PROSECUTORS MUST USE THEIR IMMENSE DISCRETION TO END THE CRIMINALIZATION OF SURVIVORS OF GENDER-BASED VIOLENCE WHO ACT IN SELF-DEFENSE

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ABSTRACT [Ψ]

In March 2020, Tracy McCarter defended her life during a domestic violence incident that resulted in the death of her husband. She was arrested and subsequently spent months at Rikers Island during the height of the COVID-19 pandemic after being charged with murder in the second degree by the Manhattan District Attorney's Office. Tracy McCarter's case is only one example of how the United States' criminal legal system deems that certain individuals, particularly Black women, have no claim to self-defense. Discussing Tracy McCarter's case and other cases of self-defense, this Article provides an overview of the limited applicability of self-defense for survivors of gender-based violence and critiques the level of discretion district attorneys have but often refuse to use in these cases. This Article explores the history of selective applicability of self-defense laws that often particularly fail and exclude Black women who protect themselves against gender-based violence. It argues that: (1) arrest, prosecution, and incarceration cause perpetual trauma and block the healing that survivors of gender-based violence need to rebuild their lives after abuse; and (2) district attorneys can reduce the unjust criminalization of survivors of gender-based violence who act in self-defense by using their discretion to drop charges or refuse to prosecute specific cases.

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[Ψ] Editorial note: Many mass media news articles contain factual inaccuracies and do not exactly align with Tracy's factual recounting of her story.

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INTRODUCTION[1]

I AM SOMEBODY!
By Joan Little

I may be down today
But I am somebody!
I may be <u>considered</u> the lowest
on earth; but I am somebody!
I came up in low rent housing,
sometimes lived in the slums;
But I am still somebody!
I read an article where a black youth a [sic]
was jailed, he stole some food, but got

[1] This Article is possible due in large part to research compiled in the June 2014 *No Selves to Defend* anthology created by Mariame Kaba of the Chicago Alliance to Free Marissa Alexander. MARIAME KABA ET AL., NO SELVES TO DEFEND: A LEGACY OF CRIMINALIZING WOMEN OF COLOR FOR SELF-DEFENSE (2014), https://perma.cc/MK9J-3JXT.

15-20 years–he was somebody!
I killed a white in 'self-defense'
but the jury doesn't care–and when
he came for me to prepare trial–
he said she deserves the chair–
Every time
Every hurt and pain I feel inside,
Everytime [sic] I pick up the morning news
only to see my name on the front page–
I begin to wonder; they make me feel
less than somebody.
But in the end I will have freedom
and peace of mind. I will do anything
to help prove my innocence. Because
of one important fact above all . . .
'I am somebody!'[2]

In August 1974, an incarcerated Black woman named Joan Little defended herself from sexual assault by a white male guard in Beaufort County, North Carolina.[3] Joan protected herself by stabbing the guard with an ice pick he had used to threaten her.[4] The guard died from the stab wounds.[5] Joan maintained that she had acted in self-defense, but an all-white grand jury charged her with first-degree murder, which carried the possibility of the death penalty.[6] The judge forced Joan to await trial in a women's prison in Raleigh.[7] Individuals and groups across the country mobilized to support Joan and formed a mass campaign known as the "Free Joan Little Movement."[8] After a five-week trial, the jury acquitted Joan, which marked "the first time a woman was acquitted of murder on the grounds of self-defense against sexual violence."[9]

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[2] Joann Little, *I Am Somebody!*, *in* SAVE JOANN LITTLE (1975).

[3] Emily Thuma, *Joan Little*, *in* KABA ET AL., *supra* note 1, at 21.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 21-22.

[9] *Id*. Along with public outcry, a legal defense team led by the Center for Constitutional Rights produced documentation that persuaded the court that the intense racism of Beaufort County residents would prevent Little from receiving a fair trial or an impartial jury. In response, the venue for Little's case was successfully changed to Raleigh. The jury, made up of both Black and white jurors, deliberated for only an hour and eighteen minutes before acquitting Little. *Id.*; *State of North Carolina v. Joan Little*, CTR. FOR CONST. RTS., https://perma.cc/9KN2-LKDF (Oct. 9, 2007); *see also Aug. 15, 1975: Joan Little Acquitted*, ZINN EDUC. PROJECT, https://perma.cc/YZ5F-66TB (last visited May 10, 2023).

However, Joan's case is a rare example of the U.S. legal system recognizing that a survivor of gender-based violence, specifically a Black woman, has a right to self-defense.[10] Joan's acquittal required mass resources and a national organizing campaign to ultimately influence the legal system to uphold her freedom.[11] Since Joan's freedom, the legal system has continued to deny Black women their personhood when faced with violence by repeatedly claiming that Black women's circumstances do not meet the standard for self-defense.[12]

Decades later, Joan's contemporaries, Black women, trans women, and even girls subject to domestic abuse or physical assault in public, still face the legal system's harshest punishments for defending themselves. In August 2010, Marissa Alexander fired a warning shot to scare off her abusive husband.[13] The bullet hit no one, but Marissa was arrested and later convicted of aggravated assault with a deadly weapon.[14] She received a 20-year prison sentence under Florida's mandatory minimum sentencing laws.[15] The court denied Marissa a "Stand Your Ground" ("SYG") defense, the same defense George Zimmerman used to justify killing Trayvon Martin.[16] In June 2011, white adults targeted and directed

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[10] *See* ZINN EDUC. PROJECT, *supra* note 9. Black women experience anti-Blackness and misogyny simultaneously within the United States. Living with multiple forms of oppression makes Black women susceptible to the worst forms of brutality in a legal system that upholds white male supremacy. *See* Keeanga-Yamahtta Taylor, *Until Black Women Are Free, None of Us Will Be Free*, NEW YORKER (July 20, 2020), https://perma.cc/7P8C-XDMC. *See also* Rebecca Ruiz, *Why You Need to Know What 'Misogynoir' Means Right Now*, MASHABLE (Apr. 7, 2020), https://perma.cc/D5F2-WGA9.

[11] ZINN EDUC. PROJECT, *supra* note 9.

[12] *See* Caroline Light et al., *Gender and Stand Your Ground Laws: A Critical Appraisal of Existing Research*, 51 J.L., MED. & ETHICS 55, 57, 59-60 (2023); Terressa A. Benz, *Black Femininity and Stand Your Ground: Controlling Images and the Elusive Defense of Self-Defense*, 46 ASS'N CRITICAL SOCIO. 7, 2 (2020) (describing the July 2017 case of Siwatu-Salama Ra, a Black woman who used a legally owned gun to protect herself and her family and was denied a defense under Michigan's Stand Your Ground laws. When convicted, Ra stated, "I don't believe they imagine a black woman being scared–only mad.").

[13] Mychal Denzel Smith, *Marissa Alexander*, *in* KABA ET AL., *supra* note 1, at 7.

[14] *Id.*

[15] *Id.*; *Who Is Marissa Alexander and Why Does She Face 60 Years in Prison?*, FREE MARISSA NOW, https://perma.cc/QFP9-354R (last visited May 10, 2023). Due to grassroots insurgency by the "Free Marissa Now" mobilization campaign, Marissa Alexander was finally released from Florida state confinement after three years behind bars and two years of house detention. Christine Hauser, *Florida Woman Whose 'Stand Your Ground' Defense Was Rejected Is Released*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/us/marissa-alexander-released-stand-your-ground.html (on file with CUNY Law Review). *See also We Did It! Marissa Alexander Is Finally Free*, FREE MARISSA NOW (Jan. 27, 2017), https://perma.cc/ETJ8-X5UZ.

[16] Katy Waldman, *Marissa Alexander: A Reverse Trayvon Martin?*, SLATE (Apr. 25, 2012, 2:54 PM), https://perma.cc/LXL9-ZYR7 (demonstrating how Florida's SYG law is applied unequally across races and genders by comparing how Marissa was denied the SYG

racist and transphobic slurs at a trans woman named CeCe McDonald and her friends outside a bar in Minneapolis.[17] The altercation soon turned physical, and CeCe fought for her life, which led to the death of one of her attackers.[18] CeCe survived the attack but was arrested and charged with second-degree murder.[19] CeCe was sentenced to 41 months in a men's prison facility.[20] In July 2016, fourteen-year-old Bresha Meadows was arrested for killing her abusive father.[21] Prosecutors charged Bresha with aggravated murder and planned to try her as an adult.[22] She faced a potential life sentence in Ohio.[23]After a mass defense campaign brought attention to her case, Bresha took a plea and was sentenced to one year in a juvenile jail, six months in a mental health facility, and two years of probation upon release.[24]

On March 2, 2020, Tracy McCarter acted in self-defense to save her life during a domestic violence incident.[25] She survived, but her husband

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defense but George Zimmerman, the man who shot and killed Trayvon Martin, a seventeen-year-old Black boy, was granted the SYG defense). *See also* Deepti Hajela, *Trayvon Martin, 10 Years Later: Teen's Death Changes Nation*, ASSOCIATED PRESS (Feb. 24, 2022, 9:04 AM), https://apnews.com/article/trayvon-martin-death-10-years-later-c68f12130b2992d9c1ba31ec1a398cdd (on file with CUNY Law Review).

[17] *Justice for CeCe McDonald*, TRANSADVOCATE, https://perma.cc/8XG3-MKF3 (last visited May 10, 2023).

[18] *Id.*; William C. Anderson, *Cece McDonald*, *in* KABA ET AL., *supra* note 1, at 25.

[19] *See* Anderson, *supra* note 18; TRANSADVOCATE, *supra* note 17.

[20] CeCe served 19 months in a men's prison and was released on January 13, 2014. KABA ET AL., *supra* note 1, at 25; *see also* Anderson, *supra* note 18, at 25; *CeCe McDonald Released from Prison*, NAT'L LGBTQ TASK FORCE, https://perma.cc/35D5-P4ZZ (last visited May 10, 2023). She continues to be an advocate and was the subject of a documentary about her experience. *See* FREE CECE! (Jac Gares Media 2016).

[21] Melissa Jeltsen, *Bresha Meadows Thought You'd Understand*, HUFFINGTON POST, https://perma.cc/P7U9-98S8 (Mar. 29, 2021).

[22] *See* Jonah Engel Bromwich, *Bresha Meadows, Ohio Teenager Who Fatally Shot Her Father, Accepts Plea Deal*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/us/bresha-meadows-father-killing.html (on file with CUNY Law Review); Mariame Kaba & Colby Lenz, *Bresha Meadows Returns Home After Collective Organizing Efforts*, TEEN VOGUE (Feb. 5, 2018), https://perma.cc/LEX5-RDHK. Trying children as adults is a common practice in the United States, especially when the child is Black. *See generally* Michael J. Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, 31 MINN. J.L. & INEQ. 331 (2013); Jeltsen, *supra* note 21.

[23] *See* Kaba & Lenz, *supra* note 22.

[24] *Id.*

[25] *See* Deanna Paul, *Murder Case Exposes Bail System's Flaws, Advocates for Abuse Victims Say*, WALL ST. J., https://www.wsj.com/articles/murder-case-exposes-bail-systems-flaws-advocates-for-abuse-victims-say-11600951548 (Sept. 24, 2020) (on file with CUNY Law Review).

did not.[26] Tracy was promptly arrested, charged with murder, and indicted by a grand jury.[27]

Marissa, CeCe, Bresha, Tracy, and so many Black survivors of gender-based violence are free today because of freedom campaigns that have demanded that their lives are worth saving and have pushed against the disparate implementation of self-defense laws. Tracy's family members, Survived & Punished New York organizers, pro bono lawyers, and other supporters developed a mass defense campaign that brought media attention to her case and garnered political pressure with the support of many more organizations.[28] After almost three years of fighting her case in and outside of the courtroom, the Manhattan District Attorney's Office finally dropped Tracy's murder charge.[29] As these harrowing stories show, we need to work towards a world in which Black women and girls who face abuse are never forced to experience even more ongoing abuse because of the criminal legal system.

This piece examines the recent struggle in New York City to free Tracy McCarter, a Black survivor of domestic violence who acted in self-defense to save her life, from prosecution and incarceration. The first section of this piece looks at Tracy's legal case and freedom campaign to highlight the ways that the criminal legal system harms survivors of violence and denies their right to self-defense. The second section details the power prosecutors have to reduce this unjust criminalization by declining to prosecute cases and dropping charges.

I. JUSTICE DELAYED: TRACY'S STORY

Content Warning: This is a first-person account that includes graphic descriptions of domestic violence and self-defense.

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[26] *Id.*

[27] Victoria Law, *A Judge Dismisses the Murder Charge Against a Domestic Violence Survivor*, NATION (Dec. 2, 2022), https://perma.cc/QPD7-VKHJ; *Survived & Punished: Meet Tracy McCarter, a Nurse Jailed, Then Cleared, for Stabbing Abusive Husband*, DEMOCRACY NOW! (Oct. 2, 2023), https://www.democracynow.org/2023/10/2/tracy_mccarter_domestic_violence_awareness_month.

[28] *See Stand With Tracy*, SURVIVED & PUNISHED N.Y., https://perma.cc/5UAZ-S5RR (last visited Apr. 26, 2023) (showing how the Stand With Tracy mass defense campaign included petitions, fundraisers, interviews, news articles, artwork, rallies, court support, and so much more).

[29] *See* Victoria Law, *Tracy McCarter Is a Case Study of the Abusive Carceral State*, NATION (Dec. 23, 2022), https://perma.cc/F8FD-4NED; Jonah E. Bromwich, *Judge Criticizes D.A. for Halting Prosecution of Woman in Husband's Death*, N.Y. TIMES (Dec. 9, 2022), https://www.nytimes.com/2022/12/02/nyregion/mccarter-case-dismissed-bragg.html (on file with CUNY Law Review).

I am a Black woman. I was arraigned the day after the March 2, 2020, death of my husband, James Murray, a white man, and charged with his second-degree intentional murder.[30] I am a miracle. Being a miracle is not a prize I won. It is a simple, hard truth that Black women like me, who are facing trial for the "murders" of white men, do not usually come away free.

I am middle-class, educated, and, unlike my husband,[31] have no criminal record of committing any prior violent acts. I firmly believe that had my husband been Black and I white, I would not have even been arrested. Only 2.9% of Black women accused of killing white men are ultimately not charged with a crime, in comparison to 13.5% of white women accused of killing Black men.[32] In other words, I was arrested just like 97.1% of women in my position who happen to have more melanin in their skin. [33]

My case was prosecuted by the Manhattan District Attorney's Office under two different district attorneys ("DAs"), Cyrus R. Vance Jr. and Alvin Bragg, for almost three years.[34] A mere ten days before the start of the trial, DA Bragg wrote a letter to the court requesting that the murder charge be dropped.[35] No one saw the dismissal coming. There aren't even statistics about that, so rarely does it happen. Like I said, a miracle.

DA Bragg stated in the letter to the court that he did not believe I had committed intentional murder.[36] Because of his reasonable doubt of the evidence to support the second-degree murder charge, he could not in "good conscious [sic]" go forward with the case.[37] All I could focus on was the misspelling of the word "conscience." This, followed by the DA's poorly written and barely adequate motions for dismissal,[38] was, for me, emblematic of all of my interactions with that office. It spoke to the

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[30] *See* People v. McCarter, 179 N.Y.S.3d 536, 538-39 (Sup. Ct. 2022); *see also* Victoria Law, *After Six Months on Rikers, a Nurse Stands Accused of Murder in a Case She Says Was Self-Defense*, GOTHAMIST (Sept. 9, 2020), https://perma.cc/W9RA-YQZC.

[31] Transcript of Bail Hearing on April 30, 2020 at 24-25, People v. McCarter, 179 N.Y.S.3d 536 (No. 0746).

[32] Lauren Gill, *Prosecutors Ignored Evidence of Her Estranged Husband's Abuse. She Faces 25 Years in Prison for Murder.*, INTERCEPT (May 24, 2021, 1:20 PM), https://perma.cc/W4Z2-XU2U.

[33] *See id.*

[34] *See* Bromwich, *supra* note 29.

[35] Letter from Alvin L. Bragg Jr., Dist. Att'y, N.Y. Cnty., to Hon. Diane Kiesel, Acting Sup. Ct. Just., N.Y. State Sup. Ct. (Nov. 18, 2022), https://perma.cc/2R3B-Q4DY [hereinafter Letter to Hon. Diane Kiesel]. *See also* Bromwich, *supra* note 29.

[36] Letter to Hon. Diane Kiesel, *supra* note 35.

[37] *Id.*

[38] People v. McCarter, 179 N.Y.S.3d 536, 540-42 (Sup. Ct. 2022).

egregious level of incompetence and sloppiness underlying the entire case leveled against me.

Still, it took nearly three years to secure my freedom.[39] It also took the help of Survived & Punished New York—a coalition of volunteers committed to ending the criminalization of survivors of domestic and sexual violence[40]—nine lawyers and the financial resources of their four law firms,[41] mass media coverage,[42] political pressure,[43] the help of other organizers,[44] and public outcry.[45] It scares me that it took all those combined resources to get *one* Black woman free.

A. The Night of My Husband's Death: Retraumatization at the Hands of the State

March 2, 2020, started as a normal workday. I was a nurse in the inpatient rehab unit of the NewYork-Presbyterian/Weill Cornell Medical Center. The panic of the COVID-19 pandemic had not yet hit, though there were cases already in New York City.[46] Nearing the end of my shift, I got the first phone call. I recognized that it was from a LinkNYC kiosk, a device developed by the city to provide a network of citywide public Wi-Fi and to replace the pay phone system.[47] Unfortunately, these calls to me had become a regular occurrence. It signaled the worst trouble.

My estranged husband, James Murray—who preferred to be called "Jim"—suffered from alcoholism. He had recently completed thirty days

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[39] *See* Tracy McCarter, *As a Black Woman Accused of Killing a White Man, I Was Never Innocent Until Proven Guilty*, TRUTHOUT (Oct. 1, 2023), https://perma.cc/JG99-PM9H.

[40] *See* SURVIVED & PUNISHED N.Y., *supra* note 28; *End the Criminalization of Survival*, SURVIVED & PUNISHED N.Y., https://perma.cc/4848-V8YT (last visited Apr. 15, 2023).

[41] *McCarter*, 179 N.Y.S.3d at 538. *See also Dechert Helps Secure Dismissal of Murder Charges in NY Case*, DECHERT LLP (Dec. 7, 2022), https://perma.cc/M94B-7336**.**

[42] *See, e.g.*, Bromwich, *supra* note 29; Law, *supra* note 30; Paul, *supra* note 25.

[43] The political pressure included social media campaigns that encouraged DA Alvin Bragg to drop Tracy's charges. *See, e.g.*, #StandWithTracy #DropHerCharges, X, https://twitter.com/search?q=%23StandWithTracy%20%23DropHerCharges&src=typed_query&f=top (last visited Nov. 12, 2023). It also included general pleas from political figures like the head of the NAACP Legal Defense Fund at the time, Sherrilyn Ifill. Sherrilyn Ifill (@Sifill_), X (Sept. 10, 2020, 9:37 AM), https://perma.cc/7BUR-W2X9.

[44] *See, e.g.*, Color of Change (@ColorOfChange), X (May 19, 2022, 6:05 PM), https://perma.cc/P6WA-7EBV.

[45] *See, e.g.*, Tandy Lau, *Courthouse Rally, 21,000+ Signature Petition Urges D.A. Bragg to Drop Murder Charges Against Domestic Abuse Survivor Tracy McCarter*, N.Y. AMSTERDAM NEWS (Oct. 27, 2022), https://perma.cc/JVF5-8ZYQ.

[46] Juan Manuel Benitez, *A Year Ago, New York City Confirmed Its First COVID-19 Case*, SPECTRUM NEWS NY1 (Mar. 2, 2021 6:57 PM), https://perma.cc/B2VG-6BWR; Elizabeth Kim, *Manhattan Woman Is First Confirmed Case in New York State, Second Infected Person in U.S. Dies*, GOTHAMIST (Mar. 1, 2020), https://perma.cc/X3P7-9PE7.

[47] *Services: New Yorkers: LinkNYC*, N.Y.C. OFF. OF TECH. & INNOVATION, https://perma.cc/9RCV-C6A8 (last visited May 10, 2023).

of rehab at an inpatient facility in Connecticut. He also agreed to stay an additional thirty days at a sober living facility before returning to the city. Unfortunately, he had left a few days early, deciding to relocate to an Airbnb in New York City. By that time in the relationship, we were living separately. I had moved to my own apartment to be safe from him when he was drinking. His entire personality would morph when he was intoxicated. I referred to this as "Drunk Jim."

A call from a LinkNYC kiosk could only mean one thing: Jim had fully relapsed. I answered the phone. He asked for help. I told him I would not be available to help him that day. I was upset at him for leaving sober living early. I was disappointed that he was already drinking. I could hear Drunk Jim in his slurring words. I was annoyed, but I was also afraid of him. He had become increasingly violent while drinking.

After that first phone call, I tried to put Jim out of my mind. I went back to doing my work. But the phone would ring again. And again. At the third phone call, it became clear he was not going to leave me alone that night. I answered to tell him that I would help, but only to give him medicine and help him get back to sober living. He agreed. When I reached my apartment, Jim was already downstairs in front of my building. I hadn't planned for that. I wanted to have time to gauge if it was safe to allow him up. But he was outside of my building on the sidewalk. He had attacked me there before, so I made a quick decision to let him come up to get the Librium.[48]

We headed up the stairs. I unlocked the door to let us in. He took off his shoes and dropped his jacket to the floor. He immediately demanded money. Ignoring him, I went to grab the medicine he had agreed to take. I had learned to stay physically away from Drunk Jim, so I took as much space as I could get, but I didn't have much. My apartment was a tiny eight-foot-wide railroad-style space that was typical for Manhattan. I offered him the medication.

Jim then stated, "Give me money." I said, "Oh, hell no. I'm not giving you any money. You asked for help. I will give you medicine. You can sleep it off and go back to sober living tomorrow. That's it." He just kept repeating, "Give me money. Give me money." Then, Jim shambled past me, down the hall. He picked up my purse and tried to walk back past me in the hallway. I looped my arm through the longer strap dangling from my purse. He pulled at it. I pulled at it. We were fighting over my purse. I began screaming stuff like, "Help, help." "You're not taking my

[48] Librium is a central nervous system depressant used primarily to treat anxiety and withdrawal symptoms related to alcoholism. *Drugs and Supplements: Chlordiazepoxide Hydrochloride (Oral Route)*, MAYO CLINIC, https://perma.cc/8XC2-N4VM (Nov. 1, 2023).

purse." "Somebody, help me." "Get the fuck out." "You can't take my purse."

I wouldn't let go of the purse. He kneed me in the stomach. I'm not sure if he did it intentionally or if it just happened as part of the struggle. I doubled over. He let the purse go, but only to loop his arm around my neck from behind to put me in a chokehold. I was terrified. He had choked me many times before, usually when he thought I had something he wanted.

He squeezed tightly and would not let go. I tried to keep screaming. Deprived of air, I couldn't. I started panicking. *He is going to kill me. I'm about to die. Not again. I'm so stupid. He's going to kill me!* Jim wasn't saying anything. It was so fucking terrifying. He just kept squeezing. My body demanded that I fight. So I struggled against him. He increased the pressure. I started to pass out. When I began to slump, we lost our balance. A large floor-standing mirror, taller than us both, began to fall towards us. I put my hands up to stop it from falling; I think he did, too. When he let go, I was able to move away from him. He came away with the purse.

I started yelling again for help and for him to get out. *He has to leave. I can't let him keep attacking me.* I screamed and screamed at him to get out. No one came. I grabbed for a knife to scare him with. It was a bread knife with a blunt tip and serrated blade, but it was long. Very long. *I will scare him into leaving. It's worked before. He has to go.*

I held the knife up to him as I continued to scream for him to get out. He ignored my screams and ignored the knife. He rifled through my purse. He wasn't getting scared. He would not leave. *Is he even noticing it? Why isn't this working?* He took my phone from the purse, then my keys. But he did not find the money he was looking for. He advanced toward me, the knife at his throat now. It made contact with him, but he still didn't seem to notice or to care. *Oh my God, this isn't working. Oh, fuck, I have to make him leave. Please just go. I can't scare him. Why won't he go? No one is coming.* "Give me money."

I knew that if he reached me again, he was going to kill me. More scared than I had ever been in my life, I decided the key to surviving was just to give him what he wanted. I say, "Okay, okay. I'll give you money." I had decided to give him my wallet. I backed up and put the bread knife back in the drawer. But when I reached for the wallet in my scrub pants' pocket, where I always kept it during work, it was not there. So, I desperately patted my scrub top pockets, praying to find it. It wasn't in either pocket of my scrub top either. He looked pissed.

I started to beg. I say, "Oh my god, Jim, I don't know where it is. Please. I swear. I don't know." I whine, "Just go, PLEASE!" He said something I couldn't entirely understand, something that sounded like "fucking lie" or "fucking liar," and with his face balled up with rage,

forehead vein bulging, he launched himself towards me again. He was coming at me, and he was going to kill me. I knew it. I was about to die. I reacted. I reached behind me and blindly grabbed for another knife from the drawer. I held it out towards him. I could not let him touch me again. If he did, I was going to have to use it. *Please stay away. Don't do this. I can't let you. Please, no.* When he lurched toward me, though, he stumbled. It happened so fast.

The knife entered his upper shoulder/chest area, but I didn't see it enter. I felt like my eyes were closed. I will never forget the moment it penetrated. I wish I could forget how it felt. But I can't. It was so soft that I remember thinking it couldn't be that bad. My brain was racing with thoughts but was also slow to catch up. I could not have told you at that moment exactly what happened. It would be days before I remembered some of it. Trauma is strange.

I still don't have much memory of the 911 call, just that I made it. As seen on the body camera footage, within 10 minutes of calling, my home was swarmed with police officers.[49] Most of the officers entered my apartment, but several stood at the entrance.[50] I was placed in handcuffs by the first cops to arrive on the scene.[51] I was questioned by the officers in my home, while Jim was on the floor next to me, dying.[52] I was never read my *Miranda* rights.[53] Police were blocking the door. I was not free to leave.[54] The police pulled me away from Jim. They prevented me from performing life-saving measures.[55] When I saw them doing things wholly inadequately or outright wrongly, I screamed at them to keep applying compression to the wound—the only thing I thought would prevent Jim from bleeding out—until Emergency Medical Services arrived.[56]

While I was traumatized and could not fully explain what happened, I did tell the police that Jim was attacking me. They had every reason to believe I acted in self-defense.[57] They came in response to (1) a 911 call from a neighbor who heard me screaming for help[58] and (2) my own 911

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[49] *See* Omnibus Motion at 6, People v. McCarter, 179 N.Y.S.3d 536 (Sup. Ct. 2020) (No. 0746).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 7.

[53] *Id.*

[54] *Id*. at 6-7

[55] *See id*. at 7, 9.

[56] Tracy was seen applying pressure to Jim's chest wound when the police arrived. *See* Omnibus Motion, *supra* note 49, at 9; Victoria Law, *Attorneys Raise Body Camera Evidence Questions in Manhattan "Self-Defense" Murder Case*, GOTHAMIST (Nov. 20, 2021), https://perma.cc/7QVK-Y2A8.

[57] *See* Omnibus Motion, *supra* note 49, at 7, 9-11, 13; *see also* Law, *supra* note 30.

[58] Omnibus Motion, *supra* note 49, at 9.

call seeking emergency medical assistance for Jim, who I explained had attacked me.[59] But this did not matter. I was arrested, and Jim was transported to Mount Sinai Morningside hospital (formerly St. Luke's Hospital), where he was pronounced dead.[60] The Assistant District Attorney ("ADA") assigned to my case would later say in court that I never claimed to the police that it was self-defense.[61] I do not know *what* body camera footage she was watching. This was only one of the lies told by the State.

B. The Prosecution of My Case: The House of Cards Collapses

The State prosecuted my case by relying on a fabricated quote that purportedly admitted my guilt and by withholding evidence of my self-defense justification. The case would go through many judges, ending up in the court of Justice Diane Kiesel after Justice Melissa Jackson reportedly announced her retirement.[62] In her dismissal ruling, Judge Kiesel pointed to a series of statements made by NYPD officer Samantha Cortez and my neighbor, emphasizing that I failed to "deny" or "correct" them.[63] In ADA Sara Sullivan's applications for at least three search warrants, she included an officer's statement purporting that I had uttered the following quote at the scene: "I let him stay the night. I tried to help him, he tried to take my purse, and I stabbed him in the chest."[64]

Detective Cruz, one of the two detectives assigned to my case, also swore that I made this fabricated quote to Cortez and that this false statement was necessary to provide probable cause to arrest and prosecute me.[65] The glaring problem here: I never actually made this statement. It was cobbled together, removed from the fullness of my actual statements, and lacking all context. The result is total fiction.

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[59] *Id.* at 9.

[60] *Id.* at 7.

[61] *See* Affirmation of the People's *Clayton* Motion at 14, People v. McCarter, 179 N.Y.S.3d 536 (Sup. Ct. 2020) (No. 0746). The motion was filed under Section 210.40 of New York's Criminal Procedure Law and is known as a *Clayton* motion after a 1973 New York case, *People v. Clayton*, 342 N.Y.S.2d 106 (App. Div. 1973). *See also* Transcript of Bail Hearing on April 30, 2020, *supra* note 31, at 27; Victoria Law, *"The Worst Abuser You Could Ever Have,"* NATION (July 18, 2022), https://perma.cc/8H38-KCZH (describing ADA Sullivan's claim that Tracy "stabbed" Jim and the prosecution's theory of the case as jealousy, not self-defense).

[62] *See McCarter*, 179 N.Y.S.3d at 538. At the time of publishing this Article, Judge Melissa Jackson is still on the bench. *See Courtroom Directory*, N.Y. STATE UNIFIED CT. SYS. (last visited Nov. 7, 2023), https://perma.cc/3PKP-Z53S.

[63] *See McCarter*, 179 N.Y.S.3d at 544.

[64] *See* Law, *supra* note 56.

[65] Complaint and Jury Demand at 2, 14-15, McCarter v. City of New York, No. 23-cv-9562 (S.D.N.Y. Nov. 2, 2023).

Unusually, I had a preliminary hearing before being indicted by a grand jury because the COVID-19 pandemic had closed the courts to all jury trials and hearings.[66] ADA Sullivan relied on this purported quote to make her case against me.[67] When my attorneys asked about the differing wording of this alleged quote on ADA Sullivan's search warrant applications, ADA Sullivan told them that she had to "'refresh' the officer's memory."[68] Body camera footage shows that I never made that statement to any of the officers present.[69]

In the approximately seven months that I was confined at Rikers, ADA Sullivan obtained additional evidence of my innocence, none of which she disclosed to the grand jury. After my arrest, but before ADA Sullivan presented her case, the prosecution learned that Jim was intoxicated and had a history of domestic violence against me. The prosecution discovered:

- A June 15, 2018 email sent after Jim pulled my hair and punched me, in which he "apologize[d] profusely for hitting me."[70] He wrote: "I can't live with myself hitting you . . . . I can't stop crying and I'm a terrible man."[71]
- A June 16, 2018 text message exchange with my friend in which I described my fear of Jim because he had punched, kicked, and tried to choke me.[72]
- An August 22, 2019 video recording in which Jim is screaming in my face, pulling my hair, and choking me as I cry and beg him to stop;[73] I personally recall that this started because Jim demanded that I give him cigarettes, which I did not have.

The prosecution asserted that my digital communications and data were "not specific enough and did not demonstrate a meaningful pattern

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[66] *See McCarter*, 179 N.Y.S.3d at 539.

[67] *See* Law, *supra* note 56.

[68] *Id.*

[69] *Id.*

[70] Email from James ("Jim") Murray to Tracy McCarter (Jun. 15, 2018, 12:25:58 EDT) (on file with CUNY Law Review). *See also* Affirmation of the People's *Clayton* Motion, *supra* note 61, at 4; Omnibus Motion, *supra* note 49, at 13.

[71] Email from James ("Jim") Murray to Tracy McCarter (Jun. 15, 2018, 12:25:58 EDT) (on file with CUNY Law Review). *See also* Affirmation of the People's *Clayton* Motion, *supra* note 61, at 4; Omnibus Motion, *supra* note 49, at 13.

[72] *See* Affirmation of the People's *Clayton* Motion, *supra* note 61, at 4-5; Omnibus Motion, *supra* note 49, at 14.

[73] Video Recording (Aug. 22, 2019) (on file with CUNY Law Review); *See also* Omnibus Motion, *supra* note 49, at 14.

of domestic violence."[74] In reality, I believe that they were never interested in the truth and were simply working to get a conviction at any cost.

C. The Aftermath: Being Left to Rebuild My Life

My life might have ended that night, but that did not matter to either the cops who arrested me or to the DA's office that went on to prosecute and retraumatize me. I was incarcerated for almost seven months at Rikers Island, one of the most notoriously dangerous, abusive, and corrupt jails in the country.[75] One of the worst things I remember was being forced to submit to a full body strip and cavity search before and after *computer* visits with my family—up to six strip searches a week for the three allotted video visits. There were other random strip searches for contraband on top of those.

I was not allowed to grieve the loss of my husband. Until the Manhattan DA dropped the case, no one would even tell me where he was buried. I first met Jim when he was in recovery. I did not learn that he had a history of alcoholism until about a year into our relationship. I cared deeply for the person he was; the person I met and fell in love with. We were together for more than three years before alcohol reclaimed him. It was complicated, but I deserved to be allowed to properly grieve him.

Because I was the victim of his abuse and the subsequent abuse by the State, I was also forced to miss the births and newborn months of my first two grandchildren. My daughters were forced to birth their children without the care and support of their mom, who happens to also be a nurse. My father's sister and mother, my aunt and grandmother with whom I spent many childhood summers, also died while I was being prosecuted. I was not allowed to attend either funeral. Those are losses for which there are no do-overs.

I now am left with the task to rebuild a tattered life. While there are laws that can help protect a convicted person's right to work and to be educated in the state of New York, these laws paradoxically fail to protect some people who, like me, have been arrested but not yet found guilty. The New York City Human Rights Law did bar my hospital employer from firing me, yet it allowed my employer to legally place me on *unpaid* leave for three years.[76] With no income, the effect was nearly the same as being let go.

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[74] *See id.* at 14-15.

[75] *See* Bromwich, *supra* note 29. *See generally* JOCELYN SAMUELS ET AL., U.S. DEP'T OF JUST., CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND (2014), https://perma.cc/A32E-LEEM.

[76] *Fair Chance Act: Fact Sheet for Employees*, N.Y.C. COMM'N ON HUM. RTS., https://perma.cc/RQC7-RRSM (last visited May 10, 2023). While the Fair Chance Act

I applied for and was offered two different nursing jobs while awaiting trial. Both offers were pulled when their background checks on me came back showing my arrest, but no conviction. Because I am a nurse, the law does not protect my right to work in my field. Columbia University entered a complaint of gender-based violence on my school record, and I was considered a persona non grata on campus. This paused my education until I made the argument that my classes were online and I thus put no other students at risk. Even though I and people like me are still innocent under the law, this innocence does not prevent the state-sanctioned suffering inflicted. It is wrong.

My job and the university that I attended as a student treated me as other institutions typically do after a person is arrested: as guilty as a person who has been convicted. As a result of this wrongful prosecution, my finances are decimated. I no longer have the savings to buy an apartment. I no longer have a retirement fund; modest as it was, it is now non-existent. I can try to sue the city for malicious prosecution, but prosecutors employed by the Manhattan DA's office have the benefit of prosecutorial immunity.[77]

Yet the reality is, I am one of the few lucky ones. I have had so much support, so much care from my community. I have a family that is still intact and strongly bonded. I successfully fought back against the school and completed my master's degree at Columbia University. I have returned to full-time work as a nurse at NewYork-Presbyterian/Weill Cornell Medical Center. I am a miracle. I Am Free.[78]

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prohibits employers from taking an adverse employment action based on a pending legal case, it permits employers to place an employee on unpaid leave. *See* NYC *Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History*, N.Y.C. COMM'N ON HUM. RTS, https://perma.cc/K3Q5-DP8N (July 29, 2021).

[77] *See generally* Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 HOFSTRA L. REV. 315, 322-24 (2021).

[78] On November 2, 2023, Tracy filed a civil rights claim against the NYPD alleging wrongful arrest and prosecution. Complaint and Jury Demand, *supra* note 65.

II. SURVIVORS OF GENDER-BASED VIOLENCE HAVE A RIGHT TO DEFEND THEIR LIVES

A. Arrest, Prosecution, and Incarceration Retraumatize Survivors of Gender-Based Violence

The state over-prosecutes and abuses those it views as having no selves to defend and abandons them once incarcerated.[79] Close to 60% of incarcerated women in state prisons in the country are survivors of physical or sexual abuse.[80] In addition, many gender-based violence survivors have experienced multiple forms of physical and sexual abuse in childhood and in adulthood.[81] Black women in New York City, like Tracy, die due to intimate partner violence at almost two and a half times the rate of white women.[82] Black women in general are also nearly two times more likely than white women to be incarcerated due to policing and criminalization.[83] The criminal legal system systematically punishes survivors of gender-based violence for protecting themselves and their children.[84] The State criminalizes survivors "for self-defense, failing to control abusers' violence, migration, removing their children from situations of abuse, being coerced into criminalized activity and securing resources needed to live day to day while suffering economic abuse."[85]

The use of more policing, imprisonment, and surveillance does not protect survivors. Instead, these approaches truly function as violent tools of control over survivors.[86] The State often prosecutes and retraumatizes survivors of gender-based violence who already have enormous trauma

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[79] Mariame Kaba, *Black Women Punished for Self-Defense Must Be Freed from Their Cages*, GUARDIAN (Jan. 3, 2019, 6:00 AM), https://perma.cc/CC32-VK7E.

[80] *See* ACLU & Georgetown Univ., *Prison Rape Elimination Act Of 2003 (PREA): Georgetown and ACLU Comment: Proposed Rule, National Standards to Prevent, Detect, and Respond to Prison Rape*, ACLU (Apr. 4, 2011), https://perma.cc/89CU-Q2VX (explaining that "as many as 94% of certain female prison populations . . . have a history of physical or sexual abuse").

[81] *See* ALISA BIERRIA ET AL., SURVIVED & PUNISHED, DEFENDING SELF-DEFENSE: A CALL TO ACTION BY SURVIVED & PUNISHED 7, 10 (2022), https://perma.cc/4MZ2-7S2K.

[82] *See* N.Y.C. DOMESTIC VIOLENCE FATALITY REV. COMM., N.Y.C. MAYOR'S OFF. TO END DOMESTIC & GENDER-BASED VIOLENCE, 2022 ANNUAL REPORT 6 (2022), https://perma.cc/7U7Z-FXE2.

[83] *See Criminal Justice Fact Sheet,* NAACP, https://perma.cc/WYT6-BLRV (last visited May 10, 2023).

[84] BIERRIA ET AL., *supra* note 81, at 10. *See generally* Kaba, *supra* note 79. Furthermore, Failure to Protect laws are used to prosecute a caregiver who is aware of but fails to report child abuse. *See* Amanda Mahoney, *How Failure to Protect Laws Punish the Vulnerable*, 29 HEALTH. MATRIX 429, 431, 435-38 (2019). These laws are often effectively used to punish survivors of domestic violence and blame them for not escaping the abuse. *See id.*

[85] Kaba, *supra* note 79.

[86] *See* BIERRIA ET AL., *supra* note 81, at 3-4.

from having to defend themselves.[87] In these cases, police, prosecutors, and judges take on the role of the abuser. Then, incarceration itself may become a source of sexual violence.[88]

In Tracy's case, her husband attacked her and forced her to defend herself.[89] She then witnessed her husband die.[90] Without any time to process what happened, police officers restrained and questioned her.[91] Not long after that, she was incarcerated at the women's jail on Rikers Island.[92] Jail guards at Rikers subjected Tracy to strip searches, non-stop surveillance and control, and demeaning treatment.[93] Even though New York City otherwise released people who were incarcerated in light of the spread of COVID-19 in jails, judges repeatedly denied her bail during the height of the global COVID-19 pandemic despite the fact that she had an apartment and job in New York City.[94] The actions of prosecutors, judges, and other actors in the criminal legal system reflected how little they valued Tracy's life and how they effectively punished her repeatedly for saving herself.[95]

B. Self-Defense as a Justification for Use of Force

The need for a massive advocacy campaign for a Black woman domestic violence survivor to prevail against the odds in court suggests that the biases against Black women and survivors who act in self-defense

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[87] *See id.*

[88] *See id.* at 10.

[89] Complaint and Jury Demand, *supra* note 65, at 1-2.

[90] *Id.*

[91] *Id.*

[92] *See* Bromwich, *supra* note 29.

[93] *See generally* SAMUELS ET AL., *supra* note 75, at 3, 18, 20, 68 (describing "hundreds of surveillance cameras," strip searches, and other examples of demeaning treatment at Rikers among adolescent inmates and concluding that "the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers").

[94] *See* Transcript of Bail Hearing on April 30, 2020, *supra* note 31, at 3, 8; Transcript of Bail Hearing on March 14, 2022, at 5-6, People v. McCarter, 179 N.Y.S.3d 536 (Sup. Ct. 2020) (No. 0746). During the height of the COVID-19 pandemic, actors within the legal system worked to ensure the release of many incarcerated individuals. Tracy could have been released while awaiting her trial like so many others. *See generally* N.Y.C MAYOR'S OFF. OF CRIM. JUST., NEW YORK CITY JAIL POPULATION REDUCTION IN THE TIME OF COVID-19 (2020), https://perma.cc/ZC7R-DJYZ.

[95] *See* BIERRIA ET AL., *supra* note 78, at 7, 10; Kaba, *supra* note 79. When faced with punishment and abandonment by the State, survivor defense campaigns have been integral to providing emotional, financial, and other resources to individuals facing criminalization. *See generally* LOVE AND PROTECT & SURVIVED AND PUNISHED, #SURVIVEDANDPUNISHED: SURVIVOR DEFENSE AS ABOLITIONIST PRAXIS (2017). These campaigns have countered the harmful biases against domestic violence survivors in the criminal justice system and used media, direct action, and mass mobilization to ensure the release of numerous criminalized survivors. *Id.*

contributed to Tracy's prosecution. Societal acceptance of who is allowed to protect themselves from physical harm is often steeped in racial, gender, and class biases.[96] These biases impact the application of self-defense laws, which are often applied narrowly in situations of gender-based violence to exclude survivors from acquittal or mitigation.[97]

Self-defense is one of the oldest legal principles that justifies the use of force, including deadly force, in scenarios that would usually be criminalized as assault, battery, or homicide.[98] Homicide justified by self-defense can lead to an acquittal or a reduction in the charge from first- to second- or third-degree murder, or from murder to manslaughter.[99]

The specific definitions of and exceptions to self-defense vary by state.[100] For example, New York Penal Law Section 35.15 states:

> A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person . . . .[101]

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[96] *See, e.g.*, Light et al., *supra* note 12, at 60 (explaining how "'Black women have long been excluded from dominant perceptions of vulnerability,' with severe consequences when they try to invoke self-defense laws" (quoting Benz, *supra* note 12)).

[97] In this section, we are not arguing for an expansion of laws and policies around self-defense but simply providing an overview of the principle of self-defense to highlight the disparities in application. *See generally* Denise Crisafi, No Ground to Stand Upon?: Exploring the Legal, Gender, and Racial Implications of Stand Your Ground Laws in Cases of Intimate Partner Violence 16-27, 29-31 (2016) (Ph.D. dissertation, University of Central Florida) (describing ways in which victims of intimate partner violence are held to a different legal standard compared to those who are not victims of intimate partner violence during the application of Stand Your Ground laws).

[98] *See* V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1236 (2001); *Criminal Law 5.2 Self-Defense*, UNIV. OF MINN. LIBRARIES PUBL'G ELEARNING SUPPORT INITIATIVE, https://perma.cc/7GZM-GJAZ (last visited Nov. 7, 2023).

[99] *See* Univ. of Minn. Libraries Publ'g eLearning Support Initiative, *supra* note 98. Murder laws and the meanings of various degrees of murder vary by state. *Id.* For instance, in New York, a second-degree murder charge does not equate to lesser culpability than a first-degree murder charge. *See* N.Y. PENAL LAW §§ 125.25, 125.27 (McKinney 2023). They are effectively the same charge except that a first-degree murder charge applies when protected persons, like a police officer, are the victims. *See* N.Y. PENAL LAW §§ 125.25, 125.27 (McKinney 2023).

[100] *Self-Defense and 'Stand Your Ground,'* NAT'L CONF. OF STATE LEGS., https://perma.cc/4BVD-EJWY (Mar. 1, 2023). There are exceptions to self-defense that vary by state. *Id.* This section provides a brief overview of the principle of self-defense without diving into the detailed state laws.

[101] *See* N.Y. PENAL LAW § 35.15(1) (McKinney 2023).

Many states, including New York, also have the "castle doctrine" or SYG[102] laws that expand the right to use deadly force as a means of self-protection.[103] The castle doctrine allows individuals who are attacked within their homes or surrounding property the right to use force without first having to retreat from the threatening or violent altercation.[104] Even though there is no duty to retreat under the castle doctrine, women and gender nonconforming survivors of abuse by their partners or cohabitants are often prejudiced in this analysis because law enforcement holds them to a higher standard.[105] There is still an expectation within society for domestic violence survivors to leave their home if they are being abused—a deviation from the castle doctrine's standard.[106]

Tracy had a complete justification defense supported by facts and forensic evidence, but she was still criminalized.[107] Tracy was in her home and asked her husband, from whom she was separated, to leave multiple times while he attempted to take money from her.[108] Based on past incidents of violence and his recent attempt to drunkenly strangle her, Tracy reasonably believed that she was in danger of a serious injury or death.[109] She used reasonable force by holding a knife to scare her husband away

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[102] SYG laws expand the "castle doctrine" to include public places outside the home. *See* Ahmad Abuznaid et al., *"Stand Your Ground" Laws: International Human Rights Law Implications*, 68 U. MIAMI L. REV. 1129, 1130 (2014); *see, e.g.*, People v. Aiken, 828 N.E.2d 74, 77-78 (N.Y. Ct. App. 2005) (explaining that "our current statutory recognition of the castle doctrine in Penal Law § 35.15 reaffirmed New York's traditional self-defense principles. If the attack occurs in the dwelling, a defender need not retreat but may use reasonable force to repel it") (internal citation omitted).

[103] Over thirty states have passed SYG laws that eliminate the duty to retreat prior to using force. AM. BAR ASS'N, NAT'L TASK FORCE ON STAND YOUR GROUND LAWS, FINAL REPORT AND RECOMMENDATIONS 2 (2015); *see, e.g.*, N.Y. PENAL LAW § 35.20(2)(3) (McKinney 2023).

[104] Cristina G. Messerschmidt, *A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence*, 106 J. CRIM. L. & CRIMINOLOGY 593, 593 (2016).

[105] *See, e.g.*, Jenny Kutner, *Stand Whose Ground? How a Criminal Loophole Gives Domestic Abusers All the Rights*, SALON (Oct. 16, 2014), https://perma.cc/DXG9-CUUN (describing how South Carolina prosecutors appealed a judge's decision to grant a Black woman, Whitlee Jones, immunity in the murder of her abusive boyfriend based on the state's SYG law, arguing that the law "does not apply to housemates in episodes of domestic violence").

[106] Messerschmidt, *supra* note 104, at 617 (asserting that "[i]n other words, while men, whose violent confrontations inside the home are likely to involve strangers, are allowed to stand and fight, women, whose violent confrontations inside the home are likely to involve cohabitants, are effectively expected to retreat").

[107] *See* Affirmation of the People's *Clayton* Motion, *supra* note 61, at 6-13.

[108] *See id.* at 12-13.

[109] *See* Omnibus Motion, *supra* note 49, at 23-24.

from her[110] and immediately administered first aid to him after he was wounded.[111]

Nonetheless, in cases of gender-based violence like Tracy's, there is always a focus in the legal analysis on whether the danger was imminent and whether an objective party would believe the force used was necessary in the situation.[112] When a prosecutor, judge, or juror makes these "objective" assessments, personal biases based on societal norms can influence decisions.[113] These biases include misconceptions that undermine a survivor's experiences and fear.[114]

III. PROSECUTORS HAVE THE POWER TO REDUCE THE CRIMINALIZATION OF SURVIVORS OF GENDER-BASED VIOLENCE

Upholding the carceral system is inherent in the role of prosecutors. Even so-called "progressive"[115] prosecutors work within the carceral system framework and often fail criminalized survivors of gender-based violence. In numerous jurisdictions in the United States, prosecutors and judges generously apply self-defense laws "to white men who feel threatened by men of color" but "very narrowly to women and gender nonconforming people."[116] This is especially applicable for women and gender nonconforming people of color who seek to protect themselves in domestic violence and sexual assault cases.[117]

A. Prosecutorial Failures in Tracy's Case

From the beginning, the prosecutorial decisions of the ADA assigned to Tracy's case signaled that she did not believe Tracy's experiences as a survivor. Due to an election, two different DAs prosecuted Tracy, but the

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[110] *See* Affirmation of the People's *Clayton* Motion, *supra* note 61, at 12. Mr. Murray tripped and fell onto the knife; both the prosecution's medical examiner and the defense's medical expert agreed that the knife then moved through his body unobstructed by muscle or bone. *Id.*

[111] *See* Omnibus Motion, *supra* note 49, at 6.

[112] *See generally* Crisafi, *supra* note 97.

[113] *See generally id.*

[114] Even when there is evidence of a pattern of domestic violence, a prosecutor may argue that the past violence was not "bad enough" to warrant fatal self-defense. *See id.* at 20.

[115] *See* Paul Butler, *Progressives Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1993 (2022).

[116] *See* Kaba, *supra* note 79; *see also* Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and Its Racial Implications*, DUKE CTR. FOR FIREARMS L. (Jan. 18, 2022), https://perma.cc/KA4U-SP2D (explaining that, in states with SYG laws, "homicides in which white shooters kill Black victims are deemed justifiable five times more frequently than when the situation is reversed") (internal citation omitted); Crisafi, *supra* note 97; Messerschmidt, *supra* note 104; Kutner, *supra* note 105; *see also* Benz, *supra* note 12.

[117] Kaba, *supra* note 79.

one ADA assigned to her case from arraignment to dismissal was Sara Sullivan, a white woman.

Under the supervision of Cy Vance, the Manhattan DA at the time, ADA Sullivan focused on maligning Tracy's character and keeping her incarcerated.[118] When she could have used her discretion for Tracy to be released during the height of the COVID-19 pandemic, she instead cast doubt on the history of domestic violence and trauma that Tracy experienced as a survivor.[119] On April 30, 2020, when arguing against Tracy getting bail, ADA Sullivan stated, "The defendant says he then put her into a chokehold, which I don't doubt. It's not entirely clear from the video, but at some point the phone goes down; so you can't see what's happening. It's quite possible he puts her into some sort of chokehold, but it would have been for a very short period of time."[120] In doing so, she dismissively disregarded Tracy's prior experiences of being abused by Jim while he was intoxicated and downplayed the danger of being in a chokehold.[121] The judge presiding over the hearing, New York City Supreme Court judge Diane Kiesel,[122] notably expressed concern about the prosecution's ongoing disregard of Tracy's long history as a domestic violence survivor by raising the likelihood that Tracy was "a victim of domestic violence" and therefore the altercation could be "part and parcel of a long history in which she felt some need to defend herself."[123] Yet Judge Kiesel did not correct ADA Sullivan's statement, subsequently denied bail, and sent Tracy back to Rikers.[124]

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[118] *See, e.g.*, Transcript of Bail Hearing on April 30, 2020, *supra* note 31, at 11-22. ADA Sullivan accused Tracy of being a jealous and revengeful wife, despite conceding that Tracy's ex-husband suffered from alcoholism and was violent towards Tracy. *Id.* at 15-18. ADA Sullivan stated that "[Tracy] would get information from the complainant about the different women he had seen and she would get upset about it." *Id.* at 18.

[119] *See id.* at 11. For example, during a bail hearing, ADA Sullivan said, "[Jim was] highly, highly intoxicated. . . . He's . . . invading her space and in her face . . . [but] he's not pushing her, he's not hitting her, he's nothing. . . . Towards the end of the video he does grab ahold of her hair and pull her head towards him." *Id.* at 19-20. ADA Sullivan made this statement while knowing that she could have instead used her discretion to release Tracy during the COVID-19 pandemic while Tracy awaited her trial like so many others. *See id.* at 11; N.Y.C MAYOR'S OFF. OF CRIM. JUST., *supra* note 94.

[120] Transcript of Bail Hearing on April 30, 2020, *supra* note 31, at 20.

[121] *Impact of Strangulation Crimes*, TRAINING INST. STRANGULATION PREVENTION, https://perma.cc/7V98-K2M2 (last visited Dec. 4, 2023) (explaining how "the odds of becoming an attempted homicide increased by about seven-fold for women who had been strangled by their partner") (internal citation omitted).

[122] *Judge Profile: Diane Kiesel*, N.Y.L.J., https://perma.cc/2E8K-8RGJ (last visited Apr. 17, 2023). Kiesel is the same judge who would later reluctantly affirm the decision to dismiss the murder charge against Tracy. *See* People v. McCarter, 179 N.Y.S.3d 536, 547 (Sup. Ct. 2022).

[123] *See* Transcript of Bail Hearing on April 30, 2020, *supra* note 31, at 29-30.

[124] *See id.* at 30.

ADA Sullivan also withheld evidence of Jim's pattern of domestic abuse and Tracy's possible self-defense claim from the grand jury.[125] When Tracy's attorneys confronted ADA Sullivan about the evidence that the almost six-month investigation produced, she stated that the evidence of Jim's alcoholism and violence "did not demonstrate a meaningful pattern of domestic violence."[126] Furthermore, ADA Sullivan claimed, Jim was "not drunk" or "not that drunk."[127] Tracy's defense lawyers filed a motion arguing that the grand jury hearing was not legally sufficient, partially due to the previously discussed statements that law enforcement falsely attributed to Tracy.[128] The judge at the time, Judge Melissa Jackson, denied the motion.[129] After targeted advocacy for her release and increased media attention—including a feature in the *Wall Street Journal*[130]—Tracy was released from Rikers.[131] However, instead of granting her bail and freedom of movement to seek treatment and see her family, ADA Sullivan fought for Tracy to be released on electronic monitoring on the condition that she not leave her apartment.[132]

B. Prosecutors Can Dismiss or Decline to Prosecute Cases[133]

Prosecutors have the power to "wreck lives, to put people on trial, and to lock them up—in short, to create dire outcomes."[134] This "far-reaching discretionary power includes virtually unreviewable decisions over which charges are pursued, whether to recommend bail, the offers to make in plea bargaining, and what sentences are recommended."[135]

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[125] Omnibus Motion, *supra* note 49, at 23-24; Law, *supra* note 56.

[126] Omnibus Motion, *supra* note 49, at 14-15; Gill, *supra* note 32.

[127] Omnibus Motion, *supra* note 49, at 15; Gill, s*upra* note 32.

[128] *See* Affirmation of the People's *Clayton* Motion, *supra* note 61, at 7, 14. This motion describes how "Officer Cortez testified, contrary to all the body camera footage, that Ms. McCarter 'was screaming "I stabbed him. You made me do it. Why did this happen."' *Id.* at 14.

[129] Law, *supra* note 56.

[130] Paul, *supra* note 25.

[131] Gill, *supra* note 32.

[132] *Id.*

[133] This section does not argue for the expansion of prosecutorial power or the need for more progressive prosecutors but rather advances that a reduction in prosecutions of survivors of gender-based violence is integral to reducing the scope of criminalization in the United States. It is important to note that, although prosecutors have broad discretion, there are cases in which the executive can override their power by removing them from cases or appointing special prosecutors. *See, e.g.*, Butler, *supra* note 115, at 1995-97.

[134] David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 483 (2016).

[135] Butler, *supra* note 115, at 1989; *cf.* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 166–67 (2007) (explaining some of the difficulties for the

However, there are also instances in which prosecutorial discretion can be used to reduce the harms of the criminal legal system. In an instance of such discretionary prosecutorial restraint, a district attorney in Albany, New York refused to prosecute Occupy protesters in *Soares v. Carter.*[136] When the judge in that case threatened to use the court's contempt powers to force the DA to prosecute the case, DA Soares refused to call witnesses at the trial.[137] The Court of Appeals held that a trial court could not insist that a district attorney prosecute a case or hold him in contempt for a failing to do so.[138]

After Tracy was indicted and released from Rikers, Manhattan DA candidates made largely hollow promises while campaigning about supporting domestic and sexual violence survivors. The DA candidates all learned about Tracy's case and responded by claiming that they supported survivors of gender-based violence.[139] Almost all of the candidates promised to not target survivors of gender-based violence for defending themselves against their abusers.[140] Despite the fact that most of the DA candidates pledged restraint in deciding to prosecute survivors who defend themselves in domestic violence cases, the domestic violence unit in the Manhattan DA's office[141] continued to relentlessly prosecute Tracy, a survivor of domestic violence.

Alvin Bragg, a Black man and former civil rights attorney from Harlem, won the Manhattan DA election and, once in office, vacillated between positions on Tracy's case. Before he became the Manhattan DA, he wrote in a September 2020 tweet, "I #StandWithTracy," followed by,

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public to hold prosecutors accountable, including having "very little information" about how prosecutors will exercise their discretion before they get elected into office).

[136] Soares v. Carter, 32 N.E.3d 390, 391 (N.Y. Ct. App. 2015). This case was cited in Judge Kiesel's dismissal of Tracy's case. People v. McCarter, 179 N.Y.S.3d 536, 546 (Sup. Ct. 2022). *Soares* makes clear that "[i]t is within the sole discretion of each district attorney's executive power to orchestrate the prosecution," and "[w]here the court assumes the role of the district attorney by compelling prosecution, it has acted beyond its jurisdiction." *Soares*, 32 N.E.3d at 392.

[137] *Soares*, 32 N.E.3d at 391-92; *see also* Robert Gavin, *Appeals Court Sides with Soares in Occupy Albany Case*, TIMES UNION (Jan. 23, 2014), https://perma.cc/S4JK-JVMP.

[138] *Soares*, 32 N.E.3d at 392.

[139] *See* Gill, *supra* note 32. In May 2021 reporting, out of nine DA candidates—eight Democrats and one Republican—Dan Quart was the only candidate who pledged not to prosecute domestic or sexual violence survivors for self-defense against their abusers. *Id.* Tali Farhadian Weinstein, a "Wall Street-backed former prosecutor," remarked, "[u]nder my leadership, victims will never be treated as targets." *Id.* Alvin Bragg, Eliza Orlins, Lucy Lang, and the only GOP candidate, Thomas Kenniff, stated that they would "carefully scrutinize cases of domestic violence before deciding whether to prosecute." *Id.*

[140] *Id.*

[141] *About the Office: Bureaus and Units*, MANHATTAN DIST. ATT'Y'S OFF., https://perma.cc/4J3S-FGL4 (last visited May 11, 2023).

"[p]rosecuting a domestic violence survivor who acted in self-defense is unjust."[142] However, when he entered office, DA Bragg continued to prosecute Tracy instead of dropping the murder charge against her.[143] Tracy's defense team started a campaign targeting Bragg and demanding that he follow through on his campaign promise to stand with Tracy and other survivors of gender-based violence.[144] Bragg's office eventually began the process of pressuring Tracy to not go to trial and accept a plea deal.[145] Around May 2022, the DA's office offered Tracy an *Alford* plea (a plea in which the defendant does not actually admit guilt and makes "no admission of wrongdoing or factual allocution[]").[146] The *Alford* plea would have required Tracy to plead guilty to the charges of manslaughter in the second degree and menacing in the second degree. After one year of good behavior, she could withdraw her felony plea to instead be convicted of the class B misdemeanor of menacing.[147] However, Judge Kiesel rejected this plea, stating that the proposed *Alford* plea was "illegal" because a guilty plea to second-degree murder must also include a plea to a class C violent felony offense, and therefore, neither second-degree manslaughter nor second-degree menacing was sufficient.[148]

Even once DA Bragg sought to be more lenient in prosecuting Tracy's case, Judge Kiesel continually declined to defer to the DA office's position. Eventually, in August 2022, DA Bragg moved to dismiss

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[142] Alvin Bragg (@AlvinBraggNYC), X (Sept. 10, 2020, 8:29 PM), https://perma.cc/43T6-AQYT; *see also* People v. McCarter, 179 N.Y.S.3d 536, 546 (Sup. Ct. 2022); Jessica Washington, *Tracy McCarter Walked Free from Murder Charges. A Public Campaign Helped Get Her Out*, ROOT (Mar. 3, 2023), https://perma.cc/U23S-SYQJ.

[143] Jessica Washington, *DA Alvin Bragg Still Won't Drop Charges Against Manhattan Woman Charged with Murder Who Says She Acted in Self-Defense*, CITY (Mar. 14, 2022, 5:50 PM), https://perma.cc/BU4H-KL2J.

[144] *Id. See also* Tamar Sarai, *Pressure Mounts for Manhattan District Attorney to Drop Charges of Criminalized Survivor Tracy McCarter*, PRISM (Mar. 29, 2022), https://perma.cc/X32U-H8E3.

[145] *See McCarter*, 179 N.Y.S.3d at 539; Letter to Hon. Diane Kiesel, *supra* note 35. Many people are coerced into plea agreement as a function of the criminal legal system. *See generally* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435 (2020) (discussing the history of plea bargaining, its prevalence in the criminal legal system, and its inherent coerciveness). Justice Kiesel asserted that the DA's attempt to persuade Tracy to accept a plea "should be . . . rare." *McCarter*, 179 N.Y.S.3d at 539 (internal quotations omitted). However, the Supreme Court has recognized that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

[146] *McCarter*, 179 N.Y.S.3d at 539. *See also* North Carolina v. Alford, 400 U.S. 25, 37-38 (1970); People v. Miller, 694 N.E.2d 61, 63-64 (N.Y. Ct. App. 1998).

[147] *McCarter*, 179 N.Y.S.3d at 539; Transcript of Calendar Call Before Hon. Diane Kiesel at 4, *McCarter*, 179 N.Y.S.3d 536 (No. 0746).

[148] *McCarter*, 179 N.Y.S.3d at 539.

Tracy's murder indictment "in the interest of justice."[149] DA Bragg's motion to dismiss the murder indictment also contained a request that his office be permitted to re-charge Tracy with a lower crime of manslaughter in the first degree (Penal Law § 125.20) via a superior criminal information ("SCI") instead of through an additional indictment.[150] Judge Kiesel again declined the prosecution's now-joint motion to dismiss, stating that the DA's motion was "wholly inadequate" because the prosecution provided "no rationale" for going to trial on SCI instead of presenting the charge of manslaughter in the first degree to a petit jury.[151] In other words, the judge essentially ruled that the DA's office had not provided sufficient reasoning for their discretionary downward departure in charges. As she had previously stated when refusing to accept Tracy's *Alford* plea, Judge Kiesel also denied the motion because there were "no compelling circumstances rendering continued prosecution of the indictment unjust."[152] When she denied the *Clayton* motion that would have ended Tracy's prosecution, Judge Kiesel stated, "The defendant may indeed be a survivor and her late husband may indeed have been a vicious, violent, and threatening man . . . . If so, the trial will bear that out."[153] By continually advancing Tracy's prosecution to trial in this manner, the court completely ignored the trauma Tracy continued to experience due to her prolonged and unnecessary prosecution.

Ultimately, DA Bragg had to take more resolute steps for Judge Kiesel to grant his motion to dismiss the murder charge against Tracy. In November 2022, when trial was set to begin, DA Bragg personally went into court to justify his desire to dismiss the murder charge against Tracy and answer the judge's questions.[154] Shortly after, Judge Kiesel finally accepted the Manhattan DA's request to dismiss the charge against Tracy based on *Soares*, where the court could not "overstep its bounds" with a prosecutor who affirmatively refused to go to trial.[155] Nonetheless, Judge

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[149] *McCarter*, 179 N.Y.S.3d at 540; *see also* Memorandum in Support of the People's *Clayton* Motion at 1, *McCarter*, 179 N.Y.S.3d 536 (No. 0746); Letter to Hon. Diane Kiesel, *supra* note 35.

[150] *McCarter*, 179 N.Y.S.3d at 540.

[151] *Id.*

[152] *Id.*

[153] Jocelyn Simonson, *Tracy McCarter and the Interests of 'Justice,'* N.Y.L.J. (Sept. 11, 2022, 9:30 PM), https://perma.cc/PE25-NAV4.

[154] Dean Moses, *DA Bragg Moves to Dismiss Murder Charges Against Tracy McCarter, Nurse Accused of Killing Husband in Self-Defense*, VILLAGER (Nov. 28, 2022), https://perma.cc/FY7A-NLAK; *see also McCarter*, 179 N.Y.S.3d at 541 (citing Letter to Hon. Diane Kiesel, *supra* note 35, at 1).

[155] *See McCarter*, 179 N.Y.S.3d at 546. Judge Kiesel's dismissal order highlighted a power struggle between prosecutors and the judiciary and acknowledged that "[a]bsent more than headlines and news stories, this court cannot overstep its bounds and demand that a duly-

Kiesel emphatically defended her position that continuing to trial "doesn't punish victims of domestic violence" and that a jury would have determined the case based on its merits.[156] Judge Kiesel also held that her dismissal did not preclude further prosecution of the same case and that the prosecution could still file a felony complaint of manslaughter in the first degree or seek an indictment for manslaughter in the first degree before the grand jury.[157]

The pushback the DA's office received from the court and the harm that Tracy faced over almost three years of prosecution could have been reduced if the Manhattan DA's office had simply never pursued an indictment in Tracy's case. Prosecutors can always decline to prosecute a case, even after bringing charges. For example, in July 2022, the Manhattan DA's office dismissed charges against Jose Alba prior to a grand jury indictment.[158] Mr. Alba, a bodega worker, killed a Black man named Austin Simon by stabbing him multiple times with a knife.[159] Mr. Alba claimed self-defense as a justification because Mr. Simon attacked him behind the bodega counter.[160] Mr. Alba was originally charged with second-degree murder, but the DA's office decided to dismiss the case because they could not prove beyond a reasonable doubt that the defendant was not justified in his use of deadly physical force.[161] In contrast to its actions in Tracy's case, the DA's office submitted a detailed legal memorandum explaining their investigatory process and how they came to the conclusion

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elected prosecutor step aside." *Id.* at 546. Judge Kiesel further stated that a "district attorney has the power to decline to prosecute a case, but that power is not unilateral." *Id.* at 541. She also suggested that the DA's office was forcing her to dismiss the case, stating that "[t]he court finds no compelling reason to dismiss the indictment but for the District Attorney's unwillingness to proceed." *Id.* at 547.

[156] *Id.* at 542-43.

[157] *Id.* at 547.

[158] There was public outcry for the Manhattan DA to not prosecute Mr. Alba, including from the New York City mayor and small business owners. *See* Gaby Acevedo, *Murder Charge Dropped in NYC Bodega Clerk 'Self-Defense' Stabbing Case*, NBC NEWS, https://perma.cc/EK2E-GTDS (July 20, 2022, 1:35 AM); Jeffrey C. Mays, *Adams Shows Support for Man Charged in Bodega Killing That Caused Outcry*, N.Y. TIMES (July 8, 2022), https://www.nytimes.com/2022/07/08/nyregion/bodega-stabbing-jose-alba.html (on file with CUNY Law Review). However, Mr. Alba's lawyer suggested that the DA was able to easily decline to prosecute Mr. Alba because the deceased, Mr. Simon, "aggressively cornered" Mr. Alba and was a "much younger and bigger" Black man. *Id.*

[159] Memorandum in Support of People's Motion to Dismiss at 1-2, People v. Alba, No. CR-017778-22NY (N.Y. Crim. Ct. July 19, 2022).

[160] *Id.* at 11.

[161] Motion to Dismiss, People v. Alba, No. CR-017778-22NY (Crim. Ct. July 19, 2022); Memorandum in Support of People's Motion to Dismiss, *supra* note 159, at 14-16 (dismissing second-degree murder charge against bodega owner who killed Austin Simon behind the counter).

that they would not prosecute Mr. Alba.[162] Ultimately, it is not enough for prosecutors to simply claim to "support survivors." True support requires that prosecutors use their discretion and power to dismiss and decline to prosecute these types of cases.

CONCLUSION

While it is a cause for celebration when a criminalized survivor is released from incarceration or acquitted, the outcome usually comes after years of traumatization and abuse by the criminal legal system. Therefore, more efforts need to be made to ensure that survivors never enter the criminal legal system or face prosecution for acts of self-defense in the first place. Self-defense laws do apply to instances of gender-based violence, but social norms and biases often lead to survivors not being believed about their fear or experiences with violence. Prosecutors are part of the system that harms survivors, but they have the power to reduce the criminalization of survivors of gender-based violence by declining to prosecute these cases and dismissing charges.

[162] Memorandum in Support of People's Motion to Dismiss, *supra* note 159, at 2-3, 14-16.