

# Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal

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In her keynote address to the ninth annual Washington University School of Law Access to Equal Justice Colloquium, Professor Jane Spinak suggested five questions that we should ask about Family Court reform efforts:

What do we say about the reform work we do and to what degree is what we say accurate? How does the way in which we talk about family court reform implicate our analysis of what we are achieving? How does our place or our role within the system affect our perceptions of reform? What limits our willingness and ability to apply rigorous evaluative techniques to determine whether we are reaching our goals? And if we are failing, can we acknowledge failure and learn from it?<sup>1</sup>

One could pose the same questions about the development of the legal response to violence between intimate partners. For the purposes of this essay, I focus particularly on what I view as a central failure in domestic violence law and policy reform—the creation of a body of law and set of policies based on outmoded notions of what domestic violence is, the identities of the women who experience violence,<sup>2</sup> the identities of their partners, and what such women need

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1. Jane Spinak, *Reforming Family Court: Getting It Right between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11 (2009).

2. In this Article, I have chosen not to use the terms “victim,” “survivor,” or “battered

and want. I believe that the theoretical underpinnings of domestic violence law and policy largely are to blame for this excessively narrow and problematic view of domestic violence.

Domestic violence law and policy reflects the influence of dominance feminism, the brand of feminism in vogue in the late 1970s and 1980s, when state responses to domestic violence mushroomed.<sup>3</sup> Dominance feminism posits that in a male-dominated society, women exist as sexual objects to be exploited by men at their pleasure.<sup>4</sup> Laws, drafted, passed, and interpreted largely by men, have actualized the goal of the dominators—the continued subordination of women.<sup>5</sup> Dominance feminism advocates the redeployment of the law to alleviate women’s subordinated status.<sup>6</sup> In the realm of intimate partner violence, dominance feminism views physical violence as a state-sanctioned manifestation of men’s dominance over women and casts all women who experience violence in the role of a stereotypical victim: weak, passive, and powerless.<sup>7</sup> Dominance feminists argue that to counteract this domination, the state must respond in a way that the state believes will ensure the victim’s safety, regardless of individual women’s goals.<sup>8</sup>

Anti-essentialist feminism critiques this view of women’s place in the world, arguing that the experiences of all women cannot be

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woman,” all of which reduce women down to the experience of violence and ignore other facets of their lives. BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 87–88 (1989). Instead, I use the terms “women who have been battered” or “women who experience violence.” These terms are intended to bring attention to the violence women face without describing them solely as a product of that violence. This construction is consistent with my belief that too much of domestic violence law and policy reduces women who experience violence to stereotypes and accordingly narrows the law and policy options they are offered. Reimagining domestic violence law requires us to see women who have been battered as individuals with varying goals, desires, and constraints; using this construction, while less compact, is a first step in that process.

3. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. (forthcoming 2009).

4. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 45 (2d ed. 2003).

5. *Id.* at 46.

6. CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 105 (1987).

7. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 346 (2006).

8. Goodmark, *Autonomy Feminism*, *supra* note 3.

distilled down to this victim-centered, über-woman view.<sup>9</sup> Domestic violence does not transform every woman who experiences it into a stereotypical victim, nor should this victim stereotype shape domestic violence law and policy.<sup>10</sup> Instead, anti-essentialist feminism compels us to delve into the complexities of the lives of individual women and consider the totality of who they are, rather than reducing them to their lowest common denominator—their common experience with domestic violence. Anti-essentialist feminism reminds us that women who experience domestic violence are more than the experience of that violence. They are rich, poor, middle class, African-American, Latina, Asian, white, Native American, immigrant, disabled, able-bodied, gay, straight, transgendered, rural, urban, self-defensive, aggressive, frightened, and angry. They have different goals, aspirations, concerns, and priorities. The solutions we develop need to be attentive to those complexities. To that end, this essay suggests a number of anti-essentialist principles for reinventing domestic violence law and policy, all of which should guide the reconsideration of the legal response to domestic violence and underpin concrete choices about policy, legislation, and systemic reform. These principles are not exhaustive, but serve as a jumping-off point for further discussion about how an anti-essentialist feminist response could transform domestic violence law and policy.

#### I. DIVORCE UNIVERSALIZING THEORIES OF DOMESTIC VIOLENCE FROM THE LAW

Lenore Walker's cycle of violence was once the primary theoretical model used to describe domestic violence.<sup>11</sup> Since 1979, Walker's paradigm has been used in basic domestic violence training to explain how domestic violence should look: a tension-building phase, followed by an acute battering incident, culminating in a honeymoon period.<sup>12</sup> Without some intervention, the cycle repeats

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

10. See generally Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *YALE J.L. & FEMINISM* 75 (2008).

11. LENORE E. WALKER, *THE BATTERED WOMAN* 55–70 (1979).

12. *Id.* at 55.

itself incessantly, with the physical violence coming more quickly and growing more intense over time.<sup>13</sup> Walker's theory is compelling for a number of reasons. It is a simple narrative that accurately depicts the behavior of some women who are battered, occurring frequently enough for judges to recognize and vest credibility in it. The narrative has a clear villain and victim, which allows for easy categorization of the parties to an action. The narrative suggests a solution (interrupt the cycle to stop the violence); and casts the judge in the role of the hero who can, in fact, break the cycle by separating the parties. The theory is consistent with a dominance feminist view of victims as passive non-actors: cycles are inevitable, something that a person unintentionally becomes part of and cannot easily escape. The cycle, like a force of nature, is more powerful than the individual caught up in it.

For years, actors within the legal system were told to look for the characteristic phases described by Walker, the presence of which signaled domestic violence.<sup>14</sup> The problem, of course, was the converse—if the cycle was not present, no domestic violence was occurring. Walker herself never made this argument, but the ubiquity of the cycle of violence choked out other discourse within the legal system about how to identify violence in intimate relationships, entrenching the cycle of violence as the benchmark against which women's claims of violence would be tested.<sup>15</sup>

Walker also introduced the legal system to the notion that women who have been battered suffer from learned helplessness.<sup>16</sup> Walker explained the inability of women to escape abusive relationships as a function of their repeated experiences of powerlessness in the face of

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13. Glenda Kaufman Kantor & Jana L. Jasinski, *Dynamics and Risk Factors in Partner Violence*, in *PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH* 1, 3 (Jana L. Jasinski & Linda M. Williams eds., 1998).

14. See Megan G. Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 614 (2007). See generally Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 197–98, 206–08, 232 (2008) (describing the use of Walker's theories in court).

15. Legal system actors are still advised to look for the cycle of violence, though in a more measured way. See, e.g., Jennifer Gentile Long, *Prosecuting Intimate Partner Sexual Assault*, PROSECUTOR, Apr./May/June 2008, at 20.

16. WALKER, *supra* note 11, at 43.

battering.<sup>17</sup> Like the dogs in Martin Seligman's behavioral psychology experiments, Walker argued, when women were beaten enough, they learned that no effort they made to stop the violence would succeed.<sup>18</sup> As a result, women who experienced violence became passive and weak, unable to leave their violent partners.<sup>19</sup> The description of women who have been battered as weak, passive non-actors has been enshrined in the law through Battered Woman Syndrome, a diagnosis-turned-excuse for women who fight back against their abusers.<sup>20</sup>

At the same time that Walker's work was exerting such a profound influence over domestic violence law, others were scrutinizing Walker's formulation and suggesting alternate theories of domestic violence. Walker's own work failed to support the ubiquity of the cycle of violence or the universality of women's feelings of helplessness.<sup>21</sup> Advocates and scholars questioned the utility of a theory that accounted for the real-life experiences of so few women who have been battered. Edward Gondolf and Ellen Fisher recast women who experience violence as survivors struggling actively against their abusers.<sup>22</sup> Evan Stark introduced the concept of coercive control and contended that the physical violence that was the trough of the woman's experience in Walker's theories might actually be the least harmful type of abuse a woman experiences.<sup>23</sup> The real harm in domestic violence, Stark argued, was less the physical violence done and more the deprivation of liberty that is at the heart of coercive control.<sup>24</sup> Michael Johnson distinguished among types of violence, categorizing violence between partners as intimate terrorism, situational couple violence, violent resistance, and mutual

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17. *Id.*

18. *See id.* at 45–47.

19. *See id.* at 48.

20. *See generally* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994).

21. *See* David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997) (arguing that Walker's research does not support her conclusions).

22. EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 3 (1988).

23. EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 5 (2007).

24. *See id.* at 380–82.

violent control.<sup>25</sup> Intimate terrorism encompasses most (but not all) of Stark's theory of coercive control and largely involves male violence against women;<sup>26</sup> situational couple violence refers to violence that is not meant to control a partner's actions, but arises from a specific conflict relationship and is used by both genders;<sup>27</sup> violent resistance describes the actions of women who fight back against their intimate terrorist partners;<sup>28</sup> and mutual violent control exists when both partners use violence to exert control over the other partner.<sup>29</sup> Johnson suggests that each of these types of violence might call for different policy responses, given the significant differences in what motivates the violence.<sup>30</sup> Even Lenore Walker has revisited and refined her earlier work on learned helplessness.<sup>31</sup> The social science research regarding intimate partner violence is incredibly dynamic; undoubtedly, scholars and researchers will continue to posit and refine theories about what domestic violence is and how it affects its victims.

This theoretical evolution is precisely why creating law and policy around such theories is so problematic. Domestic violence is not a monolith explicable by a seamless, overarching theory. Such theories are seldom expansive enough to account for the experiences of the vast array of women who experience violence. Their uncritical acceptance, however, can bar women who do not conform to what is expected under those theories from accessing the legal system.<sup>32</sup> Experts in the field have largely abandoned the theory of learned helplessness and its conception of women who experience violence as passive non-actors.<sup>33</sup> Those same stereotypes remain codified as

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25. MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE AND SITUATIONAL COUPLE VIOLENCE 6 (2008).

26. *Id.* at 6–8.

27. *Id.* at 11.

28. *Id.* at 10.

29. *Id.* at 12.

30. *Id.* at 72.

31. See generally LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 69–84 (3d ed. 2009).

32. See, e.g., Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 10, at 76–77 (explaining that battered women who fight back may not be viewed as “true victims”).

33. See JOHNSON, *supra* note 25, at 48–49.

law in many states nonetheless.<sup>34</sup> Courts and legislatures simply cannot keep pace with the social science research on domestic violence.

Domestic violence is as individual as each woman who comes before a court seeking assistance. Too often, though, judges fail to see the individuals for the theory that was meant to explain the violence they experience. Worse, judges sometimes are constrained by existing statutes and case law, which prevent consideration of a woman's experience of violence if it fails to conform to the law's conception of domestic violence. Enshrining theories of domestic violence in the law ignores the changing nature of our understanding of domestic violence and reifies outdated and problematic notions about what violence is and who needs assistance.

## II. ACKNOWLEDGE THE COMPLEXITY OF WHO BATTERED WOMEN ARE AND WHAT THEY WANT

Domestic violence law and policy is grounded in a stereotype: "the victim of domestic violence." The "victim" is white, straight, middle-class, meek, weak, passive, and dependent.<sup>35</sup> This stereotype poses real problems for women who are not white, middle-class, heterosexual, or helpless, but nonetheless seek protection from courts.<sup>36</sup> When women who have been battered fail to conform to the stereotype, their credibility is undermined, compromising their ability to secure needed protection and services.<sup>37</sup> Formulating law and

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34. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (LexisNexis 2006); MO. REV. STAT. § 563.033 (2000); OHIO REV. CODE ANN. § 2901.06 (WEST 2006). Wyoming's statute is the most prescriptive, admitting expert testimony on Battered Woman Syndrome but defining Battered Woman Syndrome as "a subset under the diagnosis of Post-Traumatic Stress Disorder established in the Diagnostic and Statistical Manual of Mental Disorders III-Revised of the American Psychiatric Association." WYO. STAT. ANN. § 6-1-203 (2009) (LexisNexis). Despite the language of these statutes, Sue Osthoff & Holly Maguigan have written that "the move beyond the limitations of [Battered Woman's Syndrome] is significant," with experts more likely to testify on battering and its effects than Battered Woman Syndrome itself. Sue Osthoff & Holly Maguigan, *Explaining without Pathologizing: Testimony on Battering and Its Effects*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 225, 236-37 (Donileen R. Loseke et al. eds., 2d ed. 2005). Nonetheless, statutory schemes like Wyoming's would seem to preclude testimony that strayed too far from the traditional understanding of Battered Woman Syndrome.

35. Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 10, at 91.

36. *Id.* at 113-14.

37. *Id.* at 119.

policy around the paradigmatic victim excludes far too many women from protection. An anti-essentialist reframing would refocus domestic violence law and policy around the diversity of women who experience domestic violence. A reframing would ask what the law can do to help individual women with unique characteristics, prompting us to think in a more complex way about the attributes and needs of women who experience violence.

The literature on domestic violence frequently asserts that the primary goals of any intervention should be victim safety and offender accountability.<sup>38</sup> These are laudable goals; it would be difficult to argue that women who have experienced violence should be unsafe, or that men who batter should be able to abuse their partners without consequence. What frequently gets lost, however, is that women who experience violence may have other goals as well—goals that they prioritize over safety or accountability at a given point in time. Some women want to preserve their relationships.<sup>39</sup> Some prioritize economic security over immediate physical security.<sup>40</sup> Others may value the continued support of their families or communities more than holding their partners accountable.<sup>41</sup> Advocates tout “woman-centered advocacy”—advocacy driven by an individual woman’s goals—but too often that theoretical framework is juxtaposed against a narrowly defined set of options for women who have been battered: arrest, prosecute, secure a protective order,

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38. See, e.g., Judith S. Kaye, *Inaugural Hon. Joseph W. Bellacosa Distinguished Jurist-in-Residence: Lecture*, 81 ST. JOHN’S L. REV. 743, 753 (2007); Jennifer Gentile Long & Viktoria Kristiansson, *Taking a Process-Oriented Approach to Domestic Violence Prosecutions*, PROSECUTION, Sept./Oct. 2007, at 14; Judy Harris Kluger, Chief of Policy and Planning, New York State Courts, Domestic Violence Courts: Overview, [http://www.courts.state.ny.us/courts/problem\\_solving/dv/home.shtml](http://www.courts.state.ny.us/courts/problem_solving/dv/home.shtml) (last visited Sept. 4, 2009).

39. See, e.g., SUSAN SCHECHTER, EXPANDING SOLUTIONS FOR DOMESTIC VIOLENCE AND POVERTY: WHAT BATTERED WOMEN WITH ABUSED CHILDREN NEED FROM THEIR ADVOCATES 7 (2000); Lynn Ingrid Nelson, *Community Solutions to Domestic Violence Must Address Cultural Roots and Beliefs*, ASSEMBLING THE PIECES, Winter 2002, at 2.

40. For a description of the economic difficulties facing women who leave their abusive partners, see Barbara J. Hart, *Economics and Domestic Violence*, in WHY DOESN’T SHE JUST LEAVE? REAL WOMEN, REAL STORIES: A NEW PERSPECTIVE ON DOMESTIC VIOLENCE 19–22 (Heather Stark & Emilee Watturs eds., 2008).

41. See *Yuki’s Story*, in WHY DOESN’T SHE JUST LEAVE? REAL WOMEN, REAL STORIES, *id.* at 88–91; Anitha Venkataramani-Kothari, *Understanding South Asian Immigrant Women’s Experiences of Violence*, in BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA 11, 14 (Shamita Das Dasgupta ed., 2007).



go to a shelter, get a divorce. Such a cramped conception of advocacy does not provide women with real choices. Only by expanding our understanding of the diversity of women's goals can we create meaningful interventions for women who have been battered.

### III. FORMULATE POLICY AROUND THE EXPERIENCES OF MARGINALIZED WOMEN

Domestic violence law and policy assumes a stereotypical victim who is white, straight, and middle-class.<sup>42</sup> Not coincidentally, much of the leadership of the early battered women's movement was also white, straight, and middle-class.<sup>43</sup> This leadership appealed to white, straight, middle-class men in positions of power to enact legislation and fund programs to serve women who had been battered.<sup>44</sup> Women of color protested their exclusion from policymaking early on,<sup>45</sup> but those cries fell largely on deaf ears, the concerns of marginalized women pushed to the side in favor of political expediency.

White, straight, middle-class women are better positioned to access resources to address domestic violence and secure the assistance of the court system. While all women who allege violence face some skepticism, the system is more culturally disposed to believe the claims of white, heterosexual, economically secure women.<sup>46</sup> Women facing the barriers of poverty, racism, and heterosexism, by contrast, are disadvantaged in their dealings with police and courts. Gender bias task force reports confirm that while all women who experience violence find their credibility sharply questioned when they seek assistance, none face greater skepticism, if not outright hostility, than women of color.<sup>47</sup> The literature on

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42. *Supra* note 35.

43. Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 282 (1997).

44. *Id.*

45. Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, in DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE 50, 54 (Natalie J. Sokoloff with Christina Pratt eds., 2005).

46. Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 10, at 100, 107-09.

47. See Ronald L. Ellis & Lynn Hecht Schafran, *Achieving Race and Gender Fairness in the Courtroom*, in THE JUDGE'S BOOK 91, 113 (Alfred J. DiBona, Jr. ed., 2d ed. 1994); see also

domestic violence is replete with stories of negative treatment of lesbians by police, judges, and court personnel.<sup>48</sup> In sociologist Claire Renzetti's groundbreaking study, only two percent of lesbians who had been battered responded that they would find the legal system or courts helpful in addressing the abuse.<sup>49</sup> Moreover, women of color and lesbians may be reluctant to turn to systems with a history of mistreating their partners and communities.<sup>50</sup> Domestic violence law and policy is unresponsive to the needs of low-income communities, failing to provide economic stability for women who, by leaving abusive relationships, imperil their daily existence.<sup>51</sup> The system relies upon intermediaries (lawyers) who are more readily accessible to women with economic power.<sup>52</sup> Women with lawyers are far more successful in their dealings with the legal system.<sup>53</sup> Despite the relative advantages of straight white women and the clear challenges faced by those who fail to conform to the victim stereotype, domestic violence law and policy largely has been built around the needs of that paradigmatic victim.

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Shamita Das Dasgupta, *Battered South Asian Women in U.S. Courts*, in *BODY EVIDENCE*, *supra* note 41, at 211, 219.

48. Sandra E. Lundy, *Equal Protection/Equal Safety: Representing Victims of Same-Sex Partner Abuse in Court*, in *SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE* 43, 44 (Beth Leventhal & Sandra E. Lundy eds., 1999).

49. CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* 124 (1992).

50. See Jo-Ellen Asbury, *African-American Women in Violent Relationships: An Exploration of Cultural Differences*, in *VIOLENCE IN THE BLACK FAMILY: CORRELATES AND CONSEQUENCES* 89, 100 (Robert L. Hampton ed., 1987) (pointing to African-American women's reluctance to expose African-American men to "ridicule" as a reason for their silence); Mary Lou Dietrich, *Nothing Is the Same Anymore*, in *NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING* 155, 159 (Kerry Lobel ed., 1986) (describing pressure in the lesbian community not to air problems in relationships); Carolyn M. West, *Domestic Violence in Ethnically and Racially Diverse Families: The "Political Gag Order" Has Been Lifted*, in *DOMESTIC VIOLENCE AT THE MARGINS*, *supra* note 45, at 157, 158 (referring to community pressure not to speak out on intimate partner violence as a "political gag order").

51. See generally Hart, *supra* note 40, at 19–22 (describing the economic barriers to leaving a violent relationship).

52. E.g., Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 *AM. U. J. GENDER SOC. POL'Y & L.* 499, 511 (2003) (explaining that a "lack of legal representatives in [Civil Protective Order] proceedings makes it difficult for litigants to understand and complete the process"; the study found that being represented by an attorney "substantially increased the rate of success in obtaining a protection order.").

53. *Id.*

Professor Donna Coker and others have suggested that the focus of domestic violence policy must change to accommodate the needs of the neediest women who experience violence. Coker writes, “[L]aw and policy that is developed from the experiences of a generic category ‘battered women,’ is likely to reflect the needs and experiences of more economically advantaged women and white women, and is unlikely to meet the needs of poor women and women of color.”<sup>54</sup> The solution, then, is to refocus our system on the needs of women of color, poor women, and women from other marginalized communities, and to create policies and programs that help them address violence in ways that are attentive to the contexts of their lives. As Lee Jacobs Riggs writes about rape reform:

A successful anti-rape movement will focus not only on how rape upholds male supremacy, but also on how it serves as a tool to maintain white supremacy and myriad other oppressive systems. When this is done, the importance of creating alternative ways to address violence becomes more apparent, and the state-sponsored systems that reproduce inequality seem less viable options for true transformative change.<sup>55</sup>

#### IV. STOP DEMONIZING MEN WHO BATTER

Just as women who experience violence are more than the experience of violence, men who batter are more than simply batterers. To acknowledge the complexity of men who batter is not to excuse or justify their behavior. But researchers have begun to distinguish among men who batter. Building on work by Amy Holtzworth-Monroe, Neil Jacobson, John Gottman and others, sociologist Michael Johnson categorizes men who batter as dependent intimate terrorists (men who are obsessed with their partners and desperate to hold and control them) and antisocial intimate terrorists (men who generally are violent and are willing to

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54. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 811–12 (2001).

55. Lee Jacobs Riggs, *A Love Letter from an Anti-Rape Activist to Her Feminist Sex-Toy Store*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE 107, 111 (Jaclyn Friedman & Jessica Valenti eds., 2008).

use violence to have their way, at home and elsewhere).<sup>56</sup> While our understanding of men who batter is not terribly deep, and more “data from men to more precisely determine what motivates them to be abusive”<sup>57</sup> is certainly needed, we have the seeds from which to develop more individually tailored interventions with men who batter.

The remedies we currently employ to address men’s violent behavior—incarceration and batterer intervention treatment—are not particularly effective and fail to distinguish among men who batter. The evidence on the effectiveness of certified batterer intervention programs, as distinct from generic anger management programs, which are not appropriate in cases involving domestic violence, is mixed at best. A review of studies of batterer intervention programs recently found that forty percent of men who batter are successfully non-violent after they receive treatment. But thirty-five percent are successfully non-violent without undergoing treatment.<sup>58</sup> In some cases, batterer intervention programs exacerbate an already bad situation. One rural Ohio woman described her experience with her partner’s batterer treatment program:

He had to go to domestic violence counseling every Monday for six months, but sending him to that counseling meant that I got beat every Monday night for six months. Because he would come home madder than hell because he had to go to that place. . . . I told the judge, “I don’t care what you do to him, but don’t send him to counseling.” And she sent him back there anyway. So every Monday for six more months I got beaten because he had to go for three hours and sit in class. . . . And then we meet up with a few of the guys from his class and I think they all did it. Because they were all mad every Monday night and a few of the women I talked to, they’re like,

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56. JOHNSON, *supra* note 25, at 32.

57. WALTER S. DEKESEREDY & MARTIN D. SCHWARTZ, DANGEROUS EXITS: ESCAPING ABUSIVE RELATIONSHIPS IN RURAL AMERICA 96 (2009).

58. JOHNSON, *supra* note 25, at 78. See also Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 644–46 (2004–05) (surveying research on batterer intervention programs).

“Yep, they come in extra mad because it’s your fault we have to be there.”<sup>59</sup>

She called counseling, “the worst help ever.”<sup>60</sup>

The most frequently employed alternative to treatment is criminalization, but there is no strong evidence that criminalization deters men who batter from committing further acts of violence, even for the small percentage of men who are incarcerated for any appreciable period of time.<sup>61</sup>

Essentializing men who batter is as problematic as essentializing women who are battered; both allow judges and legislators to rely on stereotypes in making policy, resulting in policies that are not responsive to the needs of the individuals who come within the system. In fact, essentializing men who batter reinforces problematic stereotypes about women who have been abused. If the man who batters is evil, the woman who is abused must be angelic to satisfy the stock narrative and be deemed worthy of the legal system’s protection. Because few women can live up to that ideal, stereotyping men who batter ultimately may deprive women who have been abused of the protection and assistance they need.

Men who batter may be motivated to change. Change, defined as curbing a man’s abusive behaviors, should be an important goal of any intervention, since his violent behavior is what brings the man to the attention of the legal system.<sup>62</sup> Change is distinct from accountability (holding a man responsible for his violence, ordinarily through counseling or incarceration), a frequent theme in domestic violence law and policy. Change could be motivated by a number of factors, including immigration status, employment, jail time, children, or maintaining intimate relationships. But laws and policies

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59. DEKESEREDY & SCHWARTZ, *supra* note 57, at 90–91 (second alteration in original).

60. *Id.* at 91.

61. Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: Part II: Prosecution* 39–40 (2008) (explaining that simply prosecuting does not deter further abuse; abuse is deterred somewhat only when very intrusive sentences, including “jail, work release, electronic monitoring and/or probation” are imposed). See also Alyce D. LAVIOLETTE & OLA W. BARNETT, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 57 (2d ed. 2000) (citing studies on the lack of a link between arrest and deterrence). Klein explains that convictions leading to incarceration vary widely among jurisdictions, but are more likely in those jurisdictions with specialized domestic violence courts. Klein, *supra* note 61, at 42–44.

62. See Goodmark, *supra* note 58, at 646–47.

that paint all men who batter with the same brush neither probe what prompts men to change nor use such information to develop more meaningful (and ultimately effective) responses.<sup>63</sup> Demonizing men who batter prompts simplistic, rhetorically appealing, but hollow “jail them all” laws and policies. Such responses are unrealistic, particularly given how little jail time men who are convicted of battering actually serve,<sup>64</sup> and are unlikely to prompt behavioral change. They do, however, allow policymakers to ignore the complexity of why men batter and avoid the question of how to stop abusive behavior.

#### V. ELIMINATE MANDATORY POLICIES

Mandatory policies preclude the legal system from being able to respond contextually to the needs of individual women. The legal system has embraced a number of mandatory policies in domestic violence cases, including mandatory arrest,<sup>65</sup> no-drop prosecution,<sup>66</sup> and bans on mediation in civil cases.<sup>67</sup> Most of these policies are justified on safety grounds and reflect the belief that once a woman has been battered, she is no longer capable of making an autonomous choice about having her partner arrested, assisting with prosecution, or participating in mediation.<sup>68</sup> Her request that police not arrest her partner and her decision to drop charges against her partner are seen as tainted by the control that her partner must have exerted over her

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63. Research suggests, for example, that feminist cognitive therapy may be more effective with antisocial intimate terrorists, and psychodynamic therapy more successful with dependent intimate terrorists. Daniel G. Saunders, *Feminist-Cognitive-Behavioral and Process-Psychodynamic Treatments for Men Who Batter: Interaction of Abuser Traits and Treatment Model*, 11 VIOLENCE & VICTIMS 393, 393 (1996).

64. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 71 (1992). See also Klein, *supra* note 61, at 55–57 (discussing variability in rates of imposition of and lengths of sentences involving incarceration).

65. For a description of mandatory arrest policies, see EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 126 (3d ed. 2003).

66. For a description of no-drop prosecution policies, see *id.* at 194.

67. See, e.g., 750 ILL. COMP. STAT 5/607.1 (2008) (prohibiting court from ordering mediation in cases in which there is evidence of domestic violence); MD. CODE ANN., Family Law 9–205 (LexisNexis 2009); MONT. CODE ANN. § 40–4–301 (2007); N.D. CENT. CODE § 14–09.1–02 (2004); 23 PA. CONS. STAT. ANN. § 3901 (West 2000).

68. Goodmark, *Autonomy Feminism*, *supra* note 3, at 34.

to achieve his desired outcome.<sup>69</sup> Women who have been battered are seen as too fragile and susceptible to fear to mediate with their partners, too likely to capitulate under the pressure of being near them.<sup>70</sup> Once a woman has experienced domestic violence, she somehow becomes incapable of rationality—with rational defined as making the choice that system actors believe she should make.<sup>71</sup> Setting aside the suspect notion that anyone ever acts completely autonomously (all of us—even those of us whose rationality is not being challenged—make contextual decisions influenced by family, community, cultural, religious, and other concerns), the prevailing view of women who have been battered seems to be that whenever they make an “irrational” choice, that choice has necessarily been influenced at best, coerced at worst, by their abusive partners.

This paternalism is problematic, particularly given the social scientific research suggesting that women who have been battered use arrest and prosecution instrumentally, but not necessarily to achieve the incarceration of their partners.<sup>72</sup> Instead, women may use decisions about pursuing criminal sanctions to secure promises to change from their partners, gain leverage in future violent situations, or force concessions in divorce and custody proceedings.<sup>73</sup> When mandatory policies operate on women who do not want to participate in the legal system, the results can be disastrous. Prosecutors regularly seek arrest warrants for victims of violence who are unwilling to testify against their abusers.<sup>74</sup> Recently, at the request of prosecutors in Baltimore, Maryland, a judge issued a warrant that would jail a woman who was six months pregnant until just before her due date.<sup>75</sup> Her crime? Being unwilling to cooperate in the

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69. *See id.*

70. *See id.*

71. *Id.* at 72.

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

73. *Id.* *See also* Kathleen J. Ferraro & Lucille Pope, *Irreconcilable Differences: Battered Women, Police, and the Law*, in *LEGAL RESPONSES TO WIFE ASSAULT* 96, 108 (N. Zoe Hilton ed., 1993).

74. David A. Ford, *Coercing Victim Participation in Domestic Violence Prosecutions*, 18 *J. INTERPERSONAL VIOLENCE* 669, 669 (2003). *See, e.g.*, Michele Henry, *Pregnant Teen out on Bail*, *TORONTO STAR*, Apr. 12, 2008, at A6.

75. Interview with Ginger Robinson, in Baltimore, Md. (Mar. 10, 2009).

prosecution of her child's father.<sup>76</sup> As with other women who have been arrested for failing to respond to prosecutors' subpoenas or prosecuted for perjuring themselves in proceedings they never wanted brought, it seems highly unlikely that this woman will ever seek the assistance of the legal system again. Mandatory policies not only deprive women of choice, they punish women for making choices that the system refuses to sanction, substituting the power of the state for the power of the abusive partner. An anti-essentialist system would create room for a variety of choices concerning arrest, prosecution, mediation, and other options by rejecting the notion that all women must comply with the system's expectations.

#### VI. RELEGATE THE LEGAL SYSTEM TO A MORE LIMITED ROLE

Not every social problem can or should be solved by the legal system. As Ann Scales notes, "[l]awyers have learned to view a legal dispute as the beginning and end of a controversy. But that is usually not true."<sup>77</sup> The justification for invoking the legal system in domestic violence matters is that these actions are violations of criminal law. For years, advocates for women who had been battered argued that intimate partner assaults should be treated just as stranger assaults, rejecting the notion that the legal system's response to violence should be different in cases where the perpetrator and victim were involved in an intimate relationship.<sup>78</sup> But that intimate relationship is precisely what makes these crimes different—context is everything. Women who have been battered and their partners are bound together in multiple ways: economically; by their children; through extended family, community relationships, and cultural ties; and by love. In some immigrant communities, seeking protection from the legal system simply is not acceptable; immigrant women who choose this course find themselves ostracized from their only sources of support.<sup>79</sup> In rural communities, the only help available

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76. *Id.*

77. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY 114 (2006).

78. Zorza, *supra* note 64, at 47.

79. Dasgupta, *supra* note 47, at 218; FAMILY VIOLENCE PREVENTION FUND, INTIMATE PARTNER VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: CHALLENGES, PROMISING



may be difficult to access or, worse, staffed by members of an “ol’ boys network” unwilling to arrest or prosecute their friends.<sup>80</sup> These contexts color the goals and choices of women who have been battered; they help to make sense of what seems inexplicable, providing answers to questions like “why doesn’t she leave?”<sup>81</sup> We may not like the ways in which these factors constrain women’s choices. Until those constraints are removed, however, we need to understand that women are making rational, contextual decisions about how they want to address the violence, and that sometimes those decisions mean opting out of the legal system.

In the early years of the battered women’s movement, using the legal system to combat domestic violence seemed an obvious choice. No other mechanism seemed as well equipped to provide women with safety. No other system had tools designed to coerce non-violence or to hold men accountable for their violence. For some women, the system has kept its promise—the criminal law and criminally enforceable civil law have worked together to ensure that women are safe from further abuse and to send the message, both to the individual perpetrator and to society, that violence against women will not be tolerated. But the system has not worked, and cannot work, for all women. The goals and methods of the system do not mirror the goals of some women who have been battered. The system operates in ways that undermine women’s autonomy. Many men who batter are not deterred by the possibility of legal action. The legal system is not responsive to certain claims and certain women. Relying on the legal system has enabled us as a society to believe that something has been done about domestic violence. But as Professor Spinak noted in the context of dependency court reform, while we might have done something, it is not clear what we actually have

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PRACTICES AND RECOMMENDATIONS 15 (2009), <http://www.rwjf.org/files/research/ipvreport20090331.pdf>. Dasgupta also notes that reporting violence can increase scrutiny of the community by immigration authorities, raising the risk that the community will ostracize the woman who reports. Dasgupta, *supra* note 47, at 216.

80. DEKESEREDY & SCHWARTZ, *supra* note 57, at 9, 12–13.

81. For books dedicated to this question, see generally LAVIOLETTE & BARNETT, *supra* note 61, and WHY DOESN’T SHE JUST LEAVE? REAL WOMEN, REAL STORIES, *supra* note 40.

accomplished,<sup>82</sup> particularly for those women who cannot or will not deploy the state against their partners.

We should not turn our backs on the last forty years of domestic violence legal reform. Creating that framework was an essential step in developing a societal response to domestic violence and expanding the options for women who have been battered. The existence of that framework has given women who seek to address violence from within their relationships, without external assistance, a powerful tool.<sup>83</sup> Instead, we should consider whether those reforms are consistent with the principles I have articulated, keeping those which continue to hold promise under an anti-essentialist framework (e.g., protective orders with a variety of options) and jettisoning those, like mandatory arrest and no-drop prosecution, that do not. The legal system should exist as an option for those women who are interested in using it, but should never be imposed on those who are not. For women who are seeking assistance but are unwilling to engage the legal system, we must begin to develop a community-based menu of options for addressing violence. Only through this anti-essentialist reframing of domestic violence law and policy can we ensure that women who have been battered will have the ability to make choices based on their own priorities, goals, and life circumstances. And finally, we should acknowledge that sometimes, the legal system has little or nothing to offer women who have been battered, and that we need to look beyond that system for solutions. Sometimes ensuring access to justice means walking away from the justice system.

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82. See Spinak, *supra* note 1, at 11.

83. LEE H. BOWKER, BEATING WIFE-BEATING 104 (1983) ("The most potent personal strategy used by the wives, threatening to contact the police or a lawyer, gained at least some of its potency by association with these powerful caretakers of social sanctions.").