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A “Neo-feminist” Assessment of Rape and Domestic Violence Law Reform

Aya Gruber*

I. INTRODUCTION

For the past several decades, the slogan, “The personal is political,” has been the widespread rallying cry of American feminists.¹ Regarding my own beliefs on the state of women’s subordination, the personal really became the political after I practiced as a public defender in a specialized domestic violence court. Prior to that, I believed that women are universally united and similarly situated in their subordinate status to men. I bought into the idea that all abused women are trapped in a cycle of violence perpetuated solely by a cunning, socially empowered abuser. I adhered to the concept that equal rights and the use of criminal strategies to combat gender crimes are the logical solutions to the problem of sexism. Of course, law school injected a good amount of skepticism and nuance into my thinking. Nonetheless, I continued to regard protecting prototypical abuse victims by throwing the book at batterers as the highest moral calling.

Later, as an eager-eyed new public defender, I absolutely dreaded the prospect of defending horrible macho male abusers in domestic violence court. Soon, however, I began to dread domestic violence court for a host of other reasons. Not only did I see the rampant destruction of domestic relations, entrenchment of economic disempowerment, and mass

* Professor of Law, University of Colorado Law School. I would like to thank Shelley Cavalieri, Cyra Choudhury, Frank Rudy Cooper, Jorge Esquirol, Leigh Goodmark, Neil Gotanda, Jennifer Hendricks, Laura Kessler, Angela Onwuachi-Willig, Peggie Smith, and Ahmed White for their helpful inike toput. I would also I express my gratitude to the editorial staff at the *Journal of Gender, Race & Justice* and , in particular, Rachael Jensen for her thoughtful edit. This short article is adapted from a speech presented at the *Journal of Gender, Race & Justice’s* 2010 Symposium, *Race, Gender, and Class at a Crossroads: A Survey of Their Intersection in Employment, Economics, and the Law*. I discuss many of the ideas in this Article in greater detail in my forthcoming article, *Domestic Violence Law and Feminism’s Identity Crisis: Toward a “Neo-feminist” Legal Theory*.

¹ See Carol Hanisch, *The Personal is Political*, in NOTES FROM THE SECOND YEAR: WOMEN’S LIBERATION 76 (Shulamith Firestone ed., 1970) (originating the term).

incarceration of minority men, but I also saw distinctly anti-female ideologies at work. I observed government actors systematically ignore women's desires to stay out of court, express disdain for ambivalent victims, and even infantilize victims to justify mandatory policies while simultaneously prosecuting the victims in other contexts.² It seemed to me that feminist criminal law reform had become less about critiquing the state and society's treatment of women³ and more about allying with police power to find newer and better ways of putting men, who themselves often occupy subordinate statuses, in jail.⁴

These personal experiences informed my view of feminism when I later became a law professor. Concerned over feminists' embrace of the penal state and prosecutorial interventions, I produced critiques of feminist interventions like domestic violence mandatory arrest and prosecution policies.⁵ Because my scholarship is critical of some of the most "successful" feminist law reform interventions, some view it as anti-feminist. However, I never intended to reject or recede from feminism. Rather, I dub my analysis a "neo-feminist" critique. I agree with the feminist moral hierarchy dictating that non-violent relationships are better than abusive relationships but critique the practical operation of policies geared toward enforcing this

² For a narrative description of one of my experiences in domestic violence court, see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 742–47, 830–33 (2007) [hereinafter Gruber, *Feminist War*].

³ See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833–34 (1990) (“[L]abeling methods or practices or attitudes as feminist identifies them as a chosen part of a larger, critical agenda originating in the experiences of gender subordination.”).

⁴ See Gruber, *Feminist War*, *supra* note 2, at 742–47 (expressing this view); *infra* note 111 (discussing disproportionate arrest and prosecution of minority men under reformed domestic violence laws).

⁵ See generally *id.*; see also Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 653 (2009) [hereinafter Gruber, *Rape, Feminism*] (“At this particular moment, feminists ought to be consistent in critiquing the enormity and inhumanity of our criminal justice system, as well as its flawed premises. Women should not ‘walk the halls of power’ in the criminal justice system but should rather begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy-reinforcing criminal system that is unable to produce social justice.”) (footnotes omitted).

hierarchy through the use of police power.⁶ Moreover, I accept the basic feminist premise that women benefit from sexual, economic, and social agency but reject that increased policing and prosecution of gender-based crimes within the current U.S. criminal justice structure produces this benefit. To me, “neo-feminism” is an appropriate name for this type of scholarship because the term signifies a commitment to women’s issues specifically⁷ and applies fittingly to analysis that responds to problems with past feminist interventions by utilizing novel anti-subordination arguments.⁸

The purpose of this short Article is to place my critique of certain gender crime reforms and similar critiques squarely within the larger category of feminist legal theorizing. In fact, this Article seeks to make the case that recent feminist crime-control efforts actually represent a break from feminism’s largely progressive agenda. To that end, this Article discusses the alliance

⁶ See *infra* notes 84–102 and accompanying text (critiquing mandatory domestic violence arrest and prosecution policies).

⁷ See Martha L.A. Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL’Y 349, 359 n.21 (1995) (maintaining that “[i]n a world in which gender is more than semantics, feminist legal theory cannot be gender-neutral” but “must be woman-centered, gendered by its very nature”).

⁸ When using the term “neo-feminism” at conferences, I often receive comments about possible negative connotations of the term. In fact, many scholars who tend to agree with the basic premises of neo-feminism, which will be described later in the article, feel “uncomfortable with the term.” It is true that the prefix “neo” is often used by critics to describe not just a new, but a radicalized and dangerous form of an already negative movement, for example, “neo-Nazi,” “neoconservative,” “neoliberal.” However, this is not always the case. The term “neosoul” movement has come to describe a very positive evolution in the soul and R & B musical genre. See Ben Ratliff, *Out of a Rut and into a New Groove*, N.Y. TIMES, Jan. 23, 2000, <http://www.nytimes.com/2000/01/23/arts/music-out-of-a-rut-and-into-a-new-groove.html?scp=1&sq=&st=nyt> (describing “neosoul” artists as the “antidote to the sameness problem: their records are more well-rounded, more musicianly, more complete”). Another example comes from contemporary international law scholarship, where the term “neoconstitutionalism” signifies a “post-positivist” view of constitutionalism in which constitutions become “the pathways through which moral values migrate from the ethical to the legal world.” Luis Roberto Barroso, *The Americanization of Constitutional Law and Its Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World*, 16 ILSA J. INT’L & COMP. L. 579, 586–87 (2010). “Neo-feminism,” as I am using it, bears no relation to earlier usages of the term in the legal literature, which signified a form of cultural feminism. See, e.g., Mary Ellen Gale, *Unfinished Women: The Supreme Court and the Incomplete Transformation of Women’s Rights in the United States*, 9 WHITTIER L. REV. 445, 465 (1987) (calling “neofeminists” “self-styled, pro-family, born-again feminists who criticize the traditional feminists for seeking to integrate women into a man’s world—believe that most women’s priorities do center around home and family life, and that the law properly provides special benefits for women workers because of their special role as mothers”) (footnotes omitted).

between feminism and crime-control ideologies and how an initially progressive set of ideas ended up bolstering conservative ideologies regarding social disorder and undergirding a highly authoritarian, ubiquitous governance structure—the criminal justice system. The Article then turns to the critique of feminist criminalization strategies in an effort to demonstrate that questioning such tactics can inure to the benefit rather than detriment of women victims. Finally, it will conclude with some formative remarks on “neo-feminist” scholarship in general.

II. THE TRAJECTORY OF FEMINIST CRIMINAL LAW REFORM

Among criminal law scholars, the common wisdom is that the U.S. penal system is, in many ways, broken.⁹ Especially for progressives, the state of American penal law is intolerable.¹⁰ Civil libertarians assert that the criminal justice system treats defendants unfairly by inadequately protecting their individual rights.¹¹ Understanding the limits of the liberal critique,¹² race scholars have set forth many arguments that pinpoint the myriad of ways in

⁹ See J.C. Oleson, *The Punitive Coma*, 90 CALIF. L. REV. 829, 830 (2002) (“Throughout the last twenty years, the American rate of incarceration has grown dramatically. More than two million people are currently held in American prisons and jails.”); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007) (observing that “the United States leads the world by imprisoning 750 people out of every 100,000 citizens, while almost every European country ranges between 100 and 200”).

¹⁰ See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225–26, 228–233 (2007) (discussing the various critiques of U.S. criminal law policy); see, e.g., David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455 (2001) (criticizing penal severity in the United States); David Rudovsky, *A Closing Keynote: A Comment on Mass Incarceration in the United States*, 11 U. PA. J. CONST. L. 207, 207 & *passim* (2008) (objecting to America’s “era of mass incarceration”).

¹¹ See, e.g., Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783 (1997); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993); Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995); George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169 (2005).

¹² Rights-rhetoric does little to address the socio-cultural, economic, and racial conditions that make certain groups particularly vulnerable to police power. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058–59 (1982) (asserting that legal decisions cannot be “rationally justified” by the “inherent logic of rights”).

which conscious and unconscious racism condition the modern American carceral regime.¹³ Left scholars have also chimed in with a more Marxist assessment of criminal justice as reinforcing and reflecting the economic oppression of the lower classes.¹⁴

While progressive civil libertarians, critical race theorists, and left scholars have voiced concerns over the monolithic and authoritarian U.S. criminal justice system, another powerful progressive group—feminists—have been noticeably absent from this critique. Feminists rather tend to regard the criminal system as an effective and desirable method of ending gender-based violence.¹⁵ Today, feminist reformers have been very successful in changing the dynamics of the criminal system regarding rape and domestic violence. Changes in rape laws, like rape shield statutes and affirmative consent doctrines, seek to make it easier to prosecute rape cases and to

¹³ See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (suggesting that jury nullification can temper the criminal justice system's disproportionately negative effects on black communities); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 31–37 (1998) (observing that prosecutorial discretion is affected by unconscious racism); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1275–76 (2004) (“For the most part, the data consistently show disproportionate searches of African-American and Hispanic motorists in relation to their estimated representation on the road.”); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1006 (2010) (stating that “the use of racial profiling by law enforcement authorities in the United States has long been permitted and encouraged, if not expressly authorized, by U.S. constitutional law”); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404–09 (1996) (noting the ways in which socially constructed images of ethnic minorities affect jurors in self-defense cases); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274–76 (2004) (describing the phenomenon of mass incarceration of African Americans).

¹⁴ See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 97–102 (2001); CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (1999) 32–55; JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007);; Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759(2005) (arguing that mass incarceration in the United States is a product capitalism's endemic problem of surplus labor during times of fiscal crisis).

¹⁵ See Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 302 (2006) (observing the “perceived success of feminist rape law”); Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römkens & Marianne Wesson, *Battered Women & Feminist Lawmaking*, 10 J.L. & POL'Y 313, 344 (2002) (querying whether “the feminist social movement [is] to be remembered for its influence on criminal law”).

ensure that prosecutors, judges, and jurors adjudicate sexual violence cases on the basis of facts and not social norms about appropriate female behavior.¹⁶ In the domestic violence context, reformers' achievements include extensive adoption of mandatory arrest laws and prosecution policies that seek to counter police, prosecutor, and even victim ambivalence.¹⁷

Many progressives aggressively criticize feminism's bolstering of the penal state and its other seemingly illiberal choices: such as reifying an essentialist vision of womanhood, ignoring other forms of subordination, and downplaying critiques of capitalism. Class critics dismiss feminism for its complicity in maintaining the capitalist state apparatus.¹⁸ Critical Race theorists oppose feminism's tendency to marginalize minority women¹⁹ and to exacerbate the subordination of minority men.²⁰ Postmodern scholars "take a break" from feminism because of

¹⁶ See *infra* notes 45–51 and accompanying text.

¹⁷ See *infra* notes 53–64 and accompanying text.

¹⁸ See, e.g., CAROLINE RAMAZANOGLU, FEMINISM AND THE CONTRADICTIONS OF OPPRESSION 16 (1989) (observing the rejection of liberal feminism on the ground that it "has appealed to bourgeois or middle-class women within national movements, rather than to the millions of working-class, rural, and destitute women who make up the majority of the world's female population"); Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug's Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 3–4 (2001) (comment by Regina Austin) ("A 'feminist' theory that works to liberate one group of women (Western, bourgeois professional women, for example) may result in the oppression of another (poor immigrant domestic workers of color, for example).").

¹⁹ See BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 23 (1984) (observing that minority women "dismiss the term [feminism] because they do not wish to be perceived as supporting a racist movement"); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 154 (1989) ("The value of feminist theory to Black women is diminished because it evolves from a white racial context that is seldom acknowledged.").

²⁰ See, e.g., I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1367 (2010) (contending that "in attempting to eradicate sexism in rape laws, feminist scholars have entrenched an approach to analyzing rape allegations that is, if not overtly racist, very much racialized").

its instantiation of a view of women as morally superior and its privileging of women in particular as the recipients of legal efforts.²¹

Nonetheless, it is easy to see why feminists embraced crime control as a tool of women's liberation. Stopping gender violence is a good thing, and perhaps the feminist intervention could have a positive effect on the criminal justice system. Perhaps it could make police and state actors more conscious of universal social inequality. Unfortunately, changing the systemic inclinations of criminal justice is not easily achieved, and rather than the criminal justice system adopting a feminist agenda, feminist reformers essentially adopted the criminal justice system's agenda.

A. *Liberal Origins*

Feminist efforts to reform the criminal law really began in the era called the “second-wave” of feminism—the period of the late 1960s through the early 1990s.²² Any discussion of second-wave feminism should begin with so-called liberal feminism. Liberal feminism is most closely associated with women's liberationist efforts to bolster women's autonomy and secure formal equality between the sexes.²³ In rape law, for example, the liberal idea was that the key to

²¹ See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* xxix (supporting “a new shape of politics [that] emerges when identity as a common ground no longer constrains the discourse on feminist politics”) (1990); JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 17–18 (2006) (critiquing what she describes as the principal characteristic of American feminism—distinguishing between male and female (“m/f”), prioritizing female over male (“f>m”), and advocating legally for that prioritization (“Carrying a Brief for f”)).

²² See Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 *IND. L.J.* 893, 950 (2010) (describing the “second-wave of feminism” as “stretching from the 1960s until the 1990s”).

²³ See Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism's Visions of the “Progress” of Muslim Women*, 39 *U. BALT. L.F.* 153, 154 n.2 (2009) (noting that liberal feminists “share liberalism's political agenda of individual autonomy, equal rights, and a commitment to liberal democracy”); Linda C. McClain, *“Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 *S. CALIF. L. REV.* 1171, 1175 n.10 (1992) (observing that the liberal feminist label is attached to litigation strategies advocating “formal equality”).

women's empowerment in the sexual arena was ensuring that sex was consensual.²⁴ To achieve formal equality within the criminal justice system, feminists advocated eliminating sexist legal barriers to criminal prosecution, like corroboration²⁵ and resistance requirements,²⁶ and to reorient the trial to focus on the question of consent.²⁷

The efforts to reform rape law through the prism of equal rights quickly exposed the limits of liberalism. Eliminating the formal prosecution barriers did little to address the cultural norms that led victims, police, and prosecutors to be reluctant to prosecute and juries to be reluctant to convict.²⁸ Although the law no longer *a priori* declared women incredible in the absence of clear corroboration, most commonly serious injury, prosecutors still looked for such evidence in their case prioritization decisions, as did jurors in their decision-making.²⁹ Although

²⁴ See Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35, 38 (1995) (observing that “liberal feminism” shaped rape reform in the “classic liberal ideology of privacy, autonomy, and individual choice”).

²⁵ See, e.g., *Lore v. Smith*, 256 N.Y.S.2d 422, 425 (N. Rochelle City Ct. 1965) (“There must be other proof that an act of sexual intercourse occurred at the time and place charged, and that the complainant’s disclosure even if made promptly does not constitute the sole basis for sufficient corroboration”)(citations omitted).

²⁶ See, e.g., *McLain v. State*, 149 N.W. 771, 771 (Wis. 1914) (“[T]here must be the utmost resistance by the woman by all means within her power.” (citing *Brown v. State*, 106 N.W. 536 (Wis. 1906))).

²⁷ See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962–68 (1998) (discussing the evolution and eventual abolition of the resistance requirement, including reformers’ roles); Gruber, *Rape, Feminism, supra* note 5, at 593 (“Spurred on by feminists, liberals, and prominent female politicians, courts and legislatures began to systematically eliminate resistance and corroboration requirements.”).

²⁸ See generally Susan Estrich, *Rape*, 95 YALE L.J. 1087 *passim* (1986) (analyzing rape myths); *id.* 1177–79 (discussing jurors’ focus on acquaintance of victim to defendant, corroboration, and victim precipitation); Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1104–13 (1987) (reviewing SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987) (discussing influence of rape myths on judges’ constructions of facts)).

²⁹ See ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 7 (1999) (maintaining that, despite elimination of the requirement, juries still demand corroboration); see also Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1049 (2008) (noting that jurors typically want more than the victim’s word); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN’S L. REV. 979, 995 n.58 (1993) (citing a survey in which thirty-eight percent of men and thirty-seven percent of women indicated a seductively dressed woman is partly responsible for rape).

the law no longer required women to act like “ideal” victims by displaying “the utmost resistance,” jurors continued to assume that victims, who did not resist, especially those with “precipitating” attributes, either could not have been raped or deserved to be raped.³⁰

A similar genealogy characterizes domestic violence reform. It is true that in order to achieve social change, early reformers worked outside the liberal paradigm and adopted a more distributive approach to remedying battering; advocates initially argued for economic and social support for abuse victims, like battered women’s shelters and counseling.³¹ Nevertheless, many of the early arguments for legal transformation were packaged in the name of equality.³² Similar to rape reformers’ contention that rape is a crime of violence and not just imperfect private sex,³³ feminists opining on domestic violence asserted that battering was a true violent crime and not an issue about the private relationship between husband and wife.³⁴ Feminists found, however, that simply creating legal access could not work given social and institutional resistance. Although the law formally treated spousal battering like any other criminal assault, police,

³⁰ See Andrew E. Taslitz, *Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L.J. 145, 155 (2007) (“[E]ven the most well-meaning[] ‘feminist’ jurors may find that they have reasonable doubt about the . . . rape case . . . if the tale told fits cultural stories about ‘slutty women.’”).

³¹ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666 (2004) (describing the early battered women’s movement as a “grassroots effort to provide services and shelter to domestic violence victims, independent of state involvement”).

³² See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850, 1881–82 (1996) (“The underenforcement of domestic violence laws and the refusal to mandate participation for certain groups ultimately denies women legitimate state protection and enforcement of the right to be free from violence in their homes and in their communities. An equal and effective response to domestic violence requires that all citizens be subject to the same prosecution policies.”).

³³ See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 369, 377 (1975) (asserting that rape should be “placed where it truly belongs, within the context of modern criminal violence and not within the purview of ancient masculine codes”).

³⁴ See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 2 YALE J.L. & FEMINISM 3, 13 (1999) (“Since the early 1970s, battered women’s advocates have called upon police and prosecutors to treat domestic violence ‘like any other crime.’”).

prosecutors, judges, and jurors did not necessarily see it that way. State actors continued to downplay the seriousness of domestic violence cases either because of chauvinistic predispositions or because of skepticism regarding the prospects of prosecutorial success.³⁵

B. *The Authoritarian Turn*

As feminist scholars responded to the limits of liberal reform efforts, feminism, a quintessentially progressive movement, veered in a curious direction. In responding to the failure of equal opportunity to bring about substantive results,³⁶ certain feminist legal theories moved toward authoritarian policies and obdurate views of right and wrong. So-called “dominance” feminism, associated most readily with the writings of Catharine MacKinnon,³⁷ for example, views the inequality of men and women, not solely as a matter of unequal rights and formal institutional disparities, but as a matter of the ubiquitous power differential between men and women in all aspects of life.³⁸ From the point of view of dominance feminists, establishing uniform rights would not adequately address the “patriarchy,”³⁹ a system of norms, practices,

³⁵ See Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 312 (2004) (discussing police failure to respond quickly to domestic violence reports and failure to arrest perpetrators because police view these disputes as less criminally serious); Christine O’Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 942–43 (1999) (attributing prosecutor reluctance to the belief that domestic violence is a private problem and victims are reluctant to pursue charges).

³⁶ *Supra* notes 28–35 and accompanying text.

³⁷ See generally Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987), reprinted in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 81, 81–82 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) [hereinafter MacKinnon, *Difference and Dominance*]; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, THEORY OF STATE].

³⁸ See Mackinnon, *Difference and Dominance*, *supra* note 37, at 87 (asserting that gender is “a question of power, specifically of male supremacy and female subordination”).

³⁹ See Robin L. West, *Law’s Nobility*, 17 YALE J.L. & FEMINISM 385, 421 (2005) (describing patriarchy in dominance feminism as “the ubiquitous controls of women’s work, reproduction, children, and property, across cultures and across time, [which] are aimed at the appropriation of female sexuality”).

instincts, and signals that keeps men dominant and women subordinate.⁴⁰ While many progressive theories emphasize social conditions that render claims of rights-based neutrality suspect, dominance feminism differs in that it regards sexuality in particular as the singular cause of women’s social inequality.⁴¹

In defining the patriarchal structure as a sexual structure, dominance feminism centers on a fairly uncompromising and absolutist idea of bad and good—bad being things that sexualize women and good being the eradication of those things through prohibitory law.⁴² In addition, dominance feminism’s refusal to link feminism to Marxism and view gender subordination as a subset of the larger problem of economic inequality resulted in its embracing prosecutorial rather than distributive solutions to the problem of sexual domination.⁴³ Dominance feminism accordingly calls for the reversal of the gender power structure by utilizing penal law to stamp out instances of sexual domination.⁴⁴

⁴⁰ See MacKinnon, *Difference and Dominance*, *supra* note 37, at 84 (rejecting the “liberal idealism” because “virtually every quality that distinguishes men from women is already affirmatively compensated in this society”).

⁴¹ See MACKINNON, *THEORY OF STATE*, *supra* note 37, at 195 (asserting that sexualization “is a central feature of women’s social definition as inferior and feminine”).

⁴² See *id.* at 245–46 (condemning “the systemic failure of the state to enforce the rape law” as reinforcing male supremacy).

⁴³ MacKinnon considers gender, not class, as “the most pervasive and tenacious system of power in history.” *Id.* at 116. For a larger discussion of MacKinnon’s view of socialism and distributive reform, see Aya Gruber, *Neofeminism* (unpublished manuscript) (on file with author).

⁴⁴ See Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 341 (2006) (asserting that governance feminism is a “very state-centered, top-down, sovereigntist” feminism that “emphasizes criminal enforcement,” “speaks the language of total prohibition,” and “envisions the legal levers it pulls as activating a highly monolithic and state-centered form of power”). *Id.* at 345–46, 349–50 & 422 (discussing how MacKinnon’s philosophy helped create and reinforce governance feminist ideas).

In the rape context, the dominance intervention directly and indirectly led to reforms that were largely protective of victims during trial. Civil libertarians assert that these protections often come at the expense of a fair trial.⁴⁵ Rape shield laws seek to cloak the rape complainant in a degree of privacy, requiring courts to presumptively exclude sexual information that could prejudice a jury.⁴⁶ Affirmative consent standards, which define sexual assault as intercourse in the absence of an affirmative expression of consent,⁴⁷ aim to serve two equalizing functions. The first is to focus the trial on the actual communication between the defendant and complainant.⁴⁸ The second is to help transform the view of consensual sex from intercourse where the reluctant party has failed to meet the communicative burden of voicing nonconsent to intercourse where the person desiring sex has met the communicative burden of obtaining consent.⁴⁹ Outside of the trial forum, prosecutor's offices reorganized themselves to include sex crimes "units," in which the attorneys developed "expertise" in rape cases and exhibited particular sensitivity toward rape victims.⁵⁰ The evidentiary and substantive law reforms obviously served to disadvantage

⁴⁵ See generally Gruber, *Rape, Feminism, supra* note 5, at 614–15. (discussing civil libertarian critiques of rape reform).

⁴⁶ See, e.g., FED. R. EVID. 412(a) (excluding evidence that victim "engaged in other sexual behavior" and evidence of "victim's sexual predisposition"); MASS. GEN. LAWS ch. 233, § 21B (1983) (prohibiting "[e]vidence of the reputation of a victim's sexual conduct" and "[e]vidence of specific instances of a victim's sexual conduct").

⁴⁷ See, e.g., *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (redefining forcible rape as sexual intercourse without affirmative consent).

⁴⁸ See *id.* at 1274 (characterizing the affirmative consent doctrine as a response to the old law's tendency to put the victim on trial).

⁴⁹ See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2181 (1995) (analogizing person who desires sex to a surgeon who must get permission before bodily invasion).

⁵⁰ See Anna Y. Joo, Note, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 266 (1995) ("Increased reporting of rape is often credited to the establishment of sex crime units by law enforcement agencies, survivor advocates in rape crisis centers, survivor specialists in prosecutor's offices, and survivor counselors in hospitals."). *But see* Kay L. Levine, *The Intimacy*

defendants, who, feminists asserted, had been unfairly benefitting from sexist cultural beliefs all along.⁵¹ From the neo-feminist perspective, however, the issue is whether the changes benefitted women victims and furthered the larger goal of gender equality. This Article will return to this issue a bit later on.⁵²

Domestic violence law reform efforts, while less directly linked to dominance feminism because of the theory's preoccupation with sexual domination in particular,⁵³ also moved away from liberal and distributive commitments toward authoritarian and paternalistic policies to curb abuse. As with rape law, the formal legal equality of domestic abuse to other assault crimes failed to achieve widespread substantive results because of greater social and cultural forces. State actors and lay people alike viewed domestic violence complainants who stayed with abusers with the same jaundiced eye as rape victims who were voluntary companions of defendants.⁵⁴ As with rape cases, prosecutors often wrote off domestic violence trials as "unwinnable."⁵⁵ Like rape victims, domestic violence victims were often reluctant to enter and

Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload, 55 EMORY L.J. 691, 706 (2006) (citing a study of a Chicago sexual assault prosecution unit finding that prosecutors based charging decisions on the likelihood of juror empathy with the victim).

⁵¹ See Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 682 (1998) (observing that criminal prosecutions proceed against a backdrop of "the patriarchal tale of rape that our culture inculcates and that we use to measure the credibility of any given charge of rape"); Megan Reidy, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?*, 54 CATH. U. L. REV. 297, 299 (2004) (asserting that "defense attorneys, in an effort to exonerate their clients, challenge rape victims' testimony and credibility through an attack on the victims' sexuality").

⁵² See *infra* Part IV.B.

⁵³ See *supra* notes 41–44 and accompanying text.

⁵⁴ See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 557 (1992) (The immediate question for most people when they first hear about the problems of battered women is "why don't they leave?").

⁵⁵ See O'Connor, *supra* note 35 (attributing prosecutor reluctance to the belief that domestic violence is a private problem and victims are reluctant to pursue charges).

remain in the criminal process for a variety of reasons explored below.⁵⁶ As noted above, favored feminist legal response in the rape context was to make the criminal process more comfortable for the victim by excluding embarrassing sexual evidence and focusing the trial on the issue of consent expression.⁵⁷ Making the criminal process a kinder and gentler experience for rape complainants was feminists' preferred solution to the problem of victims' participatory reluctance. But something quite different happened with domestic violence reform.

It is true that some of the domestic violence reforms were similar to rape reforms. For example, prosecutors' offices today often boast specialized domestic violence units. However, where rape shield laws and affirmative consent standards seek to prevent jurors from focusing on rape precipitation issues (her short skirt, her accompanying him to his apartment, her sex with past partners),⁵⁸ no similar legal technology exists to focus jurors in domestic violence cases away from the main precipitation question in that context (why doesn't she leave?). Nevertheless, one innovation has been to simply take domestic violence cases out of the hands of jurors altogether by prosecuting such cases as simple assaults meriting bench trials in front of specially trained domestic violence judges.⁵⁹

Where domestic violence reform diverged most sharply from rape reform was in dealing with reluctant complainants. Instead of just relying on a more victim-friendly process to

⁵⁶ See *infra* notes 86–89 and accompanying text.

⁵⁷ *Supra* notes 24–27 and accompanying text.

⁵⁸ See *supra* note 46 and accompanying text.

⁵⁹ Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 44–49 (1999) (noting that judges assigned to the District of Columbia domestic violence court are “required to undergo formal training on intimate abuse”); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006) (describing the domestic violence system as a misdemeanor system, in which judges play a prominent role).

encourage complainants to participate, domestic violence reformers advocated and often achieved more radical legal and policy restructurings. Domestic violence reform advocates lobbied legislatures to enact laws mandating that police arrest any suspect the police had probable cause to believe committed a domestic assault, or at least laws excepting domestic assaults from the typical rules requiring warrants for misdemeanor arrests.⁶⁰ Reformers also encouraged legislatures and prosecutors' offices to implement pro-prosecution policies in domestic violence cases.⁶¹ As a result of this lobbying, states overwhelmingly changed their arrest laws.⁶² Many mandated prosecutorial prioritization of domestic violence cases, thereby limiting the wide discretion to dismiss difficult-to-prove cases that prosecutors typically enjoy, and prosecutors' offices adopted domestic violence "no-drop" procedures as a matter of their own policy.⁶³ Rather than making the criminal process a more positive experience for victims, such policies ignored the wishes of ambivalent or non-prosecutorial victims and even caused

⁶⁰ See Barbara Fedders, Note, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 289–91 (1997) (discussing feminist reformers lobbying efforts in favor of mandatory arrest laws).

⁶¹ See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 564–65 (1999) (noting lobbying efforts to secure mandatory arrest and prosecution policies).

⁶² See, e.g., ARIZ. REV. STAT. ANN. § 13-3601 (B) (2010) (allowing warrantless arrest for domestic violence, but only mandating arrest in cases of "physical injury"). Many mandate arrest in all cases of suspected domestic violence. See, e.g., ALASKA STAT. § 18.65.530 (2010); CAL. PENAL CODE § 836(c)(1) (West 2008); COLO. REV. STAT. § 18-6-803.6(1) (2006); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2009); WASH. REV. CODE § 10.31.100 (2006) (mandating arrest in domestic violence cases).

⁶³ See, e.g., FLA. STAT. ANN. § 741.2901(2) (West 2010) ("The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence, as defined in s. 741.28, and an intake policy and procedures coordinated with the clerk of court for violations of injunctions for protection against domestic violence."); MINN. STAT. ANN. § 611A.0311(2)(4) (2009) (mandating "procedures to encourage the prosecution of all domestic abuse cases where a crime can be proven").

certain victims material harm.⁶⁴ The next two parts of the Article explore the responses to the authoritarian turn in feminist theorizing and activism regarding rape and intimate abuse.

III. CRITIQUES OF FEMINIST CRIMINAL LAW REFORM THAT ARE NON-FEMINIST RATHER THAN NEO-FEMINIST

The critiques of rape and domestic violence law that this Article lays out in Part IV and identify as “neo-feminist” are feminist viewpoints in the sense that they centralize the non-subordination of women. Yet, they break from the orthodox view that the feminist approach to the problem of gender crimes ought to be strengthening the prosecutorial apparatus. In this sense, neo-feminist critiques are distinct from the many critiques of rape and domestic violence reforms that are not based in an effort to remedy gender subordination. Indeed, the non-liberal yet female-centric nature of these reforms has led to vocal attacks from both the right and the left. Because it is often easiest to understand what something is by highlighting that which it is not, elucidating the critiques of gender-crime reform that come from outside the feminist movement should further the conceptualization of the critique in Part IV as neo-feminist. Accordingly, the following sections will briefly examine the major non-feminist objections to domestic violence and rape reform, some of which are distinctly anti-feminist.

A. *Anti-feminist Critiques*

Certain conservatives have been vocal in condemning affirmative consent policies as nothing more than a hysterical response to mythical reports of rampant college date rape.⁶⁵ In agreement with popular ridicule of the notion of a “sex contract,”⁶⁶ they denigrate affirmative

⁶⁴ See *infra* Part IV.A.

⁶⁵ See, e.g., KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 39–44 (1993).

⁶⁶ See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 689 (1999) (noting “[t]he popular rejection of verbal communication in the sexual context”).

consent requirements as paternalistic and ruining the mystique of cryptic sexual communications.⁶⁷ Others counter rape law reform efforts in a less doctrinal manner by constantly publicizing the notion that there is widespread fabrication of rape and pointing to “irrefutable” empirical evidence.⁶⁸ In the domestic violence arena, so-called “men’s rights” groups characterize the domestic violence process as facilitating the ability of angry women to ruin men’s lives by making up domestic violence claims in order to obtain restraining orders, facilitate a desired arrest, or gain the upper hand in divorce and custody proceedings.⁶⁹ However, despite popular resistance to date rape criminalization and certain men’s frustration with women’s “unfair advantages” in domestic violence court, conservatives have generally welcomed amplified efforts to incarcerate sex offenders and the concept of “throwing the book” at batterers.⁷⁰ This Article will discuss later the cultural narrative that conditions conservative

⁶⁷ See, e.g., ROIPHE, *supra* note 65, at 62 (arguing that affirmative consent “proposes that women, like children, have trouble communicating what they want”); Camille Paglia, *Madonna—Finally, a Real Feminist*, N.Y. TIMES, Dec. 14, 1990, <http://www.nytimes.com/1990/12/14/opinion/madonna-finally-a-real-feminist.html> (asserting that “[n]o’ has always been, and always will be, part of the dangerous, alluring courtship ritual of sex and seduction . . .”).

⁶⁸ See, e.g., Edward Greer, *The Truth Behind Legal Dominance Feminism’s “Two Percent False Rape Claim”* Figure, 33 LOY. L.A. L. REV. 947, 948–49 (2000) (arguing that rape reform agenda might be reasonable if false reporting were rare, but because it is frequent, feminist rape efforts “are truly destructive”).

⁶⁹The Nat’l Fathers’ Res. Ctr., *Domestic Violence*, FATHERS4KIDS.COM, <http://www.fathers4kids.com/html/DomesticViolence.htm> (last visited Feb. 8, 2012) (“Fathers’ organizations now estimate that up to 80% of domestic violence allegations against men are false allegations. Since society offers women so many perks for claiming that they are victims of DV . . . false or staged DV allegations now appear to be even more frequent in family court cases than false sex abuse allegations.”); cf. Phyllis Schlafly, *Domestic Violence Law Abuses Rights of Men*, SAN DIEGO UNION-TRIB., May 12, 2006, http://www.signonsandiego.com/uniontrib/20060512/news_lz1e12schlafl.html (“Knowing that a woman can get a restraining order against the father of her children in an ex parte proceeding without any evidence, and that she will never be punished for lying, domestic-violence accusations have become a major tactic for securing sole child custody.”).

⁷⁰ See, e.g., President George W. Bush, Remarks by the President on Domestic Violence Prevention (Oct. 8, 2003), (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031008-5.html>) (last visited Feb. 8, 2012) (stating that the “government is engaged in the fight” against domestic violence through prosecutors who are “finding the abusers, and . . . throwing the book at them”).

support for tough treatment of rapists and abusers and how it directly undermines the transformative potential of the feminist criminal law reform project.⁷¹

B. Civil Libertarian Critiques

Probably the most familiar critical analyses of domestic violence and especially rape reform come from left-leaning civil libertarians concerned with defendants' rights. Civil libertarians assert that the novel evidentiary rules peculiar to rape and domestic violence cases have the effect of denying defendants in those cases the right to a fair trial. For example, they claim that rape shield laws can exclude relevant evidence of innocence in certain cases.⁷² In the domestic violence context, civil libertarian critics contended, and the Supreme Court agreed, that domestic violence prosecutors' practice of introducing any and all extrajudicial victim statements as "excited utterances" violated defendants' confrontation rights.⁷³ In addition to the claim that rape reforms impinge on defendants' trial rights, there is the more generalized liberal contention that affirmative consent standards are incompatible with the "harm principle" (the government should not sanction harmless behavior)⁷⁴ because in essence they treat sex premised on botched communications as the "ultimate" crime of rape.⁷⁵

⁷¹ See *infra* notes 132–48 and accompanying text.

⁷² See, e.g., David S. Rudenstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976); Shawn J. Wallach, Student Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485 (1997).

⁷³ See *Davis v. Washington*, 547 U.S. 813 (2006) (finding that admission of the alleged domestic violence victims' statements in response to police investigative questioning violated the defendant's confrontation rights).

⁷⁴ See JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

⁷⁵ See, e.g., Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1112 (2007) ("It is wrong to use the strong arm of the criminal law to impose rules intended to change societal or cultural attitudes when doing so transforms

C. Critical Race and Leftist Critiques

Finally, there are the critical race and leftist assessments of rape and domestic violence reform. Critical race theorists point out that feminist rape reformers have essentially ignored historical evidence that white society deployed sex crime laws as means of racial persecution.⁷⁶ They also condemn toughened rape and domestic violence laws for disproportionately harming minority and immigrant men, and by extension, communities of color.⁷⁷ There is also the familiar argument that feminist criminal law reform has right-leaning political valence because it strengthens the operation of criminal law.⁷⁸ Law and society theorists catalog the shift from alternative forms of governance and informal mechanisms of crime control to “governing through crime.”⁷⁹ Today, the penal system has grown into an enormous state bureaucracy that asserts direct and indirect control over the majority of Americans’ lives.⁸⁰ The rise of the American penal state is also troubling from the left perspective because it helped facilitate the retrenchment of the welfare state and denigrate communitarian values in the eyes of the public.⁸¹

conduct that many members of the community would regard as, at most, unreasonable into one of the worst kinds of criminal offenses.”).

⁷⁶ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990) (observing that for many black women, rape has come to “signif[y] the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by ‘crying rape’), by white women.”).

⁷⁷ See, e.g., Capers, *supra* note 20, at 1364 (observing that by advocating rape reform, “in attempting to eradicate sexism . . . feminist scholars have entrenched an approach to analyzing rape allegations that is, if not overtly racist, very much racialized”).

⁷⁸ See, e.g., Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 153 (1998) (lamenting feminism’s connection to the criminal system, whose purpose is to “control the ‘dangerous classes’ and to perpetuate and replicate existing power relations”).

⁷⁹ See generally SIMON, *supra* note 14.

⁸⁰ See *id.* at 6 (asserting that governing through crime “fuels a culture of fear and control that inevitably lowers the threshold of fear even as it places greater and greater burdens on ordinary Americans”).

⁸¹ See *infra* notes 132–38 and accompanying text.

The above-discussed critiques are not themselves feminist critiques, although the critical race and class-based arguments can be connected to the larger feminist program, as this Article will discuss later.⁸² The arguments are non-feminist because they do not reject gender-crime law reform on the particular ground that it actually disserves individual women and is damaging to the greater goals of feminism. However, feminist criminal law reform has engendered numerous internal critiques that do scrutinize the relationship between such reform and women's subordination. These neo-feminist analyses recognize that gender-based crimes are serious problems meriting feminist concern and that society's historically lackadaisical attitude toward gender-based crime evidences significant social inequality. Nevertheless, these theories criticize rape and domestic violence reform on the basis of two realizations: (1) that certain aspects of feminist efforts within criminal law have intended and unintended negative repercussions for women, especially the poor and minority women most vulnerable to violence and most desperately in need of cultural, institutional, and economic reform; and (2) that aspects of feminist criminal law reform are thus incompatible with the larger feminist "commitment to a more egalitarian distributive structure and a greater sense of collective responsibility."⁸³

IV. NEO-FEMINIST CRITIQUES OF FEMINIST CRIMINAL LAW REFORM

Neo-feminist scholarship maintains a commitment to women's issues specifically, although it is critical of certain aspects of feminism-driven criminal law reform. In discussing the neo-feminist evaluations of domestic violence and rape reform, this Article will elucidate the easier critique of the domestic violence system before tackling the more difficult appraisal of rape reform. Expounding the drawbacks of domestic violence reform from a woman-centric

⁸² See *infra* notes 95–99, 106–111 and accompanying text.

⁸³ Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1184 (1994).

position is a less taxing enterprise than critiquing rape reform because of the obviously illiberal nature of mandatory policing and prosecutorial policies and the attendant essentialist assumptions about battered women's psychology.

A. *Critiques of Domestic Violence Reform*

Critics argue that the slate of prosecutorial domestic violence reforms advocated by feminists actually disempowers women in both direct and indirect ways.⁸⁴ Turning first to the direct negative effects, many scholars note that mandatory policies inevitably force certain domestic violence victims to proceed with prosecutions that they would rather avoid for a variety of reasons.⁸⁵ Not only is this situation at odds with the central feminist tenet of women's empowerment and autonomy, it may actually cause more harm than good.

Critical feminists contend that reformers' assumption that battered women do not know how best to keep safe is empirically unjustified and that their practice of forcing reluctant women to prosecute may actually imperil the women more than not prosecuting.⁸⁶ Moreover, there is the argument that forced prosecution can have devastating effects on the victim's financial health and family structure.⁸⁷ In addition, mandatory policies have led to prosecutors charging the

⁸⁴ See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 1 (2009) (contending that "policy choices, like no-drop prosecution and bans on mediating in domestic violence cases, are . . . marked by their denial of decisionmaking to women who have been battered").

⁸⁵ *Infra* notes 86–89 and accompanying text.

⁸⁶ See, e.g., Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 469 (2003) (asserting that the harm of no-drop policies "is twofold: the prosecution may have failed to make the victim safe from future attacks and, in addition, by coercing the victim's participation the state may have taught her to distrust the system").

⁸⁷ See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1017–18 (2000) (noting that "without the batterer's income or his assistance with childcare, for example, women may lose jobs, housing, and even their children"); Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 415 (2005) (citing

abuse victims, themselves, for domestic abuse and other criminal offenses.⁸⁸ Unfortunately, women who exist at the intersection of multiple axes of subordination (race, immigrant status, income level) appear to suffer the most under mandatory policies.⁸⁹

Even the aspects of domestic violence reform separate from mandatory policies are, at best, double-edged swords when it comes to bettering the lives of the women victims. Take, for example, specialized domestic violence courts with trained judges. On the one hand, such judicial specialization can have the salutary effect of helping to ensure that abuse cases are not adjudicated in front of juries or jurists that harbor chauvinistic assumptions about domestic violence (e.g., victims often lie; if abuse was really that bad she would leave; domestic violence is a private matter).⁹⁰ Thus, specialized courts at their best have the potential to provide a fair forum for adjudication and a positive experience for crime victims. On the other hand, trained judges may have the tendency to internalize the essentialist characterization of domestic violence victims as coerced and damaged, discussed below.⁹¹ As a result, they may paternalistically

Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. ISSUES NURSING (Jan. 31, 2002), http://www.nursingworld.org/ojin/topic17/tpc17_3.htm (last visited Feb.5, 2012) (observing that women fail to prosecute abuse for reasons including “desire to keep the family unit intact, concern for their children, [and] emotional attachment to the abuser”).

⁸⁸ See L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, in 9 VIOLENCE & VICTIMS 125, 126 (1994) (finding that mandatory arrest law resulted in twelve-fold increase in arrests of women, but only a two-fold increase for men).

⁸⁹ See Coker, *supra* note 87, at 1047 (noting that “[p]oor women of color are particularly vulnerable” to suffering negative consequences from mandatory domestic violence policies); see generally Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT’L & COMP. L.J. 27 (2002) (discussing the adverse impact of mandatory domestic-violence policies on immigrant victims).

⁹⁰ See *supra* notes 54–56 and accompanying text.

⁹¹ See *infra* notes 94–95 and accompanying text.

prioritize their judgment of what is best for the woman over the woman's actual desires by, for example, refusing to lift a no-contact order when a victim requests it.⁹²

Feminist critics of domestic violence reform also note the more inchoate harms of mandatory policies both to battering victims specifically and subordinated women generally. In order to produce the legal conclusion that mandatory policies benefit abuse victims and are therefore what they "should" want, reformers had to come up with a set of arguments to justify dismissing the choices of non-prosecutorial victims. The stock argument in support of mandatory arrest and prosecution is seductively logical: Because batterers coercively control abuse victims, allowing victims to decline arrest and prosecution essentially cedes power over the criminal process to the batterer.⁹³ In order to support this scared-or-prosecutorial dichotomy, however, advocates bought into and even publicized an essentialist and objectifying script that portrayed victims as paralyzed by fear, weak-willed, and even automaton-like.⁹⁴

The reductionist characterization of all abused women as simply too scared to prosecute hides the complex reality of many battered women's lives.⁹⁵ Abused women decline to ally with

⁹² See Mary Becker, Keynote Address, Symposium, *Domestic Violence and Victimized the Victim: Relief, Results, Reform*, 23 N. ILL. U. L. REV. 477, 487–88 (2003) (cautioning that domestic violence education "is not necessarily effective and can reinforce stereotypes and actually do harm").

⁹³ See, e.g., Machaela M. Hctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CALIF. L. REV. 643, 687 (1997) ("Because batterers have such overwhelming control over their victims, and the system required victims to control the prosecution, batterers, in effect, were being given control over the disposition of their own criminal case."). Some also repeat the prosecutorial mantra that battering is a crime against the state, and therefore the victim's wishes should not control the fate of the prosecution. See, e.g., Toni L. Harvey, Student Work, *Batterers Beware: West Virginia Responds to Domestic Violence with the Probable Cause Warrantless Arrest Statute*, 97 W. VA. L. REV. 181, 205 (1994) (asserting that tough criminalization policies "ensure that domestic violence will be perceived and treated as a crime against 'society as a whole'").

⁹⁴ See Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975 (1995) (calling such characterizations of battered women a "traumatization model" that "provide[s] an inaccurate, reductionist, and potentially demeaning representation of woman battering").

⁹⁵ Reformers adopt an even more stigmatizing form of objectification to account for victim reluctance in the absence of evidence of abuser threats. Some characterize battered women who refuse to prosecute as sick and

police actors for a number of reasons—money, children, fear of the state, immigration concerns, race-related reasons, and even emotional attachment to the abuser.⁹⁶ By crafting policy under the assumption that fear of reprisal is the sole factor keeping women in abusive relationships and making them reluctant to prosecute, reformers have done little to address the multifaceted needs of many abuse victims.⁹⁷ This also has more global, negative consequences in that the essentialist domestic violence script deflects attention away from the socio-economic antecedents of battering.⁹⁸ Battering has become a problem of individual bad actors rather than a phenomenon produced by profound economic inequity, sexist cultural attitudes, and racial and other forms of discrimination.⁹⁹

The autonomy-stripping aspects of domestic violence reform appear blatantly at odds with the philosophical commitments of feminism, given that ending the social and biological objectification of women has always been one of the main goals of the American feminist movement. From the 1892 case *Bradwell v. State*, holding that the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of

psychologically defective. See, e.g., Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605 (2000).

⁹⁶ See *supra* notes 87, 89.

⁹⁷ See Goodmark, *supra* note 84, at 4 (“The problem with policies like mandatory arrest is that they reify two goals—safety and perpetrator accountability—and marginalize autonomy, serving women who share the goals of the system but disenfranchising those with divergent goals.”).

⁹⁸ See Gruber, *Feminist War*, *supra* note 2, at 814 (arguing that by focusing on the coercive control of the abuser “reformers give license to society to ignore its complicity in creating the problems that lead to domestic violence”).

⁹⁹ See Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 112 (2004) (asserting that “men’s violence against women is too pervasive to be understood as a pathology of a few individual men” and “must be analysed within the context of the larger patterns of presumed male entitlement, authority, and power constructed in the culture more broadly”).

civil life,”¹⁰⁰ to more recent incidents like former Harvard President Lawrence Summers’s declaration that women are underrepresented in the academic sciences because of the “taste preferences” of little girls,¹⁰¹ characterizing women as objects of biology or cultural psychology has been an time-honored tactic for silencing the female voice and justifying the oppressive status quo. Accordingly, the set of assumptions internalized by the domestic violence reform movement have been the subject of intense internal feminist criticism precisely because of the obvious self-contradiction—a feminist reform movement utilizing the mechanism of female objectification in its effort to amplify domestic violence criminalization.¹⁰²

A few more problematic aspects of domestic violence law merit discussion before moving on to the neo-feminist critiques of rape law. First, there is the question of the racial implications of the domestic violence reform narrative. Above, this Article notes the ways in which mandatory policies pose particular harm to abused women who suffer subordination in other spheres.¹⁰³ In addition to that, the characterizations of battered women within the domestic violence reform movement operatively exclude women of color. It is true that to gain support from skeptical minority women, domestic violence activists emphasized that abuse happens

¹⁰⁰ *Bradwell v. State*, 83 U.S. 130, 141 (1872).

¹⁰¹ See Lawrence H. Summers, President, Harvard Univ., Remarks at NBER Conference on Diversifying the Science & Engineering Workforce (Jan. 14, 2005), (transcript available at http://www.harvard.edu/president/speeches/summers_2005/nber.php).

¹⁰² See HALLEY, *supra* note 21, at 346 (observing that “representing women as end points of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men, feminists refuse also to see women—even injured ones—as powerful actors” and thus “[f]eminism objectifies women”); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 242 (2005) (maintaining that mandatory policies “reify[] the cultural stereotypes of the incapacitated and irrational woman”).

¹⁰³ See *supra* notes 95–99 and accompanying text.

across the racial and socioeconomic spectrum.¹⁰⁴ This particular message, however, was all but lost as certain reformers and politicians pursued a larger, more effective, dialectic strategy.

The most notable catalytic moment for domestic violence awareness was the O.J. Simpson murder trial in 1995, which famously involved a celebrated black athlete accused of brutally murdering his young, beautiful, white ex-wife and her male friend.¹⁰⁵ The prosecution presented evidence, in the form of photos of Ms. Simpson's bruised face, to support that O.J. had engaged in domestic violence against her in the past. Certain activists seized on the political climate and utilized the vehicle of popular media to push forward reforms.¹⁰⁶ In doing so, the domestic violence reform movement, perhaps unintentionally, adopted the oversimplified and stereotypical views, popular within victims' rights parlance, of victims as innocent, non-poor, white women.¹⁰⁷ The racially specific view of battering victimhood helps explain why women of

¹⁰⁴ See, e.g., Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 *HAMLIN L. REV.* 115, 121 (1991) (stating that "domestic violence occurs in all socio-economic and racial groups").

¹⁰⁵ See Miccio, *supra* note 102, at 238 ("With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the "zero tolerance" bandwagon.").

¹⁰⁶ See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 199 (2000) (acknowledging that the Simpson trial "provided a major opportunity for national education on the issue of domestic violence over the past thirty years.").

¹⁰⁷ See Laurie L. Levenson, *Stereotypes of Women in the O.J. Simpson Case*, O.J. Simpson Case Commentaries, (Dec. 7, 1994) available through Westlaw (enter "oj-comment" into the database; then conduct a natural language search with the phrase "stereotypes of women") ("The name Nicole Brown Simpson has now become synonymous with the image of the battered wife- a young, beautiful woman, unable to escape her abuser, and unable to get the criminal justice system to respond to her pleas."); Charisse Jones, *Nicole Simpson, in Death, Lifting Domestic Violence to the Forefront as National Issue*, *N.Y. TIMES*, Oct. 13, 1995, <http://www.nytimes.com/1995/10/13/us/nicole-simpson-death-lifting-domestic-violence-forefront-national-issue.html> (observing that "Nicole Brown Simpson has unleashed a wave of support for battered women and firmly anchored domestic violence in the American psyche as a problem that must be dealt with").

color are more likely to be prosecuted as “mutual combatants” in domestic violence cases rather than as victims engaging in self-defense.¹⁰⁸

Nevertheless, the view of domestic violence victims as white might prove to have some equalizing effect regarding the racial composition of domestic violence offenders. If the quintessential silent, long-suffering abuse victim is a white middle-class woman, then given society’s general presumption of continuity of race and class in romantic partnerships, one might expect the prevailing image of an abuser to be a non-poor white man. Unfortunately, any image of a white middle-class batterer butts up against long entrenched racial fear of violent black and Latino men.¹⁰⁹ Moreover, domestic violence reform did little to change the problems attendant to a discretionary criminal system in a racially stratified society.¹¹⁰ It is therefore no surprise that minority men have been disproportionately arrested and prosecuted under our “enlightened” domestic violence schemes.¹¹¹ To the extent that feminism is as much for women of color as for white women and it condemns racial hierarchy, it should regard as intolerable legal changes that elevate the already insufferable level of racial injustice in the criminal system and society.

¹⁰⁸ See Meghan Condon, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL’Y 487, 492 (2010) (“Minority women are more likely to be arrested than white women, and when they are arrested, they are charged with more serious crimes than white women.”).

¹⁰⁹ See N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1345 (2004) (noting continued characterization of black men as “sexually predatory”); Lynne Henderson, *Co-opting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579, 587 (1998) (asserting that “the image of the criminal is the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male”).

¹¹⁰ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18–19, 53–64 (1998).

¹¹¹ See Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class*, 11 AM. U. J. GENDER SOC. POL’Y & L. 309, 319 (2003) (citing a 2001 Milwaukee, Wisconsin study reporting that while blacks represented only twenty-four percent of the population, they constituted sixty-six percent of prosecuted domestic violence arrests. By contrast, whites, who comprised sixty-two percent of the population, represented only thirty-two percent of prosecuted domestic-violence arrests) (citations omitted).

The racially specific media images discussed above, perhaps because they were racially specific, did help make the public and government aware of the harm of intimate abuse.¹¹² Even conservatives like John Ashcroft and George W. Bush condemned domestic violence as a heinous crime.¹¹³ Right-leaning political actors embraced domestic violence reform, however, on very different philosophical grounds from feminists. Social conservatives cast the problem of battering in terms of the destruction of “family values,” even proposing faith-based solutions.¹¹⁴ They also emphasized that reforms should make women understand their responsibility to utilize the now-ample criminal avenues for relief, rather than “choosing” to stay with the abuser.¹¹⁵ Conservative leaders, in fact, had very little to lose by supporting domestic violence criminal law reform. They could appear to take domestic violence seriously, embrace favored tough-on-crime solutions, and deflect any pressures to change the underlying socioeconomic disparities that lead to battering.

B. Critiques of Rape Reform

¹¹² See *supra* notes 105–07.

¹¹³ See John Ashcroft, U.S. Att’y Gen., Prepared Remarks at the Annual Symposium on Domestic Violence (Oct. 29, 2002), (transcript available at <http://www.justice.gov/archive/ovw/docs/agremarks.htm>) (asserting that “when families are wracked by violence and abuse, [family] values are corrupted”); *supra* note 70 and accompanying text.

¹¹⁴ See Ashcroft, *supra* note 113; President George W. Bush, National Domestic Violence Awareness Month, 2005, A Proclamation by the President of the United States of America, Sept. 30, 2005, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/09/20050930-12.html> (“Faith-based and community organizations are also making vital contributions in the effort to combat domestic violence. These organizations are fostering an environment where victims can step out of the shadows and get the help and care they need.”).

¹¹⁵ See Ashcroft, *supra* note 113 (“One victim of domestic abuse who found help described this transformation [of family values] better than I ever could. She said, quote, ‘I finally realized the truth, that I was hurting not only myself, but I was hurting my children even more. I was teaching them by example that they deserved to be abused and that violence was acceptable.’”).

Moving on to the neo-feminist assessment of rape reform, it is a far more subtle critique because rape law did not go in the direction of mandating victim participation in sexual violence cases. Thus, the grave autonomy concerns that shadow domestic violence reform simply are not present in the rape context. Nonetheless, there are neo-feminist critiques of both the narrative of sex-offense law reform and specific legal innovations like rape shield laws and affirmative consent standards. The narrative of rape law reform, for the most part, has been one of ubiquitous danger.¹¹⁶ Second-wave feminist efforts to convince state actors, jurors, and society in general to take rape seriously often involved publicizing statistics attesting to the stunning frequency of incidents of rape and their shockingly low reporting levels.¹¹⁷ Later, non-feminist crime control activists would use the depiction of an “epidemic” of child predators to push through draconian measures to confine and track convicted sex offenders.¹¹⁸

Equating sex to fear, danger, and oppression, which also constitutes a central tenet of the dominance feminism intervention, engendered quite a bit of push-back, as critical feminists expressed concern over the effects of such an equation on women’s autonomy and sexuality. “Sex-positive” feminists worry that the relentless focus on the perils of sexual activity threatens to stifle women’s sexual agency and expression and even to hinder theorizing on women’s

¹¹⁶ See, e.g., Mary P. Koss, *Scope, Impact, Interventions and Public Policy Response*, 48 AM. PSYCHOLOGIST 1062, 1062 (1993) (asserting that “uniting all women is the fear of rape”).

¹¹⁷ See, e.g., SUSAN ESTRICH, REAL RAPE 10–15 (1987). See Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 658 n.31 (2001) (observing the “oft-quoted October 1985 *Ms. Magazine* survey, titled *Date Rape: The Story of an Epidemic and Those Who Deny It*, that found that one in four college women is the victim of rape or attempted rape”).

¹¹⁸ See, e.g., 151 CONG. REC. 20464 (Statement of Rep. Ted Poe) (asserting the importance of the Child Safety Act to “stop the epidemic of violence and sexual abuse against our children”).

sexuality.¹¹⁹ Moreover, critics assert that “the subordination of pleasure to a virtually exclusive focus on identifying and preventing danger deprive[s] women of a resource vital to self-understanding and resistance.”¹²⁰ Aside from its effect on women’s sexuality, the fear of rape plays a significant limiting role in many aspects of women’s lives. The fear of sexual assault is often a conditioning factor in women’s decisions about travel, dress, communication, dating, and residence.¹²¹ Thus, sexual assault serves the “disciplinary function” of compelling women to conform to male ideals.¹²²

Feminist commentators also argue that some of the rape reforms, which are justifiably concerned with how rape victims experience the criminal process, have the effect of reinforcing chastity norms. Chastity norms help create an environment in which sexual assault can flourish in two principle ways. First, in this era when premarital and casual sex is the standard, chastity norms manifest as pre-intercourse linguistic performances. Women may seek to appear chaste by refraining from engaging in open and frank communications about impending sexual

¹¹⁹ Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 318–19 (2008) (“Sex-positive feminist theory points to the capacity of legal reforms aimed at protecting women from dangers such as rape, domestic violence, or inequality in the workplace to ultimately strengthen repronormative ideologies or increase the constraints experienced by women in their pursuit of sexual and political agency.”); see, e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 208 (2001) (cautioning feminists against pursuing policies that “nourish[] a theory of sexuality as dependency and danger at the expense of a withering positive theory of sexual possibility”).

¹²⁰ Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 311 (1995).

¹²¹ Roxanne Lieb et al., *Sexual Predators and Social Policy*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 49 (Michael Tonry ed., 23d ed. 1998) (“Fear of sexual assault is an influential aspect of women’s psychology and often leads women to make adjustments in the kinds of activities they engage in and in their perceptions of situations.”) (citation omitted).

¹²² Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1329–36 (1992); see also Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 786 (2001) (“Many women believe that they can avoid rape (or at least lessen the odds of being raped) provided they do not ‘assume the risk.’ In this way, patriarchal norms about the way women should behave (particularly that women should be passive, modest, and under male protection) are reproduced and reenacted, even by those who claim not to embrace the ideology.”).

acts—“playing coy” in the popular vernacular.¹²³ Some may go so far as to feign reluctance.¹²⁴ Women’s use of such duplicitous tactics in an effort to engage in culturally appropriate chaste sex adds further obfuscation to an interaction already unlikely to involve perfect communications. It increases the probability that those seeking sex, who are already inclined to interpret all cues in favor of consent, will write off true reluctance as socially required pre-sex protestations.¹²⁵ Second, chastity norms have the effect of disqualifying rape complainants who evidence unchaste behavior through dress, past acts, attitude, or social behavior.¹²⁶ Scholars point out that rape shield laws, by presuming that past or present sexual behavior should be shielded as private, reinforce such chastity norms.¹²⁷ On the other hand, given prevalent social attitudes towards “loose” women, rape victims can suffer from trial-related revelations of their

¹²³ See Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 18 n.18 (1994) (stating that teen magazines and television “urge[] girls to embrace and perfect the coy, passive-aggressive sex role”).

¹²⁴ Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 877 (1988) (citing a finding that women’s fear of appearing promiscuous leads to token resistance).

¹²⁵ See Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 952 (2007) (“[I]f women are taught to deny their desire, their ‘no’s’ appear ambiguous, making it easier for men to believe that ‘no means yes’ . . .”).

¹²⁶ See Gruber, *Rape, Feminism*, *supra* note 5, at 595 (“People continue to believe that women who dress and behave in sexual ways deserve to be raped.”); Mark A. Whately, *Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-Analysis*, 1 AGGRESSION & VIOLENT BEHAV. 81, 91 (1996) (discussing studies in which respondents assigned more blame to provocatively dressed victims).

¹²⁷ See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 94 (2002) (“Instead of championing women’s sexual autonomy, drafters concentrated on how degrading and embarrassing it was for women to have to discuss publicly their private sexual affairs.”); Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE L. REV. 45, 74–80 (2002) (asserting that rape shield laws prevent meaningful juror discussion of female sexuality).

sexual behaviors.¹²⁸ In the end, “anyone who takes up the weapon of privacy in the cause of women’s equality must be aware that it is a double-edged weapon.”¹²⁹

The final neo-feminist critique of rape reform, which actually applies with equal force to domestic violence reforms, is that the consolidation of feminist efforts in criminal law solutions is problematic. First, gender crime-control efforts have strengthened and given moral cover to an authoritarian and discriminatory criminal justice system, which in recent decades has been instrumental in entrenching an anti-distributive neoliberal ethic in American consciousness. In this sense, domestic violence and rape reform appear to be theoretical outliers in a largely leftist movement critical of the maintenance of status quo hierarchy.¹³⁰ Moreover, criminal law’s embedded narratives and institutional structure make it a poor mechanism for dismantling hierarchy and male domination.¹³¹ The very characteristics of American criminal justice effectively negate the potential of rape and domestic violence reform to produce sweeping social transformation.

As noted in the beginning of the Article, criminal law experts are, for the most part, in agreement that the United States has for several decades seen a tough-on-crime era, in which

¹²⁸ See Gruber, *Rape, Feminism*, *supra* note 5, at 638 (observing that “victims value sexual secrecy in a world that impugns female sexuality”); Sakthi Murthy, Comment, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim’s Sexual History To Show the Defendant’s Mistaken Belief in Consent*, 79 CALIF. L. REV. 541, 552 (1991) (observing that rape shield laws protect “a woman’s choice of sexual lifestyle”).

¹²⁹ Martha C. Nussbaum, *Is Privacy Bad for Women?*, BOS. REV. Apr./May 2000, <http://www.bostonreview.net/BR25.2/nussbaum.html>.

¹³⁰ See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1–2 (2d ed. 2003). (“Most legal writers or practitioners who identify themselves as feminists are critical of the status quo. The root of the criticism is the belief that women are currently in a subordinate position in society and that the law often reflects and reinforces this subordination.”).

¹³¹ See HOOKS, *supra* note 19, at 118 (describing the American penal system as the very embodiment of “the Western philosophical notion of hierarchical rule and coercive authority,” which serves as the “foundation” of male domination of women).

rehabilitation and forgiveness seem like long-extinct legal dinosaurs.¹³² The tough-on-crime phenomenon, however, did not occur in a vacuum. Rather, crime-centered politics served as the foot soldier of the neoliberal revolution in the late 20th century. The neoliberal philosophy of rampant individualism, anti-social welfare, and trickle-down economics reached a pinnacle during the Reagan eighties.¹³³ The term neoliberalism encompasses not just the conservative economists' backlash against Keynesian economics, but also anti-welfare and privatization arguments that took on a moral quality.¹³⁴ In the neoliberal moral equation, consideration of nuance, inequality, and social constraint yields to reductionist dichotomies of public versus private and right versus wrong.¹³⁵ Specifically constructed to serve the interests of this philosophy was the war on crime and later the war on drugs. Drug dealers, murderers like Willie Horton, and lazy welfare mothers were the essential icons representing the failure of social welfare and why there were no excuses for individual wrongdoing.¹³⁶ With internally evil criminals firmly established as the cause of social problems, the state could appear as the white

¹³² See *supra* notes 9–10 and accompanying text.

¹³³ See Pearson Liddell, Jr. et al., *Welfare Reform in Mississippi: TANF Policy and Its Implications*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1107, 1113 (2003) (“Perhaps no other politician effectively, yet controversially, built public resentment against social welfare programs like Ronald Reagan.”); *G.O.P. Testimony on Violence*, N.Y. TIMES, Aug. 1, 1968, at 20 (quoting then-governor Ronald Reagan as stating: “It is time to restore the American precept that each individual is accountable for his actions”).

¹³⁴ See Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1, 6 (2003), http://muse.jhu.edu/journals/theory_and_event/V007/7.1brown.html (noting the current configuration of morality as “rational deliberation about costs”); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 657–58 (1990) (noting the view that the state must promote the “will of the economic actor”).

¹³⁵ See generally David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032 (2004) (asserting that modern conservatives justify harsh criminal policies by advancing a binary view of morality in which there are inherently good or bad people).

¹³⁶ See David Lauter, *Crime Issue Becoming Election Battleground*, L.A. TIMES, June 13, 1988, at 1, available at 1988 WLNR 1879985 (discussing how the Willie Horton murder case became a central issue in George H.W. Bush's presidential campaign); Liddell et al., *supra* note 133, at 1113 (“The term ‘welfare queen’ originated from Reagan's inaccurate portrayal of welfare recipients as lazy African-American women with values and morals contradicting those of working and middle class Americans.”).

knight using its police powers to exterminate social blight, while maintaining the appearance of small government.¹³⁷ Thus, if being a feminist means pursuing “a larger, critical agenda originating in the experiences of gender subordination,”¹³⁸ then strengthening the already ubiquitous criminal justice system, especially in its current anti-distributive form, appears inconsistent with the feminist identity as a philosophical matter.

Moreover, tough-on-crime philosophy entails a discourse of criminality and victimhood which operatively divests rape and domestic violence reform of any potential to produce sweeping cultural change. In order to make criminals and victims straw men in the argument for neoliberalism, politicians have emphasized particularly evil, individually culpable offenders and helpless innocent victims to cast the complex question of how to manage socially undesirable behavior into the most simplistic polarization of good victims (and those in solidarity with them) and bad criminals.¹³⁹ This dialogue is infused with racial imagery that exploits long-existing

¹³⁷ Ronald Reagan, for example, stated:

Individual wrongdoing, [liberals] told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. And somehow . . . it was society, not the individual, that was at fault when an act of violence or a crime was committed. Somehow, it wasn't the wrongdoer but all of us who were to blame. Is it any wonder, then, that a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity.

President Ronald Reagan, Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut (June 20, 1984) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/publicpapers.html>).

¹³⁸ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 833–34 (1990).

¹³⁹ See Henderson, *supra* note 109, at 586–87 (noting the popular view that “[d]efendants are subhuman; they are monsters”); Vik Kanwar, *Capital Punishment as “Closure”: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 231 (2001) (noting trend of laws named after sentimentalized “white female children” victims “who constitute the public’s preferred image of a ‘victim’”); see, e.g., 148 CONG. REC. 3197 (remarks of Rep. Green) available at 2002 WL 397497 (stating that Two Strikes and You’re Out Child Protection Act is “simply about taking these sick monsters off the streets . . . to try to end the cycle of horrific violence that is every parent’s nightmare”).

fears of men of color, as this Article previously discussed.¹⁴⁰ Aided by the victim's rights movement's emotional appeal to society at large, which appears ever-eager to cathartically identify with "the humbled victims in our midst,"¹⁴¹ the conservative government accrued unprecedented penal authority while otherwise dismissing the validity of governance in general.¹⁴²

These embedded narratives go far in explaining the dichotomous trajectory of rape law reform. On the one hand, reforms aimed at protecting children by indefinitely detaining sexual "predators" and intensely tracking convicted sex offenders, which push the law to the very brink of constitutionality, are extremely popular.¹⁴³ By contrast, reform laws that aim to address juror bias against adult female complainants, who are not appropriately chaste or virginal, remain controversial and ineffective.¹⁴⁴ Some experts go so far as to say that the affirmative consent law

¹⁴⁰ See *supra* note 136 and accompanying text (citing the Willie Horton murder case as a classic example).

¹⁴¹ GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIAL 7 (1996); see Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 9 (1999) (noting how sentimental identification with victim allows society to avoid ethical question of punishment).

¹⁴² See Angela P. Harris, *Bad Subjects: The Practice of Theory and the Constitution of Identity in Legal Culture*, 9 CARDOZO WOMEN'S L.J. 515, 516 (2003) ("Indeed, for many contemporary conservatives there is no 'society' at all, only individuals, or at most local moral 'cultures' that must bear the responsibility for their own moral uplift. In this discourse, questions relating to crime and 'welfare,' for example, become personal moral issues rather than social problems.") (footnote omitted); Jonathan Simon, *From a Tight Place: Crime, Punishment, and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 854 (1999) (book review) ("Both Presidents Reagan and [George H.W.] Bush embraced punishment as one of the few forms of domestic governance defensible within their political ideology.") (footnotes omitted).

¹⁴³ See Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 567-68 (2002) (observing how publicity of gruesome sex crimes elevated crime against women and children to "national crises"); Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1543 (2005) (observing that society despises sexual predators).

¹⁴⁴ Compare Christopher Anderson, *DA Candidates Voice Views on Date Rape*, BOULDER DAILY CAMERA, May 14, 2000, at 1B, available at 2000 WLNR 1312008 (reporting that D.A. candidates emphasized the importance of investigating the complainant's credibility) with Emily Ramshaw, *Child Sex Bills Raising Concern: Victims' Groups Think Death Penalty, Other Ideas Could Backfire*, DALL. MORNING NEWS, Jan. 5, 2007, at 2A, available at

“invites jury nullification.”¹⁴⁵ Given the predominant messages of criminal law, how could feminists hope to secure date rape convictions against boys who do not look like deviant sickos or gang members?¹⁴⁶ How could feminists expect jurors to view a sexually experienced co-ed, who was out for a night of drinking and fooling around in the same manner as the brutally murdered seven-year-old Megan Kanka, Megan’s Law’s namesake?¹⁴⁷ It seems that the din of voices declaring, ever louder, the war on crime drowned out feminists’ message of gender equality. For this reason, conservatives were far more successful at convincing the public that rape is a matter of the compulsions of sexual deviants than feminists were at characterizing rape as a matter of gender inequality.¹⁴⁸

Feminist law reform thus became essentially another facet of the criminal justice system’s program of jailing bad guys with little regard to the social, economic, cultural, and racial complexity of crime. As such, the criminal system absorbs women victims into its punitive mission while largely ignoring their material needs and reinforces the social structures that made

2007 WLNR 227832 (reporting that “[s]ex offenders were a hot topic during the 2006 [Texas] governor’s race, with all four contenders . . . open to the death sentence for repeat child victimizers”).

¹⁴⁵ Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 422–23 (1998).

¹⁴⁶ GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 219 (1989) (quoting a white female juror in a rape trial, who found defendant’s appearance contrary to the stereotype of rapists, as stating that the defendant was “[a] nice-looking young fellow,” “[n]ice[ly] dressed, like a college boy” with a “[n]eat haircut,” and she “couldn’t believe he would be capable of something like this”).

¹⁴⁷ See Orenstein, *supra* note 51, at 681 (1998) (asserting jurors disbelieve “[w]omen who push the limits of their sex roles”); see also *Jurors Order Death Sentence for Megan Kankas Killer*, CNN.COM (June 20, 1997), http://articles.cnn.com/1997-06-20/us/9706_20_kanka.verdict.pm_1_timmendequas-maureen-kanka-court-judge-andrew-smithson?_s=PM:U (describing the Megan Kanka case and the outcome for the man convicted of her rape and murder).

¹⁴⁸ See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 876–78 (2000).

the women vulnerable to violence in the first place.¹⁴⁹ Unfortunately, a collateral harm of the domestic violence and rape reform campaigns is that criminalization efforts diverted an enormous amount of feminist academic and political capital away from distributive and dialectic efforts that could help secure the well-being, not just of women victims, but of all women.¹⁵⁰ This is not to say that feminists were wrong to try to make the criminal system more responsive to the needs of gender violence victims. Nor is it an argument that criminal law can never be used as a vehicle of anti-subordination. Given the benefit of hindsight, however, the neo-feminist is in a position to inject a dose of healthy skepticism into plans for future feminist criminalization efforts. Perhaps neo-feminists can even make a compelling argument, at this particular time, for taking criminalization off the feminist agenda.

To conclude, I hope I have made the case that many of the current critical assessments of domestic violence and rape reform fit firmly within the feminist theoretical tradition. Addressing the issue of gender subordination is as complicated an endeavor as any normative analysis regarding a just social state. Moreover, no philosophical theory is immune from attack, criticism, or rejection, and in fact such close, critical scrutiny usually inures to the benefit of the theory. As a result, feminism accommodates a range of theorizing, as different and perhaps conflicting as liberal and Marxist, so long as such theorizing is in the service of women's empowerment. The neo-feminist analysis of gender crime law, although it rejects many aspects of law reform in the

¹⁴⁹ See, e.g., *supra* notes 85–89 and accompanying text.

¹⁵⁰ See MS. FOUND. FOR WOMEN, SAFETY & JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM 10 (2003), *available at* http://www.ms.foundation.org/user-assets/PDF/Program/safety_justice.pdf. (“To achieve a better response from law enforcement, which has traditionally been unresponsive to violence against women, the movement has devoted considerable energy to legal reform and to getting the legal-judicial systems to take the problem seriously. This has led to an over-emphasis on, or ‘over- resourcing’ of, the legal system to the virtual exclusion of other alternatives.”).

area of domestic violence and sex offenses, prioritizes the interests of women victims particularly, women generally, and the feminist commitment to larger egalitarianism.

V. CONCLUSION: SYNTHESIZING THE PRINCIPLES OF NEO-FEMINISM

In analyzing the neo-feminist response to domestic violence and rape law reform, some underlying principles of neo-feminism emerge. A neo-feminist analysis rejects that purely liberal strategies, formal equality, and equal rights can solve the problem of women's subordination. However, the answer should not be a pursuance of authoritarian state intervention at all costs. In addition, the neo-feminist is wary of both the characterization of women as atomistic rights-bearers and the essentialist notion that all women suffer similarly from male domination. As a consequence, neo-feminist theorizing recognizes the difficulties of both liberal and dominance feminism strategies to combat gender crimes and other sex-based inequalities.

The neo-feminist approach accordingly supports a focus on legal approaches that are more responsive to social welfare concerns. Alternatively, it advocates turning the bulk of efforts away from purely legal solutions toward policy efforts that transform economic distributions and cultural attitudes. In addition, neo-feminism is in a position to gauge the successes and failures of second-wave interventions. Rather than being a grand narrative of women's condition, the neo-feminist approach can be practical in its support of strategies whose benefits to women's conditions outweigh the drawbacks. As a result, a neo-feminist theory can account for the differing ways in which women from different subgroups experience male domination and other forms of subordination.

Understanding these characteristics of neo-feminism, one can sense that legal scholarship devoted to women's issues may be experiencing a "neo-feminist moment." It appears that scholars are analyzing a variety of legal issues in a way that is cognizant of the limits of liberal

theory, careful about essentializing women’s experiences, and concerned about state police power. In the domestic violence realm, many feminist scholars are questioning the feminist commitment to police-power-based strategies.¹⁵¹ Neo-feminist theorizing is also occurring, for example, in the realm of international women’s rights and sex trafficking law. In their article, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking*, Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas analyze a variety of feminist issues in transnational and international law, including wartime rape and sex trafficking. They remark:

Our sense at the moment is that a preoccupation with normative achievements (message sending, making rape/sexual violence visible, changing hearts and minds among elites and across populations) and a legal imaginaire in which prohibition would “stop” or “end” conduct harmful to women—or decriminalize it in order to liberate them and give scope to their agency—animates the [feminist] projects we are studying and detaches them from a certain pragmatic attitude and interest in complex distributional consequences that we seek to bring to the domain. We are all agreed that we’re working, methodologically, for a new legal realism that would anticipate the complex ways in which legal entities meet complex societies.¹⁵²

Similarly, Shelley Cavalieri proposes a “third-way” feminist approach to sex work that “relies on the dominance feminist critique of social conditions generative of women’s economic desperation, which often underlies women's choice to engage in sexual labor[,]” but “at the same time . . . rejects gender essentialism and endorses a liberal notion of the individual woman as an actor with real, though constrained, personal autonomy.”¹⁵³ In the transnational family law arena,

¹⁵¹ See, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001); Goodmark, *supra* note 84; Holly MaGuigan, *Wading into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 427 (2003); Miccio, *supra* note 102, at 281.

¹⁵² Halley, Kotiswaran, Shamir & Thomas., *supra* note 44, at 421.

¹⁵³ Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1410 (2011).

Cyra Choudhury observes that the exportation of Western family law norms “include racist and neo-imperial judgments about the backwardness of ‘traditional’ women” and advocates that liberal feminism “re-orient” itself “to be in partnership and with sensitivity to what local women need and desire.”¹⁵⁴ Addressing the home/work issue, Laura Kessler suggests a class-conscious approach to feminist analysis that recognizes anti-essentialism, emphasizes government distribution strategies over private ordering, and incorporates insights from sociology.¹⁵⁵

These are only a few of many scholarly articles firmly committed to the problem of gender subordination, but skeptical of certain liberal and dominance feminist legal devices. Far from being anti-feminist or somehow traitorous, neo-feminists enrich feminist legal theory by producing scholarship that has the effect of both remedying gender inequities and forging connections between women and other subordinated groups. Moreover, rather than being steeped in post-modern paradox or definitional-stop,¹⁵⁶ neo-feminists are crafting legal and social strategies that seek to concretely benefit women, while continuing to recognize the complexities of overlapping systems of hierarchy and power. The many neo-feminist contributions in the criminal law realm that this Article discusses in Part IV serve to counter the notion that feminists are at odds with civil libertarians, race critics, and other progressives, who largely critique the current American penal state. Accordingly, this neo-feminist moment in criminal law scholarship can be seen as a return to the feminist first principles of non-subordination, distributive equality, and skepticism of the status quo.

¹⁵⁴ Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259, 322 (2011).

¹⁵⁵ Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915, 918–19 (2008).

¹⁵⁶ Neo-feminist commentary, unlike much postmodern feminist theory, *see* HALLEY, *supra* note 21, is not particularly concerned with exposing the contingent construction of gender (and even sex) or the seeming impossibility of theorizing about group rights in a non-essentialist manner.