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[INCLUDING BUT NOT LIMITED TO] VIOLENCE AGAINST WOMEN

Giovanna Shay*

In recent years, commentators have paid increasing attention to male sexual victimization and same-sex intimate partner violence. Law professor Bennett Capers has published an article entitled *Real Rape Too*, focusing on male rape;¹ human rights activists have written about how the human rights community has tended to equate gender violence with violence against women;² and the national media has reported on the experiences of male rape victims.³ At the same time, the LGBTQ rights movement has called for more awareness regarding intimate partner violence in same-sex relationships.⁴

In this symposium piece, I want to reflect on our current moment of transition to more gender-inclusive notions of sexual and intimate partner violence. I'm going to highlight three developments in 2012 that represented that movement: the FBI's adoption of a gender-neutral

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1. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1259 (2011).

2. Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 605-606 (2009).

3. Roni Caryn Rabin, *Men Struggle for Rape Awareness*, N.Y. TIMES, Jan. 23, 2012, available at <http://www.nytimes.com/2012/01/24/health/as-victims-men-struggle-for-rape-awareness.html>.

4. NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE (2011), available at http://www.avp.org/storage/documents/Reports/2012_NCAVP_2011_IPV_Report.pdf. See also Tara R. Pfeifer, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN. ST. L. REV. 1251, 1252-1253 (2005); Krisana M. Hodges, *Trouble in Paradise: Barriers to Addressing Domestic Violence in Lesbian Relationships*, 9 L. & SEXUALITY 311, 312-313 (1999-2000). See also Tara R. Pfeifer, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN. ST. L. REV. 1251, 1252-1253 (2005).

definition of rape; the debate regarding the reauthorization of the Violence Against Women Act (VAWA); and the promulgation of new Department of Justice (DOJ) regulations under the Prison Rape Elimination Act of 2003 (PREA).

The first important development that I want to consider occurred early in 2012, when the FBI changed its definition of rape to include male victims.⁵ Until 2012, the FBI definition tracked the traditional definition of rape, and was gendered: it criminalized “carnal knowledge of a female forcibly and against her will.”⁶ The vast majority of American jurisdictions have adopted rape statutes that are (in large measure) gender-neutral,⁷ although gendered rape statutes are still on the books in some jurisdictions.⁸

5. Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES, Jan. 6, 2012. The new FBI definition of rape is: “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” See U.S. Dep’t of Justice, *Attorney General Holder Announces Revisions to the Uniform Crime Report’s Definition of Rape*, (Jan. 6, 2012), <http://www.fbi.gov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape>.

6. Stephanie Hallett, *Definition of Rape Officially Changed, Impacts Men As Well As Women*, HUFF POST WOMEN, Jan. 6, 2012, http://www.huffingtonpost.com/stephanie-hallett/definition-of-rape_b_1190633.html. Accord John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1083 (2011); See also Elizabeth J. Kramer, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 301-302 (1998) (noting that because rape statutes were not gender neutral, rape shield laws also failed to protect male victims of sexual assault).

7. See Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 516 & n.88 (2012) (“today statutory rape statutes are gender-neutral with respect to both the class of perpetrators and the class of victims in almost all, if not all, states”); Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 SEATTLE J. FOR SOC. JUST. 481, n.33 (2007) (stating that all but five states had adopted gender-neutral rape statutes as of 2007); Deborah Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, n.152 (1997) (reporting in 1997 that forty-one states had gender-neutral statutes).

8. See, e.g., ALA. CODE § 13A-6-61(a)(1) (LexisNexis 2005) (defining first-degree rape in part as opposite-sex intercourse, providing: “A person commits the crime of rape in the first degree if he or she engages in intercourse with a member of the opposite sex by forcible compulsion . . .”); MD. CODE ANN., Criminal Law § 3-303 (a)(1) (LexisNexis 2012) (defining rape in the first degree in part by reference to female anatomy: “a person may not engage in vaginal intercourse with another by force”); MISS. CODE ANN. § 97-3-71 (West 2011) (defining the crime of assault with intent to ravish as “assault with intent to forcibly ravish any female of previous chaste character.”); N.C. GEN. STAT. § 14-27.2(a)(2) (2011) (defining first-degree rape in part by reference to a female anatomy that “A person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force and against the will of the other person.”); IND. CODE ANN. § 35-42-4-1 (LexisNexis 2009) (stating that a person commits rape when that person “knowingly or intentionally has sexual intercourse with a member of the opposite sex” under certain circumstances). Idaho criminalizes a separate crime of “male rape,” IDAHO CODE ANN. § 18-6108 (Supp. 2012) (defined as “the penetration, however, slight, of the

Nonetheless, until the FBI made this change, male rape victims did not count in federal crime statistics.⁹ Even if state law rape definitions encompassed male victims, those cases simply were not reported in the Uniform Crime Reports (UCR), which were based on the FBI definition—the ultimate erasure.¹⁰ At a minimum, the change in the FBI statistics signals important recognition of the existence of male victims, and will assist with more accurate reporting.¹¹

The second significant episode of 2012 was resolved as this article was being written—it was the Congressional debate regarding the reauthorization of the Violence Against Women Act (VAWA). In April 2012, the Senate passed a reauthorization of VAWA providing funding for projects to serve LGBT communities and prohibiting VAWA-funded services from discriminating on the basis of sexual orientation and gender identity.¹² Republicans in the House stripped language referring specifically to gay and transgender victims from the bill.¹³ Although even

oral or anal opening of another male” in specified circumstances). See also Courtney O’Donnell, *Swedish Judge Rules Man Not Guilty of Attempted Rape of Trans Woman Because She Has No Vagina*, HUFF POST GAY VOICES, July 6, 2012, http://www.huffingtonpost.com/courtney-odonnell/sweden-transgender-rape_b_1647981.html.

9. Savage, *supra* note 5.

10. *Id.*

11. But see Brenda V. Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers’ Sexual Interactions with Men and Boys in Custody*, 59 UCLA L. REV. 1690, 1719 (2012) (arguing that the new federal definition of rape—“penetration . . . of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person” – may recognize men as rape victims, but still does not encompass women as perpetrators, because of the penetration requirement).

12. Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. (2011-12) (the Senate bill would have expanded the definition of “underserved populations” to include categories of sexual orientation and gender identity; would have prohibited service providers from discriminating on the basis of sexual orientation and gender identity; and would have funded expansion of programs for those who have not received services because of their sexual orientation and gender identity); Violence Against Women Reauthorization Act of 2011, Report of the S. Comm. on the Judiciary, S. 1925, 112th (2011) (noting that “programs which primarily serve gay men . . . have been denied access to [VAWA] funding in the past because they do not predominantly address violence against women.”) See Jonathan Weisman, *Senate Votes to Reauthorize Domestic Violence Act*, N.Y. TIMES, Apr. 26, 2012, available at <http://www.nytimes.com/2012/04/27/us/politics/senate-votes-to-renew-violence-against-women-act.html>.

13. Violence Against Women Reauthorization Act of 2012, H.R. 4970, 112th Cong. (2012). David Grant, *House Passes Violence Against Women Act, Grudgingly*, CHRISTIAN SCIENCE MONITOR, May 16, 2012, <http://www.csmonitor.com/USA/DC-Decoder/2012/0516/House-passes-Violence-Against-Women-Act-grudgingly>; Jennifer Bendery & Laura Bassett, *House Passes Violence Against Women Act that Leaves Out LGBT, Immigrant Protections*, HUFFINGTON POST, May 16, 2012, http://www.huffingtonpost.com/2012/05/16/house-passes-violence-against-women-act_n_1522524.html; Russell Berman, *House, Senate Can’t Agree on Violence Against*

some House Republicans called on their colleagues to send a more inclusive bill to the White House, the 112th Congress ended without the issue being resolved.¹⁴ Shortly before this article went to press, the 113th Congress passed an LGBT-inclusive version of VAWA, which President Obama signed into law in March 2013.¹⁵

The third important development that I'd like to highlight is the movement to address sexual violence in prison, including violence against men and boys. This movement has produced the Prison Rape Elimination Act of 2003 (PREA),¹⁶ under which new federal regulations were promulgated in May 2012.¹⁷ These new regulations—the first national standards ever to address prison sexual violence¹⁸—cover men and boys as well as women and girls. They are more protective of female prisoners than male inmates in some respects. Most notably, the new PREA regulations ban cross-gender pat searches of adult women but not adult men.¹⁹ However, the regulations are largely gender-neutral, and the process that produced them involved a lot of public attention to male rape survivors' stories, including from advocacy groups like Just Detention International (JDI)²⁰ and in the report of the National Prison Rape Elimination Commission.²¹

Women Act, THE HILL, June 23, 2012, <http://thehill.com/homenews/house/234409-house-gop-senate-dems-cant-agree-on-violence-against-women-act>.

14. Jennifer Bendery, *Violence Against Women Act: John Boehner, Eric Cantor Pressured by Republicans to Act*, HUFF POST POLITICS, Dec. 11, 2012, http://www.huffingtonpost.com/2012/12/11/violence-against-women-act-john-boehner-eric-cantor_n_2278549.html.

15. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (including sexual orientation and gender identity as protected categories in the non-discrimination provision and in the definition of “under-served” populations). See Jackie Calmes, *Obama Signs Expanded Anti-Violence Law*, N.Y. TIMES, March 7, 2013 (explaining that the new version of VAWA extended protections to gay and transgender victims of domestic violence).

16. 42 U.S.C.A. § 15606(d)(1), (e)(1) (West 2005).

17. Prison Rape Elimination Act National Standards, 77 Fed. Reg. 37,197 (June 20, 2012) (codified at 28 C.F.R. pt. 115). See David Kaiser & Lovisa Stannow, *Prison Rape: Obama's Program to Stop It*, N.Y. REVIEW OF BOOKS, Oct. 11, 2012, available at <http://www.nybooks.com/articles/archives/2012/oct/11/prison-rape-obamas-program-stop-it/>.

18. Dep't of Justice, *Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape*, May 17, 2012, <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html>.

19. 28 C.F.R. § 115.15 (b) (2012) (providing that, by certain phased-in deadlines, “the facility shall not permit cross-gender patdown searches of female inmates, absent exigent circumstances.”).

20. See *Survivor Testimony*, JUST DET. INT'L, http://www.justdetention.org/en/survivor_testimony.aspx (last visited Mar. 20, 2013).

21. NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT (2009).

PREA requires state corrections systems to report data on prison sexual violence, and this is important for another reason: as Kim Shayo Buchanan recently has pointed out, the statistics undermine “conventional gender expectations.”²² As Buchanan emphasizes, female staff are the alleged perpetrators in the majority of male prisoners’ reports of sexual abuse,²³ and women prisoners report more abuse by other female inmates than by officers of either gender.²⁴

I submit that these three developments—the change in the FBI definition of rape, the debate over VAWA reauthorization, and the promulgation of the new PREA regulations—mark 2012 as a year in which we moved towards more gender-inclusive conceptions of rape and intimate partner violence. Twenty-five years ago, reformers’ project was to “expose fully the sexism of the law,”²⁵ and stories of institutionalized misogyny and male power dramatized some of the most egregious injustices. Today “governance feminism” has established itself as a prevailing criminal justice paradigm,²⁶ and feminist law reforms, albeit imperfect and incomplete,²⁷ have achieved important gains. Today’s reform efforts both

22. Kim S. Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1639 (2012). See also Smith, *supra* note 11 (“One of the most surprising findings of the [BJS] research [after PREA] was the widespread involvement of female correctional staff in sexual incidents—both with adult and juvenile males in custody.”).

23. Buchanan, *supra* note 22, at 1638-39 (“In men’s facilities, women generally constitute a minority of correctional staff, yet survey respondents consistently report much higher rates of sexual victimization by women staff than by fellow inmates. More than two-thirds of male victims of staff sexual abuse say that their perpetrators were exclusively women.”). Buchanan also writes, “in spite of stereotypical expectations, correctional authorities investigating allegations of prison rape have often found more ‘substantiated’ cases involving female than male staff.” *Id.* at 1672. See also Paul Cook, *The Dynamics of Sexual Abuse of Male Juveniles by Female Correctional Officers—Myth and Fact*, 48 CRIM. L. BULL. 1326, 1333 (2012) (writing that a 2008-2009 Bureau of Justice Statistics study demonstrated that “[i]n the juvenile setting, the males abused by staff were abused almost exclusively by female staff.”).

24. Buchanan, *supra* note 22, at 1669.

25. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1090 (1986).

26. JANET HALLEY, *SPLIT DECISIONS* 20-22 (2006) (providing a critical description of “governance feminism,” stating that “feminism rules. Governance feminism. Not only that, it *wants* to rule. It has a will to power.”).

27. See, e.g., Michelle J. Anderson, *Marital Immunity, Intimate Relationships, & Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1468 (2003) (describing how, despite gains by rape law reformers in trying to abolish marital rape exemptions, about twenty-four states still have some kind of marital immunity); See Decker & Baroni, *supra* note 6; Emily J. Sack, *Is Domestic Violence A Crime?: Intimate Partner Rape as Allegory*, 24 ST. JOHN’S J. OF LEGAL COMMENT. 535, 564 (2010) (“Continuing unequal treatment of marital rape is directly traceable to the historically unequal treatment of women, and married women in particular.”). See also Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law’s Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819 (2012) (describing how

build on and question prior feminist reforms, as we move toward more gender-inclusive approaches to these issues.

It's no surprise that dominant rape and domestic violence narratives²⁸ have been about men raping and abusing women. Cases fitting that narrative are still the vast majority of reported cases,²⁹ although we might ask whether that reflects in part a lack of reporting on behalf of male victims.³⁰ Some have suggested that more victims of same-sex rape and intimate partner violence will come forward after *Lawrence v. Texas*, now that there is no longer criminal stigma attached to same-sex sexuality.³¹

Our dominant narratives are not solely the product of empirical realities, however. Legal theorists in the schools of legal realism, cultural studies, cultural cognition, and law and society have long argued that law—along with legal claims and legal arguments—can “construct” social reality.³² Law and society scholars Austin Sarat and Thomas Kearns

marital rape is still—despite law reforms—not punished as severely as non-marital rape, and suggesting that states should implement reforms similar to those enacted in the domestic violence arena).

28. Others have written of “dominant narratives” of rape and domestic violence law, making different points about race and gender privilege. See, e.g., Aya Gruber, *A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 608 (2012) (“[C]riminal law’s embedded narratives and institutional structure make it a poor mechanism for dismantling hierarchy and male domination.”); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 616 (2009) (quoting Elizabeth M. Iglesias, *Rape, Race & Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 890 (1996)).

29. According to the National Crime Victimization Survey, 1.3 per 1000 women reported that they were sexually assaulted in 2010, compared with 0.1 per 1000 men. JENNIFER L. TRUMAN, CRIMINAL VICTIMIZATION, 2009-10 (2011).

30. Capers, *supra* note 1, at 1273-74 (writing that the reasons for underreporting of rape among men include “the taint of homophobia; the fear of appearing weak and hence not masculine; and definitional and perceptual issues.”).

31. *Id.* at 1262 (“[P]rior to the U.S. Supreme Court’s 2003 decision in *Lawrence v. Texas* invalidating sodomy laws, those who came forward as rape victims risked being prosecuted as criminals in many states.”); Pfeifer, *supra* note 4. Scholars have made a similar point about opposite-sex rape prosecutions following the abandonment or desuetude of laws criminalizing consensual heterosexual sex. See Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998) (arguing that traditional rape law doctrine, which may be viewed as misogynist, is better understood when we consider that “[w]e inherited the rape crime from a culture in which rape was only one of two basic categories of heterosexual offenses. The other category of offenses consisted of consensual sexual intercourse outside of marriage—fornication and adultery—in which the man and woman were accomplices.”); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 5 (2012) (describing how “until the mid-twentieth century, marriage played an important role in the adjudication, enforcement, and even definition of the crime of seduction.”).

32. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948 (1995). See Menachem Mautner, *Three Approaches to Law & Culture*, 96 CORNELL L. REV. 839, 848-56 (2011) (describing schools of critical legal studies, law and feminism, and law and society,

explain, “[w]e come . . . to see ourselves as law sees us.”³³ As we all know, feminist law reform efforts of the latter half of the twentieth century focused on male violence against women,³⁴ and were rooted in dominance feminism, specifically the work of giants such as Catharine MacKinnon.³⁵ It’s not due to numbers alone that we see rape as a tool of male oppression of women.

The “dominant narratives” of rape and domestic violence law have been reinforced by the efforts of reformers who brought claims predicated on violence against women as a type of *sex* discrimination. Linda Kelly has written of the example of the 1984 case *Thurman v. City of Torrington*,³⁶ which I discuss regularly with my Gender & Criminal Law students. Tracey Thurman famously sued the town for repeatedly failing to enforce orders of protection against her abusive husband.³⁷ The claim in *Thurman* was crafted as a gender discrimination claim, alleging that the City had failed to protect “women who have complained of being abused by their husbands”³⁸ Accordingly, Ms. Thurman’s equal protection claim received an intermediate level of scrutiny.³⁹ As Professor Kelly has argued, although this equal protection argument in *Thurman* garnered a more

and how these schools describe “law as constitutive of culture and social relations.”). Mautner quotes Pierre Bourdieu and Richard Terdiman: “law is the quintessential form of the symbolic power of naming that creates the thing named” *Id.* at 850 (quoting Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 838 (1987)). See also Dan Kahan, *Culture, Cognition and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases*, 158 U. PENN. L. REV. 729, 799 (2010) (“The only certain effect of any sort of reform is expressive. Laws have meanings as well as consequences.”).

33. Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in AUSTIN SARAT & THOMAS R. KEARNS, ED. *LAW IN THE DOMAINS OF CULTURE* (1998).

34. Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977).

35. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC’Y 635, 650-51 (1983) (“To be rapable, a position which is social not biological, defines what a woman is.”). See also Linda Kelly, *Disabusing the Definition of Domestic Abuse: How Women Batter Men and the Role of the Feminist State*, 30 FLA. ST. U. L. REV. 791, 817-18 (2003) (discussing the role of feminist theory, and in particular the work of Catharine MacKinnon, in shaping our dominant understanding of domestic violence).

36. Kelly, *supra* note 35, at 832-36 (discussing *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984)).

37. Kelly, *supra* note 35, at 832 (“The critical 1984 decision in *Thurman v. City of Torrington* set the tone, adding the judicial branch to the increasingly pervasive number of institutions that ignore female violence.”).

38. 595 F. Supp. at 1527.

39. *Id.*

plaintiff-friendly legal standard, it also wholly equated domestic violence with men's abuse of women.⁴⁰

Legal claims casting sexual and intimate partner violence as sex discrimination against women continue to appear in domestic violence advocacy,⁴¹ as well as in Title IX proceedings⁴² and international human rights law,⁴³ eclipsing victimization of men. Although the Violence Against Women Act (VAWA)⁴⁴ is gender neutral in its language, its title

40. Kelly, *supra* note 35, at 832-36 (2003) (Professor Kelly criticizes the equal protection rationale of *Thurman*, writing that, in employing a "gender-related" equal protection standard, the court "fail[ed] to leave room for the possibility of female violence," and argues that, "[b]y tailoring the standard exclusively to battered women, the courts have further reinforced the belief that only women can be the victims of domestic violence."). See also Ryan Elias Newby, *Evil Women and Innocent Victims: The Effect of Gender on California Sentences for Domestic Homicide*, 22 HASTINGS WOMEN'S L.J. 113 (2011) (comparing sentences for men and women convicted of spousal homicide in California and concluding that women were more often subject to weapons enhancements, but also more likely to be convicted of lesser included offenses if they could demonstrate their spouse's prior history of violence).

41. See Erica Franklin, *When Domestic Violence and Sex-Based Discrimination Collide: Civil Rights Approaches to Combating Domestic Violence and its Aftermath*, 4 DEPAUL J. for Social Justice 335 (2011) (advocating using claims of sex-based discrimination under the equal protection clause, Title VII, and the Fair Housing Act to help female survivors of heterosexual domestic violence, although recognizing that intimate partner violence occurs in same-sex relationships as well, and that men can be victims). The author explains, "with some exceptions, the civil rights challenges discussed in this Comment apply by their very nature only to female survivors of domestic violence—an inevitable limitation of the approach for which this Comment advocates." *Id.* at 339. See also Niji Jain, *Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause*, 60 EMORY L.J. 1011, 1040 (2011) (developing an equal protection argument to address police non-enforcement of restraining orders by targeting police stereotypes about women).

42. See, e.g., Wendy Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirement to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007, 1014 (2006) ("Women victims of serious or pervasive sexual and gender harassment had to jump through . . . burdensome hurdles . . . while students reporting even a single verbal slur regarding their race or sexual orientation received immediate and meaningful intervention."); see also Erin Buzuvis, *Court Dismisses Claims in Bully-Suicide Case*, Title IX Blog (Jan. 9, 2012, 12:04 PM), <http://title-ix.blogspot.com/2012/01/court-dismisses-claims-in-bully-suicide.html> (discussing the decision, *Estate of Carmichael v. Galbraith*, No. 3:11-CV-0622-D, 2012 WL 13568 (N.D. Tex. Jan. 4, 2012), in which the court rejected claims by the survivors of a teen who committed suicide after being bullied, concluding that the decedent had not been targeted "because of sex," as required by Title IX, despite his tormentors' use of homophobic slurs such as "fag, queer, homo, and douche.").

43. See Darren Rosenblum, *Unsex CEDAW, or What's Wrong With Women's Rights*, 20 COLUM. J. GENDER & L. 98, 107 (2011) ("The drafters of CEDAW sought to situate women's rights as a preeminent international concern. Women throughout the world confronted sexist institutions, and the drafters' goals centered on utilizing international human rights law to ameliorate these harms.") (footnote omitted).

44. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in 42 U.S.C. §§ 13981-14045 (2006)).

demonstrates its animating focus.⁴⁵ Professor Sally Goldfarb writes that the bill's sponsors were "deeply immersed in an awareness that violence against women is one of the principal ways in which male dominance and female subordination are expressed and perpetuated."⁴⁶ It is for this reason that Professor Capers has described VAWA as an effort to "gender crime."⁴⁷

These dominant, gendered narratives of rape and domestic violence have imposed certain costs. Some argue that they have reinforced the notion that to be raped or battered is, by definition, a woman's experience,⁴⁸ contributing to male survivors' feelings of shame and isolation.⁴⁹ Others have noted these stories obscure intimate partner violence in LGBT relationships.⁵⁰

An increasing number of theorists have proposed different ways of conceptualizing intimate violence. Angela Harris and Kim Buchanan have employed the term "gender violence," emphasizing that violent acts affirm

45. See Sally F. Goldfarb, *Viewing the Violence Against Women Act Through the Lenses of Feminist Legal Theory*, 31 WOMEN'S RTS. L. REP. 198, 201 (2010) ("Despite the emphasis on violence against women in the statute's title and legislative history, the civil rights section furnished a claim to anyone, male or female, who was a victim of a crime of violence motivated by gender.").

46. *Id.* at 200.

47. Capers, *supra* note 1, at 1295.

48. See Smith, *supra* note 11, at 1719 ("The law reinforces the narrative that women can only be passive victims of rape by virtue of their gender."); cf. MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 8-9 (1997) ("The general belief persists that either men cannot be raped, or if they are, so few men are raped that it becomes a freak occurrence.").

49. Scarce, *supra* note 48, at 9-10 ("[W]hen men are raped by other men, society tends to silence and erase them rather than acknowledge the vulnerability of masculinity and manhood."); Smith, *supra* note 11, at 1723 ("In female-on-male sexual assault cases, men are disbelieved, mocked, or thought to have initiated, encouraged, or enjoyed the assault in some manner. This contributes to men's reluctance to report forced or coerced sex, especially by women.") (footnote omitted).

50. Commentators mark the 1983 Lesbian Task Force of the National Coalition of Domestic Violence as the first public, national recognition of the problem of battering in LGBT relationships. Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1101 (2000). Beginning in the 1990s, increasing numbers of legal commentators wrote about abuse in same sex relationships, the lack of legal protections for gays and lesbians, and the need for training of law enforcement personnel. See Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence*, *Law & Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 568 (1990); Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 339 (1995); Kathleen Finley Duthu, Perspective, *Why Doesn't Anyone Talk About Gay & Lesbian Domestic Violence*, 18 T. JEFFERSON L. REV. 23, 24 (1996); Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 N. ENG. L. REV. 273, 274-275 (1993).

the offender's normative masculinity, and can be perpetrated on men as well as women.⁵¹ Others, most famously Janet Halley, have called for the left to “take a break from feminism,”⁵² in order to work outside what Halley describes as an “M>F” anti-subordination framework.⁵³ Halley asks whether feminism has endowed women with the ability to “wield[] the moral code of good sex,” and whether this moralism is in fact “bad for women.”⁵⁴

By contrast, other commentators have reaffirmed that they are intentionally working from a “violence against women” perspective, and argue that domestic violence remains rooted primarily in male dominance.⁵⁵ Some assert that men are trying to “co-opt” the label of “victim.”⁵⁶

51. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 780 (2000) (using the term “gender violence” to describe “violent acts committed by men . . . [as a means of] demonstrating the perpetrator’s manhood,” and arguing that “men as well as women may be its victims.”); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 17-18 (2011); Kim S. Buchanan, *Our Prisons, Ourselves: Race, Gender & the Rule of Law*, 29 YALE L. & POL’Y REV. 1, 37 (2010) (explaining that in both prison and the free world, men “use same-sex sexual abuse and harassment to reaffirm that they are straight and manly and that their victims deserve abuse and contempt for being effeminate or gay”); Kim S. Buchanan, *E-race-ing Gender: The Racial Construction of Prison Rape*, in MULTIDIMENSIONAL MASCULINITIES AND LAW: FEMINIST AND CRITICAL RACE APPROACHES 187, 188-89 (Frank Rudy Cooper & Ann C. McGinley eds., 2012); Christopher N. Kendall, *Gay Male Pornography and Sexual Violence: A Sex Equality Perspective on Gay Male Rape and Partner Abuse*, 49 MCGILL L.J. 877, 918 (2004) (arguing that gay male pornography can reinforce notions of masculinity that rely on violence and that “[g]ay men who batter and abuse their partners have specific ideas about masculinity and what it means to be ‘male.’”).

52. HALLEY, *SPLIT DECISIONS*, *supra* note 26, at 283; Janet Halley, writing *sub nom* Ian Halley, *Queer Theory by Men*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 9, 9 (Martha Albertson Fineman et al. eds., 2009); *see also* Marc Spindelman, *Feminism Without Feminism*, 9 ISSUES IN LEGAL SCHOLARSHIP: LEGAL FEMINISM NOW, ARTICLE 8 (2011), available at <http://www.bepress.com/ils/vol9/iss2/art8>.

53. Halley, *Queer Theory by Men*, *supra* note 52, at 10 (“[T]o be a feminism in the United States today, a position must posit some kind of subordination as between M and F.”).

54. HALLEY, *SPLIT DECISIONS*, *supra* note 26, at 356 (Halley asks us to reimagine a divorce case in which the wife has alleged coerced bondage by the husband, asking: “Can feminism read the case as male subordination and female domination—and *still* as bad for women?”).

55. *See* Kathleen J. Ferraro, *Woman Battering: More Than A Family Problem*, in WOMEN, CRIME, AND CRIMINAL JUSTICE 135, 136-37 (Claire M. Renzetti & Lynne Goodstein eds., 2009) (“The violence against women perspective insists that patriarchy, sexism, and gender inequality are the fundamental conditions under which violence against female partners develops. . . . This chapter is written from the violence against women perspective and uses the term ‘woman battering.’”); *see also* Hodges, *supra* note 4, at 331 nn.112-13 (quoting and discussing Demie Kurz, *Violence Against Women or Family Violence? Current Debates and Future Directions*, in GENDER VIOLENCE: INTER-DISCIPLINARY PERSPECTIVES 443, 447 (Laura L. O’Toole et al. eds., 1997); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 334 (3d ed. 2013)

Against the backdrop of this debate, the prison anti-sexual violence movement may provide a model of a more gender-inclusive approach to reform. The movement that produced the Prison Rape Elimination Act (“PREA”) was led in part by male survivors,⁵⁷ and informed from the start by awareness of male rape victims.⁵⁸ Passage of the initial PREA legislation in 2003 was not as much a mainstream gay rights movement victory as it was the product of a counter-intuitive alliance including evangelical Christian elements.⁵⁹ However, the final Department of Justice (“DOJ”) regulations promulgated under the statute in 2012 were shaped by contributions from free-world LGBT advocacy groups,⁶⁰ which included many ground-breaking provisions affecting LGBT prisoners.⁶¹

The movement that produced PREA is remarkable among law reform movements for its focus on male rape survivors. This is illustrated by the rape survivors’ testimony on the web site for Just Detention International (“JDI” formerly STOP Prisoner Rape) one of the organizations that was

(noting that “[s]ome feminists prefer to use the term ‘woman abuse’ or ‘male battering of women’ to highlight the fact that women are most often the victims of the violence.”).

56. Patricia Novotny, *Rape Victims in the (Gender) Neutral Zones: The Assimilation of Resistance*, 1 SEATTLE J. FOR SOC. JUST. 743, 745, 750 (2003) (arguing that “male co-optation of the victim category” may represent a “backlash” against feminist law reform).

57. See Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road From Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL’Y REV. 489, 494, 501 (2011) (describing multiple constituencies that contributed to the movement to eliminate prison rape, including the organization Stop Prisoner Rape, and explaining the importance of the testimonials of prison rape survivors).

58. See Capers, *supra* note 1, at 1267 (finding that systemic efforts to gather data on male rape resulted from Congress’ passage of the “mostly hortatory” PREA) (quoting Alice Ristorph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 175 (2006)); see also Terry A. Kupers, M.D., M.S.P., *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA WOMEN’S L.J. 107, 108-109 (2010).

59. Jenness & Smyth, *supra* note 57, at 503 (describing the role of Prison Fellowship Ministries in the passage of PREA and explaining its involvement in part based on the fact that “the modern evangelical sector has long been committed to controlling sexual behavior and sexuality—especially when it involves same-sex participants.”).

60. Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 365-66 (2009) (describing contributions of LGBT advocacy groups to the regulations proposed to the DOJ by the National Prison Rape Elimination Commission).

61. National Standards To Prevent, Detect, and Respond to Prison Rape, Final Rule, 77 Fed. Reg. 119, 37109-110 (June 20, 2012) (to be codified at 28 C.F.R. § 115), available at <http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf> (describing provisions affecting LGBT inmates and Gender Non-Conforming Inmates, including training for staff, no searches permitted solely to determine genital status; no segregated units for LGBT inmates without a consent decree, judgment, or settlement; requirement that housing for transgender prisoners be determined on a case-by-case basis).

instrumental in getting PREA enacted.⁶² JDI features stories from men and women, including gay and transgender prisoners. One JDI campaign on social media features two pictures of the same young man. In the first photo, he is wearing street clothes and the caption reads, “would you joke around about this man being raped?” In the second, he appears in a prison uniform, and the caption reads, “how about now?”⁶³

The more gender-inclusive nature of the movement to end prison sexual violence may be attributable in large part to the demographics of the incarcerated population,⁶⁴ but also may be reinforced by the nature of available legal claims. Although advocates for women prisoners and for male victims of prison rape often worked separately due to the state-enforced sex segregation of corrections institutions, the Eighth Amendment provides a single legal standard that applies to all sentenced prisoners.⁶⁵ Unlike equal protection or statutory sex discrimination provisions, the Eighth Amendment is not dependent on protected categories or comparators.⁶⁶ Nor is there any ambiguity about whether abuse of gay or transgender prisoners is covered under the Eighth Amendment.⁶⁷ In fact, the prevailing Eighth Amendment standard for failure to protect cases was set in the case of a transgender woman housed in a male facility in *Farmer v. Brennan*.⁶⁸ The *Farmer* standard may be very difficult to meet,⁶⁹ but it does not require a demonstration of sex discrimination.

This does not mean that courts are even-handed in their application of legal standards to prisoners’ cases. Some are less receptive to men’s claims of sexual abuse than to similar claims by women prisoners,⁷⁰ grounding

62. *Survivor Testimony*, JUST DET. INT’L, http://www.justdetention.org/en/survivor_testimony.aspx (last visited March 21, 2013).

63. *Attitudes*, JUST DET. INT’L, <http://www.justdetention.org/en/attitudes.aspx> (last visited March 21, 2013).

64. The Bureau of Justice Statistics reports that in 2011, there were 1,487,393 people in corrections facilities designated for men, under state or federal authority, and 111,387 people in facilities designated for women. See E. ANN CARSON & WILLIAM J. SOBOL, DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, 2 (Dec. 2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

65. See U.S. CONST. amend. VIII.

66. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

67. *Id.*

68. *Id.* at 829-30, 837.

69. See Sharon Dolovich, *Cruelty, Prison Conditions & the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 892 (2009) (criticizing the *Farmer* standard because it “holds officers liable only for those risks they happen to notice . . .”).

70. See Nancy Levit, *Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity*, in PRISON MASCULINITIES 93, 93 (Don Sabo et al. eds., 2001).

their Eighth Amendment analysis in evidence of women prisoners' asserted heightened vulnerabilities.⁷¹ A number of decisions have rejected due process or privacy challenges to female officers' supervision of male prisoners.⁷² One opinion even doubted whether sexual abuse of male prisoners constituted a "physical injury" within the meaning of the Prison Litigation Reform Act ("PLRA"), thereby precluding survivors from seeking money damages.⁷³

Moreover, as Kim Buchanan has forcefully pointed out, anti-prison sexual violence commentators and advocates themselves are not immune from the power of our dominant, gendered rape narratives, sometimes perpetuating these narratives even when they are not supported by statistics.⁷⁴ Buchanan argues that, despite the fact that data generated by PREA directly counters some of our dominant narratives about the gendered dynamics of rape, these notions remain resistant to change.⁷⁵ Indeed, some provisions of the new PREA regulations—most notably the provisions regarding cross-gender pat searches—were limited to women prisoners and juveniles.⁷⁶ The DOJ stated that it adopted different cross-

71. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993) (concluding that random, suspicionless, clothed-body pat searches of female prisoners by male guards violated the Eighth Amendment, in part based on factual findings by the district court "that physical, emotional and psychological differences between men and women 'may well cause women, and especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women.'").

72. See *Levit*, *supra* note 70, at 93. See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 150-151 (7th Cir. 1995) (rejecting a male pretrial detainee's Fourth Amendment and due process challenges to observation of naked male prisoners by women officers).

73. *Hancock v. Payne*, No. 1:03-CV-671, 2006 WL 21751, *1, 3* (S.D. Miss. Jan 4, 2006). See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PENN. J. CON. L. 139, 143-47 (2008) (discussing the PLRA physical injury requirement and the *Hancock* case).

74. Buchanan, *supra* note 22, at 1678 (noting that, despite the BJS statistics, "official and academic commentators persist in characterizing nonforcible staff-on-inmate sex as 'romantic' or harmless.").

75. *Id.* at 1673 ("[W]hen researchers encounter surprising, counter-stereotypical results, their explanations reveal interpretive tendencies that reconcile those results with stereotypical expectations."). Buchanan concludes her article: "The gaps and elisions of prison rape discourse reveal the grip of unexamined gender and racial stereotypes on our understanding of prison rape and of sexual abuse more generally. Prison realities demonstrate that, at least in some circumstances, women may be more sexually aggressive, and men more sexually vulnerable, than conventional gender expectations would predict." *Id.* at 1688. See also Smith, *supra* note 11, at 1692 ("This Article seeks first and foremost to explain why the statistical evidence of abuse of men and boys in custodial settings surprises reformers and disrupts perceived gender norms, and to explain why female correctional workers have sex with men and boys in custody.").

76. 28 C.F.R. § 115.15 (b) (2012) (providing that, by certain phased-in deadlines, "the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent

gender pat search policies for women because corrections officials feared charges of employment discrimination if they limited female officers' duties in male facilities, and because of high reported rates of past abuse by women prisoners.⁷⁷ Certainly, these justifications can and will be subject to continued debate.

Despite the continued influence of gendered expectations, the anti-prison sexual violence movement has been shaped by male rape survivors to a much greater extent than free-world anti-violence movements. The more gender-inclusive approach of the movement that produced PREA may be a precursor to further free-world trends, particularly more awareness of LGBT victims.

We might ask what larger shifts are driving this transition to more gender-inclusive anti-violence movements. Certainly, a weakening of societal homophobia and growing LGBT rights movements are key components of the new environment.⁷⁸ Another powerful force might be increased public attention to abuse of boys in scandals involving institutions like Penn State,⁷⁹ the Horace Mann School,⁸⁰ and the Catholic Church.⁸¹

A common denominator to many of these developments, however, is our changing conception of gender, and particularly a growing focus on the construction of masculinities.⁸² Masculinities scholars such as Frank Rudy Cooper and Jackson Katz have contributed to an increasing understanding that gender is a "performance",⁸³ that male "gender violence" can victimize

circumstances." 28 C.F.R. § 115.315 (2012) (barring cross-gender pat-down, strip, and visual body cavity searches of juveniles except in exigent circumstances).

77. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,133 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115) (responding to comments on cross-gender pat-down searches).

78. See LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION 324 (2012) (arguing that the gay rights movement has largely met its goals).

79. Tim Rohan, *Sandusky Gets 30 to 60 years for Sexual Abuse*, N.Y. TIMES, Oct. 9, 2012, http://www.nytimes.com/2012/10/10/sports/ncaafootball/penn-state-sandusky-is-sentenced-in-sex-abuse-case.html?_r=0.

80. Amos Kamil, *Prep-School Predators: The Horace Mann School's Secret History of Sexual Abuse*, N.Y. TIMES, June 6, 2012, <http://www.nytimes.com/2012/06/10/magazine/the-horace-mann-schools-secret-history-of-sexual-abuse.html?pagewanted=all>.

81. Laurie Goodstein & Erik Eckholm, *Church Battles Efforts to Ease Sex Abuse Suits*, N.Y. TIMES, June 14, 2012, <http://www.nytimes.com/2012/06/14/us/sex-abuse-statutes-of-limitation-stir-battle.html?pagewanted=all>.

82. See Nancy E. Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 29 (Frank Rudy Cooper & Ann C. McGinley, eds., 2012).

83. See Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies*, *Terry Stops & Police Training*, 18 *COL. J. GENDER & L.* 671, 684 (2009) (writing that "the field of masculinities studies presumes that men's behavior is socially constructed" and that "our performances of our

other men;⁸⁴ and that men's socially-constructed gender roles often mask men's very real vulnerabilities.⁸⁵ Counter-intuitively, our attention to how male gender roles contribute to male violence also may help us to conceive of men as victims in certain contexts.⁸⁶

An increasingly flexible conception of gender is not just an academic trend, but a consciousness that increasingly informs popular and youth culture—what the New York Times recently described as “Generation LGBTQIA.”⁸⁷ This attitudinal shift has encompassed a more frank acknowledgment of the possibility of male victimization. For example, the Columbia University “Take Back the Night” march, which previously had a female-only space, went fully “gender-neutral” in 2012.⁸⁸ One student organizer explained, “Men can be survivors as well and it’s good to remind everyone of that.”⁸⁹

A question that others have posed and that bears further attention is how anti-violence movements can adopt a more inclusive stance toward male and same-sex victims, without producing yet more over-incarceration of poor communities and communities of color.⁹⁰ Feminist efforts to reform rape and domestic violence law have been criticized by some for

gender constitute the very gender they are said to express.”); Video: Jackson Katz, *Tough Guise: Violence, Media & the Crisis in Masculinity* (Susan Ericsson, Sanjay Talreja 2006) (on file with author).

84. Harris, *supra* note 51, at 780.

85. Katz, *supra* note 83.

86. Dowd et al., *supra* note 82, at 29 (explaining that “some of that structuring [of masculinity] creates a price, not a privilege; it creates harm, not benefit.”).

87. Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES, Jan. 9, 2013, <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all>.

88. Abby Abrams *Take Back the Night March Goes Gender-Neutral*, COLUMBIA SPECTATOR, March 29, 2012, <http://www.columbiaspectator.com/2012/03/29/take-back-night-march-goes-gender-neutral>.

89. *Id.*

90. See Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory & Practice Meet Criminal Law’s Conventional Response to Domestic Violence*, 13 S.CAL. REV. L. & WOMEN’S STUD. 81, 86 (2003) (advocating responses to same-sex domestic violence that are not based solely on criminal law, and arguing that “the better and more productive responses to same-sex domestic violence, which are primarily the product of social service agencies and community-based organizations, are underpinned by queer theory’s concepts of sexuality in general . . .”). See also URVASHI VAID, *IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS AND THE ASSUMPTIONS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POLITICS* 63 (2012) (Arguing that “reducing the over-criminalization of certain communities, sentencing reform, support for better treatment of prisoners, working for an end to rape inside prison affect many LGBT people, and disproportionately affect people of color.”).

relying too much on state power and criminal punishment,⁹¹ a particular concern in an era of unprecedented U.S. incarceration⁹² and a persistently racially biased criminal punishment system.⁹³ An increasing number of commentators have called for anti-violence efforts that are more sensitive to survivors' autonomy,⁹⁴ and rely less on our bloated incarceration system.⁹⁵ These important questions are beyond the scope of this brief symposium contribution.

In this piece, I have highlighted some recent markers of our transition to a more gender-inclusive notion of sexual assault and intimate partner violence. The change to a more gender-inclusive approach will have many implications for criminal justice policy and institutions, some of which Professor Kelly Strader and I discussed in a book review that appeared last year.⁹⁶ One critical project is to ensure that courts and prosecutors adopt competent and fair practices in cases involving same-sex intimate partner and sexual violence.⁹⁷ In future articles, I hope to look more closely at various aspects of how these issues play out in our criminal prosecution system. For today, let's remember 2012 as a moment of transition in movements against violence, now [including but not limited to] violence against women.

91. See Gruber, *supra* note 28, at 653 (arguing that “feminists should disengage from rape reforms that strengthen the penal state”); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 763 (2007) (describing “the domestic violence reform movement’s transformation from a grassroots progressive movement to an ally of conservative criminology.”); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1675.

92. See Hope Metcalf, *Foreword: When Words Fail: Confronting the Carceral State*, 38 WM. MITCHELL L. REV. 1209, 1209 (2012) (discussing ramifications of the fact that 1 in 100 Americans is incarcerated, roughly 2.5 million people on any given day).

93. MICHELLE ALEXANDER, MASS INCARCERATION IN AN AGE OF COLORBLINDNESS 4 (2010).

94. See, e.g., Gruber, *supra* note 28, at 598 (calling for neo-feminist critiques of feminist law reform efforts that “reject gender-crime law reform on the particular ground that it actually disservices individual women and is damaging to the greater goals of feminism.”); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE & THE LEGAL SYSTEM 4 (2011) (noting that “[t]he law is simply not a one size fits all situation.”); Leigh Goodmark, *Reframing Domestic Violence Law & Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL’Y 39 (2009); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009).

95. See Gruber, *supra* note 28, at 653; see also Harris, *supra* note 51, at 803-804.

96. Giovanna Shay & Kelly Strader, *Book Review: QUEER (IN)JUSTICE: Mapping New Gay (Scholarly) Agendas*, 102 J. CRIM. L. & CRIMINOLOGY 171, 174-75 (2012).

97. See Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59, DRAKE L. REV. 669, 671 (2011) (discussing issues of cultural competence towards gay people in one role in the courts).