The Feminist War on Crime

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Aya Gruber*

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PROLOGUE

July 2000: I am standing in the busy hallway of District of Columbia Superior Court, where life swirls around like a tempest. There are young and old, faces of color, women with small babies—all huddled around oddly out-of-place orange and yellow plastic chairs lining the hall. Uniformed D.C. metro police lounge in groups, swapping stories and laughing, while inscrutable U.S. Marshals in ties and with military crew cuts determinedly enter courtrooms, accompanied by young, impeccably groomed, grey-suited U.S. Attorneys. I stand with my client, Jamal, who, at nineteen years old, still retains a beautiful baby face, with neatly done-up plaits and the latest Nike sneakers. Jamal might have come straight from the soundstage of MTV’s TRL or a teen TV show. This, however, is no TV show, and Jamal is here for the civil-protection order ("CPO") portion of his domestic violence proceedings. He had been arrested ten days ago after his eighteen-year-old girlfriend, Britney, called the police and claimed that he punched her and threw a plate at her. As of late, domestic violence advocates had been subpoenaing defendants to testify at CPO hearings in the hopes of producing self-incriminating statements that could be used against

1. Because of privacy concerns, the characters in this narrative are fictional. The events, however, are real. They are an amalgam of many similar experiences I had while defending cases in domestic violence court.

2. The District of Columbia has enacted legislation providing civil remedies to movants who make a showing of "good cause to believe the respondent has committed or is threatening an intrafamily offense." D.C. CODE § 16-1005(c) (2001). A civil protection order ("CPO") lasts for up to one year and is renewable upon motion "for good cause shown." Id. § 16-1005(d). CPOs place serious burdens on respondents. They are routinely ordered to leave their homes, stay away from their children, pay substantial amounts of money, and submit to counseling. Id. §16-1005(c). CPOs impose these burdens on respondents without any finding of criminality beyond a reasonable doubt. See id. Moreover, respondents are rarely represented by counsel in protection order proceedings. See D.C. COURTS, FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS 143 (1992) (finding that seventy percent of petitioners and respondents in protection order hearings are unrepresented). Domestic Violence Clinic Director, Deborah Epstein, describes the CPO process:

Few respondents in any jurisdiction are represented by counsel in civil protection order cases, so they are unlikely to be advised of their right to request a hearing in the month following the receipt of what, on its face, appears to be a final court order. Even in those instances where a hearing is scheduled and held, this only provides the respondent with an opportunity to undo the order long after it has gone into effect. He is likely to spend at least thirty days, and most likely far longer, ordered out of his home, forced to stay away from a range of persons and places, with no access to his children, and without the use of his car.

defendants in later criminal trials. I am here to make sure that the judge honors Jamal's Fifth Amendment privilege.

A few minutes before we enter the courtroom Britney shuffles up. She is equally cute and colorful, squeezed into tight-stretch jeans with platform flip-flops and yellow shoulder-length braids. She looks more ready for the galleria mall than for court. She asks if I am Jamal's attorney, and I reply in the affirmative. She says, "The other lady told me I have to be here, but I didn't want to come." She goes on to explain that she and Jamal live together with their baby in a project called Lincoln Heights—a place, incidentally, where a young male like Jamal is lucky to make it to age nineteen without a severe criminal record or drug habit. Britney tells me that she only called the police "cause I was mad and wanted him out the house." She does not want to pursue charges against Jamal and adamantly refuses to comply with any no-contact order. Then, in a more hushed tone, she asks, "What if I just leave now and don't show up later—will they drop the case?"

So here I am again, straddling the line between zealous advocacy, ethics violation, and obstruction of justice. The answer to Britney's question is

3. Without counsel, respondents at CPO hearings feel compelled to testify to counter the testimony of petitioners. While some family court judges fairly remind defendants of the potential for incrimination, others are more than willing to see defendants take the stand. Indeed, in the absence of testimony from the defendant, the issuance of a CPO is basically pro forma. Judges often make adverse inferences against defendants who assert their privilege. See, e.g., Frizado v. Frizado, 651 N.E.2d 1206, 1210–11 (Mass. 1995) (drawing an adverse inference against a CPO respondent who refused to testify on ground of self-incrimination); Wolf v. Rosson, Nos. 84603, 84650, 2005 WL 628235 (Ohio Ct. App. Mar. 17, 2005) (same). See generally Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'") (quoting 8 WIGMORE, EVIDENCE 439 (McNaughton rev. 1961)).

4. In Washington, D.C., domestic violence complainants can obtain a renewable 10-day temporary restraining order ("TRO") ex parte. See D.C. SUPER. CT. CIV. R. 65(b). These orders routinely contain provisions requiring respondents to have limited or no contact with petitioners. See, e.g., In re Peak, 759 A.2d 612, 614 (D.C. 2000) (describing the terms of a TRO).

5. Investigating cases and therefore talking to witnesses is part of a defense attorney's duty as a zealous advocate and essential to the defendant's Sixth Amendment right to counsel. However, witness-defense attorney interaction always presents a dicey situation. The ethical rules place limits on the extent to which defense attorneys may advise witnesses of the consequences of their testimony or lack of testimony. ABA Model Rule 4.3 states, "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983). Courts have found that ethical rules prevent defense attorneys from advising potential prosecution witnesses of their Fifth Amendment privileges. See, e.g., State v. Fosse, 424 N.W.2d 725, 728 (Wis. Ct. App. 1988) (finding such conduct to be an ethical violation). The Model Code of Professional Responsibility, a predecessor of the ABA Model Rules, also prohibits lawyers from " advis[ing] or caus[ing] a person to secrete himself . . . for
likely "yes." The government rarely serves domestic violence witnesses properly, and judges routinely dismiss cases when witnesses fail to show up. I say, "Britney, I can't tell you what to do. I am not your attorney. However, let's sit down, and you can tell me what happened between you two." Just as I am finishing my sentence, a young woman rushes up and inserts herself between Jamal, Britney, and me. She is blonde, no more than twenty-four, with a hip haircut and an enormous diamond engagement ring. "Domestic violence clinic student," I think to myself. She glares at me and demands, "What are you doing talking to my victim, and why is your defendant near her? He's violating the no-contact order!" A new, but as-of-

the purpose of making him unavailable as a witness." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-109(B) (1980).

Moreover, the federal obstruction of justice statute makes it a felony when a person "knowingly . . . corruptly persuades . . . or engages in misleading conduct toward another person, with intent to influence, delay, or prevent the testimony of any person in an official proceeding" and "intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from attending or testifying in an official proceeding." 18 U.S.C. § 1512(b) & (c) (2000). Courts have found that attorneys who advise witnesses not to testify commit obstruction of justice. See, e.g., United States v. Fayer, 523 F.2d 661, 663 (2d Cir. 1975) (holding that an attorney who advised a witness not to testify at grand jury was guilty of "corrupt[ly]" influencing witness).

6. D.C. law requires that witnesses be served with process in person. See D.C. SUPER. CT. R. CRIM. P. 17(d) ("Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for one day's attendance and the mileage allowed by law."). The U.S. Attorney's office generally mailed subpoenas to domestic violence witnesses, and thus the witnesses were not properly served. When essential witnesses failed to show up for trial, judges often dismissed cases for want of prosecution. See Robinson v. United States, 769 A.2d 747, 756 n.19 (D.C. 2001) (citing a study of one D.C. domestic violence calendar that revealed that the court dismissed for want of prosecution charges against 47% of male defendants and 22% of female defendants).

7. Of course, I am hoping to get a written statement from Britney that might be used later for impeachment at trial. Even such constitutionally required investigation is fraught with risk to defense attorneys. One prosecutor cautions:

Proceeding on their own initiative or at the perpetrator's direction, victims may ask the defendant's lawyer to prepare an affidavit recanting the statement provided to law enforcement. The criminal defense lawyer who does so will be strolling through an ethical minefield. Among the ethical violations or other problems that may arise are: conflict of interest (Rule 1.7), offering a frivolous defense (Rule 3.1), offering false evidence (Rule 3.3(a)(4)) and conduct prejudicial to the administration of justice (Rule 8.4(e)), plus potential problems with witness tampering, obstruction of justice, aiding and abetting and conspiracy, not to mention the risk of being sued for malpractice by the battered spouse/victim who decides to recant the recantation drafted by the perpetrator's conflicted lawyer.


8. For a brief description of a domestic violence clinic by its director, see Deborah Epstein, Fighting Domestic Violence in the Nation's Capital, 3 GEO. J. ON FIGHTING POVERTY 93, 94-95 (1995).

9. See supra note 4 (discussing TROs and no-contact orders).
yet unsuccessful, tactic of the clinic students is to assert that domestic violence victim-witnesses were "represented parties" under the ethical rules and thus any defense attorney who attempted to talk to them violated ABA Model Rule 4.2. This was an effort to prevent defense attorneys from obtaining statements in preparation for trial. I reply, "Britney came up to me. Apparently, she does not want to pursue this case or have no contact with Jamal." The advocate replies sarcastically, "I'm sure she told you that she wants to drop the case." Britney turns to the advocate and protests, "I don't want to be here, and Ms. Gruber told me I could leave." The advocate shoots me an accusatory glance, so I defensively reply, "No, I told her that I could not give her any advice on what to do, but, as you can see, she does not want to pursue this case." The advocate snaps, "Well, we'll just see about that. Come on Britney

10. Rule 4.2 of the Model Rules of Professional Conduct, also known as the "anti-contact rule," prohibits contact between lawyers and represented parties. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983). Needless to say, crime victims are not "represented" by prosecutors, and Rule 4.2 does not generally require defenders to refrain from speaking to them. See Neil Salon, Note, Prosecutors and Model Rule 4.2: An Examination of Appropriate Remedies, 12 GEO. J. LEGAL ETHICS 393, 404-05 (1999) (discussing application of Rule 4.2 to prosecutors and defense attorneys). The issue of whether a defense attorney is bound by Rule 4.2 becomes more complicated when the witness to a criminal case obtains the aid of an advocate for her civil-protection-order hearing. Prosecutor Nicole Howland represents the prosecutorial point of view of Rule 4.2, stating, "Lawyers representing perpetrators need to be circumspect even when they deal with victims at arms length. If the victim has a lawyer, direct communications with the victim are forbidden without the lawyer's consent. Rule 4.2." Howland, supra note 7, at 43.

11. Prosecutors widely entertain the notion that defense attorneys tell prosecution witnesses not to show up at trial. Moreover, they seem to believe that but for defense attorneys' persuasion, such witnesses would cooperate with the government. Former prosecutor Cheryl Hanna, for example, states, "Defense attorneys often informed women that if they did not appear in court, they would probably not be arrested [for failing to comply with a subpoena]. Day after day, women would not appear and defense attorneys would request dismissals." Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 HARV. L. REV. 1850, 1892 (1996). Domestic violence prosecutor Erin Claypoole warns other prosecutors, "The most obvious defense strategy in domestic violence cases is to get the victim on their team. This is to be expected and should not get you off track." Erin Leigh Claypoole, Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim, PROSECUTOR, Jan.-Feb. 2005, at 18, 26. Similarly, prosecutor Leslie Hagen writes, "The raw emotions, self-doubt, rationalization, insecurity, and introspection of the victim can easily be exploited by defense attorneys in their zealousness to find exculpatory and contradictory evidence." Leslie A. Hagen & Kim Morden Rattet, Communications and Violence Against Women: Relevant Michigan Law on Privilege, Confidentiality, and Mandatory Reporting, 17 T.M. COOLEY L. REV. 186, 190 (2000).

12. I have some reason for concern, as the U.S. Attorney's Office holds an enormous amount of power when it comes to interfering with the life of a disfavored defense attorney. One scholar explains:

[D]efense attorneys are placed in a position where their adversary, the prosecutor, has the discretionary ability to cause them to suffer severe economic costs and affect their livelihood. Given these considerations, some method must be
we need to talk, away from them." With that, she leads Britney away through the mass of humanity gathered in the bustling hall. Ten minutes later, we are all seated at counsel table. I listen as the judge orders a renewable one-year civil-protection order, including a requirement that Jamal have no contact with Britney or the baby. Britney looks down as the judge reads the order.

developed to assure defense attorneys that the practices will not be used in bad faith, nor used selectively against particular attorneys as a response to zealous advocacy.


13. One Assistant Attorney General explains the distrust that prosecutors have for defense attorneys. She states, "[P]rosecutors may come to see defense attorneys as representatives of the 'criminals' lobby.' In this view, defense attorneys use their stature as members of the bar to pursue the interests of criminal defendants not just inside the courtroom but in all of the attorneys' professional endeavors." Jo Ann Harris, The Practice of Federal Criminal Law: Lower the Decibel Level, Raise the Civility Level, CRIM. JUST. Fall 1994, at 38. Harris also notes, however, that defense attorneys harbor similar negative stereotypes about prosecutors. She observes, "For criminal defense attorneys—and often for their clients—it is tempting and all too easy to see the prosecutor as the most convenient stand-in for the ubiquitous government that the defense attorney feels obligated to fight on all fronts in order to promote the client's interests." Id. at 37. As a result, prosecutors often discourage victims and witnesses from talking to defense attorneys. See David S. Caudill, Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights, 17 GEO. J. LEGAL ETHICS 103, 103 (2003) ("Prosecutors and victim advocates are becoming more brazen about discouraging witnesses from speaking to defense counsel and investigators." (quoting Hon. Louis D. Caffin, et al., Pretrial Conferences, Pretrial Hearings and Discovery Motion Practice, in 1 MASSACHUSETTS DISTRICT COURT CRIMINAL DEFENSE MANUAL § 8.4.2(a) (Cathleen L. Bennett et al. eds., rev. ed. 2000))).

14. While it is quite easy for an alleged domestic violence victim to obtain a protection order, the orders are not in fact effective at eliminating contact between the domestic partners. One study revealed that sixty percent of protection orders are violated within one year of issuance. See Betsy Tsai, Note, The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation, 68 FORDHAM L. REV. 1285, 1292 (2000) (citing a study from The Commission on Domestic Violence). One of the reasons for the failure of the CPO system, is that the no-contact premise of the orders does not address adequately the complex relationship issues involved in a domestic violence case. See id. at 1293-94 (noting the complexity of domestic violence due to the family dynamics and emotional relationships involved).

15. So what is the moral of this story? Many would simply believe that if Jamal is in fact guilty then the correct result occurred. Hopefully, however, this narrative invites us to consider the larger social context of crime and question common stereotypes of domestic violence defendants and accusers. See Pedro A. Malavet, Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit, 33 U.C. DAVIS L. REV. 1293, 1301-02 (2000) ("Minority and subordinated communities utilize narratives to counter the 'singular homogenized experience' produced by the essentializing of identities imposed by majority society."). Not every domestic violence defendant is a prototypical serial abuser who hates women. Not every victim is weak-willed and afraid. I can say from my anecdotal evidence that most of the people who end up in domestic violence court are marginalized minorities, immigrants, and/or economically disadvantaged. The paradigm of the "burning bed" meek housewife and her white, middle-class, secretive abuser husband may exist somewhere, but not generally in D.C. Superior Court. Moreover, this story serves as a counter-narrative to the multitude of scholarly articles on domestic violence that draw in the reader by beginning with graphic descriptions of the worst cases of abuse.
INTRODUCTION

In the past several years, domestic violence reforms, which include sweeping protection orders, advocates, specialized courts, special evidentiary rules, mandatory arrests, and no-drop policies, have become increasingly popular and common in criminal court systems. The appeal of such domestic violence reforms often crosses political and philosophical lines. Many of the most ardent feminists and strict conservative policymakers would agree that Jamal and Britney should be permanently separated and Jamal should be incarcerated. Feminists might see such an outcome as the system taking domestic violence seriously and purging itself of the patriarchal idea that woman abuse is legitimate. Conservatives would consider incarceration appropriate retribution for Jamal's moral culpability.


18. See Tsai, supra note 14, at 1293 (discussing the role of specialized domestic violence courts).


20. See Hanna, supra note 11, at 1849-1910 (suggesting that mandatory-arrest and no-drop policies promote sufficiently important social interests to outweigh the wishes of the individual victim as to the prosecution of her partner). But see Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 HARV. L. REV. 550 (1999) (arguing that such policies increase the number of abuse victims).

21. See infra note 90 (describing prevalence of mandatory policies).


23. Former prosecutor Cheryl Hanna notes that domestic violence is one area of law where conservative and feminist ideologies converge:

Feminists argue that criminalization of domestic violence is one way to correct the historical, legal, and moral disparities in legal protections afforded to women, making public what traditionally has been thought of as a private crime... [and] ... social conservatives, not normally supportive of feminist legal reform, advocate using the law to enforce public morality and further the goals of retribution. They too have been supportive of criminal justice reforms in this area.


and management of Jamal’s dangerousness. But how could two camps with such different views of state power converge on the use of that power against Jamal? By embracing harsh criminalization policies, domestic violence reformers actually strayed from the underlying values of the feminist movement. They have also bolstered conservative ideologies and thus reinforced, rather than dismantled, inequality. Of course, not all feminists work in the area of domestic violence. Moreover, many of the ones who do work in this area do not advocate criminalization as a solution to domestic violence. It is undeniable, however, that domestic violence reform is a huge part of the feminist movement and that criminalization efforts are in the forefront of domestic violence reforms.

In the late 1960s and 1970s, feminists spearheaded the domestic violence and rape-reform movements and described gendered crimes as manifestations of larger patriarchal attitudes and policies infecting society in general. The criminal system failed to address gendered crimes adequately, exposing the extent to which such patriarchal beliefs pervaded the legal structure. Feminists directed their initial efforts at equalizing and civilizing the criminal justice system’s treatment of female victims, providing access


26. See infra note 102 and accompanying text (outlining the efforts within criminal law to curb domestic violence).


28. Domestic violence pioneer Elizabeth Schneider explains:

Feminists in the United States had argued for more than two centuries that women’s legally sanctioned subordination within the family denied them equality and citizenship. They saw intimate violence as an important vehicle of this subordination . . . . Feminists claimed that domestic violence threatened not only women’s right to physical integrity and perhaps even life itself, but women’s liberty, autonomy, and equality.

SCHNEIDER, supra note 27, at 4.


30. Morrison Torrey describes the effects of early liberal feminist efforts to equalize treatment of rape victims. She states, “Because liberal feminism was the dominant strain of the women’s movement in the 1970s and 1980s, the classic liberal ideology of privacy, autonomy, and individual choice shaped emerging rape reform.” 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).
and resources to such victims, and creating programs to address the economic and social realities that kept women in abusive relationships or led them to remain silent about rape.\textsuperscript{31}

Around the same time, the spark of a new and powerful criminal-reform movement appeared. In response to a perception, however false, that crime rates were perpetually rising\textsuperscript{32} and that the court system afforded too many rights to defendants,\textsuperscript{33} a grassroots movement revolving around the victim emerged.\textsuperscript{34} The crime victims' rights movement inserted new players, justifications, and a barrage of new legislation into criminal jurisprudence.\textsuperscript{35} The general public lauded the plethora of reforms in the name of empowering victims, leaving the only criticism to come from civil libertarians who expressed the unpopular view that the reforms posed threats to defendants' civil rights.\textsuperscript{36} However, while the movement engages the

\begin{itemize}
\item \textsuperscript{31} See Schneider, supra note 27, at 21, 44 (discussing, respectively, initial shelter efforts and calls for formal equality and the effort to pressure police to protect abuse victims); Sack, supra note 27, at 1666 (describing the early battered women's advocacy movement as a "grassroots effort to provide services and shelter to domestic violence victims, independent of state involvement").
\item \textsuperscript{33} See Lynne Henderson, Co-opting Compassion: The Federal Victim's Rights Amendment, 10 St. Thomas L. Rev. 579, 582–83 (1998) (noting that victims' rights were meant to counter defendants' rights); Thad H. Westbrook, At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights, 49 S.C. L. Rev. 575, 579–80 (1998) (describing the victims' rights movement as a response to Warren Court reforms).
\item \textsuperscript{35} Florida was the first state to add a provision to its constitution discussing the rights of victims. The provision reads:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

\item \textsuperscript{36} Lynne Henderson notes that "the symbolic strength of the term 'victims' rights' overrides careful scrutiny: Who could be anti-victim?" Henderson, supra note 25, at 952; see also Andrew J. Karmen, Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice, 8 St. John's J. Legal Comment. 157 (1992). "Who could oppose the legitimate demands of people espousing such a just and noble cause as the 'empowerment' of
rhetoric of individual rights and victim autonomy, it is really not about victim agency. Rather than securing victim autonomy without qualification, many victims' rights reforms simply seek to position the victim in the legal system in a way that inexorably leads to more liability and punishment for the defendant. In a sense, the victim is a foil, a tool of an even larger and more dangerous program of vigorous individuality and denial of social responsibility. The victims' rights movement is and always has been a product of conservative tough-on-crime ideology.

Unfortunately, feminist criminal law reform, which began laudably with the goal of vindicating the autonomy and rights of women, has increasingly mirrored the victims' rights movement and its criminalization goals. Many of the widespread domestic violence reforms are more about increasing the likelihood of defendants going to jail than about supporting the individual desires, welfare, and interests of victims. Reformers have embraced

innocent victims who suffered physical injuries, psychological harm, or financial losses? Who or what could stand in the way of initiatives to alleviate the plight of crime victims? Id. at 157.

37. I have elsewhere noted:

[T]he victims' rights movement is more of an anti-crime, even anti-defendant movement, than a movement intended solely to give victims of crime more participation in the criminal process. As a result, the calls for the granting of party or near-party status are a means to empowering the victim only when the victim's interests are adverse to the defendant's. Given this philosophy, the victims' rights movement certainly would not advocate an increased role for the victim in the criminal trial if doing so provided further defenses to the defendant. Ultimately then, it appears that the true end of privatization is increased punishment.


38. Victims' rights reforms, for example, seek to empower victims who feel the prosecution is too lenient. To this end, statutes require prosecutors to consult with victims before entering into plea agreements or dismissing cases. See, e.g., N.C. GEN. STAT. § 15A-832(f) (2005). The North Carolina statute provides:

Prior to the disposition of the case, the district attorney's office shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about the disposition of the case, including the victim's views about dismissal, plea or negotiations, sentencing, and any pretrial diversion programs.

Id.

39. Markus Dubber notes, "As a matter of fact, the vindication of victims' rights has everything to do with the war on crime. As a matter of principle, the vindication of victims' rights has nothing to do with the war on crime." MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 167 (2002).

40. See Dubber, supra note 34, at 6 (characterizing the victims' rights reform effort as a political movement backed by tough-on-crime politicians).

41. See infra notes 71-76 and accompanying text (describing mandatory policies). Reformers counter that such policies "work." However, while some studies suggest that mandatory policies may reduce the incidences of domestic violence, other data indicates that such policies actually increase the risk of harm to women. 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, 320-22 (2004) (citing an Indiana study revealing that
incarceration and separation models, despite a plethora of gender and race-based scholarly critiques. Moreover, the domestic violence system treats victims with increasing amounts of paternalism and disdain, as more advocates and jurists buy into the belief that female victims are weak, damaged, and unable to recognize their own interests.

This Article cautions domestic violence reformers to adhere to the original feminist program of recognizing women's autonomy and pressuring society to change the patriarchal institutions and attitudes that give rise to gendered crimes. Feminists should see that both victims and victimizers operate within an imperfect society with institutionalized racism, sexism, and economic discrimination. Part I of the Article describes the origins and goals of feminist criminal law reform. Part II discusses the very different mandatory policies could be harmful to women and that battered women were most likely to ensure their safety when they had the power to drop charges).

42. Domestic violence scholar Donna Coker explains:

The . . . problem with anti-domestic violence discourse and law is the pervasive presumption that women should leave battering partners and that doing so will increase their safety. . . . Separation threatens women's tenuous hold on economic viability, for without the batterer's income or his assistance with childcare, for example, women may lose jobs, housing, and even their children. It is a cruel trap when the state's legal interventions rest on the presumption that women who are "serious" about ending domestic violence will leave their partner while, at the same time, reducing dramatically the availability of public assistance that makes leaving somewhat possible.

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). Scholars also argue that separation is not a historic goal of domestic violence reform. See Goodmark, supra note 22, at 20 (asserting that ending violence, rather than separation, was the historic goal of reform).

43. See Naomi R. Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 VAND. L. REV. 1041, 1086 (1991) (asserting that by emphasizing the passive and helpless aspects of battered women, reformers have created a legal image of battered women as helpless defective creatures rather than capable women temporarily affected by problematic circumstances); see also G. Kristian Micchio, A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement, 42 HOUS. L. REV. 237, 242 (2005) (noting that certain proponents of aggressive domestic violence policing tactics "reify[] the cultural stereotypes of the incapacitated and irrational woman—stereotypes that confine women to, rather than liberate women from, oppressive homes").

44. See Jenny Rivera, The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements, 4 J.L. & POL'Y 463, 505 (1996) (asserting that the domestic-law-enforcement model, which takes power out of the hands of battered women, is in philosophical opposition with feminist principles of individual and community empowerment).

45. Donna Coker discusses the intimate relationship between institutionalized racism and criminal law enforcement. She asserts that one reason why discrimination continues to pervade criminal law enforcement is that "whites are seldom aware of the degree to which white privilege protects them from police suspicion and surveillance. The invisibility of white privilege (to whites) encourages them to presume that system maltreatment is, in some part, the fault of the victim of such maltreatment." Donna Coker, Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System, 93 J. CRIM. L. & CRIMINOLOGY 827, 831 (2003).
origins and philosophies of the crime victims’ rights movement and its incorporation of the discursive methodology of describing victims as objects and defendants as pure agents to support tough-on-crime policies. Part III describes how conservatives have historically used this discursive methodology to justify women’s subordination. Part IV explores the ways in which the feminist criminal law reform movement has begun to resemble the victims’ rights movement and replicate its conservative goals by, among other things, adopting the dialectic of objectification and agency. Finally, Part V provides some suggestions to move domestic violence reform in a direction more true to its roots by envisioning all parties in the domestic violence system as complex actors who are capable of making free choices and yet constrained by their social realities.

I. THE ORIGINAL IDEOLOGY OF FEMINIST CRIMINAL LAW REFORM

Scholars sometimes characterize domestic violence and rape reform as part of the larger victims’ rights movement. The purposes behind, and origins of, feminist criminal law reform, however, are quite distinct from those underlying the more general crime victims’ rights movement. Domestic violence and rape reform were part of a larger effort to resist patriarchal structures and secure social justice for women.

Historically, liberal feminists called for the formal equality of genders, requiring, at the very least, that criminal laws treat men and women equally. The lack of law enforcement against men who committed crimes against women represented formal inequality in the criminal justice system.

46. See, e.g., Alice Koskela, Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System, 34 IDAHO L. REV. 157, 163 (1997) (noting that the feminist criminal law reforms were intimately tied to the development of the victims’ rights movement).

47. See Micchio, supra note 43, at 250 (asserting that the principle of social justice and the idea that women should be free from physical and psychological control drove feminist domestic violence reform).

48. Feminist Mary Becker describes liberal feminism:

Liberal feminism assumes that people are autonomous individuals making decisions in their own self-interest in light of their individual preferences. Human well-being therefore should increase as individuals have more choices. Sexism operates by pressuring or requiring, sometimes by law, individuals to fulfill male and female roles regardless of their individual preferences. The solution to inequality between women and men is to offer individuals the same choices regardless of sex. The legal standard of formal equality is an expression of this solution.

Mary Becker, Patriarchy and Inequality: Towards a Substantive Feminism, 1999 U. CHI. LEGAL F. 21, 32–33.

Moreover, the substantive law itself often contained explicit biases against women. Rape law, for example, treated rape complainants differently than other complaining witnesses. Women alleging rape faced presumptions of incredibility, justifying special evidentiary requirements like resistance and corroboration. Feminists brought to light historical formal legal barriers to gender equality in the criminal process, debunking the myth of legal neutrality.

The second wave of feminism brought rape and domestic violence reform to the forefront of the feminist movement. Motivated in part by Catherine MacKinnon’s theory, feminists moved beyond purely liberal reasoning and asserted that under-enforcement of domestic violence and rape laws represented more than just the failure of the criminal justice system to render formal equality. The lack of enforcement of these laws reified patriarchal views that women are objects and reflected conservative ideology that subordinated women’s issues by deeming them private and

50. The common law of rape in many jurisdictions required that a prosecution could only be maintained if evidence existed that the victim “resisted to the utmost.” This requirement came from a belief that women alleging rape could not be legally credited without physical corroboration. Courts would enforce the requirement even in the face of evidence that resistance would have been dangerous. See People v. DeFrates, 210 N.E.2d 467, 470 (Ill. 1965) (finding insufficient evidence of rape in the absence of resistance and asserting that victim’s report of rape “may as well be accounted for by a belated sense of guilt occurring when a dalliance unintentionally extended into the daylight hours”). Courts have never required such physical corroboration of crime from victims of non-gendered crimes. Non-sexual assault, burglary, and theft victims, for example, never have to show that they resisted the crimes in order for a prosecution to result. For a discussion of the formal legal barriers to gender equality in the rape trial, see Aya Gruber, Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape, 4 WM. & MARY J. WOMEN & L. 203, 225-30 (1997).


52. MacKinnon asserts that the characterization of sexual and domestic relationships as "private" is political methodology employed by men to subordinate women. She states:

Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men’s forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as every life.

CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161 (1989). Mary Becker explains:

MacKinnon’s bottom line—the prize we need to keep our eyes on—is power. We need continuously to look for subtle and not-so-subtle ways in which differences between women and men are turned time after time into advantages (more power) for men and disadvantages (less power) for women. Sex is the core of this phenomena: sexuality appears as the interactive dynamic of gender as an inequality.

Becker, supra note 48, at 37-38.
thus inappropriate for legal response. Feminists characterized sexual power over women as both a symptom of patriarchal values and a tool of maintaining gender dominance, in which the state was complicit for its failure to intervene. Feminists fought against the patriarchal attitudes that sought to render women objects of men and deny women agency in domestic and sexual relationships. Scholars describe how feminists linked domestic violence to state discrimination:

The battered women's movement of the 1970s to the 1980s was the product of the social movements of the 1960s that challenged conceptions of power based on race, sex, and sexual orientation. This movement was integral to the women's liberation movement because it challenged male hegemony over women's bodies in the home. The battered women's movement developed an ideology that contested the appropriation of women's bodies, challenged conceptions of male supremacy in the family, and analyzed how the individual power of the patriarch was supported and legitimized by the state. In the feminist mindset, domestic violence and rape were not merely about individual "deviant" males asserting illegitimate power over individual

53. Schneider observes that the battered women's movement "created the theoretical concept of battering, and the issue has now moved from social invisibility as a 'private problem' to an important public concern." Schneider, supra note 27, at 5.


55. See Micchio, supra note 43, at 252-53 ("Judicial inquiry started from the point that some physical violence was acceptable to preserve the 'natural order of things'—of which familial harmony and male hegemony were integral parts.").

56. Mary Becker describes patriarchy in the context of sexual agency:

Patriarchy denies that women can be sexual agents making moral decisions in light of their own sexual desires. Patriarchy teaches that a woman should agree to sex with "her" man when he desires it regardless of whether she desires it or is likely to find it pleasurable. As beings with their own ends and purposes, women should be encouraged to develop as sexual agents capable of saying "no" to sex they do not desire and seeking their own sexual pleasures.

Becker, supra note 48, at 50-51.

57. Micchio, supra note 43, at 248-49 (footnotes omitted). Elizabeth Schneider also traces the domestic violence movement to the 1960s. She observes:

In the late 1960s a movement of feminist activists and lawyers began to bring the problem of woman abuse to public attention. At that time, there was no legal recognition of a harm of violence against women by intimates—today known as domestic violence. It simply didn't exist in the legal vocabulary.

Schneider, supra note 27, at 3.
women. Rather such crimes reflected larger social inequalities. Sexual and domestic crimes were problematic precisely because they reproduced and reinforced not only biases within the legal system, but also the vigorously defended patriarchal mindset of society. As one feminist asserted:

Battering may be experienced as a personal violation, but it is an act facilitated and made possible by societal gender inequalities. The batterer does not, and indeed could not, act alone. Social supports for battering include widespread denial of its frequency or harm, economic structures that render women vulnerable, and sexist ideology that holds women accountable for male violence and for the emotional lives of families, and that fosters deference to male familial control.

Feminists thus recognized the close relationship between domestic violence and widespread economic gender discrimination.

The earliest domestic violence and rape reforms sought to address both systemic inequality and patriarchal social attitudes. In terms of formal equality, reforms targeted legal and practical barriers to female victims' participation in the criminal process. Law reforms removed evidentiary barriers to prosecution of sexual crimes. Courts and legislatures, for

58. See Micchio, supra note 43, at 254 (asserting that domestic abuse, like homophobia, is a social problem rather than a defect in the "psyche of individual men").

59. Lynne Henderson summarizes the view that law is inherently gendered, as explained by Carol Smart in her book Feminism and the Power of Law. Henderson observes, "Smart focuses on particular issues for feminists concerned with law and seeks to demonstrate that law's patriarchy is impervious to women's concerns and voices. She argues throughout that feminist efforts to change law are and will be co-opted either by legal phallocentrism or right wing antifeminism." Lynn Henderson, Law's Patriarchy, 25 LAW & SOC'Y REV. 411, 432 (1991) (citations omitted).


61. Scholars observe:

Leading feminists and the U.S. Commission on Civil Rights suggest that violence against women begins with educational and economic discrimination . . . . Men learn to consider women burdens, stiflers and drags on their freedom. Women, in turn, do not have the economic independence and access to day care that would enable them to leave abusive settings. Feminists also suggest that violence begins with the infantilization of women so that men hold them in contempt and see them as easily dismissed or lampooned and ready targets for anger.


62. The previous view had been that rape complainants were a priori incredible. Wigmore's treatise on evidence once characterized the rape complainant as follows:

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements
example, began to eliminate or temper the marital exemption, which had served to deny married women access to the legal system altogether. Corroboration and resistance requirements, which burdened complaining witnesses in rape cases with presumptions of incredibility, were also abandoned.

In addition to formal legal reforms, other policies targeted prevailing attitudes that prevented female victims from securing justice. Feminists organized class-action lawsuits against police departments whose officers deliberately failed to intervene to protect women. Moreover, police and prosecutors were trained to treat rape and domestic violence victims with respect to lessen the overwhelming stigma associated with being a female victim of a gendered crime that is symptomatic of the patriarchal mindset.

or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. . . . The real victim, however, too often . . . is the innocent man . . . .

3a Wigmore, Evidence in Trials at Common Law § 924a, at 736 (Chadbourn rev. 1970).

63. See Lalency Weintraub Siegel, Note, The Marital Rape Exemption: Evolution to Extinction, 43 CLEV. ST. L. REV. 351, 367–69 (1995) (surveying state laws and finding that four states retain the marital exemption, twenty-four states allow for prosecution of spousal rape under certain circumstances, and twenty-two have eliminated the distinction between spousal and non-spousal rape); see, e.g., People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) ("[A] marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity.").

64. See, e.g., People v. Barnes, 721 P.2d 110, 113–24 (Cal. 1986) (discussing in detail reasons for rejecting the resistance requirement). Courts and legislatures had justified such requirements by the danger of false conviction in a "he said, she said" situation. Feminists successfully challenged the logic of these requirements as nothing more than sexism, demonstrating that such presumptions applied only to gendered crimes and not to any other crimes where the primary evidence was victim-witness testimony. See supra text accompanying note 50.


66. See Andrea A. Curcio, The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws, 20 GA. ST. U. L. REV. 565, 578 (2004) ("In many jurisdictions, police and prosecutors now have formal training sessions designed to educate them about rape myths and the need ‘to take . . . more seriously the testimony of [acquaintance rape victims], especially those whose sexual choices and conduct have traditionally been taken to be provocative, improper, or immoral.’" (quoting George E. Panichas, Rape, Autonomy, and Consent, 35 LAW & SOC’Y REV. 231, 233 (2001))).

67. Fearing that prevailing patriarchal attitudes lead society to see them as loose, weak, untruthful, or crazy, many women victims are reluctant to report or seek help for gendered crimes. I have elsewhere stated:

While I appreciate the magnitude of the social and institutional problems surrounding the rape trial, these problems must be given social and institutional solutions. Society must be informed about gender equality . . . . Police,
As one scholar explains, the battered woman "wears the stench of shame and embarrassment while her mate bathes in society's fountain of indecisiveness." In addition, feminists secured funding for services for rape and domestic violence victims. Shelters began to provide abuse victims with alternatives to staying in abusive relationships. Such early reforms did not mandate that victims' wishes necessarily coincide with state prosecutorial aims. Rather, they sought to give victims the option to access the legal system or external services if they so desired.

As time passed, domestic violence reform became more prosecutorial in nature and policies involving intrusive state intervention emerged. Many feminists embraced mandatory arrest and prosecution policies as countering patriarchy within the criminal justice system. They asserted that such policies served to correct the inevitable inequities produced by a discretionary system. Namely, police, prosecutors, judges, and jurors, internalizing patriarchal attitudes, simply did not treat victims of domestic violence the same way as other crime victims. Reformers argued that police prosecutors, and hospital workers must receive training on treating rape victims sensitively. People must learn not to stigmatize rape victims.

Gruber, supra note 50, at 232.

68. White, supra note 51, at 722-23.

69. Emily Sack explains that "[t]he early battered women's advocacy movement was a grassroots effort to provide services and shelter to domestic violence victims, independent of state involvement." Sack, supra note 27, at 1666.

70. See id. (discussing initial reformers' efforts to develop various types of assistance for victims).

71. See Margaret Martin Barry, Protective Order Enforcement: Another Pirouette, 6 Hastings Women's L.J. 339, 340 (1995) (describing 1970s women's groups' proposals of structural reforms and policy changes as a counter to sluggish responses from state actors to feminists' calls for domestic violence intervention); Sack, supra note 27, at 1666 (noting the call for increasingly aggressive police intervention and prosecution).

72. There are both intralegal and extralegal solutions to the problems presented by discretion. Extralegal solutions seek to eliminate the prevailing ideologies that lead discretion to be synonymous with discrimination. See Gruber, supra note 37, at 683 (proposing extralegal solutions to the problem of jury nullification in rape cases). Intralegal solutions take the prevailing ideology for granted and propose structural legal changes to account for them. See Sack, supra note 27, at 1689-90 (indicating that without mandatory policies, police and prosecutors would not make the "right choices"). Structural changes in such a context, however, are often highly problematic in that they temper discretion by changing procedural balances within the trial. See Gruber, supra note 37, at 644-60 (criticizing structural rape reforms as potentially violative of defendants' procedural rights). See generally Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. Chi. L. Rev. 607 (2000) (discussing the relationship between social norms and criminal law).

73. See infra notes 74-75. Similar discrimination against minority victims is evidenced in other areas of criminal prosecution, most notably imposition of the death penalty. Well-known statistics have revealed that defendants who commit homicide on victims of color are much less likely to receive the death penalty than those who kill white victims. See McCleskey v. Kemp, 481 U.S. 279, 286-87 (1987) (citing the "Baldus study," which demonstrated that in Georgia
viewed domestic violence as either a legitimate exercise of male control within a relationship or at least a private problem inappropriate for public concern. They also asserted that prosecutors were unwilling to bring domestic violence cases to trial because of their own patriarchal beliefs or fear that the complainant would not cooperate or the jury would not convict. Supporters of mandatory policies thus equated formal equality with ensuring that the percentage of domestic violence cases prosecuted in court roughly equaled the prosecution levels of other crimes.

The alliance between early domestic violence advocates and law enforcement, however, was tenuous at best, as feminists realized the risks of using state power to make the lives of women better. First, state power and women’s rights had not enjoyed philosophical symmetry in the past. State institutional mechanisms had historically subverted efforts toward women’s empowerment. In addition, the criminal justice system itself was infested with racial, socioeconomic, and gender biases that manifested every time criminal enforcement was increased. No doubt, if more persons were arrested and incarcerated for domestic violence, minorities, immigrants, and the poor would suffer the negative effects disproportionately. In addition, given the social context of law enforcement, minority victims of domestic violence were often penalized for being involved in the justice system at all. Mandatory arrest policies created the risk that women could be arrested

mutilations involving white victims resulted in the death penalty far more than murders involving black victims).

74. See Mordini, supra note 41, at 312 (discussing police attitudes).
75. See id. at 317; O’Connor, supra note 65, at 942-43 (attributing prosecutor reluctance to the belief that domestic violence is a private problem and the fear that victims would not follow through on the case); Donna Wills, Domestic Violence: The Case for Aggressive Prosecution, 7 UCLA WOMEN’S L.J. 173, 181 (1997).
77. See Schneider, supra note 27, at 182 (observing that feminists “were skeptical of an affirmative role for the state; they saw the state as maintaining, enforcing, and legitimizing male violence against women, not remedying it”).
78. See Naomi Cahn, Policing Women: Moral Arguments and the Dilemmas of Criminalization, 49 DEPAUL L. REV. 817, 821 (2000) (“The criminal route also serves to give control to the state. Where sensitivity to women is not a real priority, women can sacrifice control, getting little support in return. [In addition], many of the assumptions underlying criminal law are ‘nonneutral.’ ”).
79. See Sack, supra note 27, at 1675–76 (noting that many feminists saw the criminal justice system as the very embodiment of institutionalized male power over women).
80. See Cahn, supra note 78, at 820 (observing that because domestic violence reform has resulted in the disproportionate punishment of African American men, many African American women victims are reluctant to seek state remedies).
81. See infra notes 272–76 and accompanying text (describing the impact of criminalization on minorities).
when their abusers counterclaimed violence, and increased police attention placed battered women in other forms of jeopardy. Finally, resorting to state power to aid domestic violence victims smacked of the type of paternalism feminists had been fighting for years.

Nonetheless, there were significant benefits to a feminist law-enforcement alliance. First, there was the symbolic value of state actors taking domestic violence seriously. Prosecution of those who abuse women, many hoped, would send a message to society not to tolerate violence within domestic relationships. This might have some salutary effect on changing sexist attitudes about wife abuse. Reformers further believed that aggressive

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82. See Coker, supra note 42, at 1043–45.

83. Id. at 1047–48 (noting that some jurisdictions require police to report suspected child abuse when they respond to a domestic violence call where children are present and that many abused women become defendants themselves "as a direct result of being battered").

84. Christine O’Connor observes:

State intervention, particularly policies that mandate victim participation or no-contact orders, is premised upon a presumption that the state knows what is right for all women. These policies effectively tell the victim that her input is unnecessary, or even unworthy of consideration, in determining what has occurred and what is best for her family.

O’Connor, supra note 65, at 962; see also Sack, supra note 27, at 1666 (noting that many feminists saw the criminal justice system as having an interest in maintaining the status quo of male dominance).

85. See SCHNEIDER, supra note 27, at 186 (asserting that mandatory prosecution policies "send a message that domestic violence shall not be treated as a less serious crime than violence between strangers"); Sack, supra note 27, at 1670–71 (asserting the message-sending power of mandatory policies).

86. Schneider further states that mandatory policies “transform the private nature of domestic violence into a public matter,” SCHNEIDER, supra note 27, at 186, thus echoing MacKinnon’s criticism of the sexist public/private distinction. See MacKinnon supra note 54, at 1311. Interestingly, some scholars have noted that black women have a very different history with the public/private distinction, in that they have historically been considered property of the public realm. Jennifer C. Nash observes:

Because the black body is culturally, socially, and legally hyper-surveyed and because the black female body is inscribed and engraved with particular gendered and racialized cultural meanings, the black female subject has never been granted the same kind of privacy as the white female, the privacy that some feminists have argued needs to be “exploded.”


87. See Judith Resnik, The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act, 74 S. CAL. L. REV. 269, 274 n.21 (2000) (noting that such attitudes formed over centuries of condonation of male dominance in the domestic realm). While some hope that mandatory policies will effect attitude change, others believe that only a multi-pronged approach will work. See Tsai, supra note 14, at 1325 (expressing doubt that criminal laws alone, in the absence of far-reaching social reforms, could change such deeply held beliefs).
state intervention would deter future violence. In addition, they hoped properly administered state intervention that treated women with appropriate dignity might empower women to stay abuse-free.

As a result, formal requirements that police must arrest whenever there is probable cause to believe domestic violence occurred and prosecutorial no-drop policies began to materialize around the nation. Such policies, in

88. See Sack, supra note 27, at 1673–74 (asserting that no-drop policies increase prosecution levels and lower recidivism rates).

89. Elizabeth Schneider describes a study by anthropologist Sally Merry of domestic violence victims in a small town in Hawaii. In response to an increase in domestic violence, the town had enacted reforms increasing the availability of protective orders, increasing penalties for domestic violence, and instituting domestic violence control programs for batterers. In addition, the town established shelters and provided other forms of support for battered women. According to Schneider, Merry found that the system "had a considerable impact on the participants' understanding of themselves, violence, and the role of law . . . . 'The court becomes a place for women to turn for protection rather than a place that reinforces male authority.'" SCHNEIDER, supra note 27, at 49–50 (quoting Sally Engle Merry, Wife Battering and the Ambiguities of Rights, in IDENTITIES, POLITICS, AND RIGHTS 271, 275 (Austin Sarat & Thomas R. Kearns eds., 1995)).


States have also adopted legislation calling for the implementation of special prosecution policies. See, e.g., IOWA CODE § 236.12(3) (2005) ("A peace officer's identification of the primary physical aggressor shall not be based on the consent of the victim to any subsequent prosecution or on the relationship of the persons involved in the incident, and shall not be based solely upon the absence of visible indications of injury or impairment."); FLA. STAT. § 741.2901(2) (2005) ("The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence, as defined in § 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. § 611A.0311(b)(4) (2005) (mandating "procedures to encourage the prosecution of all domestic abuse cases where a crime can be proven"). Utah's legislative scheme provides stringent directives to judges in domestic violence cases. UTAH CODE ANN. § 77-36-2.7 (2003), entitled, "Dismissal—Diversion prohibited—Plea in abeyance—Release before trial," states:

(1) Because of the serious nature of domestic violence, the court, in domestic violence actions: (a) may not dismiss any charge or delay disposition because of concurrent divorce or other civil proceedings; (b) may not require proof that either party is seeking a dissolution of marriage before instigation of criminal proceedings; (c) shall waive any requirement that the victim's location be disclosed other than to the defendant's attorney, upon a showing that there is any possibility of further violence, and order the defendant's attorney not to disclose the victim's location to his client; (d) shall identify, on the docket sheets, the criminal actions arising from acts of domestic violence; (e) may dismiss a charge on stipulation of
theory, left no room for police and prosecutors to use their discretion to operationalize the sexist belief that domestic violence is not a crime. Mandatory arrest and prosecution were supposed to be cure-alls that would temper the patriarchal system and better protect interests of women, but something funny happened along the way. Rather than merely police and prosecutors resisting pro-enforcement policies, abused women themselves were reluctant to participate in state intervention. For a variety of social, economic, and emotional reasons, women either wanted to stay out of the system themselves or desired that the system exempt their partners from enforcement.

This development threw a significant curveball to feminists. Feminists were prepared to fight actively against police and prosecutor support of under-enforcement, which reformers could fairly and easily characterize as informed by patriarchy, but now they had to account for women's desires to stay out of the system. Feminist domestic violence reformers found themselves at a very important crossroad. The resistance of women victims to the intervention of the criminal system caused pioneers in the movement to intervene in the criminal process.

the prosecutor and the victim; and (f) may hold a plea in abeyance, in accordance with the provisions of Chapter 2a, making treatment or any other requirement for the defendant a condition of that status. . . .

(4) When a court dismisses criminal charges or a prosecutor moves to dismiss charges against a defendant accused of a domestic violence offense, the specific reasons for dismissal shall be recorded in the court file and made a part of the statewide domestic violence network described in Section 30-6-8. . . .

(6) The court may not approve diversion for a perpetrator of domestic violence.

UTAH CODE ANN. § 77-36-2.7 (2003). In addition to legislated prosecution schemes, municipalities and prosecutors' offices have adopted their own no-drop policies. See O'Connor, supra note 65, at 943-47 (surveying state and municipal formal and informal no-drop-prosecution policies).

91. See supra notes 71-76 and accompanying text (discussing police and prosecutor attitudes).

92. See Coker, supra note 42, at 1042-49 (describing women-victims' reluctance to participate in the criminal process).

93. See infra notes 306-09 and accompanying text.

94. See supra notes 72-75 and accompanying text.

95. Elizabeth Schneider explains how the feminist law reformer must exist in a "murky middle ground" between accepting state power and resisting state control of women. SCHNEIDER, supra note 27, at 196.

96. See Micchio, supra note 43, at 322 (asserting that feminists are at a "historical moment" in which they must reconsider the decision to sacrifice female autonomy for male-dominated state intervention). Renée Römkens similarly observes that the battered women's movement is currently "at a moment in history [where] feminist legal politics in the domain of domestic violence seem to have entered mainstream politics, certainly in the United States." Symposium, Battered Women & Feminist Lawmaking: Author Meets Readers, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römkens, & Marianne Wesson, 10 J.L. & POL'Y 313, 337 (2002) [hereinafter Battered Women Symposium].
to engage in serious self reflection. Reformers such as Elizabeth Schneider mused on the dangers of criminalization and questioned whether feminists had directed disproportionate efforts towards prosecution, but fell short of calling for an abandonment of mandatory policies. Others like Donna Coker and Holly MaGuigan openly and frankly reject mandatory policies and pro-prosecution sentiments. Given the importance of these voices, the larger reform movement faced a critical choice—forge ahead with criminalization policies and come up with arguments minimizing the importance of victim resistance or scale back on criminalization policies and focus elsewhere on the problem.

It was at this moment that domestic violence reformers faced a dilemma: On the one hand, many reformers thought that aggressive prosecution of domestic violence was necessary to delegitimize this form of gender subordination. On the other hand, reformers worried that pushing forward with prosecutions against a woman’s wishes ran contrary to feminist adherence to a woman’s autonomy. Nonetheless, reformers made a choice. Simply taking a look at the pervasiveness of mandatory arrest and no-

97. Sally Merry muses:

I wonder if the success of the battered women’s movement in bringing these cases to court and achieving at least minimal standards for arrest, prosecution, and even occasional incarceration is in part because it dovetailed with these other agendas, both the refocus on victims and the increase of control and surveillance over men of color.

Battered Women Symposium, supra note 96, at 332.

98. See generally SCHNEIDER, supra note 27, at 182-88 (discussing the dilemmas presented by mandatory policies).

99. See Donna Coker, Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review, 4 BUFF. CRIM. L. REV. 801, 806-07 (2001) (noting some potential benefits of mandatory policies as well as the complexity of the issue, but concluding that mandatory policies do not strike a good balance between reform efforts and state power). MaGuigan states, “[a]t a minimum, we must not enact additional mandatory arrest laws. Where they exist, we should urge prosecutors to use discretion in making decisions about which victims will have their safety endangered by prosecution. We must encourage prosecutors not to adopt no-drop policies.” 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, 443-44 (2003).

100. By “elsewhere,” I mean focusing political power, academic capital, and reform efforts on securing funding for assistance to women in areas like child care, education, and public benefits; countering patriarchal messaging and sowing economic and social empowerment generally. See Micchio, supra note 43, at 290 (noting that states channel domestic violence funds nearly exclusively to law enforcement, leaving inadequate resources for other services to abuse survivors).

101. Donna Coker describes the dilemma as follows: “The dilemma for feminists is to develop strategies for controlling state actors—ensuring that the police come when called and that prosecutors do not trivialize cases—without increasing state control of women.” Coker, supra note 99, at 807.
drop policies, one can see that the domestic violence movement forged ahead in embracing prosecutorial intervention.\(^{102}\)

This choice must be understood in light of the competing theoretical forces reformers encountered. On the one hand, reformers were well aware of the law's history of objectifying women and the state and criminal justice system's complicity in denying women autonomy. On the other hand, reformers were surrounded by a society bent on accepting the tough-on-crime ideology of the victims' rights movement. The idea that victims were helpless objects and defendants monstrous agents appealed to mainstream sentiments, such that domestic violence reformers would be rewarded for buying into this discourse. Perhaps the benefits of a philosophical alliance with the victims' rights movement was enough to compel domestic violence reformers to scale back on their adherence to feminist values. The next section analyzes the competing forces, namely, the victims' rights movement and the history of women's objectification, that underlay the domestic violence reform movement's transformation from a grassroots progressive movement to an ally of conservative criminology.

II. THE VICTIMS' RIGHTS MOVEMENT

A. ORIGINS OF THE VICTIMS' RIGHTS MOVEMENT

The victims' rights movement has a history and philosophy quite distinct from that of the feminist legal reform movement. Rather than beginning as a movement of resistance against the power elite, the crime victims' rights movement has always been part of a larger, socially conservative tough-on-crime ideology.\(^{103}\) Tough-on-crime ideals and rhetoric gained prominence in the Reagan eighties\(^{104}\) as a subset of a more general libertarian shift toward individual responsibility and away from social

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102. See supra note 90 (listing mandatory arrest and prosecution laws); see also Micchio, supra note 43, at 239 n.2 (citing statutes); Adele M. Morrison, Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence, 13 S. Cal. Rev. L. & Women's Stud. 81, 93 (2003) ("Criminal law has moved to the center of efforts to prevent, intervene in, and end domestic violence. Once efforts to enlist the law in the fight against domestic violence became successful, I argue that the law essentially took over anti-domestic violence efforts." (internal citation omitted)).

103. One of the key moments in the genesis of the victims' rights movement was Ronald Reagan's establishment of the President's Task Force on Victims of Crime in 1982. The Task Force found that the criminal justice system had lost "essential balance" and was doing a disservice to victims. President's Task Force on Victims of Crime, Final Report 114 (1982); see also Jon Kyl et al., On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, 9 Lewis & Clark L. Rev. 581, 584 (2005) (discussing the importance of Reagan's Task Force in the victims' rights movement).

welfare. This discourse coincided with a larger program of slashing welfare benefits and decreasing the role of government in healthcare, education, transportation, and distribution of wealth. In conservative ideology, each

105. Reagan’s philosophy operatively redefined public sentiment toward social welfare:
Perhaps no other politician effectively, yet controversially, built public resentment against social welfare programs like Ronald Reagan. During his bid for the 1976 presidential election, Reagan told a story about an African American woman from Chicago who was arrested for welfare fraud. According to Reagan, the woman had eighty aliases, thirty different addresses, twelve Social Security cards, four deceased husbands, and collected benefits under each name along with Medicaid and food stamps. 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.


107. President Reagan stated his philosophy as follows:
Th[e] rise in crime, caused by a hardened criminal class, was fostered partly from a liberal social philosophy that too often called for lenient treatment of criminals. Because this misguided social philosophy saw man as primarily the creature of his material environment, it thought that through expensive government social programs it could change that environment and usher in a great new egalitarian utopia. And yet even while government was launching a rash of social engineering schemes in a vain attempt to remake man and society, it wasn’t dealing with the most elementary social problems like rising crime. Individual wrongdoing, they told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. And somehow, and I know you’ve heard it said—I heard it many times when I was Governor of California—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. And today we still pay the price for those years of liberal leniency—I mean the growth in the ranks of career criminals, criminals who are contemptuous of our way of justice, who do not believe they can be caught and, if they are caught, are confident that once the cases against them enter our legal system, the charges will be dropped, postponed, plea-bargained away, or lost in a maze of legal technicalities that make a mockery of our society’s longstanding and commendable respect for civil liberties.

Ronald W. Reagan, Remarks at the Annual Conference of the National Sheriffs’ Association in Hartford, Connecticut (June 20, 1984), available at The Public Papers of President Ronald W. Reagan, http://www.reagan.utexas.edu/archives/speeches/publicpapers.html; see also 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”). Reagan’s emphasis on individual responsibility led to widespread policy reforms outside the criminal arena. See Kenneth R. Wing, The Impact of Reagan-Era Politics on the Federal Medicaid Program, 33 CATH. U. L. REV. 1, 47-48 (1983) (discussing Reagan-era cuts to healthcare and other spending programs). During the 1980 presidential election, Ronald Reagan called the Department of Education “President Carter’s new bureaucratic boondoggle.” Dan Lips,
person was an island unto oneself, ultimately responsible for his or her own failings and successes. Equality of opportunity rather than equality of outcome was the mantra, as conservative politicians decried the injustice of welfare and affirmative-action programs. Race scholar Angela Harris explains, “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.”

Tough-on-crime proponents characterized crime not as a social ill, but rather as an independent force hostile to American society. Thus, the government could declare “war” on crime and the criminal element, cementing the notion that crime existed as an evil entity that could be beaten with harsh enough criminal policy. Mari Matsuda criticizes the law for failing to consider the larger institutional mechanisms and social attitudes that contribute to individual problems or injuries. She explains:

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108. See Angelina Snodgrass Godoy, Converging on the Poles: Contemporary Punishment and Democracy in Hemispheric Perspective, 30 LAW & SOC. INQUIRY 515, 529 (2005) (noting that after the civil rights era, “conservatives called for a return to individual responsibility and a retreat from the precipice of liberal permissiveness, reframing the crime issue from a question of inadequate social welfare to one of insufficient social control”).

109. Professor Harris describes the ideology as follows: Ideologies stretching from the myth of meritocracy in higher education to the bromides of New Age self-esteem and self-improvement place both blame and responsibility on the individual. We succeed through our own individual merit and hard work; however, the concomitant insistence is that we also fail as individuals or because of a “culture” of poverty or fallen morality that we have failed to personally transcend.


110. Id. (footnotes omitted); see also Angela Onwuachi-Willig, Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity, 90 IOWA L. REV. 931, 948 (2005) (describing conservative ideology as a belief in less government involvement in social welfare and a greater emphasis on individual responsibility).

111. See Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,” 6 J. GENDER RACE & JUST. 381, 387 (2002) (characterizing Reagan’s “war on drugs” as part of a “rhetorical strategy that sought to demonize drugs and ostracize drug users”); Michael Tonry, Race and the War on Drugs, 1994 U. CHI. LEGAL F. 25, 70 (1994) (noting that the Reagan and Bush I Administrations waged several rhetorical wars on crime).

112. See Renée Rømkens, Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women, 13 YALE J.L. & FEMINISM 265, 286 (2001) (noting the current emphasis on criminalizing behaviors that were historically considered “social ills at worst”).
If a woman is raped, we look to the rapist for recourse. He is subject to the narrow criminal and civil sanctions of the law. Others in a position to predict and prevent rape... are typically absolved.... Immunity is also presumed for those who create an ideological system that makes rape possible.113

In this era, government and media portrayed criminals, not as products of circumstances, but rather as defective creatures—a class of people wholly different in comportment from average, law-abiding citizens.114 Rehabilitation gave way to deterrence and incapacitation as politicians used colorful rhetoric about criminality to support harsh policies, including increasing sentences and eliminating parole.115 Crime-fighting policy manifested solely as law enforcement and incarceration, rather than programs targeted toward eliminating poverty or creating alternatives to crime.116 Discretion in sentencing, the sole component of the criminal process that took account of defendants' social backgrounds, was greatly limited during this time period.117 In the name of “uniformity,” the federal government and a majority of states turned to mandatory sentencing guidelines, stripping judges of their discretion to sentence a defendant on social factors rather than just the fact of guilt.118 While the post-guideline


116. See Jonathan Simon, From a Tight Place: Crime, Punishment, and American Liberalism, 17 YALE L. & POL'Y REV. 853, 854 (1999) (asserting that crime control was one of the few government actions Bush and Reagan found defensible under their political ideology); see also supra note 107 (describing Reagan's ideology, which included increasing criminal sanctions while simultaneously reducing government involvement in welfare and educational programs).


THE FEMINIST WAR ON CRIME

regime did not secure the uniformity desired by sentencing commissions, it did uniformly increase sentences. 119 States and the federal government turned to legislative sentencing, stripping judges of discretion to sentence defendants on personal factors. 120

Tough-on-crime ideology is the "perfect storm" fusion of incapacitation theory 121 and retributivism. 122 Politicians moved the focus from context and desert to dangerousness, as media illustrated a society plagued with crime and in desperate need of crime control. 128 Politicians emphasized harm and guidance as a youth—for many, highly relevant to assessing an offender's culpability—are ignored by the Guidelines and even actively discouraged as grounds for departure”); Charles J. Ogletree, Jr., The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 HARP. L. REV. 1938, 1957 (1988) (asserting that the federal sentencing guidelines virtually eliminated the consideration of personal background as sentencing consideration).


First, the federal sentencing rulemaking power has become a one-way upward ratchet in which the sentences nominally required by the Guidelines are raised easily and often and lowered only rarely and with the greatest difficulty. Second, both judges and prosecutors have increasingly treated structured-sentencing rules primarily as tools for inducing guilty pleas and cooperation with the government. The consequence of these two failures operating in tandem has been unjustifiably long sentences imposed in some significant if unquantifiable fraction of federal cases . . . .


121. See Aya Gruber, Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense, 52 BUFF. L. REV. 433, 460 (2004) (describing incapacitation theory as "the concept that certain individuals should be removed from society to prevent them from harming others"); JAMES Q. WILSON, THINKING ABOUT CRIME 145 (rev. ed. 1983) (noting that incapacitation deprives criminals of liberty so that they cannot harm society).

122. Retributivism is the idea that punishment "must in all cases be imposed on [the offender] only on the ground that he committed a crime." IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (John Ladd trans., 1965) (1797).

123. One scholar links selective media coverage to the conservative agenda:

The absence of reporting about context reinforces the interpretation of crime favored by conservatives. This happens because the missing context gives the
victimhood, instead of individual culpability, and thus advocated longer sentences in the name of safety.\textsuperscript{124}

Once this tough-on-crime ideology scared the public into accepting high sentences, the rhetoric of retributivism, minus proportionality, proved a useful tool for making the public comfortable with high sentences.\textsuperscript{125} Retributivism was fused with incapacitation theory to say that all criminals were dangerous and should be incapacitated, and indeed deserved whatever punishment they got.\textsuperscript{126} As one expert has asserted, "The language of blame tends to call forth feelings of disgust in most human beings. Such feelings can be very successfully stirred up by any skilled tough-on-crime politician, and politicians frequently do exactly that."\textsuperscript{127} Retributivism, as articulated during the war on crime, stood for the principle that the general, undifferentiated criminal element was constantly culpable to the highest impression that violent crime is exclusively attributable to individual offenders' bad choices rather than to structural features. Because news coverage does not attend to the reality of crime rates and trends, it fails to provide sufficient context for the public to make reasoned judgments about crime and criminal justice policies. News media coverage of criminal justice administration typically emphasizes the "failures"—defendants freed on legal "technicalities" and by lenient judges—and presents advocates for more severe punishment as the remedy.


124. See Dubber, supra note 34, at 9; Gruber, supra note 37, at 663–64 (noting that sympathy for the plight of the victim was accompanied by a general disdain for consideration of defendant's background).

125. Generally, retributivism counsels not only that the deserving ought to be punished but also that the punishment must be fair. Retributivism thus limits the state from punishing an offender more than she deserves. See Gruber, supra note 121, at 452–53 (describing the "limiting principles" that flow from retributivism). Retributivism, as set forth by tough-on-crime reformers, includes the idea that the guilty deserve punishment but excludes the concept that such punishment must be proportional to wrong-doing. See James Q. Whitman, A Plea Against Retributivism, 7 BUFF. CRIM. L. REV. 85, 101 (2003) (criticizing the "virulence of retributivist rhetoric in our highly politicized criminal justice system"); see also infra text accompanying note 127.

126. See Whitman, supra note 125, at 88–89 (questioning the claim that "retributivism logically entails proportionality," given the use of blame discourse in modern American politics). Stephen P. Garvey analogizes retribution theory to "dynamite, which in the wrong hands can do more harm than good," explaining that the "widespread embrace of the rhetoric of retributivism—of just deserts and righteous indignation—has tended to sponsor extreme policies and practices that thoughtless retributivists themselves might well renounce." Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 UTAH L. REV. 205, 255–56 (quoting Stephen P. Garvey, Punishment as Atonement, 46 UCLA L. REV. 1801, 1839 (1999)); see also Guyora Binder & Nicholas J. Smith, Framed: Utilitarianism and Punishment of the Innocent, 32 RUTGERS L.J. 115, 118 (2000) (noting that "the public effect of retributivist rhetoric was to increase punishment").

127. Whitman, supra note 125, at 101.
degree, such that no amount of punishment was unjustified. Jonathan Simon, criminologist, explains the ideological shift:

For much of the twentieth century crime was perceived as a symptom of social pathologies that required community reform. Today the dominant view characterizes crime as an expression of willful aggression or evil. The dominant theory of how to respond to crime has returned to nineteenth-century notions of simple deterrence and elimination through exclusion or execution. Likewise, the related concept of individualized justice embodied in expert judges, and supported by a panoply of normalizing professionals (psychologists, social workers, probation officers, and so on), has been rejected in favor of mandatory sentences and zero-tolerance policies.

While this ideology of incapacitation/retributivism was constantly fed to the public, the tough-on-crime movement's basic premise—that certain people are irredeemable and deserving of the highest amounts of pain—is not an easy thing to stomach. Society in general had to shift from a belief in redemption and compassion to feelings of vengeance and hatred. Perhaps, the mere false fear of crime and rhetoric of desert could not alone effectuate such a widespread shift in social psychology.

Enter the victims' rights movement. The publicizing, not only of the heinous nature of crime (to instill fear) but also the tragedy of the victim (to

128. See Kyron Huigens, What Is and Is Not Pathological in Criminal Law, 101 Mich. L. Rev. 811, 812 (2002) (describing how "retributive rhetoric" has justified a criminal law "system of quarantine" in which desert and proportionality are ignored); see also infra notes 134-35 (discussing such rhetoric).
130. Brenda V. Smith describes the deep religious roots of beliefs in redemption:

[T]he precepts of many religious and psychological principles are based on forgiveness and redemption. These principles are premised on the belief that forgiveness is good in and of itself, that it is strengthening, and importantly, that it is necessary for the salvation and healing of the injured person. These principles, of both religion and psychology, leave open the possibility of redemption no matter what the individual has done. Both religious leaders and psychologists believe that without the possibility of forgiveness and redemption, individuals lose hope and motivation to change their lives.

132. Cf. Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics 8 (1997) ("[T]he trend toward greater public punitiveness did not precede the adoption and implementation of tough anticrime policies; officials have played a crucial role in framing the crime and drug issues in ways that imply the need for them.").
instill hatred), was the boost required by tough-on-crime proponents.\footnote{133} The media focus on crimes against women and children allowed society to see criminals as true irredeemable villains worthy of nothing but pain and death.\footnote{134} Such monsters deserve neither process, constitutional protection, nor mercy.\footnote{135} This belief easily translated to the yet-unknown criminal who, no doubt, must also be internally evil. As one expert noted, "[t]he victim became increasingly pitted against the offender, and only long sentences appeared to validate her pain and suffering."\footnote{136}

Although victims' rights seem naturally adverse to defendants, many would consider with skepticism the assertion that victims' rights reforms

\footnote{133. See Gruber, supra note 121, at 461 ("When phrased in terms of 'the safety of your children,' people's retributive intuitions move quickly to the side. Successful tough-on-crime and victim-centered narratives have moved even the highest court to embrace prevention as a goal of punishment."); DUBBER, supra note 39, at 192 ("To maintain its fever pitch of hatred, the war on crime needs ever more, and ever more sympathetic, victims.").}


Adam Walsh, Jacob Wetterling, Megan Nicole Kanka, Pam Lychner, Jetseta Gage, Dru Sjodin, Jessica Lunsford, Sarah Lunde, Amie Zyla, Christy Fornoff, Alexandra Nicole Zapp, Polly Klaas, Jimmy Ryce, Carlie Brucia, Amanda Brown, Molly Bish, Elizabeth Smart, Samantha Runnion. The names of these innocent victims are seared into the national consciousness but only represent a fraction of children victimized by violent sexual offenders. Their names comprise a roll call of insufferable loss and a call to national action—the injustice of each assault compounded by the cruel recognition that it might have been prevented. The continued vulnerability of America's children to sexual predators is a national tragedy demanding strong congressional action.


\footnote{135. In support of a federal bill that would make it a life offense to commit a second sexual assault on a minor, Representative Mark Green of Wisconsin remarked about the "Two Strikes and You're Out" Child Protection Act:

This bill is not about deterrence. This bill . . . is simply about taking these sick monsters off the streets, away from schools, away from our children, to protect our children, to protect our families, to try to end the cycle of horrific violence that is every parent's nightmare.

148 CONG. REC. H916 (2002) (remarks of Rep. Green). Experts note that the war on crime is fueled by images of the relatives of horrific crimes calling for swift and harsh punishment of "their" offender. Apart from living out vengeance fantasies borne of the powerlessness inherent in victimhood, these measures are said to prevent future violent crime by taking criminal predators off the street.


\footnote{136. Demleitner, supra note 134, at 568.}
actually disadvantage victims. One reason is that the movement widely uses the rhetoric of rights. When one thinks of a grant of "victims' rights," one naturally envisions that the victim is empowered by entitlements or abilities she did not before possess.\textsuperscript{137} It is important, however, to look past the rhetoric of rights to the substance of the reforms involved in the victims' rights movement.

The victims' rights movement, I assert, is not now and really never was about securing individuals' rights against or benefits from the government.\textsuperscript{138} If the movement were about rights, it would seek to secure victim autonomy, as it is generally understood that rights bearers control the exercise of their rights.\textsuperscript{139} When rights bearers cannot control the exercise of

\begin{itemize}
\item \textsuperscript{138} Many theorists divide rights into two distinct categories: negative rights and positive rights. Isaiah Berlin introduced the concept of negative and positive liberty and described negative liberty as freedom from interference by other persons and positive liberty as the real ability to achieve self-direction. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122-45 (1969). Over time, the negative/positive distinction has come to mean the difference between liberal protection of "natural rights" against government dispossession, see JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (MacPherson ed., 1980) (1690), and distributive justice, see HERBERT CROLY, PROGRESSIVE DEMOCRACY (1914). A negative right denotes that the rights bearer has certain protections against state interference, and thus the state may not disturb her in particular ways. The Fourth Amendment right to be free from unreasonable searches and seizures is a good example. U.S. CONST. amend. IV. Positive rights, on the other hand, require the government to do more than merely refrain from disturbing citizens and to actively provide basic entitlements. See, e.g., Leandro v. State, 488 S.E.2d 249 (N.C. 1997) (finding the North Carolina Constitution provided a substantive right to education).
\item Although the Supreme Court has characterized the Bill of Rights as a negative rights document, see DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-96 (1989) (holding that the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means"), scholars often criticize the prioritization of negative rights over positive rights, arguing that government has as much obligation to create the conditions under which citizens may enjoy a good life as refraining from interfering with the liberty of citizens. See Frank B. Cross, The Error of Positive Rights, 48 UCLA L. REV. 857, 858 (2001) (noting that positive rights advocates "urge that the U.S. Constitution explicitly recognizes a right to a minimally adequate material standard of living, a clean environment, or other conditions that require affirmative government action"). I assert that the victims' rights movement is not actually about securing negative or positive rights for victims.
\item If the exercise of a right is made mandatory, it is no longer simply a right, but rather an obligation, that imposes burdens on the bearer. For example, citizens have the "right to vote." U.S. CONST. amend. XXVI (stating that voting rights may not be abridged on account of race, sex, or age). Commonly, this means that the government may not prevent a citizen, either purposely or indirectly, from voting. See Smith v. Allwright, 321 U.S. 649, 664-65 (1944); Lane v. Wilson, 307 U.S. 268, 274-75 (1939) (invalidating racially restricted voting under the 15th Amendment); Nixon v. Herndon, 273 U.S. 556, 540-41 (1927); Guinn v. United States, 238 U.S. 347, 361 (1915); Myers v. Anderson, 238 U.S. 368, 379 (1915); Neal v. Delaware, 105 U.S. 370,
their rights, the "rights" are actually "obligations." The only situations in
which rights bearers are stripped of their ability to manage their rights is
when they are incapacitated\(^4\) or the right is too fundamental to waive.\(^4\)
The victims' rights movement, however, is simply not concerned with victim
autonomy. The victims' rights movement does not seek equal distribution of
rights to minority victims.\(^4\)

As a tool of tough-on-crime penological goals, the victim must occupy a
specific, predefined legal space, such that granting her "rights" will
necessarily lead to more incarceration for the defendant. The movement's
seemingly "negative rights" against the government are not rights against
unfair government intrusion but rather grants of power to the victim to

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\(^4\) By incapacity, I mean situations in which an individual is stripped of autonomy over
exercise and waiver because of a legally relevant condition that renders him unable to manage
his own rights. A person so incapacitated needs a fiduciary to secure his interests, whether those
interests are best served by exercise or waiver. See FLA. STAT. § 744.3215(2) (2005) ("Rights . . .
may be removed from a person by an order determining incapacity and . . . may be delegated to
the guardian . . . ."). Incapacity is, however, a touchy subject. Critics assert that the incapacity
category is easily manipulated by those who seek to strip subordinated individuals of autonomy.
See, e.g., Katherine Hunt Federle, On the Road to Reconceiving Rights for Children: A Postfeminist
Analysis of the Capacity Principle, 42 DEPAUL L. REV. 983, 987-99 (1993) (criticizing the
characterization of children as incapable of being rights bearers).

\(^4\) For example, it is commonly accepted that the right to be free from cruel and unusual
punishment and the right not to be enslaved are not waivable. See Seth F. Kreimer, Allocational
(1984). The idea that some rights are unwaivable has prompted many scholars and jurists to
hold that death-eligible convicts may not waive the right to appeal an illegal sentence. Justice
Marshall quoted the Supreme Court of Pennsylvania, stating:

"[T]he waiver concept was never intended as a means of allowing a criminal
defendant to choose his own sentence. . . . The waiver rule cannot be exalted to a
position so lofty as to require this Court to blind itself to the real issue—the
propriety of allowing the state to conduct an illegal execution of a citizen."
v. McKenna, 383 A.2d 174, 181 (Pa. 1978)).

\(^4\) There is an intimate relationship between rights and equality. The granting,
recognition, or enforcement of rights is not morally legitimate unless it is done in a fair
manner. This means that fundamental rights, whether negative or positive, should apply to all
persons. See, e.g., WASH. CONST. art. 31, § 1 ("Equality of rights and responsibility under the law
shall not be denied or abridged on account of sex."). When rights or abilities attach to certain
statuses, the need for differentiation between statuses should be compelling and the criteria for
policies, so long as they are tough on crime. See infra note 161.
overrule lenient prosecutors. Moreover, while some victims' rights policies have a welfare bent in that laws require the state to provide crime victims with monetary compensation, and thus, could be seen as positive rights, such assistance is often tied intimately to furthering the prosecution's case. In truth, the victims' rights movement has always been about changing the procedural balance in the system so that it leans even more toward conviction and incarceration. Scholars have observed that victims' rights were always intended to counter defendants' constitutional protections.

The movement has no tolerance for victims' desires that conflict with state prosecutorial goals. The movement does not support victim-witnesses' rights to be free from the coercive power of state subpoena process. It does not weigh in against the detention of victim "material witnesses." The movement does not advocate reform of cross-examination procedures.

143. For example, in certain jurisdictions, prosecutors are obligated by statute to consult with victims before entering into a plea bargain, dismissing a case, or ordering the defendant into diversion. See, e.g., N.C. GEN. STAT. § 15A-832(f) (2005). The statute reads:

Prior to the disposition of the case, the district attorney's office shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about the disposition of the case, including the victim's views about dismissal, plea or negotiations, sentencing, and any pretrial diversion programs.

Id.

144. See, e.g., COLO. REV. STAT. § 24-4.2-105 (2006) (enacting a victim-witness assistance program). In my experience as a public defender, victim compensation was often awarded, not to the victim most damaged by the crime, but rather to victim-witnesses most willing to testify for the prosecution or become informants, or those who were the most tenacious about demanding compensation. See Gruber, supra note 37, at 657-58.


146. Scholars note:

Several historical events probably stimulated the increased support of the victims' rights movement in the United States. The increase in crime rates during the 1960s and 1970s produced fear in the general public and encouraged a popular belief that the criminal justice system should be used to rectify the problem. Also, during the 1960s a series of Supreme Court decisions dramatically expanded the rights of the criminally accused. . . . These famous decisions helped heighten the public's perception that the "system" was more concerned with mechanically following procedures, thereby releasing criminals for reasons they perceived as technicalities, than administering justice.

Westbrook, supra note 33, at 579-80 (internal footnotes omitted).

147. As a consequence, the movement does not support the right of victims to advocate against the death penalty or to express forgiveness and mercy. See infra notes 166-68 and accompanying text.

148. See Tom Lininger, Bearing the Cross, 74 FORDHAM L. REV. 1353, 1365 (2005) (noting the disconnect between the prosecutorial aims of the victims' rights movement and the interest of an uncooperative victim jailed on a material-witness warrant).
rules that would make the trial less arduous for all witnesses, including victims, because doing so might disadvantage prosecutors. Experts explain that, in the war on crime, the rhetoric of victims' rights has proven extremely successful in enhancing state power, but not in empowering victims:

The war on crime, though ostensibly fought on behalf of victims, has very little to do with victims, and everything to do with the state. . . . And it treats victims as mere nuisances themselves, annoying sources of inefficiency in a system built to incapacitate the greatest number of source individuals for the longest possible time with the least effort. . . . In the war on crime, offenders and victims alike are irrelevant nuisances, grains of sand in the great machine of state risk management.

B. ESSENTIALISM AND OBJECT/AGENT CHARACTERIZATIONS IN THE VICTIMS' RIGHTS MOVEMENT

To achieve support for its zero-tolerance philosophy, the victims' rights movement engages essentialist and subtly racist characterizations of victims and defendants. Essentialism, in a nutshell, is the practice of treating members of certain “groups,” whether racial, gender, socio-economic, or ethnic, as though they all share the same beliefs, traits, goals, and desires.

149. Tom Lininger explains why the victims' rights movement does not seek to lessen the harsh impact of cross-examination:

Because prosecutors undervalue victims' privacy and wish to preserve their own option to impeach victims, they steer the victims' rights movement away from a divisive agenda that would ameliorate the hardship of cross-examination. Instead, the victims' rights movement frequently addresses other legislative priorities on which prosecutors and victims can agree: longer sentences and fewer procedural protections for defendants.

Id. at 1396.

150. DUBBER, supra note 39, at 26. Mandating participation in domestic violence cases also constitutes government interference in the lives of victims. Christine O'Connor explains, “In taking control of the victim's life, the state substitutes itself for the abuser as a coercive entity in the victim's life.” O'Connor, supra note 65, at 961.

151. Critical scholars explain:

Generally, “essentialism” is a label applied to claims that a particular perspective reflects the common experiences and interests of a broader group, as when working class men purport to define the class interests of “workers,” or white women purport to define the interests of all “women,” without acknowledging intragroup differences of position and perspective. Indeed, essentialist categories are routinely invoked precisely in order to suppress attention to intragroup differences, and thereby to consolidate a group's agenda around the preferences of the group's internal elites.

Furthermore, the movement employs the problematic tactic of treating certain individuals as pure objects and others as pure agents in an effort to disengage crime from its social moorings. Victims' rights rhetoric characterizes victims in such a way that society will sympathize with them and move toward harsher penalties against defendants. According to the victims' rights movement, victims are perpetual objects of their victimhood: they are weak, innocent, and helpless. By contrast, defendants are autonomous, irredeemable, powerful, and evil. Victim and perpetrator characterizations also feed off of deeply entrenched racial, socio-economic, and gender biases: "Defendants are subhuman; they are monsters. The criminal is Ted Bundy, Lawrence Singleton, Richard Allen Davis, Willie Horton—criminals who seem to be the very embodiment of evil. Alternatively, the image of the criminal is the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male."  

The victims' rights movement has thus created narratives illustrating prototypical victims and defendants. This essentialism is particularly pernicious because it is not about marginalized groups using identity politics to fight oppression  or even about differently subordinated groups fighting each other for advancement within institutions that subordinate both of them. Rather, it is about powerful privileged groups using stereotypes to affect policy in a way that expressly decreases the rights of the worst-off and legitimizes, rather than challenges, subordinating institutions.  


153. Essentialism in its most benign form, namely, when members of marginalized groups engage in identity politics to achieve group justice, is criticized by progressive scholars because it ignores intra-group differences and can lead to the problem of differently subordinated groups fighting against each other for the crumbs left by privileged groups. See Daria Roithmayr, A Bad Subject, 9 CARDOZO WOMEN'S L.J. 501, 501 (2003) (asserting that for minorities, "playing identity politics is a war of position, in which we are forced to resist on the oppressor's terms by mobilizing identity politics on behalf of our political commitments, to counteract the ways in which identity is used against us").

154. Anti-essentialism, which is often advocated by LatCrit scholars, employs "analyses that recognize and target the interlocking nature of different forms of oppression and privilege based on different axes of social position and group identity, whether race, ethnicity, sex, gender, class, sexual orientation, religion, ability, nationality or other similar constructs." Iglesias & Valdes, supra note 151, at 1922; see also Darren Lenard Hutchinson, Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of An Adequate Theory of Subordination, 6 MICH. J. RACE & L. 285, 289 (2001) (asserting that progressive social movements suffer because of a singular, essentialist focus).

155. Essentialism in its most malignant form includes racial, gender, or other stereotyping of subordinated groups in an effort to justify their continued oppression. See Linda L. Ammons,
One may counter that victims, like other subordinated groups, use essentialism as a tool to achieve justice for their group. The group, "victims," as represented by the victims' rights movement, however, is simply not a group that has been systematically subordinated by society. Victims consist of individuals of different races, socio-economic levels, and social statuses who have been affected to varying degrees by crime. Not all victims are mistreated by the system, other than the claimed mistreatment of the system being too easy on crime. In addition, the victims who are mistreated by the system, generally members of other subordinated groups that have been unfairly excluded from access to government resources (e.g., minorities, drug users, ex-cons, poor women), are precisely not the victims publicized and represented by the victims' rights movement. For example, the movement, does not ask prosecutors to treat drug-addicts with care.

156. See e.g., Kyl et al., supra note 103, at 584 (describing victims as a marginalized group).

157. See Dubber supra note 34, at 6 (characterizing the victims' rights movement as a "political movement, fueled by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition").

158. See Stephen L. Carter, Comment, When Victims Happen to Be Black, 97 YALE L.J. 420, 428-29 (1988) (noting that Bernard Goetz was seen as a "victim" and the persons he shot as "transgressors" because of society's racial construct of victims and criminals).


160. President Clinton articulated this ideology, stating, "We sure don't want to give criminals like gang members, who may be victims of their associates [any rights]." Henderson, supra note 33, at 585 (alteration in original) (quoting President Bill Clinton, Announcement in Support of a Victims' Rights Amendment, in ONLINE NEWS HOUR, June 25, 1996, http://www.pbs.org/newshour/bb/law/june96/victim_announcement_6-25.html). One expert has asserted that the victims' rights movement hides the reality of victimhood:

The public face of the Victims' Rights Movement hides the most severely affected victims of violent crime, sexism and racism (e.g., prostitutes or teenage black males in the juvenile justice system) who are implicitly disqualified as "genuine" victims.
Neither does it lobby for abolition of the death penalty, given the capital-punishment system's systemic bias against black victims.\textsuperscript{161} The victims' rights movement involves a non-subordinated group, backed by powerful, politically privileged actors, engaging in essentialism in order to strip a subordinated group (defendants) of the few rights that group retains.\textsuperscript{162}

In addition to essentializing both victims and defendants, the victims' rights movement seeks to deny the larger social context of crime by treating victims as the passive objects of crime committed by socially abnormal perpetrators. Victims must perpetually be objects of their victimhood, bearing no responsibility for crime and exhibiting righteous anger at every turn.\textsuperscript{163} Victims must necessarily desire tougher crime policy\textsuperscript{164} and may not in Victims' Rights rhetoric. Therefore, laws are named after prominent sentimentalized victims—white female children as in "Megan's Law"—who constitute the public's preferred image of a "victim" and consequently determine the expressive function of this victim-centered legislation.


161. \textit{See supra} note 73 and accompanying text (discussing Baldus study); Jeffrey Abramson, \textit{Death-Is-Different Jurisprudence and the Role of the Capital Jury}, 2 OHIO ST. CRIM. L.J. 117, 134 (2004) (noting "statistical studies showing that a victim's high socio-economic status seems to touch off an 'invisible bias' in sentencing authorities"). Victims' rights advocates have been particularly vocal in support of the death penalty. One such group, Justice for All, a Houston-based victims' rights organization, filed an amicus brief in the Supreme Court in \textit{Roper v. Simmons}, supporting juvenile executions. Brief for Justice for All Alliance as Amici Curiae Supporting Petitioner, \textit{Roper v. Simmons}, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 865269. After the ruling came down, outlawing juvenile executions, the group's president, Diane Clements, stated, "I think it's disgraceful and outrageous for the Supreme Court to say that 16- and 17-year-olds are somehow different and somehow less culpable than adults when you see the horrific types of crimes these people commit. ... Even a 5-year-old knows right from wrong." Mark Hansen, \textit{Ruling May Spur New Death Penalty Challenges}, 3 NO. 9 A.B.A. J. E-REP. 1 (Mar. 4, 2005) (quoting Diane Clements, President for Justice for All Alliance); \textit{see also} Kanwar, \textit{supra} note 160, at 229 ("[V]ictims' families and their supporters typically lobby for swifter executions or longer prison terms.").

162. As a group, defendants suffer the disabilities and stigma of having been involved in the criminal system. Once someone is branded a "criminal," that individual will suffer personally, socially, and economically. Social, professional, and governmental institutions openly and explicitly bar those who have been involved in the criminal justice system from participation. Others discriminate against defendants in a more covert manner. \textit{See} Smyth, \textit{infra} note 396, at 480; Thompson, \textit{infra} note 397, at 258 (describing the disabilities imposed by a criminal conviction). Moreover, defendants, as a group, consist primarily of the most marginalized members of society. The vast majority of defendants are minorities, poor, immigrants, or some combination of all three groups. \textit{See} Aya Gruber, \textit{Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital, an Exercise in Praxis}, 35 SETON HALL L. REV. 1291 (2005) (describing criminal defendants as a subordinated group). Considering the prevailing social disposition regarding the "criminal element," the defendant group would likely be totally bereft of any legal protections were such protections not explicitly laid out in the Bill of Rights. \textit{See} Westbrook, \textit{supra} note 33, at 579–80 (noting that the victims' rights movement was a response to the Warren Court's constitutional guarantees).

163. \textit{See} DUBBER, \textit{infra} note 39, at 194 (asserting that the victims' rights movement embraces the characterization of the essentially helpless victim).
act autonomously when it conflicts with the state’s punitive aims. As a consequence, the movement supports victim choice only when the victim vigorously pursues charges or advocates for high sentences, but not when the victim wishes to remain silent or exercise mercy. A compelling example of this is the difference in jurisprudential significance of victim-impact statements expressing pain and anger and those exhorting mercy.

In 1991, the victims’ rights movement secured a major victory when the Supreme Court approved the admission of victim-impact evidence into a capital sentencing hearing in *Payne v. Tennessee*. Overruling prior precedent, the Court relied on “victim-dignity” arguments to permit the introduction of impact evidence at death penalty hearings. Since *Payne*, courts have routinely allowed victims and their family members to describe in graphic detail their feelings of pain and anger. Such statements of hurt

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164. *See ibid.* at 194–209 (noting that the state uses victims' so-called interests to enhance its own coercive power).

165. Dubber argues that victims' rights and the sympathetic figure of the victim are used to obfuscate the power of the state:

> Most prosecutors spend most, if not all, of their time processing more or less unconditional surrenders. Like a chess master, they play several games against a group of vastly inferior opponents at a time. The full extent of their righteous ire is reserved for those opponents who dare to interfere with the quick disposal of their pathetic attacks against the grandmaster. These few obstreperous ones must be stamped out and put in their place. Rather than admit that the authority of the prosecutor, and therefore the state, is at stake, it is far more convenient to invoke the rights of the victim, who all too often is all too willing to play the part of the discombobulated heap of helplessness in need of state protection from the forces of evil.

*Id.* at 202.

166. *See Elizabeth E. Joh, Narrating Pain: The Problem with Victim Impact Statements, 10 S. Cal. Interdisc. L. J. 17, 17 (2000)* (noting that “neither the victims' rights community nor the Supreme Court generates or tolerates narratives in which victims' families can exercise mercy, kindness, or forgiveness towards defendants”).


168. Prior Supreme Court rulings prevented family members of victims in death-penalty cases from testifying or presenting impact evidence at sentencing because of concerns over cruel and unusual punishment. In *Booth v. Maryland*, 482 U.S. 496, 509 (1987), the Court held that introduction of such evidence would be cruel and unusual punishment. The Court opined that the introduction of impact evidence, which often includes factors about which the defendant had neither intent nor knowledge, would move the jury to impose death, not based on aggravating and mitigating factors that spoke to the defendant’s culpability, but rather on arbitrary factors that had more to do with luck than choice. *Id.* at 507. Also relevant was the disparate impact that such a regime would create for differently situated victims. *Id.* at 505.

and rage have proven very powerful in helping prosecutors achieve high sentences. The victim's right to allocate at sentencing, however, has not empowered victims who wish to advocate for forgiveness and mercy. Judges routinely deny victims the right to express forgiveness and mercy, without outcry from the victims' rights movement.\(^{170}\)

Moreover, the movement does not support victim participation in alternative dispute resolution because of its tendency to be "weak" on crime.\(^{171}\) If, in fact, the movement were primarily concerned with victims having a "voice" in the criminal process, it would probably regard restorative justice highly. In the past five years, prominent criminal law scholars have advocated a system in which victims have an opportunity to dictate the destiny of their own cases through innovations like victim-offender mediation.\(^{172}\) The victims' rights movement, however, has not accepted alternate criminal law systems and often rejects mediation.\(^{173}\)


Compare State v. Williams, 708 So.2d 703, 721 (La. 1998) (admitting family member's statement that she had no sympathy for the defendant), with State v. Pirtle, 904 P.2d 245, 271 (Wash. 1995) (refusing to admit victim's statement of opposition to a death sentence).


173. See, e.g., Brown, supra note 171, at 1273-81 (criticizing victim-offender mediation because, among other things, it does not allow the victim to express anger adequately and overemphasizes forgiveness). Professor Dubber explains:

In the punitive climate of the past decades, so-called restorative justice programs have operated quietly on a small scale, even if the results have often been encouraging. . . . Most important, they have not been embraced by the victims' rights movement, whose attention has concentrated on converting defendants' right into victims' right in the formal criminal justice process and in what is generally considered to be a related objective, increasing criminal punishment, including the more frequent use of the death penalty.

DUBBER, supra note 39, at 167; see also Leena Kurki, Restorative and Community Justice in the United States, 27 CRIME & JUST. 235, 266 (2000) ("Restorative justice respects equally victims and offenders, and this is why it cannot be seen as part of the victims rights' movement."); Robert P. Mosteller, New Dimensions in Sentencing Reform in the Twenty-First Century, 82 OR. L. REV. 1, 23
Interestingly, while the victims' rights movement characterizes victims as total objects, it treats defendants as unconditional agents. Defendants are never objects who merely exhibit pre-determined reactions to their surroundings. Rather, they are autonomously responsible for their actions and exercise ultimate free will at every turn. Characterizing members of subordinated groups as agents in their own subordination has proven a successful tool in reinforcing inequality in society. Conservatives often use agency assertions to counter progressive discourse challenging the structure of society. Progressives characterize crime, inequality, poverty, and other problems as created by institutional discrimination and unfair privilege and seek to overthrow the structures that keep dominant groups in unfair positions of power. In response, conservatives argue that, in fact, society's ills are not created by an unfair social structure but rather by the individual culpable behavior of those who suffer from such ills. Agency characterizations are essential to the preservation of unfair privilege precisely because they provide normative justification for inequality. By cementing notions of defendant autonomy, tough-on-crime supporters dispel social responsibility for crime and justify increasingly harsh penalties.

In the past several years, the criminal law has shifted from considering circumstances to considering criminal acts in a vacuum. This reinforces the notion that crime occurs because of flawed individuals who are fully

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(2003) ("[R]estorative justice does not fit within the victims' rights movement, which often advocates for punishment and retribution.").

174. Sharon Rush observes that the argument that blacks are agents in their subordination by failing to "pull themselves up by their bootstraps" developed as a response to the civil rights movement's efforts to dismantle white racism. Sharon E. Rush, Emotional Segregation: Huckleberry Finn in the Modern Classroom, 36 U. MICH. J.L. REFORM 305, 345 (2003). She states, "Not even one generation had a chance to dismantle institutional racism before the focus shifted. From this view, Blacks during the post-Jim Crow era, like the Plessy era, have only themselves to blame if they continue to lag behind Whites . . . ." Id.

175. According to theorist John O. Calmore, the fallacy of this argument is easily exposed by looking at a simple example like the Cosby Show. In order to for blacks to "pull themselves up" to the level of whites, they must be truly extraordinary. John O. Calmore, Random Notes of an Integration Warrior, 81 MINN. L. REV. 1441, 1446 (1997). As a consequence, blacks' operation as ordinary reasonable people in society is alone sufficient to make them culpable for any negative conditions they may suffer. Id. He states, "The unstated norm of whiteness requires that which is extraordinary from blacks to meet that norm, even though whites associate that norm with merely an ordinary (white) family." Id.

176. In the immigration context, those opposed to immigration justify poor conditions of immigrant communities on immigrants' unreasonable refusal to assimilate. See Kevin R. Johnson, "Melting Pot" or "Ring of Fire?: Assimilation and the Mexican-American Experience, 85 CAL. L. REV. 1259, 1280 (1997) ("[C]urrent anti-immigration advocates accuse today's immigrants, particularly those from Latin America, of refusing to assimilate by maintaining their language and culture.").

177. See infra note 187.
autonomous in their actions. As mentioned before, the tough-on-crime era all but eviscerated leeway in sentencing, the one arena for contextualizing crime. In the substantive criminal law, defenses that explicitly take into account defendants' backgrounds have become increasingly disparaged as "abuse excuses." The deeply historically rooted insanity defense, for example, has been severely limited in recent years. Juries are frequently unwilling to acquit on the basis of insanity, unless the defendant acted like an automaton and exhibited no ability to exercise judgment. Some legislatures have allowed insanity as a defense only if it completely negates all mens rea of the crime, but not otherwise. As a consequence, schizophrenic and psychotic defendants who act under the influence of their diseases are routinely characterized as culpable, autonomous agents of crime. Perhaps even more disturbing is the trend}

178. See supra notes 105-19. The stereotypical characterizations of victims and defendants by the victims' rights movement supports this idea. See supra notes 133-36, 152.


Three short decades ago, Professor Herbert Packer reported that large-circulation magazines eagerly embraced as "standard fare" the slogans of a culturally popular behaviorism: "treat the criminal, not the crime," "punishment is obsolete," and "criminals are sick." Today, cultural fears of moral relativism and victimology have led to new and different slogans: "personal responsibility," "self-control not sob-stories," and the "abuse excuse."


180. See Michael Louis Corrado, Responsibility and Control, 34 HOFSTRA L. REV. 59, 61-62 (2005) (observing that in 1980, thirty states allowed for an insanity defense when the defendant was unaware of the nature of his act or when the defendant could not distinguish right from wrong (two-pronged test), while eighteen allowed for the defense only when the defendant was unaware of the nature of his act (one-pronged test); whereas, in 2004, only fifteen states retained the two-pronged test while thirty had adopted the one-prong test).

181. See, e.g., Smith v. State, 614 P.2d 300 (Alaska 1980) (rejecting insanity claim because the schizophrenic defendant exhibited some rational behavior). In the Andrea Yates case, the jury convicted the defendant of murdering her children, even though she was clearly schizophrenic and delusional at the time. See Yates v. State, 171 S.W.3d 215 (Tex. App. 2005) (overturning Yates's conviction on evidentiary grounds and discussing history of case). The jury, interpreting the M'Naughten rule, which is far more prosecution friendly than the modern ALl rule, believed that Yates knew her actions were wrong. One juror remarked, "[S]he knew exactly what she was doing, and she knew it was wrong. . . ." 4 Yates Jurors: Confession, Photos Key to Verdict, WASH. POST, Mar. 18, 2002, at Al8.

182. See, e.g., UTAH CODE ANN. § 76-2-305(1)(a)-(b) (2003) ("It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense . . . .").

183. Similarly, courts and politicians are more than happy to describe pedophiles as objects of their condition when seeking increased incarceration. Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (approving indefinite civil commitment on the ground that it is limited to "to those who
toward treating juvenile defendants as fully culpable agents of crime. The youth and inexperience of juvenile defendants are no longer considered culpability factors in the face of overwhelming support for treating "bad" juveniles as adults. The government has successfully perpetuated a discourse of individual accountability and has avoided responsibility for

suffer from a volitional impairment rendering them dangerous beyond their control"). When objectification might give a defendant grounds for reducing culpability, such individuals suddenly become fully responsible agents. See, e.g., U.S. v. Black, 116 F.3d 198, 201 (7th Cir. 1997) (rejecting the notion that the defendant's diagnosed pedophilia made his accessing child pornography involuntary because, among other things, the defendant "confined his computer access to child pornography to periods when his roommate was away from the apartment"); U.S. v. Long, 185 F. Supp. 2d 30, 47-48 (D.D.C. 2001) (holding that the fact that a pedophile abused victims while alone in his house rendered his acts volitional, despite a doctor's testimony that the "defendant's efforts to conceal the abuse [were] 'symptoms of the disorder' that only reveal defendant's lack of volitional control"). In fact, civil commitment and registration laws, which courts justify by noting pedophiles' lack of control, came into effect because of rhetoric that distinctly characterized sex offenders as unrestrained agents. Daniel M. Filler, Making the Case for Megan's Law: A Study in Legislative Rhetoric, 76 IND. L.J. 315, 339 (2001) (describing politicians' use of the predator "metaphor, comparing the actions of animals that hunt and kill other animals to sexual offenders' pursuit and sexual victimization of children"). Rather than calling for legislation to help "poor, sick, pedophiles who are unable to help themselves," politicians justified commitment laws by painting a gruesome picture of the predator-pedophile. See, e.g., 142 CONG. REC. 10,312 (1996) (statement of Rep. Schumer) ("No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children to molest, abuse, and in the worst cases to kill.").

184. See 705 ILL. COMP. STAT. 405/5-805(3)(a) (2004) (allowing thirteen-year-olds to be transferred to adult court); IND. CODE § 31-30-3-4(3) (West 1997) (allowing ten-year-olds to be transferred to adult court under special circumstances); KAN. STAT. ANN. § 38-1636(a)(2) (2000) (permitting fourteen year-old to be transferred to adult court); MICH. COMP. LAWS § 712A.4(1) (1981) (permitting fourteen-year-old to be transferred to adult court); MINN. STAT. § 260B.125(1) (2004) (permitting fourteen-year-old to be transferred to adult court); MISS. CODE ANN. § 43-21-151(3) (2004) (allowing thirteen-year-olds to be transferred to adult court); MONT. CODE ANN. § 41-5-1602(1)(b)(ii) (2005) (allowing twelve-year-olds to be transferred to adult court); N.C. GEN. STAT. § 7B-2200 (2004) (allowing thirteen-year-olds to be transferred to adult court); N.D. CENT. CODE § 27-20-34 (1)(c)(1) (1996) (permitting fourteen-year-old to be transferred to adult court); TEx. FAM. CODE ANN. §54.02(j)(2)(a) (Vernon 2002) (permitting fourteen-year-old to be transferred to adult court); VT. STAT. ANN. tit. 33, § 5506(a) (2001) (allowing ten-year-olds to be transferred to adult court under special circumstances); WIS. STAT. § 938.18(1)(a)(1) (2004) (permitting fourteen-year-old to be transferred to adult court).

185. See Jane Rutherford, Juvenile Justice Caught Between The Exorcist and A Clockwork Orange, 51 DEPAUL L. REV. 715, 740-41 (2002) ("The current get tough on crime approach has been to inject more punishment into the juvenile jails and harsh boot camps, while sending more and more juveniles over to adult courts to be treated as adults." (footnote omitted)).

186. See Feld, supra note 123, at 1522 (discussing how "conservative politicians . . . demonized young people to muster support for 'wars' on crime and drugs"). For example, responding to Democratic criticism of a bill that would allow sixteen-year-olds to be prosecuted as adults and registered as sex offenders, Republican Representative Mark Green of Wisconsin told the story of a juvenile offender who was released at eighteen and later "preyed upon a number of children, destroyed lives, damaging families and causing so much terror." 151 CONG. REC. H7889 (daily ed. Sept. 14, 2005) (statement of Rep. Green). Similarly, Representative Gingrey supported juvenile transfer provisions of a gang bill stating, "16- and 17-year-olds are
providing the educational, social, psychological, and economic support that put youth in a position to avoid criminal behavior.\textsuperscript{187}

In sum, the victims' rights movement, in order to further a conservative ideology of criminalization and individual accountability, objectifies and essentializes victims and treats defendants as wholly culpable agents. This tactic has proven successful in gaining public support for tough criminal policies. By projecting onto defendants the character of totally autonomous individuals and onto victims the character of perpetual victimhood, society can distance itself from responsibility for crime. Society members can then identify with victims at the expense of offenders and deny any accountability for actions of the deviant criminal element.\textsuperscript{188}

III. WOMEN'S HISTORICAL OBJECTIFICATION

Given the persuasiveness of the victims' rights movement's object/agency rhetoric, it is understandable that domestic violence reformers were tempted to buy into such discourse. If they characterized battered women as perpetually helpless, innocent victims and batterers as autonomous monsters, then society would be more willing to accept aggressive criminalization of domestic violence. Feminists could thus achieve their goal of society taking domestic abuse "seriously." Militating against this force, however, was a disturbing history of objectification of women. To support domestic violence criminalization in the face of victim reluctance, reformers would have to use the very methodology that had been so instrumental in the ongoing oppression of women.
The tactic of treating disfavored individuals as objects has been effective in the historical maintenance of power inequities. The characterization of minorities as objects of the social structure, particular events in their pasts, or even biology, has been used to justify denying such individuals certain rights and/or participation as equals in society. Biological objectification, in particular, rears its ugly head in the subordination of women, and the legacy of gender discrimination bears out the efficacy of this tactic.

189. Michelle Goodwin describes the persistence of objectification in the maintenance of American racial domination:

Prejudice in this context is heaped upon an objectified and powerless “safe object” just as younger siblings are attacked in place of the feared parent. The historical affects of hatred and moralism that flowed from race fantasies (about “nigger”) can be found in socio-legal culture. Black Codes, Jim Crow segregationist policies, eugenics, and Dixiecratism powerfully illustrate the dominance of racial fantasies about blacks or the “nigger image.” These images are contemporarily viewed in media representations of welfare moms, teen drug use, and racial violence.


190. For example, “[b]y making race determinant and the product of rationality and science, dominant and subordinate positions within the racial hierarchy were disguised as the product of natural law and biology rather than as naked preferences.” Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1709, 1738 (1993) (footnote omitted).

191. Asserted biological differences are a popular way to distinguish men’s and women’s social roles. James Dobson, founder of the powerful political ministry, Focus on the Family, lays out the biological differences between men and women:

In functions, women have several very important ones totally lacking in man—menstruation, pregnancy, lactation. All of these influence behavior and feelings. The same gland behaves differently in the two sexes—thus woman’s thyroid is larger and more active; it enlarges during pregnancy but also during menstruation; it makes her more prone to goiter, provides resistance to cold, and is associated with the smooth skin, relatively hairless body, and thin layer of subcutaneous fat, which are important elements in the concept of personal beauty. It also contributes to emotional instability—she laughs and cries more easily.

James Dobson, Understanding and Accepting Your Mate’s Differences: The Gender Gap, http://www.family.org/marriage/A000000990.cfm (last visited Feb. 14, 2007). In response to a question about differences between men and women, the website further states:

Radical feminists in the ’60s and ’70s tried to sell the notion that males and females are identical except for the ability to bear children. That is nonsense. . . . Differences between the sexes . . . appear to be determined, at least in part, by genetics.

. . . He likes excitement, change, challenge, uncertainty and the potential for huge returns on a risky investment. She likes predictability, continuity, safety, roots, relationships and a smaller return on a more secure investment. . . . She tempers his impulsive, foolish tendencies, and he nudges her out of apathy and excessive
Throughout history, women have been subjects of biological objectification both in explicitly negative manners and in seemingly positive ways in order to reinforce the distribution of power among the genders. In terms of negative objectification, women have been characterized as objects of a biology that causes them to be overly emotional, weak, and timid, and thus ill-fitted for positions of power. In 1872, the Supreme Court rejected Myra Bradwell's assertion that legislation barring women from practicing law was unconstitutional, observing:

[The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and

caution. These genetic tendencies have far-reaching implications. Medical science has not begun to identify all the ramifications of sexual uniqueness. We see the wisdom of the Creator in the way the sexes interrelate at this point.


In addition, proponents of racial discrimination have appealed to asserted biological predispositions and inabilities of racial minorities. Cf. Neil Gotanda, A Critique of "Our Constitution Is Color Blind," 44 STAN. L. REV. 1, 33-34 (1991) (asserting that the construction of immutable biological racial categories gained prominence in the United States as a result of the popularity of African slavery). Such disturbing and pernicious thinking unfortunately still exists in this country. Conservatives, while refraining from explicitly stating that there is a biological link between race and crime, indicate such a connection in their pro-criminalization sentiments. Former high-level Reagan and Bush appointee William Bennett, for example, recently stated, "If you wanted to reduce crime, you could—if that were your sole purpose—you could abort every black baby in this country and your crime rate would go down." Bennett Under Fire for Remarks on Blacks, Crime, CNN.COM, Sept. 30, 2005, http://www.cnn.com/2005/ POLITICS/09/30/bennett.comments/.

While most people reject overtly negative objectification, they are often more willing to believe that positive objectification is acceptable. See Kimberly Blanton, The Pressures of "Good" Cultural Stereotypes, BOSTON GLOBE, May 8, 2005, at C2, available at http://www.boston.com/business/globe/articles/2005/05/08/the_pressures_of_good_cultural_stereotype (recognizing "stereotypes the white world holds of Asian-Americans as industrious, smart, assimilated"). For example, the statement, "Blacks are criminal," would likely garner much more criticism than the statement, "Asians are good at math," at least on the surface. But see Dorothy E. Roberts, Crime, Race, and Reproduction, 67 TUL. L. REV. 1945, 1948 (1993) (observing that "[p]opular images of black criminality are . . . sometimes buried beneath the surface, [but they] erupt when prodded"). While perhaps not as destructive as negative objectification, positive objectification is nonetheless also a tool of subordination. First, benign objectification delegitimizes the minority groups' claims of racial injustice and serves as rhetorical chasismation to subordinated groups that have not "made it." See FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 49 (2002) (explaining that the model minority myth "conceals within it an invidious statement about African Americans along the lines of the inflammatory taunt: 'They made it; why can't you?'"). Moreover, "model minorities," although not considered objects of a negative biology, are characterized as objects of a type of biology that does not challenge the power structure of privileged groups. See Chris K. Iijima, Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation, 49 B.C. L. REV. 385, 410-13 (1998) (explaining that "model minority" status is used as a "carrot" to encourage Asians to acquiesce to the dominant racial hierarchy in exchange for an incremental increase in status).
woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. 194

While this case may seem incredibly antiquated, the Supreme Court reiterated its acceptance of formal inequality as recently as 1948 in Goesaert v. Cleary 195 and 1961 in Hoyt v. Florida. 196 The Court observed in Hoyt:

[W]oman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. 197

Although in more recent times, the Court seems to have rejected these holdings, 198 in 1996, Justice Scalia, dissenting in United States v. Virginia, explicitly relied on Bradwell and Hoyt as support for the proposition that gender classifications should be subject to rational review. 199

Nonetheless, today negative objectification is fairly easily dismissed as mere chauvinism. In response, those who consciously or unconsciously seek to perpetuate gender imbalances have learned to switch to benign

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195. Goesaert v. Cleary, 335 U.S. 464 (1948). The Court held:

Michigan could, beyond question, forbid all women from working behind a bar . . . . The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

Id. at 465–66 (citation omitted).
197. Id. at 62.
198. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896–97 (1992) (stating that Bradwell and Hoyt "of course, are no longer consistent with our understanding of the family, the individual, or the Constitution").
199. U.S. v. Virginia, 518 U.S. 515, 574–75 (1996) (Scalia, J. dissenting) (relying on Hoyt and Goesaert for the proposition that "if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review").
objectification to reach their goals. Women are now often characterized as objects of a biology that makes them nurturing, good mothers, and gentle. Sexists have learned to argue that they are not discriminating against women, but rather "revering" and "honoring" them for who they are and what they do. Such arguments place women on a social rung that, although "respected," has considerably less power than the rungs reserved for men and restrains women to the gilded cage of their "revered" social role.

200. This is not to say that negative biological objectification no longer exists. Recently, the President of Harvard University, Lawrence H. Summers, set forth decidedly grandiloquent, yet undoubtedly outdated arguments for why women are seriously underrepresented among top scientists. The president said that "many different human attributes—height, weight, propensity for criminality, overall IQ, mathematical ability, scientific ability," may contribute to the disparity between top men and women scientists. Moreover, Summers pointed to "taste differences between little girls and little boys that are not easy to attribute to socialization" as a reason for the disparity. Lawrence H. Summers, Remarks at NBER Conference on Diversifying the Science & Engineering Workforce (Jan. 14, 2005), available at http://www.president.harvard.edu/speeches/2005/nber.html.

201. The FamilyLife ministry, a religious organization that puts on meetings throughout the year and claims that over 1.5 million people have attended its conferences, is dedicated to instilling so-called family values. Our Roots—Providing the Blueprints for Marriage, http://www.familylife.com/about/who_we_are.asp (last visited Jan. 14, 2007). Its website sets forth the basic premises of its "Family Manifesto." The Manifesto is an example of seemingly benign objectification. It states:

We believe God has uniquely designed women to be mothers. We believe the greatest way a mother can love her children is to love their father. We also believe God has created a woman with an innate and special ability to nurture and care for her children. Therefore, we believe mothers are the primary people who execute the vital responsibilities of loving, nurturing, and mentoring children. We believe these responsibilities should be met before a mother contemplates any other duties. We believe our culture has devalued the role of a mother by placing greater significance on activities outside the home than on those inside the home.

Family Manifesto, http://www.familylife.com/about/what_were_about.asp (last visited Jan. 14, 2007).


203. Feminist Naomi Cahn observes:

Throughout the nineteenth century, women claimed a special set of virtues lacking in men to explain their limited activism outside the domestic sphere, activism that encompassed "women's issues." The Cult of True Womanhood urged them to perform domestic activities both within and outside of their homes. The gendered
Even benign biological objectification is subject to obvious and frequent criticism. Consequently, power elites have added another level of abstraction to their objectification claims. Rather than characterizing subordinated groups as objects of their biology, they characterize them as objects of their circumstances or "culture." Members of subordinated groups are excluded from participation in institutions of power, not because of biological predisposition, but rather because of their typical conditions. The argument that women are biologically predisposed against positions of power has largely given way to the argument that women are ill-fitted for positions of power due to social pressures. Women are simply incapable of exercising autonomy in the face of an environment that rewards them for acting in an expected stereotypical fashion and stigmatizes them for breaking stereotype and seeking power positions.

appeal to morality serves both to empower and confine. Indeed, reliance on women's special morality is, of course, potentially both beneficial and dangerous and is a vibrant topic in feminist jurisprudence.

Cahn, supra note 78, at 822 (internal citations omitted).

204. See Leti Volpp, Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism, 96 COLUM. L. REV. 1573, 1601 (1996) (observing the shift from "biological to cultural explanations for racial subordination").

205. See id. at 1600–01 (criticizing the claim "that black culture's supposed inferiority and difference from a 'unified national culture' explained the fact of black racial subordination"); Römkens, supra note 112, at 286–87 (noting that the government has embraced "a rhetoric that associates poverty with criminality and in effect monitors and controls people living in lower class neighborhoods").

206. See, e.g., Kingsley R. Browne, Women in Science: Biological Factors Should not be Ignored, 11 CARDOZO WOMEN'S L.J. 509, 512 (2005) ("For a variety of reasons, both biological and social, women tend to be less willing than men to subordinate everything else in their lives to careers, which affects women's representation not only in all-consuming science careers but also in similarly demanding positions in corporations and in law firms."); Summers, supra note 200. Not to belabor the issue, but the problem with Summers's and Browne's contention is multifaceted. First, the science is suspect. No experiment can control for the myriad factors that lead to women's under-representation in science in order to isolate the biological factor that predetermines that women are bad at science. As for the contention that both biology and social factors lead to underrepresentation, Summers's and Browne's arguments completely ignore a hundred years of post-modern thought. One could say that it is not so much that women's social pressures make them ill-fit for power positions, so much as the power positions have been constructed distinctly in a manner that excludes women. Not only is any objective justification of current structure suspect, but Browne and Summers never even endeavored to set forth a normative basis for the current structure of scientific education and employment. See generally, Ellen M. Bublick, Summers' Personal as Political: Reasoning without Effort from Stereotypes, 11 CARDOZO WOMEN'S L.J. 529 (2005) (criticizing Summers's reasoning).

207. The Supreme Court hinted at this particular argument when it recognized that employment policy could be based on evidence that a woman's job performance is affected by the pressures of having pre-school aged children. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971). It stated:

The Court of Appeals therefore erred in . . . permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job
As a subordinated group, women have also felt the sting of being characterized as pure agents when society wants to immunize itself from responsibility for their well-being. As agents, women are unequal, not because of institutional discrimination, but rather because they have made poor choices. When society and government seek justification for ignoring the problem of domestic violence, they assert that women "choose" to stay in abusive relationships. Women are thus complicit in their own subordination.

performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act. But that is a matter of evidence tending to show that the condition in question is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Id. (internal quotations omitted). Justice Marshall disagreed, stating,

I cannot agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities.

George A. Martinez, Latinos, Assimilation and the Law: A Philosophical Perspective, 20 CHICANO-LATINO L. REV. 1, 7 (1999) (footnotes omitted). In the race context, agency arguments have proven important in maintaining the fallacy that society is not responsible for the condition of African Americans. See Vincent D. Rougeau, A Crisis of Caring: A Catholic Critique of American Welfare Reform, 27 HARV. J.L. & PUB. POL'Y 101, 111-12 (2003) ("Because a large percentage of white Americans believe blacks are lazy, the identification of blacks with poverty becomes a way of releasing mainstream society from any moral responsibility or communal obligation for the poor and their circumstances ....").

Prosecutors choose between objectification and agency characterizations of women victims to fit prosecutorial goals. They objectify battered women as wholly controlled by their batterers when justifying proceeding with prosecutions against victims' wills. When a battered woman is herself a defendant, however, prosecutors appeal to the "she could have left" argument to show that the woman was in fact complicit in her own subordination by "choosing" to remain in the battering relationship. See SCHNEIDER, supra note 27, at 75-77.

In a similar vein, conservatives characterize blacks as responsible for maintaining their conditions of inferiority. They argue that African American subordination is due to their "choices":

The high rates of nonmarital births and family breakdown in many poor black communities, for example, involve choices to engage in unprotected sexual intercourse and to abandon family responsibilities. High crime rates can be explained in part by decisions to join gangs, to sell drugs, and to kill. Low voter turnout in black communities reflects in part decisions not to participate in the political process. Disparities in educational achievement between blacks and whites
This “pure agent” characterization is also seen in the debate over women in the workplace. In the face of biological arguments about women, child-bearing, and incapacity to hold positions of power, feminists forged counterarguments, advancing the nuanced view that women operate as constrained agents.\(^{211}\) Accepting that women are, in fact, influenced by their biological ability to have children and the social pressure to be the primary caretaker of those children, feminists called for reform within the workplace to accommodate women (and men) who wanted a higher valuation of “domestic” work and to fully participate in both domestic and business life.\(^{212}\) In response, conservatives argued that women should not be able to force widespread childcare reform because it was their “choice” to have children rather than participate as productive members of the work force.\(^{213}\)

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211. *See supra* notes 200–06 (discussing the debate over why women are under-represented in power positions).

212. Experts explain:

> [T]he American workplace today remains structured around the life patterns of the traditional patriarchal man who has no childcare responsibilities. As explained in Part I, this structure essentially ignores the life patterns of mothers, who are primarily responsible for childcare. Therefore, simply permitting women (as well as men with childcare responsibilities) to enter the workplace as it is currently structured will not provide true equality for working parents. Many excellent employees with caregiving responsibilities are simply unable to work the long inflexible hours required by many of the best jobs.


213. *See Laura T. Kessler, The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 371, 375 (2001) (“[T]he oversimplified strain of neoclassical economic theory that has come to pervade our country’s political and legal discourse, and the influence of rational choice theory in particular, have served to construct women’s caregiving as a freely chosen endeavor that is undeserving of protection from discrimination within the workplace.”). The discourse of choice has often been used by conservatives as a justification for denying poor minority women welfare benefits. Conservatives revive agency discourse to cement patriarchal family values while simultaneously undermining the welfare state. *See generally* Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 Me. L. Rev. 289 (2003) (discussing how contemporary conservatives tout marriage as much as work as the solution to the problem of “welfare mothers”). This discourse of “choice” has proven persuasive to courts. *See, e.g.*, Gen. Elec. Co v. Gilbert, 429 U.S. 125, 136 (1976) (affirming the denial of disability benefits to pregnant women in part on the ground that pregnancy is a “voluntarily undertaken and desired
It is precisely this objectification and agency discourse that feminism has historically countered. Consequently, hopping on the criminalization bandwagon is not a logical "next step" in the feminist movement or an unimportant choice. In accepting criminalization discourse, domestic violence reformers must prepare to accept the pernicious objectification tactics that have been so fundamental to the historical subordination of women. Furthermore, they must also accept the agency characterizations that keep society free from responsibility for crime—a practice that has also been used to subordinate women in the past.

This section has provided a philosophical backdrop to the critical choice feminists faced regarding mandatory domestic violence policies. Domestic violence reformers found themselves in the middle of a vortex between the persuasive victims' rights movement and feminist voices sensitive to the history of minority objectification. Domestic violence reformers, however, made their choice. Today, many domestic violence reformers vehemently support harsh criminalization and are willing to use the very rhetorical tools that serve to oppress all women. The next section explores how domestic violence reform embraced victims' rights over equal rights and allowed objectification discourse to become part of the feminist vocabulary.

IV. FEMINISTS GET TOUGH ON CRIME

Feminist Renée Rőmkens asks, "Is the feminist social movement to be remembered for its influence on criminal law . . . ?" Is much of today's feminism nothing more than a subset of the crime victims' rights movement and its tough-on-crime goals? It seems, unfortunately, that the answer is "yes." The domestic violence reform movement has largely shifted from

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214. See infra notes 314-34 and accompanying text (discussing how some domestic violence reformers infantilize and pathologize women in order to justify mandatory policies).


216. Again, not all feminists support domestic violence criminalization, yet criminalization has undeniably become a large part of the domestic violence movement and feminism in general. As Professor Maguigan states:

Sue Osthoff, the Director of the National Clearinghouse for the Defense of Battered Women ("NCDBW"), has noted that "unintended consequences are surfacing from over-reliance on the criminal legal system . . . Twenty-five years ago, women of color were saying that we should not turn to the criminal legal system. But we put all our eggs in one basket without seeking other creative ways of community intervention."

Maguigan, supra note 99, at 432-33 (citing ANANNA BHATTACHARJEE, AMERICAN FRIENDS SERVICE COMMITTEE, WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW
implementing progressive strategies of resistance to accepting conservative ideologies that support prevailing institutional structures and power distributions.\textsuperscript{217} There are two very striking parallels between the victims' rights movement and domestic violence reform. First, conservatives have appropriated domestic violence discourse and made it part of the larger conservative effort to be tough on crime. Second, in defense of mandatory policies, domestic violence reformers have adopted the essentialist discourse of objectification and agency. The most devolutionary moment in domestic violence reform was when reformers embraced or at least accepted the practice of treating abuse victims as objects and defendants as pure agents, despite the criticisms of many feminist, minority, and progressive scholars.

A. DOMESTIC VIOLENCE AND THE CONSERVATIVE AGENDA

In the traditional conservative mindset, domestic violence was at best an acceptable method of retaining domestic control and at worst a "private" problem not subject to public debate or censure.\textsuperscript{218} Several factors contributed to the government taking notice of domestic violence as a social

\textsuperscript{217} Elizabeth Schneider states:

\begin{quote}
Domestic violence was a moment, a part of a broader problem of gender inequality. But now domestic violence has become unmoored from those issues of gender, for a whole variety of reasons, which I develop in [Feminist Law Making]. The book argues that it is necessary to reaffirm the original impetus of activism and advocacy on domestic violence, the inextricable link between violence and equality.
\end{quote}

\textsuperscript{218} See supra notes 52-57 and accompanying text (discussing the traditional view of domestic violence as a "private issue"). Even today, certain right-wingers espouse the "breakdown of the family" and reversal of traditional roles as the source of domestic violence. See, e.g., PATRICK F. FAGAN, THE BREAKDOWN OF THE FAMILY: THE CONSEQUENCES FOR CHILDREN AND AMERICAN SOCIETY (1999), available at http://www.heartland.org/pdf/24005i.pdf (blaming out-of-wedlock pregnancy, pre-marital sex, and abortion for domestic violence). Certainly, such right-wing voices are at odds with the domestic violence reform movement, as evidenced by their intense opposition to the federal Violence Against Women Act ("VAWA"). The Facts About Spousal Conflict: Personal Responsibility Must Be Expected in Public Policy, http://www.dadsnow.org/vawa/vawa2.htm (last visited Apr. 19, 2007) ("VAWA is predominantly about creating a tremendous welfare state, enacting socialized health care, entitling women's employment, guaranteeing unemployment benefits and free housing for women, raiding husbands' retirement savings, and getting immigrant status for illegal immigrants."). The domestic violence reform movement, however, is also at odds with groups primarily concerned with the welfare of the poor, minorities, and immigrants, as evidenced by the growing number of women of color scholars opposed to criminalization reform. Hence, by "conservative," I mean those individuals and groups who embrace criminalization, not just as a response to the particular problem of domestic violence, but as a response to most, if not all, of the problems afflicting disempowered members of society. The conservative position is that particular individuals are wholly responsible for wrong-doing regardless of the context in which that wrongdoing occurs.
THE FEMINIST WAR ON CRIME

problem. Feminists were vocal, organized, and effective in their efforts to persuade the government that domestic violence was not acceptable. In addition, the government began to gain awareness of the social impacts and significant economic costs of domestic violence. At the same time, the increasingly popular victims' rights movement included in its agenda increased criminalization of domestic violence. To cement its appeal, the victims' rights movement emphasized particularly vulnerable victims, such as young children. Among their list of "helpless" victims was the powerless, pure-of-heart battered woman. Nicole Brown Simpson was the poster child for the convergence of the anti-domestic violence agenda and victims' rights movement. Once the public embraced Ms. Simpson as the "ultimate" victim, society could more easily categorize domestic abusers as among the ranks of indisputably criminal monsters worthy of utmost reproach.

219. During the Reagan and Bush I Administrations, Surgeon General C. Everett Koop was very vocal about the medical impact of domestic violence. See Doctors Begin Campaign to Help Battered Women, L.A. TIMES, Jan. 4, 1989, § 1, at 17 (attributing to Surgeon General C. Everett Koop the belief that "doctors must become part of the crusade against [domestic] violence"); Jan Hoffman, When Men Hit Women, N.Y. TIMES MAC., Feb. 16, 1992, § 6 (explaining that C. Everett Koop, the former Surgeon General, "has identified domestic violence as the No. 1 health problem for American women, causing more injuries than automobile accidents, muggings and rapes combined"); Mary S. Hood & Julie Knuce Field, Domestic Abuse Injunction Law and Practice: Will Michigan Ever Catch Up to the Rest of the Country?, 73 MICH. B.J. 902, 906 n.1 (1994) ("In 1985, Surgeon General C. Everett Koop told health professionals that domestic violence was a 'public health menace.'").

220. See supra notes 133-36, 152 and accompanying text (describing the victims' rights movement characterizations of vulnerable victims and evil defendants).

221. Victims' rights advocates saw the movement as "a national movement to reform the legal system by recognizing that crime victims, especially women and young victims of sexual and domestic violence, were a discrete and unserved minority that deserved equal justice under law." Kyl et al., supra note 103, at 584.


223. See Laurie L. Levenson, Stereotypes of Women in the O.J. Simpson Case, 1994 WL 681370 (O.J. Commentaries) ("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.").

224. The outrage expressed at the Simpson verdict and the use of evidentiary rules to exclude particular evidence of domestic abuse was distinctly racial. Michelle Jacobs explains:

When the O.J. Simpson verdict of not guilty was rendered by the jury comprised of eight black women, two black men and two others, many in the white community were outraged. White feminists attacked the intelligence of the black women on the jury, claiming the black women did not understand what the case was about.
As early as 1984, conservatives took up the domestic violence issue. The Reagan Administration published the Final Report of the Attorney General's Task Force on Family Violence. The Final Report was an important milestone for the domestic violence movement because mainstream government officials, like conservatives former Detroit Police Chief William Hart and John Ashcroft, rejected the idea that domestic violence was simply a "private" family matter. The Final Report characterizes the problem of domestic violence in a distinctly criminal rather than social or economic context.

White feminists could not understand that the black women on the jury could hear an additional narrative besides the white women's narrative about domestic violence. The possibility that law enforcement was targeting a successful black man was credible and real to them. It was not that the black women did not understand domestic violence.


226. While John Ashcroft denies that domestic violence is inappropriate for public concern, he appears concerned with domestic violence only because he believes it affects "family values." Thus, consistent with conservative ideology, Ashcroft uses the domestic violence issue to carve out a role for the government in dictating the structure of domestic relationships. See id. at 2-5. Moreover, Ashcroft's record on gender issues is less than stellar. Ashcroft's actions in a Guatemalan woman's asylum claim based on domestic violence are particularly telling:

[1] In 1999 the Board of Immigration Appeals rejected a domestic violence-based asylum claim by Rodi Alvarado, a Guatemalan woman. Although former Attorney General Janet Reno vacated the Board's decision in the Alvarado case, Attorney General John Ashcroft subsequently dismissed several members of the Board of Immigration Appeals who had been appointed by the Clinton Administration, including three of the five members who had dissented in the Alvarado case. He then declined to render a decision for two years in her case, and only in January of 2005 did he remand the case back to the Board of Immigration Appeals for a re-hearing.


The bulk of the Final Report's recommendations involve subjecting domestic abusers to greater criminal intervention and sanction. While the Final Report limitedly discusses education and social welfare, most of the prescribed reforms are tougher on domestic violence. The Final Report stresses the decontextualization of domestic violence stating, "the legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and the abuser."\(^2\) The Final Report limits victim participation, noting, "it is the prosecutor, on behalf of the state, and not the victim, who initiates prosecution when the elements of criminal conduct have been determined. The prosecutor and the judge, not the victim, determine whether the case is prosecuted or dismissed."\(^2\)\(^2\)\(^9\)

By stressing that domestic violence was like any other crime, the Final Report denied any larger social roots of the problem and cemented the notion that domestic abusers act, not because of prevailing gender sentiments, but in contravention of social norms.\(^2\)\(^3\)\(^0\) The Final Report, in fact, rejects the notion that traditional gender messages contribute to domestic violence and instead asserts that the way to curb domestic abuse is to emphasize family values. It concludes:

As important as our families are to us individually and to the health of the nation, it is crucial that public policy support and strengthen family values and family well-being. The family is the bedrock of civilization. America derives its strength, purpose and productivity from its commitment to strong family values. For our nation to thrive and grow, we must do all that we can to protect, support, and encourage America's families.\(^2\)\(^3\)\(^1\)

More recently, task force member John Ashcroft has been particularly vocal in his belief that the true harm of domestic violence is that it renders parents unable to fulfill their obligation to instill family values. At a 2002 domestic violence symposium, he stated:

In [my] book, I was able to narrow the list of my most cherished beliefs down to twenty. And prominent among these twenty life lessons is that the greatest responsibility of a culture is the transmission of values from one generation to the next. Values begin and end in the family. As children, we learn values; as parents, we transmit them. Our children absorb the values we pass on to them; and they in turn pass these values on to their children. But when families are wracked by violence and abuse, values are

\(^{228}\) Final Report, supra note 225, at 4.
\(^{229}\) Id. at 30.
\(^{230}\) Feminists vehemently reject the view that domestic violence is a garden-variety crime without social implications. They see domestic violence as an outgrowth of legal, institutional, and social patriarchy. See supra Part I.
\(^{231}\) Final Report, supra note 225, at 119.
corrupted. The messages transmitted by parents are messages of violence, cruelty, and powerlessness.\(^{232}\)

Perhaps, however, the conservative embrace of domestic violence reform would have the effect of making victims’ rights and tough-on-crime ideologies more progressive. The popularity of criminalization as a response to social ills was due, in part, to stereotypical characterizations of victims and criminals.\(^{233}\) The victims’ rights movement and popular media painted a picture of young, white, innocent, non-poor female victims terrorized by monstrous, ethnic, poor men.\(^{234}\) Acceptance of domestic violence reform might be beneficial in helping to explode such racial thinking. If society were to recognize the problem of domestic violence and accept feminists’ assertions that domestic violence happens at every level of the socio-economic spectrum and in every racial group,\(^{235}\) it would have to abandon the notion that criminals are minorities and victims are white.\(^{236}\) Society would realize that criminals could actually be middle- and upper-class white men.

Unfortunately, the de-racialization of tough-on-crime ideology did not happen. Domestic violence reform did not require the widespread abandonment of stereotypical racial thinking. First, those lobbying for


\(^{233}\) These stereotypical characterizations are manifested in domestic violence reform. Popular media and politicians emphasize cases involving ideal, blameless, abused women and monstrous abusers. “The simple and sensationalist story lines encouraged by tragic cases of domestic violence and law and order frameworks also serve media and political interests. Dramatic cases and ‘tough on crime’ policies are easily communicated in the mass media and have ready appeal to voters.” Ann E. Freedman, Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses, 11 AM. U. J. GENDER SOC. POL’Y & L. 567, 588 (2005).

\(^{234}\) See supra notes 153-62 and accompanying text (describing racial characterizations of victims and perpetrators).


\(^{236}\) See supra note 152 and accompanying text (discussing the victims’ rights movement’s incorporation of racial stereotypes).
domestic violence reform were white middle to upper-class women. Poor minorities could hardly be said to be the group behind the call for being tough on domestic violence. Additionally, domestic-abuse discourse and policy tended to assume a burning-bed-type stereotype of a meek, serially abused, non-poor, white woman. Nicole Brown Simpson, a white, attractive, upper-class woman, was the icon around which the public galvanized in its support of domestic violence reform. Consequently, even though feminists argued that domestic violence affected all spectra of society, the public and conservative policymakers were lobbied by white women and affected by the publicity surrounding white domestic-abuse victims.

At the very least, accepting white women as prototypical victims, policymakers would have to accept their partners (most likely white men) as perpetrators. Logically, then, the result of domestic violence reform would be the vigorous enforcement of criminal laws against middle-class white men. As one might expect, however, domestic violence reform did not lead to widespread arrest of white middle-class men. By effectuating mandatory


238. See id.; see also Coker, supra note 42, at 1014. Donna Coker notes that the domestic violence reform movement has "the tendency to ignore or undervalue the significance of race or ethnicity in shaping the efficacy of universal intervention strategies." Id.

239. See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 2-3 (1991) (asserting that the movie The Burning Bed created a cultural image of the battered woman as an ultimately innocent, meek creature subjected to terrorism-like violence); see also Coker, supra note 42, at 1028–29 ("Research purportedly about 'battered women' or 'domestic violence' frequently rests on data gathered only or mainly about white women.").

240. Professor Linda Ammons discusses the case of Pamela Hill, an abused African American woman who killed her abuser during a struggle. The prosecutor in Hill's case stated during closing arguments. "[A] lot of people would have you believe Pamela Hill is carrying the banner of Nicole Simpson." Ammons, supra note 155, at 1006 (quoting James Ewinger, Woman Gets Prison in Boyfriend's Killing, CLEVELAND PLAIN DEALER, Sept. 20, 1994, at 3B). Ammons remarks:

The imagery and stereotypes that were raised by the prosecutor's comparison of Pamela Hill and Nicole Simpson cannot be missed. Nicole Simpson was white, beautiful, rich, portrayed as a good mother, and brutalized. Pamela Hill is black, poor, an unwed mother, and considered violent. Hill was convicted and received a sentence of five to twenty-five years. The prosecutor, in making the statement about Pamela Hill "carrying the banner of Nicole Simpson," wanted to make sure that the jurors had a picture in their minds of a real battered woman.

Id. at 1006–07.

241. Power elites are generally exempt from the reach of criminal law, which is essentially a tool of maintaining social order over the poor in a capitalist society:

[N]otions of what is wrong, what is socially harmful, and what is proper punishment reflect political choices that disfavor lower class people—who of course have less access to the political power and influence over the legal system
policies without changing the systemic biases of the criminal justice system, the oxymoronic but unsurprising result was that, although domestic violence reform became a reality because of the desire to protect white women,\textsuperscript{242} it resulted in the widespread incarceration of minority men.\textsuperscript{243} Consequently, tough-on-crime advocates could rally around domestic violence reform while continuing to internalize and perpetuate racial characterizations of victims and criminals.

Finally, conservatives had little to lose and much to gain by supporting increased criminalization of domestic violence. First, by prescribing criminal law as the cure to domestic violence, conservatives could continue to maintain the concept that domestic violence occurred because of deviant bad guys and not because of deeply entrenched socio-economic inequalities that were maintained by the government and elites.\textsuperscript{244} George W. Bush

\begin{quote}
Ahmed A. White, 

\textsuperscript{242} See Kimberle Williams Crenshaw, \textit{Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color}, in \textit{THE PUBLIC NATURE OF PRIVATE VIOLENCE}\ 93 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (noting that politicians were relatively unconcerned with domestic violence when it was considered a minority issue).

\textsuperscript{243} Donna Coker notes that "disproportionate numbers of African American and somewhat lower but still disproportionately high numbers of Latinas/os are the subject of criminal justice intervention in domestic violence cases." Coker, \textit{supra} note 42, at 1034-35 (citing JoAnn L. Miller & Amy C. Krull, \textit{Controlling Domestic Violence: Victim Resources and Police Intervention}, in \textit{OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE}\ 239 (Glenda K. Kantor & Jana L. Jasinski eds., 1997) (citing studies on domestic violence in Milwaukee, Colorado Springs, and Omaha)); see also \textit{LINDA MILLS, FROM INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE}\ 31 (2003) ("Men of color are likely to be arrested and prosecuted for intimate abuse crimes at disturbingly disproportionate rates when compared with their white counterparts."); MaGuigan, \textit{supra} note 99, at 439 ("Certainly, African American men and Latinos are disproportionately represented among domestic violence defendants in criminal courts . . . ").

\textsuperscript{244} See \textit{supra} notes 60-61 and accompanying text (discussing the socio-economic conditions precedent to battering); see also Peter Margolis, \textit{Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice}, 63 \textit{GEO. WASH. L. REV.} 1071, 1076 (1995) (asserting that limited job opportunities, lack of affordable housing, and unavailability of welfare benefits may contribute to ongoing spousal abuse); \textit{supra} notes 105-13 and accompanying text (asserting that the conservative position denies social responsibility for crime).
advanced the domestic violence cause by declaring "war" on domestic violence the same way Reagan declared war on drugs. Bush stated:

Our government is engaged in the fight, as it should be. Government has got a duty to treat domestic violence as a serious crime, as part of our duty. If you treat something as a serious crime, then there must be serious consequences; otherwise it's not very serious. . . . Our prosecutors are doing their job. They're finding the abusers, and they're throwing the book at them. And that's important.

People who commit must understand with certainty there is a consequence. One way to change behavior is to make it clear to people in our society, if you break the law, if you beat up a woman, if you abuse your wife, you will be held to account. There must be certainty in the law, and we must have prosecutors who understand that we expect them to be tough. And they are.\(^{245}\)

Moreover, the government and elites could absolve themselves of any responsibility for continued domestic violence by blaming individual women for their failure to take advantage of the now-ample opportunities to avail themselves of the criminal justice system.\(^{246}\) Finally, the government's

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\(^{245}\) President George W. Bush, Remarks by the President on Domestic Violence Prevention, Bush Proclaims October Domestic Violence Awareness Month (Oct. 8, 2003), available at http://www.whitehouse.gov/news/releases/2003/10/20031008-5.html. Bush also used the domestic violence issue to further his religious policies. In a subsequent speech he asserted:

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. Through initiatives like the Faith-Based and Community Organization Rural Pilot Program and the Safe and Bright Futures for Children Initiative, the Departments of Justice and Health and Human Services are providing funding to support these organizations in their life changing work.


\(^{246}\) John Ashcroft's remarks indicate that the more resources the government pours into domestic violence reform, the more responsibility the battered woman has for eradicating her "family" of domestic violence. He states:

As a society, it is our responsibility—and our privilege—to pass on our values to the next generation of Americans. We must work together to ensure that each victim has the opportunity to escape violence and to transform her life and the lives of her children. One victim of domestic abuse who found help described this transformation better than I ever could. She said, "I finally realized the truth, that I
philosophical and financial support of domestic violence criminalization had the effect of diverting feminist efforts toward criminal law and away from other more radical endeavors, endeavors which would, in fact, challenge the very structure of power in society. This allowed the government and powerful society members to simultaneously undermine general feminist reform while claiming to be pro-woman because of their support for tough domestic violence criminal laws.  

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.”

Ashcroft, supra note 232 and accompanying text. See Elaine Chiu, Confronting the Agency in Battered Mothers, 74 S. CAL. L. REV. 1223, 1258 (2001) (“All too often, conservatives . . . interpret opportunity for action to be the same as control over the abuse, and therefore, believe it is justified to penalize battered women anytime they do not use their opportunities and control to end the abuse.”); Deborah M. Weissman, Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local,” 42 B.C. L. REV. 1081, 1133–34 (2001) (“[A]tention to criminal remedies actually contributes to skepticism that battered women continue to face difficulties in the courts. . . . Claims that domestic violence cases suffer in the courts are received with disbelief and dismissal, and are met with a view that women have undeserved advantages.”).

247. There can be no dispute that in the last ten years the idea of being “tough” on batterers has gained widespread acceptance among policymakers, society members, and even our own students. From my own and other scholars’ anecdotal evidence, this acceptance has curiously coincided with a larger rejection of “feminism” and the study of “women’s issues.” One female law professor observes:

Over the past ten years, I have watched as fewer students, men and women, express any interest in gender and law classes. Students have told me that they fear that having such courses on their transcripts might make employers hesitant to hire them. Women who might, under other circumstances, be open to studying the gender issue are intimidated by the possibility of being labeled “feminazi” or worse yet, lesbian if they express too much interest in “women’s” issues. This trepidation is tragic.


248. For example, while advocating a “war” on domestic violence, President Bush is hardly an ally of feminists on other fronts. He opposes choice in abortion; see The First Gore-Bush Presidential Debate (Oct. 3, 2000), available at http://www.debates.org/pages/trans2000a.html (“I think a noble goal for this country is that every child, born or unborn, need to be protected by law and welcomed to life.” (statement of Gov. George W. Bush)); is philosophically adverse to the welfare state, see id. (criticizing Al Gore for planning “to grow the federal government in the largest increase since Lyndon Baines Johnson in 1965” (statement of Gov. George W. Bush)); opposes gay marriage, see The Second Gore-Bush Presidential Debate (Oct. 11, 2000), available at http://www.debates.org/pages/trans2000b.html (“I’m not for gay marriage. I think marriage is a sacred institution between a man and a woman.” (statement of Gov. George W. Bush)); criticizes robust anti-discrimination laws, see Press Release, President Bush Discusses Michigan Affirmative Action Case (Jan. 15, 2003), available at http://www.whitehouse.gov/news/releases/2003/01/20030115-7.html (asserting that University of Michigan’s diversity admissions policies are unconstitutional); and appointed Justice Alito, who has a notoriously poor record on women’s rights, see Senator Charles Schumer, News Conference on the
B. ESSENTIALISM AND OBJECT/AGENCY DISCOURSE IN DOMESTIC VIOLENCE REFORM

Even more disturbing than the conservative appropriation of the domestic violence issue is the way object-and-agency characterizations have wormed their way into reform discourse. Many advocates have adopted a practice of denying victims autonomy in order to support prosecutorial goals. Although there were salient reasons for feminists to reform the criminal justice system, once they engaged state power, it became the primary if not singular focus of the movement. Particularly distressing is the extent to which certain reformers will go in order to defend prosecutorial policies against detractors from within the feminist movement. In order to support mandatory policies, some domestic violence reformers go so far as to characterize battered women as defective creatures and demonize opposing feminist voices as anti-woman. Reformers, of course, defend harsh criminalization policies on the ground that they “work,” much in the way conservatives posit that tough-on-crime policies, like the death penalty, deter crime. Although my criticism of mandatory domestic violence policies, like my critique of tough-on-crime reforms, is not empirical, I will nonetheless briefly address the deterrence argument.

Nomination of Judge Alito to the Supreme Court, Transcript: Sen. Schumer’s Remarks on the Alito Nomination, WASH. POST, Oct. 31, 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100707.html (‘A preliminary review of his record raises real questions about Judge Alito’s judicial philosophy and his commitment to civil rights, workers’ rights, women’s rights, the rights of average Americans which the courts have always looked out for.’). Similarly John Ashcroft has been a bold supporter of criminal laws against domestic violence while exhibiting a poor record on women’s rights elsewhere. See supra note 226; see also Morrison, supra note 102, at 83 n.9 (“Domestic violence allows the politician to be sensitive especially to women and children, get support from women’s or feminist organizations and yet be tough on crime.”).

249. See supra Part II.A (discussing history of domestic violence criminal law reform).


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.

Id.

251. See infra notes 363–70 and accompanying text.

252. See, e.g., Sarah Mausolff Buel, Recent Development, Mandatory Arrest for Domestic Violence, 11 HARV. WOMEN’S L.J. 213, 216 (1988) (asserting the deterrent effects of mandatory arrest); Hanna, supra note 11, at 1895 (stating that mandatory prosecution “protects not only the victim, but also other women who might enter into a relationship with the abuser”); Marion Wanless, Note, Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?, 1996 U. ILL. L. REV. 533, 535 (noting that “supporters believe mandatory arrest laws will curtail domestic violence”).
The feminist hope that criminalization policies would stop domestic violence was palatable to the government because it aligned with the conservative desire to stop domestic violence and its attendant costs without having to make widespread reforms to equalize the genders. Reformers were heartened by the 1984 Minneapolis domestic violence experiment, which seemed to provide objective support for the proposition that mandatory arrests decrease domestic abuse. The experiment analyzed three different police responses to domestic violence complaints: arresting the suspect, sending the suspect away for eight hours, and giving the suspect advice. The scientists compared the efficacy of the three procedures over six months by analyzing police records of repeat violence and victim reports. Based on the findings, the scientists concluded that "police should probably employ arrest in most cases of minor domestic violence." This experiment has been the subject of much criticism both by legal scholars and scientists. They argue, for example, that the methodologies of the

253. See Deborah M. Weissman, Gender-Based Violence As Judicial Anomaly: Between "The Truly National and the Truly Local," 42 B.C. L. REV. 1081, 1133 (2001) (asserting that criminal remedies "do not provide women with the resources to establish secure lives with their children at home, at the workplace, or in their communities").

254. Steven Schulhofer explains:

In Minneapolis, police conducted an experiment to determine the effect of arrest in misdemeanor assault cases. The result was dramatic support for mandatory arrest: by every measure, arrest was reported to be more effective than other responses such as counseling the parties or sending the suspect away. The results were widely reported and enthusiastically received; numerous police departments adopted rules requiring arrest in domestic assault cases, and more than a dozen states enacted statutes mandating that approach statewide. By 1989, only five years after the study results were released, 84% of urban police agencies reported having mandatory or preferred arrest policies for domestic violence cases.


256. See, e.g., id.; Eve S. Buzawa & Carl G. Buzawa, The Scientific Evidence Is Not Conclusive: Arrest Is No Panacea, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 337 (Richard J. Gelles & Donileen R. Loseke eds., 1993); Coker, supra note 42, at 1034 n.102. Schulhofer observes:

Unfortunately, the rapid and uncritical acceptance of the Minneapolis findings was premature because flaws in the study made it hard to be sure that reported deterrent effects of arrest were not spurious. To afford a more complete picture, experiments testing the effects of mandatory arrest were repeated, among broader demographic groups and with better data-collection procedures, in five other cities. In three of them, arrest had a greater deterrent effect than other responses only in the short run; the effect tended to diminish over time, and within a year after the initial intervention, suspects who had been arrested were more likely to engage in repeat violence than those who had merely been warned. A reanalysis of the Minneapolis data revealed a similar pattern in that city. Over time, in other
experiment were flawed and the time frame in which the experiment was conducted rendered its results tenuous at best. Scholars also question the accuracy of any study on arrest rates, given that mandatory policies create serious disincentives for women to report violence. Since 1984, other experiments have contested the conclusion that mandatory arrest procedures decreased incidences of domestic violence and have concluded that mandatory policies actually increase the amount of harm suffered by women. However, the Minneapolis experiment continues to be the most well-known experiment and one that appears in leading criminal law casebooks. Steven Schulhofer comments:

[T]he tentative Minneapolis study and its recommendations for a more punitive approach received widespread attention and an immediately favorable reception, but public officials and the media have either attacked or ignored the more thorough studies that suggest the opposite conclusion. Theoretical and ideological commitments to punitive strategies and to a rights-oriented response to aggression seem to dominate any concern for designing operational programs which actually help abused women.

In addition, mandatory arrest and prosecution were suboptimal, quick-fix responses to the patriarchal psychology of police and prosecutors because the policies forced law enforcement officials to act without addressing the underlying reasons regarding why they had failed to act

Schulhofer, supra note 254, at 2162–63 (citations omitted).

257. See, e.g., Coker, supra note 42, at 1034 n.102 ("[C]onfidence in the result of these studies is compromised by their small sample size and the problems with comparability between 'incidents' for the before/after comparison. Comparing past incident or severity rates are subject to problems of subject recall as well.").

258. See Katharine K. Baker, Dialectics and Domestic Abuse, 110 YALE L.J. 1459, 1489 (2001) (reviewing SCHNEIDER, supra note 27) ("[T]he chief deterrent effect of mandatory arrest policies may well be their tendency to deter calls to police . . . ."); Buzawa & Buzawa, supra note 256, at 346.

259. See, e.g., Lawrence W. Sherman et al., Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence, 57 AM. SOC. REV. 680, 686 (1992) (finding that among unmarried and unemployed batterers, arrest was associated with 53.5% increase in the annual rate of subsequent violence); see also Pamela Blass Bracher, Mandatory Arrest for Domestic Violence: The City of Cincinnati’s Simple Solution to a Complex Problem, 65 U. CIN. L. REV. 155, 178 (1996) (noting that “[s]tudies have failed to show a nexus between arrest and deterrence”); Buzawa & Buzawa, supra note 256, at 337, 343 (citing studies); Micchio, supra note 43, at 294 (stating that “faith in the deterrent effect of mandatory criminal intervention is misplaced” and citing studies).


261. Schulhofer, supra note 254, at 2164 (citation omitted).
before. The reforms did not speak to the pervasive view among police officers that domestic violence was acceptable, private, or the woman's fault. As a consequence, police and prosecutors still found ways around mandatory policies or enforced them in such a way that the woman, herself, was punished for resorting to state intervention. Statistics reveal that the percentage increase in the number of women arrested pursuant to mandatory policies far exceeds the percentage increase in men arrested.

In addition, many feminist scholars have questioned whether increased criminalization has made women safer. They argue that the ability to press or drop charges empowers battered women to bargain with their abusers for safety. In addition, taking discretion away from battered women puts their

262. Dan Kahan notes that the legal reforms feminists secured often reflected their powerful advocacy in legislatures rather than a general shift in social thinking. As a result, police were psychologically and sociologically unprepared for reform and reluctant to implement it. He states:

Well organized and intensely interested advocacy groups can often secure legislation that is out of line with the preferences of the median voter. That is what happened in the fields of domestic violence law and rape law, where legislative reforms reflected strong, feminist-inspired critiques of norms that had not yet been fully repudiated by society at large. Because the feminist advocacy groups did not enjoy the same influence over enforcers as they did over legislators, the reform efforts predictably generated resistance at the enforcement stage.

Kahan, supra note 72, at 629.

263. See supra note 45 and accompanying text (describing police attitudes).

264. See Sack, supra note 27, at 1698 (footnotes omitted) (describing police and prosecutor resistance to instituting mandatory policies).

265. See Margaret Martin Barry, Protective Order Enforcement: Another Prouette, 6 HASTINGS WOMEN'S L.J. 339, 344 (1995) (asserting that police arrest women as a form of resistance to mandatory policies); Andrea D. Lyon, Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan, 5 MICH. J. GENDER & L. 253, 298 (1999) (citing studies showing the "high incidence of women arrested" and highlighting possible police resentment and retaliation toward women who have previously called police and then returned to their batterers); see also Coker, supra note 42, at 1044-45 (describing arrest and prosecution of victims for various charges including assault, child abuse, and neglect).

266. See L. Kevin Hamberger & Theresa Potente, Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice, 9 VIOLENCE & VICTIMS 125, 126 (1994) (noting that a mandatory arrest law resulted in a twelve-fold increase in arrests of women but only a two-fold increase for men); Carey Goldberg, Spouse Abuse Crackdown, Surprisingly, Nets Many Women, N.Y. TIMES, Nov. 23, 1999, at A16 (observing that pro-arrest policies in New Hampshire and Vermont led to significant increases in the percentage of women arrested for domestic violence).

267. 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. POLY & 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”); see also infra notes 270-73.

fates in the hands of outsiders unfamiliar with the details of their situations. Many feminists assert that domestic violence victims, themselves, are in the best position to assess what they need to do to keep safe. These feminists conclude that mandatory policies have the overall effect of diminishing the safety of battered women. Scholars also emphasize the economic harms that mandatory reforms impose on victims.

Finally, harsh criminalization policies have had the empirical effect of disproportionately disadvantaging minorities. Soon after states began to implement mandatory policies, a growing body of scholarship emerged, set forth most prominently by women-of-color scholars, criticizing mandatory policies. The criticisms focused not only on the policies' tendency to subject disproportionately high numbers of minority men to criminal penalties, but also on the fact that they resulted in minority women being subject to various criminal and civil sanctions. Minority women victims often found themselves arrested as "mutual combatants" under mandatory arrest

127, 150–51 (N. Zoe Hilton ed., 1993) (citing a study showing that battered women bargain for their safety); Coker, supra note 42, at 1018 ("Interviews with battered women demonstrate that women sometimes drop protection orders or refuse to cooperate with prosecution because they were successful in using the threat of legal intervention to gain concessions from their abuser."); Linda G. Mills, Intuition and Insight: A New Job Description for the Battered Woman’s Prosecutor and Other More Modest Proposals, 7 UCLA WOMEN'S L.J. 183, 191 (1997) (asserting that the victim’s "opportunity to make that choice [to prosecute] may be just the power the battered woman needs to stop the violence in her life").

269. See Mills, supra note 268, at 191 (arguing that the perverse effect of such a tactic may be "to align the battered woman with her batterer, to protect him, and to further entrench her in the abusive relationship").

270. See Mordini, supra note 41, at 323 (noting that the woman "is in a better position to choose, as she knows best what her partner is capable of and what is likely to occur from the separation"). But see Wills, supra note 75, at 181 ("The criminal justice system, on the other hand, sees a wide spectrum of batterers. It also has more resources to assist in evaluating the danger a batterer poses to the victim.").

271. Donna Coker describes the grave costs of the message-sending goal of Miami-Dade Florida's mandatory policies:

[T]he County Commission in Miami-Dade, Florida enacted an ordinance in 1999 that, among other provisions, requires the clerk of court to notify the employer of anyone convicted of a domestic violence offense. The sponsors of the legislation argue that "it sends a message," but regardless of the intended message, the result was direct and predictable harm for poor women of color. Professional men are not likely to lose their jobs if their boss is notified of a misdemeanor conviction, but men working in low skill jobs, where men of color are disproportionately represented, are likely to be fired. The ordinance takes money directly from poor women and their children by diminishing their possibility for receiving child support. The ordinance probably increases women's danger, as well, since unemployed men may be more likely to engage in repeat violence.

Coker, supra note 42, at 1016 (footnotes omitted).

272. See supra notes 81–83 and accompanying text.
policies or later embroiled in the abuse-and-neglect system relating to some perceived maltreatment of their children. Race scholars also criticized the negative effects mandatory policies imposed on immigrant communities. Because domestic violence, unlike non-domestic forms of simple assault, rendered defendants eligible for deportation, mandatory policies posed special problems for immigrants. Immigrant victims were torn between reporting domestic violence, which may result in deportation of victims or their spouses and cause emotional and financial hardship, and allowing abuse to continue.

Some defenders of criminalization dismiss the racial critique as providing a “license” for men of color to abuse. These reformers

273. A minority scholar has observed:

First, [mandatory policies] could decrease the number of black women who would actually call the police for fear that they would be contributing to the already unbearable level of criminal justice intrusion into the lives of black men. Second, mandatory arrest policies might actually heighten the rate and severity of violence that women were experiencing. They could also lead to an increased number of women of color being charged with domestic violence, since the police and the courts do not view black women as victims of domestic violence, but rather as mutual combatants in assault cases.

Jacobs, supra note 224, at 806 (footnotes omitted); see also Fenton, supra note 224, at 54 (criticizing the image of “the uncontrollable, promiscuous black woman who is capable of sustaining greater physical abuse than her white counterpart, and who is herself capable of violence”).

274. See Coker, supra note 42, at 1047–48 (discussing negative impacts of mandatory policies on victims).

275. 8 U.S.C. § 1227(a)(2)(E)(i) & (ii) (1997) provide:

(i) Domestic violence, stalking and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. . .

(ii) Violators of protection orders. Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.


277. Sarah Buel testified to Congress that cultural and racial considerations were no more than prosecutorial cop-outs:
rationalize that domestic violence prosecution benefits all women equally because domestic violence affects women on every level of the socioeconomic and racial spectrum. They thus reject a racially conscious approach to mandatory policies:

[I]n our efforts to be racially, culturally, and economically sensitive, we cannot allow violence to go unchecked under the rationale that state intervention is always racist, ethnocentric, or classist. . . . 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.\textsuperscript{278}

So does criminalization "work"? The evidence is inconclusive.\textsuperscript{279} Moreover, even if harsh policies have had some effect on deterring domestic violence, they have also created many other problems. Reformers, however, would assert that empirical utility was not the only reason to support criminalization, citing the "norming" function of criminal law as a basis for reform.\textsuperscript{280} Criminalization, according to reformers, sends a message to

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I am constantly hearing from police and D.A.'s and judges, whenever the defendant is of color, that somehow that is relevant to the abuse . . . . [They do this] because of the denial and because of the desire to distance themselves from the abuser, that if they can say this is part of the Latino culture or this is something that foreigners do, because he is from Iran, that this is how this man behaves . . . .


278. Hanna, supra note 11, at 1881–82. While pro-prosecution reformers assert that mandatory prosecution will prevent police from implementing racist attitudes, skeptics question the ability of such laws to restrain police bias. 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, 293 (1997) ("[E]ven in a mandatory arrest regime, the police still must make probable-cause determinations about whether violence has occurred; probable cause is not a colorblind calculation.").

279. Deborah Epstein argues that mandatory policies might actually lead to less compliance with law enforcement because men will perceive the criminal justice system as unfair. She states, "The likelihood of a person's compliance with the dictates of police and probation officers, or with court orders issued in civil or criminal cases, is at least as firmly rooted in his perception of fair process as in his satisfaction with the ultimate result." Epstein, supra note 2, at 1846. Considering all the evidence from the Minneapolis study and the replication studies, scholars have concluded that the empirical evidence does not unequivocally demonstrate that mandatory policies decrease domestic violence. See Sack, supra note 27, at 1676 (noting the lack of conclusive evidence on the impact of mandatory policies on safety and recidivism); see also Arthur L. Rizer III, Mandatory Arrest: Do We Need to Take a Closer Look?, 36 UWLA L. REV. 1, 15 (2005) ("Just as there are studies that say . . . [mandatory arrest] deters violence, many studies indicate that it does not.").

society that domestic violence is neither legitimate nor merely a private problem. While it is clear that we should not go back to treating domestic violence as a legitimate expression of male dominance, emphasizing that domestic violence is solely a criminal problem does not necessarily send the best message possible.

Concededly, the increased awareness of domestic violence as a crime has effected a change in social mindset. Even chauvinistic males who believe that the "woman's place is in the home" are reluctant to admit publicly that domestic abuse is valid. Rather, people now uniformly look upon "wife beaters" with hatred and disdain. While change in mindset is an achievement, it is limited in the sense that society has not abandoned the structures of inequality that foster battering. Many men have adopted the "if I ever see a man hit a woman I'd beat him" attitude. The idea is that the woman is a helpless object in need of protection while the man is a deviant bad guy deserving of retribution. This is similar to the victims' rights movement's emphasis on weak, helpless victims and evil, autonomous criminals.

Accepting such binary characterizations of abusers and victims dispels the government and society's responsibility for creating the conditions that even if they do not deter, mandatory policies serve the "indirect function of setting a standard of zero tolerance for battering that other institutions can emulate").

281. Cheryl Hanna openly supports the norming function of mandatory policies, even if such policies impose substantial hardships on abused women. She states:

[Optional automated generation of footnotes]


283. One study revealed that men define domestic violence specifically in terms of physical abuse and are less likely to see other forms of control as illegitimate. Men and Women Define Domestic Violence Differently, http://www.planetpsych.com/zPsychology_101/domestic_violence.htm (last visited Oct. 23, 2006).

284. See supra notes 114-15 and accompanying text.
precedent to domestic abuse. The message criminal law sends is that a distinct group of wicked people commit domestic violence and that once these persons are managed, the problem is solved. Thus, although criminal reform may have vindicated the view that domestic violence is wrong, it also entrenched the view that it is an insular rather than endemic wrong. Elizabeth Schneider notes that criminalization indicates that domestic violence is "a problem in and of itself and not linked to the larger issues of women's economic situation, gender socialization, sex segregation, reproduction, and women's subjugation within the family." Consequently, much like the assertion that tough-on-crime policies are good because they "work" and "send a message," reformers' contention that mandatory policies "work" and "send a message" should be viewed with a jaundiced eye.

My main critique of current domestic violence reform, however, is not empirical. Rather, I am particularly disturbed by the ideological and discursive moves made by certain reformers to account for women who oppose prosecutorial policies—moves that entrench essentialism and object/agency characterizations. Much like the victims' rights movement has no tolerance for victims without vengeance, domestic violence reform systematically denies the autonomy of female victims who are not pro-prosecution. Pro-criminalization domestic violence reformers support mandatory policies that formally strip victims of any control over the destiny of their domestic violence cases. They also criticize restorative-justice and therapeutic-jurisprudence approaches to domestic violence on the ground that they are too easy on abusers. State actors express disdain for victims who refuse to engage in separation-based legal programs.

285. Again, the government can appear pro-women while ignoring the economic, social, and legal conditions that give rise to battering. Namely, women's lack of economic empowerment, society's patriarchal beliefs about home and family, and women's inability to access legal and social resources. See SCHNEIDER, infra note 310.

286. See Mahoney, supra note 239, at 11 (asserting that judicial opinions treat domestic violence as "aberrant and unusual").

287. Cf. Martha Albertson Fineman, Progress and Progression in Family Law, 2004 U. CHI. LEGAL F. 1, 1-5 (2004) (asserting that a narrow focus on individual family structures and the well-being of children within them obscures a larger focus on economic and gender disparities).

288. Battered Women Symposium, supra note 96, at 359; see also Mahoney, supra note 239, at 12 ("Societal denial amounts to an ideology that protects the institution of marriage by perpetuating the focus on individual violent actors, concealing both the commonality of violence in marriage and the ways in which state and society participate in the subordination of women.") (footnote omitted).

289. See supra notes 133-36 and accompanying text.

290. See supra notes 72-76 and accompanying text (describing mandatory policies); infra notes 292-96 and accompanying text (describing the objectification of uncooperative domestic violence victims).

291. See, e.g., Karla Fischer et al., The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 SMU L. REV. 2117, 2171 (1993) (asserting that there is a "culture of battering" that is incompatible with mediation); Holly Joyce, Comment, Mediation and Domestic Violence:
Reformers justify ignoring women’s choices in a variety of ways. One way is to espouse the ideology that domestic violence reform laws do not exist primarily for abused women but rather for the protection of society in general. Because many of the leading domestic violence reformers are prosecutors, they articulate a more global view of victimhood, namely, that the true domestic violence victim is not the woman but rather society members forced to live amongst domestic abusers. These reformers argue


292. See Epstein, supra note 2, at 1857 (noting that district attorneys believe that uncooperative battered women “waste precious prosecutorial resources” (quoting Naomi R. Cahn, Innovative Approaches Overview, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 161, 163 (Eve S. Buzawa & Carl G. Buzawa eds., 1992))); Mills, supra note 268, at 194 (asserting that prosecutors “become mechanical, legalistic, and uninterested in those victims who are unwilling to help pursue a perpetrator”). One domestic violence advocate recounts with remorse objectifying her client by pushing prosecution on her client:

In retrospect, I realized that my reaction was inappropriate and, to a certain degree, insulating and offensive to Joan. Wanting to hold Mike accountable for his criminal behavior was a typical response, but for me to assume the role of “big brother” to my client was just the opposite end on the abuse pendulum. Like Mike, I was exercising control over Joan’s life. While Mike wanted to punish her for taking away his authority in the relationship, I wanted to protect her when I impulsively—and unilaterally—decided that Mike should be prosecuted and Joan needed rescuing.

How could I possibly know what was best for Joan after only a brief session with her? Besides our short conversation before the interview, I knew absolutely nothing about Joan or the abuse she endured. Had Joan not pulled my coattail, I would have escalated the abuse by indirectly implying that she was feeble, helpless, passive, and incapable of knowing what was best for herself.

White, supra note 51, at 725-26.

293. See FINAL REPORT, supra note 225; see also 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,’ rather than as merely an offense against the individual victim” (internal citation omitted)); Wanless, supra note 252, at 567 (arguing that when a prosecutor “acquiesce[s]” to a victim’s wishes, she “fails to recognize that domestic violence is a crime against society as well as the victim”).

294. See Wills, supra note 75, at 182 (“As guardians of public safety, prosecutors must proceed against domestic violence offenders with or without victim cooperation as long as there is legally sufficient evidence.”). Similarly, Cheryl Hanna asserts that first and foremost, a prosecutor serves the entire “community” and should prosecute on the basis of the “seriousness of the offense and sufficiency of the evidence.” Hanna, supra note 11, at 1908. Only to the extent that the victim’s wishes affect the sufficiency of the evidence are they relevant. Any philosophical reason for taking the victim into account should be ignored. She states, “Prosecutors need to be able to look beyond the theoretical dilemmas ... and to stop worrying about whether the choice to pursue a case conflicts with their feminist (or nonfeminist) ideals.” Id.
that victims' wishes should have little or no bearing on whether society's right to punish criminals is vindicated, and victims simply do not have the right to dictate the destiny of criminal cases. Cheryl Hanna, for example, defends the prosecutor’s choice to jail Maudie Wall, an uncooperative domestic violence victim, on the grounds that Ms. Wall’s reluctance cost the state money:

Feminists overwhelmingly criticized the prosecutor who jailed Maudie Wall overnight, claiming that the state had gone too far. Much of that criticism is misplaced. First, Ms. Wall’s overnight stay in jail may have been the first time that she recognized the serious abuse against her. Second, her inaction had consequences for the state. Resources had been expended in the case against the abuser. If such cases are dismissed, ‘wasting’ resources on cases never pursued, already tight prosecutors’ budgets could come under further attack.

This defense of domestic violence reform far removes the movement from its feminist roots, which concerned fighting patriarchy and vindicating women’s autonomy. Reformers have abandoned the basic premise that the well-being and equality of women is the basis for policy reform and instead espouse the view that reform is defensible on the garden-variety

295. See Melanie Randall, Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law, 23 ST. LOUIS U. PUBL. L. REV. 107, 140 (2004) (“Arguments in favour of using the punitive powers of the criminal justice system against the very women who are the victims of domestic violence are premised on the idea that these ‘bad’ victims need to be brought into line and compelled to assist the state.”).
296. Hanna, supra note 11, at 1892 (footnotes omitted).
297. See Micchio, supra note 43, at 259 (noting that early reformers adopted a “governance model” which emphasized women's agency).
298. Hanna advocates treating abused women like other “reluctant witnesses,” such as witnesses in “organized crime, gang- and drug-related” cases. Hanna, supra note 11, at 1891. From my experience representing such witnesses in other contexts, they are subpoenaed against their wills, sometimes jailed on material-witness warrants, charged with perjury for “lying” in cases and to grand juries, and charged with contempt for refusing to testify on the stand. Once the case is over, the prosecution does not follow up to see how they are doing. Some of these “reluctant witnesses” (often snitches) end up dead. Indeed, this type of treatment seems to be catching on in the domestic violence context:

Some prosecutors resort to extreme measures to get victims into court. For example, some prosecutors threaten to: take the victim's children away; prosecute the victim for child endangerment, neglect, or disturbing the peace; drop the case entirely; or not prosecute future domestic violence incidences, if the victim refuses to testify. In the most extreme cases, prosecutors threaten to or do, in fact, jail the victim prior to testifying, to ensure the victim's presence in court on the day of the trial.

ground that “criminal prosecution vindicates society’s injuries.” One scholar has noted that the domestic violence issue “has moved from one raised on the margins to one that has been appropriated by the government . . . . [F]eminist liberatory discourse challenging patriarchy and female dependency, which shaped this work, has been replaced by discourse emphasizing crime control.”

In addition to treating female victims as objects by asserting that criminal law should be relatively unconcerned with victim choice, some reformers justify criminalization policies by characterizing uncooperative victims in demeaning and objectifying ways. Because the appeal to the prosecutorial role as justification for ignoring the victim has proven fairly unpersuasive, reformers have constructed arguments to undermine the importance, accuracy, and value of the victim’s voice. The starting point for these types of arguments is quite logical and is based in a good-faith effort to recognize agency. Reformers assert that battered women elect not to prosecute precisely because they are controlled by their abusers; therefore, honoring victims’ choices not to prosecute does not secure autonomy but rather cements their objectification by abusers.

299. The concept, vigorously advocated by reformers, that domestic violence is like any other “crime against society,” necessarily implies that the victim has less control over the fate of the case. See Andrew Ashworth, Responsibilities, Rights, and Restorative Justice, 42 BRIT. J. CRIMINOLOGY 578, 578 (2002). Ashworth notes:

What is the significance of the phrase ‘a crime against society’? The idea seems to be that, when it is decided to make certain conduct a crime rather than simply a civil wrong, this implies that it should not be merely a matter for the victim whether some action is taken against the malefactor; and even that there is a public interest in ensuring that people who commit such wrongs are liable to punishment[.]

Id. at 579.

300. SCHNEIDER, supra note 27, at 183.

301. As a matter of principle, victims’ rights advocates deny that the victims’ role in the trial is merely that of a passive government witness. See Gruber, supra note 37, at 653 (observing that the victims’ rights movement sees the victim as more than just an essential witness). Moreover, feminists see domestic violence as a distinct gender issue and not just one of crime control. See Hanna, supra note 11, at 1876-77 (“Simply renaming domestic violence a public crime in order to justify mandated participation neither dissolves the theoretical dilemma posed by the public/private distinction nor eases the burden of the difficult choices lawyers and judges inevitably must make.”).

302. See Hanna, supra note 11, at 1891 (“No-drop policies that do not compel victim cooperation lack credibility. When a batterer and his defense attorney know that a victim’s failure to cooperate may result in case dismissal, they control the judicial process.”); see also Machaela M. Hocor, Comment, Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California, 85 CAL. 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.”); Wills, supra note 75, at 180 (“[E]mpowering victims by giving them the discretion to prosecute, or even to threaten to prosecute, in actuality only empowers batterers
However, even assuming, *arguendo*, that battered women are reluctant to prosecute primarily because they are afraid, there are still problems with mandatory prosecution. First, even though the woman's choice is constrained by her situation, it does not necessarily mean that she did not make the best choice.\textsuperscript{303} Moreover, by prescribing that the solution to women's constrained autonomy is ignoring their choices, domestic violence reform has alleviated all pressure on the government and society to remove the constraints on women's agency.\textsuperscript{304} If the solution is ignoring domestic violence victims' deficient decisions and prosecuting without them, there is no incentive to create the conditions in which victims can make good decisions. If prosecutors are required to get a victim's consent to prosecute, there is a much greater impetus for the state to make sure that victims are in a situation in which they are safe and economically viable, and therefore able to consent to prosecution. Of course, reformers could reply that rather than securing such conditions, prosecutors will drop the cases. Whether prosecutors value domestic violence prosecution when it requires a major expenditure of effort is a question of prosecutorial ethos. I assert that, presently, the ethos is, "We must prosecute and are willing to force the victim to participate," rather than, "We must prosecute and will put the victim in a condition where she feels comfortable assisting." How to change prosecutorial ethos is a difficult question, which this Article takes up in Part IV.\textsuperscript{305}

Furthermore, fear of reprisal from abusers is not the only reason why battered women refuse to prosecute. There is much scholarship to support the view that women decline to prosecute for a variety of reasons, including concerns over money and children,\textsuperscript{306} distrust of law enforcement,\textsuperscript{307} the existence of an emotional bond with the defendant, or other reasons.\textsuperscript{308}
Again, by ignoring the myriad of social, economic, racial, and emotional reasons why women are reluctant to prosecute domestic violence, these reformers give license to society to ignore its complicity in creating the problems that lead to domestic violence. Furthermore, characterizing women victims as pro-prosecution or scared of their abusers tends to essentialize the battered-woman experience in a way that excludes the most subordinated members of that group. Reformers ignore the experience of, for example, minority or poor women who fear state interference in their lives or immigrant women who have specific concerns over deportation. Domestic violence reforms have thus internalized the paradigm of a white, vengeful or afraid, middle-class victim.

Consequently, like the victims' rights movement's construction of an ideal victim, certain domestic violence reformers have constructed an ideal battered woman. They believe the criminal justice system should account for only two types of domestic violence victims—ones who are pro-prosecution and ones who have lost all of their free will from fear of abuse. Pro-prosecution victims present no obstacles to mandatory policies, unit intact, concern for their children's emotional attachment to the abuser, and perceived or real lack of options to leave the abuser and become self sustaining").

309. Donna Coker describes the diversity of reasons for women to reject separation. Coker, supra note 42, at 1017. She notes that women fail to leave because they lack resources to practically achieve distance from their batterers. They also stay because ending their union will pose financial hardships to their children and themselves. Id. at 1019. She further observes that poor women often correctly surmise that the state will not be able to protect them. Id. at 1017. Finally, Coker takes into account the emotional attachment between victims and their partners. Id.

310. See, e.g., Wills, supra note 75, at 177 ("[T]he great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible."). Elizabeth Schneider critiques essentialism in the domestic violence context:

Just as the term "battered woman" is static and incomplete, so too is the notion that one paradigmatic "battered woman" exists. Feminist legal theorists are not sensitive to the problem of essentialism. Over the past several years, important developments within feminist legal theory have challenged the notion of a single feminist perspective. Many feminist critics have written powerfully about the way the notion of womanhood has been described as a single uniform experience, thereby excluding a multiplicity of experiences based on race, class, ethnicity, age, sexual orientation, and other dimensions.

SCHNEIDER, supra note 27, at 62 (footnote omitted).

311. See supra notes 275-76 and accompanying text (analyzing the effects of mandatory policies on immigrant women).

312. See supra notes 163-66 and accompanying text (discussing the power of the victims' rights movement).

313. See generally Randall, supra note 295.

314. See id. at 144-45 (observing that cooperative victims are seen as "true victims" whereas "the 'uncooperative victim' is entirely helpless and fails to appear or refuses to testify about the abuse because she is paralyzed by fear").
and anti-prosecution victims are characterized as objects of their abusers.\textsuperscript{315} So long as reformers can believe that the woman's choice is shaped only by her fear, they can discount her desires.\textsuperscript{316}

In addition to essentializing battered women as controlled by their fear, certain reformers objectify women in other disturbing ways to justify denying them agency. In the face of evidence that women are uncooperative even when there is no immediate threat, reformers have characterized battered women as psychologically defective and unable to reason.\textsuperscript{317} When reformers do this, the assumption of constrained autonomy constantly follows the battered woman.\textsuperscript{318} Some reformers embrace the idea of the objectified, defective automaton victim so much that they even reject reforms targeted at directly empowering domestic violence victims through mediation.\textsuperscript{319} They argue that even with ample support from advocates and lawyers and in the controlled context of mediation, a battered woman is unable to exercise

\textsuperscript{315} Cheryl Hanna even characterizes uncooperative victims as untruthful. Hanna, \textit{supra} note 11, at 1899. She states, "[V]ictims of domestic violence often understate the situation, try to protect the batterer, or blame themselves for the violence. As a result, they do not always tell their stories in ways that accurately describe the violence and its effects." \textit{Id.} at 1900.

\textsuperscript{316} \textit{See}, e.g., Wills, \textit{supra} note 75, at 179 ("[Prosecutors] need to be able to say that despite a battered woman's ambivalence, we did everything within our discretion to reign in the batterer, to protect the victim and her children, and to stop the abuser before it was too late.").

\textsuperscript{317} \textit{See} O'Connor, \textit{supra} note 65, at 960 ("The commonly held notion of battered women as weak, passive or even pathological for staying with abusive men has fueled a societal disbelief and distrust of the victim and her perspicacity."); Randall, \textit{supra} note 295, at 154 ("We need, among other things, theoretical frameworks of violence in women's lives which are more focused on women's strengths, resilience, and resistance as a way to correct the pathologizing and stigmatizing discourses which construct women as damaged, helpless, and irrational victims . . . ").

\textsuperscript{318} \textit{See} Evan Stark, \textit{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").

\textsuperscript{319} \textit{See}, e.g., Kerry Loomis, Comment, \textit{Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court}, 35 CAL. W. L. REV. 355, 360 (Spring 1999) ("Passivity towards the abuse causes women to forego their legal rights to property, to their liberty, and more importantly, to their right to not be beaten. These fears do not spontaneously disappear upon entering into the quasi-safe atmosphere of a controlled environment in a mediation.") (footnote omitted). Proponents of mediation, however, assert that it enhances victim empowerment:

Women often find mediation to be empowering. They report that participation in mediation enhances their ability to stand up for themselves, assume responsibility for themselves, solve problems, and express their views. Most women studied prefer mediation and their satisfaction levels are not associated with power related marital issues such as abuse, who won arguments, or difficulty being heard.

rational choice—unless of course that choice is separation and incarceration.320

Such arguments come disturbingly close to characterizing adult women as suffering from an incapacity that prevents them from exercising their rights.321 For example, reformers justify the state's substitution of its prosecutorial decisions for the woman's choice by claiming that the woman is in no shape to make her own decisions.322 Not only is such infantilizing of women upsetting in and of itself, even if it were true that battered women are incapacitated, the state's claimed benign paternalism is illusory. Prosecutors do not substitute their judgments for battered women's decisions in a fiduciary effort to do what is best for the women.323 Rather, they proceed with distinctly prosecutorial goals against victims' wishes.324 Certainly, mandatory policies do not ask prosecutors with cooperative victims to decline to prosecute when they think doing so is in the victims' best interests.

In addition, by characterizing the psychology of anti-prosecution victims as pathological rather than a product of other circumstances, reformers deny social and governmental complicity in keeping battered women silent.325 Under this view, battered women refuse to participate in the criminal system because of their condition, not because they feel the system is racist, they face economic destitution, or they could be deported.326 Thus, society bears no responsibility for creating the conditions in which women may safely and beneficially participate in state intervention. Elizabeth

320. See, e.g., Rowe, supra note 291, at 864. Rowe explains:

The passivity and subordination of the battered woman make it difficult for her to assert herself in a bargaining situation, negotiate for her needs, and reject solutions which do not meet those needs. She is apt to be more easily worn down, more suggestible, and less able to be confrontive than the average disputant, whether in domestic or nondomestic situations.

Id. (footnote omitted).


322. See, e.g., Wills, supra note 75, at 173–74 (arguing that prosecutors know better than victims how to protect them from abusers).

323. Even reformers who explicitly characterize battered women as incapacitated advocate for a third-party guardian rather than a prosecutor to represent their wishes. See Jones, supra note 321, at 642.

324. See O' Connor, supra note 65, at 960 ("Mandatory criminal intervention policies are most concerned with providing safety through punishment of perpetrators, and therefore are less attentive to differentiating the needs of individual domestic violence victims.").

325. See Randall, supra note 295, at 153 (noting that such "decontextualized and individualized formulations of women's experiences . . . are severed from an analysis of the deeper structures of sexual inequality").

326. See supra notes 307–08 and accompanying text (describing the variety of reasons why women might resist state intervention).
Schneider describes how the focus on individual victim pathology obfuscates the issue of state accountability:

In the media and in legal and legislative arenas, the problems that battered women face are viewed in isolation; they are rarely linked to gender socialization, women's subservient position within society and the family structure, sex discrimination in the workplace, economic discrimination, problems of housing and lack of childcare, lack of access to divorce, inadequate child support, problems of single motherhood, or lack of educational and community support. The focus is still on the individual woman and her "pathology" instead of on the batterer and the social structure that supports the oppression of women and that glorify or otherwise condone violence.\[^{27}\]

In a similar vein, the focus on criminalization entrenches the view that batterers are wholly autonomous agents who bear sole responsibility for domestic violence.\[^{328}\] By treating domestic violence like any other crime against society, feminists missed an important opportunity to counter the agency essentialism used to subordinate criminal defendants.\[^{329}\] Giving consideration to the variety of reasons why domestic violence victims are reluctant to prosecute could help dismantle the essentialist characterizations.

\[^{327}\] Schneider, supra note 27, at 72. I would take issue, however, with the contention that criminal law reform does not focus on the batterer. It is clear that reform does speak to the individual culpability or incapacitation of the batterer. The problem is that focus on batterer pathology similarly obfuscates the role of the state in supporting and maintaining domestic violence. See also Sally F. Goldfarb, Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice, 11 Am. U. J. Gender Soc. Pol'y & L. 251, 251–52 (2003). Goldfarb says:

Domestic violence occurs on a continuum along with other manifestations of sex discrimination, including inequality in the workplace, deprivation of reproductive rights, and inadequate access to welfare, child support, and child care. Every aspect of women's oppression renders them vulnerable to violence, and in turn, violence makes women more vulnerable to other forms of disadvantage.

Id. (footnotes omitted).

\[^{328}\] Experts assert:

[It] is possible to think that the men who perpetrate violence against women are deviant individuals with an unhealthy need for power and control, understood in terms of distortions in their personal psyches. While attention to the factors which make some men act out violence towards women while others do not is of crucial importance, the larger point I am making here is that the problem of men's violence against women is too pervasive to be understood as a pathology of a few individual men. Instead, it must be analysed within the context of the larger patterns of presumed male entitlement, authority, and power constructed in the culture more broadly.

Randall, supra note 295, at 112.

\[^{329}\] See supra notes 208–10 (discussing agency characterizations).
of defendants as wholly autonomous monsters. In the zero tolerance for
domestic violence era, however, reformers have been reluctant to consider
abusers as human beings. They fear that focusing on the reason why
batterers batter will send a message that battering is a benign and curable
psychological condition.

Domestic violence, however, does not occur in a vacuum because of
deviant defendants. Social forces constantly interplay both in the creation of
domestic abuse and the prosecution or non-prosecution of such abuse.
The modern domestic violence movement includes much less discourse on
how to prevent people from becoming batterers or battered than on how to
punish or deter persons once they are batterers. Similarly, it emphasizes
dismantling abusive relationships much more than it emphasizes repairing
them. Theoretically, there is room to both consider something a crime
and also engage in efforts to reform the social predicates of the crime.
Unfortunately, experience demonstrates that the more government and
society focuses on criminalization, the less it focuses on reform to alleviate
the conditions causing crime. Scholars note that the emphasis on

330. Many scholars link the perpetration of domestic violence, not only to patriarchal
values, but also to economic inequality and racial discrimination. See, e.g., Nancy Ehrenreich,
Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems, 71 UMKC
L. Rev. 251, 291–300 (2002) (explaining that domestic violence may often be a case of
"compensatory subordination" in which lower-status men "subordinate others in order to
compensate for their own vulnerability and powerlessness"); Zanita E. Fenton, Silence
Compounded—The Conjunction of Race and Gender Violence, 11 Am. U. J. Gender Soc. Pol'y & L.
271, 282 (2003) ("[Domestic violence], like substance abuse, crime, and unwanted adolescent
pregnancy, are symptoms of living systematically deprived in a society that is designed to
dominate and control third world people." (quoting Beth Richie, Battered Black Women: A
Challenge for the Black Community, Black Scholar, Mar.-Apr. 1985, at 41)).

331. See, e.g., Wills, supra note 75, at 182 ("[T]he policy of aggressive prosecution adopts the
wisdom that '[t]here is no excuse for domestic violence.'" (quoting National Campaign Slogan,
Family Violence Prevention Fund (1993))); Joan Erskine, Note, If It Quacks Like a Duck:
Recharacterizing Domestic Violence as Criminal Coercion, 65 Brook. L. Rev. 1207, 1208, 1216–20
(1999) (observing that "batterers have become the perfect bad guys, enjoying villainous roles in
film and on television").

332. See, e.g., Hanna, supra note 23, at 1562–70 (arguing against focusing on psychological
reasons why men batter and because research should not "provide an escape route for abusive
men to avoid criminal responsibility").

333. Naomi Cahn states that "the perpetuation of domestic violence is incomprehensible
without an understanding of women's status in society; the enforcement of domestic violence
laws is similarly incomprehensible without such an understanding combined with systems of
male privilege and women's subordination." Cahn, supra note 78, at 829.

334. See Adrine & Runner, supra note 282 (observing that the majority of efforts have been
directed toward criminal responses and calling for therapeutic intervention strategies directed
towards men and boys).

335. See supra note 22 and accompanying text (discussing domestic violence reforms' emphasis on separation).

336. See generally supra Part II. Holly MaGuigan quotes Richard Sherman, "one of the
authors of the 1984 arrest experiment that was instrumental in refocusing police responses to
domestic violence," as saying, "[u]ntil you admit that mandatory arrest is a failure in our inner
domestic violence criminalization has come at the cost of deflecting focus from economic empowerment, education, and other non-punitive goals.\(^{337}\)

Finally, similar to the way victims' rights advocates demonize defense attorneys and civil libertarians for aligning with horrific rapists and murderers, some domestic violence reformers rhetorically chastise feminists who critique criminalization policies.\(^{338}\) These reformers argue that those who criticize criminalization reforms are allies of batterers and pseudofeminists, and who wish to send the women's movement back twenty years.\(^{339}\) By reproaching critical feminists through allying them with the cities, you won't get anybody to spend a penny on looking for alternatives." MaGuigan, supra note 99, at 444 (quoting Deborah Sontag, *Fierce Entanglements*, N.Y. TIMES MAG., Nov. 17, 2002, § 6, at 52 (quoting University of Pennsylvania Professor Richard Sherman)).

337. Criminal law is an easy and politically expedient solution to social problems:

Concentrating primarily on criminal law issues is also easier than pursuing the more complex, expensive and less politically palatable goal of expanding social programs in other areas. For instance, victims across social class lines have a huge unmet need for legal services and for other supportive services, whether or not their abusers are ever arrested, prosecuted or incarcerated. Of course, the provision of better legal and social services might in some cases make it possible to avoid the need for criminal law involvement altogether.

Freedman, supra note 233, at 588-89 (citations omitted).

338. See, e.g., Annalise Acorn, *Surviving the Battered Reader's Syndrome, or: A Critique of Linda G. Mills' Insult to Injury: Rethinking our Responses to Intimate Abuse*, 13 UCLA WOMEN'S L.J. 335, 338, 355 (2005) (criticizing Linda Mills's book, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* (2003) through *ad homonym* attacks, including the assertions that Mills's arguments have "no place in credible scholarship" and Mills "doesn't read the law"). In Part I, I discuss extensively the reasons why feminists initially aligned with law enforcement in the fight against domestic violence. The question remains why certain reformers seek to defend incarceration policies against all odds, despite the multitude of cautionary tales from feminist and race scholars about the illiberal nature of these policies. I hint at two reasons: (1) the fact that many of such reformers are prosecutors as well as feminists and thus have already de-problematicized the question of state power, and (2) success is addictive—unlike many feminist policy proposals, mandatory reforms were incredibly well received by the public. Linda Mills, however, offers a psychological reason for reformers' support of such policies. She asserts that "women, as members of a patriarchal society, are so deeply influenced by male expressions of power that their ability to reflect on these dynamics is hampered, even destroyed." Mills, supra note 20, at 568. This explains "the contradiction between the feminist commitment to women's self-development and empowerment and some feminists' complete disregard for these principles in their unwavering support for mandatory policies." Id. at 568-69. Otherwise, Mills asserts, "It is hard to imagine that women unencumbered by the influence of such oppression would reproduce the abusive dynamics they otherwise claim to reject." Id. at 569.

339. Domestic violence reformer Emily J. Sack uses these characterizations to describe opponents of criminalization policies from outside the feminist movement. She argues that abandoning mandatory policies in favor of discretionary ones would put the movement where it was "twenty-five years ago." Sack, supra note 27, at 1688. She further disparages Linda Kelly and Linda Mills as "pseudofeminists" because they have focused on female aggression as contributing to domestic violence. Id. at 1700-18. Sack asserts that the domestic violence movement is in crisis and sets up a false dichotomy that contrasts mandatory policies, which are "true feminism," with immoral theories. She says that the movement has solely two alternatives: Forge ahead with criminalization policies and tinker with them to try to reduce harm to women.
unquestionably horrific abuser, defenders of the current domestic violence system are utilizing the same kind of pernicious essentialism as conservative victims' rights proponents. They rely on stereotypical and absolutist characteristics of "bad" abusers to evoke feelings of repulsion and silence those who lodge systemic critiques by allying them with the repulsive element.

V. SUGGESTIONS FOR FUTURE THOUGHT

The prescription of solutions to thorny social problems is difficult and should not be undertaken hastily. Indeed, as Elizabeth Schneider says, there is a "murky middle ground" between the antiquated view that domestic violence is not a crime and an over-reliance on state prosecutorial power. While the treatment by certain reformers of women victims as objects is problematic, the solution is not to reverse the characterization and treat them as unconditional agents. Recognizing the problem of women's constrained agency, many thoughtful reformers have crafted nuanced approaches to domestic violence law. Holly MaGuigan, for example, emphasizes reforms outside of criminal law and asserts that states should or adopt a philosophy that "attacks and blames battered women pushes us backwards." Id. at 1739-40.

340. There is a striking parallel between such rhetoric and the Bush Administration's assertion that civil libertarians are on the side of "terrorists." Attorney General Ashcroft responded to criticism of overreaching by the Department of Justice, stating:

To those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.


341. James Cavallaro and Mohammad-Mahmoud Ould Mohamedou explain:

Where public outrage against crime leads to the demand for harsh justice, those who defend rights and criticize the retributive model on that basis become themselves open to attack. Such attacks frequently are leveled not only by police officers and victims' rights groups, but also by politicians seeking to seize political advantage. Those who defend human rights are often accused of protecting criminals and ignoring the rights of victims; they are blamed for hindering the police and obstructing justice.


342. David A. Super states that modern conservatives "demand ever harsher treatment of those determined unworthy and attack anyone calling for moderation as lacking conviction about the importance of the moral judgments being made." Super, supra note 114, at 2072.

343. SCHNEIDER, supra note 27, at 196.

344. See supra notes 105-10 and accompanying text (describing the treatment of battered women as total agents as a method of denying state accountability for their welfare).
institute no future mandatory policies but rather carve out a safety exception to pre-existing mandatory policies. Donna Coker advocates an intricate approach to domestic violence reform whereby localities analyze a number of factors about the relevant communities and their relationship with the police to determine the best course of action. Others support therapeutic-justice approaches to domestic violence.

She states:

At a minimum, we must not enact additional mandatory arrest laws. Where they exist, we should urge prosecutors to use discretion in making decisions about which victims will have their safety endangered by prosecution. We must encourage prosecutors not to adopt no-drop policies. When we know that we have enough information to be persuasive, we must ask legislatures to reverse themselves if they have passed mandatory arrest legislation.

MaGuigan, supra note 99, at 443–44.

Coker suggests a “material resources” test that focuses on the needs of poor women of color to guide policy. She proposes the following for domestic violence policy-makers:

In determining the preferred policy in their locale, activists should examine the quality of relations between poor communities of color and the police, including the presence of anti-immigrant sentiment. Relations between police and communities may be measured by a number of factors, including: the adequacy/inadequacy of police resources in a given community; the frequency of police brutality, harassment, and related complaints in a given locale; the degree to which methods are in place to report such police misconduct and the efficacy of those methods; the commitment of local police leadership to both racial fairness and to responding to domestic violence calls. Local advocates must also evaluate the strength of domestic violence community services for poor women of color and the degree to which state actors—notably prosecutors and child protection service workers—understand the circumstances of poor women of color in their locale.

Coker, supra note 42, at 1050 (footnotes omitted).

See Bruce J. Winick, Applying the Law Therapeutically in Domestic Violence Cases, 69 UMKC L. REV. 38, 56–58 (2000) (applauding the Miami-Dade County domestic violence court system’s therapeutic approach). See generally Amanda Dekki, Note, Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases, 18 ST. JOHN’S J. LEGAL COMMENT 549 (2004) (describing battering intervention programs). I am reluctant to advocate mandatory therapy because I believe that rehabilitation often manifests in our system as no more than a slightly abstracted way to put defendants in jail without the bother of their civil rights. See James L. Nolan, Jr., Redefining Criminal Courts: Problem-Solving and the Meaning of Justice, 40 AM. CRIM. L. REV. 1541, 1541 (2003) (noting that rehabilitative programs often down-play due process and may become coercive when applied in an overzealous fashion). See generally Jane M. Spinak, Why Defenders Feel Defensive: The Defender’s Role in Problem-Solving Courts, 40 AM. CRIM. L. REV. 1617 (2003) (observing the challenge of defense practice in specialized courts). From personal experience working in District of Columbia domestic violence court, a “specialized court” often materializes as “especially hostile to defendants.” Indeed, specialized domestic violence courts require judges to take special measures in a directly one-sided way—they are to communicate solely to alleged victims their options and to create procedures that aid victims in obtaining civil relief, often to the direct detriment of defendants’ interests. See Jennifer Thompson, Comment, Who’s Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs, 56 ME. L. REV. 407, 428–29 (2004) (describing the role of judges in specialized domestic violence courts). Batterer “therapy” often means delaying incarceration by a few months—long
I am reluctant, however, to propose a criminal law solution to the problem of domestic violence, given the current political climate. While reforming mandatory arrest and no-drop prosecution policies is one possible response to many of the concerns outlined in the paper, I see problems with any kind of criminal enforcement in the absence of widespread social changes. Even "progressive" criminal reforms rest on the assumption that proper education of state actors will enable the criminal

enough for the defendant to fail out of the programs and anger authorities. See infra notes 393–95 and accompanying text (describing Jamal’s experience with therapy).

348. It is highly unlikely that local and national leaders will support receding from a tough-on-battering approach to domestic violence law. See supra note 245 and accompanying text (noting President George W. Bush characterizing the fight against domestic violence in war terms).

349. I do see the wisdom of returning to a discretionary arrest system. One solution could be presumptive rather than mandatory arrest. Police could fail to arrest only in two situations: (1) the victim would be placed in greater danger by an arrest, or (2) the victim specifically requested that no arrest take place. If the latter situation occurred, the police would be under a new set of obligations. First, they would have to try to determine the complainant’s reasons for wanting no arrest. If, after a conversation with the victim, police determined that the victim would be placed in imminent harm by failure to arrest, police would be able to go against the victim’s wishes. Cf. ARIZ. REV. STAT. ANN. § 13-3601 (2001) (making arrest mandatory only in cases “involving the infliction of physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument”). In all situations in which the police acquiesced to the victim’s resistance to arrest, they would provide the victim with information on shelters and advocates and offer transportation to the shelter. Cf id. (stating that “the officer shall inform in writing any alleged or potential victim of the procedures and resources available for the protection of the victim”). Of course, such reform would only work if accompanied by appropriate education, perhaps anti-essentialist training, on the complexities of domestic abuse, from both victims’ and defendants’ perspectives. See Candice Hoyes, Here Comes the Brides’ March: Cultural Appropriation and Latina Activism, 13 COLUM. J. GENDER & L. 328, 351 (2004) (“In light of a long history of tensions between police and Latina/os, among other poor, immigrant, and racial minority communities, police sensitivity education is essential.”).

350. I like Linda Mills’s suggestion that prosecutors develop close relationships with victims in order to foster trust and the ability of the prosecutors to discern victims’ desires. See Mills, supra note 20, at 604–19. Similarly, Deborah Epstein argues that the criminal system can “maximize battered women’s ability to engage in optimal decision making” by offering "victims extensive legal and nonlegal advocacy services. Such advocacy includes: providing information about and access to a wide range of social services; strengthening victims' emotional support network; providing information about the civil and criminal justice systems; and safety planning.” Epstein, supra note 2, at 1889–90. For those victims whose decisions not to prosecute are based primarily on fear of continued abuse, prosecutors or advocates would communicate to the victim the types of protection she could obtain as well as the efficacy of such protection, and help the woman obtain such protection. For women who wished to stay out of the system for other reasons, the prosecutors could try to offer assistance to ameliorate their concerns. If after such advocacy, the battered woman still wishes to avoid prosecution, prosecutors should recognize her choice. Unfortunately, such a system would require an enormous amount of prosecutorial time and resources—much more than the common practice of mailing subpoenas to victims and speaking to them the day of the court hearing. Moreover, prosecutors would have to be trained and take the time to recognize the variety of reasons why battered women wish to stay out of the criminal system.
system to empower rather than subordinate minorities.\(^\text{351}\) I am skeptical of this possibility and hold the suspicious belief that, however well-intentioned, most criminal law reforms end up becoming yet another procedural vehicle for warehousing the worst off.\(^\text{352}\)

This Article is a cautionary tale about the conservatization of a progressive movement. To that end, my suggestion is simple, but it may ruffle many feathers: I propose that feminists just stop advocating increased criminalization of domestic violence in the United States.\(^\text{353}\) There was a time when such advocacy may have been critical to formal equality, but the pendulum has swung. Today, domestic violence criminal policies are arguably tougher than other criminal policies. Society has heard the message that domestic violence is a crime, and conservatives have run with it.\(^\text{354}\) They have found it convenient to support criminalization, as it does not require reorganization of the social structure or abandonment of institutionalized privilege.\(^\text{355}\) If feminists were to stop advocating for criminalization policies tomorrow, judges, prosecutors, politicians, and victims' rights reformers would likely take up the mantle of that fight.

\(^{351}\) Certainly, proposing solutions to the problem of de facto racism and discrimination in the criminal justice system is beyond the scope of this Article.

\(^{352}\) Mary Becker, in a different context, states:

We often think that all we need is more education, more education of prosecutors, more education of judges, but we have to stop and think if the education is going to be effective and what the effect will be. We do not have any empirical studies on the effect of education or on what kinds of education work in domestic violence. We do have some empirical studies on employer sponsored education on diversity and sexual harassment, and those studies indicate that education can hurt rather than help. Education is not necessarily effective and can reinforce stereotypes and actually do harm.

Mary Becker, Keynote Address, Symposium, Domestic Violence and Victimization the Victim: Relief, Results, Reform, 23 N. ILL. U. L. REV. 477, 487-88 (2003). During my practice, I found that educated judges in domestic violence court often retained the belief that no matter the circumstances and parties involved, the men were guilty, the women scared or incapacitated, and release of the men would lead to an eventual murder.

\(^{353}\) Of course, this suggestion does not apply to scholarship that addresses domestic violence in an international context.

\(^{354}\) See supra notes 317-20 and accompanying text (noting arguments that characterize battered women as pathological).

\(^{355}\) See supra notes 245-48 and accompanying text. Donna Coker states:

[C]rime control politics make criminal law a particularly attractive area of law reform. Politicians who oppose increased government spending on “social programs” have been happy to spend funds on “fighting crime.” Fighting crime has political appeal to legislators in part because it is one of the few concerns that reaches across differences in fractious American politics.

Coker, supra note 99, at 803-04.
The feminist fight is the fight for equality and autonomy of women. Feminists should not be channeling their efforts into helping the government find new, better, and easier ways to incarcerate people (most likely minority people), while remaining relatively silent on the government's and society's maintenance of patriarchy. My suggestion that feminists stop supporting incarceration is mainly directed towards scholars and activists as a framework for advocacy.

This is not to say that feminist scholars should necessarily argue for decriminalizing domestic violence. Although I am skeptical about the ability of criminal law to solve social inequality problems there may be good reasons to keep domestic violence crimes solidly "on the books." My argument is merely that the feminist movement went awry by putting the majority of its eggs in the criminal law basket. As G. Kristian Micchio states, feminists' "challenge for the twenty-first century [is] to reclaim a movement, to reform a vision, and to resituate ourselves within a feminist politic that refuses to sacrifice women's experience and autonomy to the prerogatives of the state." Additionally, because the call for criminalizing domestic violence has become so intimately entwined with mandatory policies, it has entailed the development of a feminist theory of female objectification. Feminists engaged in the defense of mandatory policies spend much of their efforts finding justifications for silencing opposing women. Many of these justifications, in turn, rely on essentialist and denigrating characterizations of women to show that their choices are unimportant.


357. Today, feminists continue to propose new and improved domestic violence crimes. See, e.g., Deborah Tuerkheimer, Recognizing and Remediying the Harm of Battering: A Call to Criminalize Domestic Violence, 94 J. CRIM. L. & CRIMINOLOGY 959, 1019-20 (2004) (proposing a new law making it a crime for a person "to engage[] in a course of conduct directed at a family or household member . . . [h]e or she knows or reasonably should know . . . is likely to result in substantial power or control over the family or household member"); see also supra notes 272-76 (discussing the negative impacts of domestic violence reform on minorities).

358. See supra note 247 (describing how feminism has lost its appeal in areas outside of domestic violence).

359. See Abbe Smith, Can You Be a Good Person and a Good Prosecutor?, 14 GEO. J. LEGAL ETHICS 355, 396 (2001) (arguing that today there are no "good" prosecutors because we live "in an extraordinarily harsh and punitive time, a time we will look back on in shame").

360. See Micchio, supra note 43, at 323.

361. See supra notes 216-18 and accompanying text (discussing reformer's arguments supporting criminalization in the face of feminist and racial critiques).

362. See supra notes 189-214 and accompanying text (discussing the ways in which the domestic violence victim is objectified).
THE FEMINIST WAR ON CRIME

In addition, although it might theoretically be possible to engage a patriarchal system and break it down from within, this is not what happened when feminists allied with conservatives. Rather than conservatives becoming more progressive, the net effect of domestic violence reform has been a subsumption of the feminist movement into the state's goal of managing undesirables. Today, society and government accept and applaud feminist criminal law reforms, while disparaging feminism generally. The fact is that the state and society still resist female empowerment, such that the mere mention of the word "feminism" evokes virulent reactions in ordinary citizens. Experience shows society fears movements that seek to change social structure. Ann Bartow describes the prevailing distrust of feminism:

The negative phenomena rhetorically linked to feminism are both myriad and mind-boggling. Feminism as a social construct has been blamed for promulgating terrorism, ruining sexual relationships, causing road rage and traffic congestion, and undermining healthy families. Feminists have been accused of being hostile to "serious" science, of urging women "to become just as promiscuous and irresponsible as . . . men," and of engaging in the systematic

363. See Gruber, supra note 162, at 1207 (asserting that it is possible to "confront the institutions of privilege and subordination by using one's ability to participate in those institutions to subvert them from within" (quoting statement by Charles Pouncy to author)).

364. See supra notes 303–10 and accompanying text.

365. See supra Part IV.A (conservative acceptance of tough domestic violence laws).

366. See supra Part IV.A (conservative acceptance of tough domestic violence laws).

367. Many of the charges against feminism are led by right-wing women. Beverly LaHaye of Concerned Women for America stated, "Feminism is more that an illness . . . it is a philosophy of death." SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 239 (1991) (quoting LaHaye). Rebecca Hagelin, Vice President of the conservative Heritage Foundation, argues passionately for the elimination of women's studies, decrying the fact that "[o]nly the pro-lesbian, egocentric, sexually perverse 'Women's Studies' majors and minors are considered politically correct." Stirring the Caldron of Radical Feminism, WORLD NET DAILY, Aug. 31, 2006, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=51754.

368. See supra note 247 (describing resistance to feminism from students).

369. See Victoria Nourse, The "Normal" Successes and Failures of Feminism and the Criminal Law, 75 CHI.-KENT L. REV. 951, 977 (2000) ("People resist feminism because it seems to place them in positions in which they may have to question their most intimate relationships, their identity, and their daily lives."); see also Joan Williams, Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work, 19 N. Ill. U. L. REV. 89 (1998) (arguing that resistance to reformation in the workplace manifested as blaming feminists for the "demise of domesticity in America").
eroding of the moral foundation of our society in the name of freedom."\textsuperscript{370}

In short, women still have a long road to travel to gain even a fairly rudimentary status of equality.

Although I suggest that feminists stop advocating for and supporting criminalization, I recognize the trend towards addressing the problem of domestic violence through criminal law will likely continue, and feminists in the legal arena will not be able simply to ignore the criminal system. Considering this reality, I do have some modest practical suggestions for scholars who teach in this area. I have indicated the importance of police and prosecutors engaging in anti-essentialism and understanding the diversity of reasons why women choose to participate or not participate in criminal prosecution.\textsuperscript{371} It is highly unlikely, however, that a prosecutor’s office would give in-house training to prosecutors to drop cases for reasons other than State priorities.\textsuperscript{372} Moreover, such training would require more commitment, expertise, and resources than many prosecution offices are willing to give.\textsuperscript{373} In addition, prosecutorial ethos often involves insensitivity to the collateral consequences that prosecution poses on minority and


\footnotesize{\textsuperscript{371} See \textit{supra} notes 267–76 and accompanying text.}

\footnotesize{\textsuperscript{372} Deborah Epstein et al. explain:}

\footnotesize{[Mandatory] policies fall squarely within prosecutorial tradition, thus inheriting at least two problematic features. First, the primary emphasis of these policies is to ensure offender accountability, a goal consistent with the prosecutor’s responsibility to ‘seek justice.’ Because prosecutors view crimes as violations of the social contract, and thus offenses against the state, the potential impact of the prosecution on the victim is not considered particularly relevant.}

Epstein et al., \textit{supra} note 267, at 466–67 (footnote omitted). In addition, individual prosecutors tend to adhere to essentialist notions of victims, defendants, prosecutors, and defense attorneys. \textit{See} Kay L. Levine, \textit{The New Prosecution}, 40 WAKE FOREST L. REV. 1125, 1179 (2005) ("The criminal court prosecutor commonly thinks of himself as ‘the good guy,’ the savior in the white hat who rides into town to restore order and to save the helpless victim.”). Levine discusses the reluctance of prosecutors to work with “difficult” victims. \textit{Id.; see also} \textit{supra} note 13 (discussing prosecutors’ views of defense attorneys).

\footnotesize{\textsuperscript{373} See White, \textit{supra} note 51, at 760 (noting that a victim-centered approach to domestic violence is often unattainable because of scarce prosecutorial time and resources).}
immigrant communities. Many prosecutors, for example, would be reluctant to drop minor charges against immigrants because of the possibility of deportation, reasoning that the “criminal did it to himself.”

All prosecutors, however, were once law students. Law school is an opportunity to disabuse future prosecutors of prevailing conservative beliefs about domestic violence and the efficacy of separation and incarceration. It is a time in which students can learn how to advocate on behalf of victims without objectifying them or subordinating their autonomy to the goals of the state. A student can be made aware of the nuances of domestic violence before she becomes part of the great machine of state control.

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374. See Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CAL. INTERDISC. L.J. 401, 413 (2000) (describing “the attitude of prosecutors who are obsessed with obtaining convictions and sending criminals to long jail terms, without giving broader consideration to the failure of our penal system as a whole”). Prosecutorial sentiments often have more to do with winning advocacy than systemic justice:

The prosecutor does not even think about “doing justice” in the sense the ethics professors envision. What prosecutor would not believe he is doing justice by fulfilling his concomitant duty to be a zealous advocate? Isn’t the whole idea of becoming a prosecutor to put the bad guys behind bars and keep the public safe? And didn’t the prosecutor sign up for an adversarial system of justice? Most prosecutors would be surprised to find out that the admonishment to “do justice” involves keeping one eye on the defendant’s rights. In an adversarial system of justice, one would think that is the defendant’s lawyer’s responsibility: “asking prosecutors simultaneously to advocate within a process and assure that the process is fair is inherently contradictory—and perhaps hopeless.” The general feeling is that defendants and their attorneys are slimy, guilty cohorts, and the idea of helping the defense seems almost antithetical to justice.


375. See David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?*, 27 FORDHAM URB. L.J. 1663, 1669 (2000) (“Prosecutor culture also can advance the notion that all offenders are bad people, and need to be prosecuted zealously, regardless of the human side or equities in a case.”); Smith, supra note 359, at 380 (“Prosecutors have a tendency to see things as black and white, right or wrong, guilty or not guilty. There is little interest in the various shades of grey that color most people’s lives.”).

376. Unfortunately, thinking outside of traditional paradigms has not necessarily flourished in the law school academy. Carlin Meyer asserts, “Feminist perspectives on law are by no means adequately represented in law school teaching, nor in mainstream publications, whether ‘e-’ or not, nor in law school curricula, textbooks, and classroom content.” Meyer, supra note 356, at 589; see also Levit, supra note 366, at 781 (“Law schools do not merely reflect social reality; they construct it. One way that gender differences are produced in law schools is by the structure of the curriculum.”).

377. Scholars argue that the current methodology of law teaching has created a prosecutorial aversion to problem-solving. See Levine, supra note 372, at 1186. Levine notes:

[Prosecutors] learn the case method of legal analysis in law school and are taught to hone their litigation skills by engaging in adversarial contests on important matters. Their educational training and the lawyer subculture steer them in a
Many domestic violence prosecutors were themselves in battered-women's advocacy groups or domestic violence clinics and seminars during law school. Clinic students or new practitioners are sometimes shocked to find that battered women come with a multiplicity of unanticipated issues. They are surprised to discover that victims are involved in the criminal system themselves, deeply distrust law enforcement and the court system, or wish to forgive the batterer. New practitioners can be unprepared for difficult situations in which a victim's zealousness, reluctance, or ambivalence toward prosecution may vary with the level of immediate fear, anger, or forgiveness she feels for her partner. In turn, a student's initial reaction may be to discount the victim's desire or impose judgments on her. In addition, students sometimes never become cognizant of the long-

particular direction, one that values courtroom advocacy and argument and pays little attention to community building or people service skills.

Id.


379. One clinician observes:

Indeed, many students are baffled by the notion that a woman could want to continue a relationship with a physically and emotionally abusive man. Some students have been quick to offer, "That would not be me. The first time someone looks at me wrong, I am gone. I would not care that we have a child together." Simply put, students have been too quick to judge their clients without having first made an attempt to understand the clients in their "full context."


380. See Meier, supra note 378, at 1345 ("[I]nexperienced lawyers often either fail to register signs of their clients' ambivalence, or react critically to those signs they do notice."). Domestic violence practitioner and clinician Lisa Smith lists things she "wish[es] [she] had known as a practitioner before entering the practice":

You have to have a lot of patience and tenacity. You have to be really interested, and you have to understand that you're opening a Pandora's box when you're working in the field because you have to be willing to think about yourself as a social worker, and as a psychologist. You have to understand the cultural problems, language barriers, and other barriers because people come in with a lot of handicaps and disabilities.


381. See Ann Shalleck, Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused, 64 TENN. L. REV. 1019, 1041–42 (1997) (asserting that ideas instilled by the "dominant" theories "that portray women primarily as victims" lead students to distrust domestic violence victims and impose their own judgments on them).
term consequences of a six-month jail sentence or even just a criminal conviction on the social and economic health of a family.\textsuperscript{382} Instead, students might believe that such intrusion is a minimal "slap on the wrist."\textsuperscript{383}

Further, many students unfortunately self-select to be domestic violence prosecutors because of pre-conceived notions, informed by the prevailing social sentiments, about the vulnerability and purity of victims and immutable malevolence of perpetrators.\textsuperscript{384} Moreover, many of these students see their role solely as that of an oral advocate who convinces judges and juries to put batterers in jail.\textsuperscript{385}

Consequently, I support the general calls for incorporating domestic violence discourse into "traditional" law courses and adding specialized courses on domestic violence,\textsuperscript{386} but suggest that the teaching of domestic violence specifically and prosecution practice generally must consider the problem of domestic violence multidimensionally.\textsuperscript{387} Any discourse on

\textsuperscript{382}See Gabriel J. Chin & Richard W. Holmes Jr., \textit{Effective Assistance of Counsel and the Consequences of Guilty Pleas}, 87 \textit{Cornell L. Rev.} 697, 700 (2002) (noting that in minor offenses "traditional sanctions such as fine or imprisonment are comparatively insignificant. The real work of the conviction is performed by the collateral consequences").

\textsuperscript{383}Cf. Jacobs, \textit{supra} note 379 (noting the effects of cultural predispositions on students' perceptions of indigent, minority clients).


\textsuperscript{385}This is partially attributable to the nature of being a student. As Enos and Kanter point out:

Although the majority of students enrolling in a domestic violence clinic express an altruistic desire to help battered women, most assume their role will consist solely of pursuing legal solutions through applying their knowledge of the law and legal systems to the client's legal problems. Accordingly, from the first moment students begin their clinical training, they are anxiously focused on developing their legal knowledge, their facility in case preparation, their abilities to negotiate and parry with legal adversaries, and their oral advocacy skills in the courtroom.

Enos & Kanter, \textit{supra} note 384, at 86.


\textsuperscript{387}See Darren Lenard Hutchinson, \textit{Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse}, 29 \textit{Conn. L. Rev.} 561, 633-94 (1997) (describing "multidimensionality" as a theory that emphasizes the interplay of both different subordinating and privileging traits in order to understand the unique harms that disempowered people face); see also Enos & Kanter, \textit{supra} note 384, at 84 ("Clients dealing with complex and multidimensional problems need service providers who approach problem-solving in a way that is client-centered, client-empowering, and incorporates multidisciplinary and community-based solutions and resources.").
domestic violence would be incomplete without a larger discussion of patriarchy, racism, and economic disparity.\textsuperscript{388} Sarah Buel asserts:

[\textbf{L}aw students must learn the theory and practice disparities that constitute additional barriers for women of color seeking legal remedies. This revisiting of the intersectionality of race, gender and violence is part of the academy's role in taking a proactive stance in addressing the cultural incompetence of white, legal stakeholders, including current and future lawyers.\textsuperscript{389}]

In addition, the domestic violence discussion must be accompanied by analyzing the history of women's objectification. By situating domestic violence law in the larger struggle for anti-subordination, law professors can help distance domestic violence law from the larger mechanism of state control.

Nothing in this article is meant to deny the amazing achievements of the domestic violence reform movement over the past thirty years. Yet, as reformers recognize, feminism generally and domestic violence reform in particular are at crossroads.\textsuperscript{390} It is at this critical point, when feminists should redirect their efforts toward challenging structures that subordinate not only women but other disadvantaged minorities. Feminist legal scholars can engage in this challenge by helping their students to break out of the typical thinking that domestic violence is an insular crime caused by a deviant bad person. Students can then bring this context to their practice when they become lawyers. In this way, feminists can help temper the negative effects of domestic violence criminalization in this tough-on-crime era.

\textbf{EPILOGUE}

The day of Jamal's criminal trial arrived. Britney had called me just the night before to say that she was not coming. She had tried to talk to the "domestic violence lady" to tell her to drop the case, but could not reach her. Although I was pretty sure Jamal's charges would be dismissed for want of prosecution,\textsuperscript{391} I prepared for trial just in case.

\begin{itemize}
\item \textsuperscript{388} See generally Margaret E. Johnson, \textit{An Experiment in Integrating Critical Theory and Clinical Education}, 13 AM. U. J. GENDER SOC. POL'Y & L. 161, 161–85 (2005) (describing the integration of critical theory into domestic violence clinic at American University, including the assignment of readings on intersectionality and victim stereotyping).
\item \textsuperscript{389} Buel, \textit{supra} note 241, at 321.
\item \textsuperscript{390} See \textit{supra} notes 215–17.
\item \textsuperscript{391} See \textit{supra} note 6 (discussing dismissals for want of prosecution).
\end{itemize}
When the case was called, the prosecutor informed the judge that the complainant was absent but he was prepared to go forward on "excited utterances," specifically Britney's initial statements to the police. Jamal told me he did not want to risk going to jail and would rather agree to deferred sentencing. In D.C., a first-time offender may be eligible for deferred sentencing, in which he enters a guilty plea to the criminal charges and the sentencing is postponed for a period of time, most commonly nine months to a year. During that time, the defendant must pay a fine, go on probation, and complete many "rehabilitative" programs. If the defendant completes the time with no problems, his case is dismissed. If he violates any

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392. Prior to the Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004), trial courts had allowed prosecutors to prove their cases in chief solely by introducing the out-of-court statements of domestic violence complainants. The *Crawford* decision, however, cast severe doubt on this practice. In *Crawford*, the Supreme Court revisited its prior holding in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), that the admission of out-of-court statements falling in a "firmly rooted hearsay exception" or bearing "particularized guarantees of trustworthiness" comported with the Confrontation Clause of the Sixth Amendment. *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66). The Court overruled *Roberts* and held instead that all "[t]estimonial statements of witnesses absent from trial" are admissible only "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. While not precisely clear on the meaning of "testimonial" the Court did note that the essence of "testimonial" was purposeful declaration in response to questioning. *Id.* at 51. The Court stated, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. In *Stancil v. United States*, 866 A.2d 799 (D.C. Cir. 2005), the D.C. Court of Appeals framed the issue as follows:

This appeal presents to this court, for the first (but assuredly not the last) time, a question as to the proper application of the principles of *Crawford* to alleged "excited utterances" which have been admitted into evidence in domestic violence cases under an exception to the hearsay rule. As the court observed in *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004), "[o]ne recent scholarly article estimates that between eighty and ninety percent of domestic violence victims recant their accusations or refuse to cooperate with a prosecution." *Id.* at 965. Prosecutors in this jurisdiction obviously face the same problem and, as the trial judge explicitly recognized in this case, the government has frequently gone forward with domestic violence prosecutions without the alleged victim's cooperation or testimony, ordinarily by introducing into evidence, as excited utterances, out-of-court statements made by the alleged victims, or by other eyewitnesses, to investigating police officers or, in some cases, to 911 operators.

*Id.* at 807 (internal citations omitted). Applying the ruling in *Crawford* to the domestic violence situation, the court of appeals held that initial on-the-scene questioning did not necessarily produce testimonial statements, but subsequent investigative questioning would produce testimonial statements inadmissible under the Confrontation Clause. *Id.* at 812. The court of appeals recently vacated the *Stancil* opinion and granted rehearing en banc. *Stancil v. United States*, 878 A.2d 1186 (D.C. Cir. 2005). Thus, the ultimate issue of admissibility of domestic violence "excited utterances" remains to be resolved with finality.
of the conditions, he is immediately sentenced. Jamal entered a guilty plea and was given deferred sentencing for nine months, with the condition that he pay a fine, go on probation, and complete twenty-seven domestic violence classes and ten anger management classes. He would have to pay eight dollars for each class.

A month later, I received a show-cause order alleging that Jamal had violated the terms of his deferred sentence. Jamal explained that he had been turned away from several of the classes because he did not have the money to pay. We went to court, and the judge found Jamal in violation of his conditions and sentenced him to one-hundred days incarceration. Jamal went to jail, and Britney struggled to pay for the apartment and baby by herself. The couple lost their eligibility for public housing because of Jamal's conviction.

Two months after his release from prison, Jamal, Britney, and the baby were living with Jamal's aunt, who told the couple to be out by the end of the month. Britney told me that prison had changed Jamal: He was withdrawn, angry, and depressed because he was still unable to find a "legitimate" job. Jamal's assault conviction turned out to be the first of several convictions he would have over the next couple of years, none of

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393. See Brawner v. United States, 745 A.2d 354, 357–58 (D.C. Cir. 2000) (describing deferred sentencing and finding that the deferred sentencing agreement which put the determination of whether the agreement had been violated solely in prosecutors' hands did not violate separation of powers).

394. See Epstein et al., supra note 267, at 494, which states:

In a deferred sentencing program, the defendant agrees to plead guilty up front. In exchange, the government agrees to recommend that sentencing be deferred for an extended period, during which time the defendant must strictly abide by various conditions, such as attending batterer's treatment sessions, complying with the terms of any civil protection order, or testing clean for substance abuse.

Id.


396. See McGregor Smyth, Hostile is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy, 36 U. Tol. L. Rev. 479, 480 (2005) ("We know from experience that if formerly incarcerated persons cannot find work, shelter, or help, they are much more likely to be caught in a recurring cycle of crime.").
which were for domestic violence.\textsuperscript{397} During Jamal's second stint in jail, Britney and the baby became homeless.

\textsuperscript{397} Ex-offenders face a multitude of disabilities upon release from prison:

A prison record, in addition to minimal education and a lack of job skills, limits ex-offenders' employability in many cases. In addition, society has created a vast network of collateral consequences that severely inhibit an ex-offender's ability to reconnect to the social and economic structures that would lead to full participation in society. These structural disabilities often include bars to obtaining government benefits, voting disenfranchisement, disqualification from educational grants, exclusion from certain business and professional licenses, and exclusion from public housing. Without structural support or intervention, these individuals face a wide range of obstacles making it virtually impossible for them to pursue legitimate means of survival.
