ARTICLE

A HOUSE DIVIDED: MANDATORY ARREST, DOMESTIC VIOLENCE, AND THE CONSERVATIZATION OF THE BATTERED WOMEN'S MOVEMENT*

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I. INTRODUCTION

On June 12, 1994, O.J. Simpson's wife, Nicole Brown, and her friend Ron Goldman, a waiter from Mezzaluna's in Brentwood, California, were murdered. Soon after, New York joined a majority of states in passing mandatory arrest laws in cases involving domestic violence. Most of the legislation passed that day had languished for years in state legislatures. With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the "zero tolerance" bandwagon.

By 1994, thousands of women had been beaten to death.[1]

Ten years have passed since a majority of states first began to mandate arrest in cases of violence against women by male intimate partners.[2] The road to this change was both long and

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1. These deaths partially led to passage of the Violence Against Women Act (VAWA) of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.). *See also* Planned Parenthood v. Casey, 505 U.S. 833, 891–95 (1992) (discussing the pervasive problem of male intimate violence and striking down Pennsylvania's provision requiring spousal notification before obtaining an abortion).

2. By 1992, Connecticut, Maine, New Jersey, North Carolina, Oregon, Utah, and Wisconsin had passed legislation mandating arrest for domestic violence. R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE 169 (1992). The majority of states passed mandatory arrest laws in 1994. Most provisions were drafted with mandatory arrest language and a concept of the batterer regardless of sex, but arrest records would show that most batterers were male and most victims were female. The following states mandate arrest when there is probable cause to believe that a violation of a protection order has occurred: ALASKA STAT. § 18.65.530(a)(2) (Michie 2002); CAL. PENAL CODE § 836(c) (West Supp. 2005); COLO. REV. STAT. § 18-6-803.5 (2004); KY. REV. STAT. ANN. § 403.760(2) (Michie 1999); LA. REV. STAT. ANN. § 14:79(E) (West 2004); MD. CODE ANN., FAM. LAW § 4-509(b) (Supp. 2004); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998); MICH. COMP. LAWS ANN. § 764.15b (West 2000); MINN. STAT. ANN. § 518B.01, subd. 14(e) (West Supp. 2005); MISS. CODE ANN. § 99-3-7(3)(a) (Supp. 2004); MO. ANN. STAT. § 455.085(2) (West 2003); NEB. REV. STAT. § 42-928 (1998); NEV. REV. STAT. ANN. § 33.070(1) (Michie Supp. 2003); N.H. REV. STAT. ANN. § 173-B:9 (Supp. 2004); N.J. STAT. ANN. § 2C:25-21(a)(3) (West 1995); N.M. STAT. ANN. § 40-13-6(C) (Michie 1978); N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2004); N.C. GEN. STAT. § 50B-4.1(b) (2003); N.D. CENT. CODE § 14-07.1-11(1) (2004); OHIO REV. CODE ANN. § 2935.03(B)(3) (Anderson 2003) (suggesting but not mandating arrest); OR. REV. STAT. § 133.310(3) (2003); 23 PA. CONS. STAT. ANN. § 6113(a) (West 2001); R.I. GEN. LAWS § 12-29-3(b)(1)(iv) (2003); S.D. CODIFIED LAWS § 23A-3-2.1(1) (Michie Supp. 2003); TENN. CODE ANN. § 36-3-611(a) (2001); TEX. CODE CRIM. PROC. ANN. art 14.03(a)(3), (b) (Vernon Supp. 2004–2005); UTAH CODE ANN. § 77-36-2.4(1) (2003); WASH. REV. CODE ANN. § 10.31.100(2)(a) (West Supp. 2002); W. VA. CODE ANN. § 48-27-1001(a) (Michie 2004); WIS. STAT. ANN. § 813.12(7)(b) (West Supp. 2004). Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1855 n.42 (2002).

The following states currently mandate arrest or create a pro-arrest policy when there is domestic violence regardless of whether a protection order has been violated: ALASKA STAT. § 18.65.530(a)(1) (Michie 2002); ARIZ. REV. STAT. ANN. § 13-3601(B) (West 2001); CONN. GEN. STAT. ANN. § 46b-38b(a) (West 2004); D.C. CODE ANN. § 16-1031(a) (2001); FLA. STAT. ANN. § 901.15(7) (Supp. 2005); 750 ILL. COMP. STAT. 60/301(a) (1994); IOWA CODE ANN. § 236.12(2) (West 2000) (requiring actual or intended injury to the victim before mandating arrest); KAN. STAT. ANN. § 22-2307 (Supp. 2004) (requiring all law enforcement agencies to adopt "a statement [regarding domestic violence calls] directing that the officers shall make an arrest when they have probable cause or believe that a crime is being committed or has been committed"); LA. REV. STAT. ANN. § 46:2140 (West Supp. 2005); ME. REV. STAT. ANN. tit. 19-A, § 4012(6)(D) (West 1998); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West 1998) (characterizing arrest as a "preferred response" in the absence of a protection order); MISS. CODE ANN. § 99-3-7(3)(a) (Supp. 2004); NEB. REV. STAT. § 42-928 (2004); N.H. REV. STAT. ANN. § 173-B:10 (Supp. 2004) (explaining that "an arrest for abuse may be made without a warrant upon probable cause"); N.J. STAT. ANN. § 2C:25-21(a)(1) (West 1995); N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2004); N.D.

arduous for battered women's advocates. Police and prosecutors routinely engaged in practices that denied women equal protection of the law, compromising not only women's rights, but also their lives.[3] The battered and abused bodies of women occasionally caught the attention of the media and a few political pundits, but legislators consistently refused to listen to those who advocated for laws that promoted individual and systemic accountability for such violence.[4] Not until the Simpson-Goldman murders did a majority of states pass legislation that, at least on paper, required the criminal justice system to treat male intimate crimes in a manner equivalent to stranger crimes.[5]

One must not overlook the radical and beneficial nature of mandatory arrest provisions: They placed male intimate violence at the center of law enforcement policy by criminalizing conduct that the justice system and society previously had sanctioned.[6] These provisions specifically targeted the criminal nature of male intimate violence and required individual accountability, seizure, and incarceration for prohibited behavior.[7] They removed

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CENT. CODE §14-07.1-11(2) (2004); OHIO REV. CODE ANN. § 2935.03(B)(3)(b) (Anderson 2003) (preferring arrest in response to domestic violence); OR. REV. STAT. § 133.310(6) (2003); R.I. GEN. LAWS § 12-29-3(b)(1)(ii) (2002); S.C. CODE ANN. § 16-25-70(B) (Supp. 2004) (stating that an officer "must arrest . . . if physical manifestations of injury to the alleged victim are present"); S.D. CODIFIED LAWS § 23A-3-2.1(2) (Michie Supp. 2003); TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(4) (Vernon Supp. 2004–2005) (allowing, but not mandating, arrest); UTAH CODE ANN. § 30-6-8(2) (1998); VA. CODE ANN. § 19.2-81.3 (Michie 2004); WASH. REV. CODE ANN. § 10.31.100(2)(c) (West Supp. 2001); W. VA. CODE ANN. § 48-27-1002 (Michie 2004) (allowing, but not mandating, arrest). Epstein, *supra*, at 1855 n.42.

3. *See* TASK FORCE ON FAMILY VIOLENCE, BEHIND CLOSED DOORS: THE CITY'S RESPONSE TO FAMILY VIOLENCE (1993) (on file with author) [hereinafter MESSINGER REPORT] (criticizing New York City's ineffective response to domestic violence and concluding that the system for helping battered women is putting them in further danger).

4. *See* Sorichetti v. City of New York, 482 N.E.2d 70, 76 (N.Y. 1985) (commenting on police failure to arrest domestic abuse offenders); Bruno v. Codd, 393 N.E.2d 976, 980–81 (N.Y. 1979) (noting the legislative response in the 1970s upon greater awareness of the issue). *See generally* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE (1988) (proposing that the constitution of the family inherently compromises a woman's rights and discussing the media's slow response to domestic violence); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (claiming that the prerogative is obscured from public view because of cultural perceptions of privacy).

5. *See, e.g.*, Family Protection and Domestic Violence Intervention Act of 1994, ch. 222, 1994 N.Y. Laws 217 (codified as N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2004)).

6. *See* MESSINGER REPORT, *supra* note 3; *see also, e.g.*, MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1998) (providing an example of a mandatory arrest provision).

7. Most states that codified mandatory arrest provisions required that the prohibited conduct constitute a crime of domestic violence or the violation of a stay-away order contained in a restraining order or order of protection. *See supra* note 2 (listing provisions). Some jurisdictions that did not have discrete domestic violence laws

discretion from a cadre of state actors who historically withheld the state's protection from battered women.[8] Yet even in the midst of what most perceived as a major victory, many battered women's advocates felt disquieted because two pressing questions remained unanswered: (1) would this change in policy precipitate a cultural shift that ultimately would improve the quality of women's lives, and (2) would the policy actually transform how society views male violence against women?[9]

The disquiet of these earlier advocates seems well founded. Ten years later, the quality of battered women's lives, as well as society's view of male violence, still needs redress. The persistence of these problems has brought into question the wisdom of mandatory practices and has generated a discourse on state intervention.

The current discourse on mandatory practices implicates two distinct ideological positions. The Protagonists view mandatory practices as a necessity in making women safe. A dominant and troubling theme that has emerged within the Protagonist bloc is that such practices are necessary because battered women are incapable of making a "rational" choice while being traumatized by the violence.[10] Mandatory practices then serve as a necessary shield—not just from the violence of individual males, but from

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mandated arrest when the act constituted a felony, misdemeanor, or violation of an order of protection and was perpetrated by an intimate partner, a family member, or one in familial relationship with the survivor. *See infra* Part V.A (discussing the evolution of New York's mandatory arrest provision).

8. *See Sorichetti*, 482 N.E.2d at 71, 77 (affirming a judgment against the City of New York for failing to protect a battered woman and child from the woman's husband); *Bruno*, 393 N.E.2d at 978 (alleging that various municipal personnel repeatedly ignored the domestic violence complaints of battered women); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 159–61 & 337 n.10 (1982) (discussing the strategy of advocates to use lawsuits, including a class action brought on behalf of battered women, to effect social change).

9. When I refer to the quality of women's lives, I am referring to direct and indirect outcomes. The direct outcome pertains to safety and conceptions of bodily integrity. It is a direct outcome because it addresses the primary problem or concern: the use of physical and psychological violence. However, the indirect outcomes, such as economic, social, and cultural factors, are of equal importance because they shape the context or paradigm within which safety and bodily integrity are constituted.

10. Although not the sole voice within the battered women's movement, it is one that has been accorded great currency within the general culture, feminist legal scholarship on mandatory practices, and the battered women's advocacy community. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1879–80 (1996) (discussing the drawbacks of the emphasis on psychological factors of domestic abuse victims); Adam Liptak, *Ohio Case Considers Whether Abuse Victim Can Violate Own Protective Order*, N.Y. TIMES, May 30, 2003, at A18 (quoting Cheryl Hanna); Interviews with advocates in New York, Colorado, and California (2003). All interviews discussed in this Article were anonymous at the request of the advocates and are on file with the Author.

what is perceived as survivor powerlessness. While not characteristic of the entire battered women's movement, this position correlates with a conservative element within the movement that has achieved both political and social ascendancy. The conservative position is problematic because it dislocates mandatory practices from their historical moorings while reifying the cultural stereotypes of the incapacitated and irrational woman—stereotypes that confine women to, rather than liberate women from, oppressive homes.

At the opposite end of the spectrum are the Antagonists. The Antagonists oppose mandatory practices because they view such practices as unnecessary and as a racist regulation of women's lives.[11] The state is perceived as a replacement for the individual-as-oppressor in its usurpation of women's decisionmaking power. Such practices are significant in the continued regulation of women rather than as a means to liberation. Mandatory practices, then, operate as a sword, severing women from personal and social power.

The current critique of mandatory practices fails to situate the birth of these policies in the proper historical context.[12] This historical amnesia obscures the origins of these policies, discounts the work of battered women's advocates, and ignores the textured nature of the problem of male intimate violence and the social response to it. Consideration of the historical context thus provides the framework for a meaningful exploration of mandatory practices.

As a result of such historical amnesia, the discourse—captured in both legal scholarship and commentary—fails to reflect the work of advocates. Both Protagonists and Antagonists write as if there were no battered women's movement—a movement whose history is complex and nuanced, especially as

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11. *See* Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 439–41 (2003) (arguing that mandatory arrests are part of the "one-size-fits-all responses [that] have failed to take into account the differences among races and cultures and therefore have failed to address many of the issues specific to various groups"); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 565–69 (1999) (proposing a clinical approach to empower survivors of intimate violence as an alternative to mandatory interventions); *see also* MS. FOUND. FOR WOMEN, SAFETY & JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM 6 (2003) (identifying various points of view regarding to what extent advocates should rely on the criminal legal system to address the issues surrounding violence against women), http://www.ms.foundation.org/user-assets/PDF/Program/safety_justice.pdf.

12. *See* Hanna, *supra* note 10, at 1857–59; Mills, *supra* note 11, at 557.

that history relates to questions of the social and political position of women. And each side, polar opposites politically, is linked by one common fact: They have constructed arguments that are dislocated from the historical moorings of the movement.

A movement has been marginalized.

This Article is *not* about mandatory arrest. Rather it is a critique of the Protagonist ideology, an ideology that has devolved into an antifeminist rhetoric that has far-reaching effects on the development of a movement's vision and on public policy.[13] Mandatory arrest is merely the vehicle in understanding how the Protagonists, perhaps unwittingly, have conservatized a movement and distorted a feminist politic.

In preparing to write this Article, I returned to advocacy communities, where roots are deep, to evaluate whether the position taken by scholars was in sync with women enmeshed in the movement. After a series of interviews and roundtable discussions with advocates in New York, Colorado, and California, held during the summer and fall of 2003, I discovered that scholar and advocate were aligned.[14]

In conversations with advocates and in the literature authored by Protagonist feminists, I discovered that the decision to sacrifice autonomy was based on flawed conceptions of will and resistance, as well as faulty ideas concerning the curative power of state intervention. The Protagonists support mandatory arrest because women survivors of male intimate violence are characterized as "incapable of making rational choice in moments of trauma."[15] As one advocate in New York stated, "her autonomy is compromised . . . because we don't know if her decisions [to stay or to not prosecute] are wholly voluntary or compelled."[16] Perhaps unwittingly, the Protagonist ideology gives currency to public policy that usurps women's decisionmaking power, replacing control by the patriarch with control by the state. This Article, then, will examine how the Protagonist position

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13. The Antagonists' position is equally problematic because it is not only ahistorical but it distorts the movement's ideology and methodological position concerning interaction with the state and conceptions of diversity. I chose not to address this part of the critique of mandatory state intervention because it is a separate article.

14. Not all advocates held this position. Indeed, many advocates were repelled by the anti-autonomy position of their sisters and were concerned that it had curried too much favor with state actors.

15. Interview with advocate in New York (2003); Interview with advocate in Colorado (2003).

16. Interview with advocate in New York (2003).

dislocates the battered women's movement from its ideological foundation,[17] contributes to the disempowerment of women, and distorts conceptions of autonomy and resistance.

Part II recounts the historical context within which the modern battered women's movement was born. The early advocates viewed violence against women by male intimate partners as the confluence of systemic and individual oppression,[18] and this violence was potentially present in all women's lives.[19] As a result of this view, shelters were political, nonhierarchical organizations, governed by consensus, with workers, residents, and board members aligned.[20] Shelters closely resembled the architects' ideology concerning power—that power was relational and a commodity that was to be shared.[21] Advocates were uneasy with building a relationship with the state because of the state's role in the systemic oppression of women.[22] Use of state resources was viewed as a negative and oftentimes a non-option.[23] The early activists relied upon the resources of the community to build their movement and their shelters.

Part III examines the origins of mandatory arrest and prosecution within the battered women's movement, identifying the tensions inherent in interacting with the state. The discourse among feminists regarding mandatory practices has been

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17. Feminist ideology spans an enormous political spectrum with liberal feminism on one end and radical lesbian feminism on the other. Notwithstanding these two poles, in relation to violence against women by intimate partners, all ideological positions embraced patriarchy as part of the problem and conceptions of women's autonomy and agency as part of the solution. *See generally* ALISON M. JAGGAR & PAULA S. ROTHENBERG, FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN (Anne Murphy & Susan Gamer eds., 2d ed. 1984).

18. Lois Ahrens, *Battered Women's Refuges: Feminist Cooperative vs. Social Service Institution*, 3 RADICAL AM. 41 (1980).

19. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–42 (1991). *But see* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612–13 (1990) ("[T]he notion that women's commonality lies in their shared victimization by men 'directly reflects male supremacist thinking. Sexist ideology teaches women that to be female is to be a victim.'").

20. SCHECHTER, *supra* note 8, at 63–66; ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 21–22 (2000); *see also* Ahrens, *supra* note 18, at 44–47.

21. *See* SCHECHTER, *supra* note 8, at 63–64.

22. *See* discussion *infra* Part III.A (asserting that mandatory arrest policies, by themselves, cannot completely remove the state's implicit consent to male intimate violence).

23. It is interesting to note that many of the arguments revolving around acceptance of money from public sources did not implicate notions of political correctness or political purity. Indeed, the primary concern was whether the source of funding would direct the evolution of shelters and the politics of the movement. SCHECHTER, *supra* note 8, at 64–65; Ahrens, *supra* note 18, at 46–47.

marked by reluctance and uneasiness concerning interaction with the state. Such uneasiness reflects more than ambivalence: It reveals the distrust that feminists hold for law enforcement. Because police are gatekeepers to the criminal justice system, they have enforced cultural prescriptions that are essentially gendered, raced, and classed. Thus, the uneasiness associated with mandatory arrest and prosecution is emblematic of the paradox inherent in working with systems that have been the source of the problem.

In this Part, I theorize that the early movement believed that mandatory arrest was essential to correct the systemic abandonment of women survivors of male intimate violence. Conceptions of equal justice and protection of women's bodily integrity were constitutive of a feminist politic. The decision to support mandatory arrest was predicated on conceptions of equal protection and autonomy that required transformation of a culture defined by gender asymmetry.[24] Consequently, mandatory state intervention was one tool in correcting institutionalized gender inequality.

Part IV analyzes the conservatization of the movement. I examine the shift in both the battered women's movement and the larger culture regarding the characterization of male intimate violence, the location of the source of the violence, and the rationale for mandatory state intervention. Here, I analyze how the transformation of shelters from political grassroots entities to professional social-service agencies contributed to the conservatization of the movement. At the same time the shelters were being transformed, the lexicon was also changing. What was initially characterized as male intimate violence against women was recast as spouse abuse or family violence. This obscured the source of the violence while marginalizing claims of gender asymmetry in family governance. Moreover, this linguistic shift, along with the organizational reconfiguration of shelters, dislocated the movement from its ideological and methodological roots.

Part V deconstructs the Protagonist ideological paradigm. The Protagonists assume that the social benefits of mandatory state intervention outweigh the costs to women's autonomy. Yet this position incorrectly presumes that intervention by the criminal justice system positively alters the quality of women's

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24. Justice and autonomy were part and parcel of conceptions of safety. Although safety is relative, the movement believed in basic conditions for safety: (1) shelter *if* the women decided to leave the home, (2) economic resources to assist in the reconstruction of her and her children's lives, and (3) police intervention if chosen by the survivor.

lives. Using data from national and local studies on the effects of mandatory arrest, I show that the Protagonists' faith in the criminal justice system is misplaced. Moreover, in the absence of a coordinated community response to male intimate violence that has at its core the transformation of gendered social systems, merely criminalizing male intimate violence is poor public policy.

I unpack the lexicon employed by the Protagonists. Their use of the term "rational" corresponds with "right" or "correct," and the right decision is premised on whether the woman leaves the home or relationship. By adopting this language and its corresponding definition, the conservative element within the movement has not only reinstated a view long rejected by feminists, they have constructed a polarity—leaving or staying—that fails to account for how violence shapes a woman's environment and her understanding of meaningful choice.

Additionally, the Protagonist position pathologizes women's choices. I compare the impact of the Protagonists' rhetorical stance to that of the doctrine of learned helplessness articulated by Lenore Walker. Much like Walker, the Protagonists have resurrected a medical model to explain women's failure to leave. Just as Lenore Walker's *The Battered Woman Syndrome* is understood to describe helplessness and pathological dependency, not social conditions, the Protagonists' focus on failure to leave obscures the sociological factors that may contribute to a woman's choice to remain in the relationship.[25] And it fails to account for how violence constructs both environment and choice and whether the positive valence placed on leaving compromises women's safety.

In Part VI, I show how the Protagonist ideology distorts conceptions of will and resistance. It at once limits women's autonomy while obscuring acts of resistance. Here, I attempt to disentangle notions of will and resistance in extreme situations. In writing this Part, I drew upon the work of Kantian philosophers, feminist relationalists, and political philosophers in understanding how the self interacts and is constituted by its environment. I reject the Protagonist position because it reinscribes Kantian conceptions of the self and autonomy—conceptions that are inherently masculinist. Moreover, in explicating conceptions of autonomy, I abandon traditional notions of independence and self-sufficiency,

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25. ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 35–47; Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 59, 65–66 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

conforming instead to conceptions of interdependence. Self-definition and direction are synergistic. Consequently, autonomy is not unitary but a collaborative and interdependent process.

I draw from the Holocaust philosophers to understand how the Protagonist ideology flattens the topography of will. The Holocaust philosophers grappled with whether autonomy and resistance existed in the Nazi concentration and extermination camps of World War II. Their writings are essential to the discourse on autonomy and resistance, now characterized by feminists as agency, because they raise the important question of whether one is capable of self-determination and resistance in oppressive environments. One can draw a parallel between the camps and homes constructed by and through terror. The link is how resistance is possible even in environments marked by terror.

Resistance is part of battered women's lives. By focusing on leaving, the Protagonists obscure subtle acts of resistance—resistance that maps the topography of women's lives. And resistance to oppression spans an enormous spectrum from the obvious—raising a gun or fist—to the more subtle—protecting children, hiding knives, or memorializing the violence through writing or bearing witness. The Protagonists fail to recognize the myriad acts that constitute resistance, ultimately denying women the meaningful choices they have made while living in homes marked by terror. And I theorize how this denial ultimately dehumanizes them.

In Part VII, I reassert that the Protagonist view is problematic because it places its imprimatur on state usurpation of women's decisionmaking power, marginalizes the constitutive nature of violence in battered women's lives, and obscures how violence constructs choice. Consequently, I call for a rejection of the Protagonist ideology and a return to the ideology of the battered women's movement during the second wave of feminism. Perhaps then we can evaluate mandatory state intervention, *our* responses, and what public policy changes are necessary to ensure equal justice and autonomy.

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As I write about the early battered women's movement, I mediate between remembrance and examination. I am part of this movement. I am one of the advocates that I write about here and that I have read about in the writings of others. The issue of mandatory intervention has a personal dimension for me because I was one of the authors of New York's mandatory arrest law and the sole author of the choice of forum law. I am one of the women whose work is being deconstructed by other scholars and by my own work.

History is about remembrance; it is at once subjective and objective. There are moments when one must stand outside of one's own experience to see the larger picture. This Article penetrates the boundaries constructed by memory, experience, and re-experience. I agree with the early feminists that the personal is indeed the political, but I also have intuited the limiting nature of individual personal experience. It is only one thread—not the entire tapestry. And as I reconstruct the political realities that existed in the early period of the second wave of feminism, specifically as that period relates to the development of the battered women's movement, I use my personal experience as a guide.

II. REMEMBERING OUR ROOTS—THE BATTERED WOMEN'S MOVEMENT OF THE 1970S–80S

A. Mapping the Contours of Women's Oppression: Developing a Feminist Ideology[26]

The battered women's movement of the 1970s to the 1980s was the product of the social movements of the 1960s that challenged conceptions of power based on race, sex, and sexual

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26. I am well aware of the complexity of the women's movement in general, and the battered women's movement in particular. The mere fact that the ideological basis spans an enormous political spectrum demonstrates its textured nature. Notwithstanding this political reality, there is a thread that unites all of the ideologies—the existence of patriarchy as a macro-organizing force. It should also be noted that while the early movement incorporated a race analysis, it did not consistently address this issue in its methodology. Although there were shelters that addressed ethnic and racial asymmetry (e.g., La Casa de Las Madres and Casa Myrna Vazquez—started by a multiracial group of women in Boston), there was not a coherent ethnic or race analysis regarding shelter organization; shelters' methodologies constituted staff, programs, and selection of issues. As the shelters became "professionalized," the chasm between methodology and a race–ethnic consciousness widened. Yet it is incorrect to characterize the battered women's movement as a white women's movement. This notion is incorrect because it makes invisible the women of color who were instrumental in its formation and because it marginalizes those women within the movement who struggled over conceptions of ideological and methodological inclusivity. Finally, women-of-color groups that addressed issues of gender asymmetry in the ethnic civil rights movement and racism in the women's movement influenced the discourse. The Combahee River Collective (the "Collective"), perhaps the most notable of the women-of-color groups, challenged conceptions of patriarchy and race on such issues as intimate violence, abortion rights, and sterilization abuse. The Collective was comprised of black lesbian feminists, but unlike the white lesbian separatist feminists of that era, the Collective did not align with the politics of separatism. Instead, it built alliances with progressive black men in addressing issues of gender, class, and racial violence. The Collective served as a powerful reminder of the intersectionality of race, ethnicity, and gender in the oppression of women and ethnic minorities. *See* The Combahee River Collective, *A Black Feminist Statement*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 362, 365–66 (Zillah R. Eisenstein ed., 1979); *see also* SCHECHTER, *supra* note 8, at 61 (describing the shelter's kitchen as an emotional battlefield of racial mixing); Crenshaw, *supra* note 19, at 1258 (asserting that "battering occurs in families of all races and all classes" and "cuts across racial, ethnic, economic, educational, and religious lines").

orientation.[27] This movement was integral to the women's liberation movement because it challenged male hegemony over women's bodies in the home. The battered women's movement developed an ideology that contested the appropriation of women's bodies, challenged conceptions of male supremacy in the family, and analyzed how the individual power of the patriarch was supported and legitimized by the state.[28]

This analysis of male intimate violence was incorporated into advocates' methodology. By situating male intimate violence within a cultural paradigm, the battered women's movement focused on altering the social conditions that produced, created, and supported such abuse. In the lexicon of the early movement, what needed fixing was not the survivor but the culture. Shelter programs and the nascent coalitions that formed in the late 1970s and early 1980s crafted an agenda that focused on social as well as legal change.[29]

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27. GLORIA I. JOSEPH & JILL LEWIS, COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES (1981); Deb Friedman, *Rape, Racism & Reality*, QUEST, FEMINIST Q., Summer 1979, at 40, 40–41; SELMA JAMES, *Sex, Race and Working Class Power*, *in* SEX, RACE AND CLASS (1975) (on file with Author); *Third World Women: The Politics of Being Other*, 2 HERESIES: A FEMINIST PUBLICATION ON ART & POLITICS 1 (1979) (on file with Author); E. Francis White, *Listening to the Voices of Black Feminism*, 18 RADICAL AM. 7, 7–9 (1984); Dale Carpenter, *The Limits of* Gaylaw, 17 CONST. COMMENT. 603, 612–13 (2000) (reviewing WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999)).

28. Diversity of thought within the feminist movement in general, and the battered women's movement in particular, is striking. Differences of thought were distributed along a political spectrum that included liberal, socialist, Marxist, radical, and lesbian feminism. *See generally* FEMINIST THEORY: A CRITIQUE OF IDEOLOGY (Nannerl O. Keohane et al. eds., 1982) (compiling essays about feminist theory spanning several systems of thought). Each ideological category constructed a political paradigm that located the source of women's subordination as either a consequence of rights inequality, class, control of capital or the means of (re)production, or sex hegemony. *See id.* Yet all of the ideological positions included patriarchy as either constitutive of, or in collaboration with, other social categories in the subordination of women. *See id.* Thus, regardless of label, patriarchy was a critical component of women's oppression. *See id.*

29. Coalitions sprang up nationwide. Of particular interest were coalitions in New York, Colorado, and Illinois. The Chicago Abused Women's Coalition (CAWC) started a legal newsletter that identified gender asymmetry in law enforcement. SCHECHTER, *supra* note 8, at 71. Additionally, in the first two years of its existence, CAWC spoke to hundreds of community groups, women's organizations, and professional agencies. *Id.* Their presentations attempted to dispel the myths of survivor blaming, to identify the broader social conditions that created the abuse, and to challenge mental health professionals to avoid pathologizing women's choices. *Id.* For further discussion of CAWC, see *id.* at 69–73. The Coalition of Battered Women's Advocates of New York City and the New York State Coalition Against Domestic Violence began lobbying legislators to change laws that restricted women's court access. *See* New York State Coalition Against Domestic Violence, About the Coalition, *at* http://www.nyscadv.org/about.htm (last visited Apr. 18, 2005) (highlighting public policy services that promote judicial responses to domestic violence). The Colorado Coalition (Denver) began to work with local law enforcement in examining unequal treatment of battered women by police. *See* CO. COALITION AGAINST DOMESTIC

Social justice is the engine that drove the movement.[30] Critical to conceptions of social justice is a woman's right to bodily integrity and to autonomy. Implicit in our notion of bodily integrity is the right to be free from violence, whether the violence is perpetrated by a stranger, lover, or significant other. As a consequence of this belief, women's safety is significant.

Intrinsic to conceptions of autonomy is the belief that women are free beings, imbued, not unlike their male counterparts, with the right to be agents in their own lives. As discussed below, conceptions of autonomy include the capacity to make meaningful choices and decisions.[31] Meaningful choice is not fixed; rather, it is contingent, tied to specific situations and constantly changing. Advocates recognized that decisionmaking is contextualized and shaped by violence and the social response to the violence. Thus, women's choices are not made in a cultural vacuum.

Accountability is part of the safety–autonomy paradigm. Mandatory arrest, the first manifestation of state intervention, grew from conceptions of individual and collective accountability. Violence against women by intimate partners manifested the gender asymmetry experienced within the social fabric.[32] Individual conduct was supported by the collective view of women—subordinated and under the control of the individual patriarch and of the Patriarchy.[33] Laws that codified this

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VIOLENCE, LAW ENFORCEMENT TRAINING MANUAL, at v–vi (2d ed. 2003) (recalling that police treated domestic violence less seriously than other crimes in the past), http://www.ccadv.org/publications/law_enforcement_manual_11-03.pdf.

30. *See* DEL MARTIN, BATTERED WIVES 31–35 (1976) (discussing legal reform exhibiting a move towards social justice); SCHECHTER, *supra* note 8, at 29–31, 34–43 (noting the antirape movement's demand for legal and institutional reforms). *See generally* SISTERHOOD IS POWERFUL, at xxi–xxix (Robin Morgan ed., 1970) (describing how the National Organization for Women (NOW) achieves reform by fighting "*within* the System"); THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR (Alice S. Rossi ed., 1973) (providing a collection of articles discussing the social roots of the battered women's movement).

31. SCHNEIDER, *supra* note 20, at 78–79; Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römkens, & Marianne Wesson*, 10 J.L. & POL'Y 313, 326 n.22 (2002) [hereinafter *Author Meets Readers*] (discussing the Beijing Conference of 1995, at which 189 governments adopted the Platform for Action to promote steps for women's economic independence and continued antidiscrimination measures).

32. *See* SCHNEIDER, *supra* note 20, at 78 (advocating the need for understanding the power imbalance favoring men inherent in all heterosexual intimate relationships).

33. *See* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 59–62 (1979) (chronicling the legal history of chastisement, whereby a woman surrendered her legal rights and distinct existence in marriage); JULIET MITCHELL, WOMAN'S ESTATE (1971) (examining the politics behind female oppression by the patriarchy); SCHECHTER, *supra* note 8, at 157–69 (noting that police historically had regarded wife beating as a private matter).

tradition enabled husbands to rape and beat their wives,[34] to control their bodies,[35] to control their material resources, and to control their public identity.[36] Consequently, advocates viewed individual and systemic accountability as key components to a safety–autonomy construct.

As Elizabeth Schneider states, advocates never claimed that women's oppression, regardless of its form, was either distinct or unique; rather, it was part of a system that subordinated persons based on race, class, sexual orientation, ethnicity, and gender.[37] Yet although the ideology of the movement situated women's oppression along an axis of domination, patriarchal power was viewed as a central force in shaping women's subordination.[38]

Advocates understood the social construction of women in the family as well as in the public sphere to be critical in the subjugation of women. Indeed, scholars have identified how law and culture operate synergistically to subordinate classes of individuals.[39] Thus, early advocates understood that women's subordination within the family was part of a larger social system in which law operated to support and legitimate gender subordination. Sexual subordination in the private sphere was marked not only by the violence of individual males but by the laws that made such violence normative.[40] The right of husbands to offer subtle chastisement to their wives was part of the social and legal terrain.[41]

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34. DOBASH & DOBASH, *supra* note 33, at 60–62; MITCHELL, *supra* note 33, at 64–65 (describing patriarchal control over institutions and ideology that subjugate women); SCHECHTER, *supra* note 8, at 24–27, 45, 157–64.

35. DOBASH & DOBASH, *supra* note 33, at 60; SCHECHTER, *supra* note 8, at 24–27, 45.

36. DOBASH & DOBASH, *supra* note 33, at 60–61; SCHECHTER, *supra* note 8, at 24–27, 45–46.

37. SCHNEIDER, *supra* note 20, at 71–73.

38. DOBASH & DOBASH, *supra* note 33, at 60–62; SCHECHTER, *supra* note 8, at 157–69. *See generally* MITCHELL, *supra* note 33 (describing the pervasive patriarchal ideology in society that supports the inferiorization of women physically, legally, and socially).

39. DOBASH & DOBASH, *supra* note 33, at 59–62 (discussing legal restrictions placed upon married women in particular and women generally); MITCHELL, *supra* note 33, at 34 (discussing the subsumption of subcultures under the mantle of the larger culture); SCHECHTER, *supra* note 8, at 157–69 (recounting police practices that trivialized claims of domestic abuse).

40. GORDON, *supra* note 4, at 255–56.

41. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432 (Univ. of Chi. Press 1979) (1765); *see also* Muller v. Oregon, 208 U.S. 412, 421–23 (1908) (justifying protective legislation for women because of their weaker physical structure); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in judgment) (agreeing with the affirmance of an Illinois law barring women from practicing law and reiterating the subservient role of women confirmed by "nature herself"); GORDON, *supra* note 4, at 255–57.

Law thus was a means of reinforcing social categories through the codification of normative values and beliefs. This is evident in how gender norms were central to shaping legal identities. Although there were vast differences in the social and legal constructions of master–slave and husband–wife relationships, there were distinct parallels. Historically, wives, not unlike slaves, were the legal property of the patriarch.[42] They did not have a social or legal identity separate from their husbands. Even though the husband could not alienate or sell his wife, her person was subsumed in his,[43] and her body was his to control.[44] Her body was the province of others. Conceptions of bodily integrity, autonomy, and privacy were alien to the materiality of women's lives; sovereignty—"over [her] self, over [her] own body"—was an anathema to male hegemony within the family and to the social order.[45] Intimate violence was not only a means of individual control over women but of social control.[46]

The nexus between the inferiority of women and the appropriate domain for women's participation was embedded by law into the social fabric. In *Bradwell v. Illinois* and again in *Muller v. Oregon*, the U.S. Supreme Court reinscribed the cult of domesticity by finding that women were ill-suited to specific professions because "[women's] natural . . . timidity" made "[them unfit] for many of the occupations of civil life" and in need of male protection.[47]

This protection came at a price. Male privilege and power within the family, protected by conceptions of marriage and familial responsibility, granted to husbands the right to beat and rape their wives.[48] Male intimate violence was justified because the husband was vested with the power to physically control his wife's behavior. The court presumed the legitimacy of such power. Judicial inquiry started from the point that some physical violence was acceptable to preserve the "natural order of

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42. *See* 1 BLACKSTONE, *supra* note 41, at 430.

43. *Id.*

44. *Id.*

45. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., Oxford Univ. Press 1991) (1859).

46. GORDON, *supra* note 4, at 252, 257; ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 129 (1987).

47. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring in judgment); Muller v. Oregon, 208 U.S. 412, 422–23 (1908).

48. GORDON, *supra* note 4, at 255–57; PLECK, *supra* note 46, at 88, 91.

things"—of which familial harmony and male hegemony were integral parts.[49]

In *State v. Black*,[50] a wife's accusation of adultery on the part of her husband constituted sufficient provocation to justify a physical attack because her behavior fell outside the bounds of acceptable wifely conduct.[51] Here, mere words on the part of the wife constituted legally sufficient provocation.[52] But in finding adequate provocation, the court inverted conceptions of abuse. The *husband* was transformed into the abused party because his wife's conduct was an affront to his power and to social conceptions of order. Use of violence protected not only male hegemony within the family but also the interests of the state in preserving social stability.

John Stuart Mill recognized that the marriage certificate gave husbands a license to abuse their wives physically and sexually. He wrote in 1859,

> The State, while it respects the liberty of each in what specially regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others. This obligation is almost entirely disregarded in the case of the family relations . . . . The almost despotic power of husbands over wives needs not be enlarged upon . . . .[53]

As a consequence of its support of such conduct, the state invested in men the right to control women's bodies. Indeed, the state's imprimatur on such violence was not lifted until the 1980s and 1990s when courts invalidated the marital rape exemptions within their penal laws.[54]

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49. Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824), *overruled by* Harris v. State, 14 So. 266 (Miss. 1894). The *Bradley* court held that husbands would not be prosecuted if they beat their wives with a stick no thicker than the diameter of their thumb. *Id.* at 157. In effect, husbands had the right to use physical force as a means to control their wives' behavior. *Id.* at 157–58. The question that triggered state action and judicial inquiry was the amount of force used—hence it was *excessive* force that was actionable, not the mere use or threatened use of force. *Id.*; *see also* State v. Black, 60 N.C. (Win.) 262 (1864).

50. 60 N.C. (Win.) 262 (1864).

51. *Id.* at 263.

52. *Id.* In *Black*, the husband pulled his wife's hair and held her down after she accused him of adultery. *Id.* Tamsey Black asked her husband if he had been "patch[ing] Sal Daly's bonnet" (Sal Daly was a woman of ill repute); they subsequently exchanged "angry words." *Id.* at 262. The court characterized the wife's conduct as "excessive abuse," or strong provocation. *Id.* at 263.

53. MILL, *supra* note 45, at 116.

54. *See, e.g.*, Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986); People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984); *see also* Commonwealth v. Chretien, 417 N.E.2d 1203, 1209 (Mass. 1981) (concluding that the Massachusetts legislature repealed the spousal exclusion in 1974).

Male intimate violence, like racial or homophobic violence, is a problem embedded primarily in the structure of the social order—not in the psyche of individual men.[55] Battered women's advocates appreciated this: They, not unlike their sisters in the suffragist movement,[56] understood that male privilege, of which intimate violence was a manifestation, was about power.[57]

In spite of the existence of the women's liberation movement, the ideological position assumed by the advocates concerning male privilege and systemic sexism ran against the cultural grain. In the 1960s and 1970s the psychological view of battered women supported the feminist contention that professionals "blam[ed] the victim."[58] The prevailing view was that battered women were masochistic and that the violence filled this need.[59] Susan Schechter points out that battered women were defined as "'aggressive, efficient, masculine, and sexually frigid.'"[60] This characterization placed women outside socially prescribed roles, where they became objects deserving not only of their husbands' rage but of society's too.

Schechter recounts a study conducted in the early 1970s concerning the criminal justice system's response to a select

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55. NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 94–96 (1998) (analyzing the cycle of abuse among abused boys who develop into adult batterers and stating that up to one fourth of American children are raised in violent homes); Michèle Harway, *Battered Women: Characteristics and Causes*, *in* BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 29, 29–36 (Marsali Hansen & Michèle Harway eds., 1993).

56. *See generally* ELLEN CAROL DUBOIS, WOMAN SUFFRAGE AND WOMEN'S RIGHTS (1998) (recounting the author's history of feminist scholarship).

57. David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 176, 178–88 (Kersti Yllö & Michele Bograd eds., 1988) (presenting several analytical models for understanding violence); *see also* SCHECHTER, *supra* note 8, at 20–24.

58. SCHECHTER, *supra* note 8, at 20–24.

59. John E. Snell et al., *The Wifebeater's Wife: A Study of Family Interaction*, 11 ARCHIVES OF GEN. PSYCHIATRY 107, 109–11 (1964) (characterizing one abused wife's venting of her "manipulative behavior" in therapy as "taking pressure off [her] husband").

60. *See* SCHECHTER, *supra* note 8, at 22 (quoting Snell et al., *supra* note 59, at 111); *see also* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 2 (1984) (hypothesizing that early social influences on battered women facilitate a psychological condition known as "learned hopelessness"); Harway, *supra* note 55, at 29–31; Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 VIOLENCE & VICTIMS 101, 107–11 (1986) (examining studies that these personality characteristics show "an inconsistent relationship to victimization"); Maria P.P. Root, *Reconstructing the Impact of Trauma on Personality*, *in* PERSONALITY AND PSYCHOPATHOLOGY: FEMINIST REAPPRAISALS 229, 229 (Laura S. Brown & Mary Ballou eds., 1992) (explaining the manifestations of trauma in personality); Lenore E. Auerbach Walker & Angela Browne, *Gender and Victimization by Intimates*, 53 J. PERSONALITY 179, 179 (1985).

number of cases involving male intimate violence.[61] The response to such violence was representative of not only the psychiatric community's position concerning battered women but the criminal justice system's position as well.[62] Psychiatrist M. Faulk, the author of the study, examined twenty-three cases in which men were arrested for seriously battering their wives:[63] nine went to jail[64] and five, including two men who murdered their wives, were placed on probation.[65] In writing about these cases, Faulk attributed the lenient sentences to the sentencing court's sympathy for the men and their "tragic situations."[66] Faulk and the court believed that the perpetrators were merely responding to marital stress or to provocative behavior on the part of their wives. Notably, there was little, if any, discussion concerning the husband's responsibility for the violence or how the court's posture implicitly supported both the violence and misplacement of responsibility.[67] Women were not only the source of victimization but agent provocateurs in their own deaths.

The Faulk study demonstrates that misogynistic beliefs about women were integrated not only into the "helping" professions but also into judicial decisions concerning accountability. The cases of the nineteenth century that crafted the rule-of-thumb axiom, and the accompanying ideology of male violence, were imprinted culturally and judicially onto the twentieth-century landscape.[68] Battered women's advocates had ample legal and social evidence to support the conclusion that the subordination of women was integral to how we order ourselves as a society and that violence against women was a means to enforce the social order.

Twenty-three years later, in 1993, the Senate Judiciary Committee documented the pervasiveness of such attitudes in hearings held on the Violence Against Women Act.[69] The

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61. SCHECHTER, *supra* note 8, at 22–23.

62. *Id.* at 23.

63. *Id.* at 22.

64. *Id.* at 23.

65. *Id.*

66. *Id.*

67. *See id.*; DOBASH & DOBASH, *supra* note 33, at 20–24 (asserting that the source of violence is challenge to male power and not lack of impulse control). *See also generally* LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION (Beverly Balos & Mary Louise Fellows eds., 1994).

68. *See* PLECK, *supra* note 46, at 158–63; *see also* Bradley v. State, 1 Miss. (1 Walker) 156, 157 (1824) (giving husbands license to beat unruly wives with a switch "no bigger than [one's] thumb").

69. S. REP. NO. 103-138, at 39–42 (1993); *see also* Violence Against Women Act (VAWA) of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified as amended in

legislative findings documented that the attitudes articulated by Faulk were manifest throughout the culture and were reflected in the practices of courts, police departments, and prosecutors' offices across the United States. Gender asymmetry and violence, first identified by the battered women's advocates in the 1970s, was now recognized as a legitimate claim.[70] Male intimate violence was finally on the national political agenda. Yet in spite of its political ascendancy and accompanying rhetoric, this violence was sanitized and disaggregated from its source, thereby obscuring its roots, its perpetrators, and its survivors at an incalculable social cost.[71]

B. Locating the Contours of Women's Oppression: The Methodology of a Movement

In the early 1960s, there were virtually no battered women's shelters in the United States. Battered women were forced to compete for shelter with the homeless who had suffered catastrophic loss or who were mentally ill or alcoholic.[72] The Salvation Army and other religious organizations also housed battered women, but these groups viewed such violence as an aberration and not the consequence of a social ideology based on gender asymmetry.[73] Women were left to their own devices to understand the nature of the violence as well as its effects. As Schechter points out, because the religious shelters stressed the importance of family unity[74] and validated gendered power

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scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.). *See generally* G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 157–59 (2000) [hereinafter Miccio, *Notes from the Underground*]; G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of* Deshaney, 29 COLUM. HUM. RTS. L. REV. 641 (1998) [hereinafter Miccio, *Deliberate Care*]. In his dissent to the Supreme Court's opinion in *Unites States v. Morrison*, 529 U.S. 598 (2000), in which the Court invalidated VAWA's civil remedy provision for exceeding congressional Commerce Clause authority, Justice Souter noted that Congress estimated the annual cost of domestic violence and sexual assault to be $3 billion. *Id.* at 632 (Souter, J., dissenting).

70. S. REP. NO. 103-138, at 38, 41–42.

71. *See* discussion *infra* Part III.

72. *See* PLECK, *supra* note 46, at 5; SCHECHTER, *supra* note 8, at 55.

73. *See* PLECK, *supra* note 46, at 5; SCHECHTER, *supra* note 8, at 55.

74. Yet sheltering battered women was not a new phenomenon. In the nineteenth century, the first shelters were the outgrowth of social improvement agencies. The Society for the Prevention of Cruelty to Children, which was staffed by native-born white Protestant men, ran the first major shelters for battered women. The clients were white immigrant women and second-generation Catholic women perceived by professional social workers to be in abusive relationships that fit their ethnic role. The immigrant family, not unlike the black family, was viewed as violent and dysfunctional; violence, then, was part of the nature of the individual. In the white Protestant families, the abusive husband and

relations within the family, the social and cultural bases for male intimate violence went unexplored.[75] Save for one shelter in California devoted exclusively to women survivors of male intimate violence, there were relatively few if any options for battered women where they could find shelter and also engage the larger issues of male violence within the culture.[76]

The importance of battered women's shelters cannot be overstated: They were informed by and formative of both the women's and battered women's movements. How they operated is important in understanding the movement's roots.

The 1970s era was critical in the development of the movement. It was during this period that advocates opened shelters devoted exclusively to battered women and their children. Shelters emerged in New York, Boston, St. Paul, and San Francisco. The shelters, regardless of organizational origin, were grounded in an ideology framed by four principles: (1) intimate violence was the confluence of male hegemony in the home and women's subordination in the public sphere; (2) the violence was political and not a consequence of women's personalities or families of origin; (3) male intimate violence was a potential in all women's lives; and (4) women's right to self-determination was significant. Feminist ideology was paradigmatic to shelter philosophy and methodology.[77]

Because there was little if any money available to open shelters exclusively for battered women and their children, advocates opened their homes.[78] Transition House, the first shelter on the East Coast, started when Cherie Jimenez and her

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submissive wife fit the gender roles appropriate to their race. Violence directed at middle-class wives was more psychological than physical. Consequently, ethnicity was a proxy for brutish behavior. Yet although the state had an interest in controlling *some* males' behavior, there was no interest in divesting ethnic males of power. Instead, the state merely controlled how such power was exercised. Indeed, as Barbara Ehrenreich points out in her monograph *Complaints and Disorders*, the power of the patriarch to control the body and the conduct of his wife was far-reaching. Economically privileged husbands confined wives to mental institutions or subjected them to sexual surgery as a means to correct socially errant conduct: "Among the indications were a troublesomeness, eating like a ploughman, masturbation, attempted suicide, erotic tendencies, persecution mania, simple 'cussedness,' and dymenorrhea." Barbara Ehrenreich & Deirdre English, *Complaints and Disorders: The Sexual Politics of Sickness*, 2 GLASS MOUNTAIN PAMPHLET 5, 35 (1973) (on file with Author); *see also* GORDON, *supra* note 4, at 255–56. By turning a blind eye to such violence, the state encouraged the further dehumanization of women.

75. SCHECHTER, *supra* note 8, at 55–56.

76. *Id.*

77. *Id.* at 56–58; Elizabeth M. Schneider, *The Violence of Privacy*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 25, at 36, 48–49; *see also* Mahoney, *supra* note 25, at 65.

78. PLECK, *supra* note 46, at 189; SCHECHTER, *supra* note 8, at 62–63.

significant other, Chris Womendez, declared their Boston apartment a battered women's shelter.[79]

Women's Advocates, a shelter program in St. Paul, Minnesota, emerged from a consciousness-raising (CR) group, in which participants felt the need to "do something" for battered women.[80] The women in the CR group first developed legal materials to instruct women on what to do if battered.[81] Then, armed with individual pledges of $350 from women throughout the community, the CR group rented a small apartment for sheltering battered women and their children.[82] Fifteen-hundred miles away, in New York, women opened their apartments and convinced others to do the same in establishing a number of safe houses to shelter women and their children.[83] This cluster of apartments subsequently became Sanctuary for Families, one of the largest shelter programs in New York State and nationwide.

Safe homes sprang up across the United States throughout rural, urban, and suburban America. Not unlike the underground railroad of the nineteenth century, advocates, many of whom were formerly battered women, created a network of individual safe houses to help women escape the violence and oppression that had defined their lives.

Unable to garner money from states or large funding sources, the advocates turned to women within their community for economic, social, emotional, and political support.[84] What is characteristic about the movement at this stage of development is its self-reliance. Community women created the power base for shelters. Power was derived from the group, and in this way women learned a unique lesson: power was generative, relational, and defining—both individually and collectively.[85] The advocates learned early on that the constitutive nature of power was significant to who they were and what they were becoming. Consequently, conceptions of women's collective agency, in conjunction with the four principles, framed methodology.

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79. SCHECHTER, *supra* note 8, at 56.

80. *Id.* at 62.

81. *Id.*

82. *Id.* at 62–63.

83. Telephone Interviews with the first Board President of Sanctuary for Families, Inc. (on file with Author) (Fall 1989–Summer 2003).

84. Advocates were also unwilling to accept state funds due to state approbation of male intimate violence and concern over issues of co-option and control. This became a key issue as the movement developed politically and organizationally. *See* SCHECHTER, *supra* note 8, at 93–98 (discussing the "mixed blessing" of money).

85. DONILEEN R. LOSEKE, THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE 29–30, 149–51, 154 (1992) (exploring the relationship between unique individuals and the collective representation of the "battered woman").

The shelters organized themselves into working collectives; no distinction existed between workers and residents, implicating many of the principles articulated above. Intrinsic to how shelters constituted themselves was the belief that because all women were potential victims, residents' lives could instruct staff on how violence constructed lives and how residents resisted. As Martha Mahoney observed, battered women were constantly mediating, planning, and strategizing so as to survive from day to day, week to week, and month to month.[86] And by engaging in "resistant self-direction,"[87] battered women were exercising some small sphere of control in their daily lives. From residents, staff learned the lengths to which survivors went to safeguard themselves and their children—the ultimate expression of their autonomy.[88] By blurring distinctions between resident and staff, the shelters would return what sexism had robbed from women: control over their lives.[89]

Women's agency was instrumental in the governance model chosen by advocates. By employing a consensus model, polices and procedures were decided upon by the entire community through a dialectical process wherein disagreement was not only common but welcome. Rules were shaped based on the day-to-day experiences of all members of the community regardless of position. Hierarchical conceptions of power were rejected for consensus and collective decisionmaking so as to infuse an egalitarian ethic into the operation of the shelters. It was a conscious decision by the framers of shelter life to choose, as one advocate characterized, "controlled chaos,"[90] rather than a top-down bureaucratic model of governance. If order was compromised, the predominance of women's decisionmaking compensated for such a loss.

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86. *See* Mahoney, *supra* note 25, at 73–74 (exploring the variety of ways women assert themselves after experiencing violence); *see also* GORDON, *supra* note 4, at 271–76 (detailing various forms of victim's resistance prior to the creation of shelters); LOSEKE, *supra* note 85, at 58–62 (outlining the creation of the South Coast shelter and its aim of helping women seek independence from abuse); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 550–57 (1992) [hereinafter Schneider, *Particularity and Generality*] (examining the particular difficulties faced by battered women as mothers); Schneider, *supra* note 77, at 45 (identifying the pros and cons of mediation).

87. SCHNEIDER, *supra* note 20, at 85 (quoting Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 833 (1999)).

88. Mahoney, *supra* note 25, at 64–65. For a discussion of Western culture's demand that mothers be self-sacrificing even in the face of intimate violence, see SCHNEIDER, *supra* note 20, at 148–57.

89. SCHECHTER, *supra* note 8, at 62–68.

90. Interview with advocate in New York (2003).

In her book, Schechter characterized the early shelters as grassroots models of governance in which professionals were not involved.[91] While she is correct that shelters were formed by community women, many of whom were formerly battered,[92] many of the advocates were trained social workers, lawyers, and members of religious communities.

I would suggest that the emphasis on the presence of professionals is misplaced. Professionals were part of the organizing groups, but the primacy of professionalism was not present. The methodology employed by the early architects was distinctive because it subordinated the role of the professional to the group's identity. Status was not a consequence of formal credentials. Staff members were shelter workers rather than lawyers, doctors, social workers, religious workers, or educators who happened to work at a shelter. Professional experience informed women's experience regardless of position, and it held no more ascendancy than any other role—including that of survivor of abuse. Because the shelters were formed by members of the community and power was relational and shared, they evolved from the grassroots. Grassroots organizations are defined not by the presence or lack of presence of professionals but by how, by whom, and for what purpose power is exerted.[93]

I do not idealize the early shelters. I recognize that shelter workers and residents clashed over internal politics, ideological positions, and cultural questions particular to ethnicity and class. Yet the methodology employed did much to "empower" women—regardless of role, ethnicity, or class.[94] And unlike the modern shelters, professional credentials were not a proxy for

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91. SCHECHTER, *supra* note 8, at 56–58, 62–68; *see also* LOSEKE, *supra* note 85, at 65–67 (describing the status of the South Coast workers as "not professionals").

92. SCHECHTER, *supra* note 8, at 57, 65.

93. *See* SAUL D. ALINSKY, RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS 3 (Vintage Books 1989) (1971) (describing how "those who want to change the world from what it is to what they believe it should be" can do so); HARRY C. BOYTE, THE BACKYARD REVOLUTION: UNDERSTANDING THE NEW CITIZEN MOVEMENT 7–8 (1980) (describing the citizen advocacy movements that used democratic power relations as an organizational principle). *See generally* Heather Booth et al., *Toward a Radical Movement*, *in* RADICAL FEMINISM: A DOCUMENTARY READER 58, 62–63 (Barbara A. Crow ed., 2000) (discussing the women's movement of the 1960s and its goals of attacking America's problems "at their root").

94. The early shelters were often plagued by internecine struggles involving ideology and strategy. Because the feminist shelters stressed consensus, such struggles were corollaries of structural dynamics. Additionally, as Pleck correctly emphasizes, the most radical shelters oftentimes collapsed because of limited finances and no viable funding stream. Inadequate funding was a consequence of the political nature of the shelters, not of shelter politics. *See* PLECK, *supra* note 46, at 190–93 (examining the transition of the first shelters from self-help organizations to social agencies).

effectiveness as a shelter staff member. There was real currency in being a survivor. Survivors supported, taught, encouraged, challenged, and cajoled one another. More importantly, survivors performed the same tasks as workers in configuring shelter life. Women's self-determination, a key organizing principle, was practiced through the egalitarian traditions employed by the advocates. Yet such equality would be sacrificed in the latter part of the twentieth century.[95]

C. Mapping the Contours of Women's Oppression: The Nexus Between Ideology and Methodology

The shelters of the mid-twentieth century were the outgrowth of a political ideology that understood male intimate violence to be part of a larger cultural view that subordinated women. By placing women's individual experience within patterns of systemic oppression, individuation of the violence was inapt. The violence was socialized, and the particularity of women's experience contextualized. Intimate violence was viewed as a corollary of women's cultural subordination rather than the consequence of women's personalities or families of origin.[96]

This analysis of male intimate violence was incorporated into advocates' methodology. By situating male intimate violence within a cultural paradigm, the battered women's movement focused on altering the social conditions that produced, created, and supported such abuse. In the lexicon of the early movement, what needed fixing was not the survivor but the culture.

Shelter programs and the nascent coalitions that formed in the late 1970s and early 1980s crafted an agenda that focused on social as well as legal change.[97] As part of social change, battered

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95. Elizabeth Pleck notes that by 1981 feminists had established less than half of the shelters. The slow influx of private and governmental money contributed to mainstream social-service agencies' involvement in providing shelter. PLECK, *supra* note 46, at 190–94. Involvement of private and governmental funding sources, in turn, contributed to the conservatization of shelter ideology and methodology. *See* discussion *infra* Part IV.B (considering the impact of outside funding on the movement).

96. *See* Harway, *supra* note 55, at 34–35 (articulating the feminist and sociological theories of battering, which attribute causation to cultural norms and male need to demonstrate power); *see also* WALKER, *supra* note 60, at 103–04 (claiming that unequal gender socialization patterns are the cause of violence and that "men abuse women because they can"); SCHECHTER, *supra* note 8, at 23–26.

97. Coalitions were established across the country, with the most prominent arising in New York, Colorado, and Illinois. In New York, Park Slope Safe Homes Project developed a speaker's bureau that fanned out across Brooklyn, involving a multi-ethnic cadre of women to challenge, confront, and cajole community members into antiviolence actions. SCHECHTER, *supra* note 8, at 304–05. Sanctuary For Families, based in New York City, worked in coalition with the few feminist domestic violence programs in New York to assess and change city social services' and law enforcement agencies' response to

women's advocates aligned ideologically with women's organizations that sought to transform conceptions of wage labor and women's participation in the labor market.[98] Such alliances were vital because, as Donna Coker points out, economic resources are critical in facilitating women's decisionmaking concerning what options are viable in either stopping or coping with the violence.[99]

Although low-income and poor battered women are doubly disadvantaged because of the violence by their assailant and the violence that accompanies poverty, economics plays an important role in the lives of middle-income women as well. Studies document that women's disposable income is reduced by half when there is either a divorce or separation.[100] In illustrating the economic vulnerability of women and the forced dependence on male wage earners, Gloria Steinem noted, "Most women are one man away from welfare."[101] The feminization of poverty, a term first used during the Carter Administration, charted the economic disparities that were deeply entrenched in a gendered wage system and how such disparities disproportionately affected

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battered women. Interviews with advocates in New York, Colorado, and California (2003). For additional discussion on coalitions in New York, and a discussion on coalitions in Colorado and Illinois, see note 29 *supra*.

98. The Congress of Neighborhood Women (CONW), located in Brooklyn, New York, is a good example of the integration of antiviolence and wage labor issues. CONW—comprised of battered women's advocates, as well as other women from the community—worked on issues involving gender asymmetry, wage labor, and issues of male intimate violence. Members understood that economic dependence on male wage earners contributed to maintenance of the relationship between perpetrator and survivor. Critical to ending male violence was the severance of economic ties to the assailant. I interviewed key members of CONW in 1980 while on faculty at the State University of New York at New Paltz, Women Studies Program.

99. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 804–05 (2001).

100. *See* Adriaen M. Morse, Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 619–20 (1996); Sara S. McLanahan & Erin L. Kelly, *The Feminization of Poverty: Past and Future*, *at* http://www.olin.wustl.edu/macarthur/working%20papers/wp-mclanahan3.htm (last visited Apr. 18, 2005) (finding that since the 1980s, full-time working women have been earning seventy percent as much as males); *see also* Mary C. Noonan et al., *Pay Differences Among the Highly Trained: Cohort Differences in the Male-Female Earnings Gap in Lawyers' Salaries* 1, 24 (May 2003) (finding that female lawyers earn approximately sixty percent of male lawyers' earnings), http://www.npc.umich.edu/publications/working_papers/paper1/03-1.pdf; Nancy Reichman & Joyce S. Sterling, *Gender Penalties Revisited* 8–9 (2004) (probing full-time wage studies conducted in Colorado, Michigan, and nationally), http://www.cwba.org/pdf/GenderPenaltiesRevisitedfullreport.pdf.

101. Lorraine Ali et al., *The Secret Lives of Wives*, NEWSWEEK, July 12, 2004, at 46, 50 (quoting Gloria Steinem and referring to her subsequent interview by *Newsweek*); *see also* McLanahan & Kelly, *supra* note 100 (finding that single women are more likely to be poor than single men).

women.[102] Such vulnerability, exacerbated by the presence of children, made economic resources a key concern.[103] Often a woman's only available means of economic support came attached to child support. But child support is difficult to obtain even in the absence of violence, and the presence of intimate violence makes acquisition of child support not only difficult but also risky for the battered mother.[104]

The necessity for child support forces women into some sort of contact with the male batterer. Laura Dugan notes that the presence of custody provisions in orders of protection increases the likelihood that a mother may be revictimized.[105] Dugan attributes revictimization to the ongoing contact between the assailant and survivor that characterizes custody orders. I would suggest that because intimate violence, like any crime, is a crime of opportunity, any formal or informal tie creates an additional opportunity for violence. And child support, not unlike custody, provides the tie that continues to bind perpetrator to survivor. When child support is an economic necessity, the tie remains intact and further violence may be inescapable. Economic independence is critical to women's safety. Consequently, transformation of social conditions that maintained women's subordinate economic status was significant in freeing women from violent homes.

The early advocates understood how material resources impact a woman's decision to leave or stay with the perpetrator. They also appreciated that in addition to economic concerns, gender asymmetry in law enforcement negatively affected women's lives. As a result, the decision to link women's bodily integrity to broader social issues was strategic.

Advocates challenged gender asymmetry in law enforcement by contesting a culture that fixed police arrest avoidance within police policies and protocols. By validating women's experience following calls to the police, advocates learned how failure to treat male intimate violence as a crime undermined women's safety and women's lives. And by placing male intimate violence

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102. McLanahan & Kelly, *supra* note 100.

103. *Id.*

104. Congress enacted a law in 1993 permitting the garnishment of federal employees' wages for the purpose of child support. 5 U.S.C. § 5520a (2000). Another federal statute allows state offices of child support enforcement to use a court process to garnish payments received by a parent from the federal government. 42 U.S.C. § 659 (2000).

105. Laura Dugan, *Domestic Violence Legislation: Exploring its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY & PUB. POL'Y 283, 301–04 (2003).

within the calculus of criminal conduct, advocates attacked the underlying cultural assumptions that protected the patriarch and the patriarchy. Transformation of the criminal justice system was one tool used to unravel a web of laws and practices that confined women to a second-class status.

Regardless of strategic focus, self-sovereignty and bodily integrity were axiomatic. As persons, women had a right to control their bodies and to be safe in their own skin. The ideology of the battered women's movement was consonant with conceptions of the self that antirape, reproductive rights, antislavery, and antiracism advocates had articulated in the nineteenth and twentieth centuries.[106] Not unlike these movements, its radicalism was resituating a subordinate class within a power dynamic that was de-gendered and transformative: It is this ideology that would be severely compromised in the twenty-first century.

III. THE EMERGENCE OF MANDATORY PRACTICES—WHEN WORLDS COLLIDE

A. The Uneasiness of Invoking State Power

Arrest was understood as one tool to hold both the battering partner and the state accountable for what was seen as collaborative conduct.[107] Because of its complex web of misogynistic rules and practices,[108] the state was considered an accomplice to the violence. Arrest then was perceived as

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106. *See* ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 2–47 (Northeastern University Press rev. ed. 1990) (1984) (maintaining that the principles of bodily integrity and self-determination are essential to the historical feminist view of reproductive freedom); *see also* Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, *in* FEMINIST THEORIZE THE POLITICAL 385, 398–400 (Judith Butler & Joan W. Scott eds., 1992) (rejecting the views that champion women's proprietary rights in their bodies and arguing that such beliefs actually reinforce a definition of female sexuality as "violable property" and promote further violations of women); Rosalind Pollack Petchesky, *The Body as Property: A Feminist Re-vision*, *in* CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION 387 (Faye D. Ginsburg & Rayna Rapp eds., 1995) (tracing the development of women's sense of "self-ownership" across various cultures and time periods).

107. *See* SCHNEIDER, *supra* note 20, at 181–83 (describing many feminists' view that the state maintained, enforced, and legitimized male violence against women); *see also* SCHECHTER, *supra* note 8, at 157–61 (recounting the success of the battered women's movement in enacting state laws that expand the police power to arrest).

108. *See* People v. Liberta, 474 N.E.2d 567, 572–78 (N.Y. 1984) (discussing and invalidating the marital exemption in New York's penal law defining rape); *see also supra* Part II.A.

corrective to a social system that refused to treat male intimate violence as offensive conduct and as criminal behavior.

Arrest was the first mandated intervention conceived by advocates and approved by policymakers.[109] While individual states struggled to define "mandatory," most states removed discretion from police in cases in which the violence constituted a crime or the offensive conduct formed the basis for a violation of an order of protection.[110] Once police responded to a "domestic violence" call *and* there was probable cause to believe that a crime between intimates existed, they were mandated to arrest the offending party.

Criminalization, as envisioned by advocates in the 1970s and 1980s, was strategic. The institution of mandatory practices, specifically arrest, was perceived as the first step in a process that would lead to a seismic cultural change by inscribing women's empowerment, individual and collective accountability, and conceptions of equality upon the cultural landscape.[111]

Yet advocates knew that arrest alone would not result in the intended benefits of safety, autonomy, and accountability.[112] Accordingly, in addition to advocating for a panoply of social and economic supports and services, many feminists supported "no-drop" policies by prosecutors in cases of male intimate violence.[113] Under no-drop policies, prosecutorial discretion would be

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109. Not all advocates supported mandatory arrest in its inception or currently. There was much concern regarding police practices in communities of color as well as the tenuous position of documented and undocumented battered women. In New York, prior to the establishment of mandatory arrest, advocates from the Coalition of Battered Women's Advocates of New York City, the New York State Coalition of Battered Women's Advocates, the Asian Women's Center, the Center for Battered Women's Legal Services of Sanctuary for Families, the New York State Office for the Prevention of Domestic Violence and Victim Services Agency, Sakhi for South Asian Women, and the Immigrant Women's Project held a series of meetings throughout New York to account for the various voices and experiences of battered women. As a result of these meetings, advocates proposed and New York adopted mandatory arrest only for felonies and violations of stay-away orders and a pro-arrest policy in misdemeanor cases. N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2004); *cf.* COLO. REV. STAT. § 18-6-803.5 (2004) (mandating arrest for violators of protection orders).

110. N.Y. CRIM. PROC. LAW § 140.10(4); COLO. REV. STAT. § 18-6-803.5.

111. In retrospect and with the benefit of hindsight, our faith in a cultural shift was misplaced. The *Messinger Report*, a report issued by the Task Force on Family Violence in 1993, documented that police were still not making arrests even with mandatory arrest policies incorporated into New York City Police Department ("NYPD") protocols. MESSINGER REPORT, *supra* note 3, at 17, 59. In short, the enormity of cultural change was not effectively confronted. Instead, activists in New York, myself included, continued to advocate for a statewide mandatory arrest policy.

112. *See* SCHECHTER, *supra* note 8, at 157–69 (detailing the battered women's movement's various efforts to change police practices and reform judicial attitudes).

113. *See* SCHNEIDER, *supra* note 20, at 184–86 (discussing the arguments in favor of mandatory prosecutions and no-drop policies).

severely curtailed when that discretion pertained to reduction of charges or dismissal of cases. The State would be required to proceed regardless of the survivor's wishes. No-drop was perceived as instrumental to conceptions of equal justice, women's safety, and accountability because it criminalized the act and placed the onus of prosecution on the State.

Indeed, crimes of male intimate violence were historically undercharged, if charged at all.[114] The gendered nature of the criminal justice system's response to male violence left women vulnerable to continued attacks. No-drop policies were viewed as a necessary prophylactic to correct such inequities.

Prosecutorial practices have been altered to incorporate no-drop policies, but these alterations have been completed ad hoc. No state has incorporated a statewide policy; such decisions are left to individual district attorney's offices. For those offices that have adopted the practice, two distinct policy directions have emerged: "soft" and "hard" no-drop. The former takes into consideration the wishes of the survivor while the latter proceeds in the absence of such consideration. The hard no-drop policy, characterized by its inflexibility in relation to survivors' wishes, may in fact compromise not only women's autonomy but women's safety.[115] But both conceptions of no-drop pose significant problems for the battered woman because the social conditions that shape her decision to prosecute are marginalized.[116]

Because mandatory practices first evolved as a political strategy, the discourse among feminists has been marked by reluctance and anxiety concerning interaction with the state.[117] This anxiety reflects more than ambivalence; it reveals the distrust that feminists hold for law enforcement.[118] Because police

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114. DOBASH & DOBASH, *supra* note 2, at 146; *see also* Dugan, *supra* note 105, at 302.

115. SCHNEIDER, *supra* note 20, at 185–86; Hanna, *supra* note 10, at 1865–66; *see also* Coker, *supra* note 99, at 843–44 (lauding the flexibility of "soft" no-drop policies). *But see* Dugan, *supra* note 105, at 303–05 (indicating that "mandatory arrest laws not only reduce the chances of violence, but also keep people from calling the police").

116. *See* discussion *supra* Part I.

117. SCHNEIDER, *supra* note 20, at 182–84; *see also Beware the State: Suzanne LaFollette*, *in* THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR, *supra* note 30, at 537, 537–41 (describing the life of Suzanne LaFollette and her emphasis on economic independence over state interference).

118. SCHNEIDER, *supra* note 20, at 182–84; *see also* Elizabeth A. Stanko, *Missing the Mark? Policing Battering*, *in* WOMEN, POLICING, AND MALE VIOLENCE: INTERNATIONAL PERSPECTIVES 46, 63–65 (Jalna Hanmer et al. eds., 1989) (noting that feminist criticism of policing has had positive effects as departments have followed outside suggestions). For a discussion of the varying views of radical, conservative, and liberal feminism on the public–private dichotomy and how these views have helped frame the issue of domestic violence, see KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 37–47 (2003).

are gatekeepers to the criminal justice system, they have enforced cultural prescriptions that are essentially gendered, raced, and classed.[119] Thus, the anxiety associated with mandatory arrest and prosecution is emblematic of the paradox inherent in working with systems that have been the source of the problem.

Feminists appreciated that the police, as agents of the state, should be held accountable for failing to protect battered women. Yet they were also cognizant of the misuse of police power in marginalized communities and how these communities may respond to policies mandating arrest in domestic violence cases. Finally, feminists understood that "[p]olice action cannot by itself stem the tide of violence against women."[120] As Elizabeth Stanko notes, "To do so would require breaking its links with other aspects of social life that maintain and perpetuate women's subordination. Police protection within the context of male domination does not and cannot promise women autonomy."[121]

Because feminists viewed social change as critical to transforming the material base of women's oppression, criminalization of male intimate violence would be one means to achieve this goal. As a strategy, mandatory arrest could become a powerful symbol of cultural disapproval for such behavior. More importantly, mandatory arrest could be the first step in providing women with safety. Feminists knew, however, that absent a shift that reconfigured gendered power relations within the culture, alteration of the subordinate–dominant class structure would not be achieved and violence would not be abated. Dislodging male hegemony and state approbation of male intimate violence would require more than rules governing police conduct—it would require the transformation of how we as a culture viewed women individually and collectively.

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119. *See* John Hagan & Ruth D. Peterson, *Criminal Inequality in America: Patterns and Consequences*, *in* CRIME AND INEQUALITY 14, 22–28 (John Hagan & Ruth D. Peterson eds., 1995) (examining attitudes and reports that correlate police actions with race, gender, and class); *see also* FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS STUDY COMMISSION, "WHERE THE INJURED FLY FOR JUSTICE": REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 6–9 (Deborah Hardin Wagner ed., 1991) (finding that adult and juvenile minorities in Florida receive disparate treatment from law enforcement and recommending changes to police practices and state statutes). For a series of essays that view even the nomination of a Supreme Court Justice as an inherently racial and gendered process, see RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

120. Stanko, *supra* note 118, at 67.

121. *Id.*

B. Mediating the Contradictions

Because male intimate violence was viewed as private, the movement was embedded in a culture that relegated male intimate violence to noncriminal proceedings such as family court proceedings.[122] The focus of these proceedings was on identifying the dysfunctional characteristics of the family. Family or marital counseling was the oft-cited "solution" for intimate violence.[123] Because the dynamics of family counseling place victim and victimizer on the same level, conceptions of individual or systemic accountability in the creation and support of male intimate violence were an anathema. Assailant and survivor were seen as equally culpable in the creation of familial dysfunction.[124]

Such formalized equality is particularly dangerous because it sends a message to assailants that their conduct is beyond the purview of the state. Because accountability is not on the cultural radar screen, consequences for beating, choking, or raping women are never contemplated. An illustration of the social condonation of intimate violence involves the cultural position concerning rape in marriage.[125] Until the early 1980s, the marital rape exemption was prevalent in state penal codes throughout the United States. Because of the merger doctrine inherent in marriage, under which the wife's identity was subsumed into her husband's, courts validated and legislatures codified variations of the marital rape exemption because, predicated on merger, husbands could not rape themselves. The marital rape exemption

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122. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47–48, 52–53 (1992). *See generally* SUSAN S.M. EDWARDS, POLICING 'DOMESTIC' VIOLENCE: WOMEN, THE LAW AND THE STATE (1989) (tracing the historical view that private matters were accorded private remedies).

123. *See* Zorza, *supra* note 122, at 67 (explaining that the completion of treatment does little to stop future violence or reduce its seriousness); *see also* EDWARDS, *supra* note 122, at 50 (maintaining that intimate violence has been diverted away from the criminal justice process throughout recent history).

124. G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 93 (1999); *see also* Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1089–96 (1995) [hereinafter Miccio, *In the Name of Mothers*] (examining the use of failure to protect charges where the mother is charged for failure to stop abuse to herself); 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 57, at 282, 288 (indicating that the use of couples counseling puts the batterer and victim on equal footing).

125. *See* discussion *supra* Part II.A; *see also* People v. Liberta, 474 N.E.2d 567, 572 & n.6, 573–75 (N.Y. 1984) (discussing the history and status of the marital exemption for rape in American jurisdictions).

had an additional consequence: It made clear that within marriage women were legally incapable of withholding consent to intercourse. Women's bodies were the province of others, and women's bodily integrity within marriage was fictitious.

As the state's agent, police were consistently discouraged from responding to "domestic calls" because a full response for behavior deemed noncriminal was an extravagant use of limited resources.[126] When police did respond, there was rarely, if ever, an arrest.[127] Police would routinely separate the parties, take the assailant on the proverbial walk around the block, and permit him to return home with barely a slap on the wrist.

Yet in spite of unequal justice in the protection of battered women, advocates were hesitant to involve the state in women's lives. The anxiety that advocates felt concerning the implication of police in the protection of women's bodily integrity stemmed not only from the understanding that police practices reflected gender asymmetry but from a "hunch" that police culture suppressed violent incidents perpetrated by fellow officers.[128] Although male intimate violence by police officers was merely suspected in the 1980s, it has now been established as an epidemic.[129]

In Los Angeles County, more than seventy cases of domestic violence by police officers were discovered during the investigation of a Los Angeles Police Department (LAPD) officer for the murder of his wife.[130] During pendency of the wrongful-

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126. *See* Miccio, *Notes from the Underground*, *supra* note 69, at 157–59 (discussing congressional findings that police fail to respond adequately to calls concerning domestic violence). *See generally* Miccio, *Deliberate Care*, *supra* note 69 (arguing that the state has the affirmative duty to protect against and prevent domestic violence).

127. *See* Sorichetti v. City of New York, 482 N.E.2d 70, 73–74 (N.Y. 1985) (recounting the police's failure to act despite a protection order and numerous threats); Bruno v. Codd, 393 N.E.2d 976, 980 (N.Y. 1979) (indicating a repeated failure of NYPD to respond to domestic violence calls). For a discussion of *Bruno* and *Scott v. Hart*, a class action against the Oakland police department filed in 1976, see SCHECHTER, *supra* note 8, at 159–60.

128. Interviews with advocates in New York, Colorado, and California (2003).

129. Research on intimate violence by police is a relatively new phenomenon with the first studies conducted in the 1990s.

130. *See* Henry Weinstein, *LAPD Leak May Mean Jail*, L.A. TIMES, Oct. 12, 2002 at B1 (decrying the fact that the man who publicized the cover-up may receive more jail time than any of the abusive police officers); *see also* Appellant's Reply Brief at 9–10, Wynn v. City of Los Angeles, No. 93-56393, 1995 WL 128048 (9th Cir. Mar. 22, 1995) (alleging a "code of silence" and a policy of nonarrest when police officers are engaged in unlawful acts). For another case that shows the lack of response to domestic violence in Los Angeles County, see *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995). In the *Navarro* case, Maria Navarro was murdered by her estranged husband, Raymond Navarro. *Id.* at 714. Minutes before Navarro shot and killed Maria, she had called 911. *Id.* at 713–14. According to the record, Maria told the dispatcher that Raymond was on his way and that he was under a restraining order. *Id.* at 713. The dispatcher responded, "'O.K., well, the

death suit by the wife's estate against the LAPD and Los Angeles County, it was revealed that all of the cases had been covered up by the LAPD.[131] And of the more than seventy cases, none had resulted in criminal prosecution,[132] including a case involving the beating of a pregnant woman and the miscarriage of her fetus.[133] This last case is particularly troubling because under California's homicide statute, a fetus is treated the same as a "human being" for purposes of prosecution, regardless of whether the death occurred *in utero* or *in vivo*.[134]

The Neidig Study, released in the 1990s, documents the startling fact that forty percent of police officers self-reported that they had committed intimate violence.[135] Further, psychological studies of police officers indicate that job-related conditions cannot account for the violence.[136] Similar to males in the larger culture, police officers assault their female intimate partners because they can. Officers can engage in domestic abuse because in spite of the rhetoric and a plethora of laws to the contrary, the failure of the culture to condemn such violence supports male privilege.[137]

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only thing to do is just call us if he comes over there . . . I mean, what can we do? We can't have a unit sit there to wait and see if he comes over.'" *Id.* (alteration in original). The Ninth Circuit reversed summary judgment for the defendants, holding that material issues of fact were still in dispute as to the city's policy of handling domestic violence calls. *Id.* at 717. The court later remanded again after the district court's judgment on the pleadings for the defendants. Fajardo v. County of Los Angeles, 179 F.3d 698, 701 (9th Cir. 1999).

131. *See* Sean P. McBride, Comment, *The Collateral Bar Rule and Rule 25 Protective Orders: Overprotection of Judicial Discretion*, 35 ARIZ. ST. L.J. 1029, 1039 (2003) (stating that during discovery associated with the *Wynn* case, LAPD released information about seventy-nine domestic violence complaints brought against its officers); Tony Ortega, *Code Buster*, NEW TIMES L.A., Oct. 5, 2000, LEXIS, News Library, New Times Los Angeles (California) File ("[D]ocuments [related to the *Wynn* case] showed that the LAPD had been covering up domestic violence committed by its own police officers.").

132. *See* Weinstein, *supra* note 130 ("The files showed that more than 70 police officers had been accused of beating or raping their wives and girlfriends. The records showed none had been arrested.").

133. Interviews with appellant in *Wynn v. City of Los Angeles*, No. 93-56393, 1995 WL 128048 (9th Cir. Mar. 22, 1995).

134. CAL. PENAL CODE § 187 (West 1999).

135. Peter H. Neidig et al., *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 POLICE STUD.: INT'L REV. OF POLICE DEV. 30, 37 (1992).

136. *See* Michael G. Aamodt et al., *Is the "Police Personality" Predisposed to Domestic Violence?*, *in* FED. BUREAU OF INVESTIGATION, DOMESTIC VIOLENCE BY POLICE OFFICERS 15, 19 (Donald C. Sheehan ed., 2000) (concluding that in comparing the personality profiles of police officers and that of batterers, there was nothing that would predispose officers to domestic violence).

137. *See* SCHNEIDER, *supra* note 20, at 182 (stating that many within the feminist movement see state involvement as "maintaining, enforcing, and legitimizing male violence against women").

The impact of intimate violence by police and subsequent cover-up by officials construct the perceptions held by battered women concerning involvement of police in their cases. Studies on how battered women view police indicate that a substantial number of women believe that police involvement will not materially alter the environment or change perpetrator conduct.[138] What is startling about the data is the lack of trust that permeates all demographic categories.[139] In general, attitudes were not affected by respondent's age, race, income, education, occupation, or gender.[140]

Although the early advocates could not document police misconduct with the certitude reflected in reports released during the latter part of the twentieth century, their belief has been validated by every major study conducted since data was first compiled. More importantly, the anxiety experienced by the early advocates paralleled the experiences of battered women. This parallel does more than suggest that state interaction is risky when it comes to male violence against women; it gives voice to such trepidation. Yet such apprehension did not prevent advocates from involving the state in women's lives. The decision to integrate law enforcement into a social–legal–political schema that contested women's subordination was strategic on the part of the advocates. They understood that interactions with the state are both complex and nuanced, and while the state was a chief purveyor of misogynistic policies and procedures, it would be virtually impossible to alter women's position without crafting a relationship with the state and with state actors. Consequently, the anxiety embedded in the activist culture would tenuously co-exist in relationship with the state.[141] This ambivalence was a necessary corollary to advocating change within the status quo.

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138. NANCY MEYER-EMERICK, THE VIOLENCE AGAINST WOMEN ACT OF 1994: AN ANALYSIS OF INTENT AND PERCEPTION 53–55 (2001).

139. *See id.* at 53–54, app. A.

140. *Id.*

141. Notably, some current critiques of mandatory practices have flattened the topography concerning the ideology of the early movement. If we take what these critics say as true, the advocates were white, middle-class leader(s), naïve about the power of the state and how such power, particularly police power, was raced, gendered, and classed, and who directed policy regarding mandatory arrest. *See generally* JOSEPH & LEWIS, *supra* note 27, at 57–58 (noting that most feminist groups are made up of white, middle-class women but that they fight for all women). Such a crabbed characterization of the early movement's ideology is problematic for myriad reasons. First, it fails to account for the fact that advocates did indeed struggle over involving police and police power because of its impact on communities of color as well as on battered women. The struggle was as nuanced as the issue. *See generally id.* (describing the ways in which racial and sexual characteristics contribute to the oppression of women). Second, it seems to suggest that only law enforcement reproduced systems of oppression, ignoring how race, gender, and

C. What to Do Until the Revolution Comes, or Living in the Shadows Amidst the Enemy—Interacting with the State

Elizabeth Schneider tells us that the movement's interactions with the state are complex and nuanced.[142] Indeed, the conflation of the cultural approbation of male intimate violence and the continued failure to criminalize such violence provided the historical moment that shaped both the political discourse and strategy of the battered women's movement.[143] Mandatory intervention was viewed as constitutive of safety and freedom.[144] And Schneider reminds us that regulation of women by the state was not an acceptable outcome to advocates, either strategically or theoretically.[145] Rather, the criminalization of male intimate violence was one tool in crafting an environment in which the primacy of women's safety and autonomy held both social and legal significance.[146]

In *Battered Women and Feminist Lawmaking*, Schneider comments that "understand[ing] the roles of the state, other institutions, law, and culture in encouraging, legitimizing, and

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class have structured social, political, and economic relations. Consequently, interaction with any system is suspect. Third, it fails to situate mandatory arrest within a movement strategy. Mandatory arrest was one tool in addressing women's subordination, not the sole strategy of the movement. Fourth, it denies the historical place of first-world women in the movement and their role in shaping policies that affected use of law enforcement. Fifth, it denies the tensions inherent in contesting social conditions while living in such conditions. *See* SCHECHTER, *supra* note 8, at 17–20 (describing the impact of domestic violence on women in terms of the perpetual fear, anxiety, and uncertainty that cause isolation from outsiders); Maguigan, *supra* note 11, at 437–38 (finding that "[p]olice abuse, the inability to communicate with responding officers, and cultural pressures to maintain privacy in familial life all factored into [the] belief that these policies would not effectively deal with domestic violence in communities of color"); Pence & Shepard, *supra* note 124, at 291 ("[The] isolation [from family and friends] is intentionally imposed by the abuser to cut her off from a potential support system he may view as threatening."). Finally, it obscures a valid criticism that mandatory arrest, in the absence of a transformed police culture, may place marginalized women at greater risk of harm. *See* SCHNEIDER, *supra* note 20, at 182–85 (arguing that "many feminist activities initially rejected criminalization as an appropriate remedy or strategy to redress domestic violence" because the battered women themselves did not feel an arrest was the answer); *see also* discussion *supra* Part III.A.

142. *See* SCHNEIDER, *supra* note 20, at 181.

143. *See supra* Part II.A.

144. *See* SCHNEIDER, *supra* note 20, at 184 (stating that "[t]he historic rationales for criminalization generally, and mandatory arrest in particular, are deterrence and the importance of encouraging a more public response to domestic violence").

145. *Id.* at 181–84 (tracing the advocates' stance toward state engagement and concluding that "[m]any battered women's activists have [now] moved from a view that rejected state engagement to one that supports state and federal reform").

146. *Author Meets Readers*, *supra* note 31, at 359–60 (stating that "[c]riminalization as a solution in itself is a big problem" if the domestic violence it seeks to deter is not "linked to the larger issues of women's economic situation, gender socialization, sex segregation, reproduction, and women's subjugation within the family").

perpetuating violence" challenges advocates to "critically examine the murky middle ground between total rejection and total endorsement of working with the state."[147] Schneider is correct in describing the space between oppositional politics and assimilation politics as muddied. That space is approximate and virtually unknown. She is correct in urging us to examine that space because it is important. Yet the uncertainty that defines the middle ground is not new. It is essentially a political nether zone. Each social movement that appeared on our cultural radar screen dealt with this uncharted area.[148]

During the second wave of feminism, assimilation was encouraged by the rhetoric and ideology of liberal feminists.[149] Total rejection of the state was espoused by radical separatist feminists. Mediating between total acceptance and total rejection of the state became a political strategy in the battered women's movement with the emergence of police arrest avoidance and an understanding of how such conduct by the state left women in an environment of terror. It became clear to advocates that because women's lives were continuously at stake, the politics of separatism were not only inappropriate but dangerous.

Total endorsement of the state was not a viable option either because the state was viewed as a party to the violence and terror experienced by women. And advocates, unlike academics or intellectuals, did not have the luxury that distance affords: As shelter, hotline, and community workers, advocates were confronted daily with how state inaction contributed to the terrorization of women in the home.[150] By virtue of their connection to survivors, advocates were situated in the "murky middle ground." It is fair to say that battered women's advocates, not unlike their sisters and brothers within the ethnic, sexual orientation, and gender social movements, were in uncharted territory, attempting to transform society while positioned within it—and doing so without either a social compass or blueprint.

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147. SCHNEIDER, *supra* note 20, at 196.

148. *See, e.g.*, BOYTE, *supra* note 93, at 29–31 ("Women's awareness of their oppression by 'male hierarchies' made the movement antipathetic toward larger structures that might hold leaders accountable, thus limiting the possibilities for developing skills and sustained democratic process.").

149. Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1374–76 (1986) (stating that feminists mistakenly "adopted the vocabulary, as well as the epistemology and political theory, of law as it is"); *see* JAGGAR & ROTHENBERG, *supra* note 17, at 84–85 ("[L]iberal feminists deny the conservative inference that such [biological] differences justify providing men and women with different and unequal opportunities.").

150. Interview with advocates in New York and Colorado (2003).

During the second wave of feminism, battered women's advocates did in fact critically examine the tensions inherent in working with the state.[151] Critical examination was not only integral to advocates' strategy concerning mandatory arrest—it framed our relationship with state actors. Advocates critically examined the murky middle ground and proceeded to act with a jaundiced view because of the state's gendered use of such power. The problem concerning mandatory arrest lies not with our failure to critically assess interaction with the state but rather with the inability to shape alternatives. Reconstituting social systems in which power is gendered, raced, and classed is even more difficult when one is positioned within the spheres that require re-creation and faced with the immediacy that male intimate violence produces. Professor Schneider's insight regarding critical analysis, then, should not be used as an indictment of the battered women's movement. Rather, it is a reminder of what advocates already knew—in creating policy, one must constantly reassess and re-examine the impact of such policy on divergent populations.

The dilemma swirling around arrest policies further illustrates the "murky middle ground" that advocates have historically inhabited. During the second wave of feminism, activists realized that violence against women by male intimate partners was a nonissue for law enforcement.[152] Police arrest avoidance was the rule rather than the exception. New York, not unlike her sister states, rarely if ever arrested perpetrators of domestic violence,[153] and if a case were to find its way into the criminal justice system, it was often removed from criminal court

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151. *See* discussion *supra* Part III.A–B (concluding that advocates were hesitant to involve state law enforcement because "police practices reflected gender asymmetry" and "police culture suppressed violent incidents perpetuated by fellow officers").

152. *Id.* (describing the state's discouragement of police involvement when police were asked to respond to "domestic calls").

153. *See* Bruno v. Codd, 393 N.E.2d 976, 977, 980–81 (N.Y. 1979) (dealing with a complaint "that police officers called to the scene of a husband's assault on his wife, uniformly refused to take action"); *see also* Scott v. Hart, No. C76-2395 (N.D. Cal. filed Oct. 28, 1976) (describing a challenge that ultimately led to a settlement with police regarding the nonintervention of Oakland law enforcement in domestic disputes); Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 7 (Ct. App. 1975) (dismissing a complaint against the City of San Jose police department for wrongful death because the department enjoys absolute immunity); *cf.* Thurman v. City of Torrington, 595 F. Supp. 1521, 1528–29 (D. Conn. 1984) (denying the city's motion to dismiss). "A man is not allowed to . . . abuse . . . a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and may not 'automatically decline to make an arrest [solely] because the assaulter and his victim are married to each other.'" *Id.* (quoting Bruno v. Codd, 396 N.Y.S.2d 974, 976 (Sup. Ct. 1977)).

and placed within the family court system.[154] The principle that guided these decisions was that intimate violence was a private matter best left to the family court.[155]

By the 1970s, the family courts—the usual forum for domestic violence—"had reduced these criminal assaults to problems of individual or social pathology."[156] The source of male violence was individuated and oftentimes viewed as the fault of the woman.[157]

Social pathology gained currency within law enforcement. The Law Enforcement and Assistance Administration (LEAA) created six model projects to train officers in "crisis intervention" to respond to domestic violence calls. The therapeutic professionals who designed the training and who urged crisis intervention believed that most cases involving intimate violence were in fact devoid of violence.[158] Such incidents were viewed as "family squabbles" in which the male partner was emasculated by the female partner.[159] Officers were to take on the role of "counsellors and mediators, trained in the skills of crisis intervention."[160] Arrest was perceived as totally inappropriate.

Training manuals, supported by LEAA money and used by the police, reinforced both sexist and ethnic stereotypes about who battered and why. As R. Emerson Dobash and Russell P. Dobash point out, women were depicted as "depressed, menopausal, dominating and 'likely to resort to physical

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154. People v. Johnson, 229 N.E.2d 180, 184 (N.Y. 1967) (stating that the Family Court "has jurisdiction to deal, in the first instance, with family offenses, including any complaint of assault, felonious or simple, 'between spouses'" and thus transferring the case to the Family Court); *see also* People v. Brady, 283 N.Y.S.2d 175, 178 (Dist. Ct. 1967) ("Section 814 [of the Family Court Act] directs the Criminal Court, after it has entertained a criminal complaint charging Disorderly Conduct or an Assault between spouses . . . to transfer said proceedings to the Family Court . . . .").

155. *See, e.g.*, *Bruno*, 393 N.E.2d at 977 ("[T]he Family Court fulfills a unique function in our system of justice."); *see also* Siegel, *supra* note 4, at 2120 (stating that judges "often asserted that the legal system should not interfere in cases of wife beating, in order to protect the privacy of the marriage relationship and to promote domestic harmony").

156. DOBASH & DOBASH, *supra* note 2, at 160.

157. *Id.* at 155–56 (stating that one English magistrate went so far as to conclude that "the men who appeared before him for beating their wives were often 'tortured and taunted to the verge of madness' by women, and he indicted [sic] that it was only understandable that they should use violence").

158. *Id.* at 161–63 (finding that LEAA training resources taught police officers to conclude that most domestic disputes were nonviolent because the proponents of crisis intervention viewed these occurrences as "rarely involv[ing] violence").

159. *Id.* at 161.

160. *Id.* at 163.

violence.'"[161] And use of physical force was depicted as common in certain ethnic groups.[162]

Because the police had historically treated male intimate violence as a private matter, the new protocols reinscribed a dangerous methodology that flattened the topography of the violence. Mediation, counseling, and diversion from the criminal justice system were the only responses by the police, regardless of the degree of violence perpetrated by the defender. Absent a loss of human life, crisis intervention and mediation were the only tools in the state's arsenal to address intimate violence. The "new" professional response, conflating police practices with psychological theory, legitimized traditional police behavior.

With the institution of the LEAA project, police arrest avoidance was transformed into a viable strategy supported by a segment of the psychoanalytic profession and adopted by policymakers. Arrest was not only the disfavored course of action, it was antithetical to what constituted appropriate state (police) action.[163]

The advocates knew differently, however.

In 1976, a class-action suit was filed against the police in Oakland, California on behalf of women battered by their male intimate partners.[164] Two months after the California case, in *Bruno v. Codd*, advocates filed suit in New York against the New York City Police Department ("NYPD").[165] Both cases alleged that police failed to act when called in cases in which women were physically attacked.[166] In *Bruno*, the litigants claimed that the police, courts, and probation departments failed to comply with the laws of New York.[167] The trial court opined that the police

161. *Id.*

162. *Id.*

163. *Id.* at 161 ("Arrest was inappropriate for solving the complex social and psychological problems evident in these non-violent 'family squabbles.'"). By 1977, seventy percent of large police departments—those with one-hundred staff members or more—were training police in crisis intervention. *Id.* at 162.

164. SCHECHTER, *supra* note 8, at 159–60 (describing the facts of *Scott v. Hart*).

165. Bruno v. Codd, 393 N.E.2d 976, 977 (N.Y. 1979); SCHECHTER, *supra* note 8, at 160.

166. Bruno v. Codd, 396 N.Y.S.2d 974, 976 (Sup. Ct. 1977); SCHECHTER, *supra* note 8, at 159–60.

167. *Bruno*, 393 N.E.2d at 977 (summarizing the wives' complaint that "probation and Family Court nonjudicial personnel, with the knowledge and either the tacit consent or express approval of their supervisors, engaged in a pattern of conduct calculated" to deter the filing of petitions, to block access to the judicial system, and to prevent wives from learning their options).

department's blanket prohibition against arrest and in favor of crisis intervention presented a colorable equal protection claim.[168] Two years later, the NYPD, via a settlement, agreed to change police procedures and arrest offenders when there was probable cause to believe that a felony or misdemeanor had been committed or that a stay-away order issued by the family court had been violated.[169]

Hart and *Bruno* informed advocates' strategy in terms of working with the state in general and with the criminal justice system in particular. Nationally, *Hart* and *Bruno* resonated with advocates. In Colorado, the Colorado Coalition Against Domestic Violence (the "Coalition") worked with police to change policies concerning arrest in domestic violence cases. Not unlike the advocates in New York and California, Colorado activists changed police procedures by working with police, judges, and probation officials. Lawsuits were a potential threat but would be used only as a last resort—the fist inside the velvet glove. *Hart* and *Bruno* provided the necessary incentive in shaping procedures as arrest was now internally mandated—not imposed by statute.

Reliance on lawsuits was not the only tool used to hold the system accountable. In Colorado and New York, advocates situated themselves within the internal fabric of the police establishment. By the early 1990s, advocates in New York City were part of police and prosecutorial review panels that evaluated cases involving domestic violence. Critical to each review was whether police acted appropriately in arresting or not arresting offenders and whether district attorney offices should proceed in a specific case. In Colorado, the Coalition helped police develop arrest policies and procedures that mediated between mandatory and pro-arrest. Advocates in both jurisdictions considered criminal justice reform endemic to a viable social justice agenda.

Grassroots battered women's groups, organized around issues of ethnicity, class, or immigration status, built alliances across identity lines on issues of accountability. By 1993, one year before the seismic shift occurred nationwide regarding mandatory arrest, New York published a report by the Task Force on Family Violence, the *Messinger Report*, that critiqued not only the criminal justice system's response to male intimate

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168. *Bruno*, 396 N.Y.S.2d at 977 ("This Court has the power to compel the Police Department defendants to perform the duty imposed upon them by law to exercise their discretion, and to exercise it in a reasonable, non-arbitrary manner.").

169. *Bruno*, 393 N.E.2d at 980.

violence but also the social services, educational, judicial, mental health, health, employment, and entitlements systems within New York City.[170] Police and prosecutorial failure to adequately enforce laws was contextualized within a cultural and systemic failure to protect battered women's rights and lives.

The recommendations suggested by the *Messinger Report* were the outgrowth of roundtables held throughout the city and the concerns voiced by members of such diverse groups as Urban Women's Retreat, a program developed by and for African-American women; the New York Asian Women's Center; the Black Women's Health Project; and Park Slope Safe Homes Project, a grassroots shelter program in Brooklyn. The *Messinger Report*, sponsored in part by the Manhattan Borough President's Office, recommended the enforcement of New York's mandatory arrest provisions through disciplinary hearings for police officers failing to follow mandated procedures.[171] In spite of the policies initiated after *Bruno*, only seven percent of domestic violence calls resulted in arrests.[172] Although the drafters did not call for a state-wide mandate, they concluded that procedures in the city should be enforced because the consensus among advocates from the battered women's organizations and the narratives of battered women who testified during the roundtables indicated strong support for enforcement of the *Bruno* policies.[173] Notably, in spite of advocates' and survivors' recognition that police practices were mired in a raced and gendered culture, mandatory arrest was viewed as a necessary corollary to conceptions of justice and protection of lives. And of equal importance was the understanding by advocates that change within the law enforcement community would be both difficult and incremental—regardless of policies to the contrary.

D. Removal of Discretion

By 1994, most states incorporated some form of mandatory arrest in their criminal procedure statutes.[174] There are myriad reasons why jurisdictions moved in this direction. For some states, mandatory arrest languished in committees for five to ten years without much success of passage. With the media focus on the Simpson-Goldman murders in the summer of 1994, a

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170. MESSINGER REPORT, *supra* note 3.
171. *Id.* at 63–65 (citing NYPD Patrol Guide, Proc. No. 110-38).
172. *Id.* at 63.
173. *Id.*
174. *See supra* note 2.

plethora of states hoisted the banner of mandatory arrest while chanting the oft-repeated slogan, "zero-tolerance for domestic violence." New laws on domestic violence appeared on the scene with as much frequency as zero-tolerance bumper stickers. Domestic violence had come of age—it was now *en vogue* to be against domestic violence if one was a local or national legislator. To the advocates, who had waged the struggle for equal protection for battered women for over a century, the current political shift, although welcomed, was viewed with skepticism.

In some jurisdictions, such as Colorado, advocates were approached by key legislators to incorporate mandatory state intervention into arrest provisions.[175] This was the culmination of years of working within the law enforcement establishment as advocates attempted to change police practices through the institution of pro-arrest policies as the preferred course of action.

What jurisdictions had in common, however, was an understanding by advocates that incremental change was either too slow or not taking place. Battered women were still being beaten, but police were failing to arrest perpetrators and continuing to engage in police arrest avoidance. As evidenced by the *Messinger Report*, even with ad hoc changes in policy that mandated arrest, police were still not making arrests nor bringing such cases to the attention of prosecutors.[176]

So why did activists advocate mandatory arrest? Through conversing with advocates from New York, Colorado, and California—many of whom were active in drafting mandatory arrest legislation—and by drawing upon my own work in New York, the answer is at once complex and quite simple: There was no other alternative.

Battered women, regardless of race, class, or ethnicity, were not receiving protection from the law enforcement community.[177] Police arrest avoidance was the rule rather than the exception. Advocates had litigated the issue in the 1970s with cases stretching from one coast to the other. Advocates had entered into settlement agreements with police departments in which promises were made—but not kept—to change both practices and procedures. Advocates had trained police officers on law and in building a case involving male intimate violence. Yet as documented by the *Messinger Report*, the evidence collected from

175. Interviews with advocates in Colorado (2003).

176. *See* MESSINGER REPORT, *supra* note 3.

177. U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 20–22 (1978) ("Perhaps the most serious problem for the individual who has suffered from assault is the failure of the police to respond to [a] call for help.").

the Violence Against Women Act Hearings (the "VAWA hearings"), the Women and the Courts Taskforce reports, and the reports from the fifty states, not much had changed since the ad-hoc establishment of new arrest procedures that flowed from *Bruno* and *Hart*—police arrest avoidance was still the rule.

By the late 1980s to mid-1990s, advocates moved to incorporate mandatory arrest into statewide public policy initiatives. One reason for this political strategy was the first study conducted by Lawrence W. Sherman and Richard A. Berk that identified the arrest of perpetrators as key to reducing recidivism in domestic violence cases.[178] By examining arrest and nonarrest cases in Minneapolis, Minnesota, Sherman and Berk concluded that arrest had a deterrent effect and reduced the likelihood of repeat violence.[179] What we did not know, and would not learn until 2000, was that the Sherman and Berk results could rarely be replicated. Moreover, their dependence on offender behavior data was problematic because it relied on subsequent police reports and follow-up reporting by initial complainants.[180] While such data may give insight into recidivism, it cannot support the generalized conclusion that was drawn from the study—that arrest promotes a drop in male intimate violence against women.

Reliance on police reports and self-reporting is flawed because it does not take into account two important facts. First, police reports cannot give an adequate picture when assessing subsequent violence by offenders because many women fail to report violations of protective orders or repeat offenses.[181] Second, self-reporting fails to take into account that batterers are pattern abusers. Even if the original complainant may be reporting no

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178. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 269–70 (1984).

179. *Id.* at 263, 270.

180. JoAnn L. Miller & Amy C. Krull, *Controlling Domestic Violence: Victim Resources and Police Intervention*, *in* OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE 235, 251–52 (Glenda Kaufman Kantor & Jana L. Jasinski eds., 1997) (finding "clear and convincing evidence that police intervention influences victim perceptions and recidivistic domestic violence," but leaving the determination of whether this influence is positive or negative for a future study); *cf.* Judith McFarlane et al., *Women Filing Assault Charges on an Intimate Partner: Criminal Justice Outcome and Future Violence Experienced*, 6 VIOLENCE AGAINST WOMEN 396, 398–406 (2000) (addressing the findings of the Sherman & Berk study and reporting that "[t]he 90 women in this study report no greater reduction in new abuse following their attempt to file charges whether the perpetrator was arrested or not").

181. JOYCE KLEMPERER, COALITION OF BATTERED WOMEN'S ADVOCATES, TWICE ABUSED: BATTERED WOMEN AND THE CRIMINAL JUSTICE SYSTEM IN NEW YORK CITY (1993) (on file with Author); *see also* Joyce Klemperer, *Programs for Battered Women—What Works?*, 58 Alb. L. Rev. 1171, 1171–72 (1995).

subsequent incidents, the offender may have moved on to a new relationship and a new target for his rage. Because the study did not follow offenders and was predicated on a restrictive paradigm, its conclusion that arrest deters male intimate violence was unsupported.

Without the benefit of hindsight, advocates across the United States took the Sherman and Berk study to heart. Mandatory arrest was on the agenda in many jurisdictions. In New York, meetings were held with activists from Illinois and Connecticut—two jurisdictions that acted on mandatory arrest proposals in their respective states. In Illinois, advocates rejected legislative initiatives for mandatory arrest,[182] while Connecticut's activists supported such initiatives—with one caveat.

The Connecticut advocates understood that abating male intimate violence required a coordinated community response. Public policy that enshrined law enforcement as the *sole* response was not only counterintuitive—because of misogynistic practices within the police department—but counterproductive because survivors of such violence required access to housing, jobs, and social systems of support in addition to removal of the offender by the state.[183] As Donna Coker has noted, mere criminalization of domestic violence—exemplified by mandatory arrest—is insufficient as social policy because it fails to account for the complex economic issues confronted by battered women, especially poor battered women.[184]

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182. That rejection was short-lived. In 1994, Illinois joined a majority of states in passing mandatory arrest legislation. 750 ILL. COMP. STAT. 60/301 (1999). A critical incentive for passage—in addition to the media spotlight on domestic violence generated by the Nicole Brown Simpson and Ron Goldman murders in California—was the federal Violence Against Women Act that required statutory changes in arrest laws as prerequisite for federal funding of criminal justice programs. Violence Against Women Act (VAWA) of 1994, Pub. L. No. 103-322, § 40,231, 108 Stat. 1902, 1932 (codified as amended at 42 U.S.C. § 3796hh (2000 & Supp. I 2001)) (allowing grants to states that "implement mandatory arrest or proarrest programs and policies in police departments" in response to domestic violence).

183. *See* Richard M. Tolman & Arlene Weisz, *Coordinated Community Intervention for Domestic Violence: The Effects of Arrest and Prosecution on Recidivism of Woman Abuse Perpetrators*, 41 CRIME & DELINQ. 481, 484–85, 493 (1995) (evaluating the effectiveness of a domestic violence protocol that required coordinated community responses to domestic violence and admitting "arrest and prosecution may not reflect the important goals of battered women or may even run counter to the interests of some women"); *see also* Susan L. Miller, *Arrest Policies for Domestic Violence and Their Implications for Battered Women*, *in* IT'S A CRIME: WOMEN AND JUSTICE 287, 297 (Roslyn Muraskin ed., 2d ed. 2000) (theorizing that mandatory arrest procedures disproportionately affect women in lower socioeconomic groups partly because the "economic consequences of arrest may be more devastating" for these women).

184. *See* Coker, *supra* note 99, at 849 (disparaging mandatory policies as measures that may increase state control over poor women).

By presenting mandatory arrest as the sole option, not only do we fail to account for the economic conditions of women in general and poor battered women in particular, we give primacy to the notion that law enforcement is the source of women's subordination. Such a crabbed perception obscures how culture constructs both individual and systemic behavior. Thus, male intimate violence is treated as if it takes place in an individualized rather than socialized context, further disaggregating male conduct from its cultural base.

Yet male intimate violence, and social support for such violence, is merely emblematic of the cultural subordination of women. The Connecticut advocates of the late 1980s, not unlike their sisters in the early battered women's movement, recognized women's subordination within the family as part of a larger social construct premised upon gender subordination. Sexual subordination in the family or private sphere was marked not only by the violence of individual males but by customs and institutional practices that made such violence normative. Any strategy that incorporated elimination of male intimate violence would require transformation of the cultural, social, and institutional imperatives that shaped women's public and private lives. Thus, arrest *could* be instrumental so long as it was part of a coordinated social and political stratagem that challenged gender asymmetry. However, arrest, on its own, was not the antidote.[185]

IV. THE CONSERVATIZATION OF THE MOVEMENT

A. Setting the Stage: The Topography of Denial

In 1978, the U.S. Commission on Civil Rights held hearings on the issue of male intimate violence.[186] Witness after witness testified that such violence was not the result of familial dysfunction but part of a larger problem of male domination and

185. *See* Rebecca Emerson Dobash, *Domestic Violence: Arrest, Prosecution, and Reducing Violence*, 2 CRIMINOLOGY & PUB. POL'Y 313, 316 (2003) (relaying that evidence strongly suggests that the act of arrest on its own is not enough to reduce violence); *see also* Dugan, *supra* note 105, at 285 (citing a study that found that arrest increased "offenders' proclivity toward future violence"); Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide*, 37 L. & SOC'Y REV. 169, 177–78 (2003) ("Statutory powers are likely to be most effective when accompanied by clear policies and procedures that provide guidance for police response to domestic violence, such as specialized *domestic violence units* and *training* in local law enforcement agencies.").

186. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 177.

female subordination.[187] Del Martin, one of the founders of the battered women's movement and author of *Battered Wives*, testified that Michigan police were told to avoid arrest and "appeal to the woman's vanity" concerning abatement of the violence.[188] Martin commented that in the police training guides used nationwide, male intimate violence was transformed into "family disputes" and that such guides rarely made direct reference to *woman* or *wife* beating.[189] Marjory Fields, lead attorney in the family law unit of Brooklyn Legal Services and mother of the New York battered women's movement, painted a picture of law enforcement and the courts treating women survivors as pariahs and male offenders as unwitting victims.[190] Fields referred to the NYPD training manual's gendered depiction of the violence—such violence was interpersonal—as the result of gendered maladies such as menopause.[191] Police in New York City were trained to believe that if such violence actually existed it was due to the menopausal, domineering rage of *women*, and the appropriate course of action was mediation between the parties.[192] Fields recounted how battered women's advocates negotiated with the police to change their policies concerning training; rather than change course, however, the training guides continued to de-genderize the violence while enshrining the process of on-site mediation.[193]

This Alice-Through-the-Looking-Glass logic turned reality on its head. Violence by men against women in the home was not a corollary of male privilege or of the cultural subordination of women; rather, it was the consequence of "familial discord" caused by women and by private circumstance. Martin's and Fields's testimonies, echoed by the other witnesses, crystallized social conceptions of male violence and the prescribed remedy, neither having roots in either individual or collective accountability.

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187. *See, e.g.*, *id.* at 3, 73, 128–30, 140 (recounting testimony by various panelists discussing how, for example, the "power relationship between husband and wife" contributes to domestic violence, "victims of domestic violence are often economically dependent on their attackers," "women have always been subordinated to men and their brutalization is a direct byproduct of that subordination," and domestic violence problems cannot be adequately addressed until married women have "equal power and control over their lives").

188. *Id.* at 3, 7.

189. *Id.* at 8.

190. *Id.* at 19, 21.

191. *Id.* at 21–22.

192. *Id.*

193. *Id.* at 22.

What is telling about the 1978 testimony is its understanding of how language shaped policy and practice. The neutral scientific language of familial violence used by the dominant culture supplanted the political talk of male violence against women.[194] The focus was how dysfunctional qualities within families and families of origin produced intimate violence. It was an anathema to common wisdom that women were battered because of men's social privilege and position within the family—and that such violence was culturally ingrained. This quasi-psychiatric perspective of women-as-shrew structured socio-legal perceptions and practices. It is no wonder that law enforcement viewed male intimate violence as a nonissue, unworthy of social sanction.

The confluence of language and perspective by the dominant culture played a more pernicious role, however. It disconnected violence from its cultural roots while re-inscribing categories that sustain the gendered dominance–subordinate paradigm. And it left unexamined how systemic support of individual male intimate violence contributed to the perpetuation of such violence. Moreover, gendered conceptions of dominant–subordinate social roles and positions and how such conceptions structured social response were left uncritiqued: Collective accountability was not part of the political landscape.

The 1978 hearings identified how the neutering of domestic terror further embedded gendered power relationships while reifying social policy that structured our collective response to the violence.[195] And although the 1978 hearings were not an epiphany, they documented for the first time how pervasive individual and social violence was against women—and how politically unconcerned we were about such violence.

The testimony concerning language and perspective was a reminder that cultural attitudes about women in general and battered women in particular are gendered and socially ingrained. It is disconcerting that these findings would be replicated in the 1984 Civil Rights Commission Hearings, the reports from the fifty states in their Women and the Courts Taskforce reports, and finally in the 1993 VAWA hearings.[196] And

194. *See generally* Mahoney, *supra* note 25.

195. *See supra* Part II.A (describing the origins and ideology of the battered women's movement).

196. *See* S. REP. NO. 103-138, at 45–46 (1993) (describing a particular case in which an investigating officer insisted that a victim who was stabbed with a screwdriver, raped, and sodomized by her attacker must have provoked the attack); William L. Hart, *Statement of the Chairman*, *in* ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT, at vi, vi–vii (1984) (reporting that a "victim of family violence is no less a

it is sobering to note that the lexicon of 1978 would resonate in the late 1990s and into the twenty-first century, reminding us, once again, that misogynistic attitudes die hard.

B. The Conservatization of a Movement: Battered Women's Shelters—From Feminist Cooperatives to Social-Service Institutions

As I began the research for this Article, I remembered reading an essay about the transition of a feminist shelter in Austin, Texas. This essay, published in *Radical America* in 1980, was written by one of the founders of the shelter.[197] When I located the journal, shook off the dust collected over twenty-four years, and reread the piece written by Lois Ahrens, I was struck by the fact that this was the only volume that I had kept over the years. Perhaps I intuited the importance of this volume. It was devoted, in part, to recording the transition of battered women's shelters from "feminist, nonhierarchical, community-based organizations to institutionalized social-service agencies."[198]

I do not believe that Lois Ahrens understood the significance of her 1980 piece. It presaged not only the political shift of shelters but that of a critical core within the movement. Ahrens's analysis of what happened to a shelter in the American Southwest charted a seismic change nationally that reallocated power from resident to staff; resituated male intimate violence, from gender violence to family violence; and recharacterized women's actions as passive, a consequence of learned helplessness.[199] Because battered women's shelters were the nucleus or ideological center of the movement, their shift from political to social-services entity is critical because it altered the ideological construct of the movement. And the changes, cataloged by Ahrens and her contemporaries, profoundly affected

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victim than one set upon by strangers"); *see also, e.g.*, COLO. GENDER & JUST. COMM., COLORADO GENDER AND JUSTICE ANNUAL REPORT 8 (2000) (noting the "tendency to blame victims continues"), http://www.courts.state.co.us/supct/committees/genderjusticedocs/2000report.pdf; COMM'N ON GENDER BIAS IN THE JUD. SYS., GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA (1991) (reporting that "[g]ender biased attitudes were demonstrated to be pervasive in the judicial system's handling of domestic violence cases"), http://www2.state.ga.us/Courts/Supreme/ceadults.htm. For a comprehensive list of internet links to individual state-commissioned reports on gender bias in state courts, see National Center for State Courts, Race and Gender Fairness in the Courts: Task Force, Commission, and Committee Reports, *at* http://www.ncsconline.org/WC/Publications/KIS_RacEthStLnks.pdf (last visited Apr. 18, 2005).

197. Ahrens, *supra* note 18, at 41.

198. *Id.*

199. *See generally id.* at 41–47.

not only the movement but social policy that was generated by movement activists and state actors.

Originating in the early 1970s, the battered women's movement was a corollary of the second wave of feminism. This movement and the battered women's shelter movement operated synergistically, and the effect was the creation of a new social category: battered women.[200]

Because of its feminist roots, the shelters operated within a paradigm defined by feminist principles. They were *political* entities in which egalitarianism, autonomy, and self-determination were foundational pillars. Shelters were constructed to reflect such principles in both ideology and methodology. As a result, there was no operational distinction between staff and residents, and shelter governance was nonhierarchical and developed along consensus models. Women's choices were not pathologized nor were survivors of violence viewed or treated as sick or in need of treatment. As one advocate noted, "We respected women's choices."[201] This advocate's conception of self-determination was the principled response of battered women's advocates nationwide: What misogyny had surreptitiously stolen from women would be returned.[202] And because shelter staff were often formerly battered, their experiences informed development of shelter policy. Accordingly, the maxim, "the personal as political," was a guiding standard.

1. What's in a Name? The shelters were cash poor organizations. Thus, shelter founders relied upon the goodwill of women and community members for staffing, organizational volunteers, and material resources. Ahrens and Schechter situate the conservatization of the shelter movement and ultimately the battered women's movement with the influx of public money—and funding from large foundations.[203] As both authors noted, the infusion of money from nonfeminist organizations or from funding sources devoid of a feminist consciousness resulted in

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200. *See* SCHECHTER, *supra* note 8, at 107–08 (advancing that feminist activists contributed the skills and information needed by professionals who "established 'family violence' as their realm of expertise").

201. Interview with advocate from New York (2003).

202. *See* SCHECHTER, *supra* note 8, at 62 (asserting that shelters helped to free women from "male violence and domination").

203. *See id.* at 63 (noting requests from funding sources to an early battered women's shelter); Ahrens, *supra* note 18, at 42–45 (describing how the board of directors of the Austin Center for Battered Women decided that "funding sources would be reluctant to grant funds to any group with an 'alterative' form of organization" and how the new board determined that "it is very important to separate the issue of feminism and sexism from that of battered women").

key structural changes.[204] Women's Advocates (WA)—a battered women's shelter in St. Paul, Minnesota—was offered money from the federal government that was funneled through the local District Attorney's office. As a condition of the grant, the outside agencies suggested that WA consider changing its name, Women's Advocates, to something less inflammatory.[205]

The shelter refused and the grant was pulled.

It is curious that the District Attorney took issue with an organization named "Women's Advocates." Perhaps he was unnerved by the characterization "Women." The District Attorney's admonition reflected a phenomenon within the culture. The dominant culture consistently refused to describe the violence in terms of female objects and male subjects—obscuring victimizer and victim. Rather, through linguistic sleight of hand, woman abuse was transformed into spouse abuse which was then recharacterized as family violence.[206]

Such formalized equality distorts political reality. The liberty to beat wives, a liberty the common law granted husbands through the doctrine of *coverture*, resonated as loudly at the time WA was formed as it does today. Intimate violence was and is pervasive, and it is manifestly gendered. Indeed, U.S. Surgeons General, regardless of political party, have commented that male intimate violence is the leading cause of injury to women—far exceeding automobile accidents, muggings, and cancer-related deaths combined.[207] And we learned and now realize that male intimate violence costs us—the collective we—millions of dollars a year in survivors' lost wages, in hospitalization, and in foster care for children from families marked by terror.[208]

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204. *See* SCHECHTER, *supra* note 8, at 93–98 (declaring that money was a "mixed blessing" for shelters and detailing how the funding "undermined important movement principles" in some shelters); Ahrens, *supra* note 18, at 45–46 (complaining, specifically, about men now working in the shelters).

205. SCHECHTER, *supra* note 8, at 62–63.

206. For a discussion regarding the feminists' continuing struggle to find an adequate name to describe the harm that plagues women who are battered by men, see SCHNEIDER, *supra* note 20, at 45–49.

207. S. REP. NO. 103-138, at 38 (1993) (stating that violence is the leading cause of injury among women age 15–44 years); *see* Antonia C. Novello et al., *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132, 3132 (1992) (same); *see also* MEYER-EMERICK, *supra* note 138, at 1 (citing Novello et al., *supra*).

208. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 6 (2000) (charting the percentage of injuries resulting from domestic violence that led to hospitalization or doctor's visits), http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf (last revised Jan. 31, 2002).

The neutering of the violence does not change these facts.

Adrienne Rich understood the power of naming. She recognized that empowerment of a people is derived, in part, through the act of naming—naming the source of oppression and the site of pain.[209] The power of naming gives voice to social phenomenon, while making visible the invisible. And it constructs how we interpret certain experiences.[210] Indeed, descendants of slaves, named by their slave masters—whose surnames were passed through generation after generation—understood this most basic of human dignities. Perhaps that is why Malcolm X cast off the slave name "Little" and replaced it with an "X" to remind us that naming is an act of empowerment and a claim of identity.[211] Naming, as the *Talmud* tells us, breathes life into a person, into a people.[212]

Language is a system "through which meaning is constructed and cultural practices organized and by which, accordingly, people represent and understand their world, including who they are and how they relate to others."[213] Therefore, the advocates in St. Paul chose their shelter name carefully—and "Women's Advocates" gave currency to the lives of shelter survivors and shelter workers.

What is daunting, however, is how key feminists de-gendered the violence by adopting the lexicon of the dominant culture. In 1984, the U.S. Attorney General's Office convened a task force—the Attorney General's Task Force on Family Violence (the "Task Force")—to examine the role of the criminal

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209. ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1995); *see also* ADRIENNE RICH, *Origins and History of Consciousness*, *in* THE DREAM OF A COMMON LANGUAGE: POEMS 1974–1977, at 7, 7–8 (1978); *accord* JUDY GRAHN, THE WORK OF THE COMMON WOMAN: THE COLLECTED POEMS OF JUDY GRAHN 61–73 (1980) (exploring language and its power to express deep emotions through properly chosen words).

210. *See* Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 34–35 (1988) (postulating that language is the means by which "people represent and understand their world").

211. *See* MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 201 (1965).

212. THE LIVING TALMUD, THE WISDOM OF THE FATHERS AND ITS CLASSICAL COMMENTARIES 22–23 (Judah Goldin trans., 1957) ("If not I for myself, who then? And being for myself, what am I? And if not now, when?").

213. Scott, *supra* note 210, at 34; *see also* Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism"*, *in* FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 35, 52–53 (1995) (analyzing an expression used by the defense team in the New Bedford gang-rape trial that constructed the victim as constrained and passive yet at the same time blameworthy for the sexual acts of aggression perpetrated against her).

justice system in addressing male intimate violence.[214] The Task Force and the ensuing report collapsed all forms of intimate violence into one category: family violence.[215] Woman abuse was indistinguishable from child or elder abuse—and perpetrators were genderless. Indeed, Jeanine Pirro, feminist member of the Task Force and District Attorney from Westchester County, New York, referred to woman abuse as a "family problem."[216] Her comment situated a *feminist* imprimatur on terminology when gender violence was no longer part of the social calculus.[217] And nineteen years later, "family violence" is used by a critical mass of battered women's advocates as a metaphor for woman abuse.[218]

The collapse of woman abuse into a gender neutral category obscures the sexist roots of such violence. Additionally, by making gender unintelligible, we fail to account for how male intimate violence is an expression of sexual domination that insinuates itself into social relationships and structures social conditions. By failing to account for how gender constructs power relationships, social policy formulated to address intimate violence on both micro and macro levels neglects the source of the violence and is deficient.

The Task Force's 1984 findings raise an additional problem concerning characterization of male intimate violence. Although the Task Force focused on a criminal justice response, it was ill-advised to characterize male intimate violence as solely a criminal justice problem. Jeanine Pirro captured the sentiment of the Task Force when she stated, "Many . . . people . . . have looked at [male intimate violence] . . . as a social problem. *We believe it is a criminal problem and the way to handle it is with criminal justice intervention.*"[219] As a result, the Task Force focused its energy and policymaking initiatives solely on the

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214. *See* Hart, *supra* note 196, at vi–vii (stating that the Task Force was responsible for "identifying the scope of the problem of family violence in America and [for] making suitable recommendations").

215. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 196 (using the term "family violence" throughout).

216. *See id.* at 11.

217. While I critique Jeanine Pirro's use of language, I have always been a great admirer of her work on the bench and in the Westchester District Attorney's Office. She was a pioneer in establishing a special unit in the District Attorney's office while an assistant, and she vigorously and successfully prosecuted even the most difficult male intimate violence cases. Thus, I have always valued her contributions to the battered women's movement and her friendship.

218. Interviews with advocates in New York, Colorado, and California (2003). While the use of this term is widely employed, it is by no means uniformly employed, nor is it the lexicon adopted by all constituencies within the movement.

219. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 196, at 11 (emphasis added).

criminal justice system; thus, the solution for male intimate violence was arrest, prosecution, and incarceration of offenders.[220]

Although such recommendations are important, they do not incorporate or address the material, social, and economic concerns of women survivors. By relying solely upon the criminal justice system to remedy such violence, state resources are funneled almost exclusively into law enforcement projects. Consequently, funds for legal representation of survivors,[221] relocation, long-term housing, job training, and education are either minimal or nonexistent.[222] As one advocate from New York commented, "the all-your-eggs-in-one-basket" approach has negatively affected the delivery of services to women.[223] Indeed, a leading activist in New York City remarked that over a ten-year period approximately $258 million has been allocated through the federal VAWA for criminal justice programs in New York City[224]—yet not one dollar has been allocated for shelters, long-term housing, or job training. And because VAWA is the largest federal funding source and financial conduit for programmatic support,[225] the narrow scope of its mission severely impacts distribution of resources to programs and women survivors.

The stunted perception of the problem articulated by the 1984 Task Force not only resonates in 2005, it has shaped funding prerogatives in a way that disables conceptions of a coordinated community response. More importantly, by focusing solely on the criminal justice system and criminal sanctions, other aspects of communal life that contribute to the perpetuation of male intimate violence remain unexamined—and unaccountable.

I am *not* suggesting that the Task Force was wrong in focusing on how the criminal system perpetuates male intimate violence. I am suggesting, however, that its failure to examine how the criminal justice system *interacts* with other cultural systems in sustaining individual and systemic violence against

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220. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 177, at 22–23 (describing the way various police training manuals recommend handling domestic violence situations and suggesting "family violence be treated as a crime").

221. Julie Goldscheid, *Advancing Equality in Domestic Violence Law Reform*, 11 AM. U. J. GENDER SOC. POL'Y & L. 417, 417–19 (2003) (advocating for legal resources for battered women who litigate claims in civil and family courts).

222. Coker, *supra* note 99, at 804–05.

223. Interview with advocate from New York (2003).

224. Such programs included police and judicial training and prosecution. *Id.*

225. *See, e.g.*, *Reauthorize: Renew and Expand the Violence Against Women Act*, HOUS. CHRON., Sept. 26, 2000, at A20 (reporting how VAWA "has funded grants in Texas to encourage the arrest of batterers").

women prevents the development of an *integrated* response to male intimate violence. Because the source of the violence is particularized, remedies are as well. And when advocates adopt this paradigm—aligning ourselves with an ideology that fails to locate and address the source of the problem—we leave women unprotected and a *culture* unexposed.

2. The Mainstreaming of Domestic Violence: Its Effect on the Movement. Not unlike the antirape movement, "once the issue of battering gained legitimacy and funding was made available, more established organizations took over the issue grassroots women had worked so hard to raise."[226] And competition over limited funds enabled government and private funding sources to direct funds toward traditional nonfeminist agencies. Such funding streams supported the institution of family violence projects at Salvation Army shelters, at shelters run by state and county departments of human services, and at shelters operated by religious organizations.[227]

Because these organizations were not feminist, and in some instances antifeminist, both programmatic and organizational focus changed. As Schechter points out, feminism played no part in the shelters controlled by professional social-service agencies.[228] Male responsibility for such violence was subordinate to changing women's personality; both the violence and the survivor were treated as mental health concerns.[229] Accompanying the shift in ideology was a reallocation in programs and services. Now, a heavy institutional emphasis was placed on individual therapy and counseling.[230] Advocacy and group support were supplanted by individualized programs, and political analysis was viewed as unprofessional and outside the purview of shelter service and concern.[231]

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226. SCHECHTER, *supra* note 8, at 75; *see also* Ahrens, *supra* note 18, at 44–47 (arguing that the new "'professionalized' social service institution [was] divorced from the community" and had failed to consider the "societal, cultural, and political implications of why women are the ones in the family so often beaten").

227. SCHECHTER, *supra* note 8, at 75 (complaining about the competition for funding and how sometimes agencies such as the Young Women's Christian Association (YWCA) and Salvation Army turned their back on grassroots groups).

228. *Id.* at 106; Ahrens, *supra* note 18, at 45.

229. *See* SCHECHTER, *supra* note 8, at 106–07 (disapproving of the tendency of staff in shelters controlled by professional social-service agencies to focus on the woman's personality while "male responsibility for violence is relegated to secondary importance").

230. *Id.* at 106.

231. *Id.* at 106–07.

Outside funding to traditionally feminist shelters caused major organizational changes.[232] As Ahrens noted, funding sources shaped service and organizational structure.

And governance was one of the first to be restructured.

Prior to the influx of outside money, governance was shared, collaborative and collective in nature. Staff and residents combined to develop and implement policy. And although it was not a flawless process—and at times susceptible to internecine battles—a nonhierarchical structure encouraged collaborative decisionmaking and accountability.

Government and private agencies were unfamiliar with the governance models employed by feminist shelters. The funding sources wanted grantees to incorporate traditional managerial models with clear lines of accountability. As Schneider notes, incorporation of traditional models of accountability created a division between staff, residents, and the board.[233] Boards were empowered to make policy, staff was charged with carrying out such policy, and residents were invisible within the organizational structure—not part of the organizational ideology or purpose. Accountability was linear and directed upward to the board and more importantly outward to the funding source. And in the process, collectivity was lost.

Professionalization of staff and specialization in the delivery of services were consequences of the funding lottery.[234] Shelters were required to demonstrate that staff were credentialed in specialized areas, and "credentialed" was synonymous with having a professional degree. Knowledge and expertise gained through life, work experience, or both often failed to satisfy this requirement. Consequently, formerly battered women, without

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232. *See id.* at 98–101 (describing how feminists originally preferred a collective structure for shelters, but that once shelters began hiring directors and creating boards of directors, hierarchical structures emerged). My use of the term "outside funding" denotes a funding source that is not part of the local or national feminist network. It also applies to agencies or individuals who do not identify with feminists or a feminist politic.

233. *See* Schneider, *supra* note 77, at 36, 48–49 ("'[A] division between professional and client supplanted the more fluid continuum of relations that characterized the earlier shelters.'" (quoting Nancy Fraser, *Struggle Over Needs: Outcome of Socialist-Feminist Critical Theory of Late-Capitalist Political Structure*, *in* WOMEN, THE STATE, AND WELFARE 214 (Linda Gordon ed., 1990))).

234. *See id.* at 48 (discussing the administrative changes brought on by government funding); *see also* Ahrens, *supra* note 18, at 44 (reporting that the board of the Austin shelter hired an administrator who "placed greater value on those with credentials").

degrees but with work experience at shelters, were noncredentialed and marginalized.[235]

Residents were transformed into clients and a "division between professional and client supplanted the more fluid relations[hips] that characterized the early shelters."[236] Egalitarianism was replaced by hierarchy, and political purpose was replaced by psychological imperatives. Not unlike traditional social-service agencies, the shelters reinterpreted women's needs to be problems of "low self-esteem," and not the far-reaching claims for the social and economic prerequisites of independence.

The shelters had lost their historical and political moorings, and such dislocation altered a movement's vision.

V. THE PROTAGONISTS—THE CONSERVATIVE VOICE OF THE BATTERED WOMEN'S MOVEMENT

A. Deconstructing the Ideological Framework

The Protagonist ideology grew out of the cultural shift within the battered women's movement and the de-gendering of male intimate violence by the common culture.[237]

And while the Protagonists do not represent the entire battered women's movement, their influence is far-reaching and affects how we view male intimate violence and women survivors. An underlying assumption of the Protagonist position is that the societal benefits of mandatory state intervention

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235. *See, e.g.*, Ahrens, *supra* note 18, at 41, 44–45 (detailing how the transition of the shelter in Austin to an "institutionalized social service agenc[y]" resulted in the original staff being "demote[d] and render[ed] powerless").

236. Schneider, *supra* note 77, at 48–49.

237. *See* Hanna, *supra* note 10, at 1868–70 (debating that "feminist theory has failed to supply the answer" to domestic violence and that "removing a woman's right to choose whether to prosecute," even though it is an "infringement on her liberty," is necessary "to protect women overall"); Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L. J. 605, 641–42 (2000) (arguing that when a survivor is coercively controlled by the batterer and there is risk of serious injury or death, legal guardianship should be vested in a third party by the court to ensure that the violence is stopped); *see also* Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1260–61 (2001) (constructing an alternative to total usurpation of autonomy by the state that still allows state actors to determine "decision- and action-junctures" for battered women and requires consequences when battered mothers fail to engage in such behavior). *But see* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 68 (1999) [hereinafter Coker, *Enhancing Autonomy*] (exploring "peacemaking" as a possible solution to battery while maintaining the familial relationship and enabling the victim to have a voice in the ultimate solution); *cf.* Coker, *supra* note 99, at 802–07 (critiquing the changes in domestic violence law that "focus on crime control" and "deflect attention from other antidomestic violence strategies").

outweigh the short-term costs to women's autonomy.[238] According to Cheryl Hanna, former prosecutor and law professor, the social benefits of mandatory state intervention are punishing criminal conduct, deterring future violence, and sending a message that—in the case of male intimate violence—such conduct will not be condoned.[239] Additionally, sacrificing women's autonomy by forced participation through mandatory arrest and prosecution becomes necessary to "protect women overall."[240] Although Hanna's insights into the criminal justice system are powerful, her trust in law enforcement as remedy is misplaced, and her willingness to sacrifice women's autonomy to the state is alarming.

In analyzing the Protagonist position, represented by Hanna, one sees how it presumes that the state *qua* state is hospitable to women. This contrasts starkly with the early advocates who understood that the state was the cause of women's subordination and that male intimate violence and the system of laws that condoned such violence were emblematic of such subordination.[241] Abolition of male intimate violence would require more than a criminal justice response; it would require a reordering of power relations in both public and private life. Arrest alone or in tandem with mandatory prosecution was not the antidote.

State intervention through the use of police power was one tool in altering cultural gender asymmetry. Absent a coordinated community response to transform cultural imperatives that subordinate women, arrest and prosecution of offenders would not produce radical social change.

Moreover, faith in the deterrent effect of mandatory criminal intervention is misplaced. The deterrent value of arrest is equivocal at best. In a 2001 study conducted by the National Institute of Justice (NIJ), the data was inconclusive concerning a correlation between arrest and reduced recidivism in domestic violence cases.[242] The NIJ study found that *regardless of type of intervention* most suspects had no significant repeat criminal

238. Hanna, *supra* note 10, at 1869–70.

239. *Id.* at 1888–90.

240. *Id.* at 1870.

241. *See supra* notes 22–23, 28 and accompanying text (emphasizing the state's role in the oppression of women).

242. *See* CHRISTOPHER D. MAXWELL ET AL., U.S. DEP'T OF JUSTICE, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 13–14 (2001) (describing study results and calling for more research).

offense against the original survivor and that a majority of men discontinued aggressive behavior *without* arrest.[243]

The NIJ study should not be read to support the conclusion that *no* intervention is good public policy. Rather, it supports the idea that informal or noncriminal responses may be effective at stopping male intimate violence. In 1983, Lee Bowker found that women employed myriad successful, informal strategies to confront the violence, from accessing community resources, to threatening divorce, to leaving temporarily, to completely separating.[244] And in a 1999 article, Donna Coker tells of Navajo women who utilized community resources to stop the abuse.[245]

None of the strategies employed by Coker or Bowker's women implicated the criminal or law enforcement systems. It appears that the strategies were successful in stopping the violence because they were *particularized* to each situation and utilized various interventions. Their success, however, was invisible in studies of reoccurrence because they were informal, operating below the system's radar.[246] The failure to consider informal strategies limits options for women. If safety is the goal, however, we should be willing to employ any strategy that will stop violence.

Criminalization of male intimate violence has a special meaning when understood in the context of the historical treatment of such violence by the state. But as Naomi Cahn suggests, the legal conclusion that domestic violence is a crime is insufficient public policy:[247] Merely criminalizing the act does not address the complex social conditions that construct survivors' lives.[248] Criminalization does not address battered women's need for housing and economic or emotional support.[249] Nor does it

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243. *Id.*

244. *See* LEE H. BOWKER, BEATING WIFE BEATING 75–85 (1983) (examining several informal help options available to battered women); *see also* Littleton, *supra* note 25, at 52–53 (arguing that informal responses elevate gender equality).

245. *See* Coker, *Enhancing Autonomy*, *supra* note 237, at 68 (demonstrating that by involving the community in taking responsibility for monitoring male abuse, a Navajo battered woman curbed the domestic violence without permanent separation or intervention of police).

246. *See id.* at 68–69 (observing that "staying versus leaving" is not exhaustive of an abused wife's options).

247. *See* Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 817–18 (2000) (describing the dilemma caused by criminalization's failure to address many of the underlying issues of domestic violence).

248. *See id.* at 820–21 (noting that criminalization fails to account for the needs of outsider groups).

249. *See* Coker, *supra* note 99, at 801, 804–07 (noting that the communal socio-economic differences between men and women often preclude a battered woman's ability to live apart from her partner).

engage the myriad material concerns that women with children face, concerns that require an integrated social response. And because criminalization does not direct society's power to correct the socioeconomic inequities and emotional obstacles faced by battered women, it is an incomplete social strategy.[250]

Finally, the belief that individual women should be coerced into cooperation with the criminal justice system for the benefit of women as a class is not only unwise but also dangerous. It is unwise because it presumes that mandatory state intervention will materially alter women's lives for the better. This ignores how the state interacts differently with women based on race, parenting status, ethnicity, and social class.[251] For example, women who are mothers and survivors of violence face scrutiny by a wholly different system, the child protective system.[252] And because police and prosecutors are mandated reporters of suspected child abuse in a majority of states, police response and prosecutor involvement may open a "Pandora's box" of other institutional responses.[253] Coerced cooperation could result in further regulation of battered mothers.

Mandatory child-abuse reporting statutes coupled with the expanded definition of abuse subjects a battered mother to

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250. *See* Cahn, *supra* note 247, at 817–19.

251. Claire M. Renzetti, *Connecting the Dots: Women, Public Policy, and Social Control*, *in* CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 181, 186 (Susan L. Miller ed., 1998); *see also* Crenshaw, *supra* note 19, at 1241–45 (explaining the need to create policy which embraces the different roles women assume in society).

252. *See* Miccio, *In the Name of Mothers*, *supra* note 124, at 1088–89 (examining the application of child protective statutes to abused mothers for failing to protect their children); *see also* Melissa A. Trepiccione, Note, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution when Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1516–17 (2001) (arguing that the removal of children who witness abuse of their victimized mothers is unacceptable from both a social science viewpoint and a constitutional law perspective). In New York City, this practice was recently enjoined in *In re Nicholson*, 181 F. Supp. 2d 182, 184–85 (E.D.N.Y. 2002). In this case, the court enjoined the Administration for Children's Services, which removed children of battered mothers "for the reason that mothers 'engaged in' domestic violence by being victims of such violence," and then after returning the children to the mothers sometimes "pursue(d) neglect actions against the mothers in Family Court solely on the ground that they were victims of domestic violence." *Id.* As the court stated, "the government may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer." *Id.* at 188.

253. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS. & N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, THIRD INTERIM REPORT TO THE GOVERNOR AND LEGISLATURE 55 (2000) [hereinafter INTERIM REPORT].

charges of parental neglect for failure to stop the abuse to herself.[254] The mere threat of a child-abuse petition filed against the mother has been used by the state to compel her cooperation in prosecuting the offender.[255] In New York, it has been reported by the judiciary and by rural women that such "strong-arm" tactics included threats not only to civilly petition against battered women but to *criminally* prosecute battered women on endangering charges if the women refused to cooperate with the prosecution of the assailant.[256]

While forced participation—through mandatory arrest and prosecution—subjects battered mothers to further scrutiny and creates the potential for further regulation and control through such systems as the child protective system,[257] it does not *ensure* that the abuse will stop or fail to escalate. As Coker points out, arrest and prosecution are no guarantee that the violence will cease.[258] And because male intimate violence is random and unpredictable, the only guarantee is that there are no guarantees that any *one* state intervention method will abate the violence.

Hanna suggests, however, that coercion is appropriate because the goal is to "punish the batterer in order to protect potential victims."[259] The danger with Hanna's paradigm is that it sends a message that a viable trade-off exists for women survivors: usurpation of their decisionmaking power by the state

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254. *See*, *e.g.*, *In re* Dalton, 424 N.E.2d 1226, 1231–33 (Ill. App. Ct. 1981) (finding a mother neglectful and removing her children even though the mother claimed she remained with the assaultive father to save the children from being killed). The court disregarded evidence that the mother's attempts to leave were frustrated by the husband's threats to kill the children. *Id.* at 1230–32. *See also In re* Heather A., 60 Cal. Rptr. 2d 315, 321 (Ct. App. 1996) (finding that the mere presence in a home where there is domestic violence constitutes neglect); *In re* Glenn G., 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992) (establishing that Mrs. G. did not have the mens rea to be convicted as an abuser but holding that her "actions were manifestly inadequate to protect the children from the father's ongoing abuse" and, therefore, finding her guilty under the strict liability neglect statute).

255. In 1996, I asked a high-ranking official in the New York County District Attorney's Office whether this practice was used. I was told that it was—especially in cases where the battered women recanted and reunited with the abuser. The practice was documented in N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS. & N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, FINAL REPORT TO THE GOVERNOR AND LEGISLATURE 8 (2001) [hereinafter FINAL REPORT].

256. *Id.* at 8.

257. *See In re Heather A.*, 60 Cal. Rptr. 2d at 321; *In re Glenn G.*, 587 N.Y.S.2d at 467–70.

258. Coker, *supra* note 99, at 826 (describing the deterrent effect of arrest and prosecution as equivocal).

259. Hanna, *supra* note 10, at 1870.

in exchange for protection. Even if the punish–protection prototype is optimum, it appears to be illusory.

A study conducted by the New York State Office for the Prevention of Domestic Violence six years after the passage of New York's mandatory arrest law found that a considerable number of cases continued to slip out of the system with virtually no consequence to the offender and little safety to the victim.[260] *The Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions, Final Report to the Governor and Legislature* (*Final Report*) reported that the range for bail in four of eight research sites was $200 to $500 resulting in only nine to fourteen percent of suspects remaining in jail.[261] In six of the eight sites studied, very few convictions resulted in more than fines, although probation and jail terms were options.[262] And in the two remaining sites, offenders received almost no punishment because over half of the sentences imposed were conditional discharges.[263] Yet as noted by the evaluators in New York, "fines have not been shown to reduce offender recidivism."[264] Conditional discharge is problematic because it provides neither supervision nor control over the offender.[265] At the very least, the data from New York challenges the notion that punish and protect are consistently part of a criminal justice repertoire.

The New York experience explicitly teaches that legislative mandates do not change deeply rooted cultural practices and beliefs. One such belief is that the violence is private and beyond the purview or concern of the state.[266] Another is that women are not credible—that we lie—especially in cases in which men are charged with sexual assault or physical violence of an intimate.[267]

Legally recognized *disbelief* of women crafted evidence requirements such as the Lord Hale instruction in rape cases and the independent corroboration rule in sexual assault

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260. FINAL REPORT, *supra* note 255, at 51. New York's study was used because comparable statewide studies were neither available from target jurisdictions where advocates interviews took place—Colorado and California—nor were they available from any other jurisdiction.

261. *Id.* at 46–48.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *See supra* Part II.

267. S. REP. NO. 103-138, at 44–46 (1993) (documenting that state rules and practices continue to shine a spotlight on sexual assault victims).

prosecutions.[268] In physical abuse cases, the Senate Report accompanying VAWA noted that prosecutors and the courts often required visible injuries as a precondition to believability—the functional equivalent of the Lord Hale instruction.[269] Women's narratives were presumed untrustworthy.

And these beliefs about the violence and the victim survive today.

New York reports low arrest rates in cases in which the suspect fled the scene. The evaluators found that in all eight sites studied, none of the police departments were "structured to routinely actively pursue suspects who had fled the scene."[270] Yet two of the research sites were New York City precincts, which have follow-up procedures for investigation and apprehension of suspects who have left the scene in stranger cases.[271] At the very least, follow-up should have taken place in these two jurisdictions.

It appears that the obstacle to police follow-up in suspect-absent cases is one of police attitude, not limited resources or structural impediments. For example, the *Final Report* recommended that the legislature "make clear that mandatory arrest extends to suspect-absent cases."[272] This recommendation implies that police arrest avoidance is due to the absence of explicit language mandating arrest in suspect-absent cases.

Yet suspect presence at the scene is not the trigger for mandatory arrest, nor is it required by the state's general arrest statutes.[273] To trigger mandatory arrest in domestic violence cases, one must find probable cause that a felony or violation of a stay away order has been committed by a member of the same household, and household is broadly construed. Consistent with the state's general arrest statute, there is no requirement for a

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268. The Lord Hale instruction warns that rape is a charge "'easily to be made and hard to be proved, and harder to be defended by the party accused tho' ever so innocent.'" People v. Phillips, 536 N.E.2d 1242, 1246 (Ill. App. Ct. 1989) (Pincham, J., dissenting) (quoting Lord Hale and thus reiterating the pervasiveness of this attitude in modern society); S. REP. NO. 103-138, at 45.

269. S. REP. NO. 103-138, at 45 (explaining that "[j]udges and juries expect more corroboration in sexual assault cases than in other cases of a similar class even when there is no such legal requirement").

270. FINAL REPORT, *supra* note 255, at 4.

271. *Id.* at 2.

272. *Id.*

273. N.Y. CRIM. PROC. LAW § 140.10(1)(b) (McKinney 2004) (authorizing a police officer to arrest a suspect "when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise").

site arrest, nor is there a bar to subsequent off-site arrests. Indeed, arrests are made routinely in suspect-absent stranger cases.[274]

There appears to be a new twist to police arrest avoidance, the practice police departments engaged in during the 1970s and 1980s prior to the institution of mandatory arrest. During that period, police routinely refused to arrest offenders even when police witnessed the violence because they believed such acts were private.[275] Such conduct by police was the reason mandatory arrest was instituted in the jurisdictions—to correct police abuse of discretion. Now more than thirty years after this issue first came to light, police are engaging in similar tactics by finding an imagined loophole in the legislation.

Rather than investigate and arrest, police in the eight jurisdictions have passed this responsibility on to the survivor. If an arrest is to be made, it is her responsibility to file for and secure either a warrant or a summons.[276] But mandatory arrest was instituted as a *protective* measure, thereby removing the victim from the arrest process. The *Final Report*'s findings suggest that current police practices have compromised not only survivor autonomy but also her safety.

And prosecutors?

The same report found that prosecutors statewide were predisposed *against* filing for arrest warrants in suspect-absent cases.[277] According to prosecutors, it would be "premature [to file for a warrant] without [first] hearing the [defendant's] recounting of [the] incident."[278] But why should the offender's

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274. As a former New York City prosecutor, I was aware of numerous arrests made by police after the suspect fled the scene. If an arrest was not made within a short time following the initial investigation, it would be referred to the Detective Bureau where it would be assigned for further investigation and possible arrest. In one suspect-absent case that I handled—which was a domestic violence case—I dispatched the District Attorney Detective Squad to arrest an alleged batterer in a *Lord and Taylor* department store. This arrest was made under the NYPD mandatory arrest procedures in domestic violence cases—procedures that were part of the *Bruno v. Codd* settlement agreement. The NYPD procedures subsequently became the foundation for the statewide mandatory arrest law.

275. *See* Bruno v. Codd, 396 N.Y.S.2d 974, 976 (Sup. Ct. 1977) (alleging police failed to act on domestic abuse "even [when] the physical evidence of the assault [was] unmistakable and undenied"); *see also* Thurman v. City of Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (alleging a lower form of protection is afforded to victims of domestic abuse).

276. FINAL REPORT, *supra* note 255, at 2.

277. *Id.*

278. *Id.* Prosecutors also stated that issuance of a warrant would reduce the

account operate as a precondition for a warrant? We know that arrest warrants are issued in the absence of the defendant's account of the incident, and street arrests, based on information from and identifications by the complainant, are made every day by police. Arrest warrants issue and street arrests occur in the absence of offender interviews because the empowered party—police, prosecutor, or judge—*believes* the complainant. Perhaps the requirement for offender interviews in male intimate violence cases is a harbinger that gender still constructs credibility.

New York's experience is instructive because it offers a very different message than the one suggested by Professor Hanna. It reminds us that the punish–protect paradigm is conditioned upon the goodwill of a system still tainted by arcane and gendered notions about women in general and battered women in particular. And it tells us that the trade offered by Professor Hanna—usurpation of women's decisionmaking power in exchange for protection—is a false promise and oftentimes dangerous option.

We have come full circle.

B. Deconstructing the Lexicon

The early activists talked about abuse of women and its consequences in ways that mediated between the particular and the general. The particular recognizes women's individual perceptions and experiences.[279] The general locates particularized experiences within patterns of systemic power and oppression.[280] To the early advocates, issues and descriptions of women's experience needed to reveal the systemic nature of oppression while validating how women lived.[281]

"opportunity to obtain incriminating statements." *Id.* This is due to the fact that the right to counsel is triggered in New York with the issuance of an arrest warrant, because a felony complaint or other accusatory instrument must precede the issuance of an arrest warrant. *See* INTERIM REPORT, *supra* note 253, at 41. Once criminal proceedings have commenced, the right to counsel for the accused attaches, and this right cannot be waived without counsel's presence. *See* N.Y. CRIM. PROC. LAW § 1.20(1), (8), (17) (McKinney Supp. 2005) (defining "accusatory instrument," "felony compliant," and "commencement of criminal action"); N.Y. CRIM. PROC. LAW §§ 120.10, 120.20 (McKinney 2004) (defining "warrant" and describing the issuance process); People v. Samuels, 400 N.E.2d 1344, 1346–47 (N.Y. 1980) (explaining the procedure for commencing criminal proceedings and the manner by which counsel may be waived).

279. *See*, *e.g.*, Schneider, *Particularity and Generality*, *supra* note 86, at 527 (explaining the importance of analyzing women's experiences in the context of their detailed surroundings).

280. *Id.* (explaining how abuse should also be viewed in its societal context).

281. Mahoney, *supra* note 25, at 65 (describing the role of dialogue and experience

But there is a second level of analysis.

How do we validate the subjective—which is neither static nor open to limiting definitions but continually created and constantly evolving—while at the same time authenticate a common or shared set of experiences?[282] Both in the discourse on male intimate violence and in the creation of public policy, advocates struggled to reconcile the I–We paradigm.

In both discourse and policy, the early advocates appreciated that perceptions have meaning only in the context of experience.[283] Consequently, shelter philosophy respected women's decision to stay or leave the batterer, and staff resisted substituting their judgment for that of the survivors.[284] Shelter programs used consciousness-raising (CR) groups among staff and residents to "[talk about] the violence in [their] lives" as a vehicle to challenge subjective knowledge about male intimate violence and to approximate common ground.[285] As women from La Casa de Las Madres found, "[W]e began to see that we were . . . [all] oppressed."[286]

But CR groups produced an additional result. Through conversation with others who had had similar experiences, women made discoveries that were transformational.[287] First,

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sharing in discovering the systemic breadth of abuse); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, *in* FEMINIST THEORY: A CRITIQUE OF IDEOLOGY 1, 22 (Nannerl O. Keohane et al. eds., 1982) (explaining the benefits and goals of consciousness raising).

282. *See generally* James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991) (describing the dangers of sacrificing subjectivity on the altar of objectivity in critical legal theory); *see also* ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 2–4 (1988) (discussing the dangers of essentializing); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 59–60 (1988) (commenting on the tension between essentializing gender and recognizing difference in women's lives); *cf.* MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 8–9 (1999) (illustrating an example of essentializing on an international level through crossing artificial geographical boundaries).

283. *See* Scales, *supra* note 149, at 1386 ("Investigation of the world is a matter of communication, and communication can never be made out of context.").

284. *See* SCHECHTER, *supra* note 8, at 63–64 (recognizing self-determination as an early tenet of the battered women's movement).

285. *Id.* at 57.

286. *Id.*

287. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 86 (1989) (explaining that viewing each individual's travails as part of a common systemic experience is the first step to organizing a broad battered women's movement); *see also* Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 827 (1999) ("[O]nce [a woman] becomes aware of the influence of some group-based norms on her self-definition, she may be able to use or even create

perceptions of the self were shaped by social conditions and normative values. Second, those perceptions were alterable.[288] And third, the source of the abuse was male privilege and power, not the consequence of individual inadequacies.[289] As Catharine MacKinnon noted, the experience of CR groups was the development of knowledge, a political consciousness that challenged the experience of social inequality.[290] And the result of such groups was the creation of a collective social being culled from the individual and subjective experiences of its members.[291]

What this illustrates is that the early advocates understood the complex and at once interactive nature of women's experience with the self, other women, and the dominant culture. Accommodation and transformation of women's varied and evolving experiences was integral in both movement discourse and policy.

The Protagonists changed this.

Protagonists support mandatory arrest because women survivors are not able to "make rational choice[s] in moments of trauma."[292] And rational is a proxy for good—with good ultimately defined as leaving the relationship and cooperating with police and prosecutors.[293]

The key question is, why have Protagonists characterized *all* women survivors as irrational and incapable? And why choose a lexicon that revives nineteenth-century notions of women's inherent irrationality and inferiority?[294]

It appears that the Protagonist view is shaped by conceptions of learned helplessness first articulated by Lenore Walker in the 1980s. Learned helplessness is the cornerstone of Battered Women Syndrome (BWS), a psychological syndrome

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others to support a more enabling self-conception and to resist the influence of more dominant disenabling norms.").

288. MACKINNON, *supra* note 287, at 90–94 (describing the development of societal norms grafted onto biological traits in distinguishing gender roles).

289. *Id.* at 92–95.

290. *See id.* at 91–92.

291. *See id.*

292. Interviews with advocates in New York, Colorado, and California (2003).

293. *Id.*; *see* Hanna, *supra* note 10, at 1863 (suggesting that the ideal option for a battered woman is to assist in the prosecution of her partner).

294. *See*, *e.g.*, PLECK, *supra* note 46, at 7–10 (tracing the history of social policy towards family violence); Ellen DuBois, *The Nineteenth-Century Woman Suffrage Movement and the Analysis of Women's Oppression*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM, *supra* note 26, at 137, 137–38 (placing the nineteenth-century suffrage movement in gender and class context).

identified by Walker to explain why battered women stay in abusive relationships.[295]

BWS was used initially as an evidentiary tool in criminal cases in which abused women fought back and either killed or injured their batterers.[296] The syndrome was offered to explain both the defendant's good faith belief that she faced serious bodily harm or death and the reasonableness of that belief.[297] According to Walker, because the violence is random and unpredictable, it creates a "psychological paralysis" that affects the abused woman's perceptions and conduct. Such psychological paralysis results in a loss of control, an inability to predict outcomes, and an incapacity to identify or to take advantage of opportunities to escape or exit the relationship.[298] As part of the woman's deteriorating psychological state she experiences feelings of depression, low self-esteem, self-blame, and denial, and she is unable to recognize or seek help.[299]

It is well known that BWS has come under attack by feminist scholars and activists.[300] Evan Stark eloquently and succinctly characterizes the problem with BWS and conceptions of learned helplessness.[301] Stark claims BWS sets up a traumatization model to explain survivors' actions in the context of social variables that reinforce the assailants' conduct.[302] Stark understands that women's actions are relational, shaped by

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295. *See* WALKER, *supra* note 60, at 9–10 ("Learned helplessness theory predicts that the perception of helplessness can be learned during childhood from experiences of uncontrollability or noncontingency between response and outcome.").

296. *See* Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 998–99 (1995) (recasting the paradigm as one of coercive control, thereby focusing on how the violence constructs the environment).

297. *See* WALKER, *supra* note 60, at 40–41 (explaining that battered women retaliate with deadly force only as a last resort).

298. *Id.* at 33, 87.

299. *Id.* at 87.

300. *See, e.g.*, DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 219, 226–27 (1996) (concluding that BWS tends to "subjectivize the basic tenants of criminal law" and portrays battered women as lacking basic attributes of citizenship); SCHNEIDER, *supra* note 20, at 123–24 (arguing that all battered women cannot be cast into a uniform BWS mold because their experiences are diverse and complex); Mahoney, *supra* note 25, at 63–64 (cautioning against the stereotypical emphasis on helplessness and victimization that forms the hallmark of battered woman syndrome); Evan Stark & Anne Flitcraft, *Personal Power and Institutional Victimization: Treating the Dual Trauma of Woman Battering*, *in* POST-TRAUMATIC THERAPY AND VICTIMS OF VIOLENCE 115, 122–24 (Frank M. Ochberg ed., 1988) (rebuffing the notion that abused women are psychologically deficient).

301. *See* Stark, *supra* note 296, at 997–1000.

302. *Id.* at 999.

environmental factors that include assailant conduct and social response to the violence.

By situating their ideology within the learned-helplessness paradigm, the Protagonists pathologize women's experience, erecting a medical model to explain women's conduct. The problem is inverted: It is no longer one of male intimate violence against women, but a woman's learned helplessness as evidenced by her failure to leave. As Christine Littleton points out, "Translating women's [condition] into a problem *with women* masks the pervasiveness and extent of men's ability to oppress, harm and threaten us. It protects the legal system from having to confront the central problems of battering—male violence, male power and gender hierarchy."[303] Just as BWS is understood to describe helplessness and pathological dependency—not social conditions—the Protagonists' focus on failure to leave obscures the various factors that contribute to a woman's decision to leave or stay, such as safety for herself and her children, cultural prescriptions and prohibitions, economic resources, and familial and community support.

Moreover, by placing a positive valence on leaving, the Protagonists flatten the topography of male intimate violence. Martha Mahoney reminds us that leaving is often unsafe because male intimate violence is not a discrete incident.[304] Rather, such violence is defined by control that goes beyond an episode or series of episodes; therefore, because the offender will seek to reassert power, women may not be safe simply by leaving. Indeed, the Protagonist focus on leaving conceals the nature of male intimate violence as a "struggle for control, [while] pretend[ing] away the extreme dangers of separation."[305]

Flight, then, is a viable response only if it is safer than staying. Because each situation is defined by its particular circumstances, to craft a one-size-fits-all solution is deeply problematic because it fails to account for the varied conditions that shape women's lives and responses. But this is exactly what the Protagonists have done.

In attempting to reconcile the tension in prosecuting male intimate violence cases,[306] the Protagonists have come up with a

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303. Littleton, *supra* note 25, at 38.

304. Mahoney, *supra* note 25, at 60–61.

305. *Id.*

306. Hanna, *supra* note 10, at 1893.

> When cases are dismissed because the prosecutor fails to mandate participation, police officers and other criminal justice personnel may question the legitimacy of the trial preparation process. . . . When police do make an appropriate arrest,

simplistic answer: Mandatory state intervention is required because all battered women are incapable of rational choice in trauma. Professor Hanna's reconstruction of the Beverly Johnson case illustrates this point.[307]

While in the Baltimore City State Attorney's Office, Hanna handled a case involving a woman, Beverly Johnson, beaten by her boyfriend. Although Ms. Johnson had called the police and the offender was later arrested, she decided not to prosecute because she was dying from AIDS and did not "want a criminal case to interfere with [her] life."[308] Johnson also claimed that the glare of prosecution would reveal her condition to her family who, up to that point, was unaware of it.[309]

Although Hanna begged Johnson to prosecute, Johnson refused. Hanna pulled the case but not before warning Johnson that the case would be reopened if "her boyfriend laid a finger on her."[310] Professor Hanna ends this account by claiming she should have pursued the case. She believed she wrongfully arrived at a decision because she attempted to "preserve [Johnson's] privacy rather than . . . pursue a law enforcement objective."[311]

However, this case was not about Johnson's privacy, it was about her safety. Johnson claimed that by continuing the prosecution her life was getting "worse, not better."[312] Johnson made the decision to cease prosecution to preserve her health and her relationships—not only with her boyfriend but also with her family. Here, safety was associated with Johnson's conditions particular to AIDS and not the violence perpetrated by the boyfriend.

Johnson's decision was strategic. It may not have been the one that Hanna or another survivor of violence with AIDS would have chosen, but it was not irrational nor did it evince incapability. It was a decision based on the conditions that shaped Johnson's environment, with AIDS taking center stage. Finally, there was no guarantee that prosecution would have

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> only to see the case dismissed at trial because the victim did not want to proceed, their decreased confidence in the value of arrest can undermine their diligence when policing domestic violence. Furthermore, if police and prosecutors understand that the victim cannot prevent the case from being prosecuted, they will be more likely to take greater care in their investigations.

Id.

307. *Id.* at 1873–74.

308. *Id.* at 1874.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

been the better alternative. In fact, the opposite may have been true because in this case prosecution would have been the equivalent of severing a relationship with her boyfriend and her family at a time when she perceived a need for their support.

There is, however, another consequence of the Protagonist ideology: It constructs a set of false dichotomies. The first involves conceptions of authenticity. By authenticity, I am referring to social notions concerning legitimate claims of violence and how the genuineness of a claim is judged by whether the survivor leaves or stays. Both law and popular culture equate existence of violence with separation from the relationship.[313] Staying becomes a socially suspect choice undermining the woman's claim of abuse. Leaving, on the other hand, validates her assertion of harm. If we listen to women survivors, we learn that they stay for myriad reasons—fear of reprisal, fear of losing their children, economic concerns, emotional ties to the batterer or his family, lack of social or familial support, and lack of a place to go.[314] Yet the Protagonists have collapsed a complex set of interactions into narrow categories that fail to adequately describe the conditions that frame her life, her choices, and her conduct.[315]

The Protagonist discourse constructs a second dichotomy—the good victim–bad victim culture—framed by the survivor's relationship with police and prosecutors. The discourse creates polar opposites, "good" synonymous with cooperative and "bad" equal to disobliging. There is no quarter for women who are uncertain, fearful of the outcome, or distrustful of the system. Moreover, as Faith Lutze and Megan Symons point out,

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313. This equation is precisely the reason Walker's theory was crafted—to confront the question of why a battered woman does not leave. *See supra* notes 295–99 and accompanying text (explaining Walker's theory).

314. *See* Sally Engle Merry, *Wife Battering and the Ambiguities of Rights*, *in* IDENTITIES, POLITICS, AND RIGHTS 271, 300–02 (Austin Sarat & Thomas R. Kearns eds., 1995) (exploring the tension inherent in accessing the legal system and the conditions that shape women's choices); *see also* SCHNEIDER, *supra* note 20, at 51–52 (discussing Merry's proposition); Mahoney, *supra* note 25, at 60–62. According to an advocate in Colorado, the Denver metro area—which includes in part Denver, Jefferson, Arapaho, and Adams Counties—has approximately 250 beds for women and their children. The number of domestic violence cases in these four counties combined exceeds 5000. If only half of the survivors sought shelter and left the offender, they would most likely not find shelter in the metro area. If we factor in children, the likelihood of placement is severely reduced. Interview with advocate in Colorado (2004).

315. *See* Merry, *supra* note 314, at 304–06 (insisting that the legal system's "rights-oriented" approach "obscures the analysis of larger structures of power that impinge on both men and women"); *see also* SCHNEIDER, *supra* note 20, at 52–53 (arguing that legal intervention is "disconnected from the realities of women's lives").

uncooperative is a proxy for unworthy.[316] In effect, the recalcitrant survivor is unworthy of either our support or our concern.[317]

The Beverly Johnson case illustrates the abandonment of the bad, unaccommodating victim. As recounted by Professor Hanna, Johnson did not want to prosecute; she was an uncooperative victim. Although Hanna withdrew the case, she did not do so without first giving Johnson a "stern warning . . . that [she] would reopen [the case] if her boyfriend laid a finger on her."[318] After the case was dropped, the last interaction between Hanna and Johnson was one of rapprochement.[319]

And yet there was much Hanna could have done. She could have explored what community resources were available for individuals living with AIDS. She could have provided information regarding services in the community to address both the violence and Johnson's medical condition. She could have offered help in constructing a safety plan. Rather than admonish, Hanna could have provided options—options that addressed Beverly Johnson's needs.

Hanna's interaction with Johnson illustrates how the system's inflexibility fails to account for varying narratives and needs. This vignette crystallizes how the "bad" victim is constructed and, consonant with that construction, unworthy of support or concern.

Much like Andrea Dworkin's Madonna–Whore dichotomy to describe social stereotypes and cultural expectations of women,[320] the Protagonists have incorporated cultural prescriptions with respect to what constitutes the good or worthy battered woman, reinforcing rigid stereotypes. But who is the "good" victim? Not

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316. Faith E. Lutze & Megan L. Symons, *The Evolution of Domestic Violence Policy Through Masculine Institutions: From Discipline to Protection to Collaborative Empowerment*, 2 CRIMINOLOGY & PUB. POL'Y 319, 323–24 (2003); *see also* Myrna Dawson & Ronit Dinovitzer, *Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court*, 18 JUST. Q. 593, 612–14 (2001) (using a statistical analysis to find a correlation between victim cooperation and the likelihood of prosecution); David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, *in* LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 140–43 (N. Zoe Hilton ed., 1993) (characterizing dropped charges against batterers as a "problem" attributable to victim nonparticipation).

317. Lutze & Symons, *supra* note 316, at 323–24.

318. Hanna, *supra* note 10, at 1874.

319. *Id.* (reporting that shortly after the prosecution was dropped, Ms. Johnson sent a card thanking Hanna for respecting her wishes).

320. ANDREA DWORKIN, WOMAN HATING 73–74 (1974); MERLIN STONE, WHEN GOD WAS A WOMAN, at xx (1976) (describing the rediscovery of the goddess religions, mentioning the Virgin–harlot dichotomy).

unlike the good woman or the good mother, she is deferential, submissive to authority, and compliant to the demands of others.[321] And yet conceptions of victim are critical to women's subordination. It is, as described by Martha Fineman, like motherhood, "a colonized concept . . . physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology."[322]

Perhaps unwittingly the Protagonists have aligned themselves with the dominant culture in appropriating conceptions of victim by requiring the "good victim" to submit to the will of the state. The paradox of the Protagonist ideology is that the autonomous, liberal-self promised through cooperation with the criminal justice system is premised upon utter submission by the battered woman. Such submission is to a system that neither validates nor accounts for the material and gendered experiences of women who are battered.

The emergence of the Protagonist ideology is a natural result of the shift in the shelter movement and the continued ideological position of the dominant culture. With the transformation of the shelter from a political to a social-service entity, it is not unfathomable that an ideological strain within the movement would reflect an individualistic medical model to explain the behavior of both perpetrator and survivor. While not characteristic of all shelters and voices within the movement, the Protagonist ideology has set in motion not only the depoliticization of male intimate violence but the disempowerment of women who are battered.

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321. *See* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 289–90 [hereinafter Fineman, *Mothers in Poverty*] (defining the ideological image of motherhood as that dominated by the man and defined gender roles); Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 654 (1992) (discussing how the symbol of motherhood is defined by her dependence on husband and child). *See also generally* Donald Nicolson, *Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill*, 3 FEMINIST LEGAL STUD. 185 (1995) (exploring the good victim–bad victim dichotomy in cases where women who are battered kill their assailants). Nicolson concludes that battered women who kill face the choice of being seen as either mad or bad—either way they are constructed as irrational. *Id.* at 206.

322. Fineman, *Mothers in Poverty*, *supra* note 321, at 289–90.

VI. THE PROTAGONIST IDEOLOGY—THE DISEMPOWERMENT PARADIGM

A. The Autonomy Myth in American Culture and the Feminist Response

The Protagonist ideology incorporates traditional notions of autonomy, characterized by conceptions of control and mastery over one's environment. Within this paradigm, autonomy is synonymous with control over one's environment and control is demonstrated by one's ability to exit the relationship. Social context and conditions are irrelevant and not part of the autonomy matrix.

The Protagonist position parallels traditional notions of autonomy that are part of American culture. The quintessential American is the rugged individualist, captured in literary image and popular culture—from Natty Bumpo to the Marlboro Man.[323] He is self-sufficient, separate and distinct—the rational, ubiquitous being—standing "above the fray," as Lorraine Code comments, to "view 'from nowhere' the truths the world reveals."[324] The truly autonomous man is self-defining—distinguishing his own values from those values externally imposed.[325] He is disembodied—freed from the vagaries of the body, of the senses—disconnected from himself and from others.

Such classical conceptions of autonomy are distinctly gendered.[326] As Marilyn Friedman writes, the problems inherent in the prevailing social construct of autonomy offered by the dominant culture—mastery by and of the self, detached objectivity, rationality, and conceptions of control—reflect privileged notions of autonomy that are intrinsically masculine.[327]

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323. JUDITH FETTERLEY, THE RESISTING READER: A FEMINIST APPROACH TO AMERICAN FICTION, at xiii (1978).

324. Lorraine Code, *The Perversion of Autonomy and the Subjection of Women: Discourses of Social Advocacy at Century's End*, *in* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 181, 185 (Catriona Mackenzie & Natalie Stoljar eds., 2000); *see also* IMMANUEL KANT, *An Answer to the Question: 'What Is Enlightenment?*,' *in* KANT'S POLITICAL WRITINGS 54–55 (Hans Reiss ed., H.B. Nisbet trans., 1970) (positing that individual autonomy is an achievement of enlightenment—one's achievement of emergence from self-incurred immaturity).

325. Code, *supra* note 324, at 183.

326. *See generally* GENEVIEVE LLOYD, THE MAN OF REASON: "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY (1984).

327. Marilyn Friedman, *Autonomy, Social Disruption, and Women*, *in* RELATIONAL AUTONOMY, *supra* note 324, at 35, 35–36; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988) (arguing that classical liberal conceptions of autonomy are "essentially and irretrievably masculine"); *see also* SIMONE DE BEAUVOIR, THE SECOND SEX 161 (H.M. Parshley ed. & trans., Vintage Books 1974) (1949) (claiming that

Because the core of classical autonomy—rationality—is constructed in opposition to the stereotypic character of femaleness, women, as well as other oppressed groups,[328] are cast as irrational beings who are defined by subjectivities.[329] Thus, by their nature women are incapable of maturing into autonomous persons.[330] And by defining autonomy as the "freedom to make public use of one's reason,"[331] classical theorists deny the "hierarchical divisions that determine whose rational utterances merit public acknowledgement."[332]

Feminist relational theorists such as Friedman reject classical notions of autonomy because they are neither descriptively accurate nor theoretically sound. The relationalist finds the "I think therefore I am" disembodied-self problematic because the particularities of experience and self-identification

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"[r]epresentation of the world . . . itself is the work of men; they describe it from their own point of view, which they confuse with absolute truth"). The feminist discourse framed by relationalist feminists is part of a larger critique of Kantian conceptions of autonomy. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) (recognizing criticisms of Kant's social contract theory and offering "an alternative systematic account of justice that is superior . . . to the dominant utilitarianism of the tradition"). Rawls's conception of the person is not one of the self-interested atomism. He posits two moral powers of the person—the capacity of a sense of justice and the capacity for a conception of the good—that are both interconnected. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 233 (1985). *But see* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 15–18 (1982) (critiquing Rawls's theory of justice). For a classical discussion of atomism, see Charles Taylor, *Atomism*, *in* POWERS, POSSESSIONS, AND FREEDOM 39, 39–40 (Alkis Kontos ed., 1979); *see also* ZILLAH R. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM 5 (1981) (noting the need for feminist theory to make a "conscious differentiation" between a theory of individuality that recognizes the importance of the individual within the social collectivity and the ideology of liberal individualism that assumes a competitive, atomistic view of the individual); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 218–19 (1990) (noting that "[f]eminist psychology highlights each person's dependence on others for a sense of self"); *cf.* NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 167 (2d ed. 1999) (concluding that women tend to have a more intersubjective sense of self than men due to women's role as primary caretakers of young children); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (propounding a highly cited idea in feminist scholarship surrounding the ethic of care—an alternative vision regarding the development of the female self).

328. By situating other oppressed groups—based on race, class, ethnicity, and sexual orientation—within a "female" paradigm, I am referring to the feminization of the social-cultural "other." By feminization, I am referring to the explicit sexualization of the "other" as well as the implicit conceptions of weakness embedded in conceptions of "other."

329. *See* LLOYD, *supra* note 326, at viii–x (insisting that human reason is "male" because our ideas of reason have historically excluded the feminine); *see also* DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE 76–170 (1989).

330. LLOYD, *supra* note 326, at viii–x.

331. KANT, *supra* note 324, at 55 (emphasis omitted).

332. Code, *supra* note 324, at 183 (emphasis omitted).

are irrelevant in the creation of the autonomous individual.[333] Such stark individualism is rejected because it fails to acknowledge the conditions that construct reality and shape the self.[334]

Feminist relationalist philosophers have abandoned the classical conception of autonomy because its objectivism makes individuals mere abstractions.[335] These philosophers discard classical notions because such notions presume a mastery over the external world through the power to manipulate and control both human and nonhuman subjects.[336]

The relationalists recognize that people are socially embedded and that our identities are constituted—shaped by social relationships and cultural imperatives such as class, ethnicity, sexual orientation, gender, and familial status.[337] By contesting conceptions of objectivity and rationality, feminists have transformed our understanding of development of the self. And by recognizing that political and social conditions shape self-awareness, feminists have reconstituted conceptions of the autonomous self.[338] Finally, in rejecting the classical discourse on autonomy, feminists remind us that autonomy does not demand that we become atomistic beings "severed from the outside world of other objects . . . and simultaneously from [our] own subjectivity."[339]

There are problems, however, with the position taken by relationalist feminists. While they reject gendered and flawed conceptions of selfhood and autonomy, they accept the idea that

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333. *See* Friedman, *supra* note 327, at 38–40.

334. *Id.* at 39–40.

335. *See* Code, *supra* note 324, at 186–87 (declaring that individuals achieve autonomy through the context of their environment).

336. *See*, *e.g.*, *id.*; Friedman, *supra* note 327, at 38–40. *See generally* Diana Tietjens Meyers, *Intersectional Identity and the Authentic Self?: Opposites Attract!*, *in* RELATIONAL AUTONOMY, *supra* note 324, at 151.

337. Poststructural and structuralist feminists underscored systemic conditions that shaped women's identities. According to this school of thought, autonomy discourse must examine the effects of institutional and systemic conditions that construct identity, not merely childhood socialization. *See* CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987) (discussing two models to explain sex discrimination: the dominance approach, which "describe[s] the systemic relegation of [women] . . . to a condition of inferiority"; and the difference approach, which basically "adopts the point of view of male supremacy on the status of the sexes"); *see also* KATHRYN PYNE ADDELSON, *Autonomy and Respect*, *in* IMPURE THOUGHTS: ESSAYS ON PHILOSOPHY, FEMINISM & ETHICS 212, 218–20 (1991) (arguing a discourse on feminine autonomy cannot be maintained without discussing social structures and political hierarchies).

338. ADDELSON, *supra* note 337, at 220; *see also* Susan Dodds, *Choice and Control in Feminist Bioethics*, *in* RELATIONAL AUTONOMY, *supra* note 324, at 213, 227–29.

339. EVELYN FOX KELLER, REFLECTION ON GENDER AND SCIENCE 70 (1985).

autonomous self-definition and direction are controlled by the individual through self-reflection. Although externalities are recognized by the relationalists, the process of becoming an "autonomous" being is marked by singularity. The process is both isolated and isolating.

This approach to autonomy, reflected in the writings of Diana Meyers,[340] requires the following realization: "Autonomous people . . . pose and answer the question 'What do I really want, need, care about, believe, value, etcetera?'; they must be able to act on the answer . . . [and] correct themselves when they get [it] wrong."[341] Accordingly, the autonomous woman engages in critical self-reflection, examining her needs and desires so she can achieve personal integration and structure a life-plan that is truly her own.[342]

There is, however, no recognition in Meyers's work of how the external (socialization) structures the internal. Even though we would like to believe that the deliberative self is constituted solely through self-reflection and internalized conflict, Meyers's conception of autonomy fails to account for how social and cultural influences are internalized.[343] Indeed, as Simone de Beauvoir noted, "one is not born, but rather becomes, a woman."[344] Consequently, charting a course that is *uniquely* one's own is difficult.[345]

Florence Kennedy, a lesbian-feminist activist lawyer from the 1970s, correctly identified the problem with the relationalist position when she commented, "How do you fight an enemy that has outposts in your mind?"[346] Kennedy knew that deconstructing the voices in our heads requires more than individual introspection, reflection, or deliberation. It requires interaction with and communication among a society of women struggling over conceptions of the self in relation to the dominant culture. As Kathryn Abrams has observed, autonomy emerges in the context of collaboration because autonomy is a collective as well

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340. MEYERS, *supra* note 329; Dodds, *supra* note 338, at 226–29 (revisiting Meyers's views on feminist autonomy). *See generally* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988) (explaining the concept of the possibility of an autonomous being).

341. MEYERS, *supra* note 329, at 76.

342. *Id.* at 76–78.

343. Abrams, *supra* note 287, at 821–22 (stating that although Meyers "acknowledges that autonomy is developed in a social context," her "account of autonomy is . . . an individualized conception"); *cf.* R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 157–58 (1994) (examining the self-awareness gained by critical reflection upon one's own desires that affect, and are affected by, the outside world).

344. DE BEAUVOIR, *supra* note 327, at 301.

345. Abrams, *supra* note 287, at 821–22.

346. Florence Kennedy, Speech at which Author was in attendance (1978).

as an individual enterprise.[347] The use of consciousness-raising (CR) groups illustrates this point.

As discussed previously, CR groups were utilized in the early battered women's movement as a vehicle to deconstruct subjective knowledge about male intimate violence and to approximate common ground.[348] Interaction produced flashes of dissonance in women, which challenged individual ideas about violence, power, and familial relationships. The experience of the CR groups was the development of an individual and collective consciousness that contested prescribed notions of women, power, and male violence.[349]

CR in other contexts, whether formal or informal, produced similar results. The organization "9 to 5" used informal CR groups with women workers to challenge individual, internalized conceptions of women, work, and wage-labor and to contest systemic inequality within the workplace. Building upon the 9 to 5 model, the Center for Women in Government developed and implemented the Women's Advisors Program (WAP) in New York State Government.[350] Women members from WAP identified obstacles to individual advancement that were based on internalized "messages" reinforced through cultural assumptions about women and work. In lunchroom conversations that focused on quality of work-life issues, compensatory schemes, and barriers to advancement, women identified *systemic* as well as individual barriers that kept them in low-paying jobs within the "pink ghetto." Women connected child-care needs to barriers to advancement.[351] They mapped gendered job advancement trajectories that favored male-dominated classifications and they learned—from one another—that touching and sexual innuendo was inappropriate behavior on the job.[352] The members of WAP changed not only the topography of the individual self but

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347. Abrams, *supra* note 287, at 806.

348. *See supra* text accompanying notes 285–91.

349. *See also* MACKINNON, *supra* note 287, at 91–92.

350. The Women's Advisors Program (WAP) started in the late 1970s and began as an informal group that focused on quality of life issues for women in state government. It eventually was formalized into an advisory program at each state agency within New York State government. As an evaluator of the program, I learned of its origins and its effects on individual women and women as a group from the interviews I conducted and from the results of the survey that I drafted.

351. As a result of WAP, child-care centers were placed in state office facilities in New York.

352. Sexual harassment training programs and a program entitled "Bridge Jobs"—to bring women from dead-end secretarial positions into professional classifications—were developed as a result of WAP. Both programs were funded and sponsored by the Center for Women in Government.

systemic treatment of women in government jobs. As one member noted, it was transformational.

The collaborative paradigm is one of mediating or positioning oneself between the I and the We. Such mediation is critical because introspection alone cannot reconstitute the self. In the absence of collaboration, social influence on conceptions of the self becomes unintelligible. Because self-definition and self-direction are dynamic, the cognitive dissonance necessary to produce revised conceptions of the self can only occur if our goals, desires, and values are contested, challenged, and constantly critiqued.

An additional problem emerges from Meyers's work and the relationalist paradigm. In both, the individual is still the primary actor, the architect of her life plan.[353] Other people or influences are treated as obstacles.[354] Many feminist theorists such as Abrams find the singularity of relationalist theory problematic because it denies how participation with others is necessary first to "conceive [of] particular goals" and then to implement those goals.[355] Because barriers to self-definition and direction may be the consequence of cultural inequality, collaborative action becomes necessary.[356] And because these barriers may have been internalized, collaboration with others is important in constructing life-plans and goals.

Abrams's collaborative paradigm is essential to our understanding of autonomy. It is an invaluable contribution to autonomy discourse because it makes unambiguous how autonomy is a consequence of interaction with the self and others. But the paradigm is limited because it does not make explicit the vagaries of conceptions of self-sufficiency and independence.[357] The state of being that exists between the self and externalities is one of interdependence. Such interdependence or connection is necessary to create and implement life goals, rendering the rhetoric of independence and self-sufficiency in autonomy discourse not only false but also meaningless.

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353. *See* MEYERS, *supra* note 329, at 153–55; Diana T. Meyers, *Personal Autonomy and the Paradox of Feminine Socialization*, 84 J. PHIL. 619, 620–24 (1987) [hereinafter Meyers, *Paradox*].

354. Meyers, *Paradox*, *supra* note 353, at 623–24 (commenting that the traditional woman's "loving attachment to her family can supplant her self").

355. Abrams, *supra* note 287, at 831–32.

356. *Id.*

357. Although I subscribe to the axiom "the personal as political," conceptions of collaboration, independence, self-sufficiency, and interdependence, while having both a political nature and political impact, do transcend the purely political.

Martha Fineman eloquently challenges the autonomy paradigm of independence and self-sufficiency. In charting the trajectory of family policy in the United States, she reminds us that conceptions of autonomy are "mired in a simplistic rhetoric of individual responsibility"[358] and "detached notion[s] of self-sufficiency."[359] Fineman correctly notes that independence is neither desirable nor possible because we need the "webs of economic and social relationships that sustain us."[360] From the first to the last moments of life, the self is connected to and affected by relationships with others and the environment.[361] Self-definition and direction *require* interdependent self-recognition because our lives require such interconnection. Thus, autonomy is variable, context-specific, and nonunitary.[362]

B. Deconstructing the Protagonists

The Protagonist ideology distills complex and nuanced conceptions of the self and autonomy into a simplistic formula. According to the Protagonists, one is autonomous if one controls one's environment and such control is demonstrated by leaving the relationship.[363] By conflating autonomy with conceptions of control, the Protagonists have constructed an untextured yardstick with which to measure the existence of autonomous acts.

Taking conceptions of control to their extreme, some have argued for further regulation of women. Using Evan Stark's theory of coercive control, Professor Ruth Jones advocates for legal guardianship of battered women who are "coercively controlled" by their assailants.[364] According to Jones, a coercively controlled battered woman becomes immobilized by the violence.

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358. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 9 (2004).

359. *Id.* at 28.

360. *Id.*

361. *Id.* at 28–30, 34–35.

362. *See* Abrams, *supra* note 287, at 834–35.

363. As one advocate claimed, "What is autonomy if women are controlled by the men who beat them? A woman can't control the batterer—so she doesn't have the ability to make decisions." Interview with advocate in New York (2003). Or as one scholar noted, "[W]ith enough . . . encouragement, the battered woman will assess her situation realistically, [and] start to unlearn her helplessness . . . . When, despite their best efforts, legal personnel find that the victim cannot yet take control of her life, [police and prosecutors] face difficult choices . . . ." Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 307 (1985); *see* Jones, *supra* note 237, at 605–07 (discussing one woman's complete loss of control over daily decisions while in an abusive relationship).

364. Jones, *supra* note 237, at 609–12.

Such immobilization is characterized by her failure to leave. Moreover, she is not an autonomous being because the abuse and the abuser's control effectively deprive her of the ability to make decisions about her life. According to Professor Jones, as a result of this control, the battered woman is incapable of escape and may not recognize that she is abused.[365]

Because Jones views these women as incapacitated, she believes that legal guardianship is the best intervention.[366] Under legal guardianship, the conservator can force the abuser to separate from the survivor so that she has a safe space[367] to "rediscover her own voice and her own will."[368] Jones concludes that without such physical separation, battered women cannot empower themselves.[369]

While Jones articulates and advocates for the most radical form of state intervention, her thesis is consistent with other Protagonist advocates and scholars.[370] This thesis can be reduced to a simple equation: leaving the batterer equals control over one's life and environment, and control constitutes autonomy. Leaving then is the fulcrum to one's capacity to act autonomously and to control one's life.

The Protagonists' persistent bias in favor of separation, however, denies the interrelational aspects of autonomy. The focus on separation obscures the role that structural conditions and social connections play in supporting or impeding the capacity of the individual to act. And by equating separation with autonomy, the Protagonists assume that leaving is a proxy for autonomous decisionmaking.

Yet autonomy is *not* measured nor evaluated by outcomes. Rather, as Diana Meyers notes, autonomy is a process defined by

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365. *Id.* at 646–47.

366. *See id.* at 607–12 (criticizing the existing system for placing safety responsibility on battered women who cannot make such strategic decisions).

367. Professor Jones's faith in legal guardianship seems misplaced. There is no evidence to suggest—much less support—the proposition that a conservator can do what the police and courts have been unable to accomplish—abatement of the violence. Indeed, the statistics regarding violations of protection orders by offenders belie this faith. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS FACTBOOK: VIOLENCE BY INTIMATES 23–30 (1998) (reporting that "nearly 4 in 10 offenders sentenced to jail for violence against a current or former spouse, boyfriend, or girlfriend had a criminal justice status or a restraining order against them when they committed their crime"), http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf; *see also* MESSINGER REPORT, *supra* note 3.

368. Jones, *supra* note 237, at 642.

369. *Id.* at 657.

370. *See* Hanna, *supra* note 10, at 1885–98; *see also* Chiu, *supra* note 237, at 1265–73.

self-definition and direction.[371] The process of deciding, rather than the action taken, is relevant to autonomy determinations.[372] The critical question is whether an individual's actions are the product of critical self-reflection. And self-reflection is synergistic—requiring critique of interactions and information generated through one's relationship with others as well as one's environment. Within the context of male intimate violence, leaving or remaining in the home is not the defining characteristic of autonomy. Finally, because self-definition and direction are collaborative and interdependent exercises, control over others or our environment is a meaningless concept.[373]

C. The Protagonists: Flattening the Topography of Resistance and Will

> "I was struggling to find the reason for my sufferings, my slow dying. I sensed my spirit piercing through the enveloping gloom. I felt it transcend that hopeless, meaningless world, and from somewhere I heard a victorious 'Yes' in answer to my question of the existence of ultimate purpose."
>
> Viktor Frankl, about his experience in Auschwitz[374]

The Protagonists equate resistance with leaving or exiting the relationship. By focusing on leaving, the Protagonists marginalize subtle acts of women's resistance to male violence—resistance that maps the topography of women's lives. Such a constricted view obscures the countless ways women resist terror in the home. Yet the Holocaust and the writers that emerged from that historical moment force us to confront the varied ways individuals contest terror and oppression. The Holocaust writers remind us that resistance to oppression is as nuanced as it is complex. And their writings contest the Protagonists' crabbed notions of resistance and will.

In the soliloquy that began this subpart, Viktor Frankl's emerging spirit in the hell that was Auschwitz compels us to reconsider the meaning of resistance. Indeed, the writings of

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371. Diana Tietjens Meyers, *Feminism and Women's Autonomy: The Challenge of Female Genital Cutting*, 31 METAPHILOSOPHY 469, 471 (2000).

372. *Id.* at 470.

373. *See generally* Abrams, *supra* note 287, at 806–08; FINEMAN, *supra* note 358.

374. Viktor Frankl, *quoted in* RACHEL FELDHAY BRENNER, WRITING AS RESISTANCE: FOUR WOMEN CONFRONTING THE HOLOCAUST: EDITH STEIN, SIMONE WEIL, ANNE FRANK, ETTY HILLESUM 3 (1997).

Holocaust survivors tell us that Jews and others slated for annihilation resisted Nazi tyranny in myriad ways.[375] Resistance took many forms, from armed uprisings in the Warsaw Ghetto and in Sorbibor,[376] to *davvening* or reciting *Talmud* in the camps,[377] to chronicling and writing about what was witnessed,[378] to comforting inmates moments before deportation to the death camps,[379] to forcing oneself to survive from day to day.[380] Assertion of the self and acts of resistance transcended mere overt acts of public resistance, they occurred, as Rachel Brenner writes, in the daily acts of survival.[381]

This is not to suggest that resistance requires ultimate survival. Brenner, in writing about the works of Anne Frank, Simone Weil, Etty Hillesum, and Edith Stein, reminds us that although they did not survive, all four women resisted Nazi oppression through the act of writing.[382] Their life narratives affirmed their personhood under a "rule of terror that sought their dehumanization."[383] Within the context of the Holocaust, resistance, regardless of form, required an awareness or intuiting of the "evolving catastrophe" and an understanding of one's "radical otherness."[384] Autonomy was expressed through such resistant self-direction and imposition of will. And while such autonomy was unspecified with respect to form, it was unyielding with respect to power.

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375. EMIL L. FACKENHEIM, TO MEND THE WORLD: FOUNDATIONS OF FUTURE JEWISH THOUGHT 217, 248 (1982); VIKTOR E. FRANKL, MAN'S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY (Ilse Lasch trans., Simon & Schuster 3d ed. 1984) (1959); Elie Wiesel, *Talking and Writing and Keeping Silent*, *in* THE GERMAN CHURCH STRUGGLE AND THE HOLOCAUST 269 (Franklin H. Littell & Hubert G. Locke eds., 1974); *cf.* BRUNO BETTELHEIM, THE INFORMED HEART: AUTONOMY IN A MASS AGE 262–65 (1960) (arguing in part that meaningful resistance is manifested only in overtly public confrontations).

376. Two of the Warsaw Ghetto insurgents maintained diaries to document life in the Ghetto and the uprising that started during the Passover holy days. Sorbibor was a concentration camp where inmates rose up in armed resistance. *See* ALVIN H. ROSENFELD, A DOUBLE DYING: REFLECTIONS ON HOLOCAUST LITERATURE 40–46 (1980).

377. *Davvening* is praying. Wiesel, *supra* note 375, at 272–73.

378. *See* SIDRA DEKOVEN EZRAHI, BY WORDS ALONE: THE HOLOCAUST IN LITERATURE 21 (1980) ("'The world condemned me to die. I write because, through my books, I bear witness to my existence.'" (quoting Mendel Mann)); *see also* ETTY HILLESUM, LETTERS FROM WESTERBORK (Arnold J. Pomerans trans., Pantheon Books 1986) (1982); ELIE WIESEL, NIGHT (Stella Rodway trans., Bantam Books 1987) (1958).

379. BRENNER, *supra* note 374, at 5.

380. FACKENHEIM, *supra* note 375, at 217.

381. *See* BRENNER, *supra* note 374, at 4 (recounting the story of one Holocaust survivor determined to live in order to rebel against the Nazis' plan for her to die).

382. *Id.* at 5.

383. *Id.*

384. *Id.* at 3–7; *see also* BETTELHEIM, *supra* note 375, at 111–13.

Some might argue that the Holocaust demonstrates, as one scholar writes, a paradigm of "choiceless choice," where words such as "choice," "inner freedom," and "autonomy" are meaningless.[385] But autonomy and conceptions of will and resistance do not exist only in the absence of oppression; they are manifest in the face of oppression and terror. Indeed, as Bruno Bettelheim notes, while life in the camps was marked by limited options and severe constraints on freedom, individuals made meaningful choices and remained agents.[386] And to deny that inmates made meaningful choice is to deny their agency—their ability to act in the world—and to extinguish their humanity.

When thinking about homes marked by terror and conceptions of resistance we understand how the Protagonists have reduced women survivors to victims, incapable of agency or autonomy. Nonetheless, as Martha Mahoney asks, "Why is it so difficult to see both agency and oppression in the lives of women?"[387] It is due in part to how we have constructed cultural conceptions of victim. Victimization is understood as the absence of autonomy; while agency or autonomy is the absence of victimization.[388] The calculus of victimhood negates how autonomy means "acting for oneself under conditions of oppression."[389] Rather, within this construct, autonomy is the absence of oppression—"either having ended [it] or never having experienced it at all."[390]

Yet this view denies how women survivors of male intimate violence have become agents in their own lives by not accepting the logic of the situation imposed upon them.[391] Not unlike the inmates in the camps, while living amidst oppression women have engaged in resistant self-direction by constantly mediating, planning, and strategizing how to survive from day to day. They secreted children to protect them from harm[392] and engaged in countless nonconfrontational acts that challenged the assailant's power. As Louise Fitzgerald notes in her study of women

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385. *See generally* LAWRENCE L. LANGER, VERSIONS OF SURVIVAL: THE HOLOCAUST AND THE HUMAN SPIRIT (1982).

386. *See* BETTELHEIM, *supra* note 375, at 111–13; TERRENCE DES PRES, THE SURVIVOR: AN ANATOMY OF LIFE IN THE DEATH CAMPS 116 (1976); ANNA PAWELCZYNSKA, VALUES AND VIOLENCE IN AUSCHWITZ: A SOCIOLOGICAL ANALYSIS 127, 132 (Catherine S. Leach trans., Univ. of Cal. Press 1979) (1973).

387. Mahoney, *supra* note 25, at 64.

388. *Id.*

389. *Id.*

390. *Id.*

391. *See* DES PRES, *supra* note 386, at 76–77 (discussing how inmates moved from shock to resistance).

392. *In re* Glenn G., 587 N.Y.S.2d 464, 468 (Fam. Ct. 1992).

subjected to workplace sexual harassment, women employ a repertoire of indirect responses to harassment, from avoiding the harasser to leaving the room or changing the subject.[393] Fitzgerald found that women rejected their objectification or otherness by engaging in conduct that contested the paradigm constructed by the harasser. As Fitzgerald noted, their conduct reflected resistant self-direction even though such responses were nonconfrontational.[394]

The Protagonist conflation of leaving with autonomy obscures what women do to resist oppression. And because women's acts may not conform to the Protagonists' more confrontational expectations of resistance—leaving the assailant—the Protagonists assume that women are "either weak, wholly compromised . . . or inadequately assertive individuals" who should be "treated paternalistically . . . [and] compelled" to leave the relationship and prosecute the batterer.[395] Yet the topography charted by women survivors belies the underlying assumption of the Protagonists.

The Protagonist ideology does more than reinscribe traditional conceptions of autonomy; it denies the fact that women have and will continue to resist oppression. By flattening the topography of women's resistance, women's faith in themselves as something other than victims is extinguished.[396]

VII. WHAT IS TO BE DONE?[397]

Ferdinand Lasalle once wrote to Karl Marx, "Party struggles lend a party strength and vitality; the greatest . . . weakness of a party is its diffuseness and the blurring of clearly defined boundaries."[398] Much the same can be said about the struggle within the battered women's movement on the issue of mandatory state intervention. Mandatory state intervention has produced critics and supporters, and this debate is vital to the

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393. Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 118–21 (1995).

394. *Id.*

395. Abrams, *supra* note 287, at 842.

396. *See* DES PRES, *supra* note 386, at 76–77 (explaining that Nazi prisoners' initial shock and passivity eventually evolved into engagement and resistance).

397. The title to this Part comes from a 1902 pamphlet written by Lenin as an attempt to reconcile two divergent trends or dominant voices in the proletariat revolutionary politic. *See* V.I. LENIN, WHAT IS TO BE DONE?: BURNING QUESTIONS OF OUR MOVEMENT (Foreign Languages Press 1973) (1902).

398. Letter from Ferdinand Lasalle to Karl Marx (June 24, 1852), *quoted in* LENIN, *supra* note 397, at 1.

survival of the movement. The problem, however, is that the struggle has produced an ideology—the Protagonists—that is not only unyielding but has blurred the distinction between a feminist politic and the status quo.

The Protagonist ideology reinscribes arcane notions of women and autonomy by characterizing battered women as incapable of rational choice and in need of state protection. And by adopting a political position that endorses the usurpation of women's decisionmaking power, the Protagonists have ceded women's power to the state—a position that was untenable to the early advocates.

Although the Protagonist ideology is problematic, it is an understandable development because it is a consequence of the depoliticization of the shelter movement and the dominant culture's obfuscation of the gendered nature of the violence. Their position within the movement, however, is a necessary corollary to feminism in the twenty-first century because it challenges feminist conceptions of autonomy, male intimate violence, and conceptions of state intervention. Thus it compels us to re-examine *why* and *how* we interact with the state.

And for this reason, the challenge posed by the Protagonists and their formidable presence within the movement is invaluable.

Mandatory state intervention has created an opportunity for discourse and critical reflection. It has helped shape the ideological tensions that frame the struggle. Consequently, at this historical moment, feminists within the movement must be willing to *openly* challenge the Protagonist ideology—whether it is expressed by movement members or adopted by state actors. It is unacceptable to sacrifice women's autonomy and to underscore this sacrifice with a belief system that reinscribes women's incapacity upon the cultural landscape.

Additionally, it is essential that we reassess public policy initiatives and disassociate from policies that make the state the arbiter of women's lives. If this reassessment of policy implicates re-evaluation of mandatory arrest and prosecution, then we should be prepared to honestly appraise whether such mandates improve the quality of women and children's lives. And within the calculus of improvement, conceptions of women's agency and autonomy are indispensable elements. Indeed, all policies that affect women survivors of male intimate violence should be passed through the prism of autonomy, individual and systemic accountability, and safety. Policies that compromise this triad

should be rejected as unacceptable and unworthy of advocates' support.

We should reclaim the power of naming and resituate the violence within a cultural paradigm. Neutralizing or neutering the source of the violence obscures its gendered nature and fails to account for how power within the family and dominant culture is gendered. As a result, the cultural effects of patriarchal power are not contested nor are conceptions of individual or collective accountability scrutinized.

By resituating the violence within a cultural paradigm, we underscore how male violence is systemically and institutionally supported. Because the violence is not merely a consequence of individual conduct, public policy should reflect an integrated response that identifies and locates both the source of violence and support for such violence.

Yet this struggle that exists is not about mandatory state intervention. It centers on two thorny questions: What is the crucible of the movement's determination?[399] And how shall we construct ourselves and our politic? The Protagonists have altered our understanding of ourselves, dislocating in both discourse and ideology the centrality of sexual domination of women by individual men and cultural prerogative. Women's *experience* is sacrificed for the illusion of protection from the state. And this sacrifice—failing to account for women survivors' personal lives—brings a movement to a place in which we fail to understand the politics of women's situation.[400] And this is our failure and our challenge for the twenty-first century: to reclaim a movement, to reform a vision, and to resituate ourselves within a feminist politic that refuses to sacrifice women's experience and autonomy to the prerogatives of the state.

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399. *See* MACKINNON, *supra* note 287, at 25.

400. *See, e.g.*, *id.* at 21 (discussing works that discount women's individualism by making assumptions about a male-dominated world).