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## Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases

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AUTONOMY FEMINISM:  
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# AUTONOMY FEMINISM: AN ANTI-ESSENTIALIST CRITIQUE OF MANDATORY INTERVENTIONS IN DOMESTIC VIOLENCE CASES

LEIGH GOODMARK\*

## ABSTRACT

*In the 1970s and 80s, feminists led the way in crafting and advocating for laws and policies to address domestic violence in the United States—and those feminists got it wrong. Desperate to find some way to force police to treat assaults against spouses as they would strangers, the battered women’s movement seized on the idea of mandatory arrest—relieving police of discretion and requiring them to make arrests whenever probable cause existed. But mandatory arrest also removed discretion from the women that the policy purported to serve—a trend that has come to characterize domestic violence law and policy. Later policy choices, like no-drop prosecution and bans on mediating in domestic violence cases, are similarly marked by their denial of decisionmaking to women who have been battered. Domestic violence law and policy prioritizes the goals of policymakers and battered women’s advocates—safety and batterer accountability—over the goals of individual women looking for a way to address the violence in their relationships. The shift of decisionmaking authority has profoundly negative implications for the autonomy of women who have been battered and reflects the influence of dominance feminism on the battered women’s movement. This Article argues that the time has come to shift the lens through which we view domestic violence law and policy from dominance feminism to anti-essentialist feminism, allowing us to see how problematic mandatory policies are and helping us to craft domestic violence law and policy that honors the goals and priorities of women who have been battered.*

I. INTRODUCTION .....	2
II. MANDATORY POLICIES IN THE CRIMINAL AND CIVIL LEGAL SYSTEMS.....	5
A. <i>Mandatory Arrest and No-Drop Prosecution</i> .....	5
B. <i>(Not) Mediating Family Law Matters</i> .....	14
III. DEFINING AUTONOMY AND AGENCY.....	22
IV. WHY EMPOWERMENT MATTERS .....	29
V. THE LAW AS A DISEMPowering FORCE.....	32
VI. FROM DOMINANCE TO ANTI-ESSENTIALIST FEMINISM .....	43
VII. CONCLUSION .....	48

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## I. INTRODUCTION

June 10, 1983. Charles Thurman hands police officers a knife dripping with his wife's blood.<sup>1</sup> Then, as the officers look on, he kicks her in the head—and he is still not arrested.<sup>2</sup> After months of phone calls and reports to police warning of Charles Thurman's violence and repeated threats against his wife, and after a criminal conviction and a civil order both required Thurman to stay away from his wife, Charles Thurman was still able to stab his wife multiple times in the chest, neck, and throat, drop their son on top of her while she bled, and kick her repeatedly in the head.<sup>3</sup> Thurman's vicious attack on his wife was facilitated by the Torrington, Connecticut police department's unwillingness to respond to numerous requests for assistance for Tracey Thurman and her son, Charles Jr.—inaction that continued after the stabbing. Charles Thurman was not arrested, in fact, until he again approached his wife while she was lying on a stretcher, waiting to be taken for medical treatment.<sup>4</sup>

Tracey Thurman and her son sued the Torrington Police Department for its failure to intervene on their behalf and received \$2.3 million in damages.<sup>5</sup> The landmark suit not only provided Tracey and Charles Jr. with some small measure of compensation for their suffering (Tracey Thurman remains partially paralyzed and permanently scarred from that attack)<sup>6</sup> but, in conjunction with the settlement of lawsuits filed in Oakland, California, and New York City protesting the lack of police response to domestic violence calls,<sup>7</sup> began a policy revolution.

This revolution was designed to ensure that police could no longer ignore the pleas of women who had been battered<sup>8</sup> simply because

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1. James B. Halsted, *Domestic Violence: Its Legal Definitions*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 143, 158 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

2. *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526 (D. Conn. 1984).

3. *Id.* at 1524-26.

4. *Id.* at 1526.

5. Anne Sparks, *Feminists Negotiate the Executive Branch: The Policing of Male Violence*, in FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE 35, 42 (Cynthia R. Daniels et al. eds., 1997).

6. *Id.*

7. *Id.* at 41.

8. A woman who has been battered is not necessarily a victim, a survivor, or a battered woman, though she may be any or all of these at various times. These terms—victim, survivor, battered woman—have all been used to describe the women who are the subject of this Article, and all are limited. Victim conjures up visions of a stereotype, a passive, meek, cowering woman consistent with the early domestic violence literature. Survivor, a term intended to cast off that stereotype and instead portray women as active agents struggling against their oppressors to ensure their own survival, is similarly limited; not all women do, in fact, survive domestic violence, and not all women take action on their own behalf (however inclusive that term might be intended to be). The term battered woman is problematic because it reduces the woman to her experience of violence. A woman so

their assailants were their husbands. Throughout the country, either legislatures imposed or police departments implemented policies requiring arrests in domestic violence cases whenever police had probable cause to do so, ending the era of unfettered police discretion in determining whether individual incidents of domestic violence should be classified as crimes. Although Oregon passed the first such law in 1977,<sup>9</sup> few jurisdictions followed suit prior to 1983. After *Thurman* demonstrated the potential for crippling judgments based on police inaction, other jurisdictions quickly imposed such policies on law enforcement.<sup>10</sup> No longer were police officers permitted to advise abusive men to take a walk around the block, allowing them to return to torment their victims whenever they pleased. Instead, these attacks on their wives would be treated as seriously as if they had assaulted strangers. Advocates for women who had been battered hailed these policies, known as “mandatory arrest” laws, as a victory for every woman who had begged for police protection from her abuser to no avail.

Mandatory arrest policies were attractive because they deprived individual officers of the discretion to decide whether or not to treat a batterer’s violence as a crime.<sup>11</sup> But police officers were not the only ones to lose some measure of control with the inception of mandatory arrests. In a mandatory arrest regime, no party to the incident—abuser, officer, or victim—has the ability to preempt the involvement of the criminal system once the officer decides that he has probable cause to make an arrest. No longer could women who had been battered ask that their abusers not be taken into custody, regardless of

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described can be understood only within the context of the violence in her relationship; she has no existence independent of that one facet of her life. All of these terms reflect the same type of reductionism that plagues so much of domestic violence law and policy; they assume that all women are the same, that they all experience violence in the same way, and that the violence defines them entirely and in so doing shapes what their responses to that violence should be. BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 87-88 (1989). Using the term “women who have been battered,” by contrast, is intended to call attention to the circumstances that they have faced without describing these women solely as a product of those circumstances, defining the action rather than the woman herself. This construction is intended to provide the freedom within which to see women who have been battered as individuals, with different values, capacities, goals, and visions for their future and to suggest principles for policymaking consistent with this conception. This Article will refer to the “battered women’s movement,” however, in part because the movement self-identifies using that term, and in part because the use of that term highlights some of the problems within the movement that the Article seeks to address. Moreover, the language in quotations referring to “battered women” has not been changed.

9. *Id.* at 42.

10. Halsted, *supra* note 1, at 158.

11. Eve S. Buzawa, Thomas L. Austin, James Bannon & James Jackson, *Role of Victim Preference in Determining Police Response to Victims of Domestic Violence*, in *DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE* 255, 267 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

the reason for the request.<sup>12</sup> A call to the police would now trigger a series of events leading directly to the arrest of the batterer, irrespective of whether his victim saw that as a desirable outcome. Mandatory arrest brought greater protection for many women, but at a sizable cost—the freedom of individual women to decide whether they wanted to be involved in the criminal justice system at all.

Mandatory arrest is not the only domestic violence policy that gave protection to women who had been abused with one hand, but took their freedom to choose with the other. Both the criminal and civil laws that address domestic violence enforce policies that purport to protect women by removing not only the system's ability to choose to protect, but also the woman's ability to decline the state's protection or intervention. The autonomy of women who have been battered is the price of these policies. This Article asks whether that has been too high a price to pay.

The answer to that question depends, in part, on the goals of the legal intervention. In her article *Arrest: What's the Big Deal*, Barbara Hart, one of the founders of the legal arm of the battered women's movement, set out six goals by which legal system interventions should be measured. First and foremost, she argues, is safety for women who have been battered and their children.<sup>13</sup> Safety is followed by stopping the violence, holding perpetrators accountable, divesting perpetrators of control, restoring women who have been battered, and enhancing agency in women who have been battered.<sup>14</sup> Making safety the primary goal of legal interventions is intuitively appealing and explains policies like mandatory arrest. But the goals of advocates, policymakers, and system actors might differ from those of women who have been battered. The problem with policies like mandatory arrest is that they reify two goals—safety and perpetrator accountability—and marginalize autonomy, serving women who share the goals of the system but disenfranchising those with divergent goals.

The prioritization of safety and accountability over autonomy is consistent with the school of feminist thought that has colored a great deal of domestic violence theory and policymaking—dominance feminism. Dominance feminism focuses on women's subordinated and victimized status and argues that the legal system can best serve those victims of violence by enforcing policies that ensure safety, re-

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12. *Id.* (arguing that a consequence of mandatory arrest is the removal of victim discretion).

13. Barbara J. Hart, *Arrest: What's the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 207 (1997) (arguing that “[e]very intervention should be measured against the yardstick of safety”).

14. *Id.* at 207-09.

ardless of what an individual woman's preference might be.<sup>15</sup> What dominance feminism ignores, however, is both the diversity of women who have been battered and the choices available to those women, opting instead for a narrow version of "victim" that suggests the inability to act rationally on one's own behalf and justifies mandatory policies. The emergence of anti-essentialism as a powerful critique of the dominance feminists' tendency to group all women—particularly all women who have been battered—within the "victim" category provides a different context for examining mandatory policies. Anti-essentialism requires us to delve into the complexities of the lives of individual women who have been battered, rather than considering women who have been battered collectively. Changing the lens in this way makes it apparent that mandatory policies are deeply problematic because they deprive individual women of the self-determination and self-direction that are essential for autonomy and empowerment.

This Article will begin by considering the arguments supporting mandatory policies in cases involving domestic violence in the criminal and civil legal systems. The focus in the criminal system will be on mandatory arrest and no-drop prosecution;<sup>16</sup> on the civil side, this Article explores bans on mediating family law cases involving domestic violence. The Article will then define autonomy and explore whether women who have been battered are capable of exercising autonomy. It will explicitly link the concepts of autonomy and empowerment—central goals of the battered women's movement. Finally, the Article will argue that mandatory policies are disempowering for women who have been battered and, by employing anti-essentialist feminist theory, urge that policymakers and advocates for women who have been battered oppose policies that undermine women's autonomy.

## II. MANDATORY POLICIES IN THE CRIMINAL AND CIVIL LEGAL SYSTEMS

### A. *Mandatory Arrest and No-Drop Prosecution*

In the criminal system, the best examples of policy initiatives that deprive women who have been battered of meaningful choices are mandatory arrest laws and "no-drop" prosecution policies. As briefly

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15. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 250 (2005).

16. A number of states have also passed laws requiring the imposition of an order forbidding contact with the victim in a pending criminal case, often without providing an opportunity for the victim to express a position. See Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 322 (2004). Those types of laws have problems similar to the ones considered in this Article but will not be discussed in detail here.

discussed above, mandatory arrest policies deprive individual officers of discretion in deciding whether to arrest a perpetrator for domestic violence. Instead, mandatory arrest laws require the officer to make an arrest whenever the officer has probable cause to believe that an act of domestic violence has been committed.<sup>17</sup> Mandatory arrest laws were thought to solve the “Charles Thurman” problem—the perpetrator who gets warning after warning from police but is never arrested, and who, as a result, feels secure in his ability to continue to harass, threaten, and abuse his partner free from state sanction. Frustrated with years of police inaction in the face of severe violence,<sup>18</sup> advocates for women who had been battered saw police discretion as a crucial weakness in the criminal justice system, particularly because police were trained to use that discretion to avoid arrest whenever possible.<sup>19</sup> Remove the discretion, the thinking went, and domestic violence would be treated just as seriously as any other crime. Moreover, mandatory arrest laws would prevent police from citing discretion when choosing to credit the stories of abusers who said that their wives were simply overwrought, when ordering women who had been battered to leave their own homes, or when blaming the victim for provoking the attack.<sup>20</sup>

Mandatory arrest laws were thought to serve as a deterrent to individual abusers, sending the message that domestic violence was criminal activity warranting the intervention of the justice system.<sup>21</sup> No longer would men be able to beat their wives with impunity; they would now have to consider whether the beating was worth the consequences they could face. These laws would give women who had been battered a respite from the abuse without requiring them to affirm that they wanted to pursue charges, eliminating the potential for pressure and coercion by abusers regarding the decision about whether to arrest.<sup>22</sup>

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17. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 63 (1992).

18. See Halsted, *supra* note 1, at 155. But see Marvin Zalman, *The Courts' Response to Police Intervention in Domestic Violence*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 79, 85 (Eve S. Buzawa and Carl G. Buzawa eds., 1992) (arguing that research does not support the idea that the police intervene less aggressively in cases involving intimate partners).

19. Zorza, *supra* note 17, at 47-49 (citing to police training manuals from Oakland, California, and Michigan that discouraged officers from making arrests in cases involving domestic violence); see also SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 158-59 (1982) (quoting James Bannon, Commander of the Detroit Police Department).

20. Zorza, *supra* note 17, at 50.

21. Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 808 (1986).

22. Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences: Battered Women, Police, and the Law*, in LEGAL RESPONSES TO WIFE ASSAULT 96, 115 (N. Zoe Hilton ed., 1993); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domes-*

On a societal level, proponents believed mandatory arrest laws would remove domestic violence from the privacy of the home and subject it to the harsh light of community scrutiny.<sup>23</sup> Before the battered women's movement began to publicly characterize attacks on married women as criminal assaults, abuse of one's wife was widely viewed as a husband's prerogative.<sup>24</sup> State authorities were inclined to ignore such acts as beyond the province of the state, regardless of the injury inflicted on the victim or her pleas for assistance.<sup>25</sup> As law professor Elizabeth Schneider writes of that time, "Privacy says that violence against women is immune from sanction, that it is permitted, acceptable and part of the basic fabric of American family life. Privacy says that what goes on in the violent relationship should not be the subject of state or community intervention."<sup>26</sup> Advocates for women who had been battered fought to expose the violence that occurred in private and to ensure that intimate partner violence was treated and penalized just as violence between strangers would have been. The shift from private to public resolution of domestic violence reflected the belief that women who had been battered wanted domestic violence to be brought into the public sphere and that they would welcome state intervention and protection.<sup>27</sup> Mandatory arrest laws were an important step in that direction. Confronted with the costly results of unfettered police discretion—the successful lawsuits in Connecticut, California, and New York—convincing state legislatures to pass such laws was easy compared with earlier legislative initiatives on behalf of women who had been battered.<sup>28</sup>

Historically, police officers were unable to make arrests without warrants in misdemeanor cases unless they personally witnessed the

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*tic Violence Policy*, 2004 WIS. L. REV. 1657, 1670 (2004). Women who have been battered seem to be of two minds about these laws. While many seem to support the concept of mandatory arrest laws (and no-drop prosecution policies) in theory, fewer believe that those laws would actually improve their own situations. Many believe that such laws would deter women (including themselves) from reporting violence. Alisa Smith, *It's My Decision, Isn't It? A Research Note on Battered Women's Perceptions of Mandatory Intervention Laws*, 6 VIOLENCE AGAINST WOMEN 1384, 1384 (2000); see also Ferraro & Pope, *supra*, at 119 (citing a study showing that women were evenly split on whether police interventions were helpful).

23. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 989 (1991).

24. Some have argued that violence against women was not only tolerated, but promoted by law and public policy. See Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 11, 21-22 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

25. *Bruno v. Codd*, 396 N.Y.S.2d 974, 976 (N.Y. Sup. Ct. 1977).

26. Schneider, *supra* note 23, at 984-85.

27. Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 281 (1997).

28. Halsted, *supra* note 1, at 156; see also Zorza, *supra* note 17, at 60.

assaults.<sup>29</sup> The first statutory changes won by the battered women's movement eased these restrictions, allowing officers to arrest whenever they had probable cause to believe that an act of domestic violence had occurred.<sup>30</sup> But even after legislative revisions freed police to make warrantless arrests in misdemeanor cases, arrest rates remained low, and arrests for domestic violence continued to be rare.<sup>31</sup> In 1984, however, attitudes among law enforcement began to change after the United States Department of Justice released the *Attorney General's Task Force on Family Violence* report, which recommended a strong criminal justice response to domestic violence and touted preferred arrest policies<sup>32</sup>—the beginning of the Department of Justice's commitment to building a nationwide criminal justice infrastructure to hold perpetrators of domestic violence accountable for their actions.

Early efforts to enact mandatory arrest laws were also bolstered by research suggesting that arrest was linked to lowered rates of recidivism among perpetrators of domestic violence. In 1981 and 1982, research in Minneapolis suggested that the arrest of domestic violence suspects deterred them from future violent behavior against their partners.<sup>33</sup> Lawrence Sherman, one of the authors of that study, later wrote, "Although the authors cautioned against passage of mandatory arrest laws for domestic violence until further research could be conducted, by 1991 the results contributed to the passage of such laws in 15 states."<sup>34</sup>

Subsequent research in six additional cities would validate Sherman's words of caution. While arrest proved to deter future violence in some locations, in others there was no deterrent effect. Even worse, some evidence indicated that arrest contributed to increases

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29. Halsted, *supra* note 1, at 156 (explaining that prior to the 1970s, all but fourteen states required the officer to witness a misdemeanor before making a warrantless arrest); Fedders, *supra* note 27, at 288.

30. Fedders, *supra* note 27, at 288.

31. Halsted, *supra* note 1, at 156. In fact, the American Bar Association recommended that police not bring domestic violence cases to court in order to assist "harried and over-worked judges." Jaffe et al., *The Impact of Police Laying Charges*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 62, 69 (N. Zoe Hilton ed., 1993).

32. *Attorney General's Task Force on Family Violence*, September 3, 1984, at 24-25.

33. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOCIOLOGICAL REV. 261, 270 (1984).

34. Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOCIOLOGICAL REV. 680, 680 (1992) (internal citations omitted). Marvin Zalman suggests, however, that the authors were not quite as circumspect as this quote would suggest. In fact, he contends, one of the authors sent the results of the study to the media and the Police Foundation, whose dissemination of their findings generated significant enthusiasm for mandatory arrest policies. Zalman, *supra* note 18, at 84.

in future violence.<sup>35</sup> Sherman and his colleagues hypothesized that arrest was a more effective deterrent for some offenders than others, particularly those who had a greater “stake in conformity,” or believed that they had a great deal to lose by acting in a manner considered deviant or out of the norm.<sup>36</sup> Sherman’s studies found that those who were married and employed had a greater stake in conformity and therefore were more likely to be deterred by arrest.<sup>37</sup> Race also factored into the deterrent effect of arrest. In cities with large African American populations, arrest was positively correlated with future violence, suggesting that arrest policies endangered African American women.<sup>38</sup> Nonetheless, Sherman’s early work was cited as justification for continuing to implement mandatory arrest policies regardless of the demographics of the jurisdiction.<sup>39</sup>

Mandatory arrest laws got a further boost from the Violence Against Women Act of 1994. This Act required states to certify that they had adopted either pro- or mandatory arrest policies in order to be eligible for federal funding under the Grants To Encourage Arrests program<sup>40</sup>—a program that provided \$120 million over three years to state and local police departments.<sup>41</sup> Eager to ensure that

35. Sherman et al., *supra* note 34, at 680 (citing studies in Omaha, Charlotte, Milwaukee, Colorado Springs, and Dade County, Florida); *see also* Arnold Binder & James Meeker, *Arrest as a Method to Control Spouse Abuse*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 129, 130 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (“[W]e simply do not know whether arrest in response to cases of minor (misdemeanor) wife abuse is more or less effective in reducing recidivism than other available, and less harsh, methods. But we do know that grave doubts about its efficacy have been raised . . . . We certainly do not know the array of consequences, some possibly quite negative, of spousal arrest on, first, relationships and general contentment in the home and, second, the efficient operation of the criminal justice system. Yet, the approach of arrest in calls involving minor spousal abuse has been adopted as expected operating procedure in police departments throughout the country.”).

36. Sherman et al., *supra* note 34, at 687-88.

37. *Id.* at 686.

38. LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 3 (1992).

39. Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 193-94 (1994). This rush to embrace mandatory arrest was problematic, argues Marvin Zalman.

[W]hether the policy is wise or not, the pell-mell manner in which it was adopted indicates that conclusions were being made by lawyers, police chiefs, legislators, and policy advocates about a scientific finding (deterrence) based more upon a desired outcome than on a careful analysis of the Minneapolis Domestic Violence Experiment. This raises serious questions about the relationship between social knowledge, research findings, and legal action.

Zalman, *supra* note 18, at 106.

40. 42 U.S.C. § 3796hh(c)(1) (West 2008); *see also* Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL’Y 463, 503-04 (1996).

41. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 803 n. 5 (2001).

they would be able to access this important funding, states that had not already adopted such laws quickly did so. Today, every state has some form of pro-arrest policy and, as of 2004, at least twenty states and the District of Columbia mandated arrest in cases involving domestic violence.<sup>42</sup>

Once advocates had convinced states to enact mandatory arrest laws, they turned to the next obstacle in ensuring batterer accountability using the criminal system: prosecutors. Just as police officers historically had used their discretion to refuse to arrest perpetrators of domestic violence, prosecutors had also routinely chosen not to pursue cases against the few perpetrators of violence who police had actually arrested.<sup>43</sup> Ironically, prosecutors' failure to pursue cases involving domestic violence has been cited as yet another reason police declined to make arrests.<sup>44</sup>

Scholars have posited a number of reasons for the low rate of prosecution in domestic violence cases: the lack of evidence, the patriarchal views of prosecutors, skepticism about the seriousness of the crimes involved, and prosecutors' perceptions that judges were not interested in entertaining such cases.<sup>45</sup> The justification most frequently offered by prosecutors for their reluctance to pursue domestic violence cases was their inability to rely on their star witnesses—the wives and girlfriends of the men they were prosecuting.<sup>46</sup> The unwillingness of victims to testify to the abuse they had suffered deprived prosecutors of their best, and often their only, witnesses and hamstrung prosecutions in which the testimony of the involved parties was the only available evidence.

The failure of women who had been battered to participate in prosecutions was widely attributed to the victims' fear of repercussions at the hands of their abusers,<sup>47</sup> a credible fear given that, even after successful prosecution, sentences for domestic violence offenses

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42. Leigh Goodmark, *Law Is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 15 (2004).

43. JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 15 (1996); LISA A. GOODMAN & DEBORAH EPSTEIN, *LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, & JUSTICE* 73 (2008).

44. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1887 (2002); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1893 (1996). Police officers also expressed unhappiness with the court response to domestic violence charges. Jaffe et al., *supra* note 31, at 64.

45. FAGAN, *supra* note 43, at 42; Hanna, *supra* note 44, at 1860-61.

46. Hanna, *supra* note 44, at 1860.

47. Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in *DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE*, 161, 163 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

were ridiculously light and jail time was rarely imposed in misdemeanor cases.<sup>48</sup> Prosecutors began to look for ways to ensure that cases could be brought successfully even if victims chose not to participate in the process—a method that has come to be known as victimless prosecution.

The success of victimless prosecution hinges on the willingness of police officers to respond to cases involving domestic violence differently and more thoroughly than they would ordinary assault cases. Police officers were trained to carefully investigate crime scenes, make detailed reports, and collect evidence that would allow prosecutors to pursue cases even when the victims were unwilling to testify—much as police would investigate homicide cases.<sup>49</sup> Prosecutors relied on physical evidence, photographs of both the victim and the perpetrator (to show his demeanor at the time of arrest and any injuries, defensive or otherwise), recordings of 9-1-1 tapes, statements made to police, medical records, and other witness statements to secure convictions in cases that would have been impossible to successfully prosecute without such careful attention to gathering evidence.<sup>50</sup>

Victimless prosecution allowed prosecutors to circumvent the wishes of the victim by replacing her testimony, which had previously been viewed as essential, with other evidence sufficient to persuade a finder of fact beyond a reasonable doubt that the charged crime had actually been committed. Victimless prosecution also enabled prosecutors to undermine the testimony of victims who appeared on behalf of their partners, impeaching them with prior inconsistent statements to police, or confronting them with photographs of injuries and their own words on 9-1-1 tapes.<sup>51</sup>

Despite the implementation of these increasingly sophisticated methods of preparing domestic violence cases, prosecutorial reluctance to bring domestic violence cases and victim unwillingness to testify continued to hamper successful prosecutions. The adoption of no-drop prosecution was meant to address both of these issues. No-drop means exactly what it says—prosecutors would not dismiss

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48. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508, 1521-22 (1998).

49. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 561 (1999).

50. BARBARA E. SMITH ET AL., AN EVALUATION OF EFFORTS TO IMPLEMENT NO-DROP POLICIES: TWO CENTRAL VALUES IN CONFLICT iii (2001). Cheryl Hanna suggests that improved evidence gathering could help prosecutors avoid having to compel women who have been battered to testify through subpoenas, warrants, and incarceration. Hanna, *supra* note 44, at 1901.

51. See, e.g., *State v. Hancock*, No. C-030459, 2004 WL 596103 (Ohio App. 1 Dist. Mar. 26, 2004) (upholding conviction in domestic violence case where a witness was impeached with written and videotaped statements to police); *State v. Spraggins*, No. 82170, 2003 WL 22971050 (Ohio App. 8 Dist. Dec. 18, 2003) (affirming conviction in domestic violence case where a witness was impeached with sworn statement).

criminal charges in otherwise winnable cases simply because the victim was not interested in, or was even adamantly opposed to, pursuing the case.<sup>52</sup>

Advocates of no-drop prosecution strategies offer three justifications for the policies. First, they argue that no-drop prosecution in domestic violence cases is good for society in that the purpose of the criminal system is not to bend to the wishes of individual victims, but rather to punish offenders and to deter others from committing similar crimes.<sup>53</sup> The role of the prosecutor in the American criminal system is to reinforce the state's conception of the boundaries of acceptable behavior by ensuring compliance with the laws that define and regulate what individuals are and are not permitted to do.<sup>54</sup> The failure to prosecute domestic violence cases, whether attributable to prosecutorial diffidence or victim unwillingness, sends the message that violence against one's intimate partner is acceptable, in direct contravention of the criminal laws.<sup>55</sup> Consistent enforcement of the law is essential in ensuring respect for that law.<sup>56</sup> Allowing intimate partners to continue to flout those laws without fear of repercussion enabled perpetrators of domestic violence to believe that the laws against abusing one's intimate partner could be taken as seriously as most individuals take speed laws on major highways—which is to say, not seriously at all.

The second justification proffered for no-drop prosecution is victim safety. Prosecuting those who commit domestic violence increases safety both for the individual victim by removing the immediate threat to her, and for future victims of the same perpetrator.<sup>57</sup> The victim's inability to thwart the process is a particularly important guarantor of her safety. Because the victim no longer has the ability to stop the prosecutor from bringing the case to court, her abuser has no motivation to pressure her to do so.<sup>58</sup> Shifting the burden of deciding whether to prosecute the abuser from the victim to the prosecutor was thought to significantly safeguard the victim from further coercion and violence.

The final justification for no-drop prosecution policies was, ironically, victim empowerment. Women who had been battered, the ar-

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52. Sack, *supra* note 22, at 1673.

53. Hanna, *supra* note 44, at 1870.

54. *Id.*

55. Sack, *supra* note 22, at 1673.

56. See LEON RADZINOWICZ, *IDEOLOGY AND CRIME* 113 (1966).

57. Hanna, *supra* note 44, at 1870; Sack, *supra* note 22, at 1673. *But see* David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in *LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION* 127, 157, 159 (N. Zoe Hilton ed., 1993) (citing studies that suggest that allowing victims to drop charges they initiate after the abuser is arrested reduces the risk of future violence).

58. Sack, *supra* note 22, at 1673.

gument went, would derive strength and validation from the experience of participating in the prosecution.<sup>59</sup> This argument assumed successful prosecution of the case and positive treatment of the victim throughout the process.

One important distinction in the realm of prosecution policy is between “hard” and “soft” no-drop policies. In “soft” no-drop jurisdictions, victim testimony is not compelled; instead, prosecutors work with women who have been battered to help them feel comfortable with the system and offer them resources and support that will make compliance with the prosecutor’s requests to assist in the prosecution possible.<sup>60</sup> If the woman who has been battered is ultimately unwilling, unable, or uninterested in assisting prosecutors, she will not be forced to do so (although the services and support the woman may be relying on may no longer be available if she chooses not to cooperate with prosecutors).<sup>61</sup>

“Hard” no-drop policies, in contrast, are the purest form of these policies—prosecutors pursue their cases regardless of the victim’s wishes so long as sufficient evidence to prosecute exists.<sup>62</sup> In a hard no-drop jurisdiction, when a victim is unwilling to appear voluntarily, prosecutors might subpoena her to testify or, in the most extreme cases, issue a warrant for her arrest and/or have her incarcerated in order to compel her testimony.<sup>63</sup> Law professor Cheryl Hanna, a former prosecutor, explains the necessity for such actions: “No-drop policies that do not compel victim cooperation lack credibility.”<sup>64</sup> If both the perpetrator and victim are aware that the prosecutor will not follow through on the threat to force the victim’s compliance, there is little incentive for the perpetrator to refrain from pressuring the victim to withdraw her support for prosecution<sup>65</sup> and even less for the reluctant victim to comply voluntarily.

At their core, these policies reflect a struggle over who will control the woman who has been battered—if the state does not exercise its control over her by compelling her testimony, the batterer will, by preventing her from testifying. Hard no-drop policies express the state’s belief that it has a superior right to intervene on behalf of the woman who has been battered in service of both the woman’s needs and the state’s objectives. Using Barbara Hart’s hierarchy of the

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59. Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 184 (2003).

60. Hanna, *supra* note 44, at 1863.

61. For a discussion of the role of one of these supports, police victim advocates, see MARY ANN DUTTON, *EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION* 10 (1992).

62. Hanna, *supra* note 44, at 1863.

63. *Id.* at 1867.

64. *Id.* at 1891.

65. *Id.* at 1891-92.

goals of legal interventions in domestic violence cases, hard no-drop policies clearly prioritize safety over all other aims, including fostering the agency of the woman who has been battered.

### B. (Not) Mediating Family Law Matters

As alternative dispute resolution grows more popular in the legal system, ever-increasing numbers of civil family law matters have been deemed appropriate for mediation. In some jurisdictions, a litigant cannot have a claim for divorce or custody heard without first engaging in mediation.<sup>66</sup> Often described as cheaper, easier, and less formal than litigation, mediation is thought to give litigants greater control over the terms of the agreements they reach, encourage cooperation between the parties, and increase litigants' satisfaction with the legal process.<sup>67</sup> From the outset of the mediation explosion, however, commentators and advocates for women who have been battered have been almost universally opposed to employing mediation to resolve cases involving domestic violence.<sup>68</sup> Professor Tara Lea Muhlhauser's position is representative: "Mediation is unequivocally

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66. See, e.g., CAL. FAM. CODE § 3170 (West 2008) (requiring the court to send all cases involving custody or visitation to mediation); see Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L. Q. 53, 71-84 (2005) (cataloging state laws on mediation in family law cases).

67. See generally René L. Rimelspach, *Mediating Family Disputes in a World With Domestic Violence: How To Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95 (2001); Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003); Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253 (2001).

68. See, e.g., Sara Cobb, *The Domestication of Violence in Mediation*, 31 L. & SOC'Y REV. 397, 397-98 (1997); Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L. Q. 7, 19 (2005); Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031, 1031 (2003); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2117-18 (1993); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 272 (1992); Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 855 (1999); Nancy E. Johnson et al., *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022, 1022 (2005); Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 235 (2002); Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 855 (1985); Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L. J. 559, 559 (2002). The National Coalition Against Domestic Violence has stated that mediation is never appropriate when psychological or physical battering has occurred in a relationship. Megan G. Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 620 (2007) (citing to NCADV position paper).

wrong when the dynamics of violence exist in a relationship.”<sup>69</sup> Or, as advocates Allen M. Bailey and Carmen Kay Denny ask, “[H]ow is a client, whose spouse shoved the barrel of a .44 magnum revolver into her or his ear and threatened to kill, supposed to benefit from a ‘heart to heart’ talk with the battering partner and negotiate custody of their children or anything else?”<sup>70</sup> Theoretical and practical concerns about the appropriateness of mediating such cases seem to drive this opposition.

Some opponents of mediation fear that mediating cases involving domestic violence trivializes these matters. Because safety is the overriding concern for many advocates, the inability of mediation to stop the violence and ensure safety is a sufficient reason to avoid the process.<sup>71</sup> Women should not have to negotiate for their safety;<sup>72</sup> agreements that make the cessation of abuse contingent on some concession by the woman who has been battered are completely unacceptable for that reason.<sup>73</sup> But even when the violence itself is not what is being mediated, critics contend that using alternative dispute resolution to address cases involving domestic violence undermines the seriousness with which such cases are treated.<sup>74</sup>

Relegating these issues to mediators rather than using the time and resources of the court system to resolve them sends the message that these cases are not as important as others. Opponents of mediation have charged gender bias in the consignment of “women’s issues” like domestic violence to alternative dispute resolution.<sup>75</sup> Critics further contend that the development of the law in cases involving domestic violence is stunted when cases are resolved through mediated agreements rather than adversarial proceedings, which can create binding precedent favorable to the women who follow.<sup>76</sup>

Privacy is again a concern in the debate over mediating domestic violence cases. Given the efforts of advocates to move domestic violence from the private sphere to the public arena of the legal system,

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69. Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is a Train on the Track?*, 70 N.D. L. REV. 255, 267 (1994).

70. Allen M. Bailey & Carmen Kay Denny, *Attorneys Comment on Mediation and Domestic Violence*, 27 ALASKA BAR RAG 16 (July/August 2003) (internal citation omitted).

71. See, e.g., Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN’S L.J. 57 (1984).

72. Fischer et al., *supra* note 68, at 2153.

73. *Id.* at 2159 (“Any agreement that is structured in the format of ‘Mr. Abuser agrees to stop the abuse and Ms. Victim agrees to \_\_\_’ is conceptually wrong.”).

74. See, e.g., Gagnon, *supra* note 68, at 275-76; Lerman, *supra* note 71, at 72.

75. See Cobb, *supra* note 68, at 398 (summarizing these arguments).

76. Leigh Goodmark, *Alternative Dispute Resolution and the Potential for Gender Bias*, 35 JUDGES J. 21, 24 (2000).

it is hardly surprising that the effort to shift resolution of cases involving domestic violence into a private dispute resolution system is unpopular. Allowing mediation of these cases “causes the re-privatization of family law resulting in a setback to the political and legislative progress of the battered women’s movement.”<sup>77</sup> Mediating cases involving domestic violence removes such violence from the public eye and makes it easier for the legal system and the public alike to underestimate the prevalence of violence in family relationships and the toll that such violence takes on women who have been battered and their children.<sup>78</sup>

Moreover, mediating cases involving domestic violence allows perpetrators to avoid public sanction for their actions, undermining the goal of batterer accountability.<sup>79</sup> This is particularly true, opponents have argued, because mediation is focused on the future.<sup>80</sup> Many mediators discourage discussions of past abuse and fail to consider how that abuse could affect negotiated arrangements for interactions between the parties going forward.<sup>81</sup> This future focus prevents women who have been battered from using mediation to confront their partners with their actions and the consequences of their use of violence. This focus also precludes women who have been battered from discussing how their fears of further violence and control color their reactions to proposed custody and visitation plans or their concerns that abusers will use economic tools, like withholding alimony and child support, to continue to exercise control post-separation.

Another theoretical concern about mediating such cases is the inability to reconcile the ideology and practices of mediation with the realities of domestic violence. Mediation is frequently described as a method of resolving conflicts; by contrast, advocates for women who have been battered are quick to explain that domestic violence is not about conflict, but rather control and the use of violence to maintain that control.<sup>82</sup> Mediation provides the abuser with yet another opportunity to attempt to exert control over his partner—an opportunity that may be particularly welcome to the abuser after the parties have separated and his access to his victim decreased.<sup>83</sup>

Even if it appears that particular areas of conflict between the parties, like child custody and marital property, are being resolved, the larger issue of control lurks in the shadows and may constrain

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77. Krieger, *supra* note 68, at 235.

78. Cobb, *supra* note 68, at 437 (“[M]ediation condones and harbors violence, thereby extending the awful secret of violence beyond the boundaries of the family into the community and the legal system itself.”).

79. See Fischer et al., *supra* note 68, at 2162-63.

80. *Id.* at 2160-61.

81. *Id.*

82. *Id.* at 2118.

83. Drew, *supra* note 68, at 19.

the ability of the woman who has been battered to confidently assert her positions.<sup>84</sup> As a result, the woman may not negotiate forcefully and may concede too much in order to avoid angering her partner.<sup>85</sup> Her partner, in contrast, may contest points that are truly unimportant to him simply because he can and because he knows that it will unnerve his former partner. Mediation is said to require cooperation between the parties; cooperation with someone who changes his demands only to demoralize the other participant is a practical impossibility.<sup>86</sup>

The scant possibility of reaching an agreement makes mediation a costly addition to the legal process.<sup>87</sup> Because settlement is unlikely, mediation (which may require payments to a mediator and counsel) becomes yet another hurdle that the woman who has been battered must clear before getting access to the courtroom, where her concerns will finally be heard and her claims adjudicated.<sup>88</sup>

Perhaps the most frequently cited justification for avoiding mediation in cases involving domestic violence is the power imbalance between the parties.<sup>89</sup> One of the core principles of mediation is that the parties come to the table with equal power, equally able to assert their positions and to discuss and negotiate the terms of an agreement between them.<sup>90</sup> Some critics contend that all women are at a disadvantage in mediation by virtue of their unequal economic and social power.<sup>91</sup> Most agree that women who have been battered are at a distinct disadvantage in mediation as a result of the coercion and violence that have characterized their relationships.<sup>92</sup> The assumption is that a woman who has been battered is simply incapable of equaling her batterer's power. As Professors Karla Fischer, Neil Vidmar, and Rene Ellis write, "[B]y its very nature the culture of a

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84. Imbrogno, *supra* note 68, at 864.

85. In their study of mediation in cases involving domestic violence, Lisa Newmark, Adele Harrell, and Peter Salem found that "[a]bused women may believe that they can state their needs and seem willing to stand up for themselves but feel there could be negative repercussions for doing so." Lisa Newmark et al., *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 FAM. & CONCILIATION CTS. REV. 30, 57 (1995).

86. Gagnon, *supra* note 68, at 275; Imbrogno, *supra* note 68, at 863-64.

87. Drew, *supra* note 68, at 19.

88. *Id.*

89. See, e.g., Fischer et al., *supra* note 68, at 2168-69; Krieger, *supra* note 68, at 245-46; Rowe, *supra* note 68, at 861-62.

90. Imbrogno, *supra* note 68, at 860.

91. *Id.* at 860-61.

92. See, e.g., Drew, *supra* note 68, at 20 (citing with approval the report of the American Bar Association Commission on Domestic Violence); Fischer et al., *supra* note 68, at 2168; Imbrogno, *supra* note 68, at 862; Johnson et al., *supra* note 68, at 1027. Some mediation proponents agree with this position. See Desmond Ellis, *Family Courts, Marital Conflict Mediation, and Wife Assault*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 165, 183 (N. Zoe Hilton ed., 1993) (explaining the position that only those cases involving "serious and unalterable imbalance of power" should be excluded from mediation).

battering makes the couple unequal in subtle and pervasive ways.”<sup>93</sup> As a result, productive mediation is said never to be possible in cases involving domestic violence.

This theoretical concern about the innate power imbalance between a woman who has been battered and her abuser is tied to a pragmatic concern about the mediator’s inability to redress those power imbalances. The mediation literature is replete with references to the mediator’s ability to “balance the power” between the parties, but descriptions of just how a mediator is able to balance power or how a party can be sure that the power is, in fact, balanced before mediation proceeds are rare.<sup>94</sup> Power differentials in cases involving domestic violence are significantly different than in other kinds of relationships; the mediator may be attempting to balance power between parties who have been in unequal positions for years or who have never been equals within the relationship.<sup>95</sup> Professors Fischer, Vidmar, and Ellis note, “the notion that power which has been grossly imbalanced over the course of an entire multi-year relationship can be shifted within a two hour mediation session minimizes the seriousness of the impact of the abuse on battered women.”<sup>96</sup> A mediator’s assurances that he can balance the power sufficiently to ensure that her interests are protected in mediation may prove cold comfort to the woman who has been battered. Battered woman’s advocate Joan Zorza has argued that women who have been battered are so fearful and submissive that even mediators with a sophisticated understanding of domestic violence cannot bridge the power differential.<sup>97</sup>

Few mediators, opponents argue, have the kind of specialized training in and experience with domestic violence that would enable them to identify the violence in the first instance.<sup>98</sup> Mediators are not always required by law to have training in domestic violence, although model standards developed for mediators in family law cases require such training.<sup>99</sup> One survey of over 200 courts and mediation services throughout the United States indicated that 30% of the pro-

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93. Fischer et al., *supra* note 68, at 2162.

94. *But see* Ver Steegh, *supra* note 67, at 186-87.

95. Fischer et al., *supra* note 68, at 2168-69; Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 344 (1999).

96. Fischer et al., *supra* note 68, at 2168.

97. Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, § V(B) (1996).

98. *See, e.g.*, Fischer et al., *supra* note 68, at 2169-2171.

99. THE SYMPOSIUM ON STANDARDS OF PRACTICE: MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), *available at* <http://www.afccnet.org/pdfs/modelstandards.pdf> (“A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.”).

grams do not train their staff to identify domestic violence.<sup>100</sup> Without such training, some fear that mediators will not recognize the kind of subtle manipulation that the abuser might use to prevent his victim from fully participating in the mediation.<sup>101</sup> The abuser might even be able to turn the mediator against the woman who has been battered, contributing to a climate in which the woman feels that she cannot assert herself or have her concerns heard, or causing the mediator to pressure her to accept an unfair agreement.<sup>102</sup>

Although many states require that mediators screen for domestic violence before beginning work with the parties, that screening may not be occurring and, if it is, may not be effective in identifying violence in the relationship. Two recent studies examining mediation of family law matters in Maryland, a state that prohibits mediation in cases involving domestic violence, found that mediations occurred in a significant number of custody cases although domestic violence was clearly present.<sup>103</sup>

Even when mediators screen for and identify domestic violence, they may not change their regular practices to account for the violence. In their review of policies and practices for mediating custody cases involving domestic violence, researchers Nancy Thoennes, Peter Salem, and Jessica Pearson found that 74% of mediators sometimes conducted mediations in cases involving domestic violence without changing their regular practice; 3% of mediators with domestic violence training and 17% of mediators without training reported that they never changed their techniques in cases involving domestic violence.<sup>104</sup> These mediators, then, are unlikely to be taking special measures either to ensure the safety of the woman who has been battered or to balance the power between the parties.

Another problematic aspect of mediating domestic violence cases is that the woman who has been battered must articulate her own goals and needs during the mediation—a task that she may simply be unable to accomplish when confronted with her abusive partner. In her study of 129 divorced women with children, social scientist Demie Kurz found that 30% of women were fearful during their child support negotiations, 38% were fearful during custody negotiations,

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100. Nancy Thoennes et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 6, 25 (1995).

101. Fischer et al., *supra* note 68, at 2172.

102. See Desmond Ellis, *Safety, Equity, and Human Agency: Contributions of Divorce Mediation*, 6 VIOLENCE AGAINST WOMEN 1012, 1017 (2000).

103. Murphy & Rubinson, *supra* note 66, at 63. Murphy and Rubinson also note that screening can never be perfect because some women do not identify their relationships as abusive, either because they do not see them that way or because they do not want to disclose the abuse. *Id.* at 64.

104. Thoennes et al., *supra* note 100, at 20-21.

and 35% were fearful during marital property negotiations.<sup>105</sup> These fears, Kurz discovered, were linked to the women's experiences of violence during their marriages and separations and were stronger for women who had experienced more frequent or serious violence.<sup>106</sup>

As a result of these fears of violence, both past and future, Kurz found, these women reduced the amount of their requests for child support and, in some cases, abandoned their cases altogether.<sup>107</sup> Kurz concludes, "[T]hese data suggest that a substantial group of women negotiate for resources in a 'climate of fear' in which their fear of violence can lead them to forfeit their rights."<sup>108</sup> Imagine how much more difficult it would be for a woman to forcefully assert her rights while sitting in close proximity to her abuser in a process that expects her to be able to come to some agreement. And while having counsel present during the mediation might alleviate some of these concerns, in many mediations counsel are not permitted to attend, let alone participate.<sup>109</sup> Even if counsel is present, these same concerns might prevent a woman from giving counsel either the information or the authority to negotiate freely on her behalf.

Safety concerns are another reason for discouraging mediation in cases involving domestic violence. Mediation may require that the parties share the same physical space, giving the abuser access to the woman that he may have been denied by separation or by court order.<sup>110</sup> Court-ordered mediation could, in fact, enable the abusive partner to circumvent the terms of a court order requiring him to stay away from his partner.<sup>111</sup> Once granted that access, opponents argue, the potential for violence during the mediation itself exists, with few of the kinds of safeguards in place, like court security personnel and metal detectors, which protect women who have been battered when they enter courtrooms to confront their abusers.<sup>112</sup> Mediation could trigger violence not just during the session itself, but afterwards; having expressed her desires and, by so doing, undermined her partner's control, the woman who has been battered might fear that her abuser will retaliate against her as a way of reestablishing his dominance.<sup>113</sup>

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105. Demie Kurz, *Separation, Divorce, and Woman Abuse*, 2 VIOLENCE AGAINST WOMEN 63, 71 (1996).

106. *Id.* at 71-72.

107. *Id.* at 72.

108. *Id.* at 76.

109. Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1319 (1995).

110. Drew, *supra* note 68, at 19.

111. *Id.*

112. *Id.*

113. Murphy & Rubinson, *supra* note 66, at 56.

Recall the benefits of mediation listed earlier: cheaper, easier, less formal, gives litigants greater control, encourages cooperation, increases satisfaction. Few of these justifications for promoting mediation seem to operate in cases involving domestic violence, but potential dangers abound in mediating these cases. For that reason, many advocates have fought to ensure that women who have been battered can avoid mediation, and they have been remarkably successful. Some states require that mediators screen for domestic violence before beginning mediation.<sup>114</sup> Many states allow women who have been battered to opt out of mediation if they can persuade the court or the mediator that there is a history of violence in the relationship or if there is currently a protective order in effect.<sup>115</sup> Delaware's law is typical:

Notwithstanding any other provision of law to the contrary, Family Court mediation conferences shall be prohibited in any child custody or visitation proceeding in which 1 of the parties has been found by a court, whether in that proceeding or in some other proceeding, to have committed an act of domestic violence against the other party or if either party has been ordered to stay away or have no contact with the other party, unless a victim of domestic violence who is represented by counsel requests such mediation.<sup>116</sup>

Because they cannot feel confident that mediation will be a safe and productive process for women who have been battered, advocates routinely warn women away from participating in mediation, encouraging them to use these provisions to opt out of the process whenever possible. One critic of mediation has even suggested that states require women who have been battered to participate in therapy before and while engaging in mediation with their partners.<sup>117</sup>

In a few states, women who have been battered have no choice regarding mediation. Cases involving domestic violence cannot be mediated, regardless of the wishes of the parties involved. Maryland law, for example, prohibits the court from ordering mediation in cases in which a party or child (or a mediation program that has screened the case) represents to the court that there is a genuine issue of physical or sexual abuse of a party or child that makes mediation inappropriate for the situation.<sup>118</sup> Illinois,<sup>119</sup> Minnesota,<sup>120</sup> Montana,<sup>121</sup> North Dakota,<sup>122</sup> and Pennsylvania<sup>123</sup> also pro-

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114. *Id.* at 63.

115. *Id.* at 71-85.

116. DEL. CODE ANN. tit. 13, § 711A (2008).

117. Dunnigan, *supra* note 68, at 1059-60.

118. MD. CODE ANN. § 9-205(b)-(c) (West 2008).

119. 750 ILL. COMP. STAT. 5/602.1, 5/607.1 (2008).

120. MINN. STAT. ANN. § 484.73 (West 2008).

121. MONT. CODE ANN. § 40-4-301 (West 2007).

hibit courts from sending cases involving domestic violence to mediation. Such laws and policies ensure that women who have been battered cannot be further harmed by the process and must instead pursue their claims through the adversarial system—the ultimate protection that advocates can provide.

### III. DEFINING AUTONOMY AND AGENCY

These policies all seem like perfectly reasonable responses to deficiencies in the legal system's ability to respond adequately to domestic violence. Before we can determine whether exchanging a woman's ability to control her participation in the legal system for the mandated protection of that system has been a good bargain for women who have been battered, however, we should first consider the values of autonomy and agency.

What does autonomy mean? While that might seem a facile question, for philosophers it is a much more complicated one than it might appear. Autonomy has alternately been described as a basic state of being and as a competence that one must develop.<sup>124</sup> Contrast basic autonomy, which references individuals who are responsible, independent, and able to speak for themselves, with ideal autonomy, which requires that individuals operate in a state of maximal authenticity of choice, free of any self-distorting influences.<sup>125</sup> Philosophers have defined autonomy as the theoretical capacity for self-governance, the actual condition of self-governance, the ideal of self-governance in a state of absolute freedom, and a set of rights that undergird the ability to establish sovereignty over the self.<sup>126</sup> Fundamentally, however, autonomy is constituted of the independence to deliberate and make choices free from manipulation by others and the capacity to make reasoned decisions about how to live one's life.<sup>127</sup>

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122. N.D. CENT. CODE § 14-09.1-02 (2008).

123. 23 PA. CONS. STAT. ANN. § 3901 (West 2008).

124. See generally DIANA T. MEYERS, SELF, SOCIETY AND PERSONAL CHOICE (1989).

125. John Christman, *Autonomy in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/autonomy-moral/> (last visited Oct. 27, 2009).

126. *Id.* (citing JOEL FEINBERG, AUTONOMY IN THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 27 (John Christman ed., 1989)).

127. See, e.g., GRACE CLEMENT, CARE, AUTONOMY, AND JUSTICE: FEMINISM AND THE ETHIC OF CARE 22 (1996) ("Most literally, autonomy means self-determination. An autonomous person is one who is in control of his or her life rather than being controlled by outside forces."); MORWENNA GRIFFITHS, FEMINISMS AND THE SELF: THE WEB OF IDENTITY 135 (1995) ("I am taking 'autonomy' to mean much the same as 'independence.' Both terms routinely apply to the self-rule of individuals, of groups, and of states."); Diana T. Meyers, *Gendered Work and Individual Autonomy*, in RECOGNITION, RESPONSIBILITY AND RIGHTS: FEMINIST ETHICS AND SOCIAL THEORY 19, 20 (Robin N. Fiore & Hilde Lindemann Nelson eds., 2003) ("[T]o be autonomous is (1) to figure out what your personal values and goals are—what really matters to you as an individual and what you as an individual really

As philosopher John Christman writes, “[T]he unifying idea behind the various uses of the notion of autonomy is that of ‘self-government’—being or doing only what one freely, independently, and authentically chooses to be or do.”<sup>128</sup>

Autonomy is at the heart of liberal political philosophy. The idea that individuals should be able to choose how to govern their lives without the state dictating those choices (either to achieve its preferred goals or to protect people from choices it believes to be anti-thetical to their well-being) is central to the theories of Immanuel Kant and John Stuart Mill, whose work forms the basis of much of American political thought.<sup>129</sup> Not surprisingly, then, autonomy is also one of the cornerstones of the American legal system.<sup>130</sup>

Feminists have long been conflicted about the role of autonomy in shaping the law.<sup>131</sup> Some feminists have rejected the individualistic bent of autonomy.<sup>132</sup> Although autonomy seems congruent with the feminist goal of liberation, some have instead characterized autonomy as selfish and egotistical.<sup>133</sup> They argue that valuing the individualism of autonomy rejects the reality of women’s lives, which are often deeply intertwined with the lives of others.<sup>134</sup> In response, femi-

want out of life; (2) to figure out how you can fulfill those self-chosen values and goals; and (3) to act in ways that are congruent with those self-chosen values and goals.”)

128. John Christman, *Feminism and Autonomy*, in “NAGGING” QUESTIONS: FEMINIST ETHICS IN EVERYDAY LIFE 17, 18 (Dana E. Bushnell ed., 1995).

129. Christman, *supra* note 125. As Joseph W. Singer explains, “Under the theory of liberty championed by John Stuart Mill . . . it is a violation of autonomy for courts or legislatures to act paternalistically to protect individuals from their own mistakes on the ground that these government officials know better than individuals what is in their best interest.” Joseph W. Singer, *Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL’Y REV. 139, 143 (2008).

130. David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. CAL. INTERDISC. L.J. 293, 298 (2007).

131. For an overview of feminist critiques of autonomy, see Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 5-7 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

132. CLEMENT, *supra* note 127, at 22 (1996). Clement argues for a definition of autonomy that acknowledges the social construction of identity and allows for the achievement of autonomy through relationships to others. *Id.* at 24. Such critiques are closely linked to what has been called “different voice” or “ethic of care” feminism, which stresses the differences in the ways that men and women relate to the world and argues that the law should value women’s desire for interconnectedness just as it does the ideal of the strong, independent male.

133. Christman, *supra* note 128, at 30.

134. *But see* ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 9 (1987) (“[F]or the sake of their children, or the redemption of their husbands[,] wives have traditionally been urged to renounce their personal liberty. Many women have been bound to marriage and the family by this sense of duty and obligation. It follows, then, that the desire for personal autonomy, especially among women, would threaten family stability.”).

nist philosophers have developed relational theories of autonomy, which stress the ability to achieve autonomy within a world in which individuals are socially constructed and shaped by their relationships with others.<sup>135</sup>

Feminist theorists have also argued that the emphasis on autonomy within liberal political philosophy and the law disadvantages women who, by virtue of their subordinated status as victims of a patriarchal system, are rarely able to exercise the sort of autonomy contemplated by philosophers.<sup>136</sup> Philosopher Susan Wendell articulates this position:

Much of what women appear to do freely is chosen in very limiting circumstances, where there are few choices left to us. Even where the circumstances present many choices, it is often the case that our knowledge, our ability to judge, and our desires have been so distorted and manipulated by social influences as to make a mockery of the idea that we choose freely.<sup>137</sup>

Because women can only contemplate options and make choices within a patriarchal frame, which limits and distorts the options that are available, their choices can never truly be free. To value autonomy within a political system, then, is to ensure that women can never be equal actors within that system. As philosopher Morwenna Griffiths writes, “[A]utonomy is often thought to present a problem for women because (1) it is a desirable quality; and (2) women don’t have it.”<sup>138</sup>

Some feminist thinkers have attempted to incorporate the ideas underlying the concept of autonomy while rejecting the philosophical baggage that the term autonomy carries for feminists. The word has become so fraught, law professor Kathryn Abrams suggests, that it should be rejected in favor of the term agency, which captures the key features of autonomy—self-definition and self-direction—but recognizes how social construction delimits the choices available to women.<sup>139</sup> For Abrams, self-definition involves “determining how one conceives of oneself in terms of the goals one wants to achieve and the kind of person, with particular values and attributes, one consid-

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135. See, e.g., CLEMENT, *supra* note 127, at 45-46; Misha Strauss, *The Role of Recognition in the Formation of Self-Understanding*, in *RECOGNITION, RESPONSIBILITY, AND RIGHTS: FEMINIST ETHICS AND SOCIAL THEORY* 37, 46-47 (Robin N. Fiore & Hilde Lindemann Nelson eds., 2003).

136. GRIFFITHS, *supra* note 127, at 135-36; Patricia Smith, *Autonomy, Aspiration and Accomplishment: Some Steps and Barriers to Equality for Women*, 9 *J. CONTEMP. LEGAL ISSUES* 257, 272 (1998).

137. Susan Wendell, *Oppression and Victimization: Choice and Responsibility*, in “NAGGING” QUESTIONS: *FEMINIST ETHICS IN EVERYDAY LIFE* 41, 43 (Dana E. Bushnell ed., 1995).

138. GRIFFITHS, *supra* note 127, at 135.

139. Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 *WM. & MARY L. REV.* 805, 823-24 (1999).

ers oneself to be.”<sup>140</sup> Abrams describes self-direction as the ability to formulate goals and plans free of the undue influence of others.<sup>141</sup>

Similarly, in her book *Real Choices: Feminism, Freedom, and the Limits of Law*, philosopher Beth Kiyoko Jamieson suggests that feminists adopt “[t]he Agency Principle—that individuals have the right to make their own decisions about how to live their lives, that individuals must be assumed to be capable of making ethical decisions, and that social reprobation (well-intentioned or not) must not inhibit the decision-making process.”<sup>142</sup> A feminist conception of autonomy should include not only the ability to make choices within one’s personal life, but also the ability to exercise choice within the larger society. Philosopher Morwenna Griffiths defines autonomy as having “three interconnected strands: freedom to make oneself, freedom to live that self without fear of the consequences, and freedom to participate in public decisions that affect oneself.”<sup>143</sup>

The question of whether women can act autonomously or with agency within a patriarchal system is complicated significantly by the presence of domestic violence. Some philosophers have questioned whether women who have been battered are ever capable of acting autonomously.<sup>144</sup> They argue that battering is inherently coercive, creating a context that precludes women who have been battered from being able to exercise free will.<sup>145</sup>

Others believe that, while women who have been battered are still capable of exercising some form of autonomy or agency, their ability to do so is at best compromised and the choices that they make must be understood as being shaped by the context of the abusive relationship.<sup>146</sup> In a coercively controlling relationship, they assume, the woman is not free to make her own choices or act freely on her own decisions because she is subject to the will of another.<sup>147</sup> These philosophers believe that the autonomy of women who have been battered is undermined because they are too focused on safety to be able to fully contemplate their choices.<sup>148</sup> Law professor Ruth Jones has gone so far as to suggest that courts should appoint guardians for women who have been coercively controlled because their judgment

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140. *Id.* at 824.

141. *Id.* at 830.

142. BETH KIYOKO JAMIESON, *REAL CHOICES: FEMINISM, FREEDOM, AND THE LIMITS OF LAW* 7 (2001).

143. GRIFFITHS, *supra* note 127, at 142.

144. Christman, *supra* note 125 (summarizing these arguments).

145. *Id.*

146. MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 142 (2003).

147. *Id.*; see also Marilyn Friedman, *Autonomy, Social Disruption, and Women*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 35, 37 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

148. FRIEDMAN, *supra* note 146, at 142.

has been so impaired and their autonomy so extinguished as to render them incapable of protecting themselves or separating from their partners.<sup>149</sup> Jones writes,

Coercively controlled battered women, immobilized by violence, need a more aggressive state intervention than those provided by empowerment-based remedies. Unable to act on their own, these women require an intervention that permits someone else to act on their behalf to protect them from their abusers until they can protect themselves.<sup>150</sup>

Concluding that the agency or autonomy of women who have been battered is, at best, compromised, a number of scholars have supported the use of mandatory legal interventions to protect these women.<sup>151</sup> They justify these interventions by arguing that women who have been battered are incapable of making authentic choices to protect themselves—the choices they would certainly make, these scholars suggest, if their autonomy had not been undermined by battering.<sup>152</sup> As philosopher Marilyn Friedman writes, “Domestic violence . . . itself profoundly undermines a woman’s autonomy. Anything that succeeds in deterring an abuser’s future abusiveness promotes his victim’s long-run autonomy.”<sup>153</sup> In the short term, Friedman is willing to trade the immediate decisionmaking authority of the woman who has been battered for the increased possibility that she will be able to exercise agency in the long term; as a result, she argues, “The law should therefore do what it can to prevent men from abusing their intimate female partners, even if it must do so against the wishes of the victims and by mandating the victims’ cooperation.”<sup>154</sup>

These arguments are based on a number of problematic assumptions. These thinkers tend to equate all violent relationships with the exercise of coercive control and, moreover, to assume that all women within coercively controlling relationships are so subject to the will of their partners that they are unable to exercise the ability to choose. Ruth Jones’ definition of coercive control highlights this assumption. Women who have been coercively controlled, according to Jones, lack access to resources and the ability to use them.<sup>155</sup> What Jones ignores is that the resources of a woman who has been battered are not necessarily external. As survivor theory posits, women who have been

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149. See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 628 (2000).

150. *Id.*

151. Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAVIORAL SCI. 651 (1993).

152. FRIEDMAN, *supra* note 146, at 150.

153. *Id.*

154. *Id.* at 151.

155. Jones, *supra* note 149, at 613.

battered rely on their own knowledge of their abusers and their innate abilities to survive.<sup>156</sup> External resources might not be what a woman who is being battered believes she needs. The choice not to access resources, then, is a poor measure of whether a woman is able to exercise her autonomy. More importantly, Jones' definition, which hinges on accessing external resources, seems to link the inability to choose to the inability to leave the relationship. This formulation ignores the legitimate autonomous choices that some women make to remain with abusive partners.

Supporters of mandatory interventions focus primarily on the potential for preventing severe physical violence; as Friedman asserts, "Helping to preserve someone's very life takes obvious precedence over respecting her autonomy."<sup>157</sup> The lives of many women who have been battered are not always at risk, however; lethality occurs too often in intimate relationships, but it does not occur in all of them, or even in the majority. Further, this argument assumes that legal intervention prevents future abuse and that autonomy will not be of use to the victim of violence in the course of the legal intervention—that somehow the development of autonomy can wait until a later date. While domestic violence can certainly involve coercion, these thinkers assume that the choice not to engage the legal system is always a coerced choice. Given how these mandatory policies operate to deprive a victim of choice, it is worth questioning whether a woman who has been battered is ever free of coercion, regardless of the measures she uses to address the violence she experiences.

Women who have been battered can exercise autonomy and/or agency. The exercise of autonomy does not require unfettered or entirely consistent choice.<sup>158</sup> In fact, John Christman explains, "many external life situations display such contradictory and confusing characteristics that one's very survival may demand at least a partially conflicting set of desires and values."<sup>159</sup> Women who have been battered must be free to make choices that others disagree with or fail to understand.<sup>160</sup> As Morwenna Griffiths writes, "Women want autonomy; they want to decide the course of their own lives—even though this may mean that they decide to continue with precisely the situations that others may define for them as ones in which they lack autonomy."<sup>161</sup>

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156. EDWARD W. GONDOLF WITH ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 17-18 (1988).

157. FRIEDMAN, *supra* note 146, at 155.

158. See JAMIESON, *supra* note 142, at 49.

159. Christman, *supra* note 128, at 35.

160. JAMIESON, *supra* note 142, at 172, 220.

161. GRIFFITHS, *supra* note 127, at 136.

Kathryn Abrams argues that self-direction may exist even when others fail to see it, when women resist the institutional forces that conspire to limit their ability to choose.<sup>162</sup> Abrams describes this phenomenon as “resistant self-direction,” explaining that “Women who resist in these ways may not be seeking to transform society in any systematic sense, but simply to pursue their own choices and plans in contexts where doing so evokes serious gender-based challenge.”<sup>163</sup> One such situation, argues Abrams, is in the context of a violent relationship. Building on the work of feminist legal scholar Martha Mahoney and the ideas underlying survivor theory, Abrams argues that the efforts women make to safeguard themselves and their children within their relationships constitute exercises of self-direction, of agency, despite the existence of outside constraints on these women’s ability to freely choose.<sup>164</sup>

The arguments made by those who support mandatory interventions beg the conclusion that women who have been battered can rarely, if ever, act autonomously, a problematic assertion given the primacy of autonomy in the American political and legal systems. Accepting that women who have been battered are incapable of engaging in independent deliberation devalues these women as members of the political society and invites and justifies what some might characterize as paternalism on their behalf.<sup>165</sup> Paternalism reflects a lack of respect for autonomy and for the individual as a person.<sup>166</sup> A number of the policies adopted to address domestic violence—policies championed by many advocates for women who have been battered—are guided by what seems to be patently paternalistic views of these women as powerless, limited individuals incapable of acting on their own behalf.<sup>167</sup>

A better way to characterize the spirit motivating these policy choices, at least on the part of advocates for women who have been battered, is that they exemplify maternalism. These policies come from a well-meaning place—the desire to protect women who have been battered from further intimidation and violence, from their own inability to invoke the legal system given their fear of retaliation

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162. Abrams, *supra* note 139, at 832-33.

163. *Id.* at 832.

164. *Id.* at 834-35.

165. For a general discussion of paternalism, see Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/paternalism/> (last visited Oct. 27, 2009).

166. *Id.* (discussing the Kantian objection to paternalism).

167. Cynthia Daniels, *Introduction: The Paradoxes of State Power*, in FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE 1, 1 (Cynthia R. Daniels et al. eds., 1997) (“As mandatory arrest policies illustrate, a state empowered to protect women may also have power to victimize women. Many victories won by feminists . . . have been won at the expense of reinforcing traditional patriarchal assumptions that women are unable or unwilling to take care of themselves.”).

from their abusers, from losing their children or economic benefits in unfair mediations. This maternalism is born of advocates' experiences with a legal system that has too often failed to safeguard the rights and needs of women who have been battered and their belief that mandatory interventions are instrumental in ensuring that the system treats cases of domestic violence seriously.

But maternalism is no better than paternalism in that it assumes that women who have been battered are incapable of considering the full range of possibilities and deprives them of the ability to make choices for themselves, based on their own goals, values, beliefs, and understanding of their situations. Maternalism undermines the autonomy of women who have been battered. Exercises of maternalism to justify the implementation of mandatory policies are fundamentally at odds with one of the foundational goals of the battered women's movement—empowerment.

#### IV. WHY EMPOWERMENT MATTERS

If, as most scholars agree, domestic violence is characterized by a power imbalance between the parties,<sup>168</sup> restoring power to women who have been battered should be a priority when crafting domestic violence law and policy.<sup>169</sup> For that reason, empowerment has been a central, though not always well-defined, theme in the battered women's movement.<sup>170</sup> In her seminal work, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement*, social work professor Susan Schechter describes empowerment as “the illusive word that embodies the sense of controlling one's life and circumstances.”<sup>171</sup> For Schechter, empowerment is

[A] process through which women, experts about their own lives, learn to know their strength. “Empowerment” combines ideas about internalizing personal and collective power and validating women's personal experiences as politically oppressive rather than self-caused or “crazy.” In a feminist political context, empowerment signifies standing together as a community just as it means

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168. See, e.g., Imbrogno, *supra* note 68, at 860; Johnson et al., *supra* note 68, at 1027.

169. Noël Bridget Busch & Deborah Valentine, *Empowerment Practice: A Focus on Battered Women*, 15 *AFFILIA* 82, 83 (2000) (discussing the theory of empowerment).

170. See, e.g., *id.* at 82-84; see also DUTTON, *supra* note 61, at 129; ELAINE J. LAWLESS, *WOMEN ESCAPING VIOLENCE: EMPOWERMENT THROUGH NARRATIVE* 156 (2001); Kathleen O. Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 *MEDIATION Q.* 303, 309-10 (1990); M. Joan McDermott & James Garofalo, *When Advocacy for Domestic Violence Victims Backfires: Types and Sources of Victim Disempowerment*, 10 *VIOLENCE AGAINST WOMEN* 1245, 1248 (2004); Einat Peled et al., *Choice and Empowerment for Battered Women Who Stay: Toward a Constructivist Model*, 45 *SOCIAL WORK* 9, 10 (2000); David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 *OHIO ST. L.J.* 1153, 1184 (1995).

171. SCHECHTER, *supra* note 19, at 320.

supportively enabling a person to take risks. Its premise is to turn individual defeats into victories through giving women tools to better control their lives and joining in collective struggle.<sup>172</sup>

Other definitions of empowerment echo the language of autonomy and agency. Empowerment has been described as “a process of enabling people to master their environments and achieve self-determination.”<sup>173</sup> The goal of empowering social work interventions, according to social work professor and researcher Einat Peled and her colleagues, should be “to allow clients control over their own lives and the ability to make decisions for themselves—that is, to provide them the conditions to balance rights and needs and thus make choices.”<sup>174</sup> Empowerment is important not only in a theoretical sense, but also because it may have concrete positive consequences for women who have been battered. Researchers Lauren Bennett Cattaneo and Lisa A. Goodman have found that empowering court experiences predict long-term improvements in depression and quality of life for women who have been battered.<sup>175</sup>

In the world of services for women who have been battered, however, empowerment is often defined by what service providers can give to women who have been battered—particularly, the provider’s ability to reinstate choice for women whose options have been restricted by their partners.<sup>176</sup> Too often, though, those choices have been constrained by what service providers, advocates, and policy makers deem acceptable alternatives for women who have been battered—particularly, separating from their abusive partners and engaging the criminal justice system.<sup>177</sup>

In “giving” the woman options, certain possibilities, like engaging in mediation or dropping criminal charges, may never come up for discussion. If those options are raised, they are presented in a manner meant (consciously or unconsciously) to dissuade the woman from seeing them as viable alternatives. Certainly this is the case with mediation. While few advocates forbid women from participating in the process, many, if not most, describe mediation in a manner that makes it clear that the advocate believes the process to be at best antithetical to the woman’s interests, and at worst a danger to her safe-

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172. *Id.* at 109.

173. Peled et al., *supra* note 170, at 10.

174. *Id.* at 12.

175. Lauren Bennett Cattaneo & Lisa A. Goodman, *Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Wellbeing for Intimate Partner Violence Victims*, J. INTERPERSONAL VIOLENCE (prepublished May 8, 2009, DOI: 10.1177/0886260509334282), available at <http://jiv.sagepub.com/cgi/content/abstract/0886260509334282v1>.

176. McDermott & Garofalo, *supra* note 170, at 1248.

177. Goodmark, *supra* note 42, at 19-21.

ty.<sup>178</sup> Relying on the advocate's expertise and experience with the legal system, a woman who might otherwise be interested in attempting to mediate is easily steered towards other alternatives.

Restricting choice is congruent with a definition of empowerment that calls for "giving" women choices or "letting" women choose among the options presented. In that context, empowerment would not require that the woman be permitted to generate options for herself or that all choices be presented, only that some choice be given and that the woman be free to select from what is offered. But empowerment must mean more than simply substituting advocates or the state for the abusive partner as the arbiter of choices for women who have been battered. Empowerment should be read as consistent with autonomy or agency—as self-direction, self-determination, enabling the woman who has been battered not only to make choices, but to define the options for herself, regardless of how others would evaluate those options. A belief in the centrality of empowerment for women who have been battered should prevent advocates from embracing mandatory policies.

Empowerment is a central feminist theme and was a key concept in the early battered women's movement. But as the state became more involved in the lives of women who had been battered, empowerment found itself competing with other goals, particularly victim safety and offender accountability.<sup>179</sup> As one woman wrote many years ago,

It has been over a decade since the battered women-mothers planted the seeds of the domestic violence movement. Something unsettling and unanticipated has occurred; a movement which began as the battered woman's is less and less hers. Rather than

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178. See, e.g., Drew, *supra* note 68, at 19-20 (outlining safeguards that should be in place before mediating a case involving domestic violence); Fischer et al., *supra* note 68, at 2173 (contending that mediation is never appropriate when a culture of battering exists in a relationship and, acknowledging that such cases will likely be mediated nonetheless, offering a number of conditions that must be present before mediation in such cases should proceed); Johnson et al., *supra* note 68, at 1049 (arguing that mediation should never be mandated and that existing safeguards like screening and assessment are inadequate); Knowlton & Muhlhauser, *supra* note 69, at 267-68 (arguing that until mediators have appropriate training in domestic violence, cases involving violence should never be mediated).

179. David Ford and Mary Jean Regoli note that these goals need not be at odds. "[E]mpowering the victim by allowing her to make choices in the prosecution process (i.e., whether to drop charges) can increase her security." Ford & Regoli, *supra* note 57, at 159. Similarly, Kathleen Ferraro and Lucille Pope link safety and empowerment, arguing that "Any legal or policy changes that increase the power of police without simultaneously striving for the empowerment of women will have the potential to decrease rather than improve the level of women's safety." Ferraro & Pope, *supra* note 22, at 120.

true empowerment for battered women, the original political ideal,  
we battered women could be swept away . . . .<sup>180</sup>

In the case of mandatory interventions like mandatory arrest, no-drop prosecution, and mediation bans, empowerment has certainly taken a back seat, to the decided detriment of some women who have been battered.

## V. THE LAW AS A DISEMPowering FORCE

Noellee Mowatt's experience with the legal system highlights the tension between mandatory interventions and autonomy and empowerment. Mowatt called police in Ontario in December 2007, alleging that her boyfriend, Christopher Harbin, punched her, grabbed her, and stabbed at her feet with a knife.<sup>181</sup> When she failed to appear for his trial in March 2008, a warrant was issued for her arrest.<sup>182</sup> In April 2008, Mowatt, nine months pregnant with Harbin's child, was jailed for a week without bail until she gave testimony in his trial.<sup>183</sup> The court was well within the law in issuing the warrant, enabling prosecutors to secure Mowatt's testimony. But what did jailing Mowatt achieve? Harbin was acquitted in May 2008, largely because of questions about Mowatt's credibility after Mowatt recanted her allegations of abuse on the stand.<sup>184</sup> Mowatt has vowed, "I'm never call-

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180. Merle H. Weiner, *From Dollars to Sense: A Critique of Government Funding for the Battered Women's Shelter Movement*, 9 LAW & INEQ. 185, 237 (1991) (citing Stafne, *Reclaiming Our Movement: A Focus on Formerly Battered Women* (mimeograph available from the National Coalition Against Domestic Violence)); see also N. Zoe Hilton, *Introduction, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION* 5 (N. Zoe Hilton ed., 1993) ("When evaluating legal innovations, it is important not to lose the voice of the victims.").

181. Michele Henry, *Pregnant Teen Out on Bail*, TORONTO STAR, Apr. 12, 2008, at A6.

182. *Id.* A recent bill introduced in North Carolina would fine victims of violence like Mowatt who call the police but later drop charges or refuse to cooperate. House Bill 1212, sponsored by Representatives Harold Brubaker and Pat B. Hurley, would allow the court to impose a fee of \$100 on any complainant "who has caused the issuance of a criminal warrant or summons but subsequently drops the charges or refuses to cooperate with the prosecution of the case, in order to compensate the court for the time and expense of serving the warrant or summons, for the scheduling of the case on the criminal docket, and for related expenses." H.R. 1212, 2009 Leg. Sess. (N.C. 2009).

183. Henry, *supra* note 181; Michele Henry, *Pregnant Woman 'Never Calling the Police Again'*, TORONTO STAR, Apr. 8, 2008, at A10. Similarly, in a recent case in Maryland, prosecutors requested and a district court judge granted a body attachment warrant for a victim who checked in with prosecutors on the morning of her partner's criminal trial but later left the courthouse and was not present when the case was called. Prosecutors requested that the judge continue the case and issue a warrant for the victim that would last until the next court date, approximately six weeks later—despite the fact that the victim was at the time pregnant with the defendant's child and would be very close to term at the end of that six week period. Interview with Ginger Robinson, Assistant Public Defender, in Baltimore, MD (Mar. 10, 2009).

184. Chris Wattie, *Pregnant Teen Changes Testimony About Boyfriend*, NATIONAL POST, Apr. 22, 2008, available at <http://www.canada.com/topics/news/national/story.html?id=6844a587-1ef8-4c8c-b6fa-715c93859540>.

ing the police again—even if I’m dying, I’m not going to call them.”<sup>185</sup> In seeking to hold Harbin accountable and protect Mowatt, the legal system achieved neither goal. By usurping Mowatt’s choice about whether to engage the criminal system to protect her, the system instead drove her away, all but ensuring that Mowatt will avoid state intervention and any future abuse will go unpunished by the legal system.<sup>186</sup>

Meredith Bell has a similar story. On July 8, 2002, police found Bell and her boyfriend, Adrian Spraggins, arguing in the parking lot of her workplace.<sup>187</sup> Although Bell had not called the police for assistance, when they arrived she described how Spraggins had threatened her repeatedly, pushed her down, and forced her and her son into a car with him.<sup>188</sup> Spraggins then drove her to work; when Bell grabbed the keys and left the car, Spraggins chased her and threatened to hit her.<sup>189</sup> Witnesses called the police.<sup>190</sup>

What precipitated this incident? Spraggins had been violent towards Bell in the past. On July 8, 2002, Bell was scheduled to testify against him in another domestic violence case, and the threats Spraggins made that day were tied to her testimony.<sup>191</sup> The irony, though, is that Bell was not testifying willingly in the matter—she had been subpoenaed to appear.<sup>192</sup> Bell also did not testify willingly in the trial on the July 8 incident, where Spraggins was charged with witness intimidation, kidnapping, aggravated burglary, and domestic violence. Approximately one month before that trial, Bell sent a letter

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185. Henry, *supra* note 183, at A10.

186. Recognizing the complex considerations and emotions that accompany the prosecution of an intimate partner, California recently passed legislation exempting domestic violence victims from being incarcerated when held in contempt for refusal to testify in court. SB 1356, signed by Governor Arnold Schwarzenegger, does not preclude prosecution for contempt, however. In response to that bill, California Assembly Member Bill Emerson introduced legislation that would allow the court to require that a victim of a domestic violence crime who refuses to testify against her abuser attend a session of counseling; a hearing after the counseling session is required to determine whether the victim’s choice not to testify was made “freely and voluntarily and without coercion.” A.B. 1248, 2009 Assem. 10<sup>th</sup> Reg. Sess. (Cal. 2009). While some advocates viewed the bill as an opportunity to safety plan with the victim, law professor Elizabeth MacDowell argues that the statute ignores the coercion victims experience at the hands of the state and “removes the appearance of state coercion when victims testify.” E-mail from Professor Elizabeth MacDowell, Visiting Assistant Clinical Professor, Chapman University School of Law, to Leigh Goodmark, Associate Professor, University of Baltimore School of Law (Mar. 12, 2009) (on file with author).

187. *State v. Spraggins*, No. 82170, 2003 WL 22971050, at \*2 (Ohio App. 8 Dist. Dec. 18, 2003).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1-2.

192. *Id.* at 1. Some have argued that this use of the subpoena power is appropriate, stating that “it is a good idea to subpoena victims, because this shows that the victim has no control over the process.” Cahn, *supra* note 47, at 168.

asking that the charges be dismissed, stating that “she never had any intention of testifying against Spraggins, that he did not intimidate her, and that she never wanted him to be prosecuted.”<sup>193</sup>

At trial, Bell testified that her statement to the police, in which she recounted the events of July 8, was false and that she lied to police because she was angry with Spraggins.<sup>194</sup> Bell stated that she loved Spraggins, that he helped her to support her child, who was not biologically his, and that she did not want him to get into trouble.<sup>195</sup> The trial judge responded acidly to the testimony that prosecutors forced Bell to give: “So let me see if I’ve got this all straight. We’re here trying this case because you are a liar. Is that correct?”<sup>196</sup> Spraggins unsuccessfully appealed his conviction on the witness intimidation count, arguing that the judge’s statements prejudiced the jury.<sup>197</sup>

While Spraggins’ claim on appeal was not persuasive, the refusal of prosecutors to allow Bell to choose whether to proceed, coupled with the judge’s treatment of Bell on the witness stand, may have guaranteed that Bell will not use the system again.<sup>198</sup> As one Colorado judge cautioned in a case where prosecutors attempted to prosecute a woman for complicity, alleging that she contacted her partner in violation of a criminal protective order that she did not want and repeatedly and unsuccessfully asked prosecutors to dismiss, “the nature of the prosecution does not alter the victim’s status as a victim nor, through some sort of legal alchemy, permit her to be exploited by a bullying prosecutor rather than a bullying spouse.”<sup>199</sup>

The battered women’s movement endorsed the policy choices that led to these results for Nicole Mowatt and Meredith Bell—policies that actively prioritize safety and accountability over autonomy for every woman who has been battered. Championing mandatory arrest, no-drop prosecution, and mediation bans has helped to make the

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193. *Spraggins*, 2003 WL 22971050, at \*2.

194. *Id.* at 2.

195. *Id.*

196. *Id.* at 3.

197. *Id.*

198. *Id.* In a different twist, a Massachusetts prosecutor was suspended from the practice of law for six months for lying in court to protect her boyfriend from prosecution, despite expressing her unwillingness to participate at every stage of the legal proceedings. Fawn Balliro’s boyfriend blackened her eye and split her lip after he saw her speaking to another man in a bar. Balliro did not call the police, bailed her boyfriend out of jail, told the prosecutor she did not want to press charges, and gave inconsistent testimony during his trial. Charges against him were dismissed. Balliro’s suspension was a more serious penalty than the two-month suspension given to a Massachusetts lawyer convicted of assaulting his wife in 2002. See Kathleen Burge, *Prosecutor’s Punishment Angers Abuse Victims’ Advocates*, BOSTON GLOBE, Jan. 29, 2009, at Reg 3.

199. *People v. Caldarella*, No. 07CV174 (Dist. Ct. Colo. 2007); see also HILTON, *supra* note 180, at 4.

law a disempowering force in the lives of women who have been battered.<sup>200</sup> That choice is problematic on two levels. First, it assumes that these policies will actually enhance safety, despite the lack of evidence of their effectiveness at the time of their adoption and, at best, conflicting evidence today. Secondly, it assumes that all women who have been battered would choose safety—defined as separation from an abusive partner—or accountability over autonomy.

Debates continue to rage about the efficacy of these mandatory policies. While Sherman's initial studies are still used to justify mandatory arrest, more recent research, including Sherman's own, paints a much more nuanced picture of the usefulness of arrest in domestic violence cases.<sup>201</sup> Similarly, the data on the link between prosecution and repeat violence is equivocal.<sup>202</sup> Although recent studies support the hypothesis that mandatory arrest laws increase the number of offenders arrested for violence against their partners, that research has not established a link between higher arrest rates and safety or accountability.<sup>203</sup> Moreover, the number of successful prosecutions has not increased in jurisdictions that implemented mandatory arrest laws; in fact, fewer cases were prosecuted in mandatory arrest jurisdictions.<sup>204</sup> As Professor Linda Mills argues, "At worst, the criminal justice system increases violence against women. At best, it has little or no effect."<sup>205</sup>

The debate about whether mediation helps or harms women who have been battered is similarly inconclusive. Supporters of mediation claim that women find mediation empowering, that it enhances women's ability to stand up for themselves, and that it is vastly pref-

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200. HILTON, *supra* note 180, at 4.

201. N. Zoe Hilton, *Police Intervention and Public Opinion*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 45 (N. Zoe Hilton ed., 1993) (summarizing research); Ruttenberg, *supra* note 39, at 194 n. 122 (summarizing research); Sherman et al., *supra* note 34, at 680 (summarizing research).

202. Ford & Regoli, *supra* note 57, at 130-31 (explaining that arrest studies did not examine impact of prosecution and arguing that research did not support arguments that prosecution would protect victims of violence); Mills, *supra* note 49, at 567-68 (summarizing research); *but see* John Wooldredge, *Convicting and Incarcerating Felony Offenders of Intimate Assault and the Odds of New Assault Charges*, 35 J. CRIM. JUST. 379, 386 (2007) (finding that convictions and jail sentences were related to significantly lower likelihoods of recharging for criminal assault).

203. David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 297-98 (2008).

204. Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 389 (2007); *see also* Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, FLA. B.J., October 1994, at 26 ("[E]ven successful criminal prosecution is not adequate to protect a battered woman from being repeatedly injured or even killed once the batterer has been released.").

205. LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 6 (2003).

erable to litigating contested family cases.<sup>206</sup> Litigation, they argue, makes angry and hostile parents more violent,<sup>207</sup> relies on attorneys (when there are actually attorneys involved, which is increasingly rare) and judges with no training in domestic violence to protect women who have been battered,<sup>208</sup> is both financially and emotionally costly,<sup>209</sup> and undermines the self-determination of women who have been battered.<sup>210</sup>

Just as proponents of mediation have urged skeptics not to compare the best litigation with the worst mediation and find mediation wanting,<sup>211</sup> mediation's champions tend to juxtapose the worst litigation against the most successful mediation.<sup>212</sup> The argument assumes that one of these avenues for dispute resolution must be seen as unequivocally better for all women who have been battered, a conclusion that is impossible to draw. From an autonomy perspective, what is essential is that women who have been battered have the opportunity to learn (in an unbiased manner) about all of their options and are given the chance to make choices as to which option better serves their individual needs.<sup>213</sup>

Assume for a moment, however, that the data about such policies was unambiguous—that mandatory policies could be clearly and causally linked to increased offender accountability or greater safety for women who have been battered. Would such policies then be justified? Not if we hearken back to the original goals of the battered women's movement and prioritize autonomy as we should. These policies essentialize women who have been battered by assuming that all women would choose state intervention if they had the unfettered ability to make that choice, and that the coercion these women experience prevents them from exercising the "rational" choice embodied in the mandatory policy.

The emphasis on coercion in understanding the behavior of women who have been battered is in part responsible for these assump-

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206. See, e.g., Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 107-08 (2008); Jo Daugherty Bailey & Susan P. Robbins, *Couple Empowerment in Divorce: A Comparison of Mediated and Nonmediated Outcomes*, 22 CONFLICT RES. Q. 453, 454 (2005); Corcoran & Melamed, *supra* note 170, at 310-11; Ellis, *supra* note 102, at 1013; Schepard, *supra* note 67, at 421-22.

207. Ver Steegh, *supra* note 67, at 162-63.

208. See Knowlton & Muhlhauser, *supra* note 69, at 267 (contending that "[well-trained] mediators are much more likely to validate the parties['] feelings and perceptions and they provide a better balance of power among the parties than any courtroom process that I have observed in my fifteen years of clinical practice").

209. See Ellis, *supra* note 102, at 1019-20.

210. *Id.* at 1022-23.

211. Zylstra, *supra* note 67, at 259.

212. See generally Ellis, *supra* note 102.

213. Ver Steegh, *supra* note 67, at 204.

tions. But coercion—the pressure to make a particular decision—does not render every choice involuntary. Consider the case of Meredith Bell. Certainly her request that prosecutors drop the criminal case against her boyfriend was coerced in the sense that she was under pressure not to testify against him.<sup>214</sup> But did that pressure necessarily prevent her from making a rational decision not to cooperate with prosecutors? Such a position assumes that in the face of threats, women lose their abilities to consider, evaluate, and decide—that they lose their reason. It is just as possible that in the face of a threat a woman could look at the protection the system has offered in the past, the resources she has to draw on, and her goals, priorities, and relationships, and decide that not testifying could, in fact, decrease the level of threat she faces and improve her life.<sup>215</sup> The operation of a mandatory policy, designed and implemented not with Meredith Bell in mind, but based on a stereotypical victim whose choices are consistent with the legal system's goals and objectives, should not deprive her of that choice.<sup>216</sup>

Mandatory policies also ignore the profound impact that race, class, sexual orientation, immigration status, and other identities may have on women's decisions to invoke formal systems. Many women of color, for example, are profoundly ambivalent about involving the criminal system in their lives, given their negative past experiences with police and prosecutors<sup>217</sup> and concerns about subjecting men of color to further control by the state.<sup>218</sup> Lesbians may be reluctant to engage the criminal justice system for fear of being outed<sup>219</sup> or mistreated by police and prosecutors who assume that violence between women must be a “cat fight,”<sup>220</sup> or that a “butch” lesbian must

214. *State v. Spraggins*, No. 82170, 2003 WL 22971050, at 1 (Ohio App. 8 Dist. Dec. 18, 2003).

215. McDermott & Garofalo, *supra* note 170, at 1252-53 (summarizing the reasons why women who have been battered might not be interested in cooperating with the criminal system).

216. As psychologist Michelle Fine reminds, “Who decides who needs what? And what happens when the answers diverge dramatically by race, class, age, experience, and politics?” Michelle Fine, *The Politics of Research and Activism: Violence Against Women*, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS* 279, 285 (Pauline B. Bart & Eileen Geil Moran eds., 1993).

217. SUSAN L. MILLER, *VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN'S VIOLENCE IN RELATIONSHIPS* 8 (2005); BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BLACK BATTERED WOMEN* 96 (1996).

218. Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 *J. GENDER RACE & JUST.* 625, 643 (2000).

219. JANICE L. RISTOCK, *NO MORE SECRETS: VIOLENCE IN LESBIAN RELATIONSHIPS* iv (2002); Kristen Kuehnle & Anne Sullivan, *Gay and Lesbian Victimization: Reporting Factors in Domestic Violence and Bias Incidents*, 30 *CRIM. JUST. & BEHAV.* 85, 87-88 (2003).

220. Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 *NEW ENG. L. REV.* 273, 296-97 (1993); RISTOCK, *supra* note 219, at 99.

always be the aggressor.<sup>221</sup> Low income women may not be able to afford the arrest and prosecution of their partners;<sup>222</sup> the economic resources their partners provide might be more important than a cessation of the battering at a particular point in time. Immigrant women, particularly those who are undocumented or whose partners are undocumented, may fear that involvement in the criminal system will lead to deportation, depriving them of economic, emotional, extended family, or parenting support.<sup>223</sup>

Some of these same women may want to use mediation to resolve problems precisely because they are unwilling to resort to the criminal system—a solution denied them by mandatory policies against mediation in cases involving domestic violence. Such decisions are far from irrational. They are calculated choices made based on past experiences and with intimate knowledge of their partners, their resources, their political views, their family concerns—in short, based on the lives that they seek to fashion. The state should not have the power to deny that choice to women who have been battered.

How far are advocates willing to take mandatory interventions into the lives of women who have been battered in the name of safety? A look at laws requiring physicians to report evidence of domestic violence to law enforcement and/or other state agencies may be instructive. A number of states mandate that health care professionals report injuries resulting from criminal activity or inflicted by specific kinds of weapons to law enforcement. A smaller subset of these states requires that health care professionals report injuries resulting from violence by an intimate partner.<sup>224</sup> Those laws generally require physicians and other health care professionals to inform police of injuries resulting from criminal acts, including domestic violence.<sup>225</sup> The original justification for California's law was to ensure that all criminal

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221. Leigh Goodmark, *When Is A Battered Woman Not A Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 109 (2008).

222. Barbara J. Hart, *The Legal Road to Freedom*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 18 (1993), available at <http://www.mincava.umn.edu/documents/hart/hart.html#id2372872>. As Donna Coker explains, "Rather than the result of batterer intimidation or persuasion, women's cooperation with mandatory policies, particularly with prosecution, is often a product of their access to material resources . . . . Cooperation with prosecution often requires women to take time off from work, to acquire transportation and childcare, or to make other sometimes costly and difficult arrangements." Coker, *supra* note 41, at 840.

223. See Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 43 (2003) (discussing a study finding that battered immigrant women were unlikely to call police); see also Goodmark, *supra* note 42, at 37.

224. Ariella Hyman, *Mandatory Reporting of Domestic Violence by Health Care Providers: A Policy Paper*, Nov. 3, 1997, available at <http://endabuse.forumone.com/health/mandatoryreporting/policypaper.pdf>.

225. Mordini, *supra* note 16, at 324.

activity came to the attention of police;<sup>226</sup> in 1994, domestic violence was specifically listed as a crime to be reported at the urging of children's groups and law enforcement.<sup>227</sup> Former Kentucky Attorney General Steven Beshear has opined that the duty under Kentucky's reporting law is absolute, not alleviated by treatment, therapy, or the victim's refusal to press charges or leave the home.<sup>228</sup> If the adult who is the subject of the report refuses to allow state officials to enter her home after such a report, the court may issue a search warrant permitting entry onto the premises.<sup>229</sup>

Some reporting laws abrogate the physician/patient privilege and allow for the admission of statements and other information revealed during examination and diagnosis of the patient.<sup>230</sup> Colorado added its domestic violence provision in 1995;<sup>231</sup> the Colorado courts later upheld the abrogation of the physician/patient privilege, explaining that the legislature could abrogate the privilege when an overriding public policy need for the information to be made public existed. The Court held that such provisions struck an appropriate balance between the need to protect victims of domestic violence and the desire to encourage them to seek treatment free of fear or embarrassment.<sup>232</sup> New Hampshire's reporting law provides an exception to reporting if the victim is over the age of eighteen and objects to the release of the information, unless she has been treated for a gunshot or other serious bodily injury.<sup>233</sup>

These reporting laws seem to be logical extensions of the philosophy that mandatory interventions benefit victims of violence because they ensure that law enforcement will have knowledge of the commission of domestic violence crimes and the opportunity to ensure that perpetrators are held accountable for their actions. Abrogating the physician/patient privilege to require reporting simply prioritizes victim safety and offender accountability over victim privacy and autonomy—the same calculation made with other mandatory policies. Yet advocates for victims of violence roundly condemn such laws.<sup>234</sup>

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226. 36 Ops. Cal. Att'y. Gen. 200 (1960).

227. Mia M. McFarlane, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1, 13-14 (1999).

228. Ops. Ky. Att'y Gen. 83-187 (1983).

229. KY. REV. STAT. ANN. § 209.030(8) (West 2008).

230. See, e.g., *People v. Covington*, 19 P.3d 15, 22-23 (Colo. 2001) (holding that Colorado's mandatory reporting statute abrogates physician/patient privilege); Ops. Ky. Att'y Gen. 83-187 (1983) (holding that Kentucky's mandatory reporting statute abrogates physician/patient privilege).

231. See COLO. REV. STAT. ANN. § 12-36-135 (West 2008).

232. *Covington*, 19 P.3d 15, at 22.

233. See N.H. REV. STAT. ANN. § 631:6 (West 2008).

234. See, e.g., Virginia Daire, *The Case Against Mandatory Reporting of Domestic Violence Injuries*, 74 FLA. B.J. 78, 78 (2000) (writing on behalf of the Florida Coalition Against Domestic Violence).

Ariella Hyman has argued that “there is ample reason to believe that mandatory reporting of all injuries due to domestic violence represents a threat to the health and safety of survivors of domestic violence.”<sup>235</sup> Hyman argues that such laws deter victims from seeking medical treatment, expose women who have been battered to the risk of retaliation by their abusers, and undermine patient autonomy. Hyman quoted one woman involved in a support group for women who had been battered as “dismayed at being ‘treated as if they were infants and not able to make up their own minds whether to report to the police.’”<sup>236</sup> For these reasons, the Family Violence Prevention Fund, a leading voice in the movement against domestic violence, opposes mandatory physician reporting of domestic violence injuries.<sup>237</sup>

Looking at such policies through the lens of autonomy, it is difficult to find any appreciable difference between physician reporting laws and other laws that mandate the involvement or noninvolvement of the state in domestic violence matters. Yet, where there is general agreement that mandatory physician reporting laws are disempowering, there is no such consensus about mandatory arrest laws. How is the taking the choice to engage the legal system from the hands of the victim any different when a physician makes the phone call to police?

One could argue that physician reporting laws go a step further than previous policies by usurping the woman’s decision about whether to involve law enforcement at all. A woman who has been battered is deprived of the choice to involve the police in the first instance if her doctor is required to report; his duty negates any decision she might have made about whether to call the police during or after the incident.<sup>238</sup> In jurisdictions embracing mandatory policies, however, the same consequences stem from a phone call made by a neighbor as from a phone call made by a doctor: mandatory arrest and victimless prosecution. While advocates have grave and warranted concerns about creating disincentives for women who have been battered to seek medical treatment, the difference between phy-

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235. Hyman, *supra* note 224, at 14.

236. *Id.* at 6, n. 5. The American Medical Association also opposes mandatory reporting of intimate partner abuse among adults, stating that such policies “violate basic tenets of medical ethics.” American Medical Association, *AMA Data on Violence Between Intimates*, available at <http://www.ama-assn.org/ama/no-index/about-ama/13577.shtml> (last visited Oct. 27, 2009).

237. Hyman, *supra* note 224, at 6, n.5. Hyman’s paper was published by the Family Violence Prevention Fund.

238. The choice not to call the police is often based on calculations about the effectiveness of police response, the woman’s knowledge of her partner, or concerns about what involving the police could mean for the woman’s safety. As one woman in Hyman’s study explained, “She [the physician] wanted to call the police and I said, ‘No, no he is the police.’” *Id.* at 2.

sician reporting laws and other mandatory interventions is negligible, particularly in terms of the impact on women's autonomy.

Mandatory policies are disempowering because they deprive women who have been battered of the ability to control their use of tools like arrest, prosecution, and mediation. Women who have been battered use the legal system to attempt to regain control from their abusers.<sup>239</sup> Researcher David Ford has described how women who have been battered use the threat of prosecution as a "power resource," a tool that can be deployed to equalize the power imbalances within the relationship.<sup>240</sup> Women call police not only because they want their partners arrested, but also to interrupt the battering incident or to show their partners that they are willing to reach out to others and to invoke the power of the state to stop the violence.<sup>241</sup> Women participate in prosecutions against their partners not only because they want those partners punished, but also to teach them a lesson, to secure counseling for the battering partner, or to get support payments, for example.<sup>242</sup> Similarly, women drop charges for a variety of reasons beyond intimidation by their partners: because the violence has stopped, he has agreed to counseling, or he has agreed to divorce.<sup>243</sup> The instrumental use of arrest and prosecution empowers the woman who has been battered in the negotiation of the terms of her relationship with her partner. Ford warns, however, that "criminal justice options are victim power resources only if *she* can control the manner in which they are brought to bear on her mate."<sup>244</sup>

The obvious problem with Ford's caution is that the legal system and the police and prosecutors who work within that system may have very different objectives for arrest and prosecution. System actors often view their roles not as facilitating the woman's instrumental use of the system, but as upholding the laws against domestic violence and societal mores reflected in those laws, regardless of, and sometimes despite, the wishes of individual women.<sup>245</sup> The system is

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239. Jo-Anne Wemmers & Marie-Marthe Cousineau, *Victim Needs and Conjugal Violence: Do Victims Want Decision-Making Power?*, 22 CONFLICT RES. Q. 493, 498-500 (2005).

240. David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOC'Y REV. 313, 318 (1991).

241. Smith, *supra* note 22, at 1399; *see also* Ferraro & Pope, *supra* note 22, at 108 (arguing that many women call police not to end their relationships but simply to end the violence).

242. Ford, *supra* note 240, at 324-25; *see also* Ferraro & Pope, *supra* note 22, at 108 (explaining that women engage in prosecution to get help for the abuser rather than imprisonment); Ford & Regoli, *supra* note 57, at 137 (citing punishment, coercion into treatment, and empowerment as reasons that women seek prosecution and referencing study showing that only 16% of women ranked protection as primary expected outcome of filing charges).

243. Ford, *supra* note 240, at 326; *see also* Eve S. Buzawa & Carl G. Buzawa, *Introduction, in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE vii, xvii (1992).

244. Ford, *supra* note 240, at 318.

245. Angela Davis describes this divergence of goals in the story of her meeting with a prosecutor. Davis, on behalf of the defendant, had gotten the complaining witness to sign a statement asking the prosecutor to drop the charges. "When I showed the statement to the

simply not the woman's to use—there are too many other actors with competing interests for such a practice to be possible.<sup>246</sup>

Opponents of mediation justify their position by claiming that the goals of mediation cannot be achieved in cases involving domestic violence.<sup>247</sup> But Ford's insight is important in the mediation context as well. Whether the goals of mediation can be met in cases involving domestic violence depends on who defines those goals. If the goals are those generally articulated by the legal system—cheaper, less adversarial, more likely to promote agreement<sup>248</sup>—opponents of mediation are indeed correct that the goals may be difficult to meet. But the goals of the woman who has been battered may be very different than those of the system. She might choose to use mediation as a space within which to express her anger at her partner—an anger which, if expressed during an adversarial proceeding, could alienate the judge and damage her case.<sup>249</sup> She might choose to confront her partner with the consequences of his actions—the end of the relationship, the distribution of property, and the determination of custody rights. She might use mediation to show her partner that he no longer has the ability to control her.

Mediation could be a boon to the woman who has been battered regardless of whether an agreement is ever reached, notwithstanding that reaching an agreement is the usual measure of success for mediation. Rather than reinforcing a power imbalance between the parties, mediation could serve as a power restorative, providing a safe space within which the woman who has been battered could make demands and have them heard and ratified by a neutral third party, and in so doing, recapture her power. Mediation, too, could serve as a

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prosecutor, she was furious. She told me that she didn't care what Mrs. Jefferson wanted and that it wasn't up to Mrs. Jefferson to decide how the case was prosecuted. The prosecutor went on to say that she had a duty to fight domestic violence and that she was going to fulfill that duty, with or without Mrs. Jefferson's help. . . . It was as if the victim was ruining *her* case and impeding *her* fight against domestic violence. Instead of viewing the victim as a person who was badly hurt and in need of assistance and compassion, the prosecutor seemed to view her as the enemy—someone standing in the path of her battle against domestic violence." ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 67-68 (2007).

246. This assumes, of course, that any of those actors have clearly articulated their goals. In 1993, Ronald Roesch, Stephen D. Hart, and Laurene J. Wilson noted, "In fact, as embarrassing as it is to admit, it appears that we as a society have not made the goals of our interventions sufficiently explicit." Ronald Roesch, Stephen D. Hart & Laurene J. Wilson, *Legal Responses to Wife Assault: Future Prospects for Intervention and Evaluation*, in *LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION* 289, 295-96 (N. Zoe Hilton ed., 1993). I believe this to still be the case. But even if society's goals were clearly articulated, to the extent that they differ from or clash with the woman's goals for the intervention, it is her goals that should be paramount.

247. See *supra* Section II.B (discussing the many problems and concerns in mediating domestic violence cases).

248. See sources cited *supra* note 67.

249. Goodmark, *supra* note 76, at 46.

“power resource,” but only if the woman who has been battered has the ability to control the terms upon which it is going to be used.

Is it realistic to believe that women who have been battered will be able to control these systems? We will never know if women do not have the ability to make nonconforming choices. A guiding principle for domestic violence law and policy that seeks to honor the autonomy of women who have been battered must be to enact only policies that women can control. If we truly value the empowerment of women who have been battered, we should not advocate for policies that operate upon women, rather than at their behest—policies that deprive them of self-determination and of choice.

## VI. FROM DOMINANCE TO ANTI-ESSENTIALIST FEMINISM

Mandatory policies reflect the influence of dominance feminism, a strand of feminism prevalent in the 1980s and 90s, the same time that domestic violence law and policy was being created and implemented. Dominance feminists, led by Catherine MacKinnon, contended that male domination of women in the sexual sphere was the primary vehicle for the continued subordination of women.<sup>250</sup> MacKinnon argued that “our male-dominated society, aided by male-dominated laws, had constructed women as sexual objects for the use of men.”<sup>251</sup> Using this theory, dominance feminists cast the unwillingness of the law to confront issues of sexual harassment and rape as the manifestation of male assertions of dominion over the sexuality of women.<sup>252</sup> Most notoriously, MacKinnon and Andrea Dworkin used dominance feminist theory to argue that pornography should be outlawed, contending that pornography was the eroticization of male domination and therefore a key contributor to women’s subordination within society.<sup>253</sup>

Mandatory arrest, no-drop prosecution, and policies banning mediation are consistent with a dominance feminist view of the law. Dominance feminism facilitated the enactment of mandatory policies by suggesting that by virtue of their subordinated status, women were incapable of making rational choices in the face of abuse and instead were in need of the substituted judgment of the legal system.<sup>254</sup> Such policies fail to acknowledge that women can be battered and nonetheless be actors with the ability to determine the course of their

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250. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 53 (2003).

251. *Id.* at 54.

252. *Id.* at 54-55.

253. *Id.* at 59.

254. *Id.* at 53 (citing dominance feminists’ reliance on the state to achieve feminist goals); Daniels, *supra* note 167, at 1. The irony, of course, is that in turning to the state for assistance, women who have been battered are then forced to rely on male-dominated, male-defined agencies to protect them from male domination. Sparks, *supra* note 5, at 38.

lives.<sup>255</sup> Dominance feminism provided an ideological justification for domestic violence policies that stereotyped all women who had been battered as a particular type of victim, denied them agency, and dictated what their response to the violence should be.<sup>256</sup>

Critics of dominance feminism have given it a different label: victim feminism.<sup>257</sup> Dominance feminism rests upon the idea that every woman is a victim or a potential victim of male subordination, acted upon rather than acting.<sup>258</sup> That perspective has been challenged by a new wave of feminist theorists who argue that the experiences of individual women, rather than a stereotyped “universal” woman or victim, must be at the center of feminist theorizing and policymaking.<sup>259</sup> Anti-essentialist feminists argue that there is no unitary women’s experience; the experiences of black women may be vastly different than those of white women, for example, or those of poor women distinct from those with greater means.<sup>260</sup>

The attempt to shoehorn all women’s experiences into that of the über-woman, anti-essentialist feminists contend, has privileged the experiences of white, middle class, straight women over those of others.<sup>261</sup> Anti-essentialists argue that we must instead see women at the intersections of the various identities that construct them: race, sexual orientation, class, disability, and any other characteristic that shapes the woman.<sup>262</sup> Only then can policies be responsive to the needs of all women. While some have argued that third-wave feminism is pre-legal,<sup>263</sup> anti-essentialism may, in fact, be the legal manife-

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255. Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59, 64 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

256. As Janet Halley argues, “While feminism is committed to affirming and identifying itself with female injury, it may thereby, unintentionally, intensify it. Oddly, representing women as end points of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men, feminists refuse also to see women—even injured ones—as powerful actors. *Feminism* objectifies women, *feminism* erases their agency—could that be right?” JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 346 (2006).

257. JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* 59 (1999) (citing Nadine Strossen).

258. CHAMALLAS, *supra* note 250, at 53.

259. NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 26 (2006).

260. CHAMALLAS, *supra* note 250, at 85-86.

261. Coker, *supra* note 41, at 811-12; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990).

262. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1241-42 (1993).

263. Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 *MICH. J. GENDER & L.* 99, 158-59 (2007). Chronologically, third wave feminism refers to the cohort of women too young to have participated in the feminist activism of the 1970s. *Id.* at 101. The focus of third wave feminist activity is diverse, encompassing activism around female sexuality, economic mobility, and the multifaceted nature of women’s identities. *Id.* at 102. Third wave feminists take a

station of third-wave feminism, embracing third-wave feminism's rejection of early versions of feminist theory and focusing on the "multiple nature of personal identity."<sup>264</sup>

Mandatory policies in cases involving domestic violence are inconsistent with anti-essentialist feminism. Mandatory policies assume that all women who have been battered are "victims," stereotyping them as meek, afraid, and easily manipulated and controlled, rather than seeing the complexity of and differences among them.<sup>265</sup> These policies deny women the ability to define themselves, distilling every woman down to the stereotypical victim in need of the system's protection, unable to make rational choices. Mandatory policies ignore that women experiencing violence may have multiple goals, assuming instead that all women prioritize safety and accountability.

Defining all women as victims allowed the legal system to narrow the available options, depriving women who had been battered of the ability to pursue possibilities beyond the range of those deemed acceptable by the legal system. Anti-essentialist feminism requires that women who have been battered be treated as individuals with different identities and capacities, and that they be given the opportunity to make choices consistent with their own goals and priorities. In a third-wave feminist world, women who have been battered should not be told by the state that they have no choice about arrest, prosecution, or mediation.<sup>266</sup> Instead, domestic violence law and policy should respect the rights of individual women to choose whether and how to use the criminal and civil legal systems.<sup>267</sup> Such a shift would be consistent both with anti-essentialist feminist theory and with the focus on autonomy and agency that characterized the early battered women's movement.

Critics of anti-essentialist feminism have argued that its focus on the individual creates a fragmentation of interests that can render policymaking impossible.<sup>268</sup> But focusing on an individual's autonomy—her right to make her own decisions—creates a clear path for

broad view of women's issues, capturing everything from human rights to ecofeminism to anticorporate activism. Niamh Moore, *Imagining Feminist Futures: The Third Wave, Post-feminism, and Eco/feminism*, in *THIRD WAVE FEMINISM: A CRITICAL EXPLORATION* 137 (Stacy Gillis, Gillian Howie & Rebecca Munford eds., 2d ed. 2007).

264. *Id.* at 118-19. My thanks to Professor Margaret E. Johnson for this argument.

265. *See generally* Goodmark, *supra* note 221, at 75.

266. As Beth Kiyoko Jamieson writes, "Exerting control over the victimized is not an appropriate feminist solution." JAMIESON, *supra* note 142, at 220.

267. *Id.* at 227 ("It is better, ethically and politically, that women decide individually how best to lead our lives rather than that women as a group lead the best life. Even the best choice is compromised if it is not selected by an individual deciding for herself. And it is better to make our own choices than to be directed to a single correct choice.")

268. *See, e.g.*, Leslie Friedman Goldstein, *Can This Marriage Be Saved? Feminist Public Policy and Feminist Jurisprudence*, in *FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE* 11, 29 (Leslie Friedman Goldstein ed., 1997).

policymakers. Domestic violence law and policy should not act on individuals, but rather should be available to be deployed by them as they see fit. Domestic violence law and policy need not address each individual's personal concerns; it need only give her the ability to choose whether, when, and how to utilize tools like arrest, prosecution, and mediation. Creating space for choice honors the differences between women, recognizing that race, class, sexual orientation, disability status, and a multiplicity of other variables color how a particular woman might want to respond to a particular incidence of violence at a particular moment in time. Enabling women who have been battered to decide how they will engage with the legal system respects their autonomy and agency and allows individual women to craft the solutions that they perceive are most likely to meet their goals, whether those goals are safety, accountability, economic stability, or maintenance of their intimate relationships.

The choices made by women who have been battered will certainly have consequences, sometimes overwhelmingly negative consequences.<sup>269</sup> Some women who choose not to have their partners arrested will be battered again; some will die.<sup>270</sup> Some offenders will be free to abuse again as a result of dismissed prosecutions. Some women will strike bad deals in mediation or experience revictimization in the process. Creating space for individuals to exercise their ability to choose, regardless of the outcomes of those choices, is a hallmark of autonomy. But many other women will be empowered by the ability to make these choices for themselves in the contexts of their own lives, rather than having the legal system impose decisions upon them based on what they "should" want. If empowerment is still the goal of the battered women's movement, we must accept that women who have been battered have the right to make choices that we might disagree with, dislike, or fear.<sup>271</sup>

Although many of the advocates who originally endorsed them have come to question mandatory policies,<sup>272</sup> that reevaluation may

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269. As Mary Ann Dutton notes, with the recognition that women who have been battered must have the freedom to make choices comes the responsibility for the consequences of those choices. DUTTON, *supra* note 61, at 116.

270. Sue Carlton, *Why Do We Hear This Story So Often?*, ST. PETERSBURG (FLORIDA) TIMES, Apr. 14, 2009, at 1B (describing the death of Jennifer Johnson, who called the police about her abusive boyfriend eleven times but dropped the charges each time; the twelfth call she made was from the trunk of a car, after which she was found dead); *see also* Milton J. Valencia & John R. Ellement, *Slain Woman Was Too Afraid to Aid Prosecution*, *Family Says*, BOSTON GLOBE, Jan. 9, 2009, at B3.

271. JAMIESON, *supra* note 142, at 172.

272. Some advocates for women who have been battered remain fierce defenders of these policies. In a recent issue of the Domestic Violence Report, for example, longtime advocate Joan Zorza defended the use of mandatory arrest and no-drop policies on autonomy grounds, arguing, "While there is no doubt that the numbers of arrests and prosecutions has increased greatly, the reality is that notwithstanding what police and prosecutors may

have come too late. The state, which has embraced these mandatory policies, has very different goals for its interventions than advocates do. The state has put substantial resources behind policies like mandatory arrest and no-drop prosecution,<sup>273</sup> and an entire generation of police and prosecutors has been schooled in both the theory underlying these policies and the techniques for instituting them.<sup>274</sup> Similarly, mediation bans are enshrined in state law and policy.<sup>275</sup> Mediators and judges are trained to screen domestic violence cases out of mediation,<sup>276</sup> and advocates hold tight to their belief that mediation is harmful for all women who have been battered.<sup>277</sup>

Mandatory interventions, particularly in the criminal justice system, are the rule, not the exception, and new mandatory interventions are being proposed to address perceived shortcomings in the system.<sup>278</sup> Changing the legal system's culture to foster autonomy for women who have been battered will be significantly more difficult than getting the legal system to embrace those changes in the first instance. The experience with mandatory policies should serve as a cautionary tale, though, prompting advocates and policy makers to think carefully before enacting laws and policies that bind all women who have been battered, notwithstanding those women's own goals, beliefs, choices, and situations. Mandatory interventions in cases in-

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say, in no jurisdiction do police arrest batterers in every DV case, nor do police prosecute batterers in every case. But what is true, is that victims have less control over whether they can prevent their abuser from being arrested or prosecuted. What has changed is that in the past, they had almost no control over whether they could force an arrest or prosecution." Joan Zorza, *Empowering Battered Women by Expanding Their Options: Part II, DOMESTIC VIOLENCE REPORT*, October/November 2008, at 3.

273. The fiscal year 2007 budget included appropriations of \$157 million for STOP grants and \$62 million for Grants to Encourage Arrest. See CAMPAIGN FOR FUNDING TO END DOMESTIC AND SEXUAL VIOLENCE: VAWA APPROPRIATIONS FOR FISCAL YEARS 2006 AND 2007, AND FISCAL YEAR 2008 REQUESTS (2007), available at <http://www.naevs.org/Resources/approps102707.pdf> (last visited Oct. 27, 2009).

274. As Eve and Carl Buzawa recognized about mandatory arrest policies in 1992, "To this extent, the new response that explicitly favors arrest has, in the unprecedented span of five or six years, achieved a new orthodoxy, at least among the federal government and policy elites." Buzawa & Buzawa, *supra* note 243, at xiii.

275. In both Maryland and New Jersey, for example, although the law does not seem to explicitly forbid mediation in domestic violence cases, the policy has been to prohibit mediators from handling cases involving domestic violence.

276. In Maryland, advocates for women who had been battered teamed with law professors to create a training video (featuring me as the victim) designed to teach judges and mediators how to screen out cases involving domestic violence.

277. A recent discussion on a listserv populated by advocates for women who have been battered is illustrative. The posts began from the position that mediation was unequivocally problematic in cases involving domestic violence; only after a few dissenters began to post was a more nuanced conversation about whether and how mediation should occur in cases involving domestic violence possible.

278. See, e.g., Jennifer R. Adler, *Strengthening Victims' Rights in Domestic Violence Cases: An Argument for 30-Day Mandatory Restraining Orders in Massachusetts*, 8 B.U. PUB. INT. L.J. 303, 314-16 (1999) (citing approvingly Colorado's mandatory restraining order law and advocating for such laws in Massachusetts).

volving domestic violence are a second-wave relic that feminists should shed as we move into a third-wave world.

## VII. CONCLUSION

Barbara Hart has argued that

Agency is the power to make informed decisions and implement them without interference by the batterer. Agency is the power to organize one's life. Agency is the power to establish stable, nurturing homes for children. Agency is the power to participate, without batterer impediment, in work, education, faith, family and community . . . . Agency is the power to employ the legal options, community resources, economic remedies, housing opportunities, and educational programs available in order to escape the violence and achieve lives that are free of intimidation, degradation, and violation.<sup>279</sup>

But agency is also the power to choose not to have an intimate partner arrested. Agency is the power to choose not to participate in a prosecution that could cause an intimate partner to go to jail or be deported or simply be removed from the family. Agency is the power to confront an intimate partner with his violence and advocate on one's own behalf for a mediated settlement to pending litigation. Agency is the power to see a physician to have injuries treated but choose to have that physician maintain confidentiality about the cause of those injuries. Agency is self-direction, self-determination, and the ability to identify, evaluate, and make decisions. Agency and autonomy are what women who have been battered are denied by mandatory policies in cases involving domestic violence. Anti-essentialist feminist policymaking should turn away from the mandatory policies of the past and embrace policies that empower women who want to be seen as individuals, agents, and actors—not as victims. A third-wave feminist vision of the world demands no less.

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279. Hart, *supra* note 13, at 209.