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## Disabusing the Definition of Domestic Violence: How Women Batter Men and the Role of the Feminist State

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DISABUSING THE DEFINITION OF DOMESTIC VIOLENCE: HOW  
WOMEN BATTER MEN AND THE ROLE OF THE FEMINIST STATE

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DISABUSING THE DEFINITION OF DOMESTIC  
ABUSE: HOW WOMEN BATTER MEN AND THE  
ROLE OF THE FEMINIST STATE

LINDA KELLY\*

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## INTRODUCTION

Domestic abuse. The term immediately conjures up images nationally spread through such highly publicized events as the murder trial of O.J. Simpson and the saga of John and Lorena Bobbit, hit tunes like Tracy Chapman's *Behind the Wall*,<sup>1</sup> and movies like Julia Robert's *Sleeping with the Enemy*<sup>2</sup> or Farrah Fawcett's *The Burning Bed*.<sup>3</sup> Everyone can also tell a more local story about domestic violence, be it one carried in a hometown newspaper or known about the neighbors. After a long history of hiding domestic violence behind closed bedroom doors, everyone now knows all about the existence and prevalence of domestic violence.<sup>4</sup> Or do we? The images we associate with domestic violence depict the male as batterer and the female as victim. Yet, despite the critical importance of first acknowledging and then eradicating the male abuse of women, an equally important but untold story remains.<sup>5</sup> Women can be batterers. Men can be victims.

Over the last twenty-five years, leading sociologists have repeatedly found that men and women commit violence at similar rates. The 1977 assertion that "the phenomenon of husband battering"<sup>6</sup> is as prevalent as wife abuse is confirmed by nationally representative studies, such as the Family Violence Surveys, as well as by numerous

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1. TRACY CHAPMAN, *Behind the Wall*, on TRACY CHAPMAN (Electra/Asylum 1983).

2. SLEEPING WITH THE ENEMY (20th Century Fox 1991).

3. THE BURNING BED (Tisch-Avnet Prod. Co. 1984).

4. On the historic privacy of domestic violence and the successful efforts to make domestic violence a public issue, see *infra* note 163 and accompanying text.

5. Throughout this Article, my use of the terms domestic, intimate, and spousal violence or abuse are used to refer to men and women who have experienced physical violence at the hands of their partner. These violent couples may be married or not married, living together or apart. Certainly other forms of domestic violence exist, such as child abuse, elder abuse, homosexual abuse, and sibling abuse. However, purely as a shorthand measure, the terms are relied upon here exclusively to refer to violence between heterosexual partners. For recognition of the other forms of domestic violence, see *infra* notes 297-300 and accompanying text.

6. Suzanne K. Steinmetz, *The Battered Husband Syndrome*, 2 VICTIMOLOGY: AN INT'L J. 499, 499 (1977). For a discussion of Steinmetz's work, see *infra* Part I.A.

other sources.<sup>7</sup> However, despite the wealth and diversity of the sociological research and the consistency of the findings, female violence is not recognized within the extensive legal literature on domestic violence. Instead, the literature consistently suggests that only men commit domestic violence. Either explicitly, or more often implicitly, through the failure to address the subject in any objective manner, female violence is denied, defended and minimized.

How is it that our general legal understanding of domestic violence as defined by the male abuse of women is so squarely contradicted by the empirical reality? Honestly answering this question requires tracing the history of both the theory and practice of domestic violence law. Undertaking such an exploration, one quickly finds that the “discovery” of domestic violence is rooted in the essential feminist tenet that society is controlled by an all-encompassing patriarchal structure.<sup>8</sup> This fundamental feminist understanding of domestic violence has far-reaching implications. By dismissing the possibility of female violence, the framework of legal programs and social norms is narrowly shaped to respond only to the male abuse of women. Female batterers cannot be recognized. Male victims cannot be treated. If we are to truly address the phenomenon of domestic violence, the legal response to domestic violence and the biases which underlie it must be challenged.

Through an open discussion of domestic abuse, Part I of this Article endeavors to expose the fact that domestic violence is committed by women. In so doing, I introduce to legal literature the first extensive account of the Family Violence Surveys and various other studies completed over the last twenty-five years which have repeatedly found that men and women commit violence at similar rates.<sup>9</sup> After exploring the tendency to deny, defend or minimize the violence of women in Part II and then arguing that female violence must be addressed, I assert in Part III that today’s refusal to react is a product

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7. For a discussion of the Family Violence Surveys and related work on intimate violence, see *infra* notes 14-35 and accompanying text.

8. See R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES* 1-13 (1979). For further discussion of the patriarchal beginnings of domestic violence, see *infra* notes 109, 116, 254 and accompanying text.

9. In relation to the thousands of articles on domestic violence, a LEXIS/NEXIS search found that the Family Violence Surveys are cited in only twenty-six articles. None of these articles gave any meaningful critical examination of the Family Violence Surveys. In fact, only one article gave anything more than a cursory footnote reference to the surveys’ coverage of female intimate violence. The one article which did contain any substantive discussion of the National Family Violence Surveys did so only in order to compare it to the National Violence Against Women Survey (which was completed by the article’s author) and the National Crime Victimization Survey. Patricia Tjaden, *Extent and Nature of Intimate Partner Violence as Measured by the National Violence Against Women Survey*, 47 *LOY. L. REV.* 41, 50-51 (2001). For further discussion of the National Violence Against Women Survey and the National Crime Victimization Survey, see *infra* notes 59, 158 and accompanying text.

of the feminist control over the issue of domestic violence. Female violence presents both a threat to feminist theory as well as to the practice of domestic violence law. Notwithstanding such concerns, today's myopic understanding of domestic violence has serious implications. Limiting this examination to the criminal justice system, Part IV considers how the feminist definition of domestic violence has skewed arrest and prosecution philosophies, resulting primarily in having only male batterers criminally pursued. The Part also reviews how rehabilitative programs are geared toward treating domestic violence as the byproduct of a patriarchal society, thereby only producing programs which address male violence. Similarly, the services for domestic violence victims, in particular, the availability of shelters, have also been shaped by the feminist definition of domestic violence. In conclusion, Part V calls for challenging the existing gendered definition of domestic violence and thereby demands changing our norms and institutions so that we may honestly work toward addressing and eliminating domestic violence.

Having set out the prerequisite roadmap, it is important to emphasize and re-emphasize what this Article is not. It is not an attempt to minimize or question in any respect the magnitude or seriousness of the intimate violence inflicted on women by men. Rather, it is an attempt to look candidly at the possibility of the violence inflicted on men by women, look at the reaction to such revelations, discuss the explanations for and implications of such responses, and call for a more honest, open discourse on domestic violence.

## I. THE STUDY OF INTIMATE VIOLENCE

The reality of husband abuse was first nationally exposed with the release of several studies during the 1970s. The findings of these early studies were startling. Not only were women engaging in intimate violence, but their propensity for such acts as compared to male abuse of intimate female partners was similar in a number of ways. Such radical reports ignited a controversy which continues today. Husband battering continues to be heatedly denied, defended and minimized. However, when the early studies of husband abuse, its confirmation by a variety of later research, and the attacks on the projects are examined together in a critical fashion, a simple truth remains. Women batter.

### A. *The Early Studies*

In her 1977 work entitled *The Battered Husband Syndrome*, sociologist Suzanne Steinmetz was among the first to bring public and

academic attention to the “phenomenon of husband battering.”<sup>10</sup> While the article was brief, it was explosive. Professor Steinmetz studied the use of physical violence by husbands and wives in five independent surveys conducted by various family violence research teams.<sup>11</sup> Such surveys relied primarily upon the “Conflicts Tactic Scales” (CTS). Developed in 1971 to measure family violence, CTS breaks physical force and violence into eight categories ranging from (1) throwing things; (2) pushing, shoving or grabbing; (3) hitting or slapping; (4) kicking, biting or hitting with a fist; (5) hitting or trying to hit with something; (6) beating up; (7) threatening with a knife or gun; and finally, (8) using a knife or gun.<sup>12</sup>

### 1. Use

In four out of the five studies reported, Professor Steinmetz found that husbands and wives are roughly equal in their use of any form of physical violence. While data from three of the reported studies finding gender parity was based on her individual work,<sup>13</sup> the fourth set of data was from the landmark National Family Violence Survey

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10. Steinmetz, *supra* note 6, at 499.

11. In addition to the empirical data, Steinmetz’s work examines spousal violence by comparing the historic treatment of husband and wife abuse and its portrayal in comic strips. *Id.* at 499-501. It is from relying on such a variety of sources that Steinmetz concludes the “phenomenon of husband battering” exists and can no longer be ignored. *Id.* at 499, 503-08.

12. In all, CTS is comprised of eighteen items, divided into three approaches to resolving conflict: (1) rational discussion, (2) verbal and non-verbal hostile expressions (which are not physical) and (3) the use of physical force and violence. It is this last stage of conflict resolution, the physical violence continuum, which was, and continues to be, the most controversial. For a more detailed explanation of the development and use of CTS, see MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 26-28, 253-66 (1980). For a further discussion of CTS and its critics, see *infra* notes 52-59 and accompanying text.

It should be noted that Steinmetz’s study comparison completely omitted the CTS physical violence category of “beating up.” Further, several of the studies compared by Steinmetz did not ask questions specifically addressing kicking, threatening with a knife and gun, or use of a knife or gun. For a complete chart of the five studies compared by Steinmetz, see Steinmetz, *supra* note 6, at 502.

13. In three separate studies directed by Professor Steinmetz—one involving a random sample of couples in New Castle, Delaware; the second based upon a broad based non-representative U.S. sample; and the third relying upon a sample of Canadian college students—she found that husband and wives were roughly equal in their use of any form of physical violence. In the Delaware study, 47% of husbands were reported to have used some form of physical violence against their wives at some point during the marriage, 43% of wives also were reported to have used violence (on at least one occasion) during the marriage. From the Canadian sample of fifty-two families, 23% of husbands resorted to violence, compared to 21% of wives within the sample. Similarly, in the broad-based, non-representative U.S. sample of ninety-four couples, 32% of husbands and 28% of wives were reported to use violence during their marriages. While the percentages vary *between* studies, the rates of husband and wife violence within each study are similar. Steinmetz, *supra* note 6, at 501-03. For Steinmetz’s work dedicated to the Delaware study, see SUZANNE K. STEINMETZ, *THE CYCLE OF VIOLENCE: ASSERTIVE, AGGRESSIVE, AND ABUSIVE FAMILY INTERACTION* (1977).

of 1975.<sup>14</sup> Directed by sociologists Richard Gelles, Murray A. Straus and Suzanne Steinmetz through the support of the Family Violence Research Program of the University of New Hampshire, the team was responsible for conducting the first national survey dedicated to family violence. Focusing specifically on spousal violence and child abuse, a nationally representative sample of 2143 “intact couples” was selected.<sup>15</sup> From this sample one adult in each couple was interviewed in person and questioned about family conflicts which had occurred over the last twelve months and conflicts which had occurred at any time during the marriage or parent-child relationship.<sup>16</sup> The Family Violence Research Laboratory’s national survey proved consistent with Steinmetz’s other work. Reporting the rate of marital violence committed *only in the year 1975*, the data reflected gender parity—12% of husbands and 12% of wives had used violence during the year 1975 against their mates.<sup>17</sup>

The final, fifth comparison study did suggest husbands used violence at a greater rate than wives.<sup>18</sup> However, unlike the other four surveys, such results were recognized to be skewed as half of the

14. Steinmetz, *supra* note 6, at 501-03. Many books and papers devoted exclusively to the 1975 Family Violence Survey, as well as comparing it to the later surveys, have been published. For one of the first published papers dedicated to the 1975 survey, see Murray A. Straus, *Wife Beating: How Common and Why?*, 2 VICTIMOLOGY: AN INT’L J. 443 (1977). For the first book devoted to the 1975 survey and authored by its leading sociologists, see STRAUS ET AL., *supra* note 12. For later works comparing the 1975 survey with later, similar surveys conducted in 1985 and 1992 by the same individuals, see RICHARD J. GELLES, *INTIMATE VIOLENCE IN FAMILIES* (3d. ed. 1997) (comparing results of the 1975, 1985 and 1992 surveys) [hereinafter *INTIMATE VIOLENCE IN FAMILIES*]; RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* (1988) (comparing the 1975 and 1985 surveys for a broad, public audience) [hereinafter *INTIMATE VIOLENCE*]; MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* (1989) (comparing the 1975 & 1985 surveys for an academic audience) [hereinafter *PHYSICAL VIOLENCE*]. For further discussion of these three leading surveys, see *infra* notes 15-18 and accompanying text.

15. In order to qualify as an intact couple, the couple was required to consist of a man and woman currently living together. While marriage was not required, the survey characterizes all intercouple violence as spousal, without drawing any marital/non-marital distinctions. Of the 2143 families surveyed, 1146 families met the study’s criterion of having children between the ages of 3 and 17. STRAUS ET AL., *supra* note 12, at 24-26. For criticisms by the Family Violence Research Laboratory of their sampling methodology and efforts to improve it in later studies, see *id.* at 25-26; *PHYSICAL VIOLENCE*, *supra* note 14, at 9-14, 49-73.

16. Of the 2143 families, 960 men and 1183 women were interviewed. STRAUS ET AL., *supra* note 12, at 24.

17. While the 12% figure is drastically lower than the percentages provided in the other surveys reported in Steinmetz’s work, the 12% figure represents violence during a one-year reporting figure, while the other surveys report violence occurring at any time during the marriage. Steinmetz, *supra* note 6, at 502. For a summary of Steinmetz’s three projects, see discussion *supra* Part I.A.

18. Reporting on the use of any violence during the course of a marriage, the study found 47% of husbands, as compared to only 32% of wives, had used violence on at least one occasion. RICHARD J. GELLES, *THE VIOLENT HOME* 51-52 (1972) (reporting survey results).

survey participants were selected from police blotter or social service agency reports of domestic violence which were recognized to disproportionately reflect male-perpetrated domestic violence.<sup>19</sup>

## 2. Frequency

The comparable use of physical violence by spouses marks only the beginning of the similarities evidenced by these comprehensive first studies of intimate violence. Arguably, husband abuse can be discounted in comparison to wife abuse if women are found to utilize physical violence against their spouses in a much more sparing fashion than men. However, the various surveys consistently reported that *women not only use violence at rates similar to men, but that women match, and often exceed, husbands in the frequency with which they engage in violent behavior.*<sup>20</sup>

Later studies confirm the findings of these early, controversial works. In 1985, the Family Research Laboratory conducted another national study.<sup>21</sup> Reaching more than 6000 families through tele-

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19. See Steinmetz, *supra* note 6, at 503. For further discussion of the ongoing bias of recognizing male abuse and ignoring female abuse evident in cultural norms and in the policies of legal and social service agencies, see *infra* note 90 and accompanying text. See also *infra* Part IV.B.

20. Counting the number of reported acts by husbands and wives during the course of their marriages, each of Steinmetz's three surveys reported wives engaging in more acts of physical violence than husbands. Looking only at the frequency of violence in couples in which one or more acts of violence had occurred, the reported frequency of violence for wives versus husbands was as follows: in the Delaware survey, 4.04 versus 3.52; in the Canadian survey, 7.82 versus 6.00; in the national non-representative survey, 7.00 versus 6.60. Steinmetz, *supra* note 6, at 503.

Similarly, the Family Violence Research Survey of 1975 also found that women on average committed more acts of violence in the reporting year of 1975 than husbands. Again looking only at the frequency of violence in couples in which one or more acts of violence had occurred during the year 1975, Straus's report reflects wives committed an average of 10.3 physically violent acts against husbands, while husbands averaged 8.8 acts against their wives. *Id.* at 503. However, in order not to "overstate the case," Straus states a preference for relying upon the median as better reflecting the typical frequency of violent behavior in couples for which violence had occurred during 1975. Straus, *supra* note 14, at 445. This median reflects husbands' medium frequency of violent acts for the year was 2.5 acts, while wives' median frequency of violent behavior was reported slightly higher, at 3.0 acts for 1975. *Id.* For a full narrative and statistical frequency discussion of the Family Violence Research Survey of 1975, see STRAUS ET AL., *supra* note 12, at 41-43; Straus, *supra* note 14.

While the fifth survey in Steinmetz's study (which was completed by Richard J. Gelles) reported that men relied upon physical violence more frequently than women in their intimate relationships, such results need to be considered critically in light of the frequency rates consistently reported by the other survey and perhaps more importantly, the skewed nature of the sample gathered to be surveyed. In his 1974 survey, Gelles found, for example, that 11% of husbands and 5% of wives engaged in violent acts between two and six times a year. Steinmetz, *supra* note 6, at 503. For further discussion of the skewed nature of samples used in various domestic violence studies, see *infra* note 59 and accompanying text.

21. There is a wealth of literature which relies upon the 1985 survey and compares its findings to the earlier surveys (particularly its predecessor survey of 1975). Two critical

phone interviews, the research team sought to ensure its data was representative by creating a sample group over twice the size of the 1975 survey as well as “oversamples” of certain minority groups and populations in certain states who were at risk of under-representation.<sup>22</sup> Relying again on the Conflict Tactics Scale, the 1985 study confirmed the use and frequency of physical violence by men and women.<sup>23</sup>

### 3. Severity

While the similarity of rates of physical violence by wives and husbands presented by the various surveys is revealing, such data is not sufficient to make an accurate comparison of the violent nature of wives and husbands. As the definition of “physical violence” used in the various CTS-based studies ranges from “throwing something” to “using a knife or gun,” wives arguably could compare to husbands in *use* and *frequency* of violent behavior, but not in the severity of the *type* of violence employed.

Some differences per type of violence utilized by each sex are certainly evident. Women were found to be twice as likely to throw something at their husbands.<sup>24</sup> Wives were also more likely than husbands to kick, bite and punch.<sup>25</sup> They were also more likely to hit, or try to hit, their spouses with something and more likely to threaten their spouses with a knife or gun.<sup>26</sup> Husbands, on the other hand, rated higher in the four categories of pushing, grabbing and

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books were written by the surveys’ authors and are dedicated to the subject: INTIMATE VIOLENCE, *supra* note 14 (written for wide public distribution); and PHYSICAL VIOLENCE, *supra* note 14 (written for the academic community). For other discussions of these two leading surveys, see *supra* notes 14-18, 20 and accompanying text, and *infra* notes 66-68 and accompanying text.

22. In total, the 1985 “resurvey” by the Family Research Laboratory interviewed 6,002 households, with 4,032 households selected in proportion to household distribution per state and three “oversamples” consisting of: (1) an oversample of 958 households in twenty-five states in order to assure 100 interviews in thirty-six key states; (2) an oversample of 508 black households; and (3) an oversample of 516 Hispanic households. In order to accommodate the increase in interviews from the 1975 in-person survey, interviews in the 1985 study were completed via telephone. For further discussion of the methodologies used in the second national survey, see INTIMATE VIOLENCE, *supra* note 14, at 207-12. For a scholarly analysis and comparison of the 1975 and 1985 methodologies, see PHYSICAL VIOLENCE, *supra* note 14, at 17-28. For further discussion of the 1975 survey, see *supra* notes 14-18 and accompanying text.

23. PHYSICAL VIOLENCE, *supra* note 14, at 95-99.

24. During 1975, 5% of wives threw something at their husbands, compared to 3% of husbands. STRAUS ET AL., *supra* note 12, at 37-38; Steinmetz, *supra* note 6, at 502.

25. During 1975, 3% of wives kicked, bit or slapped, as compared to 2% of husbands. STRAUS ET AL., *supra* note 12, at 37-38; Steinmetz, *supra* note 6, at 502.

26. During 1975, 3% of wives hit, or tried to hit their spouse with something, as compared to 2% of husbands. Six percent of wives threatened their husbands with a knife or gun, as compared to 0.4% of husbands. STRAUS ET AL., *supra* note 12, at 37-38; Steinmetz, *supra* note 6, at 502.

shoving;<sup>27</sup> slapping or hitting;<sup>28</sup> beating up;<sup>29</sup> and actually using a knife or gun.<sup>30</sup> Yet, such per category differences did not evidence that men were unquestionably more prone to acts of severe domestic violence than women. Combining the data collected on the last five categories of physical violence to create a “Severe Violence Index,” *wives were found to engage in more severe acts of violence than husbands*.<sup>31</sup> Taking the frequency of severely violent behavior into account does not mitigate these findings. Wives show a pattern of severely violent behavior statistically comparable to husbands.<sup>32</sup> Consistent with this “over-all similarity” found in the 1975 survey,<sup>33</sup> other early reports also found that husbands and wives show “equal potential” for intimate violence and that they “initiate[d] similar acts of violence.”<sup>34</sup>

### B. Recent Findings

These staggering findings on the use, frequency and severity of violence similarly perpetrated by husbands and wives kept sociologists committed to the study of family violence. In 1992, members of the Family Violence Research Laboratory completed yet another nationally representative survey.<sup>35</sup> The study reaffirmed that wives en-

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27. During 1975, 11% of husbands pushed, grabbed or shoved as compared to 8% of wives. STRAUS ET AL., *supra* note 12, at 37-38; Steinmetz, *supra* note 6, at 502.

28. STRAUS ET AL., *supra* note 12, at 37-38.

29. *Id.*

30. As reported in 1975, husbands used a knife or gun on their wives in 0.3% of cases, as compared to 0.2% of wives committing similar behavior. STRAUS ET AL., *supra* note 12, at 37-38; Steinmetz, *supra* note 6, at 502.

31. As reported in 1975, 3.8% of husbands engaged in “severe violence,” as compared to 4.6% of wives. STRAUS ET AL., *supra* note 12, at 39-41. The last five CTS categories are: kicking, biting or hitting with a fist; hitting or trying to hit with something; beating up; and threatening with or using a knife or gun. For further discussion of CTS, see *supra* note 12 and accompanying text.

32. Looking just at couples reporting spouse “beating,” the survey found that in about one-third of the cases there had been only one incident of severe violence and that wives and husbands were equal in committing such “one-time” severe violence. STRAUS ET AL., *supra* note 12, at 41. Comparing households where two acts of severe violence occurred, 20% of severely violent husbands and 12.5% of severely violent wives committed two severe acts. *Id.* Forty-seven percent of “wife-beating” husbands beat their wives three or more times in 1975 compared to 53% of wives who beat their husbands three or more times. *Id.* at 41-42. Arguably, ending the comparison at three times or more is not a sufficient basis for comparison because within such a category a spouse of one sex who engages in three acts of severe violence is measured equally against a spouse of the opposite sex who engages in many more acts of severe violence. For a discussion of such criticisms of the Severe Violence Index, see *infra* Part II.A.2(a).

33. STRAUS ET AL., *supra* note 12, at 37-38. The specific act comparison chart is reproduced in Steinmetz’s work without the “beating up” item. See Steinmetz, *supra* note 6, at 502.

34. Steinmetz, *supra* note 6, at 505.

35. The 1992 survey was completed with a nationally representative sample of 1970 families and was conducted through telephone interviews by Glenda Kaufman Kantor. The results of the 1992 survey and its comparison to the two National Family Violence Surveys

gaged in intimate violence at rates comparable to husbands.<sup>36</sup> However, a comparison of the 1975, 1985 and 1992 studies also reveals an important trend. Despite the finding that husbands and wives were roughly equal in terms of the percentages of spouses who engaged in any act of violence, the gap in the use of severe violence by husbands and wives had widened.<sup>37</sup> In comparing the 1975 and 1985 results, researchers observed that while the male use of severe physical violence had declined 21%, the female use of such violence remained virtually constant.<sup>38</sup> In the 1992 results, researchers again found that while severe assaults by wives remained fairly steady, the rate of severe abuse perpetrated by husbands decreased between 1985 and 1992 by almost 37%.<sup>39</sup> In overall comparison to the constant rate of husband abuse, the combination of such significant decreases in wife-beating represented a 50% drop between 1975 and 1992.<sup>40</sup>

## II. THE REACTIONS

While the study of husband abuse by the Family Violence Research Laboratory, its associates, and others engaged in similar projects has received some praise, such support has been completely overshadowed by the degree and extent of criticism levied against it.

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was presented to the 13th World Congress of Sociology held in Bielefeld, Germany via a paper by Straus and Kantor. Murray A. Straus & Glenda K. Kantor, *Changes in Spouse Assault Rates from 1975 to 1992: A Comparison of Three National Surveys in the United States*, in POPULATION, ENVIRONMENT AND SUSTAINABLE LIVELIHOOD (Herwig Brig et al. eds., 1994). For discussion of the 1992 survey, see BEVERLY FORD, VIOLENT RELATIONSHIPS: BATTERING AND ABUSE AMONG ADULTS 13 (2001); INTIMATE VIOLENCE IN FAMILIES, *supra* note 14, at 70-92; Richard J. Gelles, *Estimating the Incidence and Prevalence of Violence Against Women: National Data Systems and Sources*, 6 VIOLENCE AGAINST WOMEN 784, 797 (2000).

36. For a discussion of such a study, see *supra* note 35.

37. For an earlier discussion of the lower reporting of severe violence by men than by women as reported in 1975, see *supra* notes 14-18 and accompanying text.

38. In reporting on the use of "severe violence" (kicking, hitting or trying to hit with something; beating up; and threatening or using a knife or gun) as measured by CTS, the researchers reported that husband-to-wife use of "severe violence" decreased from thirty-eight husbands per 1000 couples in 1975 to thirty husbands per 1000 couples in 1985. By comparison, wives' use of "severe violence" remained constant, with women reported to use "severe violence" at the rate of forty-six women per 1000 couples in 1975 and forty-four women per 1000 couples in 1985. INTIMATE VIOLENCE, *supra* note 14, at 250-51. For a discussion of the 1985 statistics and their comparison to the 1975 statistics, see *id.* at 108-15; PHYSICAL VIOLENCE, *supra* note 14, at 118-21, 529-34. For discussion of the "Severe Violence Index" see *supra* note 31 and accompanying text.

39. While the 1985 rate of wife-beating was thirty per 1000 couples in 1985, the 1992 rate was nineteen per 1000 couples. FORD, *supra* note 35, at 11-13; Gelles, *supra* note 35, at 797.

40. The 1992 study also included a comparison of violence by gender through a "minor assault" index, which was comprised of the less severe pushing, grabbing, shoving and slapping categories. Minor assaults perpetrated by husbands appeared to decrease between 1975 and 1992, minor assaults perpetrated by wives increased. See FORD, *supra* note 35, at 13; see also Gelles, *supra* note 35, at 797. For a discussion of the gender reporting differences found in comparing the studies, see *infra* Part II.A.2.(b).

Criticisms have ranged from personally attacking the researchers, to more academic efforts directed at attacking the work itself by denying the validity of the reports, to an outright defense of the violent behavior of women or otherwise minimizing its significance. Yet, while the nature of the criticisms has differed, they have invariably all been vehement.

### A. Denying Female Violence

#### 1. By Woozles and Scare Tactics

In the public arena, the media's reaction to the reports of husband abuse was an overreaction. Estimates that two million males in the United States were subject to domestic violence quickly became inflated by the newspapers to twelve million.<sup>41</sup> As the Family Violence Research team quipped, "Woozles, it seems, tend to multiply in direct proportion to the degree of controversy associated with a story."<sup>42</sup>

Other reactions could not be responded to so lightly. Perhaps the most physically and personally intimidating behavior was directed at Suzanne Steinmetz, who had first brought the issue to the public's attention.<sup>43</sup> Steinmetz appeared on such shows as the *Today Show* and *Phil Donahue*.<sup>44</sup> Her work was reported in various newspapers and magazines, including a full-page story in *Time* magazine.<sup>45</sup> Yet, while Steinmetz's work received some support, the public attack against Steinmetz and her family evidenced the public's overwhelming rejection of her work.<sup>46</sup> Verbal threats were launched against her and her children—at home and in public. Threatening phone calls were made to Steinmetz and the sponsors of her speaking engagements in order to prevent Steinmetz from further publicizing her work. On one occasion, a bomb threat was called into an ACLU meeting at which Steinmetz was scheduled to speak.<sup>47</sup> Professionally, Steinmetz was also threatened. In an attempt to prevent her from receiving tenure, every female faculty member at the University of Delaware was lobbied by individuals calling on behalf of the women's rights movement.<sup>48</sup> Academicians also became involved in the per-

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41. The "twelve million" figure is attributed to the reporting of Roger Langley, a journalist for the New York Daily News. For discussion of the early media reports, see INTIMATE VIOLENCE, *supra* note 14, at 105-06.

42. *Id.* at 105.

43. For a discussion of Steinmetz's work, see *supra* Part I.A.

44. PHILIP W. COOK, ABUSED MEN: THE HIDDEN SIDE OF DOMESTIC VIOLENCE 109-14 (1997); INTIMATE VIOLENCE, *supra* note 14, at 105-06.

45. COOK, *supra* note 44, at 109-14; INTIMATE VIOLENCE, *supra* note 14, at 105-06.

46. For my discussion of why there has been such a strong reaction to the study of battered men, see *infra* Part III.

47. COOK, *supra* note 44, at 109-12.

48. *Id.* at 112.

sonal attack, deriding her work as anti-feminist and simply biased to its funding source.<sup>49</sup>

Other social scientists committed to the study of husband abuse and family violence were similarly mistreated.<sup>50</sup> Such tactics seem to have proven effective. Both researchers who were involved in the early projects, and even those who might have become involved, admit that they now choose to give the topic of battered men “wide berth.”<sup>51</sup> Such a commentary is tragic, not only for those interested in female violence, but for all of us committed to protecting academic research and intellectual freedom.

## 2. *By Methodological Critique*

### (a) *CTS Challenges*

Beyond wozzles and scare tactics, a more effective and facially neutral intellectual tactic used to silence the study of female violence has been an attack on the methodology. As an initial criticism, the CTS-based reports, by definition, allow only a focus on violence resulting from conflict situations. While acknowledging the value of CTS in other social studies, sociologists critique their use in the study of family.<sup>52</sup> Because the scale’s focus upon “conflict” does not acknowledge the use of violence in a familial setting as a tactic of coercive control, such methodology fails to emphasize the use of violence by men to maintain power or the use of violence without provocation.<sup>53</sup> The CTS reporting methodology is also criticized for its limited focus upon the *acts* of violence, not the *consequences*, or more specifically, the *severity of the injuries* resulting from such acts.<sup>54</sup> For example, the ordering of the violence with such acts as “trying to hit with something” regarded as more severe than “slapping” is deemed inappropriate given the potential of severe physical injury which can result from a slap, while no injury could ever result from throwing

49. *Id.* at 109-12.

50. Many years after the initial reporting of the family violence research team, a seemingly embittered Straus charged that although his early work on violence against women had been commonly relied upon by feminists in their arguments of institutional male violence, he was simply “excommunicated” from the feminist ranks after the family violence surveys’ publications. Murray A. Straus, *Physical Assaults by Wives: A Major Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 82 (Richard Gelles & Donileen R. Loseke eds., 1993). For earlier reaction of the family researchers criticized for their findings, see INTIMATE VIOLENCE, *supra* note 14, at 105-06.

51. INTIMATE VIOLENCE, *supra* note 14, at 106.

52. Kersti A. Yllö, *Through a Feminist Lens: Gender, Power and Violence*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* note 50, at 47, 52-53.

53. Demie Kurz, *Physical Assaults by Husbands: A Major Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* note 50, at 88, 94-96; Yllö, *supra* note 52, at 53. For the related critique that the CTS’ noncontextual approach fails to understand the gendered nature of domestic violence, see *infra* Part II.B.2.

54. Yllö, *supra* note 52, at 52-53.

something at someone but failing to strike.<sup>55</sup> Criticism is also levied at separate groupings of various types of violence which are instead seen as overlapping.<sup>56</sup>

Recognizing such concerns, the Family Violence Research Laboratory addressed them in their initial studies.<sup>57</sup> However, rather than rejecting the methodology and therefore any information it produced outright, the researchers noted that CTS was previously accepted as a methodology in family studies limited to wife abuse. They therefore rationalized that the research methodology remained valuable in a combined study of husband abuse and wife abuse.<sup>58</sup> Moreover, despite being collected through CTS methodology, the research of the Family Violence Researchers yields similar results to numerous other studies of husband and wife abuse, including those which rely upon non-CTS methodology.<sup>59</sup>

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55. R. Emerson Dobash & Russell P. Dobash, *Research as Social Action: The Struggle for Battered Women*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 51, 59 (Kersti Yllö & Michele Bograd eds., 1988).

56. For example, there is criticism over separating “kick[ing], bit[ing], or hit[ting] with a fist” from “[b]eat[ing] up the other one.” *Id.* at 59. For a review of the CTS categories, see *supra* note 12 and accompanying text.

57. STRAUS ET AL., *supra* note 12, at 27-28.

58. Straus, *supra* note 50, at 84.

59. By 1999, over 100 studies are counted as consistently finding that men and women engage in domestic violence at similar rates. See Murray A. Straus, *The Controversy Over Domestic Violence by Women: A Methodological, Theoretical, and Sociology of Science Analysis*, in VIOLENCE IN INTIMATE RELATIONSHIPS 17, 17-18 (Ximena B. Arriaga & Stuart Oskamp eds., 1999). For a review of a number of studies of family and partner abuse yielding similar rates of abuse by men and women, see *id.* at 25-27; Straus, *supra* note 50, at 68-72 (discussing the results obtained from a study of the assault rate of partners in married and cohabitating relations and a study of the assault rate of individuals in dating relationships); see also PHYSICAL VIOLENCE, *supra* note 14, at 162 (comparing the similarity in data on female and male abuse to earlier studies and concluding that “[t]hese findings are so consistent that they leave little doubt about the high rate of assaults by women”); Terrie E. Moffitt, *Partner Violence Among Young Adults*, NAT’L INST. JUST.: RESEARCH PREVIEW (Apr. 1999) (discussing preliminary results of an over twenty-year ongoing longitudinal study in New Zealand finding women reporting greater acts of domestic violence against their partners than men); Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 55, at 96 (noting numerous studies supporting the work of the Family Violence Research team through findings which reported “23% to 71% of battered women used violence . . . against their abusers”).

For discussion of other non-CTS studies yielding comparable results regarding the similar usage of violence by men and women, see FORD, *supra* note 35, at 7-14 (providing an overview of numerous critical studies including the National Crime Victimization Survey, National Family Violence Surveys, National Youth Survey and homicide and other intimate violence statistics collected by the U.S. Bureau of Statistics); WILLIAM A. STACEY ET AL., *THE VIOLENT COUPLE* (1994) (conducting a survey of eighty-six couples in Austin, Texas who were participating in a counseling program, but noting at the outset the skewed nature of the sample, largely because in two-thirds of the cases the couples were participating as a result of a court referral to the counseling program in lieu of the male member of the couple being convicted of domestic violence); Barbara J. Morse, *Beyond the Conflict Tactics Scale: Assessing Gender Differences in Partner Violence*, 10 VIOLENCE & VICTIMS 251 (1995) (reporting the results of the National Youth Survey, a nationally representative

*(b) Gender Concerns*

Other important methodological issues may also be accounted for. Of significant concern is the belief that men tend to underreport their acts of domestic violence, and that any study relying upon surveying men would therefore yield inaccurate results.<sup>60</sup> However, in a variety of ways, the husband-abuse studies minimized this threat. First, while the CTS surveys collected data on households, typically only one spouse completed the questionnaire or interview. Since, in the majority of instances, the participating spouse was the wife, the perceived threat of unreliable male reported data was reduced at the outset.<sup>61</sup> In the 1985 CTS study, the Family Violence Research team went further to address the risk of male underreporting by isolating the information reported by men from the information reported by women. Even when the researchers relied solely on the data reported by women, the data revealed that the use of violence by men and

seventeen-year longitudinal survey of intimate violence among married and cohabitating partners and finding trends and patterns of use of minor and severe violence by men and women similar to those reported by the National Family Violence Survey).

It must be noted that a number of other surveys have found significantly higher rates of violence by men than women. In 1997, the results of the National Violence Against Women in America Survey (NVAW) were released. NVAW surveyed 16,000 households, equally interviewing 8000 men and 8000 women. It concluded that men physically assaulted their female partners at three times the rate women engaged in such behavior. Such conclusions regarding disparate rates of assault, however, must be interpreted in light of the survey questions which were geared to focusing on injury-producing violence and types of violence more likely to be considered criminal. Straus, *supra*, at 26-27.

Similarly, several other commonly cited surveys are the "battered women's studies" which generally rely on data collected from women residing in battered women's shelters; "police call studies," which are based on statistics gathered from calls made to the police by victims of domestic violence, who are typically women; and the National Crime Victims Survey, a government survey based upon criminal statistics regarding domestic violence. These surveys have been criticized as based on non-representative, skewed samples with disproportional numbers of abused women. The battered women's shelter studies are non-representative because they rely only upon interviews with female victims who are residing in shelters. Similarly, because it is acknowledged that male victims of violence are less likely to call the police than female victims, the police call surveys also are based on samples with a disproportionate numbers of female victims. Likewise, the National Crimes Victims Survey is seen as non-representative because acts of domestic violence committed by men are more commonly reported and treated as a "crime" than domestic violence perpetrated by women. Straus, *supra* note 50, at 68-72; *see also*, STACEY ET AL., *supra*, at 45 (acknowledging the unreliability of official police and court statistics on domestic violence and quoting one critic as declaring such data to be "practically worthless for purposes of criminological research"); Steinmetz, *supra* note 6, at 503-04 (critiquing earlier studies of female violence due to the skewed sample). For a further general discussion of the methodological problems and non-representative concerns in both clinical studies (such as those based upon criminal and shelter data) and representative community samples (such as the National Family Violence Survey), see Straus, *supra* note 50, at 77-80.

60. Straus, *supra* note 50, at 68 (acknowledging the concern of male underreporting).

61. STEINMETZ, *supra* note 13, at 14-16 (noting that of the fifty-seven families studied in her survey, 35% of the husbands-fathers participated in the questionnaire component of the survey, while only 9% of the personal interviews relied upon male participation). For further discussion of Steinmetz's work, see *supra* notes 6-34 and accompanying text.

women remained at similar rates. Moreover, the parity between the acts of violence committed by men and women existed when the data was separated into the CTS indices of “minor” and “severe” acts of violence.<sup>62</sup>

## *B. Defending Female Violence*

### *1. Quantitative Criticisms*

If the methodological critiques are accurate, the assertion that men and women engage in similar patterns of domestic violence can be denied fairly. Yet even effectively raising the shortcomings of these criticisms (as I have just attempted to do) does not sufficiently respond to the critics. For those interested in discrediting the assertion that men and women both act violently, a bolder move is to not only accept the female use of violence, but to defend it. In conceding that women do engage in acts of domestic violence, female use of vio-

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62. In so doing, the researchers found that males reporting on male violence did tend to report more minimal violence than women reporting on male violence. Straus, *supra* note 50, at 68. As reported by women, the 1985 Family Violence Research Survey data indicated the following percentage of spouses who engaged in domestic violence toward their mates:

Perpetrator of Violence	“Minor”	“Severe”	“None”
Male	6.9%	4.9%	88.1%
Female	7.7%	4.4%	87.9%

As reported by men, the 1985 Family Violence Research Survey data indicated the following percentage of spouses who engaged in domestic violence toward their mates:

Perpetrator of Violence	“Minor”	“Severe”	“None”
Male	9.2%	1.3%	89.5%
Female	7.5%	4.7%	87.8%

PHYSICAL VIOLENCE, *supra* note 14, at 156-57, 162.

There appears to be some dispute on the gender honesty question. In comparing the 1975, 1985 and 1992 data, other statisticians have found that men tended to report greater rates of male violence than women, and that women tended to report greater rates of female violence than men. For a breakdown by gender differences per reporting period, see FORD, *supra* note 35, at 13. *See also* Gelles, *supra* note 35, at 797.

lence is justified as self-defense—a lifesaving reaction of women who are being physically attacked by their male partners.<sup>63</sup>

The development of the battered woman syndrome as a defense for crimes committed against abusive male partners, including homicide, evidences the wide acceptance of a woman's use of violence as self-defense.<sup>64</sup> The self-defense theory of female domestic violence is not, however, fully supported by the statistics. According to the statistics on intimate violence, while in approximately 50% of cases both spouses are reported to act violently, in the remaining 50% only one spouse is reported to ever use domestic violence.<sup>65</sup> Admittedly, the finding that in approximately 50% of cases both spouses engage in violence does not help in determining who is initiating the violence.<sup>66</sup>

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63. Dobash & Dobash, *supra* note 55, at 59-60. For the self-defense characterization of the statistical reporting of violence by women, see Daniel Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense?*, 1 VIOLENCE & VICTIMS 47 (1986). For further discussion of the battered woman's defense in employing violence, see *infra* notes 64, 69, 137 and accompanying text.

64. Lenore Walker, a pioneer in the study of domestic violence, is credited with the development of the battered woman's syndrome. See, e.g., LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989); Lenore E. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (1992). For a sampling from the tremendous body of literature discussing the creation, use, and debate surrounding the battered woman's syndrome, see ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1987); AMY LOU BUSCH, *FINDING THEIR VOICES: LISTENING TO BATTERED WOMEN WHO'VE KILLED* (1999); *INTIMATE VIOLENCE*, *supra* note 14, at 141-59 (challenging the notion of "learned helplessness" by reporting on the variety of female responses to domestic violence); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994) (critiquing the battered women's syndrome defense as a reinforcement of negative female stereotypes). For further discussion of battered women's syndrome and its relation to the patriarchal definition of domestic violence, see *infra* notes 109, 116, 254 and accompanying text. For further discussion of learned helplessness, see *infra* note 130 and accompanying text.

There are few efforts to extend the battered women's syndrome beyond women to include other intimates who are abused and defend themselves with violence. This one-sided application of a self-defense theory for intimates supports this Article's argument regarding the unquestioning acceptance of a feminist-oriented definition of domestic violence. See *infra* notes 120, 256 and accompanying text (on the pervasive impact of the feminist definition of domestic violence on legal and social institutions). For one author's effort to extend the battered women's syndrome to all victims of domestic violence, see Hope Toffel, Note, *Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337 (1996).

65. STRAUS ET AL., *supra* note 12, at 36-37.

66. It is interesting to note, however, that the 1985 Family Violence Survey found that women were more likely than men to cite using violence as their common response to the violence of their partners. *PHYSICAL VIOLENCE*, *supra* note 14, at 155-56. Based on a given range of possible responses (from crying, yelling, running to another room, hitting back, running out of the house, calling a friend or relative, or calling the police), 24% of women and 15% of men cited violence as their common response. *Id.* at 155. The most common response of women was to cry (54%), while the most common response of men was "other" (32%). *Id.* This high report of "other" by men has suggested to researchers that men are more likely to ignore the violence of women than to respond in any affirmative manner. *Id.* at 155-56; see also *INTIMATE VIOLENCE*, *supra* note 14, at 149-50. For a consistent discussion of the minimization of female violence by men, see *infra* note 90.

Consequently, the battered woman/self-defense theory is a plausible explanation for the female use of violence in those cases. However, the remaining 50% of couples who report violence by only one spouse further breaks down to reveal that while the husband is the sole perpetrator in one half of such cases, the wife is the sole perpetrator in the remaining half.<sup>67</sup> Moreover, when questioned specifically as to initial abuse, men and women report initiating violence at similar rates.<sup>68</sup> These virtually identical rates of violence by men and women as sole perpetrators call into question the assertion that women's use of domestic violence is always defensive; they also suggest that women may be the only physical aggressor in violent relationships as often as men.<sup>69</sup>

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67. Based on the 1985 National Family Violence Survey results of 495 couples admitting to violence, in 48.6% of the cases both spouses were violent, in 25.9% only the male was violent and in 25.5% only the female was violent. Straus, *supra* note 50, at 74. Similarly, in the 1975 study, 49% of the couples who engaged in violence did so on a mutual basis, whereas of the remaining 51%, in 27% of the cases only the husband was violent and in 24% of the cases only the wife was violent. STRAUS ET AL., *supra* note 16, at 36-37; *see also* INTIMATE VIOLENCE, *supra* note 14, at 146-50, 258 (discussing female and male reaction to violence yet providing graph and detailed statistics only for female reaction).

68. This statistic did not significantly vary based upon the sex of the survey respondent. Broken down by gender, the 1985 Family Violence Survey reported the following results regarding who initiated the violence:

Gender Reporting	Male Initiator	Female Initiator	No Memory
Male	43.7%	44.1%	12.2%
Female	42.6%	52.7%	4.7%

PHYSICAL VIOLENCE, *supra* note 14, at 154-55.

69. Various quantitative studies have been offered to bolster the self-defense motivation for a woman's use of violence. In a study first reported in 1986 aimed at determining the motivations for a woman's use of violence, Daniel Saunders, a self-described "feminist researcher," interviewed fifty-two battered women and found that "self-defense" was the most frequently cited reason given for the use of violence, with 40% of women using severe violence and 30% of women using nonsevere violence as defined by a "modified Conflict Tactics Scale." Saunders, *supra* note 59, at 102-05. "Fighting Back" was also commonly cited, with 33% of women using severe violence and 23% of those using nonsevere violence ascribing to such motivation. *Id.* at 105. By contrast, only one woman (representing 3% of the study) who used severe violence and four women (11%) who used nonsevere violence explained their motivation as self-initiated. *Id.* As acknowledged by Saunders, however, interviewing only battered women created a skewed sample which fails to include nonbattered women who rely upon violence. *Id.* at 108. Without a representative sample of battered *and* nonbattered women, Saunders' study fails to accurately reflect when women's use of violence is self-initiated or in response to male violence. For an earlier, exclusive discussion of Saunders' study, see Saunders, *supra* note 63. Other studies purporting to support the self-defense theory have also been acknowledged to be inconclusive. *See* Saunders, *supra* note 59, at 97-101.

## 2. Qualitative Criticisms

Yet, even such quantitative statistics on the similar rates of violence initiation does not end the controversy surrounding female use of domestic violence. Qualitative defenses are also offered to explain the female use of violence. An appreciation of the “power and control” dynamics of domestic violence cautions against relying solely upon such statistics to reject outright the female use of violence as self-defense theory.<sup>70</sup> When the severity of a woman’s violent behavior is greater than her spouse’s, it is suggested that a woman’s lack of training in less violent reactions may excuse her behavior.<sup>71</sup> A woman’s anger toward her mate, rather than simply her fear of violence, is also raised as a defense.<sup>72</sup> Such a defense is illustrated, for example, in the characterization of the female use, perhaps even initiation, of domestic violence as simply a “slap the cad” response to offensive, even if not physically violent, male behavior.<sup>73</sup> Others have gone further in defending the female use of violence. Warning against describing male behavior as simply caddish, the defense raised instead is that women’s use of violence is warranted when men engage in “unwanted sexual advances, belittling of . . . [women], verbal intimidation, [and] drunken frenzy.”<sup>74</sup> In this vein, the question changes from, “[W]ho began [the] hitting?” to, “[W]ho began the argument?”<sup>75</sup> Such a change is more dangerous than defending female violence as a response to caddish behavior, for it risks legitimizing female violence whenever the argument is male initiated. However, this focus on the argument, rather than on the use of violence, is significant in that it exposes the core justification for disregarding the violence perpetrated by women.

By focusing on the question of who initiates the argument, the implication is that because male anger carries the threat of greater harm, acts of female violence cannot only be condoned as a preventive defense, but can also be overlooked. In choosing the latter, we

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70. In reviewing his findings, Straus suggested that statistics on the initiation of violence by women needed to be interpreted in consideration of such factors as: (1) a woman being more likely to take the blame for violence initiation; (2) a woman’s likelihood of understanding the question “Who initiated the violence?” as “Who initiated the fight?”; (3) a woman perhaps being the “first hitter” in an isolated incident, but the act is defensive in contrast to the man’s initiation of violence in the relationship; and (4) a woman perhaps reporting to have initiated violence in response to a question directed at solely examining the most severe incidents of violence and framing a question in such a manner which prevents recognizing that the man may have initiated the use of violence in the relationship. See Straus, *supra* note 50, at 75-76.

71. Saunders, *supra* note 59, at 99 (discussing *State v. Wanrow*, 559 P.2d 548, 558 (Wash. 1997)).

72. *Id.* at 107.

73. Straus, *supra* note 50, at 79.

74. Kurz, *supra* note 53, at 96.

75. PHYSICAL VIOLENCE, *supra* note 14, at 155.

shift from a position of defending female violence to minimizing its consequences. Simply put, female violence can be legitimately ignored because male violence causes greater injury.

### C. Minimizing Female Violence

Since the first controversial exposure of husband battering, there has been little debate on the assertion that male domestic violence is more likely to produce injury. In attempting to understand why husband battering was given such "selective inattention," pioneer Suzanne Steinmetz determined that the realization of the greater physical strength of men as compared to women provides the most plausible explanation for disregarding female violence.<sup>76</sup> Male violence produces injury at *six* times the rate of female violence.<sup>77</sup> Comparing the type of injuries also shows that women suffer greater physical and psychological harm when physically assaulted. When measuring physical injury via the three categories of the need for medical care, time off from work, and time spent bedridden, women rank higher in every category.<sup>78</sup> In terms of psychological injuries, while abused men and women consistently display psychosomatic symptoms, abused women suffer greater depression and stress levels than abused men.<sup>79</sup>

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76. Steinmetz, *supra* note 6, at 504-06. For further discussion of Professor Steinmetz's work on female and male domestic violence, see *supra* notes 10-34 and accompanying text.

77. Relying upon the 1985 Family Violence Research Survey, it was concluded that 3% of male assaults caused injuries compared to injuries produced in only 0.4% of the cases involving female assault. Straus, *supra* note 50, at 69; see also Steinmetz, *supra* note 6, at 505.

78. These statistics were based upon the 1985 Family Violence Research Survey. See PHYSICAL VIOLENCE, *supra* note 14, at 152. According to the results regarding the need for medical care, 7.3% of women versus 1% of men who were the victims of "severe violence" as defined by the CTS scale required such attention. *Id.* at 157. Neither sex reported the need for medical care when victim to minor violence, as defined by CTS. *Id.* In response to the need to take time off from work, 19% of women versus 10% of men resorted to such a measure when victim to "severe violence." *Id.* When victim to minor violence, both sexes requested time off at the rate of 4%. *Id.* In regard to having to resort to bed rest, of "severe violence" victims, 22.8% of women required one or more days in bed, compared to 13.8% of male victims. *Id.* at 158. The need for bed rest was also broken down by minor and severe violence to reveal that when the violence was minor, 15.2% of women and 12.8% of men needed bed rest. *Id.* at 159. Commenting on the results, the researchers observed that the higher rate of female reaction did not conclusively indicate that women suffered greater injury. *Id.* at 158. Researchers cautioned that the data should be considered in conjunction with such factors as the lesser amount of humiliation suffered by women as opposed to men who are victims of domestic violence, as well as the relative ease in which women might be able to take time off from jobs which typically provided the family's second, lower wage and a more flexible schedule. *Id.* at 154-64. On the stigma associated with being a male victim of domestic violence, see *infra* notes 183, 285 and accompanying text.

79. The study initially found that of non-victimized individuals, men and women disproportionately displayed psychosomatic symptoms (26.8% of non-victimized women and 15.9% of non-victimized men displaying psychosomatic symptoms). PHYSICAL VIOLENCE, *supra* note 14, at 158-59. When studying abused men and women, psychosomatic symptoms were positively correlated to increased levels of domestic abuse. *Id.* However, abused

In addition to the higher risk of injury faced by abused women, the differing rates of injury also supply an argument for dismissing the statistical parity between the genders in their use of violence. Men are seen to possess the “single beating” advantage, as the mere threat of causing injury allows men to control women without physically having to raise a hand after the first beating.<sup>80</sup>

*D. Responding to The Critics: Why Female  
Violence Must Be Examined*

Acknowledging the damage differential in the domestic violence used by men and women may seem to end the need to study female violence.<sup>81</sup> Yet does it? A number of important practical and theoretical justifications militate against ignoring female violence. First, notwithstanding the “damage differential,” some important normative observations about men and women can be drawn from an acknowledgment of male and female violence. Given the statistical parity in the use of domestic violence,<sup>82</sup> there appears to be no basis for the traditional belief that women are either born or bred to be less physically aggressive than men. Likewise, the statistics do not bear out the “nagging” wife stereotype. Women are not more prone to engage in verbal abuse than men.<sup>83</sup> Moreover, the recognition of the difference in consequences between male and female violence does not diminish the fact that men and women bear similar intentions in regard to their inclination to engage in intimate violence.<sup>84</sup> In fact, their comparable intent leads to similar results when the physical strength difference between men and women is taken into account. Controlling for the “hand-to-hand” combat advantage of men by relying solely upon statistics measuring injury produced by domestic violence involving a weapon, the rate at which men are injured by

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men and women showed no significant difference in the amount of symptoms suffered once the differences in such symptoms as experienced by non-abused individuals were taken into account. *Id.* at 164.

In terms of depression levels, non-victimized women were generally more depressed than men (20.9% of non-victimized women and 13.7% of non-victimized men evidencing depression). *Id.* at 160-61. Yet women became disproportionately more depressed than men upon the introduction of increasing levels of severe domestic violence, with 58.3% of severely abused women and 29.8% of severely abused men evidencing depression. *Id.* In terms of stress levels, non-victimized women experienced greater levels of stress than men (25.2% of non-victimized women vs. 15.2% of non-victimized men evidencing stress). *Id.* at 160. Minor violence did not disproportionately raise either sex’s stress levels. *Id.* Yet, once faced with severe violence, women became disproportionately more stressed than men (61.1% of severely abused women and 33.9% of severely abused men evidencing stress). *Id.* at 160.

80. STRAUS ET AL., *supra* note 12, at 42; *see also* Straus, *supra* note 14, at 446.

81. Steinmetz, *supra* note 6, at 505 (discussing the idea of damage differential).

82. *Id.*

83. Ironically, statistical data reveals that men are as likely or more likely than women to engage in the “nagging” type verbal abuse. *Id.*

84. *Id.*

women is similar or greater than the rate at which women are injured by men.<sup>85</sup> Put succinctly by one commentator, “[a]pparently, it’s just a matter of style.”<sup>86</sup>

Second, focusing on the injury, rather than the assault, contradicts the understood campaign against wife-beating which has been to end wife abuse per se, not just the violence which produces injury.<sup>87</sup> To support a domestic violence policy restricted only to injury-produced violence would end the expectation of any legal response or social protection to noninjured victims.<sup>88</sup>

A third argument for resisting the effort to deny, defend, or minimize female abuse of men lies in recognizing that the decrease in male abuse of women is largely credited to the attention which has been given to male abuse of women since the earliest explorations of domestic violence. Increased treatment and prevention programs, counseling for male abusers, and shelters for abused women are amongst other important items credited for the significant reductions in male abuse of women.<sup>89</sup> Defining domestic violence as the abuse of women by men has brought a growing cultural intolerance for wife abuse, while there is reported to be little change in the tolerance of female violence.<sup>90</sup> In very real terms then, the failure to stigmatize or

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85. Philip W. Cook, *Female Violence Against Men Is a Serious Problem*, in DOMESTIC VIOLENCE: OPPOSING VIEWPOINTS 25, 29 (Tamara L. Roleff ed., 2000).

86. *Id.*

87. See Straus, *supra* note 50, at 69-70.

88. See FORD, *supra* note 35, at 23.

89. Other factors raised to explain reductions in male violence on women include changing family roles and improved economies. INTIMATE VIOLENCE IN FAMILIES, *supra* note 14, at 79. For further discussion of the history of funding and attention given to wife and child abuse and its role in reducing the abuse of women and children, see *id.* at 19-39. For further discussion of treatment programs, see *infra* notes 234-35, 239, 241, 243, 258 and accompanying text. For further discussion of shelters and victim services, see *infra* notes 235, 261, 263-76 and accompanying text.

90. The reported decline in the rates of male abuse of women and the lack of change in the rates of female abuse of men is matched by findings in attitudinal studies. In one study, data collected from four surveys over a twenty-six year period (from 1968 through 1994) was compared to measure the change in cultural norms toward domestic violence. Each survey included two critical questions: (1) whether it was acceptable for a husband to hit a wife, and (2) whether it was acceptable for a wife to hit a husband. Murray A. Straus et al., *Change in Cultural Norms Approving Marital Violence from 1968 to 1994*, in OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE 3, 6 (Glenda Kaufman Kantor & Jana L. Jasinski eds., 1997). A comparison of the responses for the twenty-six year survey period demonstrated that approval for a husband slapping a wife had “decreased sharply”—from 20% to 10% of all individuals (both men and women) approving such behavior. *Id.* at 7. By contrast, the approval given by both sexes for a wife slapping a husband remained “almost identical over the 26 years,” with little variance from the 20% approval figure measured in 1968 and again in 1994. *Id.* A breakdown of the approval rates by gender showed other similarities. *Id.* at 7-12. While approval rates for men slapping women had decreased with both sexes, men were consistently found to be more accepting of such behavior. *Id.* at 12-13. Similarly, while approval rates for women slapping men remained constant with both sexes, men were consistently found to be more accepting of such behavior. *Id.*

even acknowledge the female abuse of men allows and encourages its continuation.<sup>91</sup>

The significant decreases in the use and approval of male violence, in drastic contrast to the lack of change in use or approval of female violence, has led researchers to what appears to be a self-evident conclusion. “[S]ocial movements condemning violence against women, legal and institutional reforms, and systemic antiviolence educational efforts can produce major changes in public attitudes about violence and should therefore be expanded.”<sup>92</sup> However, even recommending “zero tolerance of violence by both men and women” does not necessitate complete insensitivity to the greater risk of injury which female victims of domestic violence face.<sup>93</sup> Yet an emphasis on the abuse of women by men is far different from demanding an exclusive focus on such abuse to the preclusion of the abuse of men by women. Indeed, even if motivated solely by an interest in ending wife or child abuse, it is still necessary to address the various forms family violence can take—including female violence. The abuse of men by women and the abuse of children by either parent are two forms of family violence which are directly related to any effort to systematically address wife abuse.<sup>94</sup> Consequently, a fourth argument for acknowledging and addressing the abuse of men by women is that it will ultimately work to end the abuse of women by men. Put in blunt utilitarian terms, female violence must be addressed in order to protect women as a man provoked by a violent female has the potential to inflict greater injury.<sup>95</sup>

This argument is somewhat controversial because the demand for self-control is placed solely on the female and seems tantamount to victim-blaming.<sup>96</sup> Such an objection may legitimately refute any ar-

91. See *supra* notes 20-22, 24-27, 30-32, 35, 37-41 and accompanying text (discussing the changing rates of violence per gender over time).

92. Straus et al., *supra* note 90, at 14.

93. *Id.*

94. For a discussion of the relation of wife abuse to other family violence, see STRAUS ET AL., *supra* note 12, at 97-122. For a recognition of the many other forms of family violence, see *infra* notes 297-300 and accompanying text.

95. Straus, *supra* note 50, at 79. For a discussion of the differences in the injury caused by abusive men and women, see *supra* notes 76-79 and accompanying text.

96. See Morse, *supra* note 59, at 252. In this respect, addressing the abuse of men by women in order to protect women from further abuse is similar to the “victim-blaming” criticisms which were levied at the early efforts to address the abuse of women by targeting the (non-violent) actions taken by female victims believed to trigger male violence. For various discussions of victim-blaming, see, for example, DOBASH & DOBASH, *supra* note 8, at 159-60 (cautioning against allowing the public to blame victims of violence); DONALD G. DUTTON, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 26 (1995); V. MICHAEL MCKENZIE, *DOMESTIC VIOLENCE IN AMERICA* (1995) (acknowledging domestic violence victim self-blaming ability); Barbara Hart, *Battered Women and the Criminal Justice System*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 98, 101 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (recognizing victims’ assumption of guilt for beatings suffered and batterers’ contribution to such feelings).

gument raised to look at female violence in order to protect women. However, this type of controversy does not prevent recognizing the effect of husband-beating on children. Regardless of the gender of the child or the violent parent, children who witness the violence of one parent on another are more likely to be violent in their adult relationships.<sup>97</sup> These findings therefore provide the basis for a fifth reason for supporting a gender-neutral effort to address spousal violence. Witnessing either husband-beating or wife-beating as a child is equally likely to breed a predisposition toward intimate violence.<sup>98</sup>

Finally, a wider look at family violence that includes an awareness of husband-beating will also allow a greater emphasis to be placed on the socio-cultural factors which teach violent tendencies.<sup>99</sup> Male-blaming can no longer be relied upon as the single explanation for the ills of society.

From such an array of reasons for addressing female violence, it may seem that no one should be against such an endeavor. Some reason should appeal to everyone. Acknowledging female violence arguably not only will protect men, but it will ultimately work to protect women and children. Social causes of family violence also seem more likely to be given serious attention. Moreover, an effort to address actions, rather than injury, maintains the integrity of traditional domestic violence policy. What then is the harm in targeting, discussing, or even revealing the abuse of men by women? Why has such abuse not been “explode[d]” in the manner Catherine MacKinnon demands the abuse of women by men must be treated?<sup>100</sup> Why does the denial continue?

Although the reactions against examining female violence may vary, the critics share key theoretical and practical motives which are often intertwined. It is these motives that not only account for the vehement rejection of efforts to study female violence (unless it is couched in the language of self-defense), but are also responsible for shaping our legal, cultural and social policies and norms on domestic violence. Looking at the development of domestic violence theory is

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97. STRAUS ET AL., *supra* note 12, at 99-101.

98. While such discussion is beyond the context of this Article's focus on husband-beating, it must be noted that the direct abuse of children is also directly linked to spousal abuse. For example, people who experience the most physical punishment as teenagers are four times more likely to be wife-beaters or husband-beaters than those not physically abused. *Id.* at 110. For further discussion of the childhood victimization of adult abusers and its creating a predisposition toward family violence, see Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 55, at 158.

99. Steinmetz, *supra* note 6, at 507. For discussion of the need to move away from male-bashing explanations in order to both further social progress and legitimize feminism, see *infra* Part V.

100. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 100 (1987).

the foundation for exploring such explanations and their implications.

### III. THE EXPLANATIONS

#### A. *Female Violence: A Theoretical Threat*

##### 1. *The Development of the Patriarchal Definition of Domestic Violence*

The “discovery” of domestic violence is credited to the battered women who came forward in the 1970s and began telling their stories in the new female focused community centers of England.<sup>101</sup> Of course, violence against women was certainly not a new phenomenon. It had not only been previously recognized, but also, on a sporadic and brief occasion, been delegitimized.<sup>102</sup> However, it is the 1970s’ attention to the domestic violence suffered by women which marked the beginning of the current effort to eradicate domestic violence. Consequently, it is this identification of domestic violence as a woman’s issue that shapes today’s understanding of domestic violence. Because of this background, the definition of domestic violence has developed as the use of physical power by men against women not motivated simply by a desire to inflict physical pain or even emotional suffering but rather as part of a larger effort by men to gain and maintain control over women.

While such a definition may now be accepted without question, the characterization of the male as sole user of physical force and the female as sole recipient was revolutionary in several important respects.<sup>103</sup> Recognizing domestic violence as a social phenomenon, the male as batterer/female as victim perspective largely dispelled earlier understandings of domestic violence as an illness suffered by both the batterer and the victim.<sup>104</sup> From this medical perspective, a

101. DOBASH & DOBASH, *supra* note 8, at 1-3; *see also* ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 173 (1993).

102. DOBASH & DOBASH, *supra* note 8, at 3 (noting the “fleeting” focus on domestic violence in the late nineteenth and early twentieth centuries).

103. As Lenore Walker described:

A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.

LENORE E. WALKER, THE BATTERED WOMAN xv (1979).

104. This sociological treatment of domestic violence is recognized to have coincided with the general growth of sociology and the civil rights movement of the 1960s. Yllö, *supra* note 52, at 50.

batterer's use of domestic violence had been explained as the product of illness.<sup>105</sup> Likewise, a victim's inability to leave a battering relationship was understood as a manifestation of her own masochistic or pathological nature.<sup>106</sup> Reacting to this limiting, medical jargon, an alternative definition of domestic violence was eventually found in Lenore Walker's "cycle of violence," with its ongoing pattern of tension building, acute battering and batterer contrition.<sup>107</sup> The recognition that a battered woman may stay in an abusive relationship for legitimate reasons including love, concern for her children, and fear of heightened violence upon separation was also welcomed as it further encouraged an end to victim blaming.<sup>108</sup>

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105. For a discussion of the early treatment of male battering as an illness and the gradual move from medical definitions to more sociological understandings of domestic violence, see DUTTON, *supra* note 96, at 61-77; DANIEL JAY SONKIN ET AL., *THE MALE BATTERER: A TREATMENT APPROACH* (1985); WALKER, *supra* note 103, at 205-50; *see also infra* note 106.

106. While much work has been done to correct these medical misconceptions, battered women remain subject to a host of overly simplified characterizations ranging from helpless victim to violence provocateur. For a recognition of the early medical stereotyping of battered women and its persistence today, see Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 343-44 (1995); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1882-85 (1996); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1301-02 (1993).

107. For the gradual development in understanding battered women from pathological and sadistic to more sociological definitions, see OLA W. BARNETT & ALYCE D. LAVIOLETTE, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 65-92 (2d ed. 2000); WALKER, *supra* note 103, at 18-54.

108. The myriad of reasons a domestic violence victim remains in the relationship has been widely discussed. For a discussion of the emotional difficulty in leaving due to an ongoing love for the batterer as well as the shame associated with leaving and publicly disclosing the relationship's violent nature, see, for example, DOBASH & DOBASH, *supra* note 8, at 145-46; WALKER, *supra* note 103, at 27 (recognizing the love which is restored during periods of contrition in the cycle of violence); Kimberlé Williams Crenshaw, *Panel Presentation on Cultural Battery*, 25 U. TOL. L. REV. 891, 893 (1995) (acknowledging that a victim of abuse does not want to leave, but simply wants the violence to stop); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 8 (1991) (acknowledging her reluctance to tell her own story).

On the fear of separation assault, see, for example, Mahoney, *supra* (addressing the fear of separation assault). For further discussion of separation assault, see *infra* notes 138, 169 and accompanying text.

On the victim's concerns regarding the children's physical safety and emotional well-being if removed from an abusive home, see DOBASH & DOBASH, *supra* note 8, at 148 (recognizing children are cited as the most common reason a battered woman stays in a relationship); Mahoney, *supra*, at 19 (recognizing that a mother's decision-making process includes calculating her spouse's and children's interests); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 614-15 (1986) (recognizing that a woman's connected nature tends to result in her making decisions regarding her own welfare in connection with consideration of her children's and spouse's interests).

On the economic issues associated with leaving, see CATHERINE T. KENNEY & KAREN R. BROWN, *NOW LEGAL DEF. & EDUC. FUND, REPORT FROM THE FRONT LINES: THE IMPACT OF*

While such work appreciably advanced our understanding of domestic violence, its ongoing focus on the physical aspect of domestic violence was soon criticized as secondary to the need to focus on the patriarchal dynamics surrounding the use of violence.<sup>109</sup> Such a perspective would properly emphasize that domestic violence “is not gender neutral any more than the economic division of labor or the institution of marriage is gender neutral.”<sup>110</sup> Replacing the cycle of violence, the “power and control” wheel provided a better means of depicting the gender driven nature of domestic violence and emphasized that physical violence formed only a part, albeit an important one, in the patriarchal scheme.<sup>111</sup> From a central hub of power and control, the wheel’s outer rim is formed by a circle of physical and sexual violence. This central power is then connected to the outer use of violence through spokes identified with such additional forces as using children, minimizing, denying, blaming, isolating, relying upon male privilege, coercing, threatening, intimidating, and abusing both

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VIOLENCE ON POOR WOMEN (1996); Martha F. Davis & Susan J. Kraham, *Protecting Women’s Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141 (1995).

On the cultural and racial concerns which complicate a decision to leave, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). That similar reasoning may also explain the decision of male victims of violence to remain has also been specifically recognized. Cook, *supra* note 85, at 30 (arguing the male victims’ concerns regarding child custody); Steinmetz, *supra* note 6, at 507. Instead of explaining the victim’s reaction, others have emphasized the need to focus on the perpetrator. See Hanna, *supra* note 106, at 1879-80; Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 305 (1997).

109. Mahoney, *supra* note 108, at 28-34 (criticizing the physical definition of physical violence given by such individuals as Lenore Walker, Mary Ann Douglas, Angela Browne, and Mildred Pagelow); *id.* at 53-55 (criticizing legal literature’s failure to focus on the “power and control, domination and subordination” dimensions of domestic violence as a result of the “traditional” acceptance of male domination); Meier, *supra* note 106, at 1317-22 (discussing the development of the patriarchal dynamics of domestic violence); see also G. Chezia Carraway, *Violence Against Women of Color*, 43 STAN. L. REV. 1301, 1305-06 (1991) (advancing the patriarchal definition of domestic violence as part of an overall effort to redefine violence against women of color in order to include “economic violence, cultural violence, legislative violence, medical violence, spiritual violence, emotional violence, and educational violence”).

The importance of social forces is likewise recognized by the family researchers in their study of both male and family violence. However, while acknowledging the patriarchal condition, their thrust is upon how socioeconomic forces can cause both men *and* women to behave violently. The external factors affecting both sexes include poor economic and employment conditions, as well as the social and media condonation of violence, racism, and sexism. See, e.g., INTIMATE VIOLENCE, *supra* note 14, at 194-206; THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE (Murray A. Straus & Gerald T. Hotaling eds., 1980); STRAUS ET AL., *supra* note 12, at 123-52.

110. Yllö, *supra* note 52, at 54.

111. The “power and control wheel” is part of the “Duluth Model” developed by the Duluth Domestic Abuse Intervention Project (DAIP) in Duluth, Minnesota. PENCE & PAYMAR, *supra* note 101, at 1-15. For further discussion of the critical impact of the “power and control wheel” on the treatment of domestic violence, see *infra* notes 247-55 and accompanying text.

emotionally and economically.<sup>112</sup> In combination, such tactics allow the wheel of power and control to be spun by men in their efforts to control women.<sup>113</sup> Violence, then, is not simply the male use of physical violence against women. Through the power and control wheel, domestic violence can more broadly be described as the male “way of ‘doing power’ in a relationship; battering is power and control marked by violence and coercion.”<sup>114</sup> Such a framework also allows for the controlling effects of the violence on women and the pervasive use of violence as a patriarchal tool to be highlighted. “A battered woman is a woman who experiences the violence against her as determining or controlling her thoughts, emotions, or actions, including her efforts to cope with the violence itself. Many, many women experience such violence in our society.”<sup>115</sup>

## 2. *Challenging Domestic Violence, Challenging Feminism*

### (a) *Through Theory*

Beyond serving as merely an academic change, the widespread acceptance of this association of domestic violence with male power and control has critical consequences for society’s treatment of domestic violence.<sup>116</sup> These very tangible results form an important part of this

112. PENCE & PAYMAR, *supra* note 101, at 3.

113. *Id.* at 1-15; *see also* Yllö, *supra* note 52, at 54-55.

114. Mahoney, *supra* note 108, at 93.

115. *Id.*

116. For a sampling of works from the volumes of entire books, chapters and articles explicitly devoted to the patriarchal use of domestic violence or male violence, see, for example, BARNETT & LAVIOLETTE, *supra* note 107; R. EMERSON DOBASH ET AL., CHANGING VIOLENT MEN (2000); DOBASH & DOBASH, *supra* note 8; DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES (UBC Press 1995); FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 55; JEAN GILES-SIMS, WIFE BATTERING: A SYSTEMS THEORY APPROACH (1983); JERRY M. GOFFMAN, SELF-HELP COUNSELING FOR MEN WHO BATTER WOMEN (1983); EDWARD W. GONDOLF & DAVID M. RUSSELL, MAN TO MAN: A GUIDE FOR MEN IN ABUSIVE RELATIONSHIPS (1987); EDWARD W. GONDOLF, MEN WHO BATTER: AN INTEGRATED APPROACH FOR STOPPING WIFE ABUSE (1985); NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS (1998); EDWARD JUKES, MEN WHO BATTER WOMEN (1999); LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION (N. Zoe Hilton ed., 1993); MACKINNON, *supra* note 100, at 85-92; PENCE & PAYMAR, *supra* note 101; ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES: THE DYNAMICS OF DOMESTIC VIOLENCE (1987); SONKIN ET AL., *supra* note 105; RICHARD A. STORDEUR & RICHARD STILLE, ENDING MEN’S VIOLENCE AGAINST THEIR PARTNERS: ONE ROAD TO PEACE (1989); WALKER, *supra* note 103; DAVID B. WEXLER, DOMESTIC VIOLENCE 2000: AN INTEGRATED SKILLS PROGRAM FOR MEN: GROUP LEADER’S MANUAL (2000); WOMAN BATTERING: POLICY RESPONSES (Michael Steinman ed., 1991); Cynthia Grant Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201 (1992); Donald G. Dutton & James J. Browning, *Power Struggles and Intimacy Anxieties as Causative Factors of Wife Assault*, in VIOLENCE IN INTIMATE RELATIONSHIPS 163 (Gordon W. Russell ed., 1988); Ruth E. Fleury, *Missing Voices: Patterns of Battered Women’s Satisfaction with the Criminal Legal System*, 8 VIOLENCE AGAINST WOMEN 181 (2002); Carol Gregory & Edna Erez, *The Effects of Batterer Intervention Programs: The Battered*

discussion.<sup>117</sup> However, before discussing the impact of the definition, it is important to remain at the theoretical level for a moment longer in order to fully grasp why there is such resistance to acknowledging female violence. Domestic violence is not viewed as just another tool used by men in the subordination of women. Rather, it is considered “one of the most brutal and explicit expressions of patriarchal domination.”<sup>118</sup> Such strong roots in patriarchy have produced an equally strong force against accepting female violence. Acknowledging female violence risks negating the very basis of the existing domestic violence definition.

The consequences for domestic violence theory, however, are only a small part of a much larger threat. Domestic violence represents the prized gemstone of feminist theory’s fundamental message that our legal, social, and cultural norms are fashioned in a manner which permit men to engage in a constant and pervasive effort to oppress women by any and every available means. A successful challenge to the patriarchal definition of domestic violence may thus undermine feminism itself. To remain true to feminist theory, no aspect of male-female relations can be considered without first accepting the male as all powerful and the female as powerless.<sup>119</sup> The gender hierarchy is omnipresent.<sup>120</sup>

(b) *Through Methodology*

Given this dynamic, the suggestion that women may rely upon physical violence for anything other than self-defense must be rejected. However, the implications of grounding domestic violence in feminist theory go beyond prohibiting any consideration of female violence. Feminist theory also provides the means for discrediting

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*Women’s Perspectives*, 8 VIOLENCE AGAINST WOMEN 206 (2002); Kurz, *supra* note 53; Mahoney, *supra* note 108; Elizabeth M. Schneider, *Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245 (1995); Malinda L. Seymore, *Isn’t It A Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032 (1996); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). See also *supra* note 8 and *infra* notes 254, 294 (noting other sources devoted to a patriarchal understanding of domestic violence).

117. While the definition permeates our legal, social, and medical institutions, I have focused within this Article on discussing the practical effects such definition has upon the criminal justice system (particularly on arrest, prosecution, punishment, and victim services). See *infra* notes 144-290 and accompanying text.

118. DOBASH & DOBASH, *supra* note 8, at ix.

119. MACKINNON, *supra* note 100, at 170.

120. As one feminist acknowledged:

[F]rom a feminist perspective, sexism is not just a factor in domestic violence. For feminists, gender is one of the fundamental organizing principles of society. It is a social relation that enters into and partially constitutes all other social relations and activities, and pervades the entire social context in which a person lives.

Kurz, *supra* note 53, at 97.

any methodology employed to demonstrate the existence of female violence. By relying upon the definition of domestic violence as a patriarchal tool of control, any methodology which is not similarly grounded within this contextual framework can be rejected outright. Specifically, studies categorized as quantitative are deemed “inherently patriarchal” and therefore invalid because their dependence upon scientific, empirical data does not account for the history and context of male domination over women.<sup>121</sup> By contrast, qualitative studies that depend upon a more clinical approach (which include the personal, in-depth interviewing of battered women) are considered to yield more accurate findings because of their fundamental commitment to a feminist perspective of domestic violence.<sup>122</sup>

At the risk of being an overly-crude distinction, the qualitative/quantitative dichotomy in the sociological study of domestic violence explains the criticisms of various CTS and non-CTS empirical studies which have reported on the violence of women.<sup>123</sup> However, at a deeper level, the divide can also be appreciated as a predictable result of the liberal-feminist tension which cuts across all fields of study. Qualitative research easily links with liberalism and its commitment to neutral principles and abstract rules on the one hand, while quantitative research adheres to feminism and its emphasis upon personal relations and context on the other.<sup>124</sup> The feminist sociologist’s critique of objective, positivist research as providing

121. Kersti Yllö, *Political and Methodological Debates in Wife Abuse Research*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 55, at 31.

122. Having relied upon both qualitative and quantitative approaches in the study of domestic violence, sociologist Kersti Yllö speaks authoritatively on the philosophical division and argues for extracting and combining the strengths of each method. Her work includes, for example, a quantitative study demonstrating the relation between domestic violence and the social, economic, political and legal status of women. *Id.* at 30-36.

123. Like any simplistic distinction, a certain overlap between the quantitative and qualitative methodologies already exists through, for example, the quantitative study’s reliance upon personal interviews and existence of researcher biases and the qualitative study’s inevitable dependence on numeric data and objectifying of interviewees. *See id.* at 39-48 (discussing the strengths and weaknesses of the two approaches in domestic violence work).

124. For a variety of studies comparing liberalism and feminism, see, for example, Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS J. WOMEN CULTURE & SOC’Y 635 (1983) (arguing for an outright replacement of liberal thought with feminist theory); Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (finding many strands of feminism within liberalism); Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363 (1996) (criticizing liberalism’s facially neutral themes of liberty, equality, and privacy as mechanisms for supporting white supremacy); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (proposing an evolution from liberalism to feminism); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (arguing for the integration of liberalism and feminism); Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990) (advocating an integration approach to liberalism and feminism).

“methodological tickets to scientific respectability but deliver[ing] intellectual blinkers and mindless adherence to sterile sophistication” while failing to account for the experiences of women<sup>125</sup> resonates in the charges of radical legal feminist Catherine MacKinnon. “Liberal legalism is . . . a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.”<sup>126</sup>

Once this connection between research methods, definitions of domestic violence, and philosophical perspectives is made, the escalating costs to feminist theory can be well understood. However, the costs become even more real when the practical impact is included in the calculus. Defining domestic violence beyond the threat to women is seen in and of itself as a threat to women’s lives.

### *B. Female Violence: A Practical Threat*

#### *1. Financial Concerns*

For real-world domestic violence advocates, defining domestic violence as a woman’s problem is a practical, not an academic, decision. In a world of infinite problems but finite resources, competition for adequate attention and funding is terrific. Recognition demands prioritization. By limiting the definition of domestic violence to male violence, domestic violence advocates have been able to frame the issue in a manner narrow and sympathetic enough for it to remain high on the public agenda. Broadening the definition to include female violence risks diluting the effectiveness of domestic violence funding campaigns, as female violence as well as male violence would then have to be targeted with, presumably, the same fixed amount of money.<sup>127</sup> As the commentators honestly explain, given the “fierce competition” for funding,

[i]f we acknowledge the existence of battered husbands, then the funding designated for programs to assist battered women will be cut further because monies will be directed at programs for battered men. Thus, many radical feminists have fought for years to keep battered husbands closeted so that the small amount of money that was available for wife abuse would not be jeopardized.<sup>128</sup>

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125. Yllö, *supra* note 121, at 45 (quoting R. Emerson Dobash & Russell P. Dobash, *The Context-Specific Approach*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 261, 263 (David Finkelhor et al. eds., 1983)).

126. Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, in *FEMINIST JURISPRUDENCE* 610, 610 (Patricia Smith ed., 1993).

127. Kurz, *supra* note 53, at 99 (recognizing that perceiving women as batterers would require diverting money from battered women’s programs in order to assist battered men).

128. *INTIMATE VIOLENCE*, *supra* note 14, at 188.

Arguably, such practical consequences may be so great that even those willing to accept the violent tendencies of women may legitimately favor concentrating on the battered woman's cause. The severity of the injuries suffered by battered women and the subordinate position traditionally held by women in the family are justifiable priorities.<sup>129</sup> However, emphasizing the battered woman's cause over the issue of battered men is far different than the current strategy that, instead, focuses on battered women by denying the existence of battered men. Practical motivations for denying the possibility of female violence altogether become more complicated.

## 2. *Marketing Dilemmas*

In domestic violence circles, the image of a battered woman as a helpless victim is routinely disavowed as overly simplistic and failing to account for the multitude of strengths shown by victims of violence.<sup>130</sup> However, notwithstanding such theoretical posturing, the "helpless victim" stereotype remains very much a part of the common understanding of domestic violence and continues to fit well within the feminists' overriding message of woman as subordinate.<sup>131</sup> A woman's ability to act aggressively challenges this simplicity.<sup>132</sup> Consequently, when it comes to funding, battered women advocates are

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129. As one of the authors of the CTS studies remarked:

Most people feel that social policy should be aimed at helping those who are in the weakest position. Even though wives are also violent, they are in the weaker, more vulnerable position in respect to violence in the family. This applies to both the physical, psychological, and economic aspects of things.

STRAUS ET AL., *supra* note 12, at 44.

For a comparison of the injuries suffered by men and women and the general acknowledgment that the injuries suffered by battered women are greater than those suffered by battered men, see *supra* Part II.C.

130. Kurz, *supra* note 53, at 99.

The helpless victim stereotype of battered women is built upon the notion of learned helplessness which suggests that a battered woman is unable to leave a violent relationship because she has been conditioned, over time, to be weak and passive in order to survive.

On learned helplessness, see BARNETT & LAVIOLETTE, *supra* note 107, at 15-38, 117-38; EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS (1988); WALKER, *supra* note 103, at 45-48. For a recognition of the problems raised by stereotypes of domestic violence, see Cahn & Meier, *supra* note 106, at 346-54; Hanna, *supra* note 106, at 1882-85.

131. As part of her critique of the CTS studies, Yllö holds the studies' researchers accountable for damaging the feminist agenda by releasing their findings. She openly argues that, as sociologists committed to ending domestic violence, they should have foreseen the controversy such statistics would unleash. In contrast to their non-contextual approach, Yllö openly praises feminists whose commitment to helping women determines what ideas and arguments are released into the "marketplace of ideas." Yllö, *supra* note 121, at 42.

132. Recognizing that a woman's ability to act violently does not refute the reality that women are battered is central to the challenge of acknowledging the violent capacities of women. For a discussion of how both the violent behaviors of men and women should be acknowledged and addressed, see *infra* Part V.

willing to promote a stereotype which, in other contexts, is readily recognized as inaccurate.

### 3. *Vindictive Possibilities*

Sympathetic to the interest in protecting women who are more likely than men to suffer injury, perhaps this strategic depiction of “woman as victim” has justification. However, not every motivation may be understood as so sincere. At least one author has argued that the treatment of female violence by feminists—be it to deny, defend, or minimize—is not a complicated matter at all. Rather, it is purely an act of revenge. Angry over a history of domination, feminists have discredited female violence in order to give women a secret way to strike back. From this perspective, the critiques of female violence are “not feminist critiques, but justifications of violence by women in the guise of feminism.”<sup>133</sup>

## IV. LEGAL IMPLICATIONS

### A. *Academic*

From theoretical concerns, to financial and marketing strategies, to perhaps even vindictive desires, the treatment of domestic violence as yet another, if not the central, manifestation of our patriarchal society, has had definite social implications.<sup>134</sup> Given the natural impact of social norms on legal institutions, it is not surprising to find that the patriarchal definition of domestic violence has had a pervasive influence upon our legal system. Feminist scholars in the legal arena, like their counterparts in the social arena, have labored to identify and eradicate the law’s perpetuation of female oppression. Defining the law’s approach to domestic violence, as well as such issues as pornography, sexual harassment, and rape within the patriarchal framework, legal feminists share the more socially-oriented feminists’ objective of addressing each issue not simply as an isolated, unique phenomenon, but rather as part of an overarching scheme to eradicate the gender hierarchy and to empower women.<sup>135</sup> The patriarchal definition of domestic violence is integral to such a vision.

The domestic violence as gender violence characterization underlies the full array of legal scholarship on domestic violence. In practice-oriented scholarship, the patriarchal understanding of domestic violence is championed as a means of sharpening lawyering skills.<sup>136</sup>

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133. Straus, *supra* note 50, at 83.

134. See *supra* Part III.B (discussing such social motivations).

135. MACKINNON, *supra* note 100, at 22.

136. See, e.g., Meier, *supra* note 106, at 1325 (encouraging the adoption of an interdisciplinary approach in law school domestic violence clinics through the integration of psy-

In more theoretical scholarship, the patriarchal definition is urged as a means of shaping substantive legal issues. For example, the patriarchal definition is critical to distinguish criminal violence from the self-defense theory of battered women's syndrome.<sup>137</sup> Building upon the self-defense theory for women who kill, Professor Mahoney's work on separation assault illustrates the fundamental male-power definition of domestic violence. Relying upon the separation assault theory and its realization of the greater risk of violence associated with leaving one's abuser, Mahoney explains a woman's use of violence not as a choice, but rather as the only means of escape.<sup>138</sup> Mahoney's separation assault theory defends women who resort to violence while providing a strong response to the ever-persistent question, "Why doesn't she just leave?"<sup>139</sup> Understanding domestic violence as simply another patriarchal means of "doing power" with the family, battered women are without the power to leave.<sup>140</sup> Consequently, separation assault and its use in explaining battered women self-defense theories fits well within the subordination continuum experienced by women on account of our patriarchal familial and social structures.<sup>141</sup>

Yet legal literature and its influence on such issues as battered woman's syndrome is only one small example of the influence of feminist domestic violence theory on the law. Genderizing the use of domestic violence is openly and widely promoted as the means of achieving greater legal redress for battered wives from a full range of legal contexts.<sup>142</sup> A critical examination of the criminal response to

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chological and legal perspectives of domestic violence as a instrument of male power); Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993) (arguing for the greater use of narratives about women and people of color in the domestic violence arena in order to bring legal and social reform).

137. For a sampling of the literature linking the battered woman's syndrome and the male use of domestic violence, see WALKER, *supra* note 64, at 55-70; Meier, *supra* note 106, at 1316-17; Walker, *supra* note 64. For an earlier discussion of battered woman's syndrome and its lack of statistical support from domestic violence studies see, *supra* notes 64-69 and accompanying text.

138. Mahoney, *supra* note 108, at 65-66:

Separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.

139. For further discussion of the reasons women are traditionally seen as unable to leave a violent relationship, see MCKENZIE, *supra* note 96, at 53; Meier, *supra* note 106, at 1317-18.

140. Mahoney, *supra* note 108, at 93-94.

141. *Id.*

142. Such goals run the gamut—from the development of pro-arrest policies for male offenders, to increased criminal prosecutions of wife-beaters, to the provision of civil protective orders for battered wives, to criminal sanctions for violations of such orders, and to

domestic violence quickly reveals the success of such efforts. From the arrest, prosecution, and punishment of batterers, to the services offered to victims, all aspects of our legal response to domestic violence attest that domestic violence is controlled by a feminist state.<sup>143</sup>

### B. *The Feminist State Of Domestic Violence*

#### 1. *Arrest*

##### (a) *The Development of Arrest Policies and Theories: The Minneapolis Experiment and U.S. Attorney General's Report*

When domestic violence first began to receive public attention, mediation prevailed as the standard police response.<sup>144</sup> Arrest, at least in the misdemeanor context, was the tool of “last resort.”<sup>145</sup> Yet, recognizing that the power differential typically associated with domestic violence made mediation completely ineffective, by the late 1970s, women’s advocacy groups began lobbying for greater use of arrest.<sup>146</sup> Today, while arrest is still not the predominant response, every state has adopted laws and policies which endorse the greater use of arrest.<sup>147</sup>

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a heightened concern for domestic violence in custody cases. Meier, *supra* note 106, at 1304; see also EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE (2d ed. 1996); DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 96. For a critique of the one gender dimensional understanding of domestic violence and its impact on our social, legal, and cultural institutions, see *infra* Part IV.B.

143. Certainly, domestic violence and its treatment are grappled with in civil contexts (such as child custody, alimony, civil restraining orders, and tort liability), as well as in a much wider variety of criminal issues (including spousal testimonial privileges and self-defense theories) and in non-legal contexts (such as medical care). However, for the purpose of writing a manageable article, I have chosen to focus on these four basic criminal matters. For feminist coverage on this broader range of issues, see generally, BUZAWA & BUZAWA, *supra* note 142 (addressing a variety of criminal law contexts influenced by domestic violence); CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW (2001) (providing legal textbook coverage of a range of domestic violence issues); NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW (1996) (covering domestic violence issues in a law school text); Demie Kurz & Evan Stark, *Not-So-Benign Neglect: The Medical Response to Battering*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 55, at 249 (discussing the medical community’s response to domestic violence); Meier, *supra* note 106 (promoting the use of feminist advocacy skills when representing victims of domestic violence); Seymore, *supra* note 116 (discussing the conflict of spousal immunity provisions and domestic violence).

144. Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 10 (1992).

145. *Id.*

146. *Id.*

147. The breadth of such laws varies widely. By 1992, fifteen states and Washington, D.C. had moved to enact mandatory arrest laws in all probable cause incidents. Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 96, at 43, 44. In other jurisdictions, while arrest is not mandatory, it is often encouraged as the “preferred response.” Such developments are often accompanied by the abolition of the “in-presence” requirement for arrest in

While the lobbying efforts of women's groups clearly influenced this development, the occurrence of three events in 1984 are often credited as being directly responsible for producing the dramatic turnaround in police response to domestic violence. The year was marked by the publication of the Minneapolis Experiment findings,<sup>148</sup> the release of the U.S. Attorney General's Family Violence Task Force recommendations,<sup>149</sup> and the decision in *Thurman v. City of Torrington*.<sup>150</sup> None of these three events conclusively found that arrest deters or prevents domestic violence. However, in unique ways, each event was nevertheless relied upon to promote arrest as the least costly response to domestic violence.

In studying the effectiveness of arrest as used by police in Minneapolis, the Minneapolis Experiment suggested that arrest served as a real deterrent to domestic violence.<sup>151</sup> Based on their findings, the researchers recommended the adoption of warrantless arrest by all states and the presumption in favor of arrest as standard police

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the event of misdemeanor domestic violence such as simple assault and battery. David Hirschel & Ira W. Hutchison, *The Relative Effects of Offense, Offender, and Victim Variables on the Decision to Prosecute Domestic Violence Cases*, 7 VIOLENCE AGAINST WOMEN 46, 47 (2001); Sherman, *supra* note 144, at 15. By 1998, all fifty states authorized warrantless arrest for when probable cause exists to show that a misdemeanor domestic violence act has occurred or that a restraining order has been violated. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1518 n.46 (1998). For a general discussion of changing arrest policies from 1970 to 1990, see Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992).

148. For the original report on the Minneapolis Experiment, see Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

149. ATT'Y GEN. TASK FORCE ON FAM. VIOLENCE: FINAL REP. (1984). For further discussion, see *infra* note 155 and accompanying text.

150. 595 F. Supp. 1521 (D. Conn. 1984). For a recognition of the combined influence of these events, see, for example, Nancy Egan, *The Police Response to Spouse Abuse: A Selective, Annotated Bibliography*, 91 LAW LIBR. J. 499, 502 (1999); Hanna, *supra* note 106, at 1859.

151. The study was based upon 314 cases in which the Minneapolis police had probable cause to believe that an incident of misdemeanor domestic violence had occurred. Sherman, *supra* note 144, at 18. However, rather than arresting in all cases, the study relied upon a lottery system in which police were randomly required to respond by either arresting the suspect, advising the parties, or sending the suspect away from the home upon threat of arrest. *Id.* at 16. In a six month follow up period, about 10% of the arrested suspects as compared to roughly 20% of the non-arrested suspects were reported to the police as having committed another act of domestic violence. *Id.* at 19. While not statistically significant, the roughly 20% of the non-arrested suspects who committed another act of domestic violence broke down to 19% of the advised suspects and 24% of the suspects who were sent away from the home. *Id.*

For the original report on the Minneapolis Experiment, see Sherman & Berk, *supra* note 148. For other later discussions, see Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 L. & SOC'Y REV. 117 (1989).

policy.<sup>152</sup> However, the researchers also recognized the limited nature of their study. They cautioned against mandatory arrest and encouraged replication studies.<sup>153</sup> Five replication studies ultimately followed and were much more equivocal on the effectiveness of arrest as a domestic violence deterrent.<sup>154</sup> Yet the replication studies had little practical impact. Ignoring the skepticism of the original experiment's authors and without waiting for the further studies, the U.S. Attorney General released his recommendation in favor of warrantless arrest and arrest as the "preferred response" within four months of the Minneapolis Experiment.<sup>155</sup>

The Minneapolis Experiment and the replication studies were evenly divided in their results—one half finding arrest to be a deterrent and the other half finding arrest to be a promoter of domestic violence.<sup>156</sup> However, even the studies' full release and review did little to sway many domestic violence advocates from their seemingly intuitive commitment to some policy of mandatory, presumptive, or

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152. Sherman, *supra* note 144, at 21-22. For discussion of the eventual adoption of warrantless arrest by all the states, see Hanna, *supra* note 147, at 1518 n.46. *See also supra* note 147 and accompanying text (discussing state developments in arrest policies).

153. Sherman, *supra* note 144, at 21-22.

154. Like the Minneapolis Experiment, the replication studies were also sponsored by the National Institute of Justice. *Id.* at 25. The five studies were conducted in Milwaukee, Omaha, Charlotte, Colorado Springs, and Miami (Metro-Dade). Only the two experiments undertaken in Colorado Springs and Miami concluded that arrest had a deterrent effect as the original experiment had found. *Id.* at 25, 32. The Milwaukee, Omaha, and Charlotte studies found that arrest correlated with an escalation in violence. *Id.* at 25. For a brief comparison of the initial Minneapolis Experiment, with the five replication studies and their varying methodologies, see JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 13-15 (1996); Hirschel & Hutchison, *supra* note 147, at 46; Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 222-38 (1992); Schmidt & Sherman, *supra* note 147, at 44-52; Sherman, *supra* note 144, at 25.

For individual discussions of the five replication studies, see Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170 (1992) (on the Colorado Springs experiment); Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spouse Assault*, 83 J. CRIM. L. & CRIMINOLOGY 120 (1992) (on the Omaha experiment); J. David Hirschel & Ira W. Hutchison, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73 (1992) (on the Charlotte experiment); Anthony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOC. REV. 691 (1992) (on the Miami experiment); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992) (on the Milwaukee Experiment).

155. *See* ATT'Y GEN. TASK FORCE ON FAM. VIOLENCE: FINAL REP., *supra* note 149, at 17. For discussions of the U.S. Attorney General's report, see David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in *LEGAL RESPONSES TO WIFE ASSAULT*, *supra* note 116, at 127, 148-49; Hanna, *supra* note 147, at 1526; Sherman, *supra* note 144, at 3.

156. *See supra* note 151 and accompanying text.

preferred arrest.<sup>157</sup> Today, the support for arrest remains firm despite the recognition that mediation between the parties continues to be the more likely police response.<sup>158</sup> Rather than simply relying upon arrest to end domestic violence, arrest is argued to be the first critical link in a “coordinated response” of various criminal and social agencies which must respond collectively and aggressively against domestic violence.<sup>159</sup> Emphasizing the need to send a message of community intolerance, arrest supporters promote the importance of arrest as a general deterrent to domestic violence despite its failure as a deterrent in specific instances.<sup>160</sup> Objectives other than deterrence are also advanced. Just as the effectiveness of arrest is not considered in determining whether or not to arrest in non-domestic situations, pro-arrest advocates argue that the effectiveness of arrest is not a relevant consideration in the domestic violence context.<sup>161</sup> Arrest is favored because it marks a “get tough” attitude toward domestic violence.<sup>162</sup> Pro-arrest policies consequently take on a symbolic

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157. In commenting on reactions to the various studies, a principal author of the Minneapolis experiment found that, “[t]he Minneapolis findings stirred enormous interest by a wide range of writers and editorialists, who hailed the results as a breakthrough. The replication results received grudging acceptance in some of those quarters, and complete silence in most others.” Sherman, *supra* note 144, at 44-45 (citations omitted). While advocates in support of arrest have held this position despite the studies’ conflicting findings, this belief seems to be supported by more recent statistical analysis of all six studies which found that arrest was associated with lower rates of repeat violence through a variety of measures. See Christopher D. Maxwell et al., *The Effects of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program*, NAT’L INST. JUST.: RES. BRIEF, July 2001, at 1, 9.

For discussion of the opposition to arrest, see *infra* notes 164-69 and accompanying text.

158. A more recent national study based upon data drawn from the 1992 through 1994 National Crime Victimization Surveys (NCVS) on personal and household victimization similarly concluded that police are less likely to arrest in cases of intimate assault than in other assault cases. While the study was limited to male-on-female violence, it also reported that in cases of intimate violence the probability of arrest increased: (1) with the increased age of the victims or offenders; (2) when the victim is white; (3) when the offender is black; (4) when the offender is under the influence of drugs or alcohol; (5) when weapons are involved; and (6) with the increased wealth of the victim. Edem F. Avakame & James J. Fyfe, *Differential Police Treatment of Male-on-Female Spousal Violence: Additional Evidence on the Leniency Thesis*, 7 VIOLENCE AGAINST WOMEN 22, 29-34 (2001); see also Hanna, *supra* note 147, at 1516-19 (noting that the inclination against arrest in the domestic violence context appears to continue although pro-arrest policies are increasing).

159. Lerman, *supra* note 154, at 220-24; see also Bowman, *supra* note 116, at 202; Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 212-16 (1992); Barbara J. Hart, *Arrest: What’s the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207, 211 (1997).

160. Bowman, *supra* note 116, at 206; Frisch, *supra* note 159, at 209; J. David Hirschel & Ira W. Hutchison, *Realities and Implications of the Charlotte Spousal Abuse Experiment*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 147, at 54, 80; Lerman, *supra* note 154, at 225; Daniel D. Polsby, *Suppressing Domestic Violence with Law Reforms*, 83 J. CRIM. L. & CRIMINOLOGY 250, 252 (1992); Zorza, *supra* note 147, at 72.

161. Frisch, *supra* note 159, at 213; Lerman, *supra* note 154, at 224.

162. Sherman, *supra* note 144, at 45. For a direct criticism of criminal efforts in the domestic violence context which may have only symbolic value, see Hanna, *supra* note 147,

importance, for they reject the traditional treatment of domestic violence as a private matter and openly acknowledge domestic violence as a public crime. In this respect, the pro-arrest position of many feminists can be easily understood as it is consistent with the broader campaign of feminists to “explode” the private/public dichotomy which has historically been used to relegate women’s issues to the private, thereby preventing any legal response.<sup>163</sup>

While support for arrest is strong, the inconsistent nature of the studies on arrest has resulted in some opposition to arrest. Not all domestic violence scholars unequivocally support arrest. Ironically, today’s most notable critics of arrest are the authors of the original Minneapolis Experiment. While still in favor of warrantless arrest, the researchers are strongly against mandatory arrest laws. Believing mandatory arrest policies only decrease violence when implemented against persons without strong social connections that could be jeopardized by arrest, the researchers go so far as to recommend the repeal of mandatory arrest laws in communities with “substantial ghetto poverty populations with high unemployment rates,” and to suggest returning to greater police discretion combined with increased reliance on such non-criminal responses as shelters and treatment programs for victims and offenders.<sup>164</sup> Feminists concerned with the limited value of arrest can also be found. Some feminists critique the emphasis on arrest for its failure to address the “sexual inequality, coercive control, and entrapment” dynamics surrounding

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at 1525 (noting the illusory nature of “get tough” criminal efforts which are allowing offenders to “get off”).

163. MACKINNON, *supra* note 100, at 100. The private/public domestic violence dichotomy and the effort to treat domestic violence as a public act has received terrific attention. See, e.g., Honorable Karen Bunstein, *Naming the Violence: Destroying the Myth*, 58 ALB. L. REV. 961, 964-65 (1995) (arguing the failure to recognize domestic violence as a public issue allows for its tolerance); Hanna, *supra* note 106, at 1869-77, 1907 (discussing the feminist public/private dichotomy and aggressive prosecution of batterers as a means of recognizing domestic violence as a public crime rather than a private matter); Hanna, *supra* note 147, at 1509 (furthering arguments for aggressive action against batterers through a discussion of stiffer sentencing standards); Mahoney, *supra* note 108, at 11-13 (acknowledging society’s denial of domestic violence); Schneider, *supra* note 116, at 1250-51 (discussing the need to reconceptualize domestic violence as a social problem in need of a public solution); Schneider, *supra* note 108, at 645-48 (outlining the growing treatment of domestic violence as a public harm); Seymore, *supra* note 116, at 1070-73 (discussing the spousal immunity doctrine in light of the private versus public domestic violence debate); Siegel, *supra* note 116, at 2154 (discussing the struggle against marital violence being regarded as a right of privacy and the “modernization” of arguments which allow for the perpetuation of domestic violence); Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153 (1993) (arguing in favor of a limited sphere of privacy in order to enhance autonomy and other values).

164. Schmidt & Sherman, *supra* note 147, at 51. For a full discussion of such class concerns, see Lawrence W. Sherman et al., *From Initial Deterrence to Long-Term Escalation: Short-Custody Arrest for Poverty Ghetto Domestic Violence*, 29 CRIMINOLOGY 821 (1991).

domestic violence.<sup>165</sup> In an effort to maintain domestic violence characterized as a crime of patriarchy, feminist critics also oppose more stringent arrest policies as they believe female victims of domestic violence will end up the ones at greater risk of arrest.<sup>166</sup> Other victim-related concerns are also raised. The use of aggressive arrest policies are feared likely to backfire in communities where cultural and social norms dictate against taking any highly visible public action against one's abuser, thus discouraging a victim who might otherwise call the police for limited counseling and assistance from calling at all.<sup>167</sup> Similarly, aggressive arrest policies are criticized for their risk of discouraging victims from seeking police assistance when they believe arrest could threaten the batterer's employment, thereby threatening the victim's and family's economic stability.<sup>168</sup> In the most general sense, by ignoring the individual victim's unique situation and feelings regarding personal safety, and the effectiveness of arrest, "forceful" legal responses such as mandatory arrest may legitimately be characterized as "revictimizing" the victim.<sup>169</sup>

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165. Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 96, at 115, 125.

166. In raising such a concern, Linda Mills relied upon a Los Angeles study, which found that while the number of men arrested doubled, the number of women arrested quadrupled with the implementation of mandatory arrest. LINDA G. MILLS, *THE HEART OF INTIMATE ABUSE: NEW INTERVENTIONS IN CHILD WELFARE, CRIMINAL JUSTICE, AND HEALTH SETTINGS* 50 (Albert R. Roberts ed., 1998). Interestingly, the statistics were relied upon without any effort by Mills to determine whether the women might have been properly arrested for abusive behavior. *See id.* A similar study noting the increase in dual arrest and the risk such arrest presents to battered women was also conducted in Connecticut. *See* Margaret E. Martin, *Double Your Trouble: Dual Arrest in Family Violence*, 12 J. FAM. VIOLENCE 139 (1997).

The failure of such criticisms to take into account the possibility that the women arrested for violence may not always simply be victims is consistent with this Article's general premise that women are implicitly believed not capable of committing domestic violence.

167. Kelly, *supra* note 108, at 311-12; Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 680-82 (1998).

168. On the acknowledgment of the economic considerations that may deter a victim from seeking assistance, see, for example, Hirschel & Hutchison, *supra* note 147, at 47. As a corollary, it is also acknowledged that victims may have a difficult time finding or maintaining employment due to such factors as having limited child care alternatives, showing poor employment histories due to prolonged domestic violence, and suffering from low self-esteem or post traumatic stress disorder. Davis & Kraham, *supra* note 108, at 1150-55.

169. For revictimization concerns brought on by a state's unilateral decision to prosecute, see Bowman, *supra* note 116, at 203-05; Hanna, *supra* note 106, at 1884. For related discussions, see Kelly, *supra* note 108, at 321 (discussing revictimization in federal government's decision to deport victim's batterer); Meier, *supra* note 106, at 1333-34 (discussing the need for domestic violence advocates to take care to avoid "usurping [the battered woman's] autonomy and decisionmaking").

While the fear of increased violence may be specifically associated with arrest, it is more generally associated with any efforts made by the victim to leave or separate from the abuser. For discussion of separation assault, see *supra* note 138 and accompanying text.

In setting out this variety of opinions, the effort here is not to resolve the debate over the efficacy of arrest. Rather, regardless of the position on arrest one may ultimately adopt, the objective here is simply to reveal the gender biases running throughout police practices and legal standards of liability, and to argue that such biases must be acknowledged in any sincere effort to effectively utilize arrest.

(b) *The Gendered Promotion of Arrest*

When it comes to arrest, female domestic violence offenders are simply not considered. As one of the arrest replication experiments candidly noted, female offenders were not included in the study because they were considered not to pose any danger.<sup>170</sup> Their exclusion from the study clearly implied that arrest could be used in a more discretionary manner by the police when it came to female offenders than it could be in the case of male offenders.<sup>171</sup> Such an assertion seems glaringly inconsistent with the experiment's authors' later conclusion that despite any inconclusive findings on the effectiveness of arrest, arrest remains a "more conscionable choice than non-arrest" because of the desire to communicate to men, women and children that domestic violence is unacceptable.<sup>172</sup> While such remarks and oversights might be disregarded as mere political commentary, other evidence clearly demonstrates that police ignore the violence perpetrated by women and that such inaction is judicially endorsed.

(c) *The Statistics*

As part of the second National Family Violence Survey, researchers included a series of questions directed at men and women who had been involved in some form of intimate violence in which they had called the police for assistance.<sup>173</sup> While arrest was gaining ac-

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On concerns regarding the safety of a victim's children upon separation, see *supra* note 108 and accompanying text.

170. Hirschel & Hutchison, *supra* note 160, at 65.

171. *Id.*

172. These remarks were made in conjunction with the Charlotte replication experiment which found that arrest did not deter domestic violence. *Id.* at 80 (quoting J.D. HIRSCHEL ET AL., CHARLOTTE SPOUSE ASSAULT REPLICATION PROJECT: FINAL REPORT, 159-69 (1991)). For a discussion of the Charlotte replication study and the other arrest experiments, see *supra* note 154 and accompanying text. For other similar support for arrest despite the inconclusive nature of the arrest studies, see *supra* notes 155-57 and accompanying text.

173. Of the over 6,000 individuals and over 4,000 families interviewed as part of this survey in 1985, approximately 800 individuals had been involved in some form of intimate violence. INTIMATE VIOLENCE, *supra* note 14, at 170. Of that number approximately one in twenty households (4.8%) had called the police. *Id.* Of these callers, seventeen were men

ceptance during the time of the study (as remains true today), mediation efforts such as trying to calm everyone or taking time to listen to the story remained the “typical form of intervention used by [the] police” in the cases studied.<sup>174</sup> Yet, in comparing the use of more forceful police action when women called as opposed to when men called, police were much more likely to respond aggressively when the caller was a woman. When women called, the male spouse was ordered out of the home 41.4% of the time.<sup>175</sup> However, in *no* cases were female spouses ordered to leave the home when men called.<sup>176</sup> Similarly, when women called, the men were threatened with arrest at the time of the incident in 10.7% of the cases, and threatened with arrest upon the next call in 28.2% of the cases.<sup>177</sup> By contrast, women were *never* threatened with arrest when men called.<sup>178</sup> Finally, in comparing the actual use of arrest, while in 15.2% of the cases the man was arrested upon the woman’s call, *no* woman was ever arrested when a man called.<sup>179</sup> In fact, it was *three times more likely* that a man would be arrested if he called as opposed to the female caller being arrested.<sup>180</sup> Not surprisingly, researchers found male callers to be generally “less pleased” with the police response than the female callers, who described the police intervention to be “about right.”<sup>181</sup>

Given that the same survey found a striking similarity in the use of intimate violence by men and women, such statistics cannot easily be explained by the suggestion that the male callers were likely to have suffered more minimal acts of violence.<sup>182</sup> Indeed, given society’s denial of the reality of female violence and the unmanly stigma attached to any man who claims to be a victim of such violence, men are much less likely than women to call for help, choosing instead to react “in private.”<sup>183</sup> In fact, it may be more likely that the male call-

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and twenty-four were women. *Id.* For a discussion of the 1985 and other National Family Violence Surveys, see *supra* notes 21-23 and accompanying text.

174. INTIMATE VIOLENCE, *supra* note 14, at 170; see also *supra* note 158 and accompanying text (noting mediation remains the predominant response to domestic violence).

175. INTIMATE VIOLENCE, *supra* note 14, at 262.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. As opposed to 4.2% of the women callers being arrested, 12.1% of the male callers were arrested. *Id.*

181. *Id.* at 170-71. For a recent study of female victims of intimate violence and the factors which affect their satisfaction with various components of the legal system when their batterers have been arrested, see Fleury, *supra* note 116, at 191.

182. For a comparison of the use of violence by men and women as uncovered by the second National Survey of Family Violence and other studies, see *supra* notes 173-80 and accompanying text.

183. In the 1985 National Survey of Family Violence, researchers found the most typical male reaction to being hit was to yell, followed by running out of the room. INTIMATE VIOLENCE, *supra* note 14, at 150. Less than fifteen in one hundred men said they reacted by striking back. *Id.* Female victims’ most common reaction was to cry, followed by yelling.

ers surveyed were victims of greater violence than the female callers as only severe violence would be threatening enough for a man to call. Taking such considerations into account, what such statistics do seem to reflect is that police share the accepted view about female violence: it does not exist.

(d) *Thurman v. City of Torrington*

In addition to the police, the feminist understanding of domestic violence is also adhered to and reinforced by the courts. Based upon Equal Protection claims, arguments for police liability have successfully been made when the police fail to adequately respond in the case of intimate violence.<sup>184</sup> However, a review of the court decisions in this area suggests that the standard of liability extends only to cases involving female victims of intimate violence. The critical 1984 decision in *Thurman v. City of Torrington*<sup>185</sup> set the tone, adding the judicial branch to the increasingly pervasive number of institutions that ignore female violence.

The facts of Tracey Thurman's case against the City of Torrington and its police department are equally horrific and sympathetic. For nearly nine months, Tracey was "attacked" and "threatened" by her estranged husband, Charles, on numerous occasions. Tracey repeatedly requested the assistance of the city police, asking them to arrest her husband.<sup>186</sup> In turn, the police repeatedly refused to take any action. Finally, the escalating violence culminated in Charles stabbing Tracey and then, in the presence of the police, dropping the knife, kicking Tracey once in the head, running indoors and seizing their child, dropping the child on his wounded mother and then kicking Tracey in the head once again. Despite several police officers witnessing such brutal events, Charles was arrested only after Tracey was placed on a stretcher and Charles, remaining on the scene and continuing to threaten Tracey, approached Tracey once again as she lay on the stretcher.<sup>187</sup>

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*Id.* at 147-48. Approximately one in four women responded by striking back. *Id.* For further discussion of male reaction to female violence and society's denial of such violence, see Steinmetz, *supra* note 6, at 503-04; see also *supra* notes 127-32 and accompanying text and *infra* notes 284-89 and accompanying text.

184. See *infra* Part IV.B.2(a).

185. 595 F. Supp. 1521 (D. Conn. 1984).

186. After her car windshield was smashed by her husband in the presence of a police officer (who had stood by watching Charles scream threats at Tracey prior to smashing the window), Charles had been arrested, convicted of breaching the peace, and placed on probation. Charles's ongoing menacing contact constituted both a violation of his probation and perhaps a violation of the restraining order obtained by Tracey, thereby providing sufficient basis to re-arrest Charles. *Id.* at 1524-26.

187. *Id.*

In her § 1983 action, Tracey successfully argued in response to the city's motion for summary judgment that the police department's inaction violated her Fourteenth Amendment guarantee of equal protection.<sup>188</sup>

As noted earlier, the *Thurman* decision is routinely cited as a key catalyst in the national adoption of mandatory arrest policies.<sup>189</sup> For more practical individuals who believe that the purpose of police department policy changes are not to increase public safety but rather to avoid department liability, *Thurman* is cited as the only motivator.<sup>190</sup> With this degree of significance, *Thurman's* gender implications must be candidly acknowledged.

In evaluating the Equal Protection claim, *Thurman* described the analysis as a comparison of police treatment of "a woman abused or assaulted by a spouse or boyfriend" with police treatment of "all other persons whose personal safety is threatened, including women not involved in domestic relationships."<sup>191</sup> Given this gendered nuance, *Thurman* was afforded intermediate scrutiny.<sup>192</sup> *Thurman* then held in favor of the plaintiff as the government failed to meet its burden of citing "an important governmental interest" which would jus-

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188. 42 U.S.C. § 1983 (2000) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In addition to her § 1983 and Fourteenth Amendment challenge, Tracey's action also raised other constitutional claims pursuant to the Fifth and Ninth Amendments and related statutory claims under 42 U.S.C. §§ 1985, 1986, and 1988. *Thurman*, 595 F. Supp. at 1524. At trial, Tracey Thurman was awarded \$2.3 million in damages, however this jury award was later reduced to \$1.9 million through a settlement exchange in which the government agreed to forgo any appeal. Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 668 n.14 (1986).

189. See *supra* notes 150, 185 and accompanying text (noting the role of the 1984 *Thurman* decision).

190. Frisch, *supra* note 159, at 212. Lawrence Sherman, the author of the Minneapolis experiment, has also suggested that the increase in the use of arrest in domestic violence cases is more likely a result of the *Thurman* decision than his study's suggestion that arrest has a deterrent effect. Sherman, *supra* note 144, at 23. In fact, in one study of urban and rural police agencies, the Minneapolis experiment ranked lowest in a list of eight factors accounting for police changes in arrest policies. *Id.* at 24. For a history of other influential court challenges brought by battered women and their advocates prior to *Thurman*, see Zorza, *supra* note 147, at 53-60.

191. *Thurman*, 595 F. Supp. at 1527.

192. *Id.* at 1527-28 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976), *reh'g denied*, 429 U.S. 1124 (1977); *Reed v. Reed*, 404 U.S. 71 (1971)). As succinctly summarized by the court, "[c]lassifications on the basis of gender will be held invalid under the equal protection clause unless they are substantially related to an important governmental objective." *Id.* at 1526 (citing *Craig*, 429 U.S. at 197).

tify “its disparate treatment of women.”<sup>193</sup> Recognizing that wife beating was historically a male prerogative, the court denounced such a practice, finding that it must “join other ‘archaic and overbroad’ premises” which had been traditionally used to condone other acts of gender discrimination.<sup>194</sup>

While not disputing the importance of a non-discriminatory police response to victims of violence, the Equal Protection framework utilized to advance a fair treatment policy must be critically examined. Why did the court compare the treatment of female victims of intimate violence by male partners versus “all others”? Why did the court not simply compare the treatment of victims of intimate violence versus the victims of stranger violence, *regardless of gender*? Relegated to a footnote, the court responded to such questions. It would accept plaintiff’s allegation of gender-discrimination as true.<sup>195</sup> In so doing, the court cited to only one study which reviewed the cases of criminal defendants charged with intimate violence and found that men were the defendants in twenty-nine out of every thirty cases.<sup>196</sup> Given the nonrepresentative nature of criminal studies which fail to measure the full scope of victims and the general concern regarding prosecutorial studies, the soundness of the court’s decision must be challenged.<sup>197</sup> Yet what is more troubling is the deeper implications of the court’s findings. By adopting a gender-related standard, the court was able to employ an intermediate scrutiny analysis, thus making the government’s justification for its arrest policy more difficult. However, in finding that the government had “failed to put forward any justification” for its arrest policy, it is likely that the government would have failed even if *Thurman* had adopted a genderless standard, and thereby, compared the police treatment of intimate versus stranger violence at the rational basis level of review.<sup>198</sup> Arguably then, if the court’s interest was ensuring

193. *Id.* at 1527-28.

194. *Id.* at 1528 (quoting *Craig*, 429 U.S. at 198-99). The court also included other recognized examples as gender discrimination. See *Stanton v. Stanton*, 421 U.S. 7 (1975) (denying the traditional belief that a woman’s place is in the home); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (rejecting the misconception that female wages do not contribute to family support); *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (dismissing the belief that husbands of female servicewomen are not dependent on their spouses as compared to wives of male servicemen); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (preventing the denial of a pregnant woman’s ability to serve in the military).

195. *Thurman*, 595 F. Supp. at 1528 n.1.

196. *Id.* (citing STEPHEN LEEDS, FAMILY OFFENSE CASES IN THE FAMILY COURT SYSTEM: A STATISTICAL DESCRIPTION ii (1978)).

197. For a critical discussion of the criminal studies on domestic violence and their use in disputing the family violence studies, see *supra* Part I.A.1.

198. *Thurman*, 595 F. Supp. at 1528. As acknowledged by *Thurman*, at this lowest level of scrutiny, classifications must be “rationally related to a legitimate governmental purpose.” *Id.* at 1526 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55, *reh’g denied*, 411 U.S. 959 (1973)).

police action in domestic violence cases, it could have achieved this goal without relying on a gender-based analysis. Instead, by so readily relying upon the assertion that only women are victims of domestic violence, the court revealed its own “archaic and overbroad” premises.<sup>199</sup> While the court was quick to reject stereotypes negatively affecting women, it was not ready to do the same for men. By failing to leave room for the possibility of female violence and that police may also fail to arrest in such cases, *Thurman* set a standard of liability only in the instance of the police’s failure to arrest male perpetrators.

Following *Thurman*, the intermediate scrutiny standard for claims made by female domestic violence victims against the police has broadened. Police policies or customs which are facially neutral may be subject to intermediate scrutiny if such policies are applied in a discriminatory fashion which adversely affects battered women.<sup>200</sup> Consequently, in many jurisdictions, proving a police policy or custom providing less protection to victims of domestic violence than nondomestic violence attacks is apparently not sufficient to win an equal protection claim. The plaintiff further has to demonstrate “that discrimination against women was a motivating factor,” and that the plaintiff was indeed injured by such practice.<sup>201</sup>

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199. *Id.* at 1528 (quoting *Craig*, 429 U.S. at 198-99).

200. *Hynson v. City of Chester*, 864 F.2d 1026, 1029 (3d Cir. 1988) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

201. *Id.* at 1031-33 (emphasis added) (vacating the denial of defendant’s motion for summary judgment but remanding action for further proceedings in light of that standard). Interestingly, *Hynson’s* three part test was based upon *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988). *Watson* set out two possible equal protection grounds for battered women raising § 1983 claims. *Id.* at 696. While the first considers domestic violence victims without regard to gender, the second considers gender. *Id.* Applying these standards, *Watson* reversed a summary judgment in favor of the defendant city regarding plaintiff’s claim of discriminatory treatment against victims of domestic violence as compared to victims of nondomestic attacks. The court reasoned that a jury could infer discriminatory motive, but found insufficient evidence to reverse summary judgment in favor of the city as to the plaintiff’s claim of class-based discrimination based on sex. *Id.* at 694-97.

Other cases have adopted a gender-based, intermediate scrutiny analysis. *See generally* *Shipp v. McMahan*, 234 F.3d 907 (5th Cir. 2001) (adopting *Watson* standard to review gender-based equal protection claims against law enforcement in domestic violence cases); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1990) (remanding with instructions to allow plaintiff to amend her equal protection claim of gender and marital status discrimination against police in responding to domestic violence calls by battered women because of certain evidence sufficient to suggest “an animus against abused women”); *McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (adopting gender-based discrimination standard but dismissing claimant’s § 1983 claims as a “complete failure” of proof to support allegation of discrimination against victims of domestic violence and finding it therefore unnecessary to reach allegation of police following policy of intentional discrimination against women).

For further discussion of the equal protection and due process standards relied upon in the review of § 1983 claims by battered women, see generally *Hathaway*, *supra* note 188, at 667-77 (for a discussion of *Thurman*, 595 F. Supp. 1521); Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After* *Deshaney v.*

As a practical matter, such a standard communicates that police liability can only result in cases of nonintervention on behalf of female victims. By tailoring the standard exclusively to battered women, the courts have further reinforced the belief that only women can be the victims of domestic violence. The effect of *Thurman* and its progeny has been to train police to respond aggressively in the case of male aggressors while further discounting the complaints of female violence. *Thurman*, then, should not be acknowledged as responsible for the national adoption of mandatory arrest policies in domestic violence cases. *Thurman* should be credited for the development of mandatory arrest policies only in the case of male perpetrators and female victims.

## 2. Prosecution

### (a) *The Development of Prosecution Policies and Theories*

Recognizing that a “coordinated response” is the only means by which a definitive effort to end domestic violence can truly be made, prosecution is regarded as the critical next step following arrest.<sup>202</sup> Echoing the justifications for pro-arrest policies, aggressive prosecution is favored as part of an overarching effort to criminalize domestic violence and make it a public crime.<sup>203</sup> The strength of this ambition is well illustrated through the recent enactment of the Violence

Winnebago County Department of Social Services, 75 CORNELL L. REV. 1393 (1990) (analyzing the equal protection and due process claims of battered women under § 1983 after the Supreme Court held that there was no general constitutional right to police protection in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 191 (1989)); Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 223-30 (1999).

For the recognition that heightened scrutiny is “not necessary” and that a rational basis test can be successfully utilized when evaluating police failure-to-protect claims made by victims of domestic violence as compared to victims of other crimes of violence, see *id.* at 227-28 (citing to the successful use of a rational basis review by victims of domestic violence in *Bartalone v. County of Berrien*, 643 F. Supp. 574 (W.D. Mich. 1986)); Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 950-51 (1991) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (supporting the argument that “negative attitudes” about victims of domestic violence should be sufficient to find police failure to protect victims of domestic violence based upon a nondeferential rational basis standard)).

202. For the promotion of a “coordinated response” to domestic violence between various legal and social agencies, see *supra* note 159 and accompanying text. For a comparison of arrest and prosecution efforts, see, for example, BUZAWA & BUZAWA, *supra* note 142, at 54 (recognizing that problems associated with addressing domestic violence in the arrest context are repeated and become even more severe in the judicial context); Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in WOMAN BATTERING: POLICY RESPONSES, *supra* note 116, at 95, 96 (lamenting that the increase in preferred arrest policies is not matched by increased prosecution); Ford & Regoli, *supra* note 155, at 129 (advocating the maintenance of advances in prosecution on par with increased arrest efforts).

203. For a discussion of the support of pro-arrest policies, see *supra* notes 160-62 and accompanying text.

Against Women Act (VAWA).<sup>204</sup> The Act aggressively attempts to: mandate the arrest and prosecution of domestic violence offenders; devote greater resources to domestic violence training for law enforcement; make certain domestic violence offenses federal crimes; and provide various civil remedies for victims.<sup>205</sup> However, as with arrest, support for strong prosecution policies is neither universal nor longstanding. VAWA provisions, such as those providing certain federal civil remedies for intrastate acts of domestic violence, have been struck down as unconstitutional.<sup>206</sup> Such resistance is also visible at the state level, where state prosecution of domestic violence offenders, although increasing, is increasing at a very gradual rate.<sup>207</sup> Like arrest, this slow development of aggressive prosecution policies illustrates conflicting feminist goals.<sup>208</sup> And again, as with arrest, any consensus which can be found in support of prosecution reveals only an interest in prosecuting male offenders.<sup>209</sup>

A long list of reasons can be given for the traditional reluctance to prosecute domestic violence.<sup>210</sup> Included among the most objective reasons is that criminal dockets are already overwhelmed by non-domestic cases and cannot absorb the flood of cases which would be introduced by criminalizing all forms of violence between intimates.<sup>211</sup> Decisions then must be made as to which domestic violence cases, if any, should be prosecuted. This may result in prosecutors

204. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 18, 28 & 42 U.S.C.).

205. Hanna, *supra* note 147, at 1516 (summarizing the practical and theoretical goals of VAWA); see also Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 575 (2000); Charis Mincavage, Comment, *Title III of the Violence Against Women Act: Can It Survive a Commerce Clause Challenge in the Wake of United States v. Lopez?*, 102 DICK. L. REV. 441 (1998).

206. *United States v. Morrison*, 529 U.S. 598 (2000); see also Catharine A. MacKinnon, Comment, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000).

207. In 1996, a survey of prosecutorial developments in medium and large jurisdictions determined there was a "growing commitment" to "vigorous prosecution." Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 96, at 176, 188. For further discussion of prosecutorial developments, see *infra* notes 216-19 and accompanying text.

208. For discussion of the conflicts in arrest theory, see *supra* notes 164-69 and accompanying text.

209. In this respect, while the provisions of VAWA are gender-neutral, its title similarly reflects a singular interest at the federal level in addressing only violence against women. For a discussion of VAWA, see *supra* notes 204-05 and accompanying text.

210. For lengthy discussions of the variety of such reasons and their connection, see, for example, BUZAWA & BUZAWA, *supra* note 142, at 56-62; FAGAN, *supra* note 154, at 27-29; Cahn & Lerman, *supra* note 202, at 96; Ford & Regoli, *supra* note 155, at 132-43; Hanna, *supra* note 106, at 1860-63; Hanna, *supra* note 147, at 1551-54; Hirschel & Hutchison, *supra* note 147; Rebovich, *supra* note 207, at 176-77.

211. BUZAWA & BUZAWA, *supra* note 142, at 56-58; FAGAN, *supra* note 154, at 27-28; Hanna, *supra* note 147, at 1553-54.

strategically deciding only to pursue cases based on legitimate considerations of whether or not they will be successful given the extent of injury and available evidence.<sup>212</sup> Yet prosecutors, judges, and other court personnel are also recognized to harbor the same social biases that prevent treating domestic violence as anything other than a minor, private matter in which the victim is as much to blame as the abuser.<sup>213</sup> Such attitudes prevent vigorous prosecution. A victim's own reluctance to prosecute may also be a product of such biases.<sup>214</sup> Victims may be further dissuaded by fear of the batterer's retaliation, ongoing love of the batterer, economic considerations, and other complicated feelings including what may be best for any children involved.<sup>215</sup>

Despite these challenges, the strong push to criminalize domestic violence has resulted in a variety of policies and programs intended to increase prosecution.<sup>216</sup> Among the most prominent are such innovations as no-drop policies limiting prosecutorial discretion,<sup>217</sup> victim support services within both police and prosecutors' offices,<sup>218</sup> and specialized domestic violence prosecution units and courts.<sup>219</sup> Yet even with such developments, prosecution is still recognized as a "relatively rare event."<sup>220</sup>

212. Hirschel & Hutchison, *supra* note 147, at 54-55.

213. BUZAWA & BUZAWA, *supra* note 142, at 56-58, 60-62; FAGAN, *supra* note 154, at 27-28; Cahn & Lerman, *supra* note 202, at 96; Ford & Regoli, *supra* note 155, at 136; Hanna, *supra* note 106, at 1860-63; Rebovich, *supra* note 207, at 176-77; Robbins, *supra* note 201, at 211.

214. Kelly, *supra* note 108, at 310-11. Such biases may be magnified for victims of certain cultures in which public acknowledgment of abuse is seen as violating strict codes on family privacy and honor. Kelly, *supra* note 167, at 680-82.

215. On the variety of victim concerns and their impact on the rate of prosecution, see BUZAWA & BUZAWA, *supra* note 142, at 58-60; Hanna, *supra* note 147, at 1551 n.191; Hirschel & Hutchison, *supra* note 147, at 47; Kelly, *supra* note 108, at 308-10; and Kelly, *supra* note 167, at 675-82.

216. For a general overview of such prosecutorial developments, see, for example, FAGAN, *supra* note 154, at 6-10; Cahn & Lerman, *supra* note 202, at 96-109; and Rebovich, *supra* note 207, at 180-90.

217. For several articles written exclusively on the variety of such policies and their strengths and weaknesses, see, for example, Hanna, *supra* note 106; Robbins, *supra* note 201.

218. Cahn & Lerman, *supra* note 202, at 98-100; Rebovich, *supra* note 207, at 187-88.

219. FAGAN, *supra* note 154, at 15; HARVEY WALLACE, FAMILY VIOLENCE: LEGAL, MEDICAL, AND SOCIAL PERSPECTIVES 226-32 (2d ed. 1999); Cahn & Lerman, *supra* note 202, at 98-107; Rebovich, *supra* note 207, at 181.

220. Fleury, *supra* note 116, at 183. Relying on the statistics gathered during the Minneapolis experiment and subsequent replication studies, it was found that of the 136 suspects arrested in the Minneapolis study, only three were subsequently fined or incarcerated. Only 5% ever even had charges filed against them. In the Charlotte study, 35% of the suspects who were charged were prosecuted. In the Omaha study, 64% of those arrested were sentenced through fines, probation, jail, or some combination. Ford & Regoli, *supra* note 155, at 129-30. For more on the arrest experiments, see *supra* Part IV.B.1.

(b) *The Gendered Promotion of Prosecution*

Given that such formal administrative and policy changes have not yielded terrific change, domestic violence prosecution debates now center around what is commonly recognized as the greatest stumbling block to prosecution—victim reluctance.<sup>221</sup> Some academics advocate even more aggressive use of no-drop policies which would take the controversial step of forcing victim participation when necessary.<sup>222</sup> Grounded in theory and practice, such a position is argued as best suited for ensuring victim safety and effective prosecution as well as sending the critical message that domestic violence is not tolerated.<sup>223</sup> Other advocates staunchly defend a victim's right to choose. Yet in so doing, they also claim reliance upon theoretical and empirical studies to argue that prosecution only effectively deters domestic violence when a victim retains the right to drop the charges.<sup>224</sup>

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221. See, e.g., BUZAWA & BUZAWA, *supra* note 142, at 58-60 (citing domestic violence victim attrition rates at 60% to 80% while recognizing that prosecutors often further discourage victims to prosecute); Ford & Regoli, *supra* note 155, at 141-43 (blaming the victim's desire to drop charges on outside forces); Hanna, *supra* note 147, at 1551 n.191 (citing victim reluctance to go forward as responsible for lack of prosecution of domestic violence crimes).

222. Taking this step only at the most extreme instance, Professor Hanna also argues strongly in favor of improved efforts to gather and use various forms of nontestimonial evidence that can be obtained from such physical evidence as police investigations, 911 calls, and medical records. Hanna, *supra* note 106, at 1898-1919.

223. In addition to her own personal experience as a prosecutor of domestic violence cases, Professor Hanna points to a study in San Diego which credited the reduction in domestic violence related homicides to the adoption of a no-drop policy. *Id.* at 1853, 1864 n.64, 1867 (arguing in favor of "hard" no-drop policies and relying on Mark Hansen, *New Strategy in Battering Cases: About a Third of Jurisdictions Prosecute without Victim's Testimony*, 81 A.B.A. J., Aug. 1995, at 14); see also Robbins, *supra* note 201, at 216-17 n.77 (relying on same San Diego homicide study). In a later work, Professor Hanna further defends her position in favor of aggressive prosecution. In summary, she argues that giving decision-making power to the prosecutor rather than to the victim is the best means to prevent intimidation and reinforce the notion of domestic violence as a public crime, not a private matter. Hanna, *supra* note 147, at 1506 n.2.

224. The only randomized field experiment to evaluate the deterrence of domestic violence as a result of various prosecution policies was conducted in reliance upon 678 cases of wife battery in Marion County (primarily Indianapolis), Indiana. With the assistance of the prosecutor's office, the cases were randomly assigned by the prosecutor to four "prosecution tracks" (no prosecution, pretrial diversion, prosecution with rehabilitation, or prosecution with more severe sanctions). These cases included both instances in which the victim was allowed to drop the charges and those in which she was prevented from doing so. The study concluded that regardless of the prosecution track initiated by the prosecutor's office, rates of recidivism only decreased significantly in the cases in which the victim had the choice to proceed and chose to proceed. The study also cautioned that victims who had chosen to proceed but who ultimately dropped the charges were at increased risk of violence. Ford & Regoli, *supra* note 155, at 150-53; David A. Ford & Mary Jean Regoli, *The Preventive Impacts of Policies for Prosecuting Wife Batterers*, in DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE, *supra* note 142, at 181, 192-205.

For recognition of the Indianapolis experiment and support of providing domestic violence victims with varying degrees of control in criminal proceedings, see, for example,

Such a review of the current developments in domestic violence prosecution indicates that the core controversy remains very much tied to a core tension in feminist theory—a desire to make domestic violence a public crime on the one hand and efforts to preserve female autonomy on the other.<sup>225</sup> What is missing from the debate is any conversation regarding the prosecution of female violence. With the existing discourse rooted in feminist theory, it is virtually impossible for such a subject to be introduced, much less entertained. Regardless of their conflicting conclusions, the few recognized empirical studies which do exist on the issue of effectiveness of prosecution are limited to the study of male batterers.<sup>226</sup> In all discussions of prosecution, it is either assumed, implied, or outright stated that the sole objective is to help battered women.<sup>227</sup> Such comments are made even by scholars who criticize the minimal research and stagnant debates on prosecution and call for more global and radical efforts in order to end domestic violence.<sup>228</sup> Again, the efforts to end domestic violence

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MILLS, *supra* note 166, at 56-57 (viewing the Indianapolis study, in comparison with later studies on the effectiveness of mandatory prosecution, to be equivocal, but ultimately suggesting that decision control be left with the victim); VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS 180-81 (Rosemary Chalk & Patricia A. King eds., 1998) (acknowledging the Indianapolis study but questioning the effectiveness of prosecution given the limited nature of the studies thus completed); Fleury, *supra* note 116, at 184 (arguing that victims must have a “sense” of control, even if they have no “actual” control); Hirschel & Hutchison, *supra* note 147, at 48 (acknowledging the importance of the Indianapolis study).

225. In her discussion of prosecution efforts, Professor Hanna acknowledges this tension through critical examination of the public/private dichotomy. She further considers the tensions engendered by feminist theory on themes of particularity/generality and agency/victimization. Hanna, *supra* note 106, at 1869-85.

226. While there are generally recognized to be just two principal studies on the effectiveness of prosecution, only the Indianapolis experiment attempts to determine if prosecution reduces the recidivism rates of violent men. On the Indianapolis experiment, see Ford & Regoli, *supra* note 155, and Ford & Regoli, *supra* note 224. The other principal prosecution study examines what variables influence prosecutorial discretion in the decision to prosecute abusive men. Janell Schmidt & Ellen Hochstedler Steury, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 CRIMINOLOGY 487 (1989). A more recent study similarly devoted itself only to how satisfied female victims of domestic violence are with the legal system’s handling of their cases and what factors impact their satisfaction levels. Fleury, *supra* note 116; *see also supra* note 224 and accompanying text (discussing studies on the prosecution of domestic violence). As noted earlier, the six principal studies on the effectiveness of arrest were limited to the arrest of male batterers. *See supra* notes 151-56 and accompanying text (discussing the Minneapolis Experiment and the five replication studies).

227. The titles of various works on prosecution alone are revealing on this point. *See, e.g.*, Cahn & Lerman, *supra* note 202; Fleury, *supra* note 116; Ford & Regoli, *supra* note 155; Ford & Regoli, *supra* note 224.

228. *See, e.g.*, FAGAN, *supra* note 154, at 48 (critiquing the limited existing means and proposing a variety of new means to study the criminalization of domestic violence, but concluding that the objective is to help battered women); Hanna, *supra* note 106, at 1909 (taking the controversial position of restricting victim control in domestic violence prosecution in order to advance efforts to make domestic violence a public crime, but limiting her discussion to the criminalization of male violence).

against women are commendable and much needed. However, if we are truly committed to ending domestic violence, the violence by women needs to be both acknowledged and addressed. Reacting to such violence must be part of the “coordinated response.” Unfortunately, however, the momentum behind the feminist hold on domestic violence is not contained. Beyond restricting the development of arrest and prosecution policies, feminist theory has debilitated the treatment of both domestic violence batterers and victims.

### 3. *Punishment*

#### (a) *Treatment*

In any criminal context, the potential influence of the judiciary over domestic violence cannot be overstated. As leading domestic violence commentators well understand:

The effect of judicial attitudes cascades throughout the criminal justice system. The judiciary retains the potential of leading the criminal justice system by example or direction. After all, they are the ultimate authority having the power to ratify or condemn the actions of the police and prosecutors, as well as defining the parameters and seriousness of a particular crime.<sup>229</sup>

Notwithstanding the strength of the judicial position, the judiciary exercises little practical influence over domestic violence today. The limited possibility of arrest, compounded by the unlikelihood of prosecution, ensures that the powerful judicial link in the “coordinated response” to domestic violence will rarely be reached.<sup>230</sup> However, in the event that police do arrest a batterer and prosecution by the state attorney is pursued, what action is taken by the judicial branch? And further, what, if any, distinctions are made between the response to male and female batterers who reach this stage?

Punishment may serve a variety of purposes—among the most prominent being rehabilitation, deterrence (either general or specific), incapacitation, retribution, and condemnation.<sup>231</sup> Yet in the domestic violence context, rehabilitation or treatment is almost universally accepted as the sole objective.<sup>232</sup> Interestingly, the wide-

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229. BUZAWA & BUZAWA, *supra* note 142, at 65.

230. For a discussion of the limited use of arrest in the domestic violence context, see *supra* notes 151-54 and accompanying text. On the unlikelihood of prosecution, see *supra* notes 210-15 and accompanying text.

231. For a general discussion of the theories of punishment underlying crimes of domestic violence, see Hanna, *supra* note 147, at 1538-48.

232. VIOLENCE IN FAMILIES, *supra* note 224, at 178; Ford & Regoli, *supra* note 155, at 158; Gregory & Erez, *supra* note 116, at 206; Hanna, *supra* note 147, at 1508, 1522; Ellen Pence & Melanie Shepard, *Integrating Feminist Theory and Practice: The Challenge of the Battered Women's Movement*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 55, at 282, 284.

spread state and federal “faith in treatment” traces back to the same 1984 U.S. Attorney General’s report which also supported aggressive arrest policies.<sup>233</sup> Recently, this inconsistency between promoting treatment while endorsing more aggressive arrest and prosecution policies has come under some attack. Suggesting incapacitation, not rehabilitation, to be the appropriate goal of punishment, at least one domestic violence activist and scholar advocates the more aggressive use of incarceration.<sup>234</sup>

Despite the widespread use of treatment as a criminal response to domestic violence, the critics of treatment are not just the small minority who favor alternative punishments. In addition to those in theoretical opposition to treatment, there is widespread recognition that treatment has, at best, yet to be proven an effective response to domestic violence, and at worst might encourage greater violence.<sup>235</sup> So why then is treatment the predictable outcome for most domestic violence assault cases which actually reach the courts?

As with prosecution, there is the practical reality that the criminal justice system is ill-equipped to underwrite more expensive and

233. Per such report, incarceration was to be reserved for only the most serious injury-producing cases of domestic violence. Hanna, *supra* note 147, at 1526 (discussing the 1984 ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE: 1984 FINAL REPORT (1984)). For earlier discussions of the Attorney General’s support of aggressive arrest, see *supra* notes 149, 155 and accompanying text.

234. In advocating greater use of incarceration, Professor Hanna also notes the ineffectiveness of treatment. Her support of incarceration is in keeping with her promotion of even more aggressive arrest and prosecution policies. Hanna, *supra* note 147.

235. For reports on a variety of treatment studies which fail to conclusively prove that treatment reduces domestic violence, see, for example, Edward W. Gondolf & Alison Snow Jones, *The Program Effect of Batterer Programs in Three Cities*, 16 VIOLENCE & VICTIMS 693 (2001). The author studied the recidivism rates of domestic violence offenders enrolled in Denver, Houston, and Dallas treatment programs and suggested only tentatively that there may be a “moderate program effect.” *Id.* at 700; see also FAGAN, *supra* note 154, at 19 (finding “very little non experimental or quasi-experimental evidence” to properly evaluate batterer programs); JACOBSON & GOTTMAN, *supra* note 116, at 231 (recognizing research on treatment programs yet to evidence treatment is effective); PENCE & PAYMAR, *supra* note 101, at 174-77 (surveying shelter workers in seventy-six battered women’s shelters to gain their perspectives on batterer’s programs and reporting results ranging from the belief that such programs helped victims, to the assertion that victims were put at risk of greater violence, to the feeling that there was no change in the violence, or that batterers used such programs to gain leverage in child custody and other matters); VIOLENCE IN FAMILIES, *supra* note 224, at 180 (suggesting that rehabilitation programs must be studied more carefully before any conclusions regarding their effectiveness can be reached); Gregory & Erez, *supra* note 116 (conducting interviews with thirty-three women whose batterers were enrolled in treatment programs and concluding that while victims believe that treatment works, such feelings are often mixed with apprehension, fear and guilt); L. Kevin Hamberger & James E. Hastings, *Court-Mandated Treatment of Men Who Assault Their Partner: Issues, Controversies, and Outcomes*, in LEGAL RESPONSES TO WIFE ASSAULT, *supra* note 116, at 188, 207-20 (summarizing twenty-eight of the major treatment studies and concluding that the mixed makeup, methodology, and results of such studies yields “[n]ot much” further knowledge about the effectiveness of treatment); Hanna, *supra* note 147, at 1514-38 (reviewing a variety of empirical evidence showing treatment is not effective); Pence & Shepard, *supra* note 232, at 291-92.

time-consuming forms of punishment such as incarceration.<sup>236</sup> Judicial biases against regarding domestic violence as a “real crime” also factor into the explanation.<sup>237</sup> Such attitudes are exacerbated by treatment advocates who support treatment not because it is effective, but because it allows domestic violence activists to retain control over the issue of domestic violence, generally, and the fate of domestic violence batterers, more specifically.<sup>238</sup> At the same time, legitimate concern for victim safety and awareness of the ongoing relationships between batterers and victims also exists. Such attitudes may give way to sincere beliefs that trying to change the behavior of batterers may be the best solution, even if it has yet to be proven possible.<sup>239</sup>

With this array of justifications and concerns, treatment programs run a certain gamut. Courts may mandate treatment as a pretrial diversion tactic, they may defer prosecution with the promise of a reduced sentence upon completion of treatment, or they may order treatment as part of a sentence upon conviction.<sup>240</sup> Basic differences in such matters as length and size of treatment programs and whether such programs are group or individually oriented also exist.<sup>241</sup> Notwithstanding the procedural and structural variety, there is

236. In supporting greater use of incarceration in the domestic violence context, even Professor Hanna notes the practical difficulties in that cases of assault and battery between intimates may already be treated more seriously than similar cases between strangers. Hanna, *supra* note 147, at 1524-26. For further discussion of court reluctance to impose harsher sentences, see FAGAN, *supra* note 154, at 30-33; PENCE & PAYMAR, *supra* note 101, at xiii; Hanna, *supra* note 147, at 1556.

237. BUZAWA & BUZAWA, *supra* note 142, at 65; *see also* Hanna, *supra* note 147, at 1556; Robbins, *supra* note 201, at 211-13. For further discussion of the traditional social minimization of domestic violence, *see supra* Part III.A.1.

238. Hanna, *supra* note 147, at 1550.

239. JACOBSON & GOTTMAN, *supra* note 116, at 231; Hamberger & Hastings, *supra* note 235, at 189-90. As Cheryl Hanna concludes:

Court-mandated treatment programs allow everyone to save face. The prosecutor checks-off ‘conviction’ on his stat sheet; the defense attorney feels like she did some good for her client; the victim has a sense of hope, however false, that the criminal justice system will help her partner change his ways; the offender avoids jail; the judge is not accused of taking these cases too lightly; the treatment program gets yet another client to support its existence; and we all go home happy . . . until the next time.

Hanna, *supra* note 147, at 1556.

240. VIOLENCE IN FAMILIES, *supra* note 224, at 178; Hamberger & Hastings, *supra* note 235, at 190-91; Hanna, *supra* note 147, at 1522.

241. While treatment programs generally favor group counseling as opposed to a one-on-one counseling approach, there tends to be a great deal of variation in other format matters. For a sampling of various program structures, *see* DUTTON, *supra* note 96 (explaining a treatment program run by the author). *See also* PENCE & PAYMAR, *supra* note 101, at 17-27 (explaining the structural design of the Duluth Model); Gondolf & Snow Jones, *supra* note 235 (reviewing the programs of Dallas, Denver, and Houston); Hamberger & Hastings, *supra* note 235, at 203-05 (reviewing treatment format issues), 208-10 (summarizing in chart form the variables of twenty-eight programs); Hanna, *supra* note 147, at 1528-30 (reviewing the development of treatment programs).

currently a great deal of consistency in the philosophical approach to treatment. Succinctly characterized, today's treatment programs are "feminist-inspired."<sup>242</sup>

(b) *The Feminizing of Treatment*

Profeminist treatment has not always been the mainstay. Rather, its predominance is a natural development in the feminist metamorphosis of domestic violence. When domestic violence theory adhered to a belief that both the batterer and victim had some accountability, treatment programs relied on models which counseled the couple. As a result, these programs focused on the *shared* desire to control and the *common* repressed anger, anxiety, or other negative feelings of the parties which ultimately resulted in violent behavior.<sup>243</sup> Yet as victim-blaming came under attack and as the cycle of violence and its emphasis on the male use of physical violence gained popularity, couple therapy was replaced by anger-management programs which not only allowed solely male attendance, but also demanded that men take full accountability for their violent behavior.<sup>244</sup> However, like the original cycle of violence, this behavioral approach came under criticism for teaching anger-management skills without any effort to address the underlying, but believed omnipresent, gender-based motivation for violent male behavior toward women.<sup>245</sup> As the feminist theory of connection between violence and patriarchy took

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242. Hanna, *supra* note 147, at 1530. For other recognition of the predominance of the feminist model, see, for example, JACOBSON & GOTTMAN, *supra* note 116, at 231; PHYSICAL VIOLENCE, *supra* note 14, at 11-14; WEXLER, *supra* note 116, at 13; Hamberger & Hastings, *supra* note 235, at 202-03; Pence & Shepard, *supra* note 232, at 294; Daniel G. Saunders, *Feminist, Cognitive, and Behavioral Group Interventions For Men Who Batter: An Overview of Rationale and Methods*, in DOMESTIC VIOLENCE 2000: AN INTEGRATED SKILLS PROGRAM FOR MEN: GROUP LEADER'S MANUAL, *supra* note 116, at 21, 22-23.

243. David Adams describes programs of this nature as following an "insight model" (explaining violent behavior as the symptom of some other underlying conflict); "ventilation model" (addressing the parties' repressed feelings and teaching "fair fighting" tactics); and "interaction model" (describing violence as a culmination of efforts by both parties to gain power and control). David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 55, at 176, 178-88; see also Hamberger & Hastings, *supra* note 235, at 196-98 (reviewing the insight, ventilation, and interaction models).

For a discussion of early domestic violence theory and its tendency to blame both couple members, see *supra* notes 104-08 and accompanying text.

244. Such a model has been described as the "cognitive-behavioral" or "psychoeducational" model. Adams, *supra* note 243, at 188-91; see also Hamberger & Hastings, *supra* note 235, at 200-01. For a similar recognition of the move away from couples therapy, see Hanna, *supra* note 147, at 1527-28. For further discussion of the cycle of violence, see *supra* notes 103-08 and accompanying text. For further discussion of victim-blaming, see *supra* note 96 and accompanying text.

245. For a review of such criticisms of the cycle of violence, see *supra* note 109 and accompanying text.

shape, so too did the profeminist model of treatment.<sup>246</sup> And as the “power and control” wheel of the Domestic Abuse Intervention Project (DAIP) of Duluth, Minnesota became the most popular invention in defining domestic violence, the profeminist Duluth Model became the most widely imitated treatment model.<sup>247</sup>

(c) *The Duluth Model*

While the Duluth Project began with an anger-management treatment program, it openly rejected this approach in 1984 and adopted a profeminist agenda with a focus on violence as a mechanism of power and control.<sup>248</sup> Almost twenty years after such a drastic change, the Duluth Model continues to identify itself with several key feminist goals. To have batterers understand that their use of violence is a means of control, “women’s reality and women’s experiences” are a constant part of the curriculum.<sup>249</sup> Male participants examine their use of violence in its “cultural and social contexts,” with the program striving to reveal how violence is socially learned by men in order to ensure their control over women.<sup>250</sup> Leaving no room for the suggestion that men may also be the “victims of sexism,” the program’s inevitably all male audience is forced to take full accountability.<sup>251</sup> No attempt to “psychologize” the problem is tolerated, for such efforts detract from the focus on violence as a tool of power and control and risk providing men with a means of denying responsibility.<sup>252</sup> Indeed, the patriarchal agenda is so controlling that group facilitators are discouraged from exploring participants’ personal prob-

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246. For recognition of the current prevalence of the profeminist model, see JACOBSON & GOTTMAN, *supra* note 116, at 231; Adams, *supra* note 243, at 190; Hamberger & Hastings, *supra* note 235, at 200-01; Hanna, *supra* note 147, at 1528-31; Pence & Shepard, *supra* note 232, at 282-85; Saunders, *supra* note 242, at 22.

247. For recognition of the Duluth program as the profeminist model most widely imitated, see JACOBSON & GOTTMAN, *supra* note 116, at 231; WEXLER, *supra* note 116, at 13; Hanna, *supra* note 147, at 1530; Pence & Shepard, *supra* note 232, at 294.

For discussion of the “power and control” wheel and its development within the Duluth project, see PENCE & PAYMAR, *supra* note 101, at 2-3. *See also supra* notes 111-15 and accompanying text.

248. PENCE & PAYMAR, *supra* note 101, at 29. It is interesting to note that the project’s change in 1984 coincided with other key developments that year, namely the Attorney General’s Task Force on Domestic Violence Report, the Minneapolis arrest experiment and the decision in *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). For a discussion of these events, see *supra* note 150 and accompanying text.

249. PENCE & PAYMAR, *supra* note 101, at 30.

250. *Id.* at 5, 29; Pence & Shepard, *supra* note 232, at 289-90 (“Participants are taught that it is not their anger that leads them to be violent, but rather their belief that they have a right to control and dominate women.”).

251. Pence & Shepard, *supra* note 232, at 295; *see also* PENCE & PAYMAR, *supra* note 101, at 29. While some female batterers have also been noted to attend, the program’s approach toward such participants is much less demanding. *See infra* note 260 and accompanying text (discussing female batterers and the Duluth program).

252. WEXLER, *supra* note 116, at 14.

lems, such as substance abuse or the particulars of their relationships.<sup>253</sup> Confronted with the categorical characterization of every batterer's violence as a weapon of male domination, the program's ultimate aspiration is to "undo sexism," eliminating not just the violence, but all the tactics men use to oppress women. Having unlearned such behavior, it is replaced with more egalitarian attitudes and skills.<sup>254</sup> So executed, a batterer's treatment program modeled on the Duluth curriculum perfectly follows the flow of domestic violence theory—from explaining male behavior through power and control, to the final goal of equality.<sup>255</sup>

The unyielding support for treatment, in contrast to the equally strong support for aggressive arrest and prosecution policies, evidences a basic feminist tension between the desire to publicly condemn and criminalize domestic violence and the desire to protect a woman's autonomy by suggesting her life with the abuser may be restored to the status quo—minus the violence and subordination.<sup>256</sup> By one interpretation, the stereotypical female "ethic of care," the female inherent nature to act in a relational, caring manner as opposed to a more male, isolationist manner is on display through this feminist call for rehabilitation.<sup>257</sup> Yet at a deeper level, the support of treatment, and more specifically feminist treatment, unequivocally reflects a more political goal. Mandating men to treatment gives feminists their most desired audience—men. Once captive to the feminist program, men can be indoctrinated. First convinced that all their violent and nonviolent actions toward women are motivated by a desire to subjugate women, the men may then be educated in the manner which women feel they should be treated.

Certainly, ending gender motivated violence and ensuring women fair treatment are laudable objectives. Yet, ultimately, the control of

253. PENCE & PAYMAR, *supra* note 101, at 29.

254. *Id.* at 7. For an extensive discussion of the Duluth Model's curricular breakdown between explaining the patriarchal behavior of violent men and replacing such behavior with "noncontrolling and nonviolent ways of relating to women," see *id.* at 30, 29-65.

255. *Id.* at 7.

256. See Hanna, *supra* note 147, at 1548-50. Professor Hanna similarly suggests that tension between feminist goals explains the ambivalence feminists manifest in supporting aggressive prosecution while simultaneously resisting "no-drop" policies which prohibit battered women from choosing to have the charges against their batterers dismissed. Hanna, *supra* note 106, at 1853, 1865-66; see also *supra* Part IV.B.2 (discussing prosecution goals and conflicts).

257. Hanna, *supra* note 147, at 1550. The female "ethic of care" originates with psychologist Carol Gilligan. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (2d. ed. 1993). Since its coinage, the term and its association with women has been subjected to a great deal of criticism. For a sampling of positive reliance on Gilligan's work by cultural feminists, see, for example, McClain, *supra* note 124, at 1182-83; Sherry, *supra* note 124, at 580, 585, 587; Robin West, *Jurisprudence and Gender*, in *FEMINIST JURISPRUDENCE*, *supra* note 126, at 493, 500-01. For negative treatment of Gilligan in radical feminist thought, see, for example, MACKINNON, *supra* note 100, at 38-39.

gender is not eradicated through the profeminist agenda; rather, it shifts. For as Cheryl Hanna sharply explains, “[t]reatment programs turn the tables of control from misogynist men to profeminist women and men whose agenda it is to restructure gender relations.”<sup>258</sup>

Beyond the gender empowerment issues, the Duluth Model’s exclusively feminist focus fails to even allow for the possibility that a man’s violence might be caused by other conditions. Recent research suggests that abusive men can be described through a variety of profiles and that more positive, less confrontational models of treatment may be more effective.<sup>259</sup> The Duluth Model’s unyielding reliance on treatment also ignores other legitimate goals of punishment and the methods used to achieve them. Yet, the most gaping hole in today’s response to batterers is the failure to consider the reality of female batterers. Under feminist control, today’s treatment denies the possibility that women can be violent. Accordingly, it fails to provide any means of treating or otherwise responding to female intimate violence. Even the few female offenders who do manage to end up in treatment, despite the layers of social and legal bias, are ultimately not required to assume the accountability demanded of male batterers. Authors of *The Duluth Model* maintain that such women must have used violence in self-defense.<sup>260</sup>

As with arrest and prosecution policies, the sincere commitment to ending domestic violence is not evident in today’s judicial system. The goal has been lost in the pursuit of the feminist agenda. Likewise, services to victims of domestic violence have also fallen under feminist control.

#### 4. *Victim Services*

##### (a) *Shelters*

By far, shelters are the predominant service for victims of domes-

258. Hanna, *supra* note 147, at 1550. As the Director of the Relationship Violence Training Institute in San Diego similarly notes:

When it comes to the values of respectful relationships, not only do treatment providers need to preach them, but they also have to show them. There is a danger of establishing a power hierarchy in the treatment setting that subtly reinforces power tactics—and that alienates the very population we want to reach.

WEXLER, *supra* note 116, at 15.

259. See *infra* note 292 and accompanying text (discussing theoretical efforts to deessentialize the batterer); *infra* Part V.B. (discussing practical efforts to develop more client-centered batterer treatment programs).

260. At the time *The Duluth Model* was published, the Duluth program had worked with one-hundred women. This number comprised 3.5% of the offenders required to attend the program. PENCE & PAYMAR, *supra* note 101, at 6. For the Duluth authors, male offenders also need to be treated in a much more serious manner than female offenders because male victims of female violence are much more capable of leaving violent relationships without the fear of retaliation felt by female victims. *Id.*

tic violence.<sup>261</sup> While the shelter movement began in England as early as 1971, the United States soon followed suit.<sup>262</sup> By 1974, the first shelter for women was opened in St. Paul, Minnesota.<sup>263</sup> By 1986, over 700 domestic violence shelters were counted in the United States.<sup>264</sup> Since then, the number has virtually doubled.<sup>265</sup>

As shelters have grown, so have their role. Originally recognized as a "crisis service," shelters now provide a range of services.<sup>266</sup> In addition to refuge, other immediate assistance is provided to both residents and nonresidents through the availability of emergency hotlines, food, child care, transportation, support groups, and referrals to additional services.<sup>267</sup> Through direct counseling services, as well as access to the network of legal and community service providers, shelters are considered critical to victims of domestic violence who seek permanent lifestyle changes by: finding alternative living arrangements, pursuing child custody and divorce, filing criminal charges, receiving job training or employment leads, and working to separate from their abusers.<sup>268</sup>

Despite the growth in and reliance on shelters, there is little empirical evidence of their effectiveness.<sup>269</sup> While shelter studies have used such measures as the recurrence of violence, the long-term separation of victim and abuser, and rates of victim satisfaction, the results are all equivocal.<sup>270</sup> Legitimate concerns are raised as to whether any of such yardsticks accurately reflect the success of shelters. Victim evaluation studies are overly subjective and have tended to review attitudes toward various types of counseling, not shelter services per se.<sup>271</sup> Because the threat of separation assault attaches to any effort to leave a violent relationship, separation is routinely

261. Shelters have recently been reported to account for 1200 of the 1800 programs in the United States for victims of domestic violence who are either spouses or intimate partners. VIOLENCE IN FAMILIES, *supra* note 224, at 110.

262. See Richard A. Berk et al., *What a Difference a Day Makes: An Empirical Study of the Impact of Shelters for Battered Women*, 48 J. MARRIAGE & FAM. 481, 482 (1986); Mary Ann Dutton-Douglas & Dorothy Dionne, *Counseling and Shelter Services for Battered Women*, in WOMAN BATTERING: POLICY RESPONSES, *supra* note 116, at 113.

263. Known as "Women's House," the shelter was opened by the Women's Advocates. WALLACE, *supra* note 219, at 177; Pence & Shepard, *supra* note 232, at 282-83.

264. Berk et al., *supra* note 262, at 482.

265. VIOLENCE IN FAMILIES, *supra* note 224, at 110 (noting the existence of 1200 domestic violence shelters in the United States by the late 1990s).

266. GONDOLF & FISHER, *supra* note 130, at 77.

267. For an overview of the intervention services offered by shelters, see GONDOLF & FISHER, *supra* note 130, at 78; Dutton-Douglas & Dionne, *supra* note 262, at 114-21.

268. Dutton-Douglas & Dionne, *supra* note 262.

269. GONDOLF & FISHER, *supra* note 130, at 81; Berk et al., *supra* note 262, at 481; Dutton-Douglas & Dionne, *supra* note 262, at 113.

270. Dutton-Douglas & Dionne, *supra* note 262, at 121.

271. Self-reported evaluations have generally investigated victims' attitudes toward services provided by women's groups as opposed to religious or more general social organizations. *Id.* at 124.

recognized to be an inadequate measure of shelter success as shelter stays may lead to more, rather than less violence.<sup>272</sup> Violence recurrence studies may be the best means of evaluating shelter success. However, they too are flawed. Surveying only domestic violence victims who have sought shelter services, such studies lack a control group and instead rely on nonrandom samples that may not accurately reflect the diverse pool of domestic violence victims.<sup>273</sup> Yet, after accounting for such methodological concerns and recognizing the risk of increased violence upon separation, violence recurrence studies generally associate a victim's use of shelter services with a reduction in violence.<sup>274</sup> But instead of finding a causal link between shelters and violence reduction, such studies conclude that it is not the victim's decision to utilize shelter services but rather the victim's assertion of control which stops violence. When a victim's use of shelter services is not perceived by the batterer as part of a "serious" decision to leave the relationship, the action is simply another display of disobedience that must be met with more violence for punitive effect.<sup>275</sup>

Such findings and criticisms of shelters certainly do not explain the support shelters enjoy. Yet, rather than detracting from the endorsement of shelters, such empirical findings have been relied upon to advocate for shelters as an integral part of a coordinated effort to supply a wider range of victim services.<sup>276</sup> Why are shelters so strongly supported?

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272. *Id.* at 121-23 (finding separation studies to be "[a]t best . . . only an indirect measure of intervention effectiveness"); GONDOLF & FISHER, *supra* note 130, at 80, 82. For a thorough discussion of separation assault, see Mahoney, *supra* note 108. *See also supra* note 138 and accompanying text.

273. Berk et al., *supra* note 262, at 484.

274. For a collection of violence recurrence studies, see *id.* (studying the recurrence of violence for victims seeking shelter services in Santa Barbara, CA); Dutton-Douglas & Dione, *supra* note 262, at 124 (reviewing various studies); Maryse Rinfret-Raynor & Solange Cantin, *Feminist Therapy for Battered Women: An Assessment*, in *OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE*, *supra* note 90, at 219 (studying violence recurrence and other factors for battered women participating in various therapies).

275. Berk et al., *supra* note 262, at 484; *see also* GONDOLF & FISHER, *supra* note 130, at 82; Dutton-Douglas & Dionne, *supra* note 262, at 124.

276. One study stated:

The overall implication in these findings is that shelters cannot do it alone. More than shelter refuge is needed to help women maintain some semblance of safety. Battered women need a wide variety of services and resources to leave their batterers. There also needs to be vigilant coordination with batterer programs to assure that the batterer's counseling does not mistakenly lure women back to an unsafe relationship. In sum, the community help sources need to be more systematically coordinated in order to effectively assist wife abuse.

GONDOLF & FISHER, *supra* note 130, at 88.

*(b) The Feminist Politics of Shelters*

As with other aspects of the domestic violence system, because shelters began in the “formative years” of the battered women’s movement, they too are built upon the feminist framework.<sup>277</sup> Overriding the shelter objective of helping victims of domestic violence to safety is the belief that women live in a world of “male imposed isolation” and that a shelter offers a means of escape from this world.<sup>278</sup> This feminist politicization of shelters is both openly acknowledged and celebrated.<sup>279</sup> Shelters provide women’s groups with:

a place where batterers and their coconspirators in the system cannot control the discussion; they cannot interpret the facts; they cannot silence women’s minds nor keep women from speaking . . . . [T]he groups are designed to create a safe space for women to find their personal power to join with other women to take back control of their lives.<sup>280</sup>

Or more simply, “[t]he role of the shelter and the advocate cannot be underestimated.”<sup>281</sup>

Given such strong feminist influence, it is no surprise that the wide variety of residential and nonresidential services offered by shelters is extended almost exclusively to female victims of domestic violence. Only a handful of men’s shelters have ever existed.<sup>282</sup> The belief that men could not possibly need the services of domestic violence shelters is so widespread that it has been implicitly assumed in the judicial review of gender-based challenges made by battered women denied the opportunity to build a shelter.<sup>283</sup>

While it is acknowledged that the few shelters that have opened for battered men have been closed for lack of support and patronage, this history does not lend itself to arguments against services for

277. See Pence & Shepard, *supra* note 232, at 282-83.

278. *Id.* at 291.

279. See PENCE & PAYMAR, *supra* note 101, at 11; see also Pence & Shepard, *supra* note 232, at 282. Yet for current support for the depoliticization of clinics and greater attention to gender-neutral services and family violence generally, see *infra* notes 296-301 and accompanying text.

280. Pence & Shepard, *supra* note 232, at 290-91.

281. *Id.*

282. See COOK, *supra* note 44, at 54, 156, 168 (noting that only one or two shelters for battered men have existed).

283. See, e.g., *Doe v. City of Butler*, 892 F.2d 315, 328 (3d Cir. 1989). In this case, the shelter application had been denied as a result of a local zoning ordinance which prevented transitional dwelling in residential areas which would house more than six people (including children). In rejecting the women’s disparate impact claim made pursuant to the Fair Housing Act, the court found the battered women’s denial of shelter space to be no greater than the denial which would come to a similarly situated group of men who might need a shelter for other purposes, such as alcoholism. In so doing, the court implicitly assumed both that only women could be abused and that only men could be alcoholics. *Id.* at 328.

male victims of domestic violence.<sup>284</sup> The lack of support is not a result of the lack of need of services for battered men. Rather, it can more fairly be attributed to the widespread denial of female violence and the stigmatization felt by any man claiming to be a victim of such.<sup>285</sup> It may be argued that shelters for homeless men are ample enough to absorb any population of battered men.<sup>286</sup> However, in some areas, particularly large metropolitan areas, there is not sufficient shelter space to assist all men seeking shelter.<sup>287</sup> In the case of battered men accompanied by their children, the lack of adequate physical space becomes more critical. There is terrific difficulty in finding suitable shelter for homeless families, particularly those headed by men.<sup>288</sup>

Even if it is conceded that battered women may have a greater need for shelter space than battered men, such concession does not mandate that both the services and the space provided by a battered women's shelter cannot be utilized to accommodate battered men. Existing space is often already partitioned in such a way to give families separate living quarters. Future space can be built to better accommodate battered men.<sup>289</sup> Yet, perhaps most importantly, as is recognized in the support of domestic violence shelters, shelters provide more than a place of physical safety. Domestic violence shelters offer "hope, support, and counseling specifically targeted to the victims of domestic violence."<sup>290</sup> Such an offer should be as readily made to battered men as it is to battered women.

## V. THE CHALLENGE

From the theoretical definition of domestic violence, to the practical treatment of arrest, prosecution, punishment and victim services, feminism controls domestic violence. Such an approach is a loss for both sexes. Battered men are prevented from seeking relief. Violent women are not restrained. To the extent legitimate, non-patriarchal explanations of domestic violence are suppressed, battered women also remain at risk. But as feminists have strongly held in their work on domestic violence, "[i]t is the constant interaction of theory and practice that keeps a movement dynamic, growing, changing, and most importantly, moving."<sup>291</sup> To remain truly committed to keeping

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284. See COOK, *supra* note 44, at 156.

285. See *id.* at 155. For further discussion of societal attitudes toward female violence, see *supra* note 90 and accompanying text.

286. See COOK, *supra* note 44, at 155.

287. See *id.* at 155-57.

288. See *id.* at 156.

289. See *id.* at 156-57.

290. *Id.* at 156.

291. Pence & Shepard, *supra* note 232, at 297.

the domestic violence movement moving, domestic violence theory must now be challenged. Revitalizing the domestic violence movement calls upon the strength of both theoreticians and practitioners and upon both women and men. It also requires suggestions for change. Such efforts can be initiated by first recognizing the value of many current discussions and projects and then building upon them.

#### A. A Challenge to Theory

Just as we have successfully challenged the “essential” battered woman, the image of the “essential” battering male is ripe for challenge.<sup>292</sup> Contrary to feminist assumptions, not all male batterers are motivated by gender domination. Recent profile studies of male batterers dispel the “homogeneous” batterer myth.<sup>293</sup> In its place are findings which suggest that batterers can be divided into subtypes based upon considerations of the extent of their marital violence, general violence (which is directed toward both strangers and intimates) and any psychopathological or personality disorders.<sup>294</sup> From such typologies, research may still support the theory that a batterer’s violence may be motivated by patriarchal interests. However, this characterization cannot be made in all cases. To the extent violent behavior is indiscriminate, or a product of either a physical or mental disorder, no patriarchal charge can be made.<sup>295</sup> Pursuing such sophisticated, complex theories which explore the variety of reasons a man might commit domestic violence, will yield more effective tools for addressing and preventing domestic violence.<sup>296</sup>

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292. See Hanna, *supra* note 147, at 1561-62. The prototypical battered woman suffered from learned helplessness and failed to account for the diversity of needs and interests brought on by differences in such factors as race, religion, class, age, culture, or immigration status. There have been various contributions deessentializing the battered woman. See, e.g., Crenshaw, *supra* note 108 (exploring the various intersectional contexts of battered women); Hart, *supra* note 96, at 99 (warning against perpetuating a homogeneous battered woman); Kelly, *supra* note 108, at 311-14 (reviewing the cultural and immigration complications faced by battered women); Meier, *supra* note 106, at 1305-07 (discussing the fallacies of learned helplessness theory); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991) (examining cultural attitudes toward domestic violence held by individuals from Asian and Pacific Rim countries in the United States); Seymore, *supra* note 116, at 1065 n.214 (noting the diversity amongst battered women).

293. FAGAN, *supra* note 154, at 36.

294. *Id.* (citing Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and Differences Among Them*, 116 PSYCHOL. BULL. 476 (1994); see also Hanna, *supra* note 147, at 1563-72 (reviewing the research on the reasons why men batter).

295. See FAGAN, *supra* note 154, at 36.

296. See Hanna, *supra* note 147, at 1561; Daniel G. Saunders, *Husbands Who Assault: Multiple Profiles Requiring Multiple Responses*, in LEGAL RESPONSES TO WIFE ASSAULT, *supra* note 116, at 9-30. For a discussion of practical proposals regarding domestic violence prosecution and treatment built on developing theory, see *infra* Part V.B.

Yet, beyond more effectively addressing the violence of men, such work must be recognized for its contribution to recognizing the violence of women. Once the patriarchal element is removed and replaced by gender neutral explanations for violence, it logically follows that violence may be committed by women as well as men. This theoretical move is consistent with other theoretical efforts that have already implicitly accepted that domestic violence is not only committed by men and that it is not always motivated by gender. Domestic violence takes form in elder abuse,<sup>297</sup> child abuse,<sup>298</sup> and sibling abuse.<sup>299</sup> Homosexual abuse, including lesbian battering, is also finally being acknowledged.<sup>300</sup> In combination with the magnitude of

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297. For a selection from the work on elder abuse, see, for example, LYND AITKEN & GABRIELE GRIFFIN, *GENDER ISSUES IN ELDER ABUSE* (1996); GERRY BENNETT & PAUL KINGSTON, *ELDER ABUSE: CONCEPTS, THEORIES AND INTERVENTIONS* (1993); MICHAEL BROGDEN & PREETI NIJHAR, *CRIME, ABUSE AND THE ELDERLY* (2000); PATRICIA J. BRONELL, *FAMILY CRIMES AGAINST THE ELDERLY: ELDER ABUSE AND THE CRIMINAL JUSTICE SYSTEM* (1998); FRANCES MERCHANT CARP, *ELDER ABUSE IN THE FAMILY: AN INTERDISCIPLINARY MODEL FOR RESEARCH* (2000); YVONNE JOAN CRAIG, *ELDER ABUSE AND MEDIATION: EXPLORATORY STUDIES IN AMERICA, BRITAIN AND EUROPE* (1997); RICHARD J. GELLES & CLAIRE PEDRICK CORNELL, *INTIMATE VIOLENCE IN FAMILIES 100-04* (2d ed. 1990); *INTIMATE VIOLENCE IN FAMILIES*, *supra* note 14, at 113-19; *THE MISTREATMENT OF ELDERLY PEOPLE* (Peter Decalmer & Frank Glendenning eds., 1997); *UNDERSTANDING ELDER ABUSE IN MINORITY POPULATIONS* (Toshio Tataru ed., 1999); WALLACE, *supra* note 219, at 237-57.

298. For a sampling from the vast literature on child abuse, see, for example, CONNIE BURROWS HORTON & TRACY K. CRUISE, *CHILD ABUSE AND NEGLECT: THE SCHOOL'S RESPONSE* (2001); *CHILD ABUSE: A GLOBAL VIEW* (Beth M. Schwartz-Kenney et al. eds., 2001); *CHILD ABUSE: A MULTIDISCIPLINARY SURVEY* (Byrgen Finkelmann ed., 1995); *CHILD ABUSE AND NEGLECT: BIOSOCIAL DIMENSIONS* (Richard J. Gelles & Jane B. Lancaster eds., 1987); *CHILD ABUSE: NEW DIRECTIONS IN PREVENTION AND TREATMENT ACROSS THE LIFESPAN* (David A. Wolfe et al. eds., 1997); *CHILD MALTREATMENT: AN INTRODUCTION* (Cindy L. Miller-Perrin & Robin D. Perrin eds., 1999); GELLES & CORNELL, *supra* note 297, at 42-63; *INTIMATE VIOLENCE IN FAMILIES*, *supra* note 14, at 41-69; *THE BATTERED CHILD* (Mary Edna Helfer et al. eds., 5th ed. 1997); WALLACE, *supra* note 219, at 28-107, 121-74; Terri L. Weaver et al., *An Examination of Physical Assault and Childhood Victimization Histories Within a National Probability Sample of Women*, in *OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE*, *supra* note 90, at 35.

299. For various accounts of sibling violence, see, for example, GELLES & CORNELL, *supra* note 297, at 85-90; *INTIMATE VIOLENCE*, *supra* note 14, at 59-60; *INTIMATE VIOLENCE IN FAMILIES*, *supra* note 14, at 97-103; STRAUS & GELLES, *supra* note 14, at 449-52; WALLACE, *supra* note 219, at 108-20.

300. On gay and lesbian abuse, see, for example, COOK, *supra* note 44, at 30-31; RICHARD L. DAVIS, *DOMESTIC VIOLENCE: FACTS AND FALLACIES* 10 (1998); FORD, *supra* note 35, at 20-22; *INTIMATE VIOLENCE IN FAMILIES*, *supra* note 14, at 119-21; *NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING* (Kerry Lobel ed., 1986); CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* (1992); *SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE* (Beth Leventhal & Sandra E. Lundy eds., 1999); *VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS* (Claire M. Renzetti & Charles Harvey Miley eds., 1996); WALLACE, *supra* note 219, at 258-69; Vallerie E. Coleman, *Lesbian Battering: The Relationship Between Personality and the Perpetration of Violence*, in *DOMESTIC PARTNER ABUSE 77-102* (L. Kevin Hamberger & Claire Renzetti eds., 1996); Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 195* (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

studies reporting on female intimate violence, such research powerfully challenges existing feminist assumptions.<sup>301</sup> Women are capable of intimate violence. Men can be victims.

### B. A Challenge to Practice

It is indisputable that feminists have engaged in hard and sincere work on the domestic violence front. The feminist “discovery” of domestic violence and subsequent efforts have made it an issue of terrific public importance.<sup>302</sup> The value of these feminist efforts should never be minimized. However, while not detracting from such progress, it must also be recognized that the limits of feminist theory prevent a full understanding of domestic violence. In addition to its advances, feminist theory is responsible for the limits of existing domestic violence theory and policies. By expanding the theoretical foundation to allow for the possibility of domestic violence in every intimate human relationship, new perspectives on how to effectively address domestic violence will inevitably develop. In new explorations of such issues as punishment and victim services, such work has already begun.

In the punishment context, the appreciation of the multi-dimensional profiles of batterers has led to the recommendation of an array of treatment programs and other responses, which go well beyond the Duluth Model.<sup>303</sup> While a great deal of such work remains limited to the context of male batterers, it rejects the premise that all violence is a function of patriarchy.<sup>304</sup> Rather than helping to build “respectful relationships,” such feminist “shame-based” programs instead “[establish] a power hierarchy in the treatment setting that subtly reinforces power tactics—and that alienates the very population we want to reach.”<sup>305</sup> Advocates of more “client-centered” solutions reject “confrontational approaches” which focus exclusively on gender and power issues.<sup>306</sup> Their proposals include counseling and substance abuse programs geared to address different mental and physical conditions.<sup>307</sup> Characterizing some batterers as “[b]orderline and sociopathic abusers” who are untreatable, the use of carcera-

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301. On the study of female violence, see *supra* Part I.A. and Part I.B.

302. DOBASH & DOBASH, *supra* note 8, at 1.

303. For discussion of the Duluth Model, see *supra* notes 247-60 and accompanying text.

304. For work which remains limited to the context of male abusers, while understanding the limits of feminist theory, see, for example, FAGAN, *supra* note 154; WEXLER, *supra* note 116, at 13; Hanna, *supra* note 147, at 1561; Saunders, *supra* note 116, at 30.

305. WEXLER, *supra* note 116, at 15. For similar criticisms of feminist treatment, see *supra* notes 256-59 and accompanying text.

306. WEXLER, *supra* note 116, at 14-15.

307. For a variety of proposals, see WEXLER, *supra* note 116, at 15-20; Hanna, *supra* note 147, at 1575-83.

tion is also recommended.<sup>308</sup> Similarly, advocates in the shelter movement are also adopting new perspectives. Rather than prioritizing the feminist agenda, greater attention is being paid to the delivery of more practical services such as those relating to housing and crisis intervention.<sup>309</sup>

#### CONCLUSION

Such work marks the beginning of a positive, new direction for the domestic violence movement. Of course, much more needs to be done. For academicians and scholars, greater exploration of the physical, mental, and social conditions that give rise to domestic violence must be undertaken. Such work will lay the groundwork for activists who can develop more effective policies and programs for police, court officials, social workers, and others engaged in the fight against domestic violence. Legitimate concerns about how best to use limited funding can also be raised without having to rely upon more underhanded tactics meant to suppress any recognition of female violence. Through such a hard but sincere struggle, feminists and their work will not be ignored. Instead, patriarchy and gender will be recognized as one of many reasons why domestic violence exists. In so doing, feminism will maintain its legitimacy. And, with a great deal of hope, effort, and time, a real end to domestic violence will be found.

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308. Hanna, *supra* note 147, at 1577.

309. *Id.* at 1531 n.117 (relying on Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 993 (1991)). Not all recognition of such change is supported, see, for example, NORMA JEAN PROFITT, WOMEN SURVIVORS, PSYCHOLOGICAL TRAUMA, AND THE POLITICS OF RESISTANCE 24 (2000) (noting such changes in the Canadian shelter system and criticizing them for failing to recognize the role of female victims). For further discussion of the politicization of shelters, see *supra* Part IV.B.4.(b).