

Dear Colleagues,

I am absolutely delighted to have the opportunity to discuss my neofeminism project with you. What follows below is a brief synopsis of the *Neofeminism* article and some formative thoughts on how a neofeminist approach might make a difference in the current debate over campus rape reform (which is not part of the article). I am continuing to work on projects involving domestic violence, sexual assault, prostitution, and human trafficking, and I look forward to your help in refining my normative commitments, methodological choices, and analytic constructs. As an initial matter, I want to offer a fairly substantial caveat. The article is in no way meant to be a comprehensive literature survey of Western feminism, and Part II is certainly not an all-encompassing description of second-wave feminism. Feminism, as I mean it in this paper, is limited almost exclusively to feminist legal theory writings that relate to workplace equality and violence against women. Accordingly, whole schools of feminist thought and scholarship are entirely absent from the discussion. The article is also nearly exclusively United Statesean in its orientation. Quite deliberately, my intended audience consists primarily of U.S. legal actors and scholars who work in the arena of gender violence and self-consciously engage in “feminist lawmaking.” Consequently, while I am happy to let the discussion flow in any direction and will try to field all questions, I cannot claim expertise (or even professional competence) on feminist issues that fall well outside the scope of the paper.

NEOFEMINISM SYNOPSIS

Feminism, it seems, is perpetually under attack. Those on the right decry feminism as anti-male, anti-family, and anti-tradition. Minorities on the left often critique “white feminism” for ignoring the voices of women of color and compounding the problems of minority men. College-aged women often refuse to bear the feminist label, and the feminist movement itself seems to be in constant conflict. Women debate each other as to whether to “lean in” or “lean out” while men are essentially left standing in place. Feminists heatedly debate the regulation of speech on women’s issues and “trigger warnings,” leaving those who teach, say, economics classes (largely white men) free from worries about their chosen pedagogical methods. Commentators go so far as say that “feminist theory is on the brink of self-annihilation,” observing that “[a]fter waves of liberal, radical, and cultural feminism, we are now riding a ‘third wave’ of feminism that risks crashing into nothingness.”¹ I too have felt a sense of “paralysis produced by the many internal critiques of feminism.”² In the context of theorizing on intimate partner violence and sexual assault, scholars can feel torn between adopting the contested and often criticized claims of mainstream feminism and rejecting those claims, only to be left feeling like their analysis is untethered from any larger social justice movement. As I have stated elsewhere in the rape reform context, “Casting oneself into the waters of the [internal] debates may leave a feminist hopelessly adrift between surrendering women to the power of the state and abandoning women to private abusers.”³

¹ Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 135 (2005).

² Brenda Cossman, *Sexuality, Queer Theory, and “Feminism After”*: Reading and Rereading the Sexual Subject, 49 MCGILL L.J. 847, 854 (2004).

³ Gruber, *Rape, Feminism, and the War on Crime*.

When I first began to write and talk about the various drawbacks of feminism's investment in criminal law as a path toward equality over a decade ago, in feminist circles I was often met with derision, called "anti-feminist," and told that my work would be a step back for women's rights. When I presented this same work in critical race theory groups, people would regard me quizzically and query why I was wedded to the frames of "white feminism" and its authoritarian bent. I, like many other young gender law scholars it turns out, often felt like my only choices were to repeat contested truisms of second-wave feminism or reject feminism wholesale and look elsewhere for theoretical grounding. Over time, however, I came to realize that there are many legal scholars, who theorize in gendered terms and seek to further women's interests, but reject many aspects of mainstream feminist legal theory. Influenced by Critical Legal Studies, Critical Race Theory, Latina and Latino 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 subordinated statuses; and rely on liberal rights regimes or alternatively authoritarian criminal policies.

The term "neofeminism" is symbolically important because it signifies a commitment to women's empowerment and appropriates an importantly radicalized term, while also recognizing that the approach is "new" because it incorporates intersectional anti-subordination analysis and responds to observed problems with past interventions. The paper proceeds in three primary parts: (1) a brief elucidation of the brands of feminism that emerged during the second wave of feminism; (2) a critical discussion of second-wave "orthodoxies," that is, principles with which second-wave feminism, or even feminism generally, is often associated in academic, social, and political discourse; and (3) an examination of how modern scholarship on domestic violence illustrates neofeminism's simultaneous gender consciousness and rejection of second-wave feminist orthodoxy. For the purposes of our discussion, I am going to add some comments about how the neofeminism framework might impact current thinking about campus sexual assault.

1. Second Wave Feminism

The term "second-wave feminism" describes a body of differing theoretical work within in a temporal time frame, namely the 1960's up until the 1990s. Within that period, there were several feminist schools of thought, ranging from purely liberal (those dedicated to giving women equal rights to men) to extremely radical (those calling for an overhaul of the male legal and social structure). 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.

Liberal feminism 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. However, the theory also assumes that once women are granted rights and opportunities, they can freely choose to or not to exercise those rights or take those opportunities. To a greater extent than other feminisms, liberal feminism, like liberalism in general, accepts the public-private distinction and supports privacy (i.e. freedom from governmental scrutiny) as a right. In this view, those things that "properly" belong in the realm of the private should be immune from government and legal intervention. Liberal feminism is subject to the larger critiques of liberalism, including the arguments that formal equality does little to achieve substantive equality given pre-existing social, cultural, and economic conditions, that "rights" are

subject to indeterminate political interpretations and bolstering “rights-talk” can undercut anti-subordination claims, and that the distinction between the public and private is arbitrary and serves to legitimate hierarchy.

The basic premise of cultural (or “relational”) 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. 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 feminist legal scholars like Robin West maintain that women’s tendency to value intimacy and interconnectedness over individualism can be attributed to their biological “experiences of breast feeding, nurturing, caring for and loving the weak so as to make the weak healthy” and advocate a “feminist, maternalist (and humanist) moral theory” that prioritizes caring and communitarianism.⁴ To many liberal feminists, cultural feminism represents a return to gender stereotypes and the notion of separate spheres. There are also a myriad of non-liberal critiques set forth by dominance, race, queer, and other feminists questioning cultural feminism’s epistemological (and perhaps even metaphysical) conclusion that women are authentically and inherently caring and domestic.

The dominance theory of feminism, also called “radical feminism,” grew out of feminist legal theorist Catharine MacKinnon’s dissatisfaction with she saw as the two exclusive paths to women’s equality, namely “be the same as men” or “be different from men.”⁵ For MacKinnon, in a universe of male domination, liberalism will necessarily be a predicate of and not the remedy for inequality. She also rejects cultural feminism as “false consciousness,” stating 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.”⁶ Dominance feminism posits that inequality is perpetuated by the liberal state and the “patriarchy,” a structural system of norms, practices, discourses, instincts, and signals that keep men dominant and women subordinate and exists prior to law. Peculiarly, dominance feminism identifies sex as the primary tool of patriarchy and benchmark of women’s oppression. Women are inherently subordinate because sexual oppression is constitutive of the very gender category, woman. For MacKinnon, “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.”⁷ Dominance feminism thus unabashedly calls upon the state to authoritatively, even violently, enforce true equality by stamping out instances of male sexual domination.

2. The Second-Wave Orthodoxies

This Part analyzes several of the more notable and contentious ideologies that emerged from the second-wave of feminism. These orthodoxies include both principles implied by the nature

⁴ Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59 (1989).

⁵ Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

⁶ *Id.*

⁷ WENDY BROWN, *The Mirror of Pornography*, in STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 77–95, 81 (1995).

or structure of the theories and ideas that have emerged as these three feminist theories have turned into real world policies. Probably the most well-known, and hotly contested, second-wave orthodoxy is the notion that there is an essential female experience. According to liberal feminism, all women experience the oppression of domesticity and desire liberation through working outside the home. Cultural feminists 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 predisposed) to embrace domesticity. Dominance theory also implies that there is a unifying woman's condition, namely that the female experience is inherently inauthentic and inevitably shaped by male supremacy. The liberal, cultural, and dominance feminist camps are locked in an intractable battle over which camp has correctly described women's inherent condition. Other critics, notably queer and critical race theorists, contest the notion that there is an essential woman's experience, and point to the heterodoxy of women's socio-economic statuses, interest in sex, relation to domesticity, views of the state, etc.

A related orthodoxy, which stems from the nature of these second-wave theories as grand narratives of women's subordination, is the notion that there are end-points of good and bad, which are clear and diametrically opposed. 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. In the dominance feminist mindset, bad is men dominating women through sex, and good is the eradication of such domination. To reduce the world of female subordination to these flattened dichotomies, the theories needed to embrace evermore hackneyed visions of women's and men's conditions. We talked about some of the essentialist images of women deployed by these second-wave theories above, but what about that of men? For cultural feminists and especially dominance feminists, men occupied the role of enemy number one—the sole entity responsible for female subordination.

Returning to the reductive characterization of women, a related orthodoxy is that women are purely objects of male domination, either perpetually (in the view of dominance feminism) or as a result of individual acts or laws. Nevertheless, liberal feminists believe that once de jure barriers are lifted, women can act as free agents in the marketplace, and cultural feminists often characterize domestic work as a product of authentic choice. Both the characterization of women as pure objects and the characterization of women as pure agents 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. On the other hand, if women's choices are considered wholly contingent products of domination, they can be disregarded in the quest to use the state apparatus to fight patriarchy. In response, critical feminists have suggested an alternate vision in which women exercise rational choice in a world that constrains them through sexism and other forms of disempowerment. In this view, feminists ought to fight actively against the constraints while recognizing that choices made within them are meaningful and should not lightly be cast aside.

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. Dominance feminism is clear in its embrace of government intervention to reverse the male-oriented power structure. While liberalism generally objects to any large role for the government in constructing the social order, even the narrowest theories of liberalism,

like libertarianism, make an exception for police intervention in the name of preventing and punishing harms. Cultural feminists, however, appear to value the very socialistic tenets of cooperation, egalitarianism, and self-sacrifice. Yet it seems that when it comes to how the state should deal with violence against women, 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. Rather, reform of the “male” justice system consists of strengthening rape and domestic violence laws.

The final second-wave orthodoxy is the rejection of privacy. Dominance feminism is clear in its condemnation of any argument that unequal gender relationships or male dominating behaviors should be immune from government regulation because they are private. American liberal legalism has long accepted the notion that privacy cannot prevent regulation of truly harmful behavior. Indeed, selective impositions on privacy have been a time-honored method of enforcing prevailing notions of sexuality and domestic order, even within our privacy-protecting society. 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. 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.

3. Neofeminism and Gender Violence

Neofeminist analysis is apparent in the spate of recent feminist scholarship on domestic violence. The bulk of feminist theorizing on domestic violence from the mid-1980s through the late 1990s characterized the social problem of intimate partner abuse primarily as a failing of law enforcement and prosecution. Consequently, the consensus seemed to be that there should be more arrests, prosecution, and incarceration of male abusers, regardless of the individual wishes and longer term interests of the women involved. Domestic violence reformers discounted the voices of nonprosecutorial victims by characterizing them as coercively controlled, perpetually threatened, or worse, psychologically defective. The feminist intervention proved incredibly generative with every state modifying its statutory regime to encourage or mandate dv arrest and many prosecutor offices adopting zero-tolerance and no-drop policies. However, today, many if not the majority of, legal scholars currently writing on domestic violence criticize, or at least are circumspect about, the highly authoritarian state of domestic violence law and the characterological presumptions underlying it. These writers remain firmly committed to women’s empowerment and equality, but expose and critique the operation of the second-wave orthodoxies in mainstream, pro-criminalization views of domestic violence.

One of the most critiqued aspects of the dv reform 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. 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. Batterers, by contrast, are empowered, culpable, and evil, and they can only be deterred by harsh sanctions (which they also deserve). Critics assert that domestic violence reform discourse fails to account for, or even capitalizes on, extant racial stereotypes and renders invisible minority victims who

society does not regard as passive and weak. Moreover, amplified prosecution efforts tend to disparately impact black and Latino men.

Many of today's dv scholars express concern that the current prosecutorial/separation model of addressing intimate abuse marginalizes the experiences of minority, immigrant, and poor women who do not necessarily favor incarceration of and permanent separation from their domestic partners. Experts note that abuse victims often engage in complicated calculi, balancing the harm of battering against the social, emotional, and pecuniary benefits staying with the partner, taking into the account the possibility of temporary relief through selective utilization of criminal and civil processes. For many of these women, forcing them into the prosecutorial machine and its punitive institutions causes more harm than good. Neofeminist analysts are quite wary of the tendency of the dv system to treat women victims paternalistically and assume that their agency is inherently tainted by the abuser's influence. Adopting the constrained agency framework, scholars assert that 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 is not to force her prosecute (which is potentially more damaging than leniency toward the abuser) but to offer services to alleviate those constraining conditions.

Related to this point, many current dv scholars lament that the movement's capital has been nearly exclusively invested in criminal law. Like the trajectory of much United Statesean law addressing social dysfunction, domestic violence reform moved away from distributive programs and toward penal law. Scholars argue that in addition to taking much-needed energy away from the aspects of the anti-dv movement concerned with women's economic security, shelter, and services, the prosecutorial "solution" to domestic violence and its concurrent bolstering of the anti-welfare penal state is really at odds with providing distributive justice to women most in need of help. 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. Consequently, while most in society condemn domestic violence as a hideous crime, many do not believe that curtailing battering involves sweeping social changes. 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."⁸ In addition, dv reform's explosion of the public/private distinction may have produced consequences that feminists did not anticipate and might not want. Experts note 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.

Finally, I want to briefly touch on how neofeminism might intervene in the current discourse on the hot-button issue of campus sexual assault. Over the past several months, the United States has experienced an amazing level of regulatory activity on campus sex and sexual assault. On the heels of several high-profile news stories, an energized Civil Rights office of the Department of Education, "new and shocking" statistics, and a President dedicated to selling the college brand to a wary public, federal administrative and university regulatory policy on sexual harassment and sexual assault has been and is being generated at incredible velocity. Climate studies are now mandatory. Federal Title IX lawsuits abound. Universities are modernizing their disciplinary systems to adopt the most expansive definitions of sexual assault and

⁸ Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1184 (1994).

harassment, ratchet-down due process protections, and express a zero-tolerance attitude toward rapists and anyone who enables “rape culture.”

Related to these events, recent times appear to have seen the emergence of a new brand of feminism, which in my apparently insatiable desire to engage in nomenclature, I have decided to call “trauma feminism.” Several empirical contentions appear to animate trauma feminism, including the claims that most, or at least a substantial percentage of, women have experienced events that produced trauma; that such events are primarily sexual events; that the experience of the traumatic event is constitutive, or at least a substantial part, of women’s identity; and that women are perpetually at risk of suffering emotional distress when the trauma is “triggered.” Like its predecessor cultural feminism, trauma feminism posits a unique, intimate and emotional woman’s experience. Unlike cultural feminism, the woman’s essential nature is not something to be celebrated but something to be regarded as unfortunate and avoidable. In this sense, trauma feminism shares space with dominance feminism in regarding the female condition as one produced by male domination. Unlike dominance feminism, however, trauma feminism’s main prescription is not reversing the gender hierarchy through prohibitive and punitive intervention, although trauma feminism certainly endorses prohibition of traumatizing actions and punishment of traumatizers. Rather, the primary prescriptions of trauma feminism involve therapy, self-care, identifying and avoiding triggers, creating social practices for trauma avoidance like by-stander intervention, and encouraging reporting.

Trauma feminism, I believe, represents *the* feminist position on campus sexual assault policy reform. Neofeminism might provide a currently absent critical perspective on campus sexual assault policy. While fully maintaining that rape is terrible and that women disproportionately suffer after botched sexual incidents, a neofeminist might question trauma feminism’s essentialist assumptions, punitive proposals, and cultural messages. A neofeminist framework would create a space for feminist scholars to question some of the dogmas of campus rape reform without running the risk of being anti-feminism or simply cast into the lot with a bunch of sexist male rapists. With this space opened up, we might critically interrogate the messages campus sexual assault codes send about college sexual encounters and young women’s relation to sexuality. We might question the desirability of constructing campus sex as gendered traumatic event that produces female victims and pushing this construction on students who are still forming their senses of self, politics, and sexuality. We might attempt to predict or trace the distributional effects of the punitive scheme. Who are the winners and losers? Will race play a role? Will it quell the speech of those with unpopular, sex-positive, and leftist views? Will it reduce harm or produce more misery overall? Will it liberate young women or instill a new chastity?

I look forward to your thoughts on these issues.

- Aya Gruber, 9/19/2014