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Foreword: The Meaning of Gender Equality in Criminal Law

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SYMPOSIUM: GENDER ISSUES AND THE CRIMINAL LAW

FOREWORD: THE MEANING OF GENDER EQUALITY IN CRIMINAL LAW

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This Symposium reflects a growing interest in the criminal law's treatment of women, both as victims and as offenders. Feminist legal analyses of crime have concentrated on men's violence against women, perhaps because it so directly imposes patriarchal power.[1] Feminists have challenged the male perspective that structured the definition of rape and discounted the harm of domestic violence. Now feminist legal scholars are examining the punishment of female lawbreakers as another site of gender inequality. This interest in criminal law makes sense. Although the law generally compels and legitimates prevailing relationships of power, the criminal law most directly mandates socially acceptable behavior. Criminal law also helps to shape the way we perceive women's proper role. The articles presented in this Symposium explore a spectrum of issues raised by this inquiry into gender and criminal law. Michelle Oberman's article, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, reconsiders statutory rape laws in light of current evidence that adolescent girls are especially vulnerable to male sexual aggression.[2] Deborah W. Denno's article, *Gender, Crime, and the Criminal Law Defenses*, studies the reasons for gender disparities in the commission of crime and considers the consequences for women's culpability for

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1 Kathleen Daly & Meda Chesney-Lind, *Feminism and Criminology*, 5 JUST. Q. 497, 513 (1988).

2 Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law Reform*, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994).

their criminal conduct.[3] Finally, in *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, Ilene H. Nagel and Barry L. Johnson challenge claims that the recent adoption of gender-neutral sentencing guidelines actually treats women unfairly.[4]

Each of the articles explores the meaning of gender equality in criminal law and wrestles with difficult issues, such as whether gender equality requires protecting teenage girls from sexual coercion through enforcement of statutory rape laws, or respecting their sexual choices by abolishing these laws; whether gender equality requires acknowledging the biological differences that influence women's criminality, or ignoring them; and whether gender equality requires preferential treatment of female offenders based on their family responsibilities, or gender neutral sentencing that imposes the same penalties on men and women. As these articles illustrate, the complexity of these inquiries often lead to opposite conclusions.

Figuring out the answers might invoke the now familiar sameness/difference debate. Feminist theorizing has grappled with describing the nature of differences between men and women and identifying the relationship of these differences to gender equality.[5] According to this framework, the "difference" approach emphasizes gender disparities and advocates different treatment (sometimes called special protection) for women. The "sameness" approach minimizes the differences between the sexes and advocates the same treatment for men and women based on gender neutrality. Proponents of the "sameness" approach fear that acknowledging gender differences in power or biology perpetuates negative female stereotypes and roles.[6] Feminists who challenge the male bias in criminal law risk similar charges of special treatment of both victims and offenders. Defining gender equality as "similar treatment" causes people to perceive some efforts to protect women from sexual coercion as paternalism.

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[3] Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994).

[4] Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181 (1994).

[5] *See generally* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990); Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987). Other feminist scholars reject the enterprise of "grand theory" altogether and suggest instead the need for a more contextual analysis of gender equality. *See, e.g.*, Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1181 (1994); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 884 (1990).

[6] *See, e.g.*, Wendy M. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

This definition of equality also sees paternalism in efforts to recognize criminal women's distinct situations in determining their culpability or punishment.

Other feminists demonstrated that the very framing of the equality inquiry in terms of sameness and difference ignored an underlying male standard, as well as the systemic subordination of women.[7] They reconceived gender equality as a question of the distribution of power, rather than the differences between the sexes. Thus, the path to gender equality does not lie in either ignoring or glorifying innate differences between men and women. It lies in eradicating society's use of gender differences to keep women in an inferior political status. As Ann Scales observed, "[i]njustice does not flow directly from recognizing differences; injustice results when those differences are transformed into social and economic deprivation."[8] Understanding the mechanisms of injustice requires attention to the operation of the law within the context of particular social circumstances.[9]

Feminists examining criminal law should be concerned with uncovering the ways that the criminal law contributes to women's deprivation by continuing to reflect and protect patriarchal interests. Feminist scholars should use these discoveries to devise ways to transform criminal law into a more egalitarian system that respects all women as self-determining human beings. The ultimate goal is not simply to remove the aspects that disadvantage women, but to describe a feminist vision of criminal justice. Of course, feminists will forever struggle over the best course to take. It is essential, however, to acknowledge the power differences between men and women and then work to eliminate them. As Fran Olsen puts it, it is pointless "to pretend that men and women are similarly situated."[10] How readers perceive the proposals presented in this Symposium for achieving gender equality in criminal law will depend largely on the degree of pretense in which they are willing to engage.

Two additional features are critical to the feminist pursuit of gender equality in criminal law. First, it must recognize that race and class shape women's confrontation with criminal law as much as gender. Race and class help to determine the criminal law's treatment of female victims of crime. For example, the social meaning of rape in

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7 *See, e.g.*, CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

8 Scales, *supra* note 7, at 1396.

9 *See* Rhode, *supra* note 5, at 1181.

10 Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 412 (1984).

America has centered on a mythology that defines Black women as sexual objects.[11] White men's sexual exploitation of Black women during and after slavery was an instrument of white supremacy, as well as male domination.[12] Further, the criminal law has enforced the racial meaning of rape by denying rape's injury to Black women. Angela Harris concluded about the history of rape law, "as a legal matter, the experience of rape did not even exist for black women."[13] Contemporary American juries and law enforcement officials continue to discount the stories of Black victims of sexual assault.[14]

Race and class also influence the criminal law's treatment of female lawbreakers. The punishment of criminal mothers, for example, reflects society's differentiation of mothers based on race and class.[15] Prosecutions of drug use during pregnancy target poor, Black women because these women are subject to greater government supervision and fail to meet the white middle-class ideal of motherhood.[16] Feminist scholars should explore the relationship between racism, class bias, and patriarchy in the criminal law's subordination of women. Achieving gender equality in criminal law requires eliminating racism and class bias from criminal law.

Second, feminists should do more than simply reveal discrimination against or preferential treatment towards women in the government's enforcement of criminal laws. They should also reveal the inequality that is embedded in the very definition of crime—an inequality which reinforces prevailing relationships of power.[17] Laws criminalizing maternal conduct, for example, help to shape the very

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11 *See* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 176-79 (1990); Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, 142 (1984); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 122 (1983).

12 COLLINS, *supra* note 11, at 177-78; ANGELA Y. DAVIS, WOMEN, RACE, & CLASS 23, 24 (1981); BELL HOOKS, AIN'T I A WOMAN 33-36 (1981).

13 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990).

14 *See* Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1470 (1992); Barbara Omolade, *Black Women, Black Men and Tawana Brawley—The Shared Condition*, 12 HARV. WOMEN'S L.J. 11, 16 (1989); Wriggins, *supra* note 11, at 122.

15 *See* Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 103-09 (1993) [hereinafter *Motherhood and Crime*].

16 Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454-55 (1991) [hereinafter *Punishing Drug Addicts*].

17 *See generally* CAROL SMART, FEMINISM AND THE POWER OF LAW (1989) (exploring how law, particularly criminal law, enforces an account of social reality); Richard C. Boldt, *The Construction of Responsibility in Criminal Law*, 140 U. PA. L. REV. 2245 (1992) (discussing how the criminal law creates and maintains a perspective on human behavior).

meaning of motherhood.[18] As noted, the prosecutions of poor, Black crack addicts do more than enforce a neutral law in a discriminatory fashion; they also devalue black motherhood. I observed elsewhere that "prosecution of these pregnant women serves to degrade women whom society views as undeserving to be mothers and to discourage them from having children. . . . Society is much more willing to condone the punishment of poor women of color who fail to meet the middle class ideal of motherhood."[19] In the same way, laws that punish mothers for failing to protect their children from another's abuse often enforce a subordinating image of mothers as selfless beings.[20] Courts often hold women responsible for harm to their children based on their role as mother, rather than the particular circumstances of the violence.[21] Thus, courts discipline these women even though they are victims of the same violence as their children. These examples show that achieving gender equality in criminal law requires uprooting patriarchal views of women at many levels.

EQUALITY FOR FEMALE VICTIMS OF CRIME

Feminists have made a dramatic contribution to rape law. They have demonstrated that, historically, the law of rape has regulated competing male interests in controlling sexual access to females, instead of protecting women's interest in controlling their own bodies and sexuality.[22] Despite two decades of rape reform, however, the criminal law still does not adequately protect female sexual autonomy. Moreover, some feminist efforts to further expand society's perception of what constitutes rape—especially acquaintance rape—face charges of perpetuating paternalistic stereotypes of female passivity. Conservatives and feminists alike question the need for the criminal law's special protection of women's agreements to engage in sexual intercourse.[23]

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18 *See* Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY WOMEN'S L.J. 1 (1992); Roberts, *Motherhood and Crime*, *supra* note 15, at 103; Roberts, *Punishing Drug Addicts*, *supra* note 16, at 1444. *See also* Stephen J. Schulhofer, *The Gender Question in Criminal Law*, *in* CRIME, CULPABILITY, AND REMEDY 105 (Ellen Frankel Paul et al. eds., 1990) (discussing ways in which traditional criminal law doctrine reflects a "male" conception of rights and responsibilities); Mary E. Odem, *Fallen Women and Thieving Ladies: Historical Approaches to Women and Crime in the United States*, 17 LAW & SOC. INQUIRY 351 (1992) (book review) (discussing the legal history of the criminal punishment of women for inappropriate sexual behavior).

19 Roberts, *Punishing Drug Addicts*, *supra* note 16, at 1435-36.

20 Roberts, *Motherhood and Crime*, *supra* note 15, at 109-19.

21 *Id.* at 110-13.

22 *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); SUSAN ESTRICH, REAL RAPE (1987).

23 *See, e.g.*, RICHARD A. POSNER, SEX AND REASON (1992) (presenting a view of sex as a

Michelle Oberman's critique of the decriminalization of statutory rape grapples with this tension between the meaning of women's sexual autonomy and the consequences of state protection. Oberman demonstrates that laws regarding minors generally depend on normative decisions about minors' access to adult activities, not on an assessment of minors' ability to make their own decisions.[24] Rather than respecting girls' sexual decisions and desires, the decriminalization of statutory rape similarly reflects the expectation that girls sometimes should be sexually accessible to males.

Oberman's analysis of the criminal law's failure to protect adolescent girls relies on a critical observation about the meaning of consent. A woman's consent to sex, like all legal choices, is a "social construct."[25] Judicial determinations of whether teenage girls freely engaged in sex inevitably depend on normative judgments about the permissibility of the male pressures they faced. Oberman argues that protecting girls' sexual autonomy involves considering the preconditions necessary for girls' meaningful consent to sexual activity.[26] This task requires attending to the imbalance of power between adolescent boys and girls and the disparate societal expectations regarding their sexuality. Although it is tempting to pretend that girls are now sexually liberated, in reality our culture still conditions them to submit to unwanted physical contact in order to please men. The challenge for reform is to craft a law that recognizes girls' vulnerability without unfairly limiting their sexuality or unjustly punishing boys who engage in mutually desired sexual relationships.

Oberman's article raises two additional problems with rape law. First, judicial interpretations of rape statutes ignore a great deal of violence in women's lives. Courts often require a showing of serious physical injury in addition to the unpermitted sexual activity. They fail to see the man's latent threat of violence or the violence in the

commodity to be traded on the market); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1791 (1992) (proposing another commodity theory of sex: "[t]here is good reason to believe that the inequality of women in sexual bargaining is less than their inequality in commercial bargaining."); KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS (1993) (criticizing "campus-rape-crisis feminists" for portraying women as intellectually inferior to men).

24 Oberman, *supra* note 2, at 45-56.

25 Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 41 (1992).

26 Oberman, *supra* note 2, at 74-82. *Cf.* Schulhofer, *supra* note 25, at 1786-87 (proposing an alternative model of rape law that replaces the traditional preoccupation with force and nonconsent with a concern for the preconditions of women's meaningful choice in sexual activities).

coerced sexual activity itself.[27] Many statutory rape cases involve so much violence that prosecutors should not need to resort to a statutory rape charge.[28] Oberman points out that some girls participated in the Spur Posse "game" of sexual exploits only because they were afraid that the boys would beat them up if they did not cooperate.[29] In *Michael M. v. Sonoma County Superior Court*,[30] in which the United States Supreme Court upheld California's statutory rape law, the victim permitted the defendant to "do what he wanted" only after he slugged her in the face several times.[31] In *Commonwealth v. Rhodes*,[32] the twenty-year-old defendant lured an eight-year-old girl from a playground into a nearby abandoned building where he had sexual intercourse with her. The trial judge held that the defendant's actions did not constitute forcible rape, despite the girl's age and her pleas for the defendant to stop, because there was no evidence of "forcible compulsion."[33] Because the law permits sexual coercion against girls, prosecutors sometimes must rely on statutory rape laws to obtain a conviction even where victims experience violence. The critique of statutory rape laws should focus on challenging courts' persistent acceptance of some degree of violence against girls as a means of sexual access, as well as on the debate over whether these laws are paternalistic.

Second, the disparate enforcement of both statutory rape laws and forcible rape laws demonstrates that categories of entitlement reflecting relationships of power in society determine the meaning of rape.[34] Juries decide whether a rape occurred by judging the man's

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27 *See* Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 369-81 (1993).

28 Prosecutors would prefer to obtain a rape conviction since statutory rape is usually punished less severely. In Pennsylvania, for example, rape is a first degree felony, while statutory rape is a second degree felony. *Compare* 18 PA. CONS. STAT. § 3121 *with* 18 PA. CONS. STAT. § 3122.

29 Oberman, *supra* note 2, at 17 n.10.

30 450 U.S. 464 (1981).

31 Oberman, *supra* note 2, at 39 n.138.

32 510 A.2d 1217 (Pa. 1986).

33 *Id.* at 1220. The Supreme Court of Pennsylvania reversed the trial court's decision, holding that "forcible compulsion" included moral, psychological or intellectual, as well as physical, force. *Id.* In Commonwealth v. Mlinarich, 542 A.2d 1335 (Pa. 1988), however, the same court held that a foster father's threat to commit a fourteen-year-old girl to a juvenile detention center if she did not submit to sexual intercourse did not constitute forcible compulsion. The court reached this conclusion despite its finding that the girl refused to have sex with the defendant until he threatened her and that she experienced pain and "'scream[ed], holler[ed]' and cried" during the defendant's attempts to penetrate her. *Id.* at 1337.

34 *See* Steven B. Katz, *Expectation and Desire in the Law of Forcible Rape*, 26 SAN DIEGO L. REV. 21, 21-23 (1989); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 648 (1983); Roberts, *supra* note 27, at 361-68.

entitlement to sexual access and the woman's entitlement to the law's protection. These judgments of entitlement depend on race and class, as well as gender.[35] Statutory rape laws protect only chaste, virtuous girls.[36] Determinations of which girls fit this category depend on the girls' sexual history, and on racial and other sexual stereotypes. Thus, the reason prosecutors felt that the victims of the Spur Posse's sexual exploits did not deserve the statutory rape law's protection has more to do with their presumption that these girls were licentious than with what occurred between them and the gang members. As with every other aspect of criminal law, statutory rape laws' favorable treatment of females extends primarily to certain classes of females who fit patriarchal standards for women. The real aim for achieving gender equality is not eliminating such superficially preferential treatment, but purging the deeper biases that value women based on illegitimate hierarchies.

EQUALITY FOR FEMALE OFFENDERS

The most striking fact about female offending is its relative infrequency and lack of violence compared to male crimes.[37] Deborah Denno's article explores the reasons for this gender disparity and suggests that the explanation accounts for the underlying causes of crime in general.[38] Denno is especially interested in determining the interplay between biology, sociology, and environment in predicting criminal conduct, and in the gender differences in the relative importance of these factors. Using the results of the Biosocial Study, she discovers that, although factors predicting crime among males and females are similar, biological factors are relatively stronger predictors of crime among females.[39] Denno concludes that gender disparity in the environmental and biological predictors of crime do not justify differential treatment unless independent, gender-neutral reasons would support this result.

Denno's article also raises the more preliminary question of whether studying biological predictions for criminal behavior is the way to seek gender equality in criminal law. The answer is probably that it is not. Feminism's greatest contribution to criminal law has been to reveal its *political* nature. Feminists have demonstrated that male violence against women is rooted in prevalent power relation-

35 *See supra* notes 11-14 and accompanying text.

36 Oberman, *supra* note 2, at 33-38.

37 *See* Darrell Steffensmeier & Emilie Allan, *Gender, Age, and Crime, in* CRIMINOLOGY: A CONTEMPORARY HANDBOOK 67, 67-70 (Joseph F. Shaley ed., 1991).

38 Denno, *supra* note 3, at 86.

39 *Id.* at 99-101.

ships rather than in men's biological or mental aberrations.[40] Scholars should extend this insight concerning male criminality to their analyses of female lawbreaking. Feminists should analyze female crimes within the context of patriarchal power. Biological explanations of crime tend to do precisely the opposite. They divert attention away from the political causes and meanings of crime.

Indeed, the powerful have historically attributed criminal conduct to irremediable biological causes in order to justify their oppression of others. Biological explanations for crime depoliticize social conflicts and make official restraint of disenfranchised groups seem natural and inevitable.[41] American eugenic theory during the first half of the twentieth century explained criminality as an inherited trait.[42] Legislatures implemented this theory in laws that mandated sterilization or castration of habitual criminals.[43] History reveals, however, that these eugenic programs punished those who deviated from *social* norms.[44] In the same way, early biological explanations of female criminality enforced a normative view of women's role as passive and asexual.[45]

Biological explanations for crime accept as unproblematic the definition of crime and the identification of criminals. They focus exclusively on why individuals acted in a way that society deems criminal, rather than considering why society defines their conduct as criminal. For example, does the Biosocial Study's finding that twenty-two percent of the black youth it tracked had at least one police contact prior to age eighteen reveal a high incidence of delinquency in this cohort or a high incidence of police harassment in their inner-city neighborhood?[46] Feminists should examine how the definition and punishment of female crimes enforce subordinating views of women,

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40 *See, e.g.*, MACKINNON, *supra* note 7, at 126-54, 171-83 (explaining rape's origin in ordinary heterosexual relationships, which enforce male power and eroticize dominance); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991) (explaining domestic violence as "the *batterer's quest for control* of the woman").

41 *See* Janet Katz & Charles F. Abel, *The Medicalization of Repression: Eugenics and Crime*, 8 CONTEMP. CRISES 227, 227 (1984).

42 *See* Nicole H. Rafter, *Introduction* to WHITE TRASH: THE EUGENIC FAMILY STUDIES 1877-1919 11 (Nicole H. Rafter ed., 1988).

43 *See* Jeffrey F. Ghent, Annotation, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R.3d 960, 963-65 (1973); Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942) (striking as unconstitutional a state statute that provided for the sterilization of certain habitual criminals).

44 Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1963-64 (1993).

45 *See* Denno, *supra* note 3, at 86-92.

46 *See* Denno, *supra* note 3, at 104. *Cf. id.* at 99-103 (noting the differential treatment of white and black juveniles charged with crimes).

as well as why women break apparently neutral criminal laws.

Finally, biological explanations for crime often point to the wrong solution for crime. They cast offenders as victims of a biological fate, rather than agents acting in a social and political context. Biological explanations for some crimes locate their cause in individual offenders' aberrational disorders, rather than in their imposition of power. They lead to the conclusion that, for example, men who batter manifest a problem with controlling their anger. Biological explanations for other crimes perceive their cause as the offenders' physical inability to cope with an oppressive environment. Under this approach, the solution to the crimes is to punish or cure the offenders' disability rather than seeking to change their oppressive environment.[47] Explanations of maternal child abuse center on the failure of maternal instinct or mothers' inability to cope with the stresses of child rearing.[48] They consequently fail to examine the connection between child abuse and power struggles in the home.[49]

Defenses based on women's illnesses, such as premenstrual syndrome and postpartum depression, also risk misdiagnosing the causes of some women's crimes. Some women may suffer from medical conditions extreme enough to negate volition or mitigate culpability.[50] The criminal law should acknowledge illnesses that affect female defendants' criminal responsibility as it has acknowledged male disabilities. Americans have a tendency, however, to ascribe women's

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47 In analyzing the causes of crime, it may be helpful to distinguish between externally-created and internally-created biological disabilities. For example, there is a significant difference between a neurological impairment caused by lead exposure that is linked to criminal conduct and a genetic predisposition towards crime. *See* Deborah W. Denno, *Considering Lead Poisoning As A Criminal Defense*, 20 FORDHAM URB. L.J. 377, 397 (1993). The obvious solution to the former criminogenic factor—eradicating hazardous lead paint—is far less problematic than the potential solutions for supposedly genetic traits. I am grateful to Joyce McConnell for helping me to articulate this distinction.

48 *See* Roberts, *Motherhood and Crime*, *supra* note 15, at 110-11; Sarah Uhl, *Stereotypes of Women Cloud Drug Discussion*, N.Y. TIMES, Apr. 7, 1990, at A24 (letter) (criticizing claim that crack use overwhelms maternal instinct).

49 *See* Roberts, *Motherhood and Crime*, *supra* note 15, at 126-30. Battered mothers are much more likely to abuse their children than mothers who are not battered. *Id.* at 126, n.156 (citing studies that demonstrate the connection between child abuse and woman battering); Evan Stark & Anne H. Flitcraft, *Woman-Battering, Child Abuse and Social Heredity: What is the Relationship? in* MARITAL VIOLENCE 147, 165 (Norman Johnson ed., 1985) (refuting the theory that abuse is transmitted intergenerationally; "To the contrary, the stimulus to this history of deliberate injury and child abuse appears to be repeated assault by a male intimate, not a personal or familial inheritance of pathology.").

50 *See generally* Linda R. Chait, *Premenstrual Syndrome & Our Sisters in Crime: A Feminist Dilemma*, 9 WOMEN'S RTS. L. REP. 267, 293 (1986); Laura E. Reece, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 757 (1991) (arguing that "[n]ew mothers who commit infanticide . . . not only should be able to introduce evidence of their [postpartum] disorders in their defense, but should have their experience of postpartum depression or postpartum psychosis considered as an exculpating factor.").

problems to illnesses.[51] Defining ordinary female experiences, such as menstruation, as pathological, has helped to justify women's subordinate position as well as the widescale medical management of women.

Female defendants may be forced to portray themselves as ill or insane, because the law does not recognize the stifling social conditions that contributed to their criminal acts. In many cases, female defendants will argue that biological explanations, such as premenstrual syndrome and postpartum depression, rather than the constraints of traditional female roles, caused them to commit the crime. Perhaps Shirley Santos, the first American woman to raise a defense based on premenstrual syndrome, hit her daughter in reaction to the burdens of childrearing, and not because of any biological ailment;[52] or mothers who argue that postpartum depression excuses them from liability for infanticide killed their babies after experiencing the stresses of singlehandedly caring for a newborn.[53] Women's reliance on these defenses reflects society's reluctance to address women's problems unless they are explained as illnesses.[54] Society is more willing to cure women's diseases than to change women's social circumstances. The political, rather than organic, origins of maternal crimes do not necessarily excuse mothers' violence. This political context, however, calls into question traditional notions of culpability and excuse. It may be a more productive site than mothers' pathologies for solving most maternal crimes.

Another issue is the meaning of gender equality in sentencing offenders. Mitigating women's sentences based on family responsibilities may be paternalistic and may perpetuate female stereotypes. There is sound historical support for this concern. Until recently, a woman's role in the family determined the criminal sentence a court imposed upon her. Sentencing of female offenders evinced society's image of women as mothers or potential mothers and enforced appropriate gender roles.[55] Sociologist Kathleen Daly theorizes that the treatment of offenders reflected a "familial justice" consisting of two

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[51] SUSAN SHERWIN, NO LONGER PATIENT 179-200 (1992) (discussing the "raging hormones" myth as stereotypical of menstruating women but advocating a PMS/organic condition defense in rare and extreme circumstances).

[52] *See* Denno, *supra* note 3, at 158-601; People v. Santos, No. IK046299 (Kings County, N.Y. Crim. Ct. Nov. 3, 1982).

[53] For example, Sheryl Massip, who was found not guilty of murder by reason of insanity, became depressed when she was unable to comfort her crying newborn. Denno, *supra* note 3, at 164 n.320; People v. Massip, 824 P.2d 568 (Cal. Ct. App. 1992).

[54] SHERWIN, *supra* note 51, at 179-80.

[55] Roberts, *Motherhood and Crime*, *supra* note 15, at 103-04. *See also* Nagel & Johnson, *supra* note 4, at nn.27-33 (citing studies demonstrating that women offenders received preferential treatment).

factors: (1) informal social controls that work in place of formal incarceration, and (2) the social costs created by incarceration.[56] Judges treated women more leniently because they assumed women's family responsibilities would provide informal social controls in their lives and that women's caretaking was essential to children's welfare.[57]

On the other hand, gender equality may require taking gender into account in sentencing because of incarceration's actual effect on women. The lives of female offenders reflect the stark gender disparity in childcare that exists in the broader society. Few men in prison are primary caretakers of children; most women in prison are primary caretakers.[58] Moreover, while the children of most male offenders remain in the care of their mother, incarcerated mothers rarely can rely on the father to care for their children.[59] Thus, it is far more likely that the incarceration of a woman will disrupt her relationship with her child. The gender disparity in childcare generally makes a particular term of imprisonment more harsh of a penalty for women than for men. Therefore, treating female offenders the same as male offenders results in inequality in the actual consequences of punishment.

In response to this disparate impact, Nagel and Johnson observe that it is impossible to distinguish this "subjective" harm to mothers from those claimed by other offenders, such as elderly prisoners with few years to live or executives at the height of their careers. "Permitting these intersubjective comparisons to alter the otherwise applicable sentence leads to a free-for-all of sentence individualization, each defendant arguing that her incarceration would be more painful than that of other defendants."[60] The harsh impact of gender-neutral sentencing on most female offenders, however, is distinctly invidious, because it results from the unequal social distribution of childcare.

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56 Kathleen Daly, *Discrimination in Criminal Courts: Family, Gender, and the Problem of Equal Treatment*, 66 SOC. FORCES 152, 154-55 (1987).

57 *Id.* at 168. Nagel and Johnson predict that recent state and federal reforms that minimize judicial sentencing discretion will reduce this historical mitigation of female offenders' sentences based on women's family roles. *See* Nagel & Johnson, *supra* note 4, at 216-20.

58 Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 951-53 (1993).

59 *See* Donna C. Hale, *Impact of Mothers' Incarceration on the Family System: Research and Recommendations*, 12 MARRIAGE & FAM. REV. 143, 149 (1988); George J. Church, *The View from Behind Bars*, TIME, Fall 1990, at 20-21; Raeder, *supra* note 58, at 955. A 1991 federal inmate survey, for example, revealed that 91% of men but only 33% of women reported that their children currently live with the child's other parent. Raeder, *supra* note 58, at 952.

60 Nagel & Johnson, *supra* note 4, at 205.

Moreover, the aim of eliminating preferential treatment for women wrongly assumes that the sentencing system is basically fair. Uniform sentencing is not fair, however, if embedded in sentencing schemes is a male-based model that presumes a potentially violent criminal who is not the primary caretaker of young children.[61]

Nor will acknowledging the gender-based nature of childcare alone achieve gender equality. Judges who mitigate sentences based on childcare responsibilities may incorporate biased images of motherhood in their decisionmaking. Sentencing judges have not treated leniently women who depart from the norm of ideal mother, such as poor women, women of color, lesbians, single women, and women who commit "unfeminine" crimes.[62] They have assumed that white, middle-class mothers are both more amenable to nonjudicial social controls and more crucial to their children's welfare.[63] To the contrary, mothers who are considered the most deviant—poor, unmarried, minority mothers—may be most in need of reduced sentences since their bonds with their children are most disrupted by their incarceration. Judges' difficulty in seeing this injury stems from devaluation of the relationship between these women and their children.

Yet another aspect of modern sentencing guidelines results in especially harsh sentencing of female offenders. Tough, mandatory minimum sentences for participation in drug trafficking conspiracies often imprison women with minor roles in these conspiracies arising from their intimate relationship with more culpable men.[64] These women may become involved in crime because of their financial dependence on, or fear of, the men, as well as their romantic attachment to them. Nagel and Johnson point out that some federal courts have mitigated the sentences of women whose victimization influenced their criminal conduct.[65] Sentencing judges see battered women who are coerced by violent men to commit crimes as less culpable under traditional excuse theories akin to duress. Assessing women's culpability, however, requires a more thorough and subtle analysis of the

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61 The American wage labor system, which is structured as if workers have no child care responsibilities, imposes an analogous form of gender inequality. *See* Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 56-61 (1979); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822 (1989). According to Joan Williams, this assumption systematically disadvantages working women who become economically marginalized in order to allow their husbands to perform as ideal workers and to ensure that their children receive high-quality care. Williams, *supra*, at 823.

62 Nagel & Johnson, *supra* note 4, at 204-05. Poor and minority defendants were disadvantaged by mitigations for ties in the community not because they had no community ties, but because their ties did not fit within the norm of middle-class social networks.

63 Roberts, *Motherhood and Crime*, *supra* note 15, at 106.

64 Nagel & Johnson, *supra* note 4, at 213-15.

65 *Id.*

gendered circumstances that lead to women's offending. Scholars may want to reexamine traditional notions of duress to construct a theory of culpability that better accounts for the moral accountability of women who are bound to criminal men. They should also examine more closely the significance of women's relationships to men in courts' reasoning about female culpability. Do judges apply theories of complicity in gendered ways that disadvantage women? In some cases, it appears that courts base women's responsibility for crime at least partly on the women's role as the wife or girlfriend of the more culpable men. The question becomes not whether women should be *excused* because of their relationship with criminal men, but whether they are sometimes *blamed* for their relationship with criminal men. The significance of women's role as intimate partner, as well as mother, in defining women's criminality is an important area for further feminist inquiry.

The meaning of gender equality in criminal law is contested even among feminists. It is impossible to define a grand feminist theory that will produce an egalitarian criminal justice system. Here are, however, three broad guidelines for a feminist analysis of criminal law: it should center on the political nature of both the commission and definition of crime; it should search beyond the appearance of preferential treatment to reveal deeper biases in the law; and it should account for the interplay of race and class, along with gender, in the criminal law's treatment of women. Ultimately, this critique of criminal law's patriarchal components should yield a feminist vision of criminal justice that questions the traditional notions of harm, culpability, and punishment that are so readily accepted.