. Citing the work of Aaron Ben Ze’ev and Ruhama Goussinsky, she argues that while DV aims to control victims, assaultive killings aim to annihilate them. DAYAN, FEMICIDE AND THE LAW, *supra* note 16, at 74 (citing AARON BEN ZE’EV & RUHAMA GOUSSINSKY, IN THE NAME OF LOVE: ROMANTIC IDEOLOGY AND ITS VICTIMS 23, 90 (2008)) (“[R]ecent research about violence against women suggests that perpetrators have different intentions in battering or murdering women: while the purpose of battery is to sustain control over the intimate partner, the purpose of killing is not to control her, but to eliminate even her existence.”). Dayan does not offer any other evidence for this distinction between DV and the killing being the prevailing view. This view complicates her argument against merger in the felony murder context. *See id.* It seems to suggest that in assaultive intimate femicides, intent or purpose is met and thus reliance on felony murder is unnecessary. Implicit here may be a judgment that although intent is present, it can be hard to prove and thus we should make it easier for prosecutors by removing the evidentiary difficulty.

166. Elena Moore, *Trump’s and Biden’s Plans for Criminal Justice*, NPR (Oct. 16, 2020), <https://www.npr.org/2020/10/16/921662530/trumps-and-biden-s-plans-for-criminal-justice> [<https://perma.cc/B74D-LJDH>].

167. *See infra* notes 234–38.

168. The federal hate crimes statute treats “gender” as distinct from “gender identity” (defined as “actual or perceived gender characteristics”) and “sexual orientation.” *See infra* note 222.

169. *Learn About Hate Crimes*, U.S. DEP’T OF JUST., <https://www.justice.gov/hate-crimes/learn-about-hate-crimes> [<https://perma.cc/BG7E-83DQ>].

these crimes seems to have overlooked the possibility that a straight, cisgender woman could be the target of a gendered hate crime.<sup>170</sup>

A. *Is There a Problem?*

To be sure, the scale of the VAW in Latin America differs from that of the United States. As Global Americans has reported, “[t]he level of violence affecting women in El Salvador and Honduras exceeds the combined rate of male and female homicides in some of the 40 countries with the highest murder rates in the world.”<sup>171</sup> According to the OECD, “as a culmination of VAW, femicide has become an endemic problem: the LAC [Latin America and Caribbean] region holds the highest rates of femicide around the world. In 2018, 3,529 women were killed across the entire region because of their gender.”<sup>172</sup>

Some suggest that the scale of the violence is what makes these laws necessary: “[t]he severity of the phenomenon *has forced* 18 Latin American countries to modify their laws to sanction femicide.”<sup>173</sup> It is not clear what is meant by “has forced,” but it may imply a determination that stronger penalties and more targeted labels are needed to deter these crimes, to express condemnation of these crimes, and to educate the public.

Moreover, as proponents of the label “femicide” (rather than femicide) have emphasized, in many countries with femicide statutes, it is not only the scale of the violence that seems to justify femicide statutes, but also the problem of impunity. Press and human rights reporting are replete with examples of the killing of women, and of inaction on the part of the state with respect to investigation and

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170. To be clear, I do not mean to suggest that trans women should not be included. On the contrary, gender-identity or gender-based violence against trans women squarely falls within the protection of hate crimes legislation and is appropriately highlighted. My suggestion is merely that it seems odd that there is no mention of even the possibility of a hate crime against cisgender women based on gender on DOJ’s website.

171. *Femicide and International Women’s Rights—An Epidemic of Violence in Latin America*, *supra* note 53 (“[A]mong 25 countries with the highest rates of femicide in the world, 14 are from Latin America and the Caribbean.”); *see also* SMALL ARMS SURVEY, A GENDERED ANALYSIS OF VIOLENT DEATHS (2016).

172. *Addressing Femicide in the Context of Rampant Violence Against Women in Latin America*, *supra* note 12, at n.3.

173. GENDER EQUALITY OBSERVATORY, FEMICIDE, THE MOST EXTREME EXPRESSION OF VIOLENCE AGAINST WOMEN (2018) (emphasis added), [https://oig.cepal.org/sites/default/files/nota\\_27\\_eng.pdf](https://oig.cepal.org/sites/default/files/nota_27_eng.pdf) [<https://perma.cc/6TGH-C3VM>].

prosecution.<sup>174</sup> Femicide laws, like other laws, do not enforce themselves, so whether the laws address impunity still will depend on whether cases are investigated and prosecuted.

So, the question is—does the United States have a problem with gendered killing of women or impunity for gendered killing of women? Tackling impunity first, in the United States, although data is hard to come by, there likely is not the same problem of almost complete failure to investigate killings of women as seen in some other countries. Nor, however, do we solve every crime. According to the U.S. Federal Bureau of Investigation (FBI), the clearance rate for murder and non-negligent manslaughter in 2015 was 61.5%.<sup>175</sup> Unfortunately, this statistic is not differentiated by gender so any gender patterns in investigation or prosecution of homicides of women are not apparent.

At a minimum, in the United States, we appear to have pockets of impunity. Increasingly there is recognition of the insufficiency of investigations, prosecutions, and data collection when it comes to killings of indigenous women and women of color.<sup>176</sup> The 2013 VAWA reform allowing prosecution of non-Native Americans in Native American courts was designed to close one window for impunity.<sup>177</sup>

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174. See, e.g., Elizabeth Salazar Vega & Marco Garro, *Los deudos del feminicidio: sin justicia no hay duelo*, [Femicide's Bereaved: Without Justice There Is No Mourning], OJO PÚBLICO, (July 12, 2020), <https://ojo-publico.com/1951/los-deudos-del-feminicidio-sin-justicia-no-hay-duelo> [https://perma.cc/R6HW-2ZPE].

175. *Percent of Offenses Cleared by Arrest or Exceptional Means*, FBI: 2015 CRIME IN THE UNITED STATES (2005), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-25> [https://perma.cc/J6SH-42NE].

176. See Carolyn Smith-Morris, *Addressing the Epidemic of Missing & Murdered Indigenous Women and Girls*, CULTURAL SURVIVAL (Mar. 6, 2020), <https://www.culturalsurvival.org/news/addressing-epidemic-missing-murdered-indigenous-women-and-girls> [https://perma.cc/UKT3-QCXB] (“[I]n 2018, the Seattle-based Urban Indian Health Institute (UIHI) completed its landmark survey, . . . reporting 5,712 missing Alaska Native and American Indian women and girls, only 116 of whom were registered in the Department of Justice database. Using data from 71 urban cities, the UIHI report exposed the tremendous scale of this problem: thousands of Indigenous women who’d gone unrecognized, ignored, and unprotected . . . [I]t became clear that not only was there an invisible epidemic, but that active neglect, discrimination, and apathy had kept it hidden.”); see also URB. INDIAN HEALTH INST., A NATIONWIDE DATA CRISIS: MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS, 2 (2018), <http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf> [https://perma.cc/4H8Y-EDDP].

177. NAT’L CONGRESS OF AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 9 (2018), [https://www.niwrc.org/sites/default/files/images/resource/SDVCJ%205%20Year%20Report\\_Final.pdf](https://www.niwrc.org/sites/default/files/images/resource/SDVCJ%205%20Year%20Report_Final.pdf) [https://perma.cc/B9X7-WE7S].

Moreover, although not differentiated by gender, recent scholarship demonstrates that clearance rates for homicides involving victims of color are lower than for homicides involving white victims.<sup>178</sup> In sum, though the United States may not have broad impunity for killings of all women, it appears to have pockets of impunity, particularly for indigenous women and women of color.

What seems pretty clear is that the silence on the issue of femicide does not stem from a lack of homicides of women at the hands of men. In the United States, more men are killed per year than women, but when a woman is killed, nine out of ten times, the perpetrator is a man.<sup>179</sup> The Violence Policy Center reports that, “[i]n 2017, there were 1,948 females murdered by males in single victim/single offender incidents that were submitted to the FBI for its Supplementary Homicide Report.”<sup>180</sup> Women in the United States tend to be killed by men they know, and often in the context of intimate relationships.<sup>181</sup> Firearms are used in over half of the murders of women involving weapons.<sup>182</sup>

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178. See Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 23 BERKELEY J. CRIM. L. 262, 266 (2018) (finding that “homicides with White victims are significantly more likely to be ‘cleared’ by the arrest of a suspect than are homicides with minority victims”). See generally *Race & Justice News: Homicide Clearance Disparities Contribute to Capital Punishment Disparities*, SENT’G PROJECT (Aug. 7, 2018), <https://www.sentencingproject.org/news/race-justice-news-homicide-clearance-disparities-contribute-capital-punishment-disparities> [https://perma.cc/2UV2-R3HQ] (explaining that homicides involving Black victims are twenty-three percent less likely to be cleared than homicides involving white victims and those with Latinx victims are seventeen percent less likely).

179. James Alan Fox & Emma E. Fridel, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2015*, 4 VIOLENCE & GENDER 38–39 (2017).

180. VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2017 HOMICIDE DATA 3 (2019), <https://vpc.org/studies/wmmw2019.pdf> [https://perma.cc/MFS3-XRUR].

181. *Id.* (internal citations omitted) (reporting key findings that “[f]or homicides in which the victim to offender relationship could be identified, 92 percent of female victims (1,611 out of 1,759) were murdered by a male they knew. Nearly 11 times as many females were murdered by a male they knew (1,611 victims) than were killed by male strangers (148 victims). For victims who knew their offenders, 62 percent (997) of female homicide victims were wives or intimate acquaintances of their killers. There were 289 women shot and killed by either their husband or intimate acquaintance during the course of an argument.”).

182. *Id.* (“[F]or homicides in which the weapon could be determined (1,716), more female homicides were committed with firearms (57 percent) than with any other weapon. Knives and other cutting instruments accounted for 20 percent of all female

It is also evident that legal actors have steered clear of exploring gendered motivations for killings of women. VAW is almost never prosecuted as a hate crime. Likewise, the VAWA framework seems to have made important inroads in reducing VAW, but its emphasis is not on shining a light on gender dynamics.

### B. Violence Against Women

In the United States, the fight against VAW has been around for decades. Until the 1970s, one major form of VAW, intimate partner violence (IPV) was largely a private concern.<sup>183</sup> Activists of the 1960s focused on empowering women as a way of fighting IPV, but by the 1970s, they were pushing for legal reforms.<sup>184</sup> Specifically, activists pushed for recognition by police, prosecutors, and the public that VAW and IPV, specifically, were crimes worthy of investigation and prosecution.<sup>185</sup>

On the federal level, these efforts culminated in the federal Violence Against Women Act of 1994.<sup>186</sup> Naturally, this Act, like the movement, focused on a variety of forms of violence, not merely on gendered killing. The VAWA is lauded as a major achievement that has helped

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murders, bodily force nine percent, and murder by blunt object six percent. Of the homicides committed with firearms, 69 percent were committed with handguns.”).

183. Zoë Carpenter, *A Reckoning Inside the Domestic-Violence Movement*, NATION (Oct. 7, 2020), <https://www.thenation.com/article/society/domestic-violence-police>.

184. Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 155–57 (2015).

185. CRS VAWA, *supra* note 3, at 1 (citing Kimberley D. Bailey, *Lost in Translation: Domestic Violence, “the Personal is Political,” and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY, 1255, 1255–1300 (2010)) (“In the 1970s, grassroots organizations began to stress the need for attitudinal change among both the public and the law enforcement community regarding violence against women.”); *see also* Murray Straus & Richard Gelles, *Societal Change and Change in Family Violence from 1975 to 1985*, 48 J. MARRIAGE & FAM. 465, 467 (1986); Tara Law, *The Violence Against Women Act Was Signed 25 Years Ago. Here’s How the Law Changed American Culture*, TIME (Sept. 12, 2019) (quoting *When Violence Hits Home*, TIME 1 (July 4, 1994), <https://time.com/vault/issue/1994-07-04/page/1> [https://perma.cc/QY77-2QQM]), <https://time.com/5675029/violence-against-women-act-history-biden>; Carpenter, *supra* note 183 (“For the past four decades, a dominant project for American feminists has been getting the police and the legal system to respond seriously to the crisis of domestic violence.”).

186. Pub. L. 103-322, 108 Stat. 1796 (1994) (codified at 34 U.S.C. §§ 13925–14045d).



to drastically reduce the incidence of VAW.<sup>187</sup> The DOJ's Office on VAW describes VAWA as "a comprehensive legislative package designed to improve criminal justice responses to *sexual assault, domestic violence, dating violence, and stalking* and to increase the availability of services for victims and survivors."<sup>188</sup> The VAWA:

[A]mong other things, (1) enhanced investigations and prosecutions of sex offenses; (2) provided for a number of grant programs to address the issue of violence against women from a variety of angles, including law enforcement, public and private entities and service providers, and victims of crime; and (3) established immigration provisions for abused aliens.<sup>189</sup>

Although VAWA largely centers on supporting state and local criminal justice measures,<sup>190</sup> some programs focus on prevention.<sup>191</sup>

The anti-VAW movement and VAWA share some philosophical underpinnings with the Latin American anti-femicide movements. First, the movement was very consciously addressing, albeit perhaps in different terms, the issue of impunity. Just as Marcela la Garde and other advocates on the issue of feminicidio emphasized not only the phenomenon of gendered killing of women but also the failure of the state to act, so too VAWA was aimed at calling out and correcting state inaction.<sup>192</sup> Likewise, VAWA was structured in very gendered (and

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187. Law, *supra* note 185 (citing SHANNAN CATALANO, U.S. DEP'T OF JUST., INTIMATE PARTNER VIOLENCE, 1993–2010 (2015), <https://www.bjs.gov/content/pub/pdf/ipv9310.pdf> [<https://perma.cc/3KC9-29UH>]) ("Today, many experts credit VAWA with contributing to a dramatic decrease in the rate of domestic violence in the United States. According to the U.S. Department of Justice, the overall rate of intimate-partner violence dropped 64% from 1993 to 2010.").

188. *About the Office on Violence Against Women*, U.S. DEP'T OF JUST. (June 2016), <https://www.justice.gov/file/29836/download> [<https://perma.cc/GH2N-SJM2>].

189. CRS VAWA, *supra* note 3, at 2, 5 (internal citations omitted) (noting that "VAWA programs generally address domestic violence, sexual assault, dating violence, and stalking, although some VAWA programs address additional crimes").

190. KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 144–45 (2008) (noting that "[m]ajor priorities for federal funding under the VAWA are to improve police investigation techniques and to gather forensic evidence" and, as an example of the dominance of this criminal justice funding priority, VAWA funding often is a small part of shelters' budgets).

191. CRS VAWA, *supra* note 3, at 5 ("VAWA grant programs largely address the criminal justice system and community response to these crimes, but certain programs address prevention as well.").

192. See *supra* note 185; see also Hilary Charlesworth, *What Are Women's International Human Rights*, in HUMAN RIGHTS OF WOMEN 70 (Rebecca J. Cook ed., 1994) (internal citations omitted) ("[W]omen's subordination to men is mediated through the

asymmetrical) terms. As with femicide, its focus was violence against women.<sup>193</sup>

VAWA's civil rights provision was explicitly concerned about the relationship between gender bias and violence. In particular, its civil remedy provision applied only in cases of gender bias or gender discrimination against women.<sup>194</sup> A Time Magazine article from 1994 described VAWA as an attempt to address gender bias: "[m]odeled on the Civil Rights Act of 1964, [VAWA] stipulates that *gender-biased* crimes violate a woman's civil rights."<sup>195</sup>

Modeled on existing federal civil rights legislation, VAWA recognized a right to be "free from crimes of violence motivated by gender"<sup>196</sup> and provided a cause of action for crimes of violence

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public/private dichotomy . . . . Feminist concern with the public/private dichotomy in western legal thought has two different aspects: the way that the law has been used to exclude women from the public sphere—from professions, from the marketplace, from the vote; and a more basic form of the dichotomy, between what is considered the business of law and what is left unregulated.”).

193. Aisha K. Gill & Hannah Mason-Bish, *Addressing Violence Against Women as a Form of Hate Crime: Limitations and Possibilities*, 105 FEMINIST REV. 1, 2–3 (2013) (internal citations omitted) (“While the term ‘violence against women’ is consistent with a feminist perspective, conveying a clear message that the violence is often not gender-neutral, the term ‘domestic violence’ is generally used when someone attempts to psychologically or physically dominate a spouse, cohabitant or non-married intimate partner. However, while both men and women may be victims of domestic violence, women are more frequently abused by intimate partners than are men. Thus, while the terms ‘violence against women’, ‘gendered violence’ and ‘gender-based violence’ are often used interchangeably . . . , feminists have argued for the adoption of ‘violence against women’ on the basis that this would focus attention on the gendered nature of diverse forms of domestic violence and also highlight the fact that these exist within a complex continuum of violence constituted by multiple forms of inequality encompassing issues of gender, race and class.”).

194. See generally Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 2 (1996) (“At the time the Violence Against Women Act was introduced in 1990 . . . it is fair to say that battering was still considered ‘natural’ violence by many and, as a result, seen by mainstream politicians as a ‘fringe’ issue trumpeted only by radical feminists.”).

195. Law, *supra* note 185 (emphasis added) (quoting Jill Smolowe, *When Violence Hits Home*, TIME 20 (July 4, 1994), <https://time.com/vault/issue/1994-07-04/page/1> [<https://perma.cc/7G4E-CF76>]).

196. 34 U.S.C. § 12361(b); see also 34 U.S.C. § 12361(d)(2) (defining “crime of violence” as: “(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or

motivated by gender (and “thus depriv[ing] another of the right” to be free “from crimes motivated by gender”).<sup>197</sup> The Act in turn defined the term “crime of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”<sup>198</sup>

The civil remedies provision faced significant opposition. Victoria Nourse contends that opponents of the civil remedy portion of VAWA failed to understand that VAWA was not simply a domestic relations law, but rather a law aimed at gender discrimination that manifested in violence.<sup>199</sup> The opponents ultimately prevailed, as the Supreme Court struck down the civil remedy provision in *United States v. Morrison*<sup>200</sup> on federalism grounds.<sup>201</sup>

More recently, VAWA has become more gender neutral in an effort to make the law more inclusive and to remove impediments to services for LGBTQ+ people. In 2013, Congress explicitly expanded VAWA’s programs to LGBTQ+ people.<sup>202</sup> This expansion, an important recognition that IPV is not confined to heterosexual couples or to women,<sup>203</sup> necessitates moving beyond the men beating women paradigm.

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not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.”).

197. Pub. L. 103-322, tit. 4, § 40302, 108 Stat. 1941 (1994), *declared unconstitutional* by *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (permitting “the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate”).

198. 34 U.S.C. § 12361(d)(1).

199. Nourse, *supra* note 194, at 1–2 (“The legislative history of the Violence Against Women Act is a story, in the end, of using the idea of equality to challenge the “veil of relationship” shrouding this violence.”).

200. 529 U.S. 598 (2000).

201. *Id.* at 613, 617–18.

202. Sarah LeTrent, *Violence Against Women Act Shines a Light on Same-Sex Abuse*, CNN (Mar. 14, 2013, 9:24 AM) <https://www.cnn.com/2013/03/14/living/same-sex-domestic-violence-and-vawa/index.html> [<https://perma.cc/DC78-F7K3>] (noting that “[p]reviously, there [had been] no grant money specifically allocated to providing domestic violence services and outreach for the LGBT population”).

203. *Id.* (citing MIKEL L. WALTERS, JIERU CHEN & MATTHEW J. BREIDING, NAT’L CTR. FOR INJ. PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION I (2013)).

On the state level, criminal prosecutions have figured prominently in the response to VAW. These measures include mandatory arrest policies,<sup>204</sup> “no-drop” policies,<sup>205</sup> special evidentiary rules designed to permit the use of a victim’s statements even when the victim refuses to appear for trial,<sup>206</sup> and issuing warrants to compel the appearance of victims in court.<sup>207</sup>

With respect to IPV or DV, of late, there has been increasing attention to the problems with the prevailing criminal justice-heavy approach to DV and VAWA.<sup>208</sup> Margaret Johnson notes that the United States’ criminal law-heavy “safety paradigm” has meant “focus[ing] primarily physical and sexual violence as domestic violence rather than also looking at psychological, emotional, and economic abuse and coercive control.”<sup>209</sup> It is also short sighted in the sense that “its goal is principally to address the immediate crisis and defuse the situation through short-term remedies” and “physical separation of the parties.”<sup>210</sup> Finally, it makes the state and not the victim the decisionmaker.<sup>211</sup>

The downsides are the corollaries of these features. The legal system excludes abused people

because they do not experience severe enough violence, because what they want is not deemed “safe” by the institutions and the state from which they may be seeking assistance, and because they have

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204. See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857–58, 1858 n.27 (1996) (noting that ninety percent of urban police forces had either mandatory or preferred arrest policies by 1988).

205. See generally *id.* at 1853 (explaining a “no-drop” policy is necessary as abused women often will not cooperate with outside intervention); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 863–65 (1994) (discussing the variety of approaches states take to enact and enforce no-drop policies).

206. See, e.g., OR. REV. STAT. § 40.460(26).

207. See, e.g., KITTITAS CNTY. PROSECUTING ATTY’S OFF., MATERIAL WITNESS WARRANTS IN DOMESTIC VIOLENCE CASES, <https://www.co.kittitas.wa.us/uploads/prosecutor/about/protocols-programs/Domestic%20Violence%20Material%20Witness%20Warrant%20Policy.pdf> [<https://perma.cc/5H5T-BSQD>].

208. Johnson, *supra* note 184, at 150–51.

209. *Id.* at 157.

210. *Id.*

211. *Id.* (“[I]t provides that the state, and not the person subjected to abuse, is the decision maker as to how best to address the domestic violence.”).

not sought assistance but are coerced or ordered to receive assistance to be “safe,” as deemed by the institutions and the state.<sup>212</sup>

Other critiques of the carceral approach to VAW and DV relates to how victims experience the process. Many contend that victims are retraumatized by their experiences with the judicial system.<sup>213</sup>

Some jurisdictions are engaging in reforms that address aspects of these critiques. Recognizing that DV takes a variety of forms and that an exclusive focus on physical violence may miss serious instances of DV, for example, legislators are beginning to address the issue of coercive control.<sup>214</sup>

### C. Hate Crimes

Hate crime statutes also capture some of what femicide statutes seek to address but extend to a wider range of crimes than just homicide. They typically involved either the creation of separate crimes or sentencing enhancements for crimes committed because of a

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212. *Id.* at 150–51, 153 (footnotes omitted) (arguing that “security, not safety, serve as the philosophical driving force behind domestic violence law and practice” and “that law, funding, policy, and practice should promote long-term assistance intended to support resilience, agency, and dignity. Such a response would include long-term housing options, including the ability to be within a supportive community; long-term employment or other income-generation options, with long-term employment supports such as career counseling, education, quality child care, and available transportation; increased income and asset-building opportunities without the barriers of discrimination; access to public assistance; long-term physical and mental health care, preventative, and treatment options; long-term civil protective and other court orders that provide injunctive, family, housing, and economic remedies; and the development of enhanced social capital and community connection for persons subjected to abuse.”).

213. Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88 (2020) (arguing that trauma-informed lawyering and cross-cultural competence skills are critical to prevent victims of DV from being re-traumatized through the judicial process and that law schools should teach trauma-informed lawyering).

214. See Melena Ryzik & Katie Benner, *What Defines Domestic Abuse? Survivors Say It’s More than Assault*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/01/22/us/coribush-fka-twigs-coercive-control.html> [<https://perma.cc/AMN3-S9HW>] (“In September, California passed a law that allows coercive control behaviors, such as isolating partners, to be introduced as evidence of domestic violence in family court. That month, Hawaii became the first state to enact anti-coercive control legislation. The New York and Connecticut legislatures introduced similar laws.”); see also *Hawaii and California Lead the Way Signing the First Coercive Control Bills in the Americas*, AM. CONF. TO END COERCIVE CONTROL J. (Nov. 13, 2020); HAW. REV. STAT. § 431:10–217.5 (including “coercive control” within “domestic abuse”); § 586-1 (Sept. 15, 2020) (defining “coercive control”).

particular bias.<sup>215</sup> Gender bias, in theory, can be the basis for a hate crime prosecution, but it almost never is.

The idea behind hate crimes legislation is bringing attention to and punishing crimes aimed at the collective. As the New York legislature explained in discussing its hate crimes bill:

[V]ictims are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation. Hate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes.<sup>216</sup>

Thus, it is the combination of selection or motivation based on a particular characteristic combined with the group harm that differentiates hate crimes from ordinary crimes.<sup>217</sup>

Proponents of including gender bias as a basis for a hate crime have argued that the typical logic for hate crimes applies.<sup>218</sup> Women, like

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215. Olivia Levinson, Note, *Reconciling Ideals: Restorative Justice as an Alternative to Sentencing Enhancements for Hate Crimes*, 105 MINN. L. REV. HEADNOTES 209, 213 (2020) (“Sentencing enhancements are designed to send a message that crimes motivated by bias—whether based on race, religion, sexual orientation, or gender—are particularly heinous.”).

216. BRAD HOYLMAN, *NEW YORK’S HATE CRIMES LAW: AN ASSESSMENT* 7, Appendix A (2nd ed. 2017) (citing New York Penal Law Title Y—Hate Crimes Act of 2000 Article 485—Hate Crimes § 485.00 Legislative findings) (the assessment advocated the inclusion of “gender identity” as an additional basis for a hate crime).

217. See Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 323 (1994) (“Bias crimes differ from parallel crimes as a matter of both the resulting harm and the mental state of the offender. The nature of the injury sustained by the immediate victim of a bias crime exceeds the harm caused by a parallel crime. Moreover, bias crimes inflict a palpable harm on the broader target community of the crime as well as on society at large, while parallel crimes do not generally cause such widespread injury.”).

218. See Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN’S L.J. 157, 174 (1994) (arguing that like other hate crimes, “rape and other acts of violence against women are pervasive and have created a climate of terror that helps maintain the inequality and disadvantaged status of all women. Violence against women is not merely an individual crime of personal injury, but is a form of discrimination”); Katherine Chen, Note, *Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives*, 3 WM. & MARY J. WOMEN & L. 277,

other groups who can be the objects of hate crimes, face discrimination and structural inequalities.<sup>219</sup> Women are targeted for crimes based on their membership in the group and immutable characteristics, and VAW chills the behavior of women as a group.<sup>220</sup>

Moreover, proponents of adding gender to the list of prosecutable hate crimes viewed the addition as an important expressive act of women reclaiming the law and correcting for its masculine bias. As Katherine Chen put it:

[E]xcluding gender from state bias crime laws only serves to legitimate the idea that it is men who are entitled to define the groups that are potentially targets of hate and the types of acts by which that hate may be expressed. Further, the exclusion of gender is the use of law (specifically, the power to name), as a vehicle for the perpetuation of sex discrimination.<sup>221</sup>

Gender eventually made it into the catalog of hate crimes on the federal level with the passage of the Matthew Shephard and James Byrd Hate Crimes Prevention Act of 2009.<sup>222</sup> The Act has survived attacks

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289 (1997) (“First, crimes committed against women fit the characteristics of other types of bias crimes, particularly with respect to the issues of power and dominance and the subordination of women through group terrorism. Second, the exclusion of gender as a category of bias crimes is largely due to the fact that males have monopolized the power to name and categorize crimes. Because the power to name is male-dominated, the laws that are created as a result of the exercise of that power serve to perpetuate a social order that benefits men. Therefore, the exclusion of gender is a form of sex discrimination, which serves to reinforce the existing power disparity between men and women. Third, bias crime statutes that exclude gender while at the same time extend heightened protection to other groups violate a woman’s autonomy. Finally, the exclusion of gender serves to reinforce the stereotypical dichotomy between the nature of men and women.”); *see also* Gill & Mason-Bish, *supra* note 193, at 2, 16 (discussing VAW as a hate crime and a proposal to include gender among the bases for hate crimes in the UK).

219. *See* Chen, *supra* note 218, at 289; *see also* Gill & Mason-Bish, *supra* note 193, at 2, 16 (discussing VAW as a hate crime and a proposal to include gender among the bases for hate crimes in the UK).

220. *See* Pendo, *supra* note 218, at 174 (“Like the “hate crimes” Congress attempted to reach under the HCSA, rape and other acts of violence against women are pervasive and have created a climate of terror that helps maintain the inequality and disadvantaged status of all women.”).

221. Chen, *supra* note 218, at 300.

222. 18 U.S.C. § 249(a)(2) (expanding United States federal hate-crime law to include crimes motivated by a victim’s actual or perceived gender, sexual orientation, gender identity, or disability). In the § 249 context, courts have interpreted the phrase “because of” to mean “the substantial factor” (United States v. Jenkins, 120 F. Supp. 3d 650, 658 (E.D. Ky. 2013)) or “an actual cause.” “Because of” in brief means what it says:

based on freedom of speech under the First Amendment, equal protection under the Fourteenth Amendment, and lack of a connection to interstate commerce based on Commerce Clause grounds.<sup>223</sup> Thirty-five states now have hate crime statutes with penalty enhancements for crimes motivated by gender.<sup>224</sup>

Gender was not a shoo-in. The inclusion of gender as a basis for a hate crime met staunch opposition.<sup>225</sup> Opponents, including even groups instrumental in getting hate crime laws passed, cited a variety of arguments against including gender in the list of hate crimes.<sup>226</sup> Some contended that the scale of VAW is so great that it would swallow the category of hate crimes.<sup>227</sup> Others complained that “the definition of gender-based violence is too broad, or there is no way to accurately identify gender-based crimes, or there is insufficient evidence of the problem to justify a legislative response.”<sup>228</sup> Others noted that women often know their attackers, so they are not interchangeable in the same way as other victims of hate crimes and it therefore is not the same attack on the community as a whole.<sup>229</sup> As one author noted though, normally the fact that an attacker knows the victim is an aggravating not a disqualifying circumstance for hate crimes.<sup>230</sup>

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The prohibited act or motive must be an actual cause of the specified outcome. *United States v. Miller*, 767 F.3d 585, 592 (6th Cir. 2014) (equating actual cause with “but-for cause”).

223. *United States v. Jenkins*, 909 F. Supp. 2d 758, 773, 775–77 (E.D. Ky. 2012); see also *United States v. Hill*, 927 F.3d 188, 208 (4th Cir. 2019) (internal citations omitted) (“[I]t is irrelevant that a bias-motivated ‘punch in the face’ is non-economic, standing alone. It is not the violent act itself, or the motivation behind that act, that triggers Congress’s regulatory authority under the Commerce Clause, but the effect of that act on interstate commerce that renders it susceptible to federal regulation.”).

224. *ADL 2020 State Hate Crime Statutes*, ANTI-DEFAMATION LEAGUE (Aug. 2018), <https://www.adl.org/media/13726/download>.

225. Pendo, *supra* note 218, at 167 (“[T]here is tremendous resistance to recognizing violence against women as hate crime.”).

226. Pamela Coukos, *Deconstructing the Debate over Gender and Hate Crimes Legislation*, 1 *GEO. J. GENDER & L.* 11, 28 (1999).

227. *Id.* at 13.

228. *Id.*

229. Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 *AM. U. J. GENDER & L.* 63, 85 (1994); see also Pendo, *supra* note 218, at 168.

230. Pendo, *supra* note 218, at 165–67 (“Rape, for example, is overwhelmingly a crime of one gender against the other. Ninety-seven percent of all sex crime victims are women, and even when the victims are male, the act is profoundly gendered. In this context, the sexual violence suffered by women at the hands of men is more than isolated instances of crime. Women are targeted for certain types of violence, like rape,



Gendered hate crimes are rarely prosecuted. The DOJ has prosecuted a couple of cases under the category of “gender identity” for violent crimes against transgender women,<sup>231</sup> but apparently only initiated its first prosecution based on “gender” in 2021.<sup>232</sup> Although state numbers are hard to come by, the low level of reporting of

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mainly ‘because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender.’”).

231. To be clear, this Article does not criticize the decision to prioritize cases of hate crimes against transgender women. The earlier prosecution of hate crimes based on the category of “gender identity” may reflect a quite defensible prioritization of cases involving intersecting forms of discrimination faced by trans women. Cf. Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13 EUR. J. WOMEN'S STUD. 193, 205 (2006) (saying, of an intersectional approach to feminist politics, that “the tactical and strategic priorities should be led by those whose needs are judged by the participants of the dialogue to be the most urgent”); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS-CIV. LIBERTIES L. REV. 323, 346–47 (1987) (arguing that critical legal studies could achieve more by looking to the experiences of people of color in the United States: “There is a standing concept in movements for social change. One needs to ask who has the real interest and the most information. Those who are oppressed in the present world can speak most eloquently of a better one.”). Given high rates of violence against trans women, it stands to reason that prosecutors prioritize cases of “gender identity.” The same is true for hate crimes against women of color. However, the particular logic of the federal hate crimes statute and the tendency of prosecutors to pick one basis for the hate crime, if they charge a hate crime at all—means that the category of “gender” has until this year been in disuse.

232. I use the word “apparently,” because I find no reporting or caselaw on any prior hate crimes charges based on the category of “gender,” which, again, the statute treats as distinct from “gender identity” (defined as “actual or perceived gender characteristics”) and the DOJ lists none. Nor have I found any indication that there has been a prosecution for a hate crime against a cisgender woman under the category of “gender identity.” Though the media seems to cover these cases, it nevertheless is possible that there have been prior charges not captured by the media that have not resulted in judicial decisions captured on Westlaw. On the recent charges alleging an attempted hate crime based on gender in planning a mass shooting at a sorority, see Sealed Indictment at 3, *United States v. Genco*, No. 1:21-cr-00085 (S.D. Ohio July 20, 2021); Michael Levinson, *‘Incel’ Is Charged with Plotting to Shoot Women*, U.S. SAYS, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/us/incels-ohio.html> [<https://perma.cc/F96B-V4XM>]. There have been at least two federal hate crime prosecutions based on “gender identity” for killings of trans women. Colin Dwyer, *1st Man Prosecuted for Federal Hate Crime Targeting Transgender Victim Gets 49 Years*, NAT'L PUB. RADIO (May 16, 2017, 12:12 PM), <https://www.npr.org/sections/thetwo-way/2017/05/16/528602477/1st-man-prosecuted-for-federal-hate-crime-targeting-transgender-victim-gets-49-y> [<https://perma.cc/JE9D-2HRP>]; Press Release, Department of Justice, U.S. Attorney's Office, District of Puerto Rico, Two Individuals Charged with Carjacking, Murder, Firearms Offenses, and Destruction Of Property (May 13, 2020), <https://www.justice.gov/usao-pr/pr/two-individuals-charged-carjacking-murder-firearms-offenses-and-destruction-property> [<https://perma.cc/E68Q-V8Z7>].

gendered hate crimes by law enforcement agencies suggests that prosecutions are even fewer and far between.<sup>233</sup>

Almost as revealing as the absence of any federal hate crime prosecution based on gender prior to 2021, the very agency charged with prosecuting hate crimes on the federal level has trouble even conceiving of a hate crime against a cisgender woman based on gender.<sup>234</sup> In the list of “representative” hate crimes cases, actual cases, the DOJ provides twenty-eight examples of all different types of hate crimes, but not a single example of a hate crime against a cisgender woman based on gender.<sup>235</sup>

The one example given of a gendered hate crime is quite surprising. On the DOJ’s “teaching page” is a hypothetical example of a gendered hate crime involving a woman who has been rejected by men all her life (and thus hates them) who takes a gun to a men’s locker room and opens fire.<sup>236</sup> This hypothetical scenario seems very consciously gendered by flipping it from the far more plausible reverse scenario.

Could the lack of prosecutions for gendered hate crimes be chalked up to a lack of gendered hate crimes? Apparently not. If one looked just at FBI statistics alone, it would indeed seem that hate crimes based on gender are very rare.<sup>237</sup> The FBI’s statistics, culled from voluntary

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233. See *FBI Releases 2020 Hate Crime Statistics*, U.S. DEP’T OF JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> [<https://perma.cc/5EZF-JP2C>]; see also Erin Donaghue, *Hate Crime Murders Surged to Record High in 2019*, *FBI Data Show*, CBS NEWS (Nov. 16, 2020, 5:15 PM), <https://www.cbsnews.com/news/hate-crime-fbi-statistics-show-murders-rose-2019> [<https://perma.cc/699B-SBNK>]; Weihua Li, *Why Police Struggle to Report One of the Fastest-Growing Hate Crimes*, MARSHALL PROJECT (Nov. 26, 2019), <https://www.themarshallproject.org/2019/11/26/why-police-struggle-to-report-one-of-the-fastest-growing-hate-crimes> [<https://perma.cc/B3NX-PFY7>] (“For years, the number of hate crimes in the FBI’s annual report has been consistently lower than that in the victim surveys. Still, the discrepancy between the two reports is greater in gender related hate crime than any other type. This widening gap reflects key challenges for police departments dealing with hate crimes, especially those against women and transgender people . . .”).

234. Police and prosecutors may not be the only ones ignoring gender. The media may also be missing gendered patterns in reporting on crimes. See Jessie Klein, *Teaching Her a Lesson: Media Misses Boys’ Rage Relating to Girls in School Shootings*, 1 *CRIME MEDIA CULTURE* 90, 90 (2005).

235. See *Hate Crimes Case Examples*, U.S. DEP’T OF JUST., <https://www.justice.gov/hatecrimes/hate-crimes-case-examples> [<https://perma.cc/EJ3F-U4U9>] (including an alleged plot to kill women at a sorority house).

236. *Learn About Hate Crimes*, U.S. DEP’T OF JUST. *supra* note 169 (click on gender).

237. See *Hate Crime Statistics*, U.S. DEP’T OF JUST. *supra* note 233 (noting that gender-based hate crimes make up only 0.7% of all hate crimes).

reporting of law enforcement agencies, showed that less than one percent of hate crimes reported are based on gender.<sup>238</sup> However, numbers from the National Crime Victimization Survey (NCVS) paint a very different picture. The NCVS is based on “[n]ationally representative, household-based survey administered by the U.S. Census Bureau”<sup>239</sup> and “measures crimes perceived by victims to be motivated by an offender’s bias against them for belonging to or being associated with a group largely identified by these characteristics.”<sup>240</sup> For the five-year period from 2011 to 2015, the NCVS reported that some thirty percent of hate crimes were motivated by gender.<sup>241</sup>

Studies of prosecutors show attitudes ranging from unfamiliarity with to hostility toward the idea of gender serving as the basis for a hate crime. One qualitative study of prosecutors in Texas sought to explore prosecutorial attitudes toward gender as the basis for a hate crime and discovered a mixture of ignorance and skepticism.<sup>242</sup> Many prosecutors

238. *See id.* (reporting the occurrence of sixty gender-based hate crimes in 2019 and seventy-one in 2020); *see also* Donaghue, *supra* note 233 (noting that one percent of hate crime incidents reported by the FBI in 2019 were motivated by bias against gender); Li, *supra* note 233 (noting that the discrepancy between the FBI’s statistics and victim surveys is greater in gender-related hate crimes than any other type).

239. BARBARA OUDEKERK, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., HATE CRIME STATISTICS: BRIEFING PREPARED FOR THE VIRGINIA ADVISORY COMMITTEE, U. S. COMMISSION ON CIVIL RIGHTS 2 (2019), <https://www.bjs.gov/content/pub/pdf/hcs1317pp.pdf> [<https://perma.cc/VMA9-NMEF>].

240. MADELINE MASUCCI & LYNN LANGTON, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., HATE CRIME VICTIMIZATION, 2004–2015 1 (2017), [<https://perma.cc/8PJU-UQH5>].

241. *Id.* at 2 (“The NCVS asked hate crime victims about the types of bias they suspected motivated the crime. During the aggregated 5-year period from 2011 to 2015, victims suspected that nearly half (48%) of hate crime victimizations were motivated by racial bias . . . . About a third of victims believed they were targeted because of their ethnicity (35%) or their gender (29%). About 1 in 5 believed the hate crime was motivated by bias against persons or groups with which they were associated (23%) or by sexual orientation (22%). About 1 in 6 hate crime victimizations were thought to be motivated by bias against the victim’s religion (17%) or disability (16%).”) (emphasis added); *see also* Li, *supra* note 233 (“An analysis from the Justice Department estimates that between 2013 and 2017 more than 55,000 hate crimes targeting victims’ gender took place on average each year. That’s almost 30 percent of all hate crimes reported by victims. But you wouldn’t know that from the most recent hate crime statistics released earlier this month by the FBI. The new data show that last year police departments around the country reported 215 gender-related hate crimes targeting men, women, transgender and nonbinary people. They represented 3 percent of the total incidents in the FBI’s numbers.”).

242. Beverly A. McPhail & Diana M. DiNitto, *Prosecutorial Perspectives on Gender-Bias Hate Crimes*, 11 VIOLENCE AGAINST WOMEN 1162, 1169–70 (2005) (“Only a couple of

were surprised to learn that gender was a possible basis for a hate crime.<sup>243</sup> Many thought that gender violence, such as rape or DV, squared badly with the logic of hate crimes because they considered such offenses to be about power or control or even love and not hate.<sup>244</sup> The researchers noted that “even with some evidence of bias against women as a group in the perpetrator’s writings, the prosecutor had never considered viewing the case as a hate crime.”<sup>245</sup>

In a study focusing on New Jersey’s experience with gender-based hate crimes, Jessica Hodges reported ignorance or discomfort with the idea among prosecutors. Despite the inclusion of gender bias crimes as hate crimes in New Jersey for over a decade, “[n]one of the fifteen prosecutors and investigators interviewed . . . had experience investigating or prosecuting a gender-bias offense, and the majority of them were uncertain of the definition of a gender-bias crime.”<sup>246</sup> She observed that:

By adhering to [a] superficial definition of a hate crime [as “dislike of a particular group characteristic”], legal actors fail to recognize that bias crimes go beyond an intense dislike for someone, and that such crimes are committed in order to enforce a social hierarchy that is biased toward a particular group.<sup>247</sup>

Thus, in New Jersey, as in Texas, prosecutors are confused about or hostile toward recognizing gender bias as a basis for a hate crime.

Even among feminists, there is disagreement as to just what ought to constitute a gendered hate crime. Much like many femicide laws, the rule in broad strokes is simple—a crime committed against a woman because she is a woman. However, some would require evidence specific to the case showing this gendered motivation.<sup>248</sup> Such evidence

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prosecutors knew that the status category of gender had been included in the state’s new hate crime law, which had passed during the previous legislative session. Several prosecutors thought the researcher meant *sexual orientation* rather than *gender*, and in these instances it took a few moments to sort out the difference between gender and sexual orientation as categories. Most respondents not only expressed surprise that gender was included, but also they seemed slightly embarrassed that they did not know it was part of the law.”).

243. *Id.* at 1176.

244. *Id.*

245. *Id.* at 1173.

246. JESSICA P. HODGE, *GENDERED HATE: EXPLORING GENDER IN HATE CRIME LAW* 59 (2011).

247. *Id.* at 55.

248. See, e.g., Chen, *supra* note 218, at 277–79 (describing cases where a man killed women and the “offender explained his reasons for committing the crime, which were rooted in bias against women as a group” and citing as “[o]ther clear-cut examples of

could include such things as epithets of the accused, targeting of women, or mutilation of genitalia. Others contend that entire categories of crimes, such as rape<sup>249</sup> or DV,<sup>250</sup> are inherently hate crimes against women because they are ways of intimidating and maintaining or restoring women to subordinate positions.<sup>251</sup>

The argument for including a broader array of VAW within the category of hate crimes mirrors the argument for classifying intimate partner violence as femicide. To bridge the gap, scholars tend to turn to radical feminism. Pérez Manzano, for example, argues that classifying intimate femicide as femicide because it is a hate crime is a bad fit.<sup>252</sup> Instead, she contends that IPV is better conceived of as “instrumental violence that is employed to maintain unequal relations that situate the woman in a position of subordination.”<sup>253</sup> This logic, of course, is classic radical feminism and mirrors the logic of American feminists seeking to put rape and DV in the category of hate crime.

In sum, the American VAWA and hate crime rubrics overlap to a degree with femicide. VAWA has sought to ensure the investigation and prosecution of crimes against women, as well as to provide resources for their support. In recent years, however, the gendered nature of VAW has been deemphasized partly due to the elimination of the civil rights remedy that focused on gender bias and partly due to a commendable effort to ensure inclusivity. In theory, hate crimes are another way of addressing gendered crimes against women, but, in reality, this is seldom the case. Hate crime prosecutions are relatively rare in general, but they are particularly rare when it comes to gendered VAW.

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crimes that could be characterized as bias crimes against women . . . serial stranger rapes and fraternity gang rapes” but noting that “[c]rimes, such as nonstranger rape and spousal abuse, however, raise more complex questions regarding characterization as bias crimes against women” but ultimately argues that “state bias crime statutes should . . . encompass all gender-related crimes as a protected category”).

249. Kathryn M. Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 339 (2001) (footnote omitted) (“Rape is clearly and logically a crime of hate. More than any other gender-related offense, rape is committed against women as women and perpetuates a sexually stratified society.”).

250. *See id.* at 341.

251. *See id.* at 338.

252. Pérez Manzano, *supra* note 56, at 164.

253. *Id.* at 168 (orig. “[S]ino el carácter instrumental de la violencia que se ejerce: para mantener unas relaciones desiguales que sitúan a la mujer en una posición de subordinación.”) (English translation provided by the author).

D. *Feminist Critique of Heat of Passion and Extreme Emotional Disturbance*

Whereas some Latin American femicide statutes, like the Chilean one, have forbidden the application of heat of passion as a defense (or partial defense) to murder in cases of femicide; in the United States, the defenses of heat of passion and extreme emotional disturbance (EED) remain. Nevertheless, this aspect of femicide law is echoed in a longstanding feminist critique of these doctrines.<sup>254</sup> Arguably quite unlike in the VAW and the hate crimes areas above, where gender plays an ever less salient role, the gendered critique of these criminal law defenses is widely known. As Aya Gruber notes, the “feminist critique” of heat of passion/EED is so established, it is taught along with the doctrines themselves in criminal law casebooks.<sup>255</sup>

Heat of passion, or its broader Model Penal Code-inspired iteration, EED, are doctrines that ratchet what would otherwise be murder (intentional killing) down to manslaughter. Under the common law doctrine of heat of passion, for a defendant to succeed in mitigating murder down to manslaughter, the defendant must show that they acted reasonably in response to adequate provocation.<sup>256</sup> For EED, a defendant must show that they acted under extreme emotional or mental disturbance for which there is a reasonable explanation.<sup>257</sup> Reform proposals to address the purportedly sexist partial defense range from suggestions to limit its application—to exclude categories

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254. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1342, 1389 (1997); see also Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 296–98 (2015) (describing the evolution of the feminist critique, which started with an argument that women do not benefit equally from the defense, or partial defense, as defendants and evolved into a critique that the defense lets men off lightly for murder and sanctions, as in, permits, male violence directed at women).

255. Gruber, *supra* note 254, at 276 (listing various casebooks that provide “the feminist critique” of provocation).

256. *Id.* at 275–76, 279–80.

257. MODEL PENAL CODE § 210.3 (Am. L. Inst. 1962) (“Criminal homicide constitutes manslaughter when . . . it is committed recklessly; or . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”).

of offenders—to bolder arguments for limitation to only justified responses or the elimination of the defense altogether.<sup>258</sup>

Gruber argues that, at least in the United States, feminist critics of heat of passion and EED may be tilting at windmills. Gruber acknowledges that Nourse, an early and prominent critic of the doctrine, did offer empirical evidence in support of her contention that men were getting off lightly with murdering their wives but argues that data based on jury instructions rather than outcomes, as in Nourse's study,<sup>259</sup> is inherently limited.<sup>260</sup> Evidence that judges are willing to send the issues of heat of passion or EED to the jury, she notes, is not the same as evidence that juries are in fact applying the defense.<sup>261</sup> She contends that the limited empirical evidence on the defenses, in particular a 2004 study from New York, suggests that

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258. Gruber, *supra* note 254, at 292–93 (footnotes omitted) (“[S]ome critics advocate less radical changes to provocation law—for example, eliminating just the adultery category or adopting a caveat that men with a documented history of abuse cannot argue provocation. These limited reforms leave the provocation doctrine largely intact and address the overarching gender problem only modestly. For example, a provision preventing repeat abusers from claiming provocation will not stop sexist wife killers who fall outside the ‘repeat abuser’ category from invoking the defense. Accordingly, many feminist critics instead propose far-reaching changes like abolition or generalized limitations of the defense’s applicability (i.e., calling for a ‘warranted excuse’).”).

259. Nourse explained her choice to focus on jury instructions, rather than verdicts or holdings, in terms of feasibility and breadth of the information. Nourse, *supra* note 254, at 1349–50 (footnotes omitted) (“‘Getting to the jury,’ therefore, not the actual verdict or holding, is my measure of a ‘successful’ claim. Although this may appear to be an indirect way to study the ultimate question, it is the only way to do so without introducing deliberate legal distortions from the start: To study the verdict question directly, one would have to follow cases from police investigation through verdict and appeal, a project that could only be undertaken in a particular jurisdiction or subset of a jurisdiction (e.g., cities or counties). Given the diversity of legal regimes governing provocation claims, conclusions drawn from a single legal jurisdiction or even multiple jurisdictions that follow similar rules might provide a decidedly skewed picture of trial practice.”).

260. Gruber, *supra* note 254, at 309–10 (discussing Nourse’s 1996 data set which roughly confirmed defendants’ success in proving provocation under MPC’s EED law).

261. *Id.* at 311 (footnotes omitted) (“If Kirschner’s study [on EED in New York, finding that EED arguments rarely succeed] is representative of larger empirical trends, we are left with the contention that judges allow many sexist killers to argue provocation to juries, and this, in itself, is problematic. Even accepting the empirical observation as accurate, it is difficult to see how ‘reaching the jury’ is an underenforcement problem, with its concurrent retributive difficulties (the guilty are not punished) and utilitarian issues (people are encouraged to commit such killings), if in fact juries convict these defendants.”).

defendants rarely prevail on EED arguments.<sup>262</sup> Gruber finds the expressive argument—that even just sending the issue to the jury conveys a message normalizing male aggression—unpersuasive.<sup>263</sup>

There is an empirical question at the heart of this debate of relevance to the United States and countries with femicide statutes alike. How often are people, particularly men, successfully availing themselves of heat of passion/EED in the context of gendered killing of women, including intimate partner homicides? In the United States, if the answer is not very often, then limiting or eliminating the partial defenses does little to address gendered killing and, as Gruber argues, may have unintended collateral consequences of contributing to the racist carceral state by limiting the availability of the partial defense even in cases outside of the DV or femicide context.<sup>264</sup>

In Latin America, the answer likely varies place to place. In at least some countries and localities, the problem seems to be that femicides are not investigated or prosecuted at all, which means that possible mitigating doctrines like heat of passion never come into play.<sup>265</sup> If indeed lack of investigation and prosecution is the norm, the elimination of the defense in a statute may serve expressive purposes but only weakly if the broader message is that you may not rely on this particular argument, but you will get away with killing women anyway.

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262. See *id.* at 310 (citing Stuart M. Kirschner et al., *The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County*, 10 PSYCH. PUB. POL'Y & L. 102, 126 (2004)) (reporting that out of twelve cases, in only one case was the EED defense successful though plea bargaining).

263. Gruber discards the expressive argument by saying that expressive arguments may support punitive results. See *id.* at 319, 321. I am not sure I agree that expressive arguments are always punitive. See Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1, 11, 13 (2010); Caroline Davidson, *Aging Out: Elderly Defendants and International Crimes*, 61 VA. J. INT'L L. 57, 109 (2020), for previous work in which I have grounded defendant-friendly arguments in expressive terms, though I agree that there is an inherent circularity to the inquiry that limits its utility. A decision has to be made on what one wants to express most, and criminal law may be a blunt and imperfect tool for expressing complex messages. Cf. Gruber, *supra* note 254, at 320 (“[F]ocusing purely on the purported communicative function of criminal law tends to deflect attention away from the complex socio-legal structure in which the criminal law operates, and punishment’s often unpredictable and criminogenically escalatory effects.”).

264. See Gruber, *supra* note 254, at 330.

265. See Salazar Vega & Garro, *supra* note 174 (discussing Peru); Alcoba & McGowan, *supra* note 43 (discussing the low rate of prosecutions for the killing of women in Mexico).



### III. LESSONS FOR ONE ANOTHER

What can we learn from one another? This Part suggests lessons that we in the United States can learn from femicide frameworks and laws. This Article does not advocate that the United States pass femicide laws. Rather it argues that we can learn from the language of femicide and from the experiences of countries who have adopted femicide laws.<sup>266</sup> This Part in turn offers some potential lessons from the American experience with VAWA and hate crimes for countries with femicide statutes.

#### A. *What the United States Can Learn from Latin American Femicide/Feminicide Discussion*

Even without adopting specific femicide laws, there is much the United States can learn from places where the concept of femicide is more salient. These lessons include the need to bring attention to (or “visibilize”) the gender dynamics of violence and the role of structural inequalities in perpetuating violence the utility of situating gender violence in a human rights context, and, perhaps most concretely, the importance of comprehensive and nuanced data collection.

##### 1. *“Visibilizing” gender dynamics of violence & the role of structural inequalities*

Perhaps the most critical lesson to be drawn from Latin American femicide activism and resulting laws is that we need to be vigilant in identifying and addressing gender-based violence as gendered. The chief advantage of femicide statutes and the femicide discourse is that it puts gender and gendered structural inequalities facing women front and center.<sup>267</sup> Structural inequalities in the United States may look

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266. Cf. Evan Stark, *The ‘Coercive Control Framework’: Making Law Work for Women*, in *CRIMINALISING COERCIVE CONTROL* 33 (2020) (noting that in the context of coercive control, “while the overall coercive control framework is adaptable elsewhere, particular constituent elements like the law are not replicable from one national context to the next”).

267. Munévar, *supra* note 48, at 154 (noting that for proponents of (gender-specific) femicide laws, “the goal is the bring attention to an extreme form of gender violence, with the objective of getting real access for women to justice and the creation of public policies centered on its eradication, keeping in mind the context in which the deaths occurred, reorganizing the administration of justice and, principally, encouraging cultural and symbolic transformation”) (orig. “Para quienes plantean la adopción de un tipo géneroespecífico, la meta es visibilizar una forma extrema de violencia de género, con el fin de procurar el acceso real de las mujeres a la justicia y

different from in Latin American countries, where in turn they may look different country to country or even within countries, but we should not pretend they are not there and must recognize, as Latin American feminists have argued persuasively, that violence is both a cause and a symptom.

The hesitation to acknowledge the role of gender in violence in the United States appears in both the VAW and the hate crimes realms. In the VAW context, a discomfort with emphasizing gender became clear with hostility to the civil rights remedy in VAWA, a remedy ultimately deemed unconstitutional for lack of a connection to interstate commerce.<sup>268</sup> More recently, in our efforts to acknowledge that women are not the only victims of DV, we have arguably degendered VAWA.<sup>269</sup> Instead of degendering VAW discussions, we must acknowledge that the gender dynamics in play are more complex than simply male-on-female violence in heterosexual relationships, but still must address the role of gender bias and gendered structures in perpetuating violence.

We are even worse at acknowledging gender in the hate crimes context. Even in the contexts that seem more classically like hate crimes (incidents of mass public violence), we are slow to pick up on cues that violence may be gendered.<sup>270</sup> With the March 2021 shootings in Atlanta, much of the discussion has centered on whether the crime was an anti-Asian hate crime, but almost entirely absent from the discussion was the possibility that it was hate crime against women

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la formación de políticas públicas centradas en su erradicación, atacando los cimientos, dando cuenta del contexto en el que ocurren las muertes, reorganizando la administración de justicia y, principalmente, promoviendo transformaciones culturales y simbólicas.”) (English translation provided by the author).

268. See *supra* note 201 and accompanying text (discussing Supreme Court’s rejection of the civil remedy provision on federalism grounds).

269. See *supra* note 203 and accompanying text (discussing the expansion of VAWA programs to the LGBTQI+ community).

270. See, e.g., Klein, *supra* note 234, at 90 (arguing that the media has failed to report on gendered motivations of many school shooters). According to one feminist theorist, even VAW theory has the same blind spot on gender. Gwen Hunnicutt, *Varieties of Patriarchy and Violence Against Women: Resurrecting “Patriarchy” as a Theoretical Tool*, 15 *VIOLENCE AGAINST WOMEN* 553, 555 (2009) (“Today, research on violence against women continues to amass at impressive rates, yet theory development remains slow. In the void left by the lack of gender-sensitive theories, mainstream theories of victimization have been employed to explain gender-specific violence. Mainstream theories often strip explanations of their gender coloring, casting perpetrators and victims instead as generic ‘social units,’ obscuring the ways in which gendered power arrangements structure human action.”).

(notwithstanding the fact that all but one of the victims was a woman and the defendant's own statements to police that he committed the crimes to eliminate sexual temptation).<sup>271</sup> It can be both, and just as we should explore why there may be reluctance in labeling crimes anti-Asian hate crimes, we also ought to explore why gender is an afterthought, if it is a thought people have at all. Though we may not need a separate crime of femicide, the label of femicide or feminicide is a powerful reminder to consider the gendered dimensions of the crime.

Particularly with DV, the most common cause of the killing of women in the United States, the term, femicide, addresses an American labeling problem. Many feminists and DV activists lament the insufficiency of the term "domestic violence." Rachel Snyder contends that domestic violence is too diluted, makes the problem seem private, and instead suggests that "terrorism" better describes what we know as DV.<sup>272</sup> Others have argued that DV should be called "torture."<sup>273</sup>

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271. See, e.g., Astead W. Herndon & Stephanie Saul, *Why Some Georgia Lawmakers Want Last Week's Shootings Labeled Hate Crimes*, N.Y. TIMES (Mar. 21, 2021), <https://www.nytimes.com/2021/03/21/us/politics/georgia-hate-crime-atlanta-shootings.html> [<https://perma.cc/6LNW-AE8Q>] (reporting on the crimes as anti-Asian hate crimes, but not gender-based hate crimes). The case also may provide an illustration of the gap between the law and the public's conception or even experience of a hate crime. Federal law, for example, focuses on the perpetrator's motivations relating to the victim's group identity or perceived group identity. It does not capture within the definition of the crime one of the reasons for recognizing hate crimes—the chilling of the group who, even reasonably, perceives itself to have been targeted. See *infra* note 223. The perpetrators statements or explanations for their actions, while relevant, of course are not the only evidence that may be considered to determine their actual motivations.

272. Rachel Louise Snyder, *The Term 'Domestic Violence' Is a Failure*, ATLANTIC (June 20, 2019), <https://www.theatlantic.com/family/archive/2019/06/domestic-violence-term/590848> [<https://perma.cc/UF6E-AAMP>] (“[T]error is also precisely the feeling of those living inside a home where a partner, a parent, or another loved one is the biggest threat to their life. ‘Terrorism carries that notion of fear,’ Tannen said, finally. ‘Beating only captures the pain of the moment. Terrorism captures the lifelong effect of that pain.’ And that, more than anything else, is the story that needs to be told.”).

273. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 296 (1994) (arguing that “when stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence that have been prohibited by treaty and customary law and recognized by the international community as *jus cogens*, or peremptory norms”); see also Rhonda Copelon, *End Torture, End Domestic Violence*, ON THE ISSUES MAG.

Efforts to correct the labelling problem aim at a variety of things, including, perhaps most importantly, communicating differentiated forms of harm and gravity. Those advocating that VAW or DV be considered a hate crime, torture, or terrorism seem to be trying to situate VAW in categories that are taken seriously. Femicide, with its invocation of genocide, captures the seriousness along with the focus on gender.

This Article does not advocate for the passage of femicide laws. For one, they may not withstand equal protection challenges. One of the key arguments used to refute equal protection arguments with hate crimes is their facial neutrality, a feature that femicide statutes quite consciously reject in an effort to draw attention to violence against women.<sup>274</sup> The lack of facial neutrality would perhaps not be fatal to femicide statutes as they still could withstand challenges because they serve an important government interest in fighting VAW. Nevertheless, it is not obvious that a legal battle to pass and defend femicide statutes is the best answer in the United States when more entrenched legal tools like hate crimes statutes based on gender bias remain in disuse.<sup>275</sup>

Even without passing femicide statutes, we can learn from places that “speak” femicide a greater awareness of the phenomenon in applying our own laws. Moreover, over time, we can learn from countries seeking to translate femicide from theory into law potential ways of defining gendered violence in ways that are workable in court. Should these provisions gain traction in Latin American judicial systems, American prosecutors, legislators, and courts could benefit from

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(2009), [https://www.ontheissuesmagazine.com/2009winter/2009winter\\_7.php](https://www.ontheissuesmagazine.com/2009winter/2009winter_7.php) [https://perma.cc/C5WD-756P] [hereinafter Copelon, *End Torture*].

274. See *United States v. Jenkins*, 909 F. Supp. 2d 758, 775 (E.D. Ky. 2012) (“[T]he law creates no classifications among citizens, but is neutral on its face. [The statute]’s protections extend to *any person* who is the victim of bodily injury on the basis of his or her sexual orientation. By its terms, this statute does not provide preferential treatment only to homosexuals, but instead provides equal protection to people of all sexual orientations, which would include heterosexuals.”); see also *United States v. Beebe*, 807 F. Supp. 2d 1045, 1058 (D.N.M. 2011) (“The statute does not specify what ‘race, color, religion, or national origin’ the victim must be for the action to be criminally punishable; rather, the statute applies to crimes against victims of all races, colors, etcetera victimized on the basis of race, etcetera. Because the statute addresses this race-related issue in a racially neutral manner, it raises no equal protection issue.”), *aff’d sub nom. United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013).

275. See Carol Smart, *Preface to CONTESTING FEMICIDE*, *supra* note 74, at ix, xi (acknowledging limits to law reform and recognizing that successes in the passage of new laws are frequently followed by periods of stagnation in reform).

examining the various elements of femicide statutes and cases interpreting them and learning from prosecutors bringing femicide cases for cues on how to investigate and prove a hate crime based on gender bias.

## 2. *Situating VAW in international human rights framework*

Whereas American legislators and even activists tend to treat VAW and hate crimes as domestic phenomena,<sup>276</sup> Latin American feminists have been more successful in invoking international human rights frameworks to support legal change.<sup>277</sup> A paradigm shift wherein VAW is viewed as a human rights problem and not simply a domestic matter offers benefits for Americans seeking to combat femicide.

Importantly, participation in the international and regional frameworks comes with international monitoring and dialogue. The CEDAW committee, for example, issues reports assessing progress in women's rights issues, including measures taken to educate people on women's rights, investigate and prosecute perpetrators of femicide, and to address underlying causes.<sup>278</sup> American opponents to the ratification of CEDAW have pointed out that CEDAW shares the weakness of most human rights instruments—weak enforcement mechanisms.<sup>279</sup> Regardless, engaging in the process of collecting information for and reporting to international organizations like CEDAW is a way of fostering discussion and giving visibility to the phenomenon of femicide in the United States.

Thus, even if the United States does not follow the Latin American example of passing femicide statutes, it could still benefit from greater engagement with international organizations and frameworks oriented towards addressing gendered VAW and femicide.

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276. *But see* Copelon, *End Torture*, *supra* note 273 (suggesting that women's experience of domestic abuse is "frighteningly similar" that of prisoners who are subjected to torture).

277. MONÁRREZ FRAGOSO, *supra* note 49, at 25 ("La violencia de género es una violación a los derechos de las mujeres, y como tal debe ser prevenida y erradicada por el Estado y la sociedad.") (trans. "Gender violence is a violation of the rights of women, and as such it must be prevented and eradicated by the State and by Society.") (English translation provided by the author).

278. *Introduction of the Committee on the Elimination of Discrimination Against Women*, OFF. UNITED NATIONS HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx> [<https://perma.cc/8EGP-PYVD>].

279. CONG. RSCH. SERV., R40750, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 3 (2015).

### 3. *Data collection*

The United States, likewise, could stand to learn from the emphasis on data collection in Latin American anti-femicide efforts. As noted above, Latin American femicide initiatives have emphasized the need for nuanced and comprehensive data collection.<sup>280</sup> Though data collection efforts in Latin America are imperfect and works in progress,<sup>281</sup> there is at least, in many countries, governmental acknowledgement of the need for the collection of nuanced and standardized data to address the problem of femicide.

In the United States, the only database of femicides is run on a volunteer basis by a nurse in her spare time.<sup>282</sup> As noted above, data collection on VAW varies widely, and federal numbers are known to be incomplete and insufficiently nuanced as to victim and perpetrators information and context.<sup>283</sup> Hate crime statistics are notoriously incomplete.<sup>284</sup>

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280. Munévar, *supra* note 48, at 137 (“[L]a existencia de muertes violentas de mujeres ha de ser visibilizada mediante registros sistemáticos de las acciones centradas en la contabilización, persecución y sanción de las violencias de género, para que las estadísticas se recopilen y se publiquen, abarcando detalles que faciliten la documentación de cada caso según las circunstancias de género.”) (trans. “The existence of violent deaths of women must be made visible through systematic records of actions focused on recording, prosecuting and punishing gender-based violence, so that statistics are compiled and published, including details that facilitate the documentation of each case according to the gender circumstances.”) (English translation provided by the author).

281. Silvana Fumega, *Standardisation of Femicide Data: Key Lessons*, FEMICIDE WATCH: LONDON SCH. ECON. BLOG (Aug. 8, 2019), <http://femicide-watch.org/products/standardisation-femicide-data-key-lessons-lse-blog> [<https://perma.cc/2Y42-7F95>].

282. See WOMEN COUNT USA, <https://womenscountusa.org> [<https://perma.cc/KTR6-C9PP>]; see also Natalie Schreyer, *A School Nurse Is on a Mission to Count the Women Killed by Men*, ATLANTIC (Feb. 16, 2019), <https://www.theatlantic.com/health/archive/2019/02/building-public-database-murdered-women/582769> [<https://perma.cc/YR6H-DXYQ>].

283. James Alan Fox & Emma E. Fridel, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2017*, 4 VIOLENCE & GENDER 37, 38 (2017) (discussing shortcomings in the FBI’s Supplementary Homicide Reports (SHR) and noting that “[j]udging from estimates generated by the FBI, SHR records are unavailable for almost 8% of the nation’s homicides (unit missingness)” and that “for the existing SHR records, about one-third are missing at least some information about the victim, offender, or nature of the offense (item missingness)”).

284. Kai Wiggins, *The Dangers of Prosecuting Hate Crimes in an Unjust System*, AM. CONST. SOC’Y: EXPERT F. (Aug. 5, 2019), <https://www.acslaw.org/expertforum/the-dangers-of-prosecuting-hate-crimes-in-an-unjust-system> [<https://perma.cc/NZ9C-T9VP>]; see also Greg Ehrie, Letter to the Editor, *The Anti-Defamation League Supports Legislation that Would*

We need information to understand and address the problem. According to R. Emerson Dobash and Russell P. Dobash, “[u]nless the murders of women are examined separately from the murders of men, that is, disaggregated by gender, little can be known about this type of murder which is otherwise lost within the larger number of male-male homicides.”<sup>285</sup> Just as many countries in Latin America and elsewhere<sup>286</sup> have created government entities collecting nuanced data on killings of women as part of their initiatives to fight femicide, so too should the United States. Indeed, the World Health Organization (WHO) has recommended better data collection, including with respect to documenting sex of victims and perpetrators and the relationship between victim and perpetrator as a critical tool to fight femicide.<sup>287</sup> The U.N. Special Rapporteur on Violence Against Women has likewise called on states to create a Femicide Watch.<sup>288</sup>

In the United States, we need not only better data on homicide and possible gendered motives and contexts, but also data on the ways gender may affect criminal justice outcomes. Take, for example, the partial defense of heat of passion (or, in some jurisdictions, EED), made unavailable in some countries to those accused of femicide.<sup>289</sup> Aya Gruber has made a powerful argument that we should not blindly

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“Enhance the Accuracy” of *F.B.I. Statistics*, N.Y. TIMES (Nov. 22, 2020), <https://www.nytimes.com/2020/11/22/opinion/letters/hate-crimes-fbi.html> [<https://perma.cc/MH2H-RBXM>]; Ronald L. Davis & Patrice O’Neill, *The Hate Crimes Reporting Gap: Low Numbers Keep Tensions High*, POLICE CHIEF (May 2016), <https://www.policechiefmagazine.org/the-hate-crimes>.

285. Fox & Fridel, *supra* note 283, at 42 (quoting R. Emerson Dobash & Russell P. Dobash, *When Women Are Murdered*, in THE HANDBOOK OF HOMICIDE 131 (Fiona Brookman, Edward R. Maguire & Mike Maguire eds., 2017)).

286. See CANADIAN FEMICIDE OBSERVATORY FOR JUST. & ACCOUNTABILITY, <https://www.femicideincanada.ca> [<https://perma.cc/KZ37-PD9X>] (Canada); *Femicide or Femicide*, GENDER EQUAL. OBSERVATORY FOR LAT. AM. & CARIBBEAN, <https://oig.cepal.org/en/indicators/femicide-or-femicide> [<https://perma.cc/WBU3-FNSH>] (Latin America and Caribbean).

287. *Femicide, Understanding and Addressing Violence Against Women*, *supra* note 13, at 1, 5 (“There is a need to strengthen collection and analysis of mortality data, disaggregate these data by sex and, in the case of murders, ensure documentation of the relationship between the victim and perpetrator. These data can be complemented by information from other sources (e.g., police, mortuaries, courts and medical examiners).”).

288. *Femicide Watch Initiative*, OFF. UNITED NATIONS HIGH COMM’R HUM. RTS., <https://www.ohchr.org/en/issues/women/srwomen/pages/femicidewatch.aspx> [<https://perma.cc/E2YH-47CM>].

289. See *supra* notes 255–57 and accompanying text (comparing the Model Penal Code and common law’s burdens of proof for the heat of passion defense).

accept the feminist critique that the heat of passion or EED doctrines are bad for women without empirical support for even the preliminary proposition that men routinely in fact are successfully convincing fact finders of these partial defenses and having murder mitigated to manslaughter.<sup>290</sup> In the United States, it is hard to know who is right—the feminist critics or Gruber—without better data. This data, like the data on the underlying homicides/femicides, should be collected.

Better reporting tools supported by the government, such as an American Femicide Watch, would be an important step in combatting femicide specifically and raising attention to the issue of gendered violence against women in general. Tools like the American Bar Association's new Hate Crime tool are examples of new and creative ways to document bias crimes in general, but they should not operate at the exclusion of a body tasked with monitoring femicides.<sup>291</sup>

### *B. Lessons from the U.S. Experience with VAW & Hate Crimes*

In turn, the United States' experience with VAW and hate crimes may yield some lessons for those fighting femicide in Latin America. First, a statute is not a panacea, and without significant institutional and public support, a statute may achieve little. Second, to address the root causes of femicide, a broader look at DV, including such issues as coercive control, will likely be necessary. Finally, carceral approaches to VAW have their limitations and drawbacks.

#### *1. If you build it, they may not come (a statute is not enough)*

One critical lesson to be taken from the American experience with gendered hate crimes is that the passage of a statute does not mean it will get used.<sup>292</sup> As noted above, "gender" has been on the books as the

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290. See *supra* notes 259–63 and accompanying text (discussing Gruber's critique of reforms of the provocation doctrine).

291. Marc Davis, *Fighting Hate: Website Serves More than 2,000 in First Year of Reporting Incidents*, A.B.A. J. (Sept. 1, 2018), [https://www.abajournal.com/magazine/article/fighting\\_hate\\_website\\_innovation](https://www.abajournal.com/magazine/article/fighting_hate_website_innovation) [<https://perma.cc/N2BK-4KAW>] ("The site walks victims—who remain anonymous—through the reporting process, which can entail contacting multiple law enforcement agencies and public and private organizations. The fill-in-the-blanks tool assists victims of harassment, violence and property damage resulting from acts based on religion, race, ethnicity, gender, gender identity, disability or sexual orientation. It also prompts victims to report the ZIP code of the hate crime and where it happened—at work, school or home, for example—and the nature of the crime. Victims also may report incidents of bias. Based on that information, the site lists a variety of resources.").

292. ACUNS REPORT, *supra* note 11, at 117.



basis for a federal hate crime for a decade, and the DOJ just issued its first indictment.<sup>293</sup> As Evan Stark has explained in the context of coercive control, “[e]ven the best drawn laws function as a ‘disguised betrayal’ of women’s justice claims without concurrent commitments of resources to infrastructure, nationally coordinated assistance to local surveillance and interdiction and the comparable political will to pursue the equality agenda.”<sup>294</sup>

Latin American commentators on VAW have observed much of the same from the region’s own experiences with femicide and anti-VAW statutes. Despite the popularity of the passage of femicide statutes, perhaps because statutes are essentially good and cheap PR for governments,<sup>295</sup> enforcement remains a significant challenge. As an article in *The Guardian* noted in June of 2020, “[f]emicide laws exist in Mexico, yet impunity rates of over 90% point to their ineffectuality.”<sup>296</sup> Similarly, as Sydney Bay notes, Guatemala’s femicide laws and specialized courts appear to have done little to curb domestic violence in Guatemala.<sup>297</sup> Thus, just as the United States needs to take hard look at the obstacles that keep police and prosecutors from perceiving, investigating, and prosecuting gendered hate crimes, Latin American countries must continue to evaluate the resources and training that are needed to ensure that femicide statutes do not become a perverse symbol of impunity themselves.

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293. See *supra* notes 231–32 and accompanying text (noting that, although the Department of Justice has brought indictments for hate crimes based on gender identity, it brought its first based on gender in 2021).

294. Stark, *supra* note 266.

295. Toledo, *supra* note 74, at 42 (noting that “the criminalisation of femicide has been popular and therefore politically convenient” and that “[i]n some cases, the laws have even been used to clean the public image of authorities that have been criticised in relation to other cases involving women’s rights”); cf. Tapia Tapia, *supra* note 57, at 296 (noting that “penal expansion was shown as evidence of compliance with international human rights instruments”).

296. Alcoba & McGowan, *supra* note 43.

297. Bay, *supra* note 101, at 370. Silvana Tapia Tapia likewise has noted the failure of specialized courts in Ecuador to meet women’s expectations and needs, Silvana Tapia Tapia, *Beyond Carceral Expansion: Survivors’ Experiences of Using Specialised Courts for Violence Against Women in Ecuador*, 20 SOC. & LEGAL STUD. 1, 2–3 (2020) (describing empirical findings on Ecuador’s specialized VAW courts and arguing that, in addition to contributing to “penal expansion,” “centering criminal justice . . . masks [women’s] lack of access to urgent social services”).

## 2. *The pitfalls of a criminal justice response*

Cutting perhaps in the other direction—the United States’ experience in responses to VAW has revealed that criminalization creates problems of its own. Increasingly, organizations addressing VAW are questioning the criminal justice response to VAW as contributing to mass incarceration, the perpetuation of other structural inequities, and, in some instances, making things worse for victims in the long run.<sup>298</sup>

For several decades now, in the United States, the prevailing response to VAW has been a criminal justice one. Indeed, a key demand of early feminist initiatives was that VAW be deemed worthy of a criminal justice response.<sup>299</sup> This fight seems similar to the fight waged by femicide (and in particular, feminicide) activists throughout Latin America to get the state to investigate and prosecute the killing of women.

In recent years, anti-VAW activists and feminists have begun to question the predominantly criminal law-focused approach to VAW and feminists’ perhaps too-cozy relationship with the carceral state.<sup>300</sup> As noted above, the anti-DV community is increasingly examining the collateral damage in the United States’ predominantly carceral approach to tackling DV.<sup>301</sup> By insisting on prosecution, the concern is that measures to combat DV are contributing to mass incarceration. The legal focus on the short-term safety of victims and the insistence on prosecution of abusers, in turn, arguably denies victims agency and may be insufficiently attentive to the long-term well-being of victims.<sup>302</sup>

Hate crimes are seeing a similar pushback. As one commentator advocating a restorative justice approach to hate crimes argues, “[t]he punitive component of hate crime laws perpetuates inequalities in our justice system by utilizing oppressive tools and divesting from rehabilitative techniques. Penalty enhancements outside of the hate crime context have historically been ‘applied in an unjust and

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298. See *supra* notes 208–10 and accompanying text.

299. See *supra* note 185 and accompanying text (discussing activism aimed at involving police and prosecutors in investigating and prosecuting violence against women).

300. See *supra* notes 208–10 and accompanying text; see also Elizabeth Bernstein, *Carceral Politics as Gender Justice? The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights*, 41 *THEORY & SOC’Y* 233, 235 (2012); Aya Gruber, *The Feminist War on Crime*, 92 *IOWA L. REV.* 741, 748 (2007).

301. See *supra* notes 211–12 and accompanying text.

302. See *supra* note 209 and accompanying text.

disproportionate way against people of color and poor people.”<sup>303</sup> Federal statistics purporting to show that African Americans commit the most hate crimes, along with concerns about inaccuracies and barriers to justice cooked into the statistics, support this concern.<sup>304</sup>

This same critique that feminists should think twice before aligning themselves too closely with the carceral state has emerged in Latin America. Argentine scholar, Eugenio Zaffaroni, has argued that criminal law is merely a way of preserving hierarchies, including gendered ones: “[t]he punitive power is a pillar of the vertical hierarchization that feeds all of these discriminations and violations of human dignity.”<sup>305</sup> Ecuadorian scholar, Tapia Tapia, makes a similar argument from a decolonial perspective.<sup>306</sup> She argues that:

[T]he successful turn to criminal law in Ecuador and Latin America is symptomatic of a series of colonial continuities that include the epistemic colonisation of non-Western knowledges on community life, domesticity, sexuality, and justice. The continuation of colonial discourses on family protection, for instance, facilitated the passing of carceral laws on VAW, while also undermining the progress of feminist demands such as the decriminalisation of abortion.<sup>307</sup>

She adds: “[i]f legal coloniality is not pinpointed and interrogated, penalty can be portrayed as compatible with, and perhaps constitutive of, a redistributive political project and a human rights-based legal framework.”<sup>308</sup> Tapia Tapia thus questions the narrative of anti-VAW

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303. Levinson, *supra* note 215, at 217.

304. Wiggins, *supra* note 284 (arguing that FBI statistic showing that “African Americans are more likely than white people to commit hate crimes” are inaccurate and result from victims’ fears in reporting incidents and law enforcements failure to pursue cases even when reported and noting that “survey data from the U.S. Department of Justice [indicates that] fewer than five percent of hate crime victimizations that occur each year are recorded in the federal data.”).

305. See, e.g., Eugenio Raúl Zaffaroni, *El discurso feminista y el poder punitivo*, in *LAS TRAMPAS DEL PODER PUNITIVO* 19, 25 (2000) (Arg.) (orig. “El poder punitivo es una viga maestra de la jerarquización verticalizante que alimenta todas estas discriminaciones y violaciones de la dignidad humana.”) (English translation provided by the author).

306. Silvana Tapia Tapia, *A Decolonial Feminist Critique of Penalty*, *CRITICAL LEGAL THINKING* (Mar. 29, 2021), <https://criticallegalthinking.com/2021/03/29/a-decolonial-feminist-critique-of-penalty> [<https://perma.cc/5L3G-KFCT>] (“[C]ritical scholars have shown that human rights instruments are increasingly encouraging and even compelling states to mobilise penalty as a response to human rights violations.”).

307. *Id.*

308. *Id.* (“In addition, decolonial feminist critique can throw light into the complex effects of juridifying women’s struggles through human rights and criminal law, not

and femicide statutes as a feminist triumph and suggests that instead they may be an example of the liberal international human rights framework forcing a carceral approach on less powerful states. Note that international organizations insisted that Latin American states pass femicide statutes, not that European states do so.<sup>309</sup>

Femicide statutes avoid the issue of over-punishing for crimes that, absent their bias component, may not be terribly grave since they exclusively address deadly violence. They also inherently avoid a tension with victims' agency because victims are no longer alive. But the same possibility exists for a predominantly carceral approach to VAW to be used to prosecute marginalized defendants and to perpetuate other systemic inequalities. As Toledo has noted, some femicide statutes are gender neutral with respect to the perpetrator, and in Mexico, two of the highest sentences for femicides were against women.<sup>310</sup> Thus, as countries expand their focus to non-fatal forms of VAW, an awareness of the potential negative effects of seeking ever-heightened penalties as a way of drawing attention to the problem is warranted.

### C. *Common Challenges—Inclusion, Intersectionality and Contextualized Responses*

Some challenges are common to the United States with its VAW and hate crimes regimes and countries with femicide statutes. Perhaps most importantly, we must all strive to create and maintain responses to gendered violence that recognize gender dynamics but at the same time acknowledge that gender is not the only aspect of identity or circumstance in play.

We also must acknowledge that there is a tension between emphasizing the gendered nature of VAW and inclusivity. Arguably, the more the focus is on structures that operate to the disadvantage of women, the less inclusive the regime. This tension is easily resolved with respect to transgender women by defining women to include anyone who identifies as a woman. It is less easily resolved when the victim of violence identifies as a man or is non-binary. The United

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only via scholarly work and reflection, but also through our involvement in community projects that can directly impact on people's lives.").

309. See *supra* note 15 and accompanying text (highlighting OECD's role in calling upon Latin American governments to create legal frameworks for VAW criminalization).

310. Toledo, *supra* note 74, at 47.

States has opted, in my view correctly, for inclusivity, but must therefore work harder to identify, understand, and address the role of gender bias in violence.

Latin American femicide statutes, on their face, seem to prioritize the emphasis on structural inequities *for women*. Increasingly, however, commentators have called for femicide frameworks to be attentive to issues of intersectionality that may place some women at greater risk. Lorena Sosa argues that in their responses to femicide:

States need to pay particular attention to the situation of women facing human rights violations on the basis of multiple factors, such as their age, ethnicity, disability, sexual orientation, gender identity, migrant status, marital or family status and their poverty and literacy levels.<sup>311</sup>

This argument echoes a broader examination of intersectionality, feminism, and human rights in human rights scholarship.<sup>312</sup>

Thus, countries with femicide statutes must strive to identify and address the problems of the most vulnerable and be attentive to aspects of identity or situations that compound gender inequities. Not all women are similarly situated, and other aspects of a woman's identity—migration status, race, sexual orientation, non-conforming gender identity, itself part of “gender”<sup>313</sup>—may make women even more vulnerable. These intersections will naturally differ in different societies, but policy makers in Latin America, like their counterparts in the United States, should be aware of the ways in which the dynamics are intertwined.

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311. Sosa, *supra* note 118, at 86 (footnote omitted) (noting that “international human rights documents increasingly point to ‘intersectionality’, which emphasizes ‘the interaction between gender, race, and other social categories of distinction in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power,’ as the best lens for addressing discrimination and violence against women”).

312. See, e.g., Amanda Dale, *International Women's Human Rights and the Hope for Feminist Law—Intersectionality as Legal Framework*, 33 CANADIAN WOMEN'S STUD. 37, 42–43 (2019) (noting that CEDAW was comparatively slow to embrace intersectionality but eventually issued a General Comment embracing intersectionality in 2010); Yuval-Davis, *supra* note 231, at 206 (arguing that “the analysis and the methodology of intersectionality, especially in UN-related bodies is just emerging and often suffers from analytical confusions that have already been tackled by feminist scholars who have been working on these issues for longer, outside the specific global feminist networks that developed around the Beijing Forum”).

313. Toledo notes that Belém do Pará Convention gender violence includes more than just VAW and addresses state responsibilities for its prevention and eradication. Toledo, *supra* note 74, at 40.

In the United States, a focus on intersectionality may cut in the other direction—we need to remember that gender is one of the intersections. As this Article has shown, in recent years with VAWA, we have shifted the focus off of women. Likewise, with hate crimes, police and prosecutors seem to overlook gender (at least when defined, as the federal hate crime does, as distinct from “gender identity”) altogether. As the executive director of the National Asian Pacific American Women’s Forum, Sung Yeon Choimorrow, put it when asked whether the shooting in Atlanta was about race or about gender: “Imagine—a world in which it could be both . . . . ‘I’m frankly floored by how difficult this is for people to understand.’”<sup>314</sup>

Thus, a challenge common to all of us, with or without femicide statutes, is crafting solutions that address gender violence in all its forms and yet are attentive to the myriad of intersecting dynamics at play.

#### CONCLUSION

In the United States, we have a variety of tools to fight femicide, but we still need to learn the language of femicide. We need to wake up to the ways that gender bias can turn deadly and be better at spotting gender bias and its intersections with other aspects of identity. Countries with femicide laws can teach us a great deal—the importance of naming and identifying gender bias, the utility of international human rights frameworks in prompting reflection and change, and the need for better data. In turn, these countries can observe from the American experience, particularly with hate crimes, that a statute without the understanding and buy-in from law enforcement, prosecutors, and society as a whole is just words on a page. We need to have the humility to learn from one another lessons in how to address gendered violence in a meaningful and inclusive way.

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314. Monica Hesse, *‘It’s Race, Class and Gender Together’: Why the Atlanta Killings Aren’t Just About One Thing*, WASH. POST (Mar. 18, 2021), [https://www.washingtonpost.com/lifestyle/style/hesse-atlanta-asian-women/2021/03/18/183b3f00-8749-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/lifestyle/style/hesse-atlanta-asian-women/2021/03/18/183b3f00-8749-11eb-8a8b-5cf82c3dffe4_story.html) [https://perma.cc/G99U-Y4EW].