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# POLICING WOMEN: MORAL ARGUMENTS AND THE DILEMMAS OF CRIMINALIZATION

Naomi Cahn\*

This essay concerns the peculiar dilemmas of criminalization for women. Women, and I am deliberately essentializing<sup>1</sup> here, are constantly policed, in ways ranging from the monitoring of motherhood to the criminalization of prostitution. This policing may be through the criminal law, civil law, or it may be done more subtly through cultural attitudes that devalue women's work<sup>2</sup> yet simultaneously encourage women to do that work.<sup>3</sup> While criminalization may serve an important cultural and societal function, it may also obscure the underlying problems that lead to the need for criminalization. Yet, a failure to

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\* Professor of Law, George Washington University Law School. I thank Paul Butler, Mary Becker, Morrison Torrey, and Shana Stanton. This paper is based on remarks delivered at a panel on Criminalizing Disadvantage, Moralizing Privilege at the March 1999 DePaul Law Review's Symposium on Bridging Divides: A Challenge to Unify Anti-Subordination Theories.

1. On the dangers of essentializing, see ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Katherine Bartlett & Carol Stack, *Joint Custody, Feminism, and the Dependency Dilemma*, 2 BERK. WOMEN'S L.J. 9, 15-28 (1986); Kimberle 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. Cf. MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 8-9 (1999) (illustrating essentializing on an international level). I justify my essentializing here because I am talking about ways that all women are policed, although the form and severity varies in critical ways, depending on race, class, and family structure.

2. See ROBIN WEST, *CARING FOR JUSTICE* 7-8, 261 (1997); Naomi Cahn, *Women's Work: The Power of Caretaking*, 12 YALE J.L. & FEMINISM (forthcoming 2000) [hereinafter Cahn, *Women's Work*].

3. See, e.g., Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998) (reviewing criminal legal reform efforts on behalf of victims of domestic violence); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) [hereinafter Hanna, *No Right to Choose*] (discussing the implications of mandated victim participation programs in the criminal prosecution of batterers); 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 (1997) (suggesting flexible prosecution strategies for intimate abuse cases); Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing the evolution of domestic abuse law to illustrate the dynamic of "preservation through transformation"); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992) (reviewing the history of policy towards domestic abuse and the implementation of increased arrest powers).

criminalize may also represent tacit (or explicit) approval of the underlying behavior.

The dilemma of criminalization appears in a variety of contexts related to issues that disproportionately impact women. The most obvious issue, perhaps, is domestic violence. But there are a series of other contexts in which criminalization poses complicated problems. A pregnant woman's body is subject to a multitude of prohibitions, ranging from very public warnings about the effects of alcohol and tobacco on the developing fetus, to prosecution for drug use during pregnancy.<sup>4</sup> Mothers are prosecuted for child abuse and child neglect, including a failure to prevent further abuse or neglect by another person, including their batterers.<sup>5</sup> Because women are so closely identified with their children, they are treated particularly harshly for alleged crimes against their children. Within heterosexual relationships, women are still presumed to be sexually available; marital rape consistently carries a lower legal penalty than does stranger rape, and date rape is often treated less seriously than stranger rape.<sup>6</sup> On the other hand, statutory rape is punished based simply on the girl's age.<sup>7</sup> Women are unable to sell their bodies for sex. While this prohibition may be a good thing, the ability to do so is a sign of control over

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4. See, e.g., HELENA MICHIE & NAOMI R. CAHN, CONFINEMENTS: FERTILITY AND INFERTILITY IN CONTEMPORARY CULTURE (1997) (discussing the social aspects of reproductive techniques and technology from a feminist perspective); DOROTHY ROBERTS, KILLING THE BLACK BODY (1998) (examining reproductive liberty, reproductive domination, and its relationship to racial oppression); JANA SAWICKI, DISCIPLINING FOUCAULT: FEMINISM, POWER, AND THE BODY (1991) (examining feminism in the context of sexual freedom through Foucaultian Theory). See also Jane C. Murphy, *Legal Images Of Motherhood: Conflicting Definitions From Welfare "Reform," Family, And Criminal Law*, 83 CORNELL L. REV. 688, 712-17 (1998).

5. See Murphy, *supra* note 4, at 719-23; see also V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 229-30, 236-37 (1996); Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 584 (1998).

6. See generally SUSAN ESTRICH, REAL RAPE (1987) (examining the law's treatment of "simple rape cases" such as marital rape and date rape and arguing that the law punishes women for the failure to recognize "simple rape" as "real rape"); Katharine Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999) (suggesting the use of shame-inducing sanctions to alter the meaning of non-violent, non-consensual sex from sex to rape).

7. N.Y. PENAL LAW § 130.30 (McKinney 1997). See Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267, 274-75 (1999); Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape*, 85 J. CRIM. L. & CRIMINOLOGY 15, 37 (1994); see also Symposium, *Statutory Rape Realities: Scholarship and Practice*, 50 DEPAUL L. REV. (forthcoming 2001) (discussing statutory rape law reform).

women's bodies.<sup>8</sup> Women are criminally precluded from many forms of sexual relationships with other women.<sup>9</sup>

These are varied contexts, but they are unified because they illustrate the special impact of the criminal law on women. Moreover, although they may affect and reflect gendered behavior, their impact is felt by women themselves.<sup>10</sup> The criminalization of some of these activities leads to women's subordination; a failure to criminalize other activities has also contributed to women's subordination.

Additional failures of the criminal justice system, while not explicitly focused on women, have a disproportionate impact on women. The failure to enforce child support obligations affects women far more than men; women are almost six times more likely than men to be custodial parents.<sup>11</sup> Parental kidnapping laws, which provide for lesser penalties than do stranger kidnapping laws, again disproportionately affect women because they are more likely to serve as the custodial parent. Not considering a defendant's parenting responsibilities disproportionately affects women; one study reports that children of men in prison are "overwhelmingly cared for by the children's mothers; when women go to prison, their children are cared for by the fathers in only about one third of the cases."<sup>12</sup>

The question of criminalization/decriminalization is particularly complex for marginalized communities. The criminalization of domestic violence has resulted in more Black men going to jail. As a result, many African American women have expressed their reluc-

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8. See LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 286-94 (1998); NUSSBAUM, *supra* note 1, at 286-87.

9. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that no fundamental right exists to engage in homosexual sodomy); Ruthann Robson, *Crimes of Lesbian Sex*, in *GAY MEN, LESBIANS, AND THE LAW* (William B. Rubenstein ed., 1993) (documenting the effect of judicial opinions and legislative statutes on the lives of lesbians, gay men, bisexuals, and transgendered persons). While prostitution and sodomy laws apply to men too, they serve to regulate the female body. See generally WEST, *supra* note 2, at 261.

10. The mothering-related crimes assume gendered (and often raced and classed) behavior, but it is women who are affected. For a discussion of the complexities of "gender" versus "sex," see generally Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995) (arguing that a distinction between "gender" and "sex" prevents the use of gender discrimination based on traditionally feminine values as a substitute for sex discrimination).

11. FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, *AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING* 7 (1999). In 1998, 23% of children lived with their mothers, while 4% lived with their fathers. See *id.*

12. *Report on the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 *GEO. L.J.* 1657, 1805 (1996). See Stephen Schulhofer, *The Feminist Challenge in Criminal Law*, 143 *U. PA. L. REV.* 1251, 1290-91 (1995). Women in prison are far less likely than imprisoned men to have been convicted of a violent crime. See *Development in the Law: Alternatives to Incarceration*, 111 *HARV. L. REV.* 1921, 1925-26 (1996).

tance to use the police lest they betray the community.<sup>13</sup> As my co-panelist Jenny Rivera has pointed out, "Latinas face the precarious, often untenable situation of the 'double bind'—empowerment through the disempowerment of a male member of the community."<sup>14</sup> Moreover, the racist nature of the criminal justice system leads, more generally, to the disproportionate prosecution of Black men.<sup>15</sup>

While the civil justice system adjudicates claims between parties, the criminal justice system involves state power against the defendant. As such, it is supposed to express general judgments about the wrongfulness of the defendant's conduct.<sup>16</sup> Criminal law makes behavior into a crime against the state—it converts family abuse into a misdemeanor or a felony. It is truly fascinating to read articles by non-critical theorists who seem to accept, uncritically, the norm-setting nature of criminal law.<sup>17</sup> Because not all criminal laws are equally enforced, the mere legal conclusion of criminality does not mean that society's power is brought to bear on the crime. Thus people quite frequently engage in various forms of criminal behavior.<sup>18</sup> Indeed, it is the failure of the criminal justice system to address domestic violence crimes that lead, in large part, to the development of civil protection orders.<sup>19</sup> While the criminal justice system continues to establish certain base-

13. "In the participants' views, the situation was simple and clear: the police were not helpful, that it was risky to involve them, and that using them was disloyal to the community in almost all circumstances." THE AFRICAN AMERICAN TASK FORCE ON VIOLENCE AGAINST WOMEN, A RESPONSE TO VIOLENCE AGAINST WOMEN IN CENTRAL HARLEM 38 (1998).

14. Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 248 (1994). Lesbians and gay men have expressed similar sentiments against the use of the criminal justice system. See Machaela M. Hoctor, Comment, *Domestic Violence As A Crime Against the State: The Need For Mandatory Arrest In California*, 85 CAL. L. REV. 643, 691 (1997).

15. See Paul Butler, *Starr Is To Clinton As Regular Prosecutors Are To Blacks*, 40 B.C. L. REV. 705, 708-14 (1999); Angela Davis, *Benign Neglect of Racism In the Criminal Justice System*, 94 MICH. L. REV. 1660, 1674-84 (1996) (book review); see also Katherine Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 292-93 (1999) (discussing the heavier sanctions on Black men for violation of marriage norms than that inflicted on white men).

16. See Victoria Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 5 n.20 (1996) ("Judgments of 'wrongfulness' have a habit of dispelling our sense of 'privacy' . . . We no longer call 'private' that which we have decided is wrong . . .").

17. "The law is, rather, a vehicle by which the community debates, tests, and ultimately settles upon and expresses its norms. . . . We have seen the process at work recently in enhancing prohibitory norms against sexual harassment, hate speech, drunk driving, and domestic violence." Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 473 (1997).

18. See Nourse, *supra* note 16, at 9-11.

19. See Hanna, *No Right to Choose*, *supra* note 3, at 1877; Deborah Epstein, *Effective Intervention In Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 11-13 (1999); Siegel, *supra* note 3, at 2171.

line moral judgments, it is a crude means for recognizing women's needs. To the extent that the law is based on community and public norms developed through public consensus, it does not and cannot reflect the needs of outsider groups.<sup>20</sup> Where social groups are unequal, regardless of the existence of legal discrimination, it is difficult for those groups to influence policy.<sup>21</sup>

The criminal route also serves to give control to the state. Where sensitivity to women is not a real priority, women can sacrifice control, getting little support in return.<sup>22</sup> Finally, many of the assumptions underlying criminal law are "nonneutral."<sup>23</sup> Thus, instead of the criminal justice system alone, we need to use more affirmative and civil supports for women.

Consequently, there are problems with making arguments to criminalize or decriminalize these various aspects of women's lives. At one level, for the reasons I have just discussed, we need to question the use of the criminal justice system itself.<sup>24</sup> Assuming we have decided to use the criminal justice system, then it is tempting to use various morally-based claims with respect to women's issues as a way of emphasizing how the criminal justice system has failed to respond to women. Such claims might include: (1) women's rights to control their own bodies as a basis for decriminalizing prostitution;<sup>25</sup> (2) women's connection and responsibility for children as a basis for decriminalizing abuse and neglect; and (3) women's rights to live safely as a basis for further criminalization of violence against women. Many of these arguments are absolutely critical in ending women's subordination.

20. See NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POST-SOCIALIST" CONDITION* 69-98 (1997).

21. See *id.* at 78 (citing Jane Mansbridge, *Feminism and Democracy, in AMERICAN PROSPECT* 127 (Spring 1990)).

22. See generally Rivera, *supra* note 14 (discussing mandatory arrest policies' failure to empower women). See Hanna, *No Right to Choose, supra* note 3, at 1865, 1869-77; see also Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 *HARV. L. REV.* 550, 554 (1999) [hereinafter Mills, *Killing Her Softly*] (discussing how the state can inflict emotional abuse on battered women).

23. See Victoria Nourse, *Passion's Progress: Modern Law Reform and The Provocation Defense*, 106 *YALE L.J.* 1331, 1389 n.349 (1997). Professor Nourse also argues that, in the context of the defense of extreme emotional distress, advocates of that defense in criminal law simply cannot understand that the law is not neutral. See *id.* at 1368-83; Nancy S. Erickson, *Sex Bias In Law School Courses: Some Common Issues*, 38 *J. LEGAL EDUC.* 101, 107 (1988).

24. See Paul Butler, *Retribution, for Liberals*, 46 *UCLA L. REV.* 1873, 1880-91 (1999).

25. See, e.g., HIRSHMAN & LARSON, *supra* note 8, at 288-89 (proposing decriminalization and the use of labor laws instead); Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 *HASTINGS WOMEN'S L.J.* 119 (1999) (arguing for the repeal of prostitution laws because of their exploitation of women).

But each of them must be used carefully and contextually, with full recognition of the counter-arguments.

Women's moral self has a strong historical resonance. Throughout the nineteenth century, women claimed a special set of virtues lacking in men to explain their limited activism outside the domestic sphere,<sup>26</sup> activism that encompassed "women's issues." The Cult of True Womanhood urged them to perform domestic activities both within and outside of their homes.<sup>27</sup> The gendered appeal to morality serves both to empower and confine. Indeed, reliance on women's special morality is, of course, potentially both beneficial and dangerous and is a vibrant topic in feminist jurisprudence.<sup>28</sup>

I will briefly discuss only one of the issues concerning criminalization today, the women/children tension. At the end of the paper, I will return to other contexts beyond the criminalization of mothering which point to the particular concerns of women within the criminal justice system.

My focus is on problems with claims of morality when it comes to women's connection to children. Are women specially connected? What about children's rights? What about Black men in jail? I thus want to consider briefly the interests of two marginalized groups: women and children, and discuss the points of tension between their interests. Cultural middle-class norms expect all women to be primarily responsible for their children. The criminal justice system supports this norm by criminalizing the abusive and neglectful behavior of parents, penalizing mothers particularly harshly. There is, in accord with the themes of this panel, a subtle paradox: failure to protect children leads to children's subordination, while penalizing mothers furthers their subordination: (1) by criminalizing actions that are not crimes, for example, child neglect when the neglect is based on poverty; (2) by

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26. See Paula Baker, *The Domestication Of Politics: Women and American Political Society, 1780-1920*, 89 AM. HIST. REV. 620, 630-31 (1984); Susan Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 252 (1999).

27. See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 324 (1992).

28. The sameness/difference debate in feminist jurisprudence has served to advocate divergent approaches to women's "special" capabilities. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (discussing the global and critical claim that by virtue of their shared embrace of the separation thesis, all of our modern legal theory is essentially and irretrievably masculine); Joan L. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (disagreeing with difference feminists' description of gender) (1989); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85) (describing the doctrinal framework of the "equal treatment" approach and its implications). See generally MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (1994) ("Feminist Theory").

perpetuating the norm that women are, in fact, peculiarly responsible for children; and (3) by sending more women of color through the prosecution system. The abuse and neglect system disproportionately prosecutes poor women and women of color because they are the ones most likely to come into contact with the child protection system. I will first set out this dilemma, and then discuss means for addressing the dilemma.

Many feminists have addressed the tensions in feminist theory between women and children in abusive families. As Mary Becker has explained the problem, "[s]everal dichotomies make it difficult to deal with a mother's complex relationships with her children, particularly abused children . . . . One is the good mother-bad mother dichotomy. These problems are further complicated by biases based on class and race."<sup>29</sup> In dealing with this complex situation, however, we have tended to focus on how women's and children's needs intersect in trying to escape an abusive situation rather than on how they may differ.<sup>30</sup> Although feminist theory is uncomfortable with child abuse because of the challenge it poses to feminist images of women,<sup>31</sup> focusing on how the interests of women and children are similar provides one method of resolving this dilemma. And many feminists have focused on the abuse that women face as one means of explaining their behavior towards their children. But I want to push this dialogue further and talk about how women's and children's needs may differ. When women not in a battering relationship batter their children, or even when women in a battering relationship batter their children—how culpable should they be? How much do we want to rely on women's special connection to their children?

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29. Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability For Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 15-16 (1995).

30. See *id.* at 17.

I focus on obstacles facing mothers in abusive families, with an eye toward identifying places in which the situation of both women and children could be improved by giving more power to women so that they are more likely to protect their children effectively. I argue that, in addition to holding mothers responsible, any sincere commitment to the well-being of children must include making it easier for mothers to escape abusive households.

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Sometimes, to be sure, there are conflicts between the interests of these mothers and their children. but often their needs overlap, and in this Article I try to identify some such areas.

*Id.*

31. See Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993) (discussing "bad mothering" and the "bad mother").



The reality is that women are primarily responsible for children—women are the primary caretakers of children. Women are encouraged (or coerced) by our culture to this role; performing this role serves many purposes. It may serve as either resistance or conformity, depending on the context.<sup>32</sup> When women do child care, the following three consequences result: (1) the work actually gets done; (2) the work is perpetuated as “feminine”; and (3) women performing it reinforces their identity as a mother.<sup>33</sup> Thus, not as an inevitability but as a cultural artifact, women are seen as the responsible parties.

Professor Becker, among others, has written eloquently of this connection between mother and child.<sup>34</sup> Given the strength of the cultural conditioning, we do want to account for this apparently special connection between mothers and children (or parents and children, where the primary caretaker is not a woman).

A recent study in Denver found that severe head trauma was less likely to be recognized in young white children from intact families—that is, children from Black and single-parent families were most likely to be diagnosed as victims of child abuse, even when children from other family forms experienced this abuse.<sup>35</sup> This study shows several different things. First of all, there is severe abuse occurring at the hands of parents with which the state must deal. Second, it shows the raced and gendered nature of the child abuse and neglect system. Single parents, and particularly single parents of color, are seen as bad parents; white married parents are not. In accord with the title of this panel, disadvantage is criminalized, while privilege is exemplary.<sup>36</sup>

One more statistic—in New York, less than 5% of the children in foster care are white.<sup>37</sup> Thus, (and this is not, of course, a new point) it is primarily single mothers of color who face civil removal of chil-

32. See Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 54 (1997).

33. See Cahn, *Women's Work*, *supra* note 2.

34. See, e.g., Becker, *supra* note 29 (arguing that holding mothers responsible and facilitating their escape from abusive households protects the well-being of the children); Linda J. Lacey, “O Wind, Remind Him That I Have No Children”: *Infertility and Feminist Jurisprudence*, 5 MICH. J. GENDER & L. 163 (1998) (discussing infertility from the perspective of an infertile woman).

35. See Carole Jenny, M.D. et al., *Analysis of Missed Cases of Abusive Head Trauma*, 281 JAMA 621, 621 (Feb. 17, 1999). In white children, 37.4% of abuse head trauma cases were missed; in black children, 19% of the cases were missed; in intact families, 40.2% of the cases were missed; in single parent households, 18.7% of the cases were missed. See *id.* at 623.

36. This is also true in discussions of women on welfare. See Lucy A. Williams, *Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1163-68, 1191-95 (1995).

37. Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 144 (1999).

dren and criminal penalties for their mothering. As Dorothy Roberts has argued, prosecutions of drug-addicted pregnant Black women "are better understood as a way of punishing Black women for having babies rather than as a way of protecting Black fetuses."<sup>38</sup> The racism and sexism of the criminal justice system, however, do not mean that children are not getting hurt—children are being neglected, abused, and killed by their caretakers. Childhood, while the topic of elegiac moralizing, is nonetheless deprivileging because children simply cannot speak for themselves.<sup>39</sup> The issues, certainly in neglect, concern whether the legal system can help keep children safe, rather than whether it should punish mothers.

For feminists, there is a divide between those who define themselves as protecting children by focusing on children, and those who want to protect children by placing them in a familial context.<sup>40</sup> This dilemma appears most visibly with respect to whether children should remain in their families of origin. There are advocates for children who believe that children should be removed from mothers with drug or alcohol addictions, regardless of how these women perform as parents.<sup>41</sup> There are other advocates for children who believe children should be adopted as quickly as possible—that parental rights should be terminated as soon as possible after a child is removed.<sup>42</sup> Without support for parents, however, this position clearly threatens their rights.<sup>43</sup>

Within the feminist community, we have addressed issues concerning women's special connection to children in several different ways. When it comes to abortion, we have (generally) firmly placed our-

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38. ROBERTS, *supra* note 4, at 154.

39. See Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children, A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 987 (1993); see also Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999) (discussing the problems in denying mature minors access to information and decision-making capabilities).

40. See Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1258-59 (1999).

41. See United States Department of Health and Human Services, *Adoption 2002: The President's Initiative on Adoption and Foster Care: A Response to the Presidential Executive Memorandum on Adoption 10-11* (noting that some members of the expert working group that developed the guidelines believed that parents who had failed to complete substance abuse treatment prior to their involvement with the abuse and neglect system need not be provided with reasonable family reunification efforts).

42. See ELIZABETH BARTHOLET, *NOBODY'S CHILD: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 176-204 (1999). For further discussion of these issues, see Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (forthcoming 1999) [hereinafter Cahn, *Children's Interests*].

43. See, e.g., ROBERTS, *supra* note 4 (discussing the lack of drug treatment for pregnant women and the subsequent prosecution of black drug-addicted mothers).

selves behind (in front of) women's right to choose.<sup>44</sup> In child custody at divorce, we have splintered: some advocating maternal deference, some joint custody, some best interest of the child, and some advocating primary caretaker. For child abuse and neglect, we have focused on battered mothers who abuse or neglect. In adoption, we have begun to focus on the interests of the biological mother as well as those of the adoptive mother and adoptee.<sup>45</sup>

The problem is that women are socialized, as an overall matter, to care more about children than are men;<sup>46</sup> and thus, do feel especially responsible rather than equivalently responsible when they co-parent with a man. This delicate balance—protecting children without subordinating women, or, put another way, protecting women without subordinating children—is very difficult. The needs of two outsider groups clearly conflict at certain points,<sup>47</sup> as do the issues at the heart of this conference, because race, class, sex, and sexuality are critical in defining the interests of women and children in this context.

It is important not to be paralyzed by this potential conflict. We can, instead, rephrase the problem. The question in the criminal justice system is whether to focus on punishing women or making children safer. The current focus is on the former. If we change the focus, and think about making children safer in the context of their families, then this should help both women and children. Where there really is abuse, then perhaps the criminal justice system really needs to get involved. Where neglect is involved, we should, perhaps, move to decriminalization, relying instead on civil remedies and actions. The line between abuse and neglect is, of course, somewhat difficult, but it is clear at the extremes. Putting the emphasis on children in the context of families and communities can serve to help change the law and the law's focus on punishing mothers. Along these lines, it is critically important to provide sufficient financial support so that women can

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44. For a sensitive approach to these issues, see Tracy Higgins, Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1333-35 (1990).

45. See JOAN HEITZ HOLLINGER ET AL., *ADOPTION LAW AND PRACTICE* (1999); Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. L. CONST. J. 150 (forthcoming 1999); Lacey, *supra* note 34, at 179-82; Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 109-16 (1998).

46. See RHONA MAHONEY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* (1995); Laura Kessler, *Employment Discrimination Laws and Women's Cultural Caregiving: The Limits of Economic and Liberal Political Theory* (unpublished manuscript on file with author). The problem is, really, that men are inadequately socialized in this area.

47. See Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2475-76 (1993).

escape abusive situations with their children. Enforcement of domestic violence laws will also remove abusers.

Neglect itself, in the absence of abuse, is correlated with poverty.<sup>48</sup> Providing better financial support to women will help in neglectful situations. Our ultimate goal should be to do away with the situations that lead to neglect. Children are still protected through a civil system that can take action to protect children and remove them from their families of origin, and women should not be criminally punished for their mothering. Even when women know of their partners' abuse, for example, they perhaps should not be held criminally liable for failure to act. Punishing mothers does not universally protect children, especially given a racist criminal justice system.

I think this is an example of where women's and children's interests intersect—and so I leave for another day the harder issues involved in child abuse. The line between abuse and neglect is hard to draw, and there are many hard cases. But a mother's drug or alcohol use should not be an example of criminal neglect, even if it might necessitate child protective services involvement.<sup>49</sup>

The tension amongst criminalization, providing safety and punishment that underlie the purposes of the criminal justice system, issues of women's autonomy and privilege, and issues of women's subordination in society recurs throughout the criminal justice system when women are both victims and criminals. Domestic violence and marital and statutory rape prosecutions are examples of women as victims, while prostitution and abuse and neglect prosecutions are examples of situations where women are the defendants. In each of these areas, feminists have questioned whether women are treated as individuals or as members of a class, whether women's special connections, to men or to children or to other women, justify special treatment.

In each of these areas, there are important social and economic issues that provide the context for criminalization. These issues are all too frequently overlooked in both the development and implementation of the criminal law. In domestic violence, women may be financially and socially dependent on their abusers. In rape cases, the event of rape becomes "not just *unwanted* but terrifying and terrorizing."<sup>50</sup> In prostitution, women's economic subordination plays a role in women's "choice" of prostitution. In abuse and neglect prosecutions, women receive insufficient support from society for their

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48. See Cahn, *Children's Interests*, *supra* note 42.

49. Nor should it be the basis of the mother's failure to receive reasonable efforts to reunify her family, if her child is removed. See *supra* note 41 and accompanying text.

50. WEST, *supra* note 2, at 102.

mothering. In lesbian relationships, the attempt to exist outside of a heterosexual paradigm is threatening.<sup>51</sup> The mere attempt to criminalize, or not, reflects tensions outside of the particular behavior under review, and may or may not ultimately deter the underlying behavior. For example, in California, which enforces a strict law against statutory rape, "there is scant evidence that enforcing statutory rape laws will affect the sexual behaviors of teenagers or will result in lower rates of teenage pregnancy."<sup>52</sup> This is because the reasons for teenage female sexual involvement range from emotional and psychological needs to economic needs.<sup>53</sup> Criminalizing the behavior, while important, does not address the actual reasons for the behavior, and thus, by itself, cannot provide a meaningful solution to the problem.

Or take domestic violence. The criminalization of domestic violence results in mixed consequences for women. Studies have shown that almost 30% of female homicide victims were killed by their former husbands or boyfriends, and the rate of violence against women separated from their abusers is twenty-five times that of women who stay.<sup>54</sup> Prosecution rarely results in significant jail time, and orders of protection are often violated. Criminalization thus increases a woman's exposure to violence and death.<sup>55</sup> Where public accountability for an abuser's behavior is initiated by the state, a woman may thus have incentives to actively or passively thwart the actions of the state. In addition to facing danger, poverty, and feelings of disloyalty (whether to their communities or to their abusers, who may also be father to their children), women may also feel shame and embarrassment of the public airing of the violence. Limiting the batterer's control through criminalization does not necessarily stop him from abusing, but may provoke him to abuse more or even kill. Because criminalization does not address the emotional or financial obstacles faced by battered women, criminalization alone is insufficient.

This discussion is not meant as an argument against criminalization in all contexts. Instead, I have argued that criminalization by itself is an insufficient response to the underlying problems. Rather, the crim-

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51. See RUTHANN ROBSON, *LESBIAN [OUT]LAW: SURVIVAL UNDER THE RULE OF LAW* 11 (1991). The book is "concerned with how the rule of men and law impacts upon lesbian survival." *Id.*

52. Hollenberg, *supra* note 7, at 277. Of course, there is a debate over the justification for statutory rape laws—they may be based on deterrence or retribution.

53. *See id.*

54. See RONI BACHMAN & LINDA E. SALTZMAN, *NATIONAL CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY* 1, 4 (1995).

55. *See* Mills, *Killing Her Softly*, *supra* note 22, at 554.

inal justice system must work with, must provide support to, and must be supported by a civil remedial system that pays attention to the needs of both victims and perpetrators.

Using claims of morality when it comes to women in the criminal justice system can help to illustrate the lack of neutrality in the criminal law as well as the limits of the criminal law. On the other hand, these claims are fraught with danger lest they seem to excuse, or justify, women's behavior with impunity. If the criminal law is tempered with an understanding of the realities of women's lives, with an appreciation for social justice,<sup>56</sup> then use of these claims becomes much less necessary. In order to sensitize, reform, and change the criminal justice system, pointing out women's needs is a critical intermediate strategy.<sup>57</sup> For example, the perpetuation of domestic violence is incomprehensible without an understanding of women's status in society; the enforcement of domestic violence laws is similarly incomprehensible without such an understanding combined with systems of male privilege and women's subordination. These understandings are also critical in understanding the criminalization, or lack thereof, of all crimes that particularly affect women.

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56. See ROBERTS, *supra* note 4, at 312; WEST, *supra* note 2, at 257-58.

57. See Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1435-39 (1992).