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NEOFEMINISM

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ABSTRACT

Today it is prosaic to say that "feminism is dead." Far from being moribund, feminist legal theory is breaking from its somewhat dogmatic past and forging ahead with new vigor. Many modern feminist legal scholars seek innovative ways to better the legal, social, and economic status of women while simultaneously questioning some of the more troubling moves of second-wave feminism, such as the tendency to essentialize the woman's experience, the turn to authoritarian state policies, and the characterization of women as pure objects or agents. These "neofeminists" prioritize women's issues but maintain a strong commitment to distributive justice and recognize that subordination exists on multiple axes. In defining "neofeminism," this Article examines how the troubling nature of certain second-wave feminist principles engendered new schools of feminist thought. It then illustrates this process in the domestic violence law reform context. The Article concludes that recognizing a new and vibrant progressive feminism can counter exaggerated claims of feminism's demise, the belief that feminism has been devastated by postmodern critique, and the appropriation of the feminist label by conservative women's groups.

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TABLE OF CONTENTS

I. INTRODUCTION

Feminism gets a bad rap. It comes from all sides—from conservatives who decry the movement as nothing more than a platform for "angry" women to "bash" men[1] to racial justice scholars who criticize feminism for compounding the problems faced by minorities.[2] Young women often say that although they

1. *See, e.g.*, Dan Subotnik, *"Hands Off": Sex, Feminism, Affirmative Consent, and the Law of Foreplay*, 16 S. CAL. REV. L. & SOC. JUST. 249, 306 (2007) (describing rape reform as the product of "angry feminists" desiring to "put[ ] a man in jail"); Erin Pizzey, *How the Women's Movement Taught Women to Hate Men*, FATHERS FOR LIFE, http://fathersforlife.org/pizzey/how_women_were_taught_to_hate_men.htm (last updated Mar. 4, 2006). There are also countless blog and internet posts describing similar criticisms. *See, e.g.*, Sarah Stefanson, *How To: Deal with Angry Feminists*, ASKMEN.COM, http://www.askmen.com/dating/heidi_400/426_how-to-deal-with-angry-feminists.html (last visited Feb. 15, 2013).

2. *See* BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 23 (1984) (observing that because "feminism is often equated with white women's rights efforts," minority women "dismiss the term because they do not wish to be perceived as supporting a racist movement"); I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1367 (2010); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 154 (1989); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1306–07 (2000).

"believe in equality," they would not call themselves "feminists."[3] As one scholar notes:

> [A] wide contingent of young women—perhaps, we are told, most—decline to consider themselves as feminists at all. Among these non- or even anti-feminists, the perception is said to exist that equality for women has largely been achieved, so that the unself-critical focus on gender equality of feminism's earlier "waves" is jejune . . . . Whether or not the dark stripe of much of feminist thought has put them off or has merely served to demarcate their apparent sense of distinctness, the young women who spurn an avowedly feminist identity seem willing to dismiss the ongoing need for a feminist movement as toast.[4]

The decades of public disdain for and scholarly critique of this movement have caused the media, academics, and students alike to declare that feminism is dead.[5]

Justice-minded scholars, who centralize the experience of women in their theorizing and policy proposals as a vehicle to both understand larger subordination and remedy lived gender inequity, should reaffirm the movement in the face of scholarly discontent and popular bashing. Progressive scholars can respond to the pervasive criticism of feminism from the left and incessant trashing from the right by uniting in the message that rumors of feminism's demise are greatly exaggerated. If one accepts the contention that feminism as a social and intellectual movement has ceased to make desirable political and academic contributions, the winners are not liberals but the patriarchal

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3. *See* DEBORAH SIEGEL, SISTERHOOD INTERRUPTED 9 (2007) ("[S]ome younger women flee from the feminist label . . . ."); Linda L. Ammons, *Dealing with the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women—A Tenth-Year Reflection*, 4 BUFF. CRIM. L. REV. 891, 910 (2001) ("Today some view even the label feminist as something akin to a four-letter word."); Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys*, 11 WM. & MARY J. WOMEN & L. 221, 224–25 (2005) (recounting the "[a]ttempts to discourage women from identifying themselves as feminists").

4. Jane Maslow Cohen, *Equality for Girls and Other Women: The Built Architecture of the Purposive Life*, 9 J. CONTEMP. LEGAL ISSUES 103, 108–09 (1998).

5. *See, e.g.*, SOC. GRP. AT THE CTR. FOR ADVANCED FEMINIST STUDIES, *Introduction to* IS ACADEMIC FEMINISM DEAD? 3 (The Social Group at the Center for Advanced Feminist Studies, U. Minnesota ed., 2000) ("[F]eminism is proclaimed dead with almost comical regularity."); Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417, 425 n.11 (2009) (noting the "recurring talk about a 'death of feminism'"); Elisabeth Schüssler Fiorenza, *Public Discourse, Religion, and Wo/men's Struggles for Justice*, 51 DEPAUL L. REV. 1077, 1077 n.2 (2002) (discussing how the media continually poses the question "Is feminism dead?"); Frances Elisabeth Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L.J. 2215, 2246 n.159 (1997) (observing that the claim that feminism is past its prime has been around since the 1950s).

right. The demonizing of the term "feminism" has gone hand-in-hand with the concerted and carefully mapped effort from the right to stamp out all antisubordination discourse as nefarious "PC talk."[6] Moreover, a sizeable portion of the U.S. population believes that women have achieved equality or that any inequality is due to biological or preference differences between the sexes.[7] Feminist scholarship is so important during a time when many believe the United States is post-sexist in addition to being "post-racial."[8]

On the other hand, for many progressives, the left wing critiques of feminism are valid and powerful. Feminism has often conceived of women's issues as the interests of white, upper-middle-class women.[9] Feminism has often united with police power in a way that disadvantages not only subordinated men but also women who occupy the lowest socioeconomic statuses.[10] Feminism has often adopted positions that objectify women,[11]

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6. *See* JOHN K. WILSON, THE MYTH OF POLITICAL CORRECTNESS: THE CONSERVATIVE ATTACK ON HIGHER EDUCATION 2 (1995) (observing that the conservative constructed "myth of political correctness has made every radical idea . . . seem like the coming of an apocalypse . . . complete with four new horsepeople—Speech Codes, Multiculturalism, Sexual Correctness, and Affirmative Action"). The Internet is bursting with vilifying and demeaning descriptions of feminism and feminists. For example, UrbanDictionary.com is a website that allows people to post definitions of terms. The frightening definitions of "feminist" include "[m]ale-hating, PC, whiney left-wing-extremist bitch." URBANDICTIONARY.COM, http://www.urbandictionary.com/define.php?term=pc%20feminist (last visited Apr. 10, 2013); *see also* Bartow, *supra* note 3, at 224 ("[F]eminists are credited with profound negative influence largely as a mechanism for preventing them from gaining enough positive influence to affect significant social changes.").

7. *See* Cohen, *supra* note 4, at 108–09; Marne L. Lenox, Note, *Neutralizing the Gendered Collateral Consequence of the War on Drugs*, 86 N.Y.U. L. REV. 280, 287–88, 297 n.113 (2011) (noting the "common perception of gender equality" in the United States); *see also, e.g.*, Lawrence H. Summers, Remarks at NBER Conference on Diversifying the Science & Engineering Workforce (Jan. 14, 2005) (transcript available at http://www.president.harvard.edu/speeches/summers_2005/nber.php (last visited Aug. 6, 2011)) (attributing the lack of women in science to "taste differences between little girls and little boys").

8. Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1261 (2011). Even as talk of a post-racial America was burgeoning during the 2008 election, a CBS News poll revealed that far more respondents (42%) felt that racism was the bigger problem in the United States than sexism (10%) (A full 23% felt that neither was a problem). Poll, CBS News, Race, Gender, and Politics: March 15–18, 2008 (Mar. 19, 2008), *available at* http://www.cbsnews.com/htdocs/pdf/RACE_AND_SEX-mar08a.pdf. Perhaps not surprisingly, those same respondents were in fact more prejudiced against women political candidates than African-American ones. *See id.*

9. *See infra* note 58 and accompanying text.

10. *See infra* notes 266–275 and accompanying text.

11. *See infra* Part III.D.

deny sexual agency,[12] and promote a heterocentric and essentializing view of womanhood.[13] In response, some progressives simply "take a break from feminism."[14] Race scholars oppose feminism's tendency to ignore the experiences of black women[15] and its complicity in the oppression of black men;[16] class scholars dismiss feminism as furthering the interests only of bourgeois women;[17] and postmodern scholars reject feminism because of its essentialist presumptions about women's special ontology.[18]

Many critics of mainstream feminism continue to theorize in gendered terms and seek to further women's interests, but they reject aspects of feminism that have proven troubling. Influenced by Critical Legal Studies, Critical Race Theory, Latina/o Critical Legal Theory (LatCrit) ideas, and Marxist theory, these scholars are principally concerned with gender inequality but wary of the tendency of feminism to essentialize the female (and male) experience; downplay race, class, and other subordinate statuses; and rely on liberal rights regimes or alternatively authoritarian criminal policies.[19] Indeed, this Author has critiqued feminist

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12. *See infra* notes 135–136 and accompanying text.

13. *See infra* notes 130–133 and accompanying text.

14. *See generally, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

15. *See* Crenshaw, *supra* note 2, at 154 (contending that in feminist theory, "[n]ot only are women of color in fact overlooked, but their exclusion is reinforced when *white* women speak for and as *women*"); Taylor-Thompson, *supra* note 2, at 1306–07 (observing the break between women of color and white feminists).

16. *See, e.g.*, Capers, *supra* note 2, at 1367 ("[F]eminist scholars have entrenched an approach to analyzing rape allegations that is, if not overtly racist, very much racialized.").

17. *See, e.g.*, CAROLINE RAMAZANOGLU, FEMINISM AND THE CONTRADICTIONS OF OPPRESSION 16 (1989) (noting that liberal feminism "has appealed to bourgeois or middle-class women" rather than "the millions of working-class, rural, and destitute women who make up the majority of the world's female population"); Filomena Chioma Steady, *The Black Woman Cross-Culturally: An Overview*, *in* THE BLACK WOMAN CROSS-CULTURALLY 7, 23–24 (Filomena Chioma Steady ed., 1981) (criticizing feminism for concentrating "on sexual symbolism rather than on more substantive economic realities"); Regina Austin & Elizabeth Schneider, *Mary Joe Frug's* Postmodern Feminist Legal Manifesto *Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 3–4 (2001) (Comment by Regina Austin) ("A 'feminist' theory that works to liberate one group of women (Western, bourgeois professional women, for example) may result in the oppression of another (poor immigrant domestic workers of color, for example).").

18. *See generally* BUTLER, *supra* note 14, at 5–9; HALLEY, *supra* note 14, at 57–58.

19. *See, e.g.*, Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259, 260–61, 284 (2011); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 851–52 (2001); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 240–41 (2008); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*,

domestic violence and rape reform for its complicity in maintaining the authoritarian and racially biased American penal state.[20] Even while supporting the feminist moral hierarchy that nonviolent relationships are better than abusive relationships and sexual choice is preferable to coercion, one can still question the use of police power to enforce this hierarchy. State power, like an eager tenant, can and will quickly take up residence in the architecture of progressive legal experiments.

Thus, it appears that the current state of woman-centric legal scholarship evidences a "neofeminist" moment in which progressive scholars, mindful of the complexity of subordination, seek to further women's interests without exacerbating subordination in other spheres. The term "neofeminism" is symbolically important because it signifies a commitment to women's empowerment[21] and appropriates an importantly radicalized term, while also recognizing that the approach is "new" because it incorporates intersectional antisubordination analysis and responds to observed problems with past interventions.[22]

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101 COLUM. L. REV. 181, 181–83 (2001); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 5–6 (2009); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 411–12 (2006); Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS., no. 4, Fall 2009, at 37, 44–45, 51; Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915, 916–17 (2008); Prabha Kotiswaran, *Labours in Vice or Virtue? Neo-Liberalism, Sexual Commerce, and the Case of Indian Bar Dancing*, 37 J.L. & SOC'Y 105, 105, 113 (2010); 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, 433–34 (2003); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 281–82 (2005); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1078–79 (2006).

20. *See generally* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) [hereinafter Gruber, *Feminist War*]; Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009) [hereinafter Gruber, *Rape, Feminism*].

21. *See* Martha A. Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL'Y 349, 359 n.21 (1995) (maintaining that feminist legal theory "must be woman-centered, gendered by its very nature").

22. When using the term "neofeminism" at conferences, I often receive comments about the term's possible negative connotations. Many scholars who tend to agree with the basic premises of neofeminism, described later in the Article, feel "uncomfortable" with the term. *See* Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 585 n.8 (2012). It is true that the prefix "neo" is often used by critics to describe not just a new, but a radicalized and dangerous form of an already negative movement, for example, "neo-Nazi," "neoconservative," "neoliberal." *See, e.g.*, Fritz K. Koehler, *Investment in the New German Federal States*, 24 CASE W. RES. J. INT'L L. 495, 502 n.17 (1992) ("neo-Nazi"); Sumi Cho,

The purpose of this Article is to introduce the concept of neofeminism into academic and political discourse. In doing so, it broadly describes the patterns of thought that culminated in a neofeminist moment, discusses the animating principles of neofeminism, and examines how neofeminism fits into the larger feminist movement. Part I will briefly elucidate the main theoretical interventions of second-wave feminism, beginning with a description of liberal feminism and moving to an analysis of two well-known theories that respond to the limits of the liberal program—cultural feminism and dominance feminism. From these examinations, Part II will distill several feminist "orthodoxies," meaning certain principles with which second-wave feminism, or even feminism generally, is often associated in academic, social, and political discourse. It will also highlight the problematic, or at least double-edged, nature of these orthodoxies. Parts III and IV explore the operation of neofeminist ideology and how it responds to feminist orthodoxy by examining the debate over domestic violence reform. Finally, the Article concludes with a discussion of the nature of the neofeminist moment, whether it is really new, and how recognizing such a moment might impact the feminist movement.

II. SECOND-WAVE FEMINISM

Second-wave feminism is not a singular overarching theory of justice. Rather, the term describes a body of differing theoretical work within a temporal time frame, namely the 1960s up until the 1990s.[23] Within that period, there were several feminist schools of thought, ranging from purely liberal (those

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Post-Racialism, 94 IOWA L. REV. 1589, 1598 (2009) ("neoconservative"); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 305 (2009) ("neoliberal"). However, this is not always the case. The term "neosoul," for example, describes a very positive evolution in the soul and R & B musical genre. *See* Ben Ratliff, *Music; Out of a Rut and Into a New Groove*, N.Y. TIMES, Jan. 23, 2000, § 2, at 1 (describing "neo-soul" artists as the "antidote to the sameness problem: their records are more well-rounded, more musicianly, more complete"). Another example comes from contemporary international law scholarship, where the term "neoconstitutionalism" signifies a "post-positivist" view of constitutionalism in which constitutions become "the pathways through which moral values migrate from the ethical to the legal world." Luís Roberto Barroso, *The Americanization of Constitutional Law and Its Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World*, 16 ILSA J. INT'L & COMP. L. 579, 586–87 (2010).

23. *See* Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 950 (2010) (describing the "second wave" of feminism as "stretching from the 1960s until the 1990s"); Jane E. Larson, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252, 1252 n.1 (1993) ("The term 'Second Wave' is used to refer to the second broad-based feminist movement in the history of the United States, beginning in the late 1960s.").

dedicated to giving women "equal" rights to men)[24] to extremely radical (those calling for an overhaul of the "male" legal and social structure).[25] Rather than describing in detail all the feminist writings of the second wave, which is clearly beyond the scope of this Article, this Part concentrates on the second-wave theories that legal scholars and others most readily describe as "feminist" and have produced some of the most profound legal changes—liberal feminism, cultural feminism, and dominance feminism.[26] From these theories and their interplay, Part II will then distill certain "orthodoxies" that have evolved either by conscious feminist efforts or by feminist efforts as they have been shaped and transformed by litigation strategies, prevailing social norms, government policies, and political agendas.

A. Liberal Feminism

The second wave of feminism really began with the women's liberation and equal rights movements.[27] These movements embraced all the basic tenets of liberalism,[28] such as the priority of liberty, the assumption that humans are autonomous moral agents, the belief that government does not have to ensure substantive equality, the commitment to rights, and the protection of a private realm.[29] Accordingly, liberal feminism

24. *See infra* Part II.A.

25. *See infra* Part II.C.

26. *See* Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 158 (2010) (calling liberal, dominance, and cultural feminism the "Big Three" of the "older feminisms"); Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1066–69 & nn.223–233 (1996) (dividing "the feminist legal movement into three principal strands: (1) liberal feminism, (2) relational feminism, and (3) radical feminism"). The descriptions of these schools of thought, given the nature of this project, are necessarily reductionist and retrospective. They do not capture all of the richness of the internal debate within the theories. Thus, it may actually turn out that what I am describing as neofeminism is strikingly similar to some of the more nuanced existing permutations of liberal, cultural, and dominance feminism. *See supra* text accompanying notes 330–33 (conceding that neofeminism may not be new).

27. *See* RITA J. SIMON & GLORIA DANZIGER, WOMEN'S MOVEMENTS IN AMERICA: THEIR SUCCESSES, DISAPPOINTMENTS, AND ASPIRATIONS 4–5 (1991) (noting that second-wave feminism "veered dangerously close to becoming a one-issue movement" focusing on passage of the Equal Rights Amendment (internal quotation marks omitted)); Mary Ann Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 393 n.1 (1992) (observing the second wave of feminism's principal "demand for strict equal rights with men in all spheres").

28. The term "liberal" is used throughout this Article to signify those things and persons associated with liberal political philosophy. It is not used in the general colloquial sense to mean anything progressive.

29. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984) (noting that liberalism "conceive[s] of persons as autonomous, self-defining individuals possessing equal moral worth and dignity"); Robin West,

stands for women's formal equality within the current social, cultural, political, and legal structure and a commitment to women's rights as the vehicle of empowerment.[30] However, the theory also assumes that once women are granted rights or opportunities, they can freely choose whether to exercise those rights or take those opportunities.[31] To a greater extent than other feminisms, liberal feminism, like political liberalism, accepts the public–private distinction and supports privacy (i.e., freedom from governmental scrutiny) as a right.[32] In this view, those things that "properly" belong in the realm of the private should be immune from government and legal intervention.[33] To illustrate the impact of liberal feminist theory, we will examine two of the more notable liberal feminist interventions, the right to work movement and rape law reform, in turn.

One of the earliest second-wave feminist causes involved liberating women from a life of forced domesticity.[34] Liberal feminists did not appear to question the prevalent notion that the home, family, and "women's work" belong in the realm of the

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Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 5 (1988) (observing that liberal legalism posits "an existential state of highly desirable and much valued freedom"). *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix, *passim* (1974) (advocating a "minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on").

30. *See* Chamallas, *supra* note 26, at 159 (discussing liberal feminism's demand for equal treatment of the sexes); Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism's Visions of the "Progress" of Muslim Women*, 39 U. BALT. L. F. 153, 154 n.2 (2009) (noting that liberal feminists "share liberalism's political agenda of individual autonomy, equal rights, and a commitment to liberal democracy"); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL L. REV. 1171, 1175 n.10 (1992) (observing the liberal feminist label attached to litigation strategies advocating "formal equality").

31. *See* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 32–33 (1999) (observing that "[l]iberal feminism assumes that people are autonomous individuals making decisions in their own self-interest" and thus "[t]he solution to inequality between women and men is to offer individuals the same choices regardless of sex").

32. Feminists put forward the right to privacy argument in the abortion context, arguing that forbidding abortion infringed the fundamental right to privacy inherent in the Constitution, and securing a victory in *Roe v. Wade*, 410 U.S. 113 (1973). *See* Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 186 (2008) (describing the strategic choice to frame *Roe* in privacy rather than gender equality).

33. Unlike left and dominance feminism, which critique privacy as inherently indeterminate and political, *see infra* note 53 and accompanying text, liberal feminism touts the value of privacy in many contexts. *See* Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 558 (2006) ("[L]iberal feminists point to the value of privacy as a shield against governmental and societal coercion . . . .").

34. *See generally* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963).

private.[35] Rather, they sought to facilitate the legal conditions under which women with enough wherewithal could escape from this private realm, under the presumption that escape from oppressive private life is what women want.[36] Reformers called on legislatures and courts to reverse laws that erected de jure barriers to women working outside the home and laws that subordinated women to men within the workplace.[37] At that time, the feminist strategy was not to indict workplace standards as inherently biased toward men but rather to emphasize that women, like men, could meet existing standards.[38]

Liberal feminists pursued this sameness argument even in the face of seemingly obvious biological differences like pregnancy.[39] In many cases, pregnancy represents a uniquely female condition that operatively prevents women from meeting "objective" work standards.[40] Second-wave feminists nonetheless took up two liberal strategies to allow pregnant women to keep their jobs without stepping outside the liberal paradigm. Some

35. *See* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 967 n.31, 1019 (1993) ("Liberal feminists wish to retain the categories of public and private, but render them gender-neutral."); Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 775 (1992) (asserting that liberal feminist's concern over government regulation of private activities made them underestimate the harm of private domestic ordering).

36. *See, e.g.*, FRIEDAN, *supra* note 34, at 194 (calling domestic life a "waste of a human self"); *see also* Chamallas, *supra* note 26, at 159 ("The central theme [of liberal feminism] was providing legal and cultural support for . . . the woman breaking into male-dominated domains . . . ."). Although the explicit project of liberal feminism was to remove barriers to entry into the working world, in order to facilitate choice, many see the theory as accepting, and even emphasizing, the higher status conferred on nondomestic labor.

37. *See* Chamallas, *supra* note 26, at 159 ("The line of cases in the United States Supreme Court that dismantled gender classifications in the law—those equal protection cases litigated by women's rights lawyers such as Ruth Bader Ginsburg—were all about getting rid of 'separate spheres' ideology and challenging traditional gender roles." (footnote omitted)).

38. *See* Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 101 (1993) (observing that liberal feminism emphasizes sameness); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 97–98 (1993) (asserting that liberal feminism may be a palatable form of social change because it "seeks gender neutrality" when "gender neutrality is simply the male standard" (emphasis omitted)); *see also* HOOKS, *supra* note 2, at 21 (contending that liberal feminism "aims to grant women greater equality of opportunity within the present white supremacist, capitalist, patriarchal state").

39. *See* Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 LAW & INEQ. 171, 194 (2008) (observing that liberal feminism "requires the state to treat pregnant women the same as other individuals").

40. *See* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1306 (1987) ("Legal equality analysis 'runs out' when it encounters 'real' difference, and only becomes available if and when the difference is analogized to some experience men can have too.").

analogized pregnancy to any short-term medical issue that could afflict a man and argued that women should have medical leave on the same terms as men.[41] Others asserted that the real need for leave is related to childrearing rather than bearing, such that both men and women, who could equally rear a child, should be able to demand child-care leave.[42] The federal law regarding pregnancy adopts the liberal view. The Pregnancy Discrimination Act prohibits employers from assuming that pregnant women cannot work and firing them for their condition, but it does not require accommodation.[43] The Family and Medical Leave Act requires employers to allow men and women to take a certain amount of leave time for a variety of family and medical issues, not just pregnancy.[44]

Liberal feminists took a similar approach to rape law. While sexual intercourse and issues related to sex and reproduction remained strictly in the realm of the private, there was one legal regulation of sex that liberal feminists championed: consent.[45] In the liberal mindset, sex was acceptable so long as it was a product of agreement between two presumptively equal and autonomous adults.[46] As a consequence, liberal feminists supported criminal laws that defined rape as sex in the absence of consent or sex under conditions where the victims consent is

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41. *See id.* (noting that feminists achieved the Pregnancy Discrimination Act "by making pregnancy look similar to something men experienced as well—disability"); *see also* Ashe & Cahn, *supra* note 38, at 101 (asserting that liberal feminists treat pregnancy "as merely one of a multitude of physical disabilities that both women and men may experience").

42. Ashe & Cahn, *supra* note 38, at 101–02 (discussing liberal feminists' support for parental rather than maternity leave on the ground that "mothers should not receive special treatment"); West, *supra* note 29, at 22 (noting that liberal feminists have pursued the strategy of "deny[ing] or minimiz[ing] the importance of the pregnancy difference").

43. Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e (2006). The PDA prohibits discrimination "because of sex" or "on the basis of sex" which includes "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (2006).

44. *See* Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601–54 (2006). The FMLA allows employees to take up to twelve weeks of unpaid leave in order to care for, *inter alia*, a newborn, a sick immediate family member, or the employee herself if she has a serious medical condition. 29 U.S.C. § 2612(a)(1) (2006).

45. *See* Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 22 (2006) (observing that for liberal feminists, "[c]onsensual sex, no matter what its other attributes, is not rape, so it does not impose rape's harms"); *see also* Susan E. Thompson, Note, *Prostitution—A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 238 (2000) ("[T]he liberal feminist advocates consensual sex between individuals as long as no one gets hurt in the process.").

46. *See, e.g.*, Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER & L. 269, 292 (1996) (contending that university students have the capacity to consent to sexual relations with professors).

physically compelled.[47] Liberal feminists also called for formal equality in prosecutions of rape. They argued that rape should be treated like any other crime of violence involving a victim.[48] As such, courts and legislatures should eliminate "special" rules for rape cases, such as laws presuming the incredibility of rape complaints in the absence of corroboration or presuming consent in the absence of resistance.[49] There, however, the liberal intervention ended. It was apparently not part of the liberal project to question whether women could truly exercise agency in the sex context[50] or account for police, prosecutor, and juror bias despite formal legal equality.[51]

The criticisms of liberal feminism, many of which adopt the basic critique of liberalism, are legion. Critics of liberalism assert that its commitment to formal equality does little to achieve substantive equality given pre-existing social, cultural, and economic conditions.[52] Moreover, they argue that "rights" are subject to indeterminate political interpretations and that bolstering "rights-talk" can undercut antisubordination claims.[53] In addition, critics of liberalism have long maintained that the distinction between the public and private is arbitrary and serves to hide and legitimate hierarchy.[54]

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47. Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35, 38–39 (1995).

48. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 377 (1975) (asserting that rape should be "placed where it truly belongs, within the context of modern criminal violence"); Torrey, *supra* note 47, at 38–39 (observing that liberal feminists adopted the gender neutral characterization of rape as criminal violence).

49. *See* Gruber, *Rape, Feminism*, *supra* note 20, at 593 (discussing the feminist role in eliminating resistance and corroboration requirements); Torrey, *supra* note 47, at 39 (noting that these legal changes "[r]espond[ed] to liberal feminist demands for reform").

50. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171–72, 174–75 (1989) ("The law of rape presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity.").

51. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1181–84 (1986) (asserting that formal equality does not account for rape myths).

52. *See* Littleton, *supra* note 40, at 1307 (noting the critique that "challenges the assumed gender-neutrality of social institutions, as well as the notion that practices must distinguish themselves from 'business as usual' in order to be seen as unequal" (emphasis omitted)).

53. *See* April L. Cherry, *Choosing Substantive Justice: A Discussion of "Choice," "Rights" and the New Reproductive Technologies*, 11 WIS. WOMEN'S L.J. 431, 438–39 (1997) (noting that feminists must remain cognizant that the rights they seek do not lead to further subordination). Frances Olsen asserts that the emphasis on rights in the rape context oriented feminism toward a debate between sexual freedom and social control rather than "challenging the dominant definition of sexuality." Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 390 (1984).

54. *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 11–12, 42 (1992) ("[T]he identification of something as 'private' or 'public' may be

Applying these critiques to our two examples, nonliberal second-wave feminists argued that work rights cannot secure women's equality because they fail to address subtle workplace discrimination, do not account for the myriad of reasons why women feel compelled to stay home, and regard male-centric standards as neutral.[55] They also objected to liberal feminism's apparent glorification of the male work structure, which continued to relegate domestic work to a private, unscrutinized, and subordinate realm.[56] In the rape context, critics contended that emphasizing consent and formal equality in rape law does nothing to address subtle coercion or account for the de facto influence of sexist stereotypes and rape myths at trial.[57]

Scholars of color and class-conscious feminists also scrutinize the limits of liberal feminism. Critical race feminists point out that black women have always worked outside *their* homes, often in order to facilitate the very boredom and leisure from which savvy upper-middle-class housewives seek to escape.[58] Racial scholars also critique second-wave feminists, both liberal and nonliberal, for ignoring the historical fact of black men's persecution under strict rape laws in formulating rape prosecution policies.[59] Class critics and Marxist feminists reject liberal feminism's embrace of the liberal rights structure at the expense of pursuing distributive strategies and larger critiques of

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conclusory, a mere invocation to justify a conclusion actually reached on other grounds."); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 322 (1993) ("[A]ll private action can be made to look public and vice versa.").

55. *See* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 832–34 (1989) (observing that the liberal push toward market work combined with the cultural pressure on women to stay home leads women "to make choices that marginalize them economically in order to fulfill those same responsibilities").

56. *See* June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 975 (1991) (observing that in the liberal feminist program, "the traditional domestic role, and those who continued to pursue it, were devalued").

57. *See* MACKINNON, *supra* note 50, at 172–73; Gruber, *Rape, Feminism*, *supra* note 20, at 600 (observing the "reality of stereotyping and subtle sexism [in rape prosecutions], despite the apparent achievement of formal equality").

58. *See* Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1036–37 (2004) (observing that the right to work philosophy "disregards the experiences of most women of color" given that "[b]lack women historically experienced work outside the home primarily as an aspect of racial subordination and the home primarily as a site of solace and resistance to white oppression").

59. *See* Capers, *supra* note 16, at 1367; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601 (1990) (asserting that feminists have ignored black women's "unique ambivalence" to rape criminalization created by the history of "victimization of black men by a system that has consistently ignored violence against women while perpetrating it against men").

the capitalist system.[60] Nevertheless, the most famous critiques of liberal feminism are lodged in the writings of cultural and dominance feminists. We will now turn to a discussion of cultural and then dominance feminism and will return to the other left critiques when we examine the second-wave orthodoxies in the next Part.

B. Cultural Feminism

The basic premise of cultural (also called "relational" or "difference") feminism is that women have a different culture and even a different epistemology (different ethics, ideas, and language) from men—one that involves valuing intimacy, prioritizing relationships over competition, and being caring rather than dominating.[61] Thus, cultural feminism directly undermines liberal feminism's main premise that women can and should compete on the same terms as men in the workplace. Cultural feminism has become so well-known and prominent in feminist circles that some have called it the "official" theory of the second wave.[62]

The seminal text on cultural feminism is Carol Gilligan's *In a Different Voice*.[63] The book is not really a theory of morality or a prescription for legal, economic, or social reform. Rather, it consists of reports of qualitative studies of individual women's reactions to a variety of moral issues and the observation that women literally speak in a different voice.[64] According to Gilligan, women are communicative rather than aggressive;[65] value relationships and self-sacrifice over individual interests;[66] and are nonhierarchical and unconcerned with accruing differential power. The book concludes that

> [b]y positing . . . two different modes [male and female], we arrive at a more complex rendition of human

60. *See* HOOKS, *supra* note 2, at 20 (arguing that liberal feminists' "belief that women can achieve equality with men of their class without challenging and changing the cultural basis of group oppression" negates feminism's "potential radicalism").

61. *See* Chamallas, *supra* note 26, at 162 ("Cultural feminists emphasized relationships, the value of intimacy, the importance of mothering and caretaking, and other feminine activities.").

62. West, *supra* note 29, at 28 (calling cultural feminism the "dominant feminist dogma"); *see also* Chamallas, *supra* note 26, at 162 (noting that cultural feminism "went down easy" and inspired a "boatload of articles and studies").

63. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

64. *Id.* at 2.

65. *Id.* at 61.

66. *Id.* at 62.

> experience which sees the truth of separation and attachment in the lives of women and men and recognizes how these truths are carried by different modes of language and thought.[67]

Gilligan does not address the origin of the unique female epistemology or make any direct normative assessments of it, although the tone of her book indicates she believes these traits are particularly valuable. Others, like Robin West, have addressed more directly the nature of female preferences and the normative quality of these predispositions.[68] West, for example, has written that women's tendency to value intimacy and interconnectedness over individualism can be attributed to their biological "experiences of breast feeding, nurturing, [and] caring for and loving the weak so as to make the weak healthy."[69] She has also posited a "feminist, maternalist (and humanist) moral theory" that prioritizes caring and communitarianism.[70]

Instead of characterizing women's engagement in housework, care work, and childrearing as something inherently undesirable from which women should be liberated, cultural feminism describes those things as positive and endemic aspects of women's existence.[71] In fact, cultural feminists often regard such endeavors as more morally valuable than men's outside-the-home pursuits.[72] As a consequence, in the work arena, cultural feminism's normative theory could possibly, although not necessarily, dictate some radical policy changes. Potential cultural feminist reforms might include requiring higher wages

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67. *Id.* at 173–74.

68. *See* Ashe & Cahn, *supra* note 38, at 104; Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 80–81 (1989).

69. West, *supra* note 68, at 80; *see also* West, *supra* note 29, at 2–3 ("[W]omen are in some sense 'connected' to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and 'connecting' experience of heterosexual penetration, which may lead to pregnancy; the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding.").

70. West, *supra* note 68, at 80.

71. *See* Ashe & Cahn, *supra* note 38, at 104 ("[Cultural feminists] tend to celebrate women's positive values to a degree that erases certain negative aspects of women's experience and activity."); West, *supra* note 29, at 18 ("Cultural feminists, to their credit, have reidentified these differences as women's strengths, rather than women's weaknesses.").

72. *See* West, *supra* note 29, at 18 (describing cultural feminism's most "vital" claim as the assertion that "intimacy is not just something women *do*, it is something human beings *ought* to do"); *see also* Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 408 (1988) (observing that cultural feminists reappropriate female nature "in an effort to revalidate undervalued female attributes").

for domestic work,[73] compensating stay-at-home wives,[74] mandating paid maternity and even paternity leave,[75] and infusing governmental and business decisionmaking with compassion and cooperation.[76] Nevertheless, it appears that the cultural feminist intervention has primarily resulted in less controversial legal and policy changes[77] in the form of accommodations—accommodations for pregnancy, childcare, and physical differences.[78]

Of course, the notion that the female condition must be "accommodated" naturally troubles liberal feminists. Liberal feminists emphasize that women are similarly situated to men, deserve equal rights, and do not need special privileges.[79] Thus, to many feminists, the cultural feminist contribution represents a return to gender stereotypes and the notion of separate spheres in which women primarily belong in the home.[80] Wendy Williams,

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73. Chamallas, *supra* note 26, at 165 ("I see the imprint of cultural feminism all over the caregiver guidance and the family responsibility lawsuits, despite the liberal framework in which anti-discrimination laws currently operate. Such claims make sense only if one accepts that caring for family members is as valuable to society as paid employment and that women should not have to sacrifice their families for their work.").

74. *See id.*; *see also, e.g.*, Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 80 (1997) ("Valuing all mothers' domestic labor involves challenging . . . the false dichotomy between the spheres of home and work . . . .")

75. *See* Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1513 (2001) (noting "maternalist" feminist support for mandatory paid maternity and parental leave).

76. *See* West, *supra* note 68, at 81; *cf.* Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 888–91 (1990) (rejecting a paternalistic form of legal intervention in favor of an alternative feminist reform of judicial intervention that equalizes the powers of the respective parties).

77. *See* HOOKS, *supra* note 2, at 37 (observing that feminism's radical effort to transform family life "by its insistence that the purpose of family structure is not to reinforce patterns of domination in the interest of the state" has been the most controversial and resisted by mainstream society).

78. *See* Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 138–39 (2005) (noting cultural feminism's emphasis on legal accommodations "for women on account of their caregiving nature"); *see also* Theresa A. Gabaldon, *Assumptions About Relationships Reflected in the Federal Securities Laws*, 17 WIS. WOMEN'S L.J. 215, 217–18 (2002) (observing that cultural feminists' analytic method "arouses empathy and exposes nuance permitting situational accommodations").

79. *See, e.g.*, Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 32–33 (1999); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151, 170 (1992) (noting that the "special treatment model has great costs" because it permits "unfavorable as well as favorable treatment").

80. Williams, *supra* note 55, at 806 ("[Cultural feminism's] attempt to rehabilitate traditional stereotypes as 'women's voice,' and to associate women's voice with the new epistemology, fails to come to terms with the extent to which the gender stereotypes were designed to marginalize women. These stereotypes no doubt

for example, queries whether the cultural feminist position on maternity leave represents a "clinging, without really reflecting upon it, to culturally dictated notions that underestimate the flexibility and potential of human beings of both sexes and which limit us as a class and as individuals."[81]

There are also a myriad of nonliberal critiques set forth by dominance, race, class, and other feminists questioning cultural feminism's epistemological (and perhaps even metaphysical) conclusion that women are authentically and inherently caring and domestic.[82] Moreover, theorists object to cultural feminism's replacement of male supremacy with a form of female supremacy stemming from the purportedly superior biological and emotional characteristics of women.[83] We will explore the dominance feminism critique of cultural feminism below and some of the others when we discuss the second-wave orthodoxies in the next Part.

C. Dominance Feminism

Catherine MacKinnon proposed the dominance theory of feminism as a response to what she saw as the two then-existing paths to women's equality, namely "be the same as men" or "be different from men."[84] Thus, dominance feminism is a critique of both liberal and cultural feminism. Turning first to MacKinnon's analysis of liberal feminism, she does confess "a sincere affection for this approach" because the claim that women had been treated disparately in fact resulted in significant changes in women's status and opportunities.[85] Nonetheless, MacKinnon describes liberalism as an intervention of limited use because the standards by which "equal" competitors are evaluated, whether inside or outside the employment context, have always been defined with reference to

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articulated some values shunted aside by Western culture. But the circumstances of their birth mean they presented a challenge to predominant Western values that was designed to fail, and to marginalize women in the process.").

81. Williams, *supra* note 79, at 173.

82. *See, e.g.*, Littleton, *supra* note 40, at 1333 (observing the argument that "the socially female cannot be claimed as truly belonging to women, because it has been men who have done the defining"); *infra* notes 94–95 and accompanying text.

83. *See, e.g.*, Janet Halley, *The Politics of Injury: A Review of Robin West's* Caring for Justice, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 76 (2005), *available at* http://www.legalleft.org/wp-content/uploads/2008/04/1unb065-halley.pdf.

84. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 32–33 (1987); *see also* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 18–19 (2d ed. 2003) (referring to dominance feminism as radical feminism).

85. MACKINNON, *supra* note 84, at 35.

the male condition.[86] In fact, the whole liberal structure, which prizes autonomous competition, objective standards, and negative rights, reinforces and hides the presumption of the male condition.[87] Moreover, MacKinnon passionately critiques liberal feminists' preservation of the public–private distinction. In her view, "[f]or women, the private is the distinctive sphere of intimate violation and abuse, neither free nor particularly personal. Men's realm of private freedom is women's realm of collective subordination."[88]

MacKinnon's main criticism of cultural feminism regards the notion that caring and intimacy is a true and authentic quality of womanhood.[89] For MacKinnon, inequality is not just embedded in and perpetuated by the liberal state.[90] Rather, what has come to be known as the "patriarchy," a structural system of norms, practices, discourses, instincts, and signals that keep men dominant and women subordinate, exists symbiotically with law.[91] As a result, women's self-conception is not something separate from the operation of male domination—it is the product of such domination.[92] MacKinnon accordingly criticizes cultural feminism for "making it seem as though [female] attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use."[93] She argues that "[f]or women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness."[94] Moreover, women's "choice" is not indicative of equality precisely because "women have little choice but to become persons who then freely choose women's roles."[95]

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86. *Id.* at 36 ("For each of [men's] differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.").

87. *See id.* (asserting that "liberal idealism" is sexist because "virtually every quality that distinguishes men from women is already affirmatively compensated in this society").

88. MACKINNON, *supra* note 50, at 168; *see also* Dailey, *supra* note 35, at 1020 (observing that radical feminists view privacy as a "dangerous tool of gender oppression, shielding private abuse from social view").

89. MACKINNON, *supra* note 50, at 47–49.

90. *Id.* at 237–38.

91. *See* MACKINNON, *supra* note 50, at 237–38; Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 421 (2005) (describing patriarchy in dominance feminism as "the ubiquitous controls of women's work, reproduction, children, and property, across cultures and across time, [which] are aimed at the appropriation of female sexuality").

92. *See* MACKINNON, *supra* note 84, at 39 ("Women value care because men have valued us according to the care we give them . . . .").

93. *Id.* at 38–39.

94. *Id.* at 39.

95. MACKINNON, *supra* note 50, at 124.

Clearly, the ubiquitous patriarchy is the problem. However, one would think that fighting the patriarchy, with all its subtleties, forms, entrenched institutions, and linguistic and sublinguistic signals, would be an impossible task. And yet, dominance feminism has produced some of the most tangible and concrete law reforms of any theory of feminism, including sexual harassment laws in the work context and rape shield laws in the gender crime context.[96] This may be because the theory reduces women's subordination to one particular factor: sexuality.[97] In MacKinnon's view, sexuality is as much feminism's benchmark of oppression of women as labor is Marxism's benchmark of oppression of the lower classes.[98] Women are in an inherently subordinate position because sexual oppression is constitutive of the very gender category, woman.[99] Thus, "every feminist issue, every injustice and injury suffered by women, devolves upon sexuality; . . . sexual harassment, rape, and prostitution are all modes of sexual subordination; women's lack of authoritative speech is women's always already sexually violated condition."[100]

Dominance feminism sees the key to remedying women's unequal status as reconfiguring power.[101] It counsels for the strategic invocation of rights-talk, despite its critique of liberalism,[102] and use of police power, despite its description of

96. *See* Chamallas, *supra* note 26, at 162 ("[D]ominance feminism has proved to be remarkably generative, providing the inspiration for new laws on stalking and domestic violence and significant changes in laws related to rape, sexual assault, and sex trafficking."); *see also* Aviva Orenstein, *No Bad Men!: A Feminist Analysts of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 689 (1998).

97. *See* MACKINNON, *supra* note 50, at 109 ("[F]eminism fundamentally identifies sexuality as the primary social sphere of male power."); *see also* Franke, *supra* note 19, at 198 ("For MacKinnon, all gender is always already about sexuality, and all sexuality is always already about gender. And both gender and sexuality are entirely about women's subordination to men.").

98. *See* MACKINNON, *supra* note 50, at 3 ("Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away.").

99. *See id.* at 128, 195 (calling sexuality "constitutive of the meaning of gender" and asserting that sexualization "is a central feature of women's social definition as inferior and feminine"); MACKINNON, *supra* note 84, at 42 ("[G]ender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place . . . ."); *see also* ANDREA DWORKIN, INTERCOURSE 122–23 (1987) ("The slit between [a woman's] legs . . . which means entry into her—intercourse—appears to be the key to women's lower human status.").

100. *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 81 (1995).

101. *See* MACKINNON, *supra* note 84, at 40 ("Gender is also a question of power, specifically of male supremacy and female subordination.").

102. *Id.* at 45 (defining the goal of the dominance approach to "give women equal power in social life"); *see also supra* notes 86–88 and accompanying text (critiquing liberalism).

the state as masculinist.[103] Dominance feminism unabashedly calls upon the state to authoritatively, even violently, enforce true equality by stamping out instances of male sexual domination.[104] Curiously, although the theory embraces the state as an enforcer of prohibitory laws, it does not particularly champion state-sponsored redistribution to secure women's economic empowerment. Perhaps this is due to MacKinnon's complicated relationship with socialism, which she regards as having disserved or at least ignored women, and her view of distributive reform as reifying women's low status. [105]

For MacKinnon, the left's focus on class and capitalism came at the expense of focusing on male dominance, "the most pervasive and tenacious system of power in history."[106] She critiques *West Coast Hotel Co. v. Parrish*, the Supreme Court case upholding minimum wages for female laborers and commonly regarded as spelling the end to the *Lochner* era.[107] The Court refused to apply *Lochner*'s logic that adult workers should be at liberty to enter into any kind of contract and instead reasoned that "[t]he exploitation of a class of workers [women] who are in an unequal position with respect to bargaining power

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103. *See* MACKINNON, *supra* note 50, at 161–62 ("The state is male in the feminist sense: the law sees and treats women the way men see and treat women." (footnote omitted)). However, the problem with the state is its liberal nature, in which "objectivity is its norm." *Id.* at 162. Thus, MacKinnon has no qualms about engaging the state, in a way that many see as not neutral, in order to secure women's equality. In addition, because male supremacy is established by "the systemic failure of the state to enforce the rape law," more criminal law is the natural prescription. *Id.* at 245–46.

104. *See* MACKINNON, *supra* note 50, at 249. MacKinnon states,

> Equality will require change, not reflection—a new jurisprudence, a new relation between life and law. . . . To the extent feminist law embodies women's point of view, it will be said that its law is not neutral. But existing law is not neutral. . . . Women have never consented to its rule . . . .

Id.; *see also* Catharine A. MacKinnon, *Engaged Scholarship as Method and Vocation*, 22 YALE J.L. & FEMINISM 193, 202 (2010) (stating that unlike postmodern scholarship which "makes an effort to be as distant from the real world of the law's lived roots and impact as it possibly can," her work has served as a basis for international "litigation, prosecution, and adjudication" interventions, which "generat[ed] new definitions of and accountability for rape"). Janet Halley terms Catherine MacKinnon's international interventions "Governance Feminism," which is a "very state-centered, top-down, sovereigntist" feminism that "emphasizes *criminal* enforcement," "speaks the language of total prohibition," and "envisions the legal levers it pulls as activating a highly monolithic and state-centered form of power." Halley et al., *supra* note 19, at 340–41.

105. *See* MACKINNON, *supra* note 50, at 13. MacKinnon reads Marx as adhering to stereotypical views of women as "defined by nature, not by society," that is, "primarily as mothers, housekeepers, and members of the weaker sex." *Id.* She critiques Engels for failing to see the special role of gender (rather than just capitalism) in shaping women's status in society. *Id.* at 36.

106. *Id.* at 116–18.

107. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937); MACKINNON, *supra* note 50, at 165.

and are thus relatively defen[s]eless against the denial of a living wage . . . casts a direct burden for their support upon the community."[108] MacKinnon does recognize that *Parrish* "did do something for some workers (female) concretely" and "help[ed] the working class by setting precedents that eventually supported minimum-wage and maximum-hours laws for all workers."[109] However, she ultimately rejects this feminist–labor alliance. Because *Parrish* noted the special vulnerability of women due to their cultural, biological, and social conditions, MacKinnon concludes that the case was a "victory against capitalism and for sexism . . . for the working class perhaps at women's expense."[110]

In the end, MacKinnon cast a skeptical eye on a case that tangibly benefitted women but may have reinforced gender roles. However, she fails to cast that same jaundiced eye upon criminal prosecution, which tends to reinforce the most sexist (and racist) stereotypes of women in order to show that they are "real victims."[111] Given dominance feminism's preference for prohibition over distribution, it is not surprising that the theory is most readily associated with sexual harassment prohibitions and special rules facilitating rape prosecution.[112]

III. THE SECOND-WAVE ORTHODOXIES

This Part analyzes several notable ideologies that emerged from the second wave of feminism. The reason I term these principles "orthodoxies" is that they represent a set of beliefs that is seen by many as quintessentially "feminist." Moreover, when gender scholars critique or deviate from these orthodoxies, they are sometimes called "antifeminist."[113] The following orthodoxies are not merely the obvious normative prescriptions from liberal, cultural, and dominance feminism, although some of them are

108. *Parrish*, 300 U.S. at 392–93, 399.

109. MACKINNON, *supra* note 50, at 165.

110. *Id.* at 166 (discussing *Parish*, 300 U.S. at 394).

111. *See* MACKINNON, *supra* note 50, at 244–46; Estrich, *supra* note 51, at 1114 n.72 (discussing the court's focus in State v. Rusk, 424 A.2d 720 (Md. 1981), as "whether [the victim was] a real victim" as opposed to whether the defendant was a rapist); *infra* note 243 and accompanying text.

112. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 254 (2000) (noting MacKinnon's emphasis on rape, sexual harassment, and domestic violence over work and family issues).

113. *See* Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, *in* FEMINISM & METHODOLOGY 135, 136 & 150–51 n.5 (Sandra Harding ed., 1987); *see also* Wini Breines, Margaret Cerullo, & Judith Stacey, *Social Biology, Family Studies, and Antifeminist Backlash*, 4 FEMINIST STUDIES 43, 51 (1978).

clearly embedded in those theories. Rather, these orthodoxies include principles implied by the nature of the theories, messages that logically but perhaps unintentionally flowed from them, and ideas that developed as second-wave feminism translated into real world policies. As discussed in Part IV, the feminist program has often included compromises in which reformers capitalize on other hierarchies to advance the feminist agenda. Indeed, the most careful, nuanced, and intricate theory can be perverted, flattened, and distorted when filtered through the prevailing social, economic, cultural, political, and legal structure.

A. The Essential Woman

Probably the most well-known and hotly contested second-wave orthodoxy is the notion that there is an essential female experience.[114] According to liberal feminism, all women experience the oppression of being doomed to a life of domesticity and desire liberation from this oppression through working outside the home.[115] Moreover, liberal feminism views women as autonomous agents who, in the absence of de jure barriers, are equal to men in the ability to work outside the home.[116] In short, the essential nature of women is one of "sameness" to men.[117]

Many theorists oppose not only liberal feminism's particular view of the quintessential female experience but also its implication that there is a quintessential female experience. As mentioned above, race scholars point out that minority, immigrant, and poor women have historically had and continue to have a very different relationship to working outside of the home from white women.[118] Many women of color and otherwise

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114. Angela Harris critiques both dominance and relational feminism for their embrace of "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Harris, *supra* note 59, at 585. The problem with such essentialism, she asserts, is "that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice . . . —among them, the voices of black women." *Id.*

115. *See supra* notes 34–38 and accompanying text.

116. *See supra* notes 28–31 and accompanying text.

117. *See supra* notes 38–44 and accompanying text. *But see* Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 279 n.1 (2008) (observing "the commitments of many leading liberal feminist theorists to substantive rather than formal equality").

118. *See supra* notes 58–59 and accompanying text; *see also* Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 67 (1999) ("[T]he majority of black wage-earning women, especially mothers and wives, usually did not believe that their presence or their position in the labor force was an accurate reflection of who they were . . . ." (quoting Sharon Hayley, *When Your Work Is Not Who You Are*: *The Development of a Working-Class Consciousness Among Afro-American Women*, *in* GENDER, CLASS,

marginalized women would choose to stay in the home and care for their children rather than working, were it financially possible. In fact, some would rather do anything other than the low-paying, menial, and physically taxing tasks society assigns to them.[119]

While cultural feminists object to the characterization of the nature of female oppression within the liberal model, they do not criticize the notion that there is an essential woman's experience. Rather, cultural feminists simply inversely shift the presumptions about the female condition. Instead of desiring escape from the less valuable domestic realm, women really desire (and are in fact biologically and culturally predisposed) to engage in domestic work and be intimate and caring.[120] In short, cultural feminism defines the essential female experience as one of "difference" from men.[121] This account of women's ontology proves disturbing to many feminists and other theorists. Some point out that the description of women as particularly intimate, communal, and inclined to engage in care work proves inaccurate in many instances.[122] Other scholars, particularly queer theorists, oppose the female experience being described in terms of pregnancy, breastfeeding, and diaper changing—activities that many women do not and will not undertake.[123]

RACE, AND REFORM IN THE PROGRESSIVE ERA 42 (Nancy S. Dye & Noralee Frankel eds., 1991))).

119. *See* Williams, *supra* note 118, at 55–56 ("Feminists' imagery of the family as the locus of subordination seems most convincing to women otherwise privileged by class and race; to working-class women, it may seem instead (or as well) a haven against the injuries of class.").

120. *See supra* Part I.B.

121. *See* West, *supra* note 29, at 14 (noting cultural feminism's emphasis on "women's fundamental material difference from men").

122. *See, e.g.*, Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1020 n.8 (1992) (noting that such characterizations of women "can bolster destructive stereotypes or can divide women among themselves by excluding some women from the scope of relevance of 'feminist theory'"); Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1040, 1050–54 (1992) (arguing that ascribing cultural feminist attributes to women "is not only inaccurate, [but] dangerous"); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 624–25 (1990) (suggesting that cultural feminism's description of women is not supported empirically and can reinforce stereotypes).

123. *See, e.g.*, Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, *in* FEMINIST LEGAL THEORY 263, 266 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (contending that West's "list of 'connection' experiences ignores specifically lesbian experiences of 'connection'"); Brenda Crossman, *Sexuality, Queer Theory, and "Feminism After": Reading and Rereading the Sexual Subject*, 49 MCGILL L.J. 847, 864 (2004) (describing queer theory feminism as critical to certain sexual practices that "disrupt dominant iterations and performativities of gender, seeking in turn to undermine the gender/sex/heterosexuality triad").

Dominance feminism also criticizes cultural feminism for its assumption that women are authentically and inherently caring and intimate.[124] Although cultural feminists may be correct that woman's essential nature is relational, the problem is that so long as the male gender has its "foot [on] our necks," we can never really know "in what tongue women speak."[125] Nonetheless, dominance theory also implies that there is a unifying woman's condition. All women are united in their oppression by the patriarchy.[126] All women cannot exercise authentic agency or have true self-knowledge in the face of male supremacy.[127] All women are subordinated by sex with men.[128] Consequently, dominance feminism may not pass on the woman's essential voice, but it does describe a fundamental female experience as one of perpetual sexual subordination.[129] As with the other feminisms, dominance feminism's essentialist characterization of women's subordination is the subject of criticism from racial scholars, queer theorists, and others.[130] Critical race feminists assert that black women often experience sexism in a materially different way than white women and some find that male domination is less subordinating to them than other forms of discrimination.[131] Similarly, queer theorist Patricia A. Cain contends that dominance feminism overstates the role of male sexual domination in many women's lives.[132] She notes that lesbians may not feel nor in fact be fundamentally shaped by

124. *See supra* notes 89–95 and accompanying text.

125. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 45 (1987).

126. *See supra* notes 91–100 and accompanying text.

127. *See* MACKINNON, *supra* note 50, at 102–04. Dominance feminism's main prescriptive program is "consciousness raising," that is, making women understand how their situations, preferences, desires, and outlooks are inexorably and invariably shaped by male supremacist forces. *See id.*

128. *See* Dixon, *supra* note 117, at 282.

129. *See id.* ("[Dominance feminists] argue that liberal feminist attempts to empower women (or females), and cultural feminist attempts to revalue the feminine, are both misguided because female identity and the feminine as we know it are the pure products of a system of sexual subordination in which men defined themselves as subjects, and women as objects, via pornography and other systematic practices of male-to-female rape, prostitution, battering, and harassment.").

130. *See, e.g.*, HOOKS, *supra* note 2, at 4 (contending that the dominant feminists "have little or no understanding of white supremacy as a racial politic, of the psychological impact of class, of their political status within a racist, sexist, capitalist state").

131. *See* Harris, *supra* note 59, at 588–89; *see also* HOOKS, *supra* note 2, at 29–31.

132. Cain, *supra* note 123, at 266–67; *see also* Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 113 (2009) (calling "indefensible" MacKinnon's "claim that the eroticization of dominance is the central (and possibly only) dynamic of gender").

subordinating interactions with men.[133] "Sex-positive" scholars object to the claim that all women are oppressed by sex.[134] They argue that, to the contrary, for many women, sex, even sex with domination, can be a source of empowerment and pleasure.[135] They also oppose MacKinnon's description of women as objectified creatures, incapable of subjectivity in sexual engagements with men.[136]

B. Good Women and Bad Men

A somewhat related orthodoxy stems from the nature of these second-wave theories as grand narratives of women's subordination.[137] Because the theories seek to describe an overarching inequality between men and women, they have a tendency to reject or ignore nuance and multiple axes of subordination and instead adhere to reductionist notions of good and bad.[138] In the liberal mindset, bad is being trapped in a domestic realm, and good is competing with men in the workplace. In the cultural feminist mindset, bad is the uncaring, uncooperative culture of men, and good is the intimate, caring culture of women.[139] In the dominance feminist mindset, bad is men dominating women through sex, and good is the eradication of such domination.[140]

To reduce the world of female subordination to these flattened dichotomies, second-wave theories needed to embrace

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133. *See* Cain, *supra* note 123, at 267 (asserting that it would "enrich [MacKinnon's] theory to recognize the reality of non-subordination that some lesbians claim as their experiential reality and ask about its relevance to her underlying theory").

134. Chamallas, *supra* note 26, at 166.

135. *See* Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 605 (2003) ("[T]there have been powerful sex liberationist, sex radical, and more recently 'sex positive' feminisms that understand sexuality to be a domain of 'pleasure and danger' . . . .").

136. *See* Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 153–55 (2007) (cataloging "third-wave" feminist accounts of female sexual subjectivity).

137. *See* Rhode, *supra* note 122, at 622 (noting that feminism purports to describe "women's experience").

138. *See* Cain, *supra* note 123, at 272. Cain observes that feminist "theorists ought to resist transforming a critical standpoint into a new all-encompassing version of reality" because "what started as a useful critique of one privileged (male) view of reality may become a substitute claim for a different privileged (female) view of reality." *Id.*; *see also* Rhode, *supra* note 122, at 622 (asserting that feminism's construction of a unifying female experience has imposed "prohibitive" costs on "those who are not white, heterosexual, and economically privileged").

139. *See* Alcoff, *supra* note 72, at 408 ("For cultural feminists, the enemy of women is not merely a social system or economic institution or set of backward beliefs but masculinity itself and in some cases male biology.").

140. *See supra* notes 96–100 and accompanying text.

evermore hackneyed visions of women's and men's conditions. The above Subpart discussed some of the essentialist images of women, but what about those of men? For many cultural and dominance feminists, men have occupied the role of enemy number one—the sole entity responsible for female subordination.[141] To prove that men are the source of women's oppression—rather than capitalism, racism, xenophobia, or some other negative but arguably ungendered force—dominance, and to some extent cultural, feminism made some troubling diagnostic moves.

First, the theories had to espouse hyperbolic descriptions of men's evil natures and dictatorial, uncaring, and immoral behavior.[142] In cultural feminism, men are operatively incapable of being intimate.[143] In dominance feminism, men are gleeful sexual harassers, rapists, and abusers.[144] Second-wave feminism's tendency to emphasize the most socially unacceptable male behaviors ironically mirrored the concurrent conservative strategy of publicizing horrible crimes in order to bolster tough-on-crime policies.[145] It is doubtful that feminists deliberately publicized egregious individual male behavior in order to undermine arguments that link gender-based crime to socioeconomic status.[146] Nonetheless, these feminist theories'

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141. *See* HOOKS, *supra* note 2, at 25 (noting feminism's insistence "that men were 'the enemy,' the cause of all our problems"); Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 31 GA. L. REV. 771, 802 (1997) ("Inherent in some dominance feminism writing are notions of the male as out of control, and as the enemy." (footnote omitted)).

142. *See, e.g.*, MACKINNON, *supra* note 125, at 220 (noting "the parade of horrors demonstrating the systematic victimization of women"); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1046–47 (1996) (asserting that for some cultural feminists "[c]ertain characteristics (female) are celebrated, while others (male) are not").

143. *See* MACKINNON, *supra* note 125, at 220.

144. *See id.* at 1048 ("Under [dominance] theory, men subordinate, ignore, invade, harass, vilify, use, and torture women. They are, quite literally, the bad guys.").

145. *See, e.g.*, Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 725 (2004) (observing how politicians use retributive rhetoric and tough-on-crime proposals to gain popular support); David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2074 (2004) (asserting that modern conservatives justify harsh criminal policies by advancing a binary view of morality in which there are inherently good or bad people).

146. *See* 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 (2003). It may, however, have been a deliberate political choice to engage in such rhetoric. In the domestic violence arena, for example, "[t]he 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." *Id.*

characterizations of men tended to ignore issues of class, race, and poverty.[147] Consider feminists' condemnation of "sex hassling" on the street.[148] One might wonder who would be disciplined by a law prohibiting such behavior. Would it be the power-holders on Wall Street and in Washington? One could scarcely imagine corporate players and politicians lounging on the corner in their three-piece suits cat-calling at women. Rather, cat-calling is usually confined to the province of laborers—ethnic men of lower income and socioeconomic status.

If it weren't for free speech concerns, perhaps there would be laws outlawing cat-calling. As second-wave feminists discovered, it is much easier to succeed in establishing laws in the name of equality that disadvantage a certain subset of subordinated men than to create laws that control the behavior of seemingly "normal" men.[149] However, there is a real downside to second-wavers' choice to emphasize heinous male crimes and "low-class" machismo. Society could not ignore that sexual and domestic abuse occur, and feminists were quite convincing that such behavior is a matter of concern for all women.[150] At the same

147. *See* HOOKS, *supra* note 2, at 25–26 ("[W]hen we cease to focus on the simplistic stance 'men are the enemy,' we are compelled to examine systems of domination and our role in their maintenance and perpetuation.").

148. Robin West notes the "invisible" harm of street hassling in several articles. *See, e.g.*, West, *Desperately Seeking*, *supra* note 45, at 17; West, *supra* note 91, at 447; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 150, 162–63 (2000) [hereinafter West, *Hedonic Lives*].

149. *See* Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 586–87 (1998) (observing that tough criminal policies are propelled by "the image of the criminal [as] the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male"); Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1321 (1992) ("A common popular assessment of sexual abuse is that . . . the abuser is not normal." (internal quotation marks omitted)); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 788 (2005) ("[N]otions of what is wrong, what is socially harmful, and what is proper punishment reflect political choices that disfavor lower class people . . . .").

150. *See* Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 658 n.31 (2001) (observing the "oft-quoted October 1985 *Ms. Magazine* survey, titled *Date Rape: The Story of an Epidemic and Those Who Deny It*, that found that one in four college women is the victim of rape or attempted rape"); *see also, e.g.*, Mary E. Asmus, Tineke Ritmeester, & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 121 (1991) ("[D]omestic violence occurs in all socio-economic and racial groups."). *But see* Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 38 (2004) ("Women in low-income households experience violence at significantly higher rates than women with higher annual incomes." (footnote omitted)).

time, society clearly could not see all men as abusers, raging misogynists, and rapists. Wives did not see their husbands that way; mothers did not see their sons that way; and men did not see themselves that way. As a result, society was prepared to actively engage with feminists in the fight against what it perceived as the small, deviant subgroup of men who were that way (like sexual predators).[151] In turn, gender inequality became even more insular in origin. It was not even just an acontextual matter of what men do to women but merely a problem caused by a "pathological subclass of men."[152] Ironically, then, publicizing the worst cases of bad male sexual behavior undermined dominance feminism's potential to address the myriad of ways in which the patriarchy invisibly perpetuates subordination because the world had been divided into normal men, who are not sexually and otherwise dominating, and bad men, who are the real problem.[153] As a consequence, another, perhaps unintended, orthodoxy from the second wave consists of the notion that feminism means fighting against bad, criminally deviant men.

C. The Criminal Law Solution

Feminists' publicizing of socially condemnable male behavior appears to have triggered the typical social response—a desire for the government to do something about it. Dominance feminism is clear in its embrace of government intervention to reverse the male-oriented power structure.[154] It is also relatively evident it supports prohibitive rather than distributive strategies to dismantle male supremacy.[155] In this sense, dominance

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151. *See* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 678 (1998) (observing the American cultural paradigm that "'nice' (well educated, white, middle class, employed) men do not rape" (footnote omitted)); *see also, e.g.*, Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1112 (2007) (asserting that men engaging in nonconsensual sex should not be punished as "rapists" because "society regards rapists as some of its worst criminals").

152. Kennedy, *supra* note 149, at 1321.

153. *See* Gruber, *Feminist War*, *supra* note 20, at 809 ("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."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11 (1991) (noting that judicial opinions "treat domestic violence as aberrant and unusual").

154. *See* Levit, *supra* note 142, at 1048 ("Radical feminism argues for dramatic social transformation and redress of the [male/female] power imbalance."); *supra* notes 101–104 and accompanying text.

155. MacKinnon specifically advocates tougher criminal rape and domestic violence laws and supports laws that criminalize pornography and civilly penalize sexual harassment. Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L.

feminism, despite its radical nature, has some synergy with liberal feminism.[156] While liberalism generally objects to a robust role for the government in constructing the social order, even the narrowest theories of liberalism, like libertarianism, make an exception for government police intervention in the name of preventing and punishing harms.[157] Thus, as long as a behavior is deviant enough for society (or those in society who dictate policy) to consider it criminal, the government may play a dominant role in punishing it. Consequently, another orthodoxy of second-wave feminism is the emphasis on utilizing prohibitive laws and criminalization rather than distributive reforms and economic empowerment to achieve feminist goals.

Cultural feminists, however, value cooperation, egalitarianism, and self-sacrifice,[158] which are more socialist in nature.[159] One would therefore think that a cultural feminist might consider the violent, adversarial, uncaring criminal system as quintessentially male in origin and reject it.[160] As one expert notes, "[f]eminists, who champion empathy and connectedness,

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993, 1010–11 & n.71 (2005) (noting that MacKinnon drafted a "legal provision that squarely recognizes pornography as trafficking"). In addition, her stance is not that male dominance be remediated but that it be *reversed*. Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 591–92 (2012) (asserting that dominance feminism is "associated most readily" with MacKinnon, and that it "calls for the reversal of the gender power structure"); *see* MACKINNON, *supra* note 84, at 44–45 (arguing that only when the fundamental issue of male dominance is addressed may women truly gain equality). As Nancy Levit explains, "For dominance theorists, gender equates with and is defined by power. They argue that gender equality can only come through a shift in power: 'Equality means someone loses power. . . . The mathematics are simple: taking power from exploiters extends and multiplies the rights of those they have been exploiting.'" Levit, *supra* note 142, at 1049 (quoting ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 23 (1988)).

156. *See* HOOKS, *supra* note 2, at 9 (observing that feminism's embrace of "competitive, atomistic liberal individualism" has undermined its radical potential (internal quotation marks omitted)).

157. *See* White, *supra* note 149, at 819–20 (noting that liberalism rejects government regulation and simultaneously seeks "expansion of the criminal justice system"). Thus, the prevailing liberal regime is "a contradictory blend" supporting free market idealism and "illiberal" social norms. *Id.*; *see* Eric Mack & Gerald F. Gaus, *Classical Liberalism and Libertarianism: The Liberty Tradition*, in HANDBOOK OF POLITICAL THEORY (Gerald F. Gaus & Chandran Kukathas eds., 2004).

158. *See* Williams, *supra* note 55, at 813 ("Gilligan associates the male voice with the pursuit of self-interest, and, therefore, with capitalism's central tenet that this pursuit will benefit society as a whole."); *supra* notes 70–76 and accompanying text.

159. However, as a practical matter, identifying women as egalitarian and caring ironically supports the capitalist structure by justifying women's market invisibility as "choice." *See* Williams, *supra* note 55, at 819 (stating that cultural feminism thus "enlist[s] women in their own oppression").

160. *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1675–76 (2004) (noting the feminist view of the state as "the embodiment of institutionalized male power over women").

may logically conclude that they must extend that same ethic of care to criminal defendants."[161] Yet it seems that when it comes to how the state should deal with violent men, even cultural feminists reject caring and cooperation. They do not universally or even generally support continued intimacy with abusers or mediation with accused date rapists.[162] Rather, reform of the "male" justice system consists of strengthening rape and domestic violence laws.[163] In this sense, cultural feminists adopt the typical attitude when faced with what they believe is gross misogyny—stamp it out through police power—and they turn away their usual skeptical eyes from criminalization's costs to women and society.

D. The Female Object–Agent Dichotomy

If deviant men are the agents of female subordination, it seems that women must be the objects—they must perpetually exist as innocent victims of male domination.[164] It is true that liberal, cultural, and dominance feminism tend to treat women as innocent, that is, not complicit in their own subordination.[165] Critics accordingly argue that second-wave feminism has failed to provide a theoretical vehicle for scrutinizing women's own contribution to female oppression or how certain classes of women subordinate others.[166] However united in their view of female innocence, second-wave feminist theories set forth dichotomous views of women's subjectivity. This brings me to the next orthodoxy—the characterization of women as pure agents responsible for their life condition or alternatively as pure objects incapable of exercising real choice in life.

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161. Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 196 (1997).

162. *See* HALLEY, *supra* note 14, at 29 (observing that in the 1980s, cultural feminists centered on prosecution of rape and other direct violence against women as a locus of activism); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 3 (1998) (noting cultural feminism's call for "lawmakers [to] thoroughly revise not only the rape prohibition, but the liberal construct of autonomy itself"); West, *supra* note 29, at 59.

163. *See* West, *supra* note 29, at 59 (calling the under-prosecution of certain forms of rape a consequence of masculinist jurisprudence and calling for adequate criminalization). *See generally* West, *Hedonic Lives*, *supra* note 148, at 211–12 (2000) (criticizing inadequate gender crime law as a product of society's failure to recognize how women process pain).

164. *See* Harris, *supra* note 59, at 613 (maintaining that the "story of woman as victim" denies complexity "to further the notion of an essential woman—she who is victimized").

165. *See* Chamallas, *supra* note 26, 158–65 (discussing the goals and influence of liberal, dominance, and cultural feminism to combat female subordination).

166. *See* HOOKS, *supra* note 2, at 67 (arguing that feminists have often dismissed the problems of subordinated men).

Starting with liberal feminism's view of women's agency, liberalism, as a political theory, assumes that individuals are agents capable of exercising free rational choice.[167] For the liberal feminist, women are psychologically, socially, and culturally free to make unconstrained choices about home and work life but are often prevented from doing so by de jure barriers.[168] Without those legal barriers, women would logically choose not to be confined to a life of domesticity.[169]

Cultural feminists object to liberal feminism's failure to recognize female agency enough, while dominance feminists argue that liberal feminism relies on female agency too much. Cultural feminists reject the claim that women would not choose to be caring, domestic, and intimate if given the free choice.[170] In fact, some cultural feminists have gone so far as to call women's domesticity a choice, notwithstanding the social and legal pressures to stay at home.[171] For example, Robin West, while recognizing that "neither motherhood nor intercourse have been 'released' from patriarchy," asserts that women "continue to mother and to want to mother in spite of the compulsory nature of institutional motherhood."[172] This statement underscores the agentizing goals of cultural feminism. It would perhaps be more intuitive to claim that women mother *because of* and not *in spite of* compulsory institutional motherhood. However, by characterizing patriarchal pressures as something women would normally resist, the fact that women want to mother within a system that compels them to do so is not an indication that they are objects of the patriarchal system, but rather evidence of authentic choice.

By far contrast, dominance feminism indicts both liberal and cultural feminism for refusing to recognize that women's choices are perpetually conditioned by the patriarchy.[173] Choice is therefore an illusion and cannot morally justify any given

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167. *See supra* notes 29–33 and accompanying text.

168. *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 326 (1995) ("Liberalism, as applied in [second-wave feminist] contexts, posited a subject whose humanity consisted in her theoretically unlimited potential, and her capacity to exercise meaningful choice in the direction of her own life.").

169. *See supra* note 36 and accompanying text.

170. *See* Williams, *supra* note 55, at 801–03 (asserting that cultural feminists regard women as freely choosing the domestic realm "and celebrate that choice as a badge of virtue").

171. *See id.* at 819–20.

172. West, *supra* note 29, at 47–48.

173. *See supra* Part I.C.

woman's life condition.[174] In the prescriptive hierarchy, then, women's illusory choices must fall to the side when they conflict with policies that dismantle male supremacy.[175]

In the end, both the characterization of women as pure agents and the characterization of women as pure objects raise serious issues. The description of women as unconstrained agents who make autonomous life choices provides moral cover to those who oppose legal and social reforms to alleviate the unfair environment in which those choices occur.[176] As critics of liberalism have long argued, the language of choice hides and maintains status-quo oppression.[177] On the other hand, if women's choices are considered meaningless, they can be disregarded in pursuit of larger feminist goals. This makes individual women sacrificial lambs in the quest to use the state apparatus to fight patriarchy.[178] It may also have the effect of transplanting one form of domination in the woman's life with another, as we will see in the next Part.[179] Moreover, sacrificing what women (perhaps self-deceptively) see as free choice to the greater fight against the patriarchy may gain feminists very little given that fighting against the patriarchy has been reduced to outlawing "deviant" male behavior.[180]

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174. *See generally* MACKINNON, *supra* note 50, at 85–105. For this reason, MacKinnon prescribes "consciousness-raising" as her feminism's primary method, which involves helping women see that their choices are never free. *See id.*

175. *See* Goodmark, *supra* note 19, at 4–5 ("Dominance feminism focuses on women's subordinated and victimized status and argues that the legal system can best serve those victims of violence by enforcing policies that ensure safety, regardless of what an individual woman's preference might be.").

176. *See* Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1615 (1991) ("[A]lthough liberal thought patterns encourage us towards a dichotomy of absolute agency or absolute victimization, neither of these poles is an accurate description of anybody. The point is not that women are passive victims of ideology, but that calling their painful resolutions of work/family conflicts their 'choices' deflects our attention away from the constraints within which they operate.").

177. *See* Williams, *supra* note 55, at 826 (asserting that the language of women's choice is part of "an integrated system of power relations that systematically disadvantages women"); Mark M. Hager, *Sex in the Original Position: A Restatement of Liberal Feminism*, 14 WIS. WOMEN'S L.J. 181, 215 (1999).

178. *See* HALLEY, *supra* note 14, at 346 ("[R]epresenting women as end points of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men, feminists refuse also to see women—even injured ones—as powerful actors."); Goodmark, *supra* note 19, at 43 (maintaining that dominance feminism regards women as "incapable of making rational choices in the face of abuse and instead . . . in need of the substituted judgment of the legal system").

179. *See* Goodmark, *supra* note 19, at 43 n.254 (maintaining that the prosecutorial route forces abuse victims "to rely on male-dominated, male-defined agencies to protect them from male domination"); *infra* Part III.

180. *See supra* notes 149–153 and accompanying text. Indeed, such behavior is itself often a product of the male perpetrator's oppressed condition. *See* HOOKS, *supra* note 2, at

Critical and post-modern feminists have suggested an alternate vision, one in which women exercise rational choice in a world that constrains them through sexism and other forms of disempowerment.[181] The constrained agency theory proposes that women often make life choices under conditions of great constraint.[182] However, the response should neither focus on women's agency at the expense of attention to social inequality nor ignore women's choices because they are imperfect. Rather, feminists ought to fight actively against the constraints while recognizing that choices made within them are meaningful and should not be lightly cast aside.[183]

E. The Assault on Privacy

This brings us to the final second-wave orthodoxy—the assault on privacy. Dominance feminism is clear in its condemnation of any argument that shields unequal gender relationships and abusive male behavior from government regulation under the umbrella of privacy.[184] By contrast, liberalism embraces the public–private distinction as one of its main tenets.[185] Nevertheless, because the typical reaction to viewing morally condemnable behavior is the desire for the government to intervene, even liberals have been moved by dominance feminism's call to dismantle the public–private distinction in the domestic violence context.[186] American liberal legalism has long accepted the notion that privacy cannot

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72–74 (asserting that a male of lower socioeconomic status may oppress women to compensate for lack of social power); Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 291–300 (2002) (asserting that lower-status men may "subordinate others in order to compensate for their own vulnerability and powerlessness").

181. *See, e.g.*, Abrams, *supra* note 168, at 376 (calling for "more sophisticated accounts of liberal subjectivity or post-structuralist accounts of a decentered subject, who unproblematically juxtaposes agency with constraint").

182. *See id.* at 351–52 (discussing how constraints have led to "a female subject wholly incapable of self-direction").

183. *See, e.g.*, Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 838 (1999) (advocating "transformative agency" whereby women "seek transformation through disruption of dominant discourses"); Gruber, *Feminist War*, *supra* note 20, at 818–19 (noting that "domestic violence criminalization has come at the cost of deflecting focus from economic empowerment"); Williams, *supra* note 176, at 1621, 1625–27, 1631–32 (advocating a series of socio-cultural and legal changes to address gender equality without invoking the object-agent dichotomy).

184. *See supra* text accompanying note 88.

185. *See supra* notes 32–33 and accompanying text.

186. *See* Choudhury, *supra* note 19, at 260 n.1 ("Liberal feminism has diverged [liberalism] in that it critiques the private sphere for oppressing women . . . ."); Dixon, *supra* note 117, at 302 (observing that liberal feminism "challenge[d] the kind of stereotype that equates harm to women as a matter of private . . . concern"); Todd E. Pettys, *Sodom's Shadow: The Uncertain Line Between Public and Private Morality*, 61 HASTINGS L.J. 1161, 1211 (2009).

immunize truly harmful behavior.[187] Indeed, selective impositions on privacy have been a time-honored method of enforcing prevailing notions of sexuality and interpersonal relations, even within our privacy-protecting society.[188] As we will see in the next two Parts, liberals can argue that ignoring privacy in certain contexts is not a violation of individual rights because society has a legitimate interest in preventing and punishing outlying behavior.[189] Responding to the dismantling of the public–private distinction in the rape context, critics have noted that making various forms of imperfect sex matters of public concern comes dangerously close to morality policing.[190] In addition, scholars have recently begun to focus on the intended and unintended negative consequences of feminism opening the family home's door to police intervention.[191]

To recap, this Part has discussed several of the orthodoxies that emerged from second-wave feminism and some of the critiques of these orthodoxies. The orthodoxies include the idea that there is an essential woman's experience, the embrace of absolutist concepts of good and bad, the characterization of men (or a subset of deviant men) as the exclusive source of women's subordination, the utilization of prohibitive and criminal strategies rather than distributive strategies, the treatment of women as pure agents or objects, and the rejection of the public–private distinction. In the next Part, we will see how these orthodoxies influenced law and policy in the domestic violence arena.

IV. THE ANTI-DOMESTIC VIOLENCE MOVEMENT'S INCORPORATION OF SECOND-WAVE ORTHODOXIES

Due in no small part to the efforts of second-wave and other feminists, domestic violence criminal law has radically transformed over the last thirty years.[192] Today, the state takes

187. *See* Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 135 & n.60 (2003) ("Classical liberals, prominently John Stuart Mill, argued that the state should not police private morality, but never argued against state policing of private violence.").

188. *See generally* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1264 (2009) (asserting that criminal law has always assisted family law in defining the normative boundaries of family life).

189. *See infra* notes 210–214 and accompanying text.

190. *See, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 93–94 (2002) (arguing that concept of sexual privacy "implies an appropriate sexual modesty").

191. *See generally* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006); Murray, *supra* note 188, at 1265–67; *infra* notes 316–318 and accompanying text.

192. *See* Suk, *supra* note 191, at 5, 13 (discussing the criminalization of domestic violence and noting that "all the states have enacted protection order legislation, which they have amended and refined over the last thirty years").

domestic violence "seriously." The law contains mechanisms to boost prosecution and punishment of battering, and many consider domestic violence law reform to be feminism's greatest success.[193] It is, however, striking the extent to which theorizing and policy making about domestic violence has and continues to reflect and reinforce many of the orthodoxies discussed in the last Part.

The initial feminist efforts regarding domestic violence had a distinct welfarist bent, as women's groups came together and lobbied local, state, and federal governments for resources for battered women.[194] Experts note that the early battered women's movement did not take an insular view of abuse as something individual deviant men do to weak women but rather saw domestic violence as facilitated and maintained by a patriarchal society.[195] Early reformers regarded battering as assisted by "[s]ocial supports . . . includ[ing] 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."[196]

Beginning in the 1980s, reformers aggressively pursued criminalization as the primary solution to battering.[197] Like many

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193. *See, e.g.*, 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) (noting feminists' success in "enlist[ing] the law in the fight against domestic violence"); Murray, *supra* note 188, at 1263 (calling the domestic violence reform project "remarkably successful"); Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 593, 597–98 (1999) (asserting that domestic violence criminalization "is one of the great achievements of feminism").

194. *See* Gruber, *Feminist War*, *supra* note 20, at 748–49 (observing that early reforms involved "address[ing] the economic and social realities that kept women in abusive relationships or led them to remain silent about rape"); Sack, *supra* note 160, at 1666 (describing the early battered women's movement as a "grassroots effort to provide services and shelter to domestic violence victims, independent of state involvement").

195. *See* MACKINNON, *supra* note 50, at 5 ("The development of [the] battered women's movement . . . has now moved from social invisibility as a 'private problem' to an important public concern."); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 182 (2000) ("Many [early] feminists saw battering as the product of patriarchy, as male control over women.").

196. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 39 (1999); *see* Miccio, *supra* note 19, at 249 ("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.").

197. Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 9 (1992); *see also* Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating*

other reformers, feminists turned to the criminal law in the hopes of immediately deterring abuse and creating new social attitudes and norms.[198] Of course, scholars have noted for years that the link between law reform and social norms is plainly nonlinear and existing norms tend to be "sticky."[199] Nevertheless, in the domestic violence arena, the attitude towards abuse has seemed to change over the past few decades, perhaps due in part to increased prosecution.[200] Abuse is clearly not considered legitimate or even private.[201] Yet society still tends to divorce domestic abuse from the larger social context by viewing it as something only evil criminals do to their weak wives.[202]

While it may be somewhat intuitive to consider criminal prohibition the fastest path to social reform, feminists' choice to engage with the state was still a curious one.[203] Male actors in the criminal justice system had always "protected their own"; would they really be willing to adopt a feminist agenda?[204]

Domestic Violence, But Is It Enough?, 1996 U. ILL. L. REV. 533, 537 (1996) (noting that during the 1980s "increasing pressure from battered women's advocates forced most states" to reform their criminal laws to combat domestic violence).

198. *See* Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 115, 129 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (asserting 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"); Sack, *supra* note 160, at 1666 (noting the call for increasingly aggressive police intervention and prosecution).

199. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 610 (2000) (noting that as social norms grown in strength, "the resistance of decisionmakers [to enforce laws that alter those norms] will grow too"); *see also* Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1325 (2000) (expressing doubt that criminal law, in the absence of far-reaching social reforms, could change deeply held attitudes that predicate domestic violence).

200. *See* Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 37 (2009) ("The attitudes as well as the policies of law enforcement, prosecution, and judges have changed dramatically in the past 25 years, reflecting far greater understanding of the dynamics of domestic violence."); Wanless, *supra* note 197, at 543 ("In response to the unabated epidemic of domestic violence and other forms of violence against women, Congress passed the Violence Against Women Act . . . [which] provides a significant economic incentive for states to enact mandatory arrest laws.").

201. *See infra* notes 254–256 and accompanying text.

202. Gruber, *Feminist War*, *supra* note 20, at 817 ("[T]he focus on criminalization entrenches the view that batterers are wholly autonomous agents who bear sole responsibility for domestic violence."); Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 112 (2004) (discussing the view that "men who perpetrate violence against women are deviant individuals with an unhealthy need for power and control").

203. *See supra* note 160 and accompanying text.

204. *See* SCHNEIDER, *supra* note 195, at 182 (observing that skeptical feminists "saw the state as maintaining, enforcing, and legitimizing male violence against women");

Unfortunately, the criminal justice system did not adopt a feminist agenda; feminists adopted the criminal justice system's agenda.

Once reformers embarked on the criminal route they initially pursued a liberal strategy of calling for formal equality in prosecutions. Activists emphasized that an assault on a woman is as bad as (or worse than) any other assault and state actors and jurors should therefore take it equally seriously.[205] However, prosecution of domestic abuse also meant state intervention into family relationships.[206] Dominance feminists had always regarded the private realm as a space of male domination.[207] Cultural feminists view the domestic sphere as important and undervalued but agree that privacy could be sacrificed in truly egregious instances of male violence.[208] However, the sacrifice of relationship privacy in the domestic violence context was largely accepted, if not created, by proponents of liberalism, including antigovernment conservatives.[209]

Even those committed to political liberalism accommodate criminal law interventions into relationship privacy in the name of the larger public good.[210] In the 1980s, conservatives could take domestic violence seriously without offending their commitment to liberal individualism and privacy by characterizing domestic violence as a public problem.[211] Then-Surgeon General C. Everett

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Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 821 (2000) (critiquing the "criminal route" for giving "control to the state," providing "little support" to women, and being "nonneutral").

205. *See* SCHNEIDER, *supra* note 195, 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"); Gruber, *Feminist War*, *supra* note 20, at 752 ("[L]iberal feminists called for the formal equality of genders, requiring, at the very least, that criminal laws treat men and women equally.").

206. *See* SCHNEIDER, *supra* note 195, at 5 (noting that the battered women's movement moved the battering issue "from social invisibility as a 'private problem' to an important public concern").

207. *See supra* notes 126–132 and accompanying text.

208. *See* Dixon, *supra* note 117, at 302–03 (arguing that cultural feminists would support legislation that "attempt[s] to combat sexual and domestic violence"); *supra* notes 72, 163 and accompanying text.

209. *See* Gruber, *Feminist War*, *supra* note 20, at 763–64 (asserting that "socially conservative tough-on-crime ideology" was "a subset of a more general libertarian shift toward individual responsibility and away from social welfare").

210. *See* Murray, *supra* note 188, at 1269 (observing criminal law's history of "elaborating the normative content of married life" by, for example, criminalizing sodomy to "underscore[ ] marriage's heterosexual character" and criminalizing prostitution to "reinforce[ ] the understanding of marriage as involving non-commercial, private sex").

211. *See, e.g.*, WILLIAM L. HART ET AL., U.S. ATT'Y GEN.'S TASK FORCE ON FAMILY VIOLENCE, FINAL REP. 30 (1984) (asserting that "the prosecutor, on behalf of the state,

Koop described domestic violence as a public health problem that entailed significant healthcare costs.[212] John Ashcroft, heading President Reagan's task force on domestic violence, identified the harm of domestic violence as the abuser and victim both instilling improper family values in their children.[213] Fast forward to modern times and not only is domestic violence a public problem, but also households with suspected violence are subject to regulation in almost every conceivable way.[214]

Without the privacy hurdle, liberal reformers were free to call on state actors to vigorously intervene in abusive relationships. However, a purely liberal strategy had other problems. Abuse victims could not pursue their "rights" and receive equal treatment in criminal court given the prevailing cultural environment. Put simply, state actors and jurors were not willing to take domestic violence seriously, despite the mandate of law.[215] This made it eminently clear that domestic violence was not simply a failure of formal equality—it was a

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and not the victim" should control the destiny of domestic violence cases); *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'"); Wanless, *supra* note 197, at 567 (arguing that domestic violence is a crime against society).

212. *See* Mary S. Hood & Julie Kunce Field, *Domestic Abuse Injunction Law and Practice: Will Michigan Ever Catch Up to the Rest of the Country?*, 73 MICH. B.J. 902, 902 n.1 (1994) ("In 1985, Surgeon General C. Everett Koop told health professionals that domestic violence was a 'public health menace.'"); Jan Hoffman, *When Men Hit Women*, N.Y. TIMES MAG., Feb. 16, 1992, § 6 at 25 (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").

213. *See* HART ET AL., *supra* note 211, at 118–19 (characterizing domestic violence criminalization as "public policy [that] support[s] and strengthen[s] family values"); *see also Prepared Remarks of Attorney General John Ashcroft: Annual Symposium on Domestic Violence* (Oct. 29, 2002), DEP'T OF JUSTICE, http://www.justice.gov/archive/ovw/docs/agremarks.htm (asserting that "when families are wracked by violence and abuse, [family] values are corrupted").

214. *See infra* text accompanying note 317; *see also* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1047–48 (2000) (noting that women may be reported for child abuse and other crimes when police respond to domestic violence calls).

215. *See* Gruber, *Feminist War*, *supra* note 20, at 757 ("[P]olice, prosecutors, judges, and jurors, internalizing patriarchal attitudes, simply did not treat victims of domestic violence the same way as other crime victims."); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 312 (2004) (discussing some officers' reluctance to promptly respond to domestic violence calls and hesitancy to make arrests once upon the scene); Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 942–43 (1999) (attributing prosecutor reluctance to the belief that domestic violence is a private problem as well as victim reluctance); Sherman, *supra* note 197, at 12–13.

matter of the prevalence of patriarchy within the criminal justice system and society at large.[216]

There was an array of strategies reformers could have enlisted to fight the influence of patriarchy in domestic violence cases. They could pursue a distributive strategy of giving economic and social support to those women most vulnerable to violence to empower them to break the cycle of abuse.[217] Reformers could also intervene through education programs directed toward likely abusers, police, judges, and others. In fact, this has been done,[218] but not without controversy.[219] However, the most visible and prolific reforms geared toward addressing patriarchal attitudes have a distinctly dominance feminism bent. To fight the influence of de facto sexism, reformers turned to mandatory arrest and prosecution policies,[220] as well as other trial reforms that increase convictions (for example, specialized courts,[221] exceptional evidentiary rules,[222] and unique plea bargaining processes[223]).

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216. *See supra* note 91 and accompanying text (discussing patriarchy and the law).

217. *See supra* note 194 and accompanying text.

218. For example, the Violence Against Women Act provides funding for training about "sex stereotyping of female and male victims of domestic violence and dating violence." 42 U.S.C. § 13992(13) (2006); *see also* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 44 (1999) (noting that judges assigned to the District of Columbia domestic violence court are "required to undergo formal training on intimate abuse").

219. *See* Mary Becker, Keynote Address, *Domestic Violence and Victimizing the Victim: Relief, Results, Reform*, 23 N. ILL. U. L. REV. 477, 487–88 (2003) (cautioning that domestic violence "[e]ducation is not necessarily effective and can reinforce stereotypes and actually do harm"); Epstein, *supra* note 218, at 45–46 (noting that judicial training may create the appearance of antidefense bias).

220. Gruber, *Feminist War¸ supra* note 20, at 757; *see* Micchio, *supra* note 19, at 239, 239 n.2 (discussing prevalence of mandatory policies and citing statutes); O'Connor, *supra* note 215, at 943–47; *see also, e.g.*, ALASKA STAT. § 18.65.530 (2012); CAL. PENAL CODE § 836(c)(1) (West 2008); COLO. REV. STAT. § 18-6-803.6(1) (2012); CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 2012); FLA. STAT. ANN. § 741.2901(2) (West 2010) ("The state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence . . . ."); MINN. STAT. ANN. § 611A.0311 subd. 2(4) (West 2009) (mandating "procedures to encourage the prosecution of all domestic abuse cases where a crime can be proven"); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West Supp. 2012).

221. *See* Epstein, *supra* note 218, at 32–34 (discussing the Washington, D.C. Domestic Violence Court); Anat Maytal, Note, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 213–21 (2008) (discussing specialized domestic violence courts in Massachusetts).

222. *See* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 708–16 (2003) (discussing whether state exceptions to hearsay rules in domestic violence cases should be incorporated into the Federal Rules of Evidence); Eleanor Simon, *Confrontation and Domestic Violence Post-*Davis*: Is There and Should There Be a Doctrinal Exception?*, 17 MICH. J. GENDER & L. 175, 185–97 (2011) (analyzing whether courts create de facto exceptions to hearsay rules in domestic violence cases).

223. *See, e.g.*, COLO. REV. STAT. § 18-6-801(3) (2012); UTAH CODE ANN. § 77-36-2.7(6) (LexisNexis 2008) ("The court may not approve diversion for a perpetrator of domestic violence.").

Feminists anticipated state actor backlash against mandatory arrest and no-drop policies due to the prevalence of sexist attitudes within policing circles and prosecutorial skepticism regarding success rates.[224] However, the implementation of mandatory policies exposed the extent to which victims themselves resisted participating in criminal proceedings.[225] Many women who initially reported domestic abuse did not want their partners to be arrested, prosecuted, or convicted.[226] In turn, prosecutors proceeded against these women's wills and even in their absence.[227] One might think that women's choices not to participate in the domestic violence criminalization project would have thrown reformers into a moral crisis, but generally it did not.[228] For dominance feminists, women's actual choices should be subordinate to reforms that challenge the patriarchy because such choices are inauthentic, products of subordination, and therefore relatively meaningless.[229] However, liberal feminism, like liberalism in general, regards honoring individual choice as integral to a just

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224. *See* Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 161, 163 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (noting that district attorneys believe that uncooperative battered women "waste precious prosecutorial resources"); Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 69 (1994).

225. *See* Coker, *supra* note 214, at 1047–48 (describing victims' reluctance to participate in the criminal domestic violence process); Gruber, *Feminist War*, *supra* note 20, at 761 ("[A]bused women themselves were reluctant to participate in state intervention.").

226. *See* Coker, *supra* note 214, at 1017–19 (discussing reasons why some women prefer to stay with their batterers); Gruber, *Feminist War*, *supra* note 20, at 761 (observing that abused women "desired that the system exempt their partners from enforcement").

227. *See* Morrison, *supra* note 193, at 93 ("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."); Gruber, *Feminist War*, *supra* note 20, at 761–63 (discussing the movement toward prosecutorial intervention in domestic violence, despite victims' wishes).

228. I say "generally" because in fact many feminists in the battered women's movement were highly skeptical of the turn toward criminal law. *See, e.g.*, Coker, *supra* note 19, at 806–07 (noting some potential benefits of mandatory policies, but concluding that they do not strike a good balance between reducing harm and state power); Maguigan, *supra* note 19, at 443–44 (advocating a moratorium on mandatory arrest and prosecution laws); Sally Merry, *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, 332 (2002) (expressing concern that the domestic violence reform succeeded because it "dovetailed with [crime control] agendas, both the refocus on victims and the increase of control and surveillance over men of color").

229. *See supra* Part II.C.

society.[230] How could liberal feminism accept a system that forces reluctant women to be witnesses, sometimes under the threat of criminal penalties?

Just as liberalism makes a general exception for authoritarian criminal policies, liberal feminists have found ways to exempt mandatory domestic violence policies from their usual skepticism regarding restrictions on autonomy. Some reformers justify discounting victims' choices by emphasizing the nature of domestic abuse as a crime against society.[231] In this view, abused women have no more right to refuse to testify than other crime witnesses.[232] This argument is unsatisfying from a feminist perspective because it relegates domestic violence reform to a matter of crime control rather than women's empowerment.[233] Activists, however, had another argument for discounting the desires of nonprosecutorial abuse victims, which ultimately proved to be persuasive to liberals.

Liberalism rests on the presumption that free choice is possible and downplays social, economic, and cultural conditions that limit certain individuals' choices and renders other choices imperfect.[234] However, even within the liberal model, there are some conditions that prevent or negate choice.[235] In the liberal model, choices conditioned by direct threats or coercive behavior are not binding.[236] It is no wonder, then, that the most common

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230. *See supra* notes 31–32 and accompanying text.

231. *See supra* note 211 and accompanying text.

232. *See, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1891 (1996) (advocating treating abused women like other reluctant witnesses, including witnesses in cases involving "organized crime, [and] gang- and drug-related offenses"); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 180 (1997) ("By proceeding with the prosecution with or without victim cooperation, the prosecutor minimizes the victim's value to the batterer as an ally to defeat criminal prosecution.").

233. *See* SCHNEIDER, *supra* note 195, at 183 ("[F]eminist liberatory discourse challenging patriarchy and female dependency, which shaped [domestic violence] work, has been replaced by discourse emphasizing crime control."); Deborah Epstein, Margaret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 466–67 (2003) (observing that no drop policies are consistent with prosecutorial goals and "the potential impact of the prosecution on the victim is not considered particularly relevant").

234. *See supra* notes 52–53 and accompanying text.

235. De jure limitations are an obvious category. *See supra* notes 37–38 and accompanying text (discussing liberal feminists' calls to dismantle de jure barriers to women in the workplace).

236. *See* Anthony T. Kronman, *Contract Law & Distributive Justice*, 89 YALE L.J. 472, 475–77 (1980) (noting that the libertarian theory of contract allows for rescission only when a third party's right are violated or the agreement was coerced); Mack & Gaus, *supra* note 257, at 115.

argument for divesting abuse victims of power over the criminal case is that abused women are coercively controlled by their abusers; thus, allowing them to exercise choice operatively permits the abuser to manipulate the criminal trial.[237]

When one makes a choice under duress, the general liberal response is to allow rescission of that choice[238] or refrain from holding the individual accountable for that choice.[239] In no-drop domestic violence jurisdictions, however, when a woman decides she does not want to prosecute, in the best case, her choice is ignored as an a priori matter.[240] In the worst case, her choice is held against her, and in an effort to make her change her mind, the state uses its own coercive powers to counter the assumed duress she has been placed under by her partner.[241]

To maintain the duress argument, reformers and prosecutors have had to publicize an essentialist and objectifying view of abused women's life conditions and even psychology. They characterize battered women as "innocent": They play no willful part in the violence or maintenance of the relationship, and any reluctance to prosecute originates from the abuser's direct threats.[242] This paradigmatic image of a battered woman, which

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237. *See, e.g.*, Hanna, *supra* note 232, at 1891 ("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."); Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CALIF. L. REV. 643, 687 (1997) ("Because batterers have such overwhelming control over their victims, and the system required victims to control the prosecution, batterers, in effect, were being given control over the disposition of their own criminal case.").

238. *See* Mack & Gaus, *supra* note 257, at 115; *supra* note 236 and accompanying text (discussing duress in liberal contract theory).

239. *See* MODEL PENAL CODE § 2.09(1) (1985) ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist."); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1339 (1997).

240. *See* Wills, *supra* note 232, at 180 ("A 'no drop' policy means prosecutors will not allow batterers to control the system of justice through their victims.").

241. *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 203 ("[P]rosecutors may subpoena [domestic violence] victims and sometimes may incarcerate them to compel their testimony."); Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. CAL. L. REV. 213, 241 (2005) ("[S]ome 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 . . . . In the most extreme cases, prosecutors threaten to or do, in fact, jail the victim . . . .").

242. *See* Randall, *supra* note 202, 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

propelled forward procriminalization reforms, has been publicized in a racially specific manner. Farrah Fawcett in *The Burning Bed* and Nicole Brown Simpson were the early icons of domestic violence reform—white, beautiful, innocent, nonpoor, devoted mothers, who had been subjected to horrific violence, had made past efforts to separate from their abusers, and could have been saved by tougher prosecution.[243] In the absence of evidence of direct threats, the discourse moves toward the psychological state of the abused woman. Characterizing battered women as psychologically damaged and problematically dependent makes it easy to dismiss any choice not to prosecute.[244] Battered women have become, by definition, incapable of exercising agency.

There is another way in which reformers have maintained the claim that agency-denying domestic violence laws are not illiberal. Supporters contend that mandatory prosecution actually renders victims free to exercise their true preference, which is of course to leave the abuser. The idea is that by removing the only constraint on women's ability to prosecute (the coercive actions of batterers), women are able to pursue what they really desire—jailing the man and getting out of the relationship.[245] Domestic violence activists portray victims' actual

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fear"); *see also* Wills, *supra* note 232, at 177 (asserting that the "great majority" of domestic violence victims "have neither the will nor the courage to assist prosecutors").

243. *See* Laurie L. Levenson, Stereotypes of Women in the O.J. Simpson Case (Dec. 7, 1994), Doc. No. 681370 (Westlaw O.J. Simpson Case Commentaries Database) ("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."); *see also* Mahoney, *supra* note 153, at 2–4 (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); *cf.* Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 225, 230 (1996) (arguing that racial and sexual imagery in the media can "undermine our ability to accurately perceive how hierarchical relations of dominance and subordination have marked our history and our present and threaten our future").

244. *See* O'Connor, *supra* note 215, at 960 (noting the "commonly held notion of battered women as weak, passive or even pathological for staying with abusive men"); Randall, *supra* note 202, at 123–24 (discussing how the "battered woman syndrome" conjures images of helpless, damaged, and dysfunctional women who are "incapable of autonomy or rationality in their actions"). Some reformers advocate outright guardianship for abused women. *See, e.g.*, Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 930–31 (2006); Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 612 (2000) ("Guardianship is a legal remedy that should be used when a battered woman is coercively controlled and cannot protect herself.").

245. *See* Wills, *supra* note 232, at 180 ("Supporters of 'no drop' domestic violence policies realize that empowering victims by giving them the discretion to prosecute . . . in actuality only empowers batterers to further manipulate and endanger their victims'

decisions not to prosecute as coerced while characterizing forced prosecution as freeing victims to make authentic choices.[246] This way, they can argue that diminishing the power of victims who are reluctant to prosecute is really a form of liberation.

As victims, the state divests abuse survivors of agency. But prosecutors have no problem treating those same survivors as agents when they have the misfortune of becoming defendants. Prosecutors hold battering victims unconditionally responsible for acts of child abuse and neglect,[247] even those premised on failing to intervene.[248] The presumption that battered women are perpetually coerced to remain in the relationship, which prosecutors use to disempower nonprosecutorial victims, suddenly evaporates when battered women are charged with murdering their husbands. In such cases, the state routinely maintains that battered women are free agents, capable of leaving their abusive situations and seeking redress through nonviolent and official means.[249]

In responding to the contention that battered women who kill are pure agents, reformers could have emphasized the myriad of factors, from direct physical threats to lack of resources, which render the choice to kill rather than leave necessary and reasonable.[250] However, for strategic reasons related to the patriarchal nature of the legal system, reformers

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lives . . . ."); Gruber, *Feminist War*, *supra* note 20, at 813–14 (noting the domestic violence movement's assumption that victims are too scared to pursue the prosecutorial route they really desire).

246. By the same token, it freed conservatives to blame women who stayed with abusers for failing to take advantage of the ample prosecutorial opportunities. *See* Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1258 (2001) (contending that conservatives "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 (2001) ("[A]ttention to criminal remedies actually contributes to skepticism that battered women continue to face difficulties in the courts.").

247. *See* Coker, *supra* note 214, at 1047–48 ("An investigation into domestic violence may result in the victim losing her children or in her own incarceration or both.").

248. *See* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 553 (1992) ("[B]attered mothers whose children are abused by their batterers have been prosecuted for child abuse or neglect, and even for manslaughter, on the theory that they have failed to protect the child from the batterer.").

249. *See* Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 498–99 (1996) (observing that battered women who kill may be treated as agents rather than victims).

250. *But see* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 449 (1991) (advocating as an alternative to the battered woman syndrome defense a self-defense law that makes relevant the specific circumstances predicating the battered woman's decision to kill).

elected to characterize such battered women as objects of an aberrant psychological syndrome that prevented them from leaving.[251] In the end, the criminal system's treatment of battered women flips unsatisfyingly between ignoring and punishing battered women's choices, and as Elaine Chiu notes,

> [T]he only consistency in the present system is that battered women always end up with the short end of the stick: either being denied a voice by the system that is supposedly acting in their best interest or being blamed for abuse that they cannot completely control when the consequences of such abuse are extreme . . . .[252]

Consequently, in reform discourse, victims of domestic abuse are routinely described as objects of terrifying violence or mental conditions caused by such violence.[253] Batterers occupy the role of empowered, evil manipulators who continually perpetrate violence.[254] These characterizations helped cement the popular mindset that batterers are aberrant losers with whom no woman in her right mind would stay.[255] This discourse has the effect of creating a bright line between battering and other forms of dominating male behavior. Batterers engage in extreme brutality and are unlike "ordinary" men, who are permitted to be sexist or nonviolently controlling and still fall under the umbrella of "normal."[256] Batterers thus constitute an exceptional minority among men, who do not represent prevailing cultural attitudes.

Feminists' embrace of harsh criminal policies and employment of a dialectic involving innocent victims and monstrous defendants mirrored the general trajectory of criminal

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251. *See* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 6 (1994) (asserting that the battered woman syndrome defense "denies that women have the same capacity for self-governance that is attributed to men").

252. Chiu, *supra* note 246, at 1225.

253. *See supra* note 244 and accompanying text.

254. *See* Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 344 (1995) (noting the "[i]naccurate images of abusers as 'out of control' monsters"). The legal literature on domestic violence is rife with narratives depicting horrific crimes committed by monstrous men. *See* Gruber, *Feminist War*, *supra* note 20, at 746 n.15 (observing "the multitude of scholarly articles on domestic violence that draw in the reader by beginning with graphic descriptions of the worst cases of abuse"); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 35 (1991).

255. *See* Gruber, *Feminist War*, *supra* note 20, at 808 (noting that people "uniformly look upon 'wife beaters' with hatred and disdain"); *cf.* Mahoney, *supra* note 153, at 11 (asserting that judicial opinions treat domestic violence as "aberrant and unusual").

256. One study reveals 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*, PLANETPSYCH.COM, http://www.planetpsych.com/zPsychology_101/domestic_violence.htm (last visited Mar. 23, 2013).

law at the time. Throughout the 1980s and 1990s, the United States was in the throes of a tough-on-crime wave in which concepts like rehabilitation and forgiveness gave way to retribution and righteous indignation.[257] In the crime control moral equation, nuanced considerations of defendants' economic conditions, social circumstances, and experiences of discrimination yielded to reductionist dichotomies of good and evil, right and wrong.[258] This feminist–crime control convergence created some very strange bedfellows, as powerful conservative men with abysmal track records on women's issues adopted domestic violence activists' agenda and vocally extolled the virtues of getting tough on batterers.[259] John Ashcroft advocated strict anti-domestic violence laws and characterized pursuing prosecution as the woman's duty to her children.[260] George W. Bush ensured the public that the "government is engaged in the fight" against domestic violence through prosecutors who are

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257. *See generally* Gruber, *Feminist War*, *supra* note 20, at 763–68; *supra* notes 297–323 and accompanying text (discussing the rise of tough-on-crime ideology). Tough-on-crime ideology is most readily associated with President Ronald Reagan, who stated:

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

Ronald W. Reagan, *Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut* (June 20, 1984), THE PUBLIC PAPERS OF PRESIDENT RONALD W. REAGAN, http://www.reagan.utexas.edu/archives/speeches/1984/62084c.htm; *see also G.O.P. Testimony on Violence*, N.Y. TIMES, Aug. 1, 1968, at 20 (quoting then-governor Reagan as stating: "It is time to restore the American precept that each individual is accountable for his actions.").

258. *See* Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 GEO. MASON U. C.R. L.J. 145, 151–52 (2004) (describing the conservative "free will" ideology that asserts criminals make rational choices and that African Americans choose to promote a subculture of lawlessness); *see also* David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2074 (2004) (asserting that modern conservatives justify harsh criminal policies by advancing a binary view of morality in which there are inherently good or bad people).

259. *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1514–15 (1998) (noting the convergence of feminist and social conservatives on the domestic violence criminalization issue).

260. He stated:

> One victim of domestic abuse who found help described this transformation [of family values] better than I ever could. She said, quote, "I finally realized the truth, that I was hurting not only myself, but I was hurting my children even more. I was teaching them by example that they deserved to be abused and that violence was acceptable."

Prepared Remarks of Attorney General John Ashcroft, *supra* note 213.

"finding the abusers, and . . . throwing the book at them."[261] The world had been officially divided into two categories: autonomous abusive men (and their sexist sympathizers) and everyone else (who, of course, believed that such men should be spared no mercy by the criminal system). Today, resources continue to be poured into jailing (disproportionately minority)[262] men for battering, and the anti-abuse movement seems far removed from its progressive feminist roots.[263]

Consequently, the story of domestic violence reform illustrates the operation of the problematic feminist orthodoxies in positive law. The push toward criminalization, especially mandatory criminal intervention, reflected and was assisted by an essentialist view of domestic violence victims, their life circumstances, and their true desires. Domestic violence reform rhetoric also adopted absolutist and de-contextualized views of good and evil. Moreover, reformers unconditionally embraced the notion that privacy could only be a bad thing in abused women's lives. The reform movement also failed to adopt a nuanced approach to female agency, vacillating between viewing abused women as complete objects of batterers or defective psychology and, alternatively, as complete agents responsible for their poor choices. Finally, deploying essentialist characteristics of both abuse victims and abusers, activists successfully argued for tougher criminal laws in an era when criminalization was problematically elevated to the only acceptable form of governing.

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261. President George W. Bush, Bush Proclaims October Domestic Violence Awareness Month, Remarks by the President on Domestic Violence Prevention (Oct. 8, 2003), http://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031008-5.html.

262. *See* Coker, *supra* note 214, at 1034–35 & n.104 (stating 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" and citing studies); *see also* LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 31 (2003) (noting the disproportionate rate of prosecution of men of color for intimate abuse crimes).

263. *See* MS. FOUND. FOR WOMEN, SAFETY & JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM 6 (2003), *available at* http://files.praxisinternational.org/safety_justice.pdf (noting the concern that the modern anti-abuse movement relies too heavily on the criminal legal system). According to the report:

> 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.

V. NEOFEMINIST ANALYSES OF DOMESTIC VIOLENCE LAW REFORM

In recent years, feminist legal scholars have questioned many of the philosophical, discursive, and doctrinal moves of domestic violence law reform. This body of scholarship also analyzes many second-wave orthodoxies in the domestic violence context. One of the most critiqued aspects of the anti-domestic violence movement is its adoption and reification of essentialist characterizations of abused women (and abusers). The discourse justifying harsh domestic violence policies, particularly mandatory policies, situates battered women in a particular way. Again, reform has emphasized innocent, passive abused women who want to use the criminal system for retribution and to separate from their partners but are thwarted by their abusers' threats (or a dependent personality) and an unresponsive penal system.[264] Batterers are empowered, culpable, and evil, and they can only be deterred by harsh sanctions (which they also deserve).[265]

These reductionist descriptions are the subject of much criticism, including a powerful racial critique. In addition to the overtly racialized narratives of battered women, including those discussed earlier,[266] the paradigmatic abused woman's inherent characteristics carry racial meaning. One commentator notes that "[t]he dominant images of Black women as domineering, assertive, hostile, and immoral may hinder a judge's or juror's ability to comprehend a Black woman's act of self-defense as based on 'learned helplessness.'"[267] Domestic violence reform discourse fails to account for, and even capitalizes on, extant racial stereotypes. In doing so, it renders invisible minority victims who society does not regard as passive and weak. Linda Ammons discusses the case of Pamela Hill, an abused African-American woman who killed her partner during a struggle.[268] The prosecutor in

264. *See supra* notes 242–246 and accompanying text.

265. *See supra* notes 254–256 and accompanying text.

266. *See supra* note 243 and accompanying text; *cf.* Coker, *supra* note 214, at 1028–29 ("Research purportedly about 'battered women' or 'domestic violence' frequently rests on data gathered only or mainly about white women.").

267. Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 204 (1991).

268. Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1006–07 (1995).

Hill's case stated in closing argument that Hill was not "carrying the banner of Nicole Simpson."[269] Ammons notes:

> 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.[270]

The unfortunate result of this discourse is that black abuse victims are less likely to get relief from the criminal justice system and more likely to be arrested under mandatory arrest statutes as "mutual combatants."[271]

Moreover, amplified prosecution efforts tend to disparately impact black and Latino men. While there are stereotypes of batterers that run the racial gamut from Chicano gang member to white banker, like most tough-on-crime reforms, the burdens of harsher domestic violence laws have fallen most heavily on minority men.[272] The sad reality is that many people's conscious or subconscious picture of a violent criminal is a minority male, regardless of the nature of the violence.[273] In turn, the very

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269. *Id.* at 1006 (quoting James Ewinger, *Woman Gets Prison in Boyfriend's Killing*, CLEVELAND PLAIN DEALER, Sept. 20, 1994, at 3B).

270. *Id.* at 1006–07.

271. *See* Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795, 806 (2004) (book review) (noting the possibility that mandatory arrest policies could 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"); Meghan Condon, Note, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL'Y 487, 492 (2010) ("Minority women are more likely to be arrested than white women, and when they are arrested, they are charged with more serious crimes than white women.").

272. A 2001 Milwaukee County, Wisconsin study reported that although blacks represented only 24% of the population, they constituted 66% of prosecuted domestic-violence arrests. Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 309, 319 (2003) (citing studies). By contrast, whites, who comprised 62% of the population, represented only 32% of prosecuted domestic-violence arrests. *Id.*; *see also* Maguigan, *supra* note 19, at 439 ("Certainly, African American men and Latinos are disproportionately represented among domestic violence defendants in criminal courts . . . .").

273. *See* Henderson, *supra* note 149, at 586–87 (discussing depictions of criminals in popular culture).

structure of our discretionary criminal system puts minorities in a position to be disproportionately harmed by tougher criminal laws[274] and disproportionately unaided by lenient criminal policies.[275]

Critics further maintain that by essentializing battered women as pro-prosecution or scared, domestic violence reform discounts minority and immigrant women's variegated reasons for avoiding involvement in the domestic violence criminal system.[276] For women whose partners are noncitizens, for example, the potential repercussions of mandatory prosecution are quite dire. If the partner is deported due to a conviction for domestic violence,[277] the woman permanently loses a source of financial support, and her children lose their father.[278] As a rational (not pathological) actor, the woman might decide that such a turn of events is not the best possible result for her. Moreover, undocumented immigrant victims are justified in the fear that involvement with the criminal justice system may lead

274. *See* Coker, *supra* note 214, at 1034–35 & n.104 (citing findings that minorities are disproportionately "the subject of criminal justice intervention in domestic violence cases"); Gruber, *Feminist War*, *supra* note 20, at 797–98 ("By effectuating mandatory 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, it resulted in the widespread incarceration of minority men." (footnote omitted)).

275. *See* Jean Dubail, *Pretrial Program May Favor Whites*, SOUTH FLORIDA SUN SENTINEL, Aug. 16, 1990, at 1A, *available at* http://articles.sun-sentinel.com/1990-08-16/news/9002090256_1_whites-account-white-share-disparity (reporting that "more than three out of four participants in Florida's 'pretrial intervention' programs—which allow first-time felony offenders to avoid prison and keep their records clean—are white" which "is a much larger proportion than the white share of the general criminal population"). While aware of color-based disparities within the justice system, domestic violence reformers "dismiss the racial critique as providing a 'license' for men of color to abuse." Gruber, *Feminist War*, *supra* note 20, at 806; *see, e.g.*, Hanna, *supra* note 232, at 1881–82 ("[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."); *Women and Violence: Hearing Before the S. Committee on the Judiciary*, 101st Cong. 124–25 (1991).

276. *See* Coker, *supra* note 214, at 1048–49 (discussing potential negative effects of prosecution on immigrant and minority women); Gruber, *Feminist War*, *supra* note 20, at 813–14 (describing several reasons why minority and immigrant women might avoid prosecution).

277. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006) ("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.").

278. *See* Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L.J. 27, 38 (2002) (asserting that "deporting a batterer places most battered immigrant women in a dire economic situation" because a battered woman is more likely to choose abuse over "let[ting] her children go hungry").

to their own deportation.[279] Racial scholars further contend that the prosecutorial model downplays the extent to which minority women fear and resent the criminal justice system.[280] Michelle Jacobs notes, for example, the criminalization model underestimates black women's "fear [of] contributing to the already unbearable level of criminal justice intrusion into the lives of black men."[281]

Scholars also argue that the one-dimensional battering narrative assumed by certain domestic violence reforms harms women across the racial spectrum. According to critics, the essentialist characterizations are not only demeaning and stereotyping,[282] but they also marginalize the experiences of many battered women, regardless of race.[283] As useful as essentialist images may be to those favoring a procriminalization/separation agenda or eager for a cathartic expression of anger against abusers, they are simply inaccurate descriptions of the experiences and feelings of many real victims.[284] There are a myriad of reasons why battered women are reluctant to separate from and prosecute their partners. The prosecutorial model, for

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279. *See* Coker, *supra* note 214, at 1049 (recounting a story in which a domestic-violence victim who fought back was arrested, convicted, and faced deportation); Shapiro, *supra* note 278, at 37 (noting that because of negative police views of immigrants, battered immigrant women "are more likely to be arrested when they react violently in a domestic dispute").

280. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257–58 (1991) (noting the "unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile"); Jacobs, *supra* note 271, at 806.

281. *See* Jacobs, *supra* note 271, at 806. Another compounding problem is that in socially degraded areas, people have a tendency to call 911 or the police when seeking social services or when there is a need to address emergencies and other problems. What these poor and minority victims want is immediate relief and not necessarily to have the criminal system take over. Unfortunately calling the police can push them down a path that includes not only mandatory prosecution of and separation from their partners, but also their own prosecution for other crimes.

282. *See* Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975 (1995) (calling the characterizations of battered women as defectively dependent a "traumatization model" that "provide[s] an inaccurate, reductionist, and potentially demeaning representation of woman battering"); O'Connor, *supra* note 215, at 960 (observing that the common characterization of battered women as "weak, passive or even pathological . . . has fueled a societal disbelief and distrust of the victim").

283. *See* SCHNEIDER, *supra* note 195, at 62; O'Connor, *supra* note 215, at 960 (explaining that many different types of domestic violence victims do not fit the "battered woman stereotype").

284. *See* SCHNEIDER, *supra* note 195, at 62 ("Just as the term 'battered woman' is static and incomplete, so too is the notion that one paradigmatic 'battered woman' exists."); *see also* Randall, *supra* note 202, at 123 (reviewing the criticism of several academics of essentialist images).

example, ignores the economic complexities of many battered women's lives.[285] Abuse victims often engage in complicated calculi, balancing the harm of abuse against the pecuniary benefits of staying with the partner, taking into the account the possibility of temporary relief through selective utilization of criminal and civil processes.[286] The calculus may very well dictate that permanent separation and the partner's incarceration is not the best outcome.[287] Finally, the popular narrative often overlooks women's emotional attachment to abusers and desire for an intact family structure.[288] The domestic violence movement either disregards the possibility that women love batterers and value their existing families or writes off such emotions as symptoms of battered women's defective psyches.

Indeed, critics emphatically object to mandatory policies that use the assumption of direct duress or pathological psychology to ignore battered women's choices.[289] Some take a hardline liberal, pro-autonomy stance that battered women's choices should be

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285. *See* Gruber, *Feminist War*, *supra* note 20, at 755 n.61 (observing that many women lack the economic independence "that would enable them to leave abusive settings" (quoting Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1156 (1993))).

286. *See* David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems and Effects, in* LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 150–51 (N. Zoe Hilton ed., 1993) (citing a study showing that battered women bargain for their safety); Coker, *supra* note 214, at 1018 (noting that victims resist 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 [regarding prosecuting] may be just the power the battered woman needs to stop the violence in her life").

287. Donna Coker notes the costs to women of a law requiring employer notification of a defendant's domestic violence conviction:

> 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 214, at 1016.

288. *See* Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 415 (2005) (observing that women fail to prosecute abuse for reasons including "desire to keep the family unit intact, [and] concern for their children, [and] emotional attachment to the abuser" (quoting Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. OF ISSUES IN NURSING (2002), http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.html)).

289. *See supra* notes 237–244 and accompanying text.

followed no matter what.[290] However, many other critics are also liberalism skeptics, intimately aware of how the language of "free choice" can reinforce structural inequality.[291] They consequently reject both the authoritarian displacement of victim autonomy and the claim that the victim's nonprosecutorial choice justifies institutional blindness to abuse. Instead, these theorists argue that the state and society have an obligation to understand why certain women "choose" to stay with abusers and to attempt to alleviate the subordinating influences that condition that choice.[292]

Certainly, many battered women do fear reprisal for prosecuting and feel safer when the state can prosecute without their consent. For many other women, however, the choice not to prosecute is based on other factors such as economics, children, fear of the criminal system, and even love.[293] Moreover, even when a woman is too scared to prosecute, she is often in the best position to know how to secure her own safety.[294] When a woman's choice not to prosecute is preceded by a subordinating factor, such as poverty, immigrant status, or lack of child support, the solution should not be to force her into a choice that is potentially more damaging to her than leniency toward the abuser, but to offer services to alleviate those constraining conditions.[295]

However, the trajectory of domestic violence reform moved away from distributive programs and toward penal solutions.[296]

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290. *See, e.g.*, BETH KIYOKO JAMIESON, REAL CHOICES: FEMINISM, FREEDOM, AND THE LIMITS OF LAW 172 (2001) ("A feminist theory of liberty must not protect the right of the abuser to harm but must protect the right of the woman to decide for herself whether to leave."); Goodmark, *supra* note 19, at 46 ("If empowerment is still the goal of the battered women's movement, we must accept that women who have been battered have the right to make choices that we might disagree with, dislike, or fear.").

291. *See supra* notes 52–54 and accompanying text.

292. *See* Gruber, *Feminist War*, *supra* note 20, at 752, 824–25 (arguing that domestic violence reform should "envision[ ] all parties in the domestic violence system as complex actors who are capable of making free choices and yet constrained by their social realities"); Randall, *supra* note 202, at 142–43 (suggesting that the state shift focus "onto the barriers which interfere with and/or limit the possibility of a successful prosecution").

293. *See supra* note 288 and accompanying text.

294. *See* Mordini, *supra* note 215, at 323 (contending 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").

295. *See supra* note 292 and accompanying text.

296. *See supra* note 198 and accompanying text. Sue Osthoff, the Director of the National Clearinghouse for the Defense of Battered Women (NCDBW), notes, "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 19, at 432–33 (internal quotation marks omitted).

This trajectory appears to reflect the popular sentiments of a large segment of American society, which over the past several decades found welfare policies and even the very concept of the social safety net more and more intolerable, while increasingly becoming procrime control and promilitary intervention.[297] Many are familiar with the "strange bedfellows" critique of domestic violence.[298] But the critical analysis of the criminalization bent of this feminist reform is much more than "sticking it" to domestic violence activists by pointing out the hypocrisy of aligning with conservative, even misogynist, crime control zealots. Rather, scholars argue that the prosecutorial "solution" to domestic violence and its concurrent bolstering of the antidistributive penal state is really at odds with providing distributive justice to women most in need of help.[299]

Some respond to the critique of criminalization by optimistically emphasizing that we can "have it all." The state can simultaneously pursue criminal policies and seek social solutions to counter the antecedents of abuse.[300] Critics of the prosecution model rejoin that understanding the recent history of the American penal system leads inexorably to the conclusion that pursuing harsh criminal policies undermines substantive

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297. *See* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 803 (2003) (observing that this shift in mindset occurred amidst "global economic changes" and "white backlash" to government-supported racial equality); *supra* note 257 and accompanying text.

298. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 177 (2007) (noting that the role of lawmakers has recently "flipped" regarding the intrusiveness of crime in the governance of family); Coker, *supra* note 19, at 803 (noting that domestic violence criminalization is "particularly attractive" to politicians seeking to be tough on crime); Gruber, *Feminist War*, *supra* note 20, at 800 (arguing that the domestic violence criminalization agenda "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"); Micchio, *supra* note 19, at 238 ("With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the 'zero tolerance' bandwagon.").

299. *See* SCHNEIDER, *supra* note 195, at 198 ("If feminists are to engage with the state, it must be to ensure that the interrelationships among violence and gender, work and violence, economic resources, homelessness, and the material constraints of gender are central to both theory and practice in domestic violence legal reform efforts."); 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) ("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.").

300. *See, e.g.*, Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1299–1300 (2010) (asserting that future domestic violence policies should improve criminal laws and address status-based economic disparities).

equality.[301] The characterization of battered women as innocent objects of abuse and batterers as internally evil, fully-responsible agents reflects and reinforces the popular conservative political rhetoric that uses the concept of individual criminality to bolster free-market values.[302] Since the 1980s, drug dealers, murderers like Willie Horton, and lazy welfare mothers have been the essential icons representing the failure of social welfare and why there are no excuses for poor individual choices.[303] Emphasizing that evil individuals cause social problems allows the government to be seen as a white knight using its prosecutorial powers to stamp out social blight, while otherwise maintaining the attributes of small government.[304]

In addition, the substance of criminal law in the United States has long had an antidistributive bent. It defines culpability by a small number of the defendant's choices within a

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301. *See* SIMON, *supra* note 298, at 190–91; Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1206 (2005) ("Invoking a criminal justice framework leads us to alter fundamental understandings about the nature and scope of the risk posed by particular behaviors.").

302. *See* Gruber, *Feminist War*, *supra* note 20, at 764–65 (discussing how conservatives' concept of individual criminality "characterized crime not as a social ill, but rather as an independent force hostile to American society"); *supra* note 257 and accompanying text.

303. *See* Henderson, *supra* note 149, at 586–87 (observing that in popular consciousness, "[d]efendants are subhuman; they are monsters"); Jon Hurwitz & Mark Peffley, *Playing the Race Card in the Post-Willie Horton Era: The Impact of Racialized Code Words on Support for Punitive Crime Policy*, 69 PUB. OPINION Q. 99 (2005); Pearson Liddell, Jr., Stevie Watson & William D. Eshee, Jr., *Welfare Reform in Mississippi: TANF Policy and Its Implications*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1107, 1113 (2003) ("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."). President Reagan stated his philosophy as follows:

> 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.

Ronald W. Reagan, *Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut* (June 20, 1984), RONALD REAGAN PRESIDENTIAL LIBRARY, http://www.reagan.utexas.edu/archives/speeches/1984/62084c.htm.

304. *See* Jonathan Simon, *From a Tight Place: Crime, Punishment, and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 854 (1999) (book review) ("Both Presidents Reagan and Bush embraced punishment as one of the few forms of domestic governance defensible within their political ideology." (footnotes omitted)).

limited time frame.[305] Only once the defendant is convicted and proceeds to sentencing does the larger social context in which the defendant's choices occurred have some relevance. Today's sentencing guidelines, however, regard defendants' backgrounds as wholly immaterial to the question of punishment.[306] The perverse racial result is that while minority status is included in many people's images of a prototypical criminal and creates the risk of greater exposure to punishment, minorities' and immigrants' experiences of subordination cannot be grounds for relief from criminal sanctions.[307] This explains in part why policies that tend to increase police officers' power, strengthen criminal penalties, or make it easier to achieve conviction disproportionately affect minorities.[308]

The language of domestic violence reform appeals to conservatives and a significant segment of the public precisely because it divorces domestic violence from its sociocultural predicates. In this way, authoritarian domestic abuse laws directly undermine feminism's "commitment to a more egalitarian distributive structure and a greater sense of collective responsibility."[309] Criminalization assumes that domestic violence is a matter of what a small subset of evil men do to their female partners and not a matter of women's structural inequality, certain men's racial and ethnic subordination, or cultural attitudes about gender roles.[310]

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305. *Cf.* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 594 (1981) (contending that the criminal law's "arational choice between narrow and broad time frames keeps us from having to deal with more explicit political questions").

306. *See, e.g.*, 28 U.S.C. § 994(e) (2006) (noting "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant"); U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 5H1.12 (2009) (deeming irrelevant a defendant's "[l]ack of guidance as a youth" or "disadvantaged upbringing"); *id.* § 5H1.10 (prohibiting consideration of socio-economic background).

307. *See* U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 5H1.10 (stating that race and national origin "are not relevant in the determination of a sentence"); *supra* note 149 and accompanying text.

308. *See supra* notes 274–275 and accompanying text; *see generally* L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2044–52 (2011) (discussing the role of unconscious racial bias in policing).

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

310. Merry, *supra* note 228, at 359 (contending 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"); *see also* Mahoney, *supra* note 153, at 12 (noting that the focus on "individual violent actors" conceals "the ways in which state and society participate in the subordination of women").

Consequently, while most in society condemn domestic violence as a hideous crime, many do not believe that curtailing battering involves sweeping social changes. Elizabeth Schneider explains:

> 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 child care, lack of access to divorce, inadequate child support, problems of single motherhood, or lack of educational and community support.[311]

Finally, scholars critique the domestic violence reform movement's treatment of the public–private distinction. As noted before, one of the first strategic moves in domestic violence reform was to counter the notion that battering is a private matter inappropriate for state intervention.[312] Since then, the state has been more than willing to intervene in perceived dysfunctional homes.[313] Rarely does this intervention come in the form of elective distributive benefits. Rather, the preferred form of intervention is criminal in nature.[314] Even the noncriminal interventions, such as civil protection orders and child protective services, involve deprivation, separation, and monitoring.[315] Jeannie Suk asserts that the misdemeanor domestic violence system and its broad deployment of civil protection orders empowers the government to go beyond preventing imminent abuse and reorder nearly all aspects of "disordered" homes.[316] She notes the system's tendency to alter the nature of apparently abusive relationships through rearranging custody, residency, and financial obligations, and even imposing de facto divorce.[317] Suk concludes by urging "critical reflection on the increasing subordination of

311. SCHNEIDER, *supra* note 195, at 72.

312. *See supra* note 206 and accompanying text.

313. *See* Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 504 (2009) (noting the opposing views of "the home and the woman in it as respectable and thus needing privacy, or alternatively, as disordered and thus needing police protection from privacy").

314. *See* SCHNEIDER, *supra* note 195, at 183 (making the case that "feminist liberatory discourse challenging patriarchy and female dependency . . . has been replaced by discourse emphasizing crime control").

315. *See id.* at 742 n.2 (discussing the civil protection order process).

316. *See* Suk, *supra* note 191, at 43–53; Murray, *supra* note 188, at 1266–68 (asserting that criminal law has always assisted family law in defining family relationships).

317. Suk, *supra* note 191, at 47–50, 53, 59.

individual autonomy in domestic space to state control in the public interest."[318]

In the end, domestic violence reform has been a mixed bag of women's empowerment and disempowerment, political progressivism and conservatism, and social change and stagnation. Domestic violence reform has surely profoundly benefitted many women. Restructured legal mechanisms forced state actors to take abuse seriously, and society changed its view of battering from legitimate discipline or a private matter to a serious crime that monstrous men perpetrate.[319] Nevertheless, the intervention proved to be far less radical as a matter of equalizing gender relationships generally, improving the battered women's socioeconomic stature, and ameliorating the subordination of minorities and other groups. Moreover, the anti-abuse movement has often deployed essentialist images that assume battered women share the same injurious experiences, affected psyches, and prosecutorial desires.[320] It has also supported authoritarian policies that subordinate battered women's choices to larger goals of criminal retribution and incapacitation.[321]

This has engendered a vocal neofeminist critique, lodged by scholars very aware of how battering reflects and reinforces gender hierarchy. The critique objects to reductionist characterizations of abuse survivors and batterers that disadvantage minorities, divorce domestic violence from social inequity, and form the groundwork for discounting victims' choices. It censures domestic violence reform's complicity in bolstering the American penal state, a racially subordinating institution that is diametrically opposed to distributive strategies. Finally, neofeminists critique domestic violence reform's tendency to undermine family privacy.

VI. CONCLUSION: A NEOFEMINIST MOMENT?

This Part recapitulates the nature of neofeminism, discusses its temporal fit into the larger feminist movement, and considers

318. *Id.* at 70.

319. *See* SCHNEIDER, *supra* note 195, at 27 ("Some reforms have been institutionalized, and the problems of battered women have achieved credibility and visibility."); JONATHAN SIMON, GOVERNING THROUGH CRIME 177 (2007) ("The role of crime in the governance of the family has virtually flipped in the last two generations.").

320. *Cf.* Goodmark, *supra* note 19, at 44–45 (criticizing dominance feminism's conception of a single, universal "woman").

321. *See* Gruber, *Feminist War*, *supra* note 20, at 766–68 ("Tough on crime ideology is the 'perfect storm' fusion of incapacitation theory and retributivism." (footnote omitted)).

how recognizing a neofeminist moment might impact the current political discourse. Neofeminism may be more properly characterized as an evolution than revolution in feminist theory. It is a set of ideas that emerged as scholars had the opportunity to gauge the larger successes and drawbacks of second-wave feminism's theoretical and legal interventions. Rather than characterizing women as autonomous liberal agents or perpetual objects of oppression, neofeminism acknowledges that women must navigate the complex matrix of social, cultural, and institutional constraints.[322] Rather than assuming there is but one monolithic woman's voice, neofeminism recognizes that women's needs and identities are ever-shifting and racially, culturally, and economically contextual.[323] Rather than exclusively relying on prohibitory law as the vehicle of change, neofeminist theories seek innovative ways to shape a nonhierarchical society.[324] Rather than prioritizing women's needs over the needs of other subordinated groups (including certain men), neofeminists recognize that women are often the beneficiaries of breaking down larger structures of subordination.[325]

Neofeminism is not a postmodern rejection of feminism's embrace of gender categories.[326] Although critical of many second-wave feminist truisms, neofeminist scholarship continues to centralize women's empowerment, as socially constructed, contextual, and impossible to concretely define as the category

322. *See supra* notes 181–183 and accompanying text.

323. *See* HOOKS, *supra* note 2, at 31 ("Feminism as a movement to end sexist oppression directs our attention to systems of domination and the inter-relatedness of sex, race, and class oppression."); *supra* notes 131–135 and accompanying text.

324. *See supra* notes 298–299 and accompanying text.

325. *See* HOOKS, *supra* note 2, at 156; *supra* note 166 and accompanying text. There is an emergent school of legal feminism, "masculinities studies," which concentrates specifically on the interplay of constructions of masculinity and subordination. *See* Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 684–85 (2009) ("[M]asculinities studies describes the ways in which assumptions about the meaning of manhood are used to justify particular ideas and institutions."); *see generally* NANCY DOWD, THE MAN QUESTION (2010) (discussing how masculinities scholarship can be incorporated into feminist theory).

326. *See supra* note 14 and accompanying text (discussing postmodern breaks from feminism); *cf.* James Gathii, *Exporting Culture Wars*, 13 U.C. DAVIS J. INT'L L. & POL'Y 67, 79 n.93 (2006) ("Postmodern feminist discourses are distinguished from other sub-disciplines of feminism most prominently on their theory that sex is socially constructed through language and therefore not determinable or natural and that there is no single cause for women's inequality."); Gowri Ramachandran, Manliness *by Harvey Mansfield*, 19 YALE J.L. & FEMINISM 201, 216–17 (2007) (book review) ("[P]ostmodern feminists promote the disruption of identity.").

"woman" may be.[327] Feminist theorizing has long existed in ontological self-contradiction. As Catherine MacKinnon states of dominance feminism, "[f]eminism affirms women's point of view by revealing, criticizing, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation . . . ."[328] Deborah Rhode similarly opines that feminist theory can simultaneously "locate judgment within the patterns of social practice" and "subject that judgment to continuing critique."[329]

"Neofeminism" is somewhat of a misnomer because the ideas and critiques it encompasses are not really brand new. Many of the ideas have been germinating since the late 1980s and some even before.[330] For example, the racial critique of liberal feminism's essentialist assumptions has been around for decades.[331] Left feminists have also long been critical of dominance feminism's down-playing of class and economic status.[332] Even the critique of domestic violence criminal reform has existed for over twenty years, having been formulated in response to early discourse and efforts.[333] In fact, neofeminism is quite similar to what Martha Minow identified in 1989 as "the third stage of feminism."[334]

According to Minow, "the first stage articulated women's claims to be granted the same rights and privileges as men."[335] Professor Minow's "first stage" accordingly corresponds to liberal feminism.[336] She characterizes the "second stage" of feminism as a response to liberal feminism's tendency to "neglect[ ] the highly

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327. Neofeminism, although it embraces antiessentialism, does not wrestle with the woman question as deeply or in the same manner as postmodern feminism.

328. Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, *in* FEMINISM AND METHODOLOGY 136 (Sandra Harding ed., 1987).

329. Rhode, *supra* note 113, at 626.

330. *See supra* text accompanying notes 197 & 211.

331. *See, e.g.*, HOOKS, *supra* note 2, at 34 ("Narcissistically, [white feminists] focused solely on the primacy of feminism in their lives, universalizing their own experiences. Building a mass-based women's movement was never the central issue on their agenda.").

332. *See* Harris, *supra* note 59, at 588–89; Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1170 (1989) (book review) (noting the objection that MacKinnon's "[g]rand theory tends to be reductionist" and "may suppress the complexity and ambiguities of life").

333. *See, e.g.*, Maguigan, *supra* note 250, at 382–83; Schneider, *supra* note 248, at 566 ("Early work on battered women perhaps underestimated the difficulty, the obstacles, the psychological barriers to seeing women as reasonable. The enormous credibility problems that women face as complainants and witnesses . . . seem almost insurmountable.").

334. Martha Minow, *Introduction: Finding Our Paradoxes, Affirming Our Beyond*, 24 HARV. C.R.-C.L. L. REV. 1, 2 (1989).

335. *Id.*

336. *See supra* Part II.A.

individual experience and responsibilities that make institutional and cultural obstacles so difficult to surmount."[337] Second-stage scholarship accordingly emphasizes "women's historical and contemporary differences."[338] Minow's second stage appears to illustrate the cultural feminist reaction to liberal feminism during the second wave.[339] Minow's third and final stage is one in which feminist scholarship deemphasizes differences between men and women in favor of a more contextual approach to antisubordination.[340] Writers in the third stage recognize that:

> the focus on similarities and differences between men and women risks locking feminist advocacy in a perpetual and unresolvable battle over whether gender differences or similarities predominate, rather than drawing attention to the varieties of individual and subgroup experiences and sources of personal and social information that can and must be marshaled if social change can be envisioned and achieved.[341]

Consequently, although Minow's third stage adopts dominance feminism's position that focusing on sameness or difference is not the key to understanding women's status,[342] it departs from dominance feminism in an important way. Instead of concentrating on a uniform description of women's subordination to men, it calls for considering individual and subgroup experiences to achieve more general social transformation.[343]

In a similar vein, and as further evidence that this may all just be old wine in a new bottle, in 1990, Deborah Rhode authored an essay about a body of scholarship, which she termed "critical feminism."[344] According to Rhode, critical feminism, while concerned with women's disempowerment, is quite distinct from liberal, cultural, and dominance feminism. Critical feminism is skeptical of the atomistic self and the objective construction of rights and privacy but recognizes that these liberal constructs can be practically useful.[345] Critical feminism acknowledges the strength of cultural feminism's "demand that

337. Minow, *supra* note 334, at 2.

338. *Id.*

339. *See supra* note 71 and accompanying text.

340. Minow, *supra* note 334, at 3–4.

341. *Id.* at 4.

342. *See supra* notes 84–95 and accompanying text.

343. Minow, *supra* note 336, at 4.

344. *See* Rhode, *supra* note 113, at 625.

345. *See id.* at 628–32 (noting that critical feminism generally rejects these concepts, but finds that they have pragmatic value).

values traditionally associated with women *be valued* and that legal strategies focus on altering societal structures, not just assimilating women within them," but cautions that "to emphasize only the positive attributes traditionally associated with women is to risk overclaiming and oversimplifying their distinctive contributions."[346] So like dominance feminism and Minow's third-stage feminism, critical feminism also seeks to move past the sameness/difference dichotomy.[347] Critical feminism diverges from dominance feminism in its reluctance to recognize any unified female experience of subordination.[348] Nevertheless, "[t]o disclaim objective standards of truth is not to disclaim all value judgments. We need not become positivists to believe that some accounts of experience are more consistent, coherent, inclusive, self-critical, and so forth."[349] Thus, the lynchpin of critical feminism is combined activism and skepticism.[350] It also favors a contextual focus on concrete issues rather than generating utopian ideals.[351]

Perhaps neofeminism is simply the continuation of the third stage of feminism that Minow identified over twenty years ago or just another name for critical feminism. However, it appears that neofeminist scholarship involves more than just moving past the difference dilemma and calling for antiessentialism or skepticism in feminist legal theory.[352] In addition to those ideas, neofeminist writing adopts specific views of the contextual value and harm of privacy, the subordinating effect of police power, the double-edged nature of agency, and the role of distributive programs in social transformation.[353] Nevertheless, it is evident the story of feminism is not a temporally linear story of a chronologically evolving line of analysis in a singular context. Rather, in feminism, as in many areas of theorizing, different ideas come and go—they peak and trough over time.[354] Although neofeminist

346. *Id.* at 624–25.

347. *See id.* at 630–32 ("Part of the problem with 'difference' as an organizing principle is that legal decisionmakers do not always seem to know it when they see it.").

348. *See id.* at 622–23.

349. *Id.* at 626.

350. *See id.* at 619.

351. *See id.* at 637–38.

352. *See id.* at 626 ("What allies this method with other critical accounts is its skepticism toward everything, including skepticism. Critical feminist theories retain a commitment to locate judgment within the patterns of social practice, to subject that judgment to continuing critique, and to promote gender equality as a normative ideal.").

353. *See id.*

354. *See* HOOKS, *supra* note 2, at 10 (asserting that in order to resist "hegemonic" feminism, women must "necessarily criticize, question, re-examine, and explore new

ideas are not completely novel, it does seem that there is currently a distinct phenomenon of convergence that constitutes an important moment in feminist theorizing. Today, scholars are producing neofeminist scholarship that deviates from the orthodox second-wave script in a wide variety of areas outside of domestic violence reform, including family law, international human rights and criminal law, sexual relations and sex work, and religious and cultural studies.[355]

The question then is whether there is a point to acknowledging this moment in feminist legal thought and naming it.[356] The existing labels for feminism are exhaustive and exhausting: first-wave, second-wave, third-wave, liberal, cultural, dominance, radical, Marxist, power, postmodern. Nonetheless, I do believe that there is a point in recognizing that there is a new and powerful left feminism. To understand the role that neofeminism might play in today's legal and political dialogue, it is important to appreciate the current status of the term "feminism" in popular discourse.

In the past, the use of the feminist label always signaled a commitment to progressive and politically liberal values and policies. Katharine Bartlett notes that although "[u]se of the label 'feminist' has substantial problems," one benefit has been that "labeling methods or practices or attitudes as feminist identifies them as a chosen part of a larger, critical agenda originating in the experiences of gender subordination."[357] Similarly, Martha Chamallas remarks:

> Most legal writers or practitioners who identify themselves as feminists are critical of the status quo. The root of the criticism is the belief that women are currently in a subordinate position in society and that the law often reflects and reinforces this subordination. Whatever their differences, feminists tend to start with the assumption that the law's treatment of women has not been fair or equal and that change is desirable.[358]

In recent times, however, the feminist label has become broad or co-opted enough to accommodate distinctly anticritical,

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possibilities"); Rhode, *supra* note 113, at 626 ("[F]actors that divide [feminists] can also be a basis for enriching our theoretical perspectives and expanding our political alliances.").

355. *See supra* note 19 (listing articles).

356. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 835 (1990) (observing that despite the difficulties with the "feminist" label, "[t]o sustain feminism, feminists must use presently understandable categories, even while maintaining a critical posture toward their use").

357. *Id.* at 833–34.

358. CHAMALLAS, *supra* note 84, at 1 (footnote omitted).

subordinating attitudes. In a quite oxymoronic development, there has been a simultaneous glorification of the notion that bra-burning, "womyn"-empowering feminism is dead[359] and appropriation of the term "feminist" by those who reject all the progressive aspects of feminism and adopt the most conservative interpretations of the second-wave orthodoxies.

Today, self-termed feminists include neoconservatives like Sarah Palin—those who embrace their inherent cultural roles as mothers, wives, and cookie-bakers, but insist that women should not receive "special" treatment or, God forbid, government subsidies.[360] They are more than happy to embrace harsh prosecution of "real" criminals and advocate draconian treatment of "predators" who victimize children and women.[361] The "ifeminists.com" website, for example, touts "individualist feminism" as truly reflecting the "original" ideas of feminism.[362] It holds, among other things, that women should homeschool their children to undermine public education and fight "the forces of feminism who say a woman's place is in the paying workplace,"[363] that college women's studies programs be defunded,[364] and that "[a]s long as women are as free as men to run for office and to vote as they choose, then whatever number of women are elected is the right number for an equality based on freedom."[365] It is true that these extremely conservative voices probably do not represent most people's idea of feminism. Nonetheless, those who

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359. *See supra* note 5 and accompanying text.

360. During her campaign, Palin stated, "I'm a feminist who believes in equal rights and I believe that women certainly today have every opportunity that a man has to succeed and to try to do it all anyway." Transcript: Palin and McCain Interview (Feb. 11, 2009, 2:15 PM), CBSNEWS, http://www.cbsnews.com/stories/2008/09/30/eveningnews/main4490788.shtml>source=m; *see also* Adrienne D. Davis, *Introduction* to Symposium, The Politics of Identity after Identity Politics, 33 WASH. U. J.L. & POL'Y 1, 1 (2010) ("Republicans embraced feminist rhetoric in unprecedented numbers to defend Sarah Palin's gender performance, reproductive choices, and work/family balance."); Robin Abcarian, *Insiders See "New Feminism*," L.A. TIMES, Sept. 4, 2008, at A13 (quoting Laura Ingraham as stating that "Sarah Palin represents a new feminism").

361. *See supra* notes 296–299 and accompanying text; *supra* text accompanying note 265.

362. *See Individualist Feminism FAQs*, IFEMINISTS.COM, http://www.ifeminists.com/e107_plugins/content/content.php?cat.9 (last visited Apr. 5, 2013).

363. *See Can a Feminist Homeschool Her Child?*, IFEMINISTS.COM, http://www.ifeminists.com/e107_plugins/content/content.php?content.605 (last visited Apr. 5, 2013).

364. *See What Is the Ifeminist Position on Having Women's Studies Programs at Public Universities?*, IFEMINISTS.COM, http://ifeminists.com/e107_plugins/content/content.php?content.30 (last visited Apr. 5, 2013).

365. *See Equal Access Does Not Guarantee Equal Outcome*, WENDYMCELROY.COM (July 29, 2008), http://www.wendymcelroy.com/plugins/content/content.php?content.162 (linked from ifeminists.com).

claim they are for women's empowerment today are seldom socialists or leftists. They are prosecutors advocating for more criminal law,[366] business women seeking better ways to climb the corporate ladder,[367] and "stay-at-home-moms" wholly devoted to parenting.[368]

A strong neofeminist voice could counter both the belief that feminism is dead[369] and the conservative co-optation of the term feminism by demonstrating that progressive feminism is alive and kicking. Publicizing the abundance of neofeminist writing can in a sense "take back" the feminist label and send the message that feminism is an active, generative, and vibrant progressive movement. To those who are discouraged that political thinking has become one big tea party, neofeminism can affirm that feminism is really about rejecting stereotypical thinking, fighting subordination in all its forms, and supporting a just, distributive state.

In addition, recognizing a neofeminist moment can serve to temper the feeling of "paralysis produced by the many internal critiques of feminism."[370] One feminist scholar warns that "feminist theory is on the brink of self-annihilation."[371] She observes, "After waves of liberal, radical, and cultural feminism, we are now riding a 'third wave' of feminism that risks crashing into nothingness. The permutations of feminist legal theory have

366. *See* Gruber, *Rape, Feminism*, *supra* note 20, at 583 ("The zealous, well-groomed female prosecutor who throws the book at 'sicko' sex offenders has replaced the 1970s bra-burner as the icon of women's empowerment."); *cf.* Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 276 (2006) (observing the "political capital of feminist rape law reform," which includes "'getting tough' on sex offenders, attention to child sexual abuse, [and] concern for victims").

367. *See* Georgie Anne Geyer, *Feminism Dead, or Just More Practical?*, THE PATRIOT-NEWS, Dec. 8, 1989, at A15 ("[C]lassic feminism died in the lemminglike rush of many women to law school (the fastest way up), to the corporate ladder (direct express to success), and to the 'balancing' of career and marriage (having it all).").

368. Being a pregnant person and a first time parent of a newborn while writing this Article, I can attest to the innumerable pregnancy, baby, and mommy blogs that constantly remind those gestating and parenting about the dire risks of normal behavior (eating occasional sushi) and the necessity of constant attention to the child (tummy time, developmental milestones, reading to a newborn, milk supply, baby-wearing, omega three supplements, and the list goes on). Cyberspace is filled with aggressive defenses of domesticity. *See* Linda R. Hirshman, *Everybody Hates Linda*, WASH. POST, June 18, 2006, at B1 (noting, for example, that one commenter stated, "I feel even more sure about my choice to stay at home and raise my children after hearing what an elitist like Ms. Hirshman thinks! . . . I'm sad for her—she has such a limited view of womanhood.").

369. *See supra* note 5 and accompanying text.

370. Brenda Cossman, *Sexuality, Queer Theory, and "Feminism After": Reading and Rereading the Sexual Subject*, 49 MCGILL L.J. 847, 854 (2004).

371. Hill, *supra* note 78, at 135.

proliferated to the point of endangering feminism's existence."[372] Although neofeminism certainly is not a unified grand theory of women's condition and neofeminists do not speak with one voice, it is meaningful that there are so many scholars committed to analyzing "the woman question," despite devastating postmodern critiques, using similar methodologies that break from second-wave orthodoxies.

We should not think of these neofeminist voices as fractured, unrelated assessments of second-wave feminism, but as a new way of doing feminism. As Nancy Fraser remarks:

> [T]his is a moment in which feminists should think big. Having watched the neoliberal onslaught instrumentalize our best ideas, we have an opening now in which to reclaim them. In seizing this moment, we might just bend the arc of the impending transformation in the direction of justice—and not only with respect to gender.[373]

Neofeminists are thinking big. They are breaking from dogmatic, authoritarian, and right-leaning feminist methodologies, yet staying true to the original program of women's empowerment. They are forging ahead with bold progressive ideas that challenge popular cultural attitudes, the current economic paradigm, and even the very structure of society. This feminism is anything but dead.

372. *Id.* (footnote omitted). Hill further criticizes that "'[a]nti-essentialist reader[s],' half-finished manifestos, 'multiplicative' identity analyses, intersectionality, erotica theory, even the hint of a return to liberalism—all are welcomed." *Id.* (second alteration in original) (footnotes omitted).

373. Nancy Fraser, *Feminism, Capitalism, and the Cunning of History*, 56 NEW LEFT REV. 97, 117 (2009).