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## How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases

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HOW FEMINIST THEORY BECAME (CRIMINAL)  
LAW: TRACING THE PATH TO MANDATORY  
CRIMINAL INTERVENTION IN DOMESTIC  
VIOLENCE CASES

Claire Houston\*

*Theoretical explanations for battering are not mere exercises; by pinpointing the conditions that create violence against women, they suggest the direction in which a movement should proceed to stop it.*

Susan Schechter<sup>1</sup>

ABSTRACT

*Our popular understanding of domestic violence has shifted significantly over the past forty years, and with it, our legal response. We have moved from an interpretation of domestic violence as a private relationship problem managed through counseling techniques to an approach that configures domestic violence first and foremost as a public crime. Mandatory criminal intervention policies reflect and reinforce this interpretation. How we arrived at this point, and which understanding of domestic violence facilitated this shift, is the focus of this Article. I argue that the move to intense criminalization has been driven by a distinctly feminist interpretation of domestic violence, what I call the feminist understanding of domestic violence as patriarchal force. I demonstrate how this understanding grew out of a feminist rejection of alternative theories of domestic violence, specifically psychological and “family violence” theories, and was informed by earlier radical feminist theorizing on rape. I offer this account as a contribution to the ongoing feminist debate over mandatory policies, suggesting that for feminists looking to reform the current system, a different interpretation of domestic violence may be a necessary starting point.*

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## INTRODUCTION

The latter part of the twentieth century witnessed a remarkable shift in the way domestic violence was understood and accordingly managed. Forty years ago, domestic violence was a private relationship problem, a product of conflicting abnormal personalities, to be managed through counseling techniques that encouraged relationship preservation. While a crime, domestic violence was rarely met with a criminal response. Today, domestic violence has become, first and foremost, criminal.<sup>2</sup> Mandatory criminal interventions that force arrest and prosecution of violent partners reflect and reinforce this understanding. The state, through the criminal justice system,

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2. See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001) (arguing domestic violence law reform has focused on criminal law); see also Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) (arguing criminalization efforts are at the forefront of domestic violence reforms).

has become the primary enforcer against domestic violence, and in doing so relies on tools of arrest and prosecution that encourage family breakdown.<sup>3</sup>

This shift in domestic violence response from private to public is a feminist accomplishment.<sup>4</sup> Forty years ago, the battered women's movement mobilized to increase public awareness of domestic violence and redefine the terms of its management.<sup>5</sup> Part of the effort included redefining domestic violence as a crime.<sup>6</sup> This decision was not made lightly. Early advocates were skeptical of partnering with the "male" state to promote women's interests,<sup>7</sup> and were self-conscious about supporting an oppressive criminal justice system given their own anti-oppression agenda.<sup>8</sup> They worried that focusing on criminal justice intervention would limit attention to other options for improving battered women's lives, such as access to affordable childcare and housing.<sup>9</sup>

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3. See also JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* 7 (2009) (arguing the state's use of protective orders in misdemeanor domestic violence cases has led to a system of "state-imposed de facto divorce").
  4. See LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 1–2 (2012) (arguing that the current regime in which public system institutions have a responsibility to address abuse reflects the work of the battered women's movement). However, this is not to say feminists alone changed the system. As Professor Goodmark notes, feminist support for criminal justice intervention coincided with a more general societal turn to the criminal law. *Id.* at 2. Professor Gruber has also noted the role of the victim's rights movement in the trend toward increasing criminalization. See Gruber, *supra* note 2, at 792. Other scholars have struggled with using the blanket term "feminist" to describe advocates for battered women who have pushed for the current criminal-based system for domestic violence. See Goodmark, *supra* at 2 (describing this group as "dominance feminists"); LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 3 (2003) [hereinafter MILLS, *INSULT TO INJURY*] (using the designation "mainstream feminists"). There are many different kinds of feminism, and variety within these types. See JANET HALLEY, *SPLIT DECISIONS* (2006). Moreover, as the debate over mandatory criminal interventions demonstrates, not all feminists involved in the domestic violence struggle have supported the same policy choices. Where possible, I attempt in this Article to account for these differences.
  5. See generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (2000).
  6. See discussion *infra* Part V.A.
  7. See discussion *infra* Part III.D.
  8. See discussion *infra* Part V.A; see also SCHNEIDER, *supra* note 5, at 182–84 (discussing feminist reluctance to engage with the state generally).
  9. See Susan Schechter, *The Future of the Battered Women's Movement*, AEGIS – MAGAZINE ON ENDING VIOLENCE AGAINST WOMEN, Summer-Autumn 1980, at 23 ("[I]f the elimination of violence is our goal, we will have to struggle in areas that make the independence, autonomy and dignity of women actual, not merely formal or legalistic. This means joining with groups concerned with community control of housing

Feminist support for mandatory criminal intervention policies was even more contentious. And today, with a majority of states enforcing mandatory arrest laws and some jurisdictions operating under mandatory prosecution policies, the debate continues.<sup>10</sup> Proponents of mandatory interventions see them as a way to guarantee criminal justice involvement in domestic violence cases.<sup>11</sup> They claim this level of intervention is necessary to protect women. Opponents counter that such policies do little, if anything, to deter domestic violence, and may actually increase the risk of additional violence for some women.<sup>12</sup> They argue that increased state intervention brought by mandatory policies cannot justify the policies' adverse effects, especially the loss of autonomy for women who prefer *not* to have the state involved in their personal lives.<sup>13</sup>

This Article contributes to the present feminist debate over mandatory criminal interventions by explaining how we arrived at this point. Though it is well established that feminists were at the forefront of efforts to first criminalize and then mandate criminalization of domestic violence, *why*

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and schools, and those struggling to provide more jobs and decent, free health care.”).

10. A comprehensive review of the current feminist debate over mandatory criminal intervention policies is beyond the scope of this Article. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237 (2005), for a more detailed account.
11. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 (2004) (claiming that without mandatory policies, the criminal justice system will revert to earlier practices of non-arrest and failure to prosecute).
12. See, e.g., GOODMARK, *supra* note 4; MILLS, *INSULT TO INJURY*, *supra* note 4. These authors note the findings of the Milwaukee replication studies, which suggested only certain offenders (employed, married, white men) were deterred by arrest. For other offenders, the studies found arrest had the potential to increase violence. See also Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992); JEFFREY FAGAN, NAT'L INST. OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* (1996).
13. Another adverse effect of mandatory policies, especially mandatory arrest, is their disproportionate impact on poor communities and communities of color. Research suggests mandatory arrest policies may actually increase risk to poor women and women of color. See Sherman et al., *supra* note 12. Other commentators have noted the disparate material impacts of mandatory policies on poor and minority families. See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000). See also Gruber, *supra* note 2, and LINDA G. MILLS, *VIOLENT PARTNERS: A BREAKTHROUGH PLAN FOR ENDING THE CYCLE OF ABUSE* (2008) [hereinafter MILLS, *VIOLENT PARTNERS*], for further discussion of the racial issues involved in mandatory policing and prosecution.

feminists chose this course—especially given consistent ambivalence among feminists about engaging with the criminal justice system—is not entirely clear. Scholars attempting to answer this question have turned to feminist theory for answers. This Article takes the inquiry further, showing that alternative theories of domestic violence are just as important in explaining the feminist turn to criminalization.

This Article aims to identify the interpretation of domestic violence that led feminists to first endorse criminal law as a solution and later to support mandatory policies. I argue that this interpretation was based on a rejection of earlier, alternative theories of domestic violence, and informed by “radical” feminist theorizing on rape. I call this interpretation “the feminist understanding of domestic violence as patriarchal force.” What defined this interpretation, I argue, was its understanding of domestic violence as both reflecting and reinforcing male domination on both the individual and systemic levels.

My account proceeds over five parts: Parts I and II describe understandings of domestic violence that preceded the feminist intervention of the late 1970s: the psychological perspective and family violence approach. Feminist theorists and battered women’s advocates rejected these understandings, spurring the development of the feminist theory of domestic violence as patriarchal force. Part III introduces radical feminist thinking on rape, and the link to later feminist theorizing on domestic violence. Part IV describes early feminist theories of domestic violence, showcasing the crystallization of the feminist understanding of domestic violence as patriarchal force. Finally, in Part V, I explain how this understanding encouraged the feminist turn to criminal law and ultimately feminist support for mandatory criminal interventions in domestic violence cases.

## I. THE PSYCHOLOGICAL PERSPECTIVE

In the mid-twentieth century,<sup>14</sup> psychology provided the dominant framework for understanding domestic violence.<sup>15</sup> Psychological explanations for domestic violence focused on individuals and their relationships; “wife-beating” was considered a manifestation of relationship dysfunction caused by the interaction of the defective personality types of the husband

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14. Domestic violence has a long history. This Article focuses on the mid- to late-twentieth century understanding of the problem. See ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987), and LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988), for earlier accounts.

15. See MILDRED DALEY PAGELOW, *WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES* 19 (1981).

and wife.<sup>16</sup> This dynamic appeared to explain both why domestic violence occurred and why relationships continued in spite of violence.

Psychological theories focused on abnormal personality and dysfunctional relationships; social factors were secondary. This focus invited a personalized response to domestic violence rather than one centered on social change. Mental health professionals became experts in domestic violence management. Focusing on the relationship dysfunction that caused domestic violence, these professionals typically prescribed counseling, which emphasized relationship repair and preservation.<sup>17</sup>

Early feminist theorists and advocates for battered women rejected psychological theories on two related grounds.<sup>18</sup> The first was “victim blaming.” They argued that considering the psychology of female victims deflected responsibility away from batterers and male domination, more generally.<sup>19</sup> Second, feminists rejected psychological theories on the basis that they “privatized” domestic violence. They argued that focusing on relationship dysfunction positioned domestic violence as a private family matter, thus shielding it from state intervention and allowing batterers impunity.<sup>20</sup>

#### A. Victim Blaming

Central to the feminist critique of the psychological perspective of domestic violence was the concept of “female masochism.” First introduced by Sigmund Freud in the 1920s, the concept was developed in the 1930s by his disciple Helene Deutsch.<sup>21</sup> Deutsch claimed that masochism—the finding of pleasure in pain—was a core component of female sexuality, and thus

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16. See, e.g., Rosemary Reynolds & Else Siegle, *A Study of Casework with Sado-masochistic Marriage Partners*, 40 SOC. CASEWORK 545 (1959) (discussing a study of cases that identify the characteristics of a marriage with sado-masochistic partners).
  17. See Albert A. Kurland et al., *A Comparative Study of Wife Murderers Admitted to a State Psychiatric Hospital*, 1 J. SOC. THERAPY 7 (1955). See Michele Bograd, *An Introduction*, FEMINIST PERSPECTIVES ON WIFE ABUSE 11, 16–18 (Kersti Yllo & Michele Bograd eds., 1988), for a feminist overview of the psychological approach to domestic violence.
  18. See *infra* Part IV.B, for discussion on how some feminists, including Lenore Walker, attempted to use psychology to make sense of domestic violence from a more feminist perspective.
  19. See, e.g., Rebecca Dobash & Russell Dobash, *Unmasking the Provocation Excuse*, AEGIS – MAGAZINE ON ENDING VIOLENCE AGAINST WOMEN (Feminist Alliance Against Rape, D.C.), 1983, at 57, 66 [hereinafter Dobash & Dobash, *Provocation*]; discussion *infra* Part IV.
  20. See Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN’S RTS. L. REP. 7 (1979).
  21. See generally PAULA J. CAPLAN, THE MYTH OF FEMALE MASOCHISM 18–19 (1993).

women's psychology.<sup>22</sup> Contemporary critics decried the implication that women enjoyed violence and humiliation.<sup>23</sup> Radical feminists, writing in the 1970s, took this criticism a step further, connecting the concept of female masochism to attempts to blame women for male sexual and physical violence committed against them, and implicating it in the perpetuation of the patriarchy.<sup>24</sup> Taking a cue from the radicals, feminist domestic violence theorists and advocates for battered women rejected the psychological perspective as sexist victim blaming.<sup>25</sup>

Feminist critiques of the psychological perspective typically reference two articles:<sup>26</sup> "The Wife Assaulter"<sup>27</sup> and "The Wifebeater's Wife."<sup>28</sup> The first article did not mention masochism specifically, but it did implicate women in violence committed against them. The author, Leroy Shultz, a probation and parole officer, explained: "The victims in spouse assaults can always be assumed to have played a crucial role in their own victimization."<sup>29</sup> Shultz's conclusions originated from four cases in which men were convicted of assaulting their wives with intent to kill. To explain the violence, Shultz focused on the abnormal personalities of the husband and wife and their interactions. The husbands were described as passive, submissive individuals with a frustrated need for dependence. They were all victims of domineering and rejecting mothers. Looking to have their original dependency needs met, the men married women similar to their mothers, women described as "very masculine, outspoken, [and] domineering," who "ex-

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22. Helene Deutsch, *The Significance of Masochism in the Mental Life of Women, Part I: 'Feminine' Masochism and its Relation to Frigidity*, 11 INT'L. J. PSYCHOANALYSIS 48, 52–53 (1930). Deutsch described the mechanism of female masochism as follows: it begins with a little girl's awareness that she does not have penis, which results in envy towards those who do. This penis envy leads the little girl to turn to her father, who becomes her sex object. She develops fantasies of being castrated by him, which translate into fantasies of rape. Pleasure and pain become linked. The castration fantasy is also connected to the desire to have a child. Desiring a child represents mature female sexuality. However, female sexuality is still predicated on masochism since craving the pleasure of a child means craving the pain of childbirth. *Id.* at 49–53.
23. See, e.g., Karen Horney, *The Problem of Female Masochism*, 22 PSYCHOANALYTIC REV. 241, 242 (1935) (restating the concept of female masochism as "[w]hat the woman secretly desires in intercourse is rape and violence, or in the mental sphere, humiliation.").
24. See *infra* Part III.B.
25. See SCHECHTER, *supra* note 1, at 20.
26. See Sue E. Eisenberg & Patricia L. Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 143 (1977).
27. Leroy G. Shultz, *The Wife Assaulter*, 6 J. SOC. THERAPY 103 (1960).
28. John E. Snell et al., *The Wifebeater's Wife: A Study of Family Interaction*, 11 ARCHIVES GEN. PSYCHIATRY 107 (1964).
29. Shultz, *supra* note 27, at 103.

plait[ed] and profit[ed] from their husband's passiveness and dependency."<sup>30</sup> Violence occurred when the husbands' dependency needs were not met.<sup>31</sup>

The second article referenced female masochism specifically. The authors, led by John E. Snell, were interested in the motivations of wives who brought abusive husbands to court (as compared to wives who considered domestic violence an "intrafamilial disagreement" for the couple to handle privately).<sup>32</sup> They conducted an informal study of "wifebeaters" referred to a court psychiatric clinic and their wives. The authors described the husbands as passive, indecisive, and sexually inadequate, and the wives as aggressive, masculine, frigid, and masochistic. They postulated that domestic violence enabled the couple to temporarily reverse roles. Violence allowed the husbands to dominate the wives, and the wives to feel subordinate to the husbands.<sup>33</sup> This periodic reversal of roles, the authors claimed, ensured relationship equilibrium. Only when the relationship equilibrium was upset, such as when a child attempted to stop the violence, did the wife turn to the police for assistance.<sup>34</sup>

Feminists involved in the early battered women's movement lodged valid complaints against these two articles. Firstly, the conclusions offered by Shultz were questionable if only for the tiny sample on which they were based. Second, the article by Snell and his colleagues failed to implicate the larger issue of gender roles that seemed to figure prominently. Moreover, by describing domestic violence as functional, Snell and his colleagues seemed to be condoning the violence. But the most important complaint feminists launched at these articles was that they blamed female victims. Any account of domestic violence that focused on a woman's role in relationship conflict deflected attention away from the real culprit: the violent man.<sup>35</sup>

A book chapter published soon after this feminist criticism emerged attempted to provide some nuance.<sup>36</sup> Natalie Shainess, a psychiatrist, argued that insights from psychology ought to be incorporated into the emerging feminist theories. Shainess acknowledged sexism's role in domestic violence.<sup>37</sup> She did not, however, think this perspective barred consideration of

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30. *Id.* at 107–08.

31. *Id.* at 108.

32. Snell, *supra* note 28, at 108.

33. *See id.* at 111.

34. *Id.*

35. *See* Woods, *supra* note 20, at 8.

36. Natalie Shainess, *Psychological Aspects of Wifebattering*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 111 (Maria Roy ed., 1977); *See* DEL MARTIN, *BATTERED WIVES* (1976) (First feminist book on domestic violence).

37. Shainess, *supra* note 36, at 111–12.

individual factors such as personality, including the personality of the victim-wife.<sup>38</sup> The section, “Personality Problems in the Beater’s Wife,” opens with the statement: “[T]he wife almost inevitably plays a part in her own assault.”<sup>39</sup> Anticipating the feminist critique, Shainess explained: “This is not in any way to say that she is to *blame* for the assault.”<sup>40</sup> Instead, wives were implicated because their personalities interacted with those of their husbands to trigger violence.<sup>41</sup> “People pick mates responsive to their own (unrecognized) neurotic needs,” Shainess explained. It was therefore common for violent men who were “attacking, overly demanding, and sadistic,” to end up with masochistic women.<sup>42</sup> Masochism, as the author used the term, did not mean enjoyment of suffering, but rather submissiveness tied to low self-esteem.<sup>43</sup> It was this low self-esteem that kept women in abusive relationships.<sup>44</sup> Despite Shainess’ careful positioning, early feminist theorists were not willing to consider women’s psychology as a contributing factor to domestic violence.<sup>45</sup>

### B. *A Private/Family Matter*

The second charge feminists leveled against psychological theory was that it framed domestic violence as a private, family problem.<sup>46</sup> By interpreting domestic violence as a product of familial relationship dysfunction, psychological theory discouraged criminal justice interventions in favor of mental health responses. Feminists argued that this kept domestic violence in the “private” realm of the family, free from “public” state intervention, and thus guaranteed its perpetuation.

Police efforts to manage domestic violence before the 1970s reflect the strong impact of psychological theory. For example, a program established in New York City in 1966 to train police officers in “family crisis intervention” was designed to merge “mental health and crime prevention techniques.” Officers were instructed not to arrest in cases of domestic violence, but instead to attempt conflict resolution. Failing that, officers were trained

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38. *Id.* at 115–16.

39. *Id.* at 115.

40. *Id.*

41. *Id.* at 117.

42. *Id.* at 115.

43. *Id.*

44. *Id.* at 116.

45. See Bograd, *supra* note 17, at 17 (“Feminist psychologists also reframe and relabel constellations of emotions and behaviors typical of battered women. Instead of viewing them as preexisting contributing factors to the abuse, they are examined as the consequences of repeated brutalization and potentially life-threatening violence.”).

46. See MARTIN, *supra* note 36, at 142–47.

to administer psychological screening in order to link couples with community mental health services. With such training it was thought that “the policeman’s efficiency may be improved, lives saved, and *families preserved*.”<sup>47</sup>

Similarly, a 1967 article reported on the Chicago police department’s prevailing practice of “adjustment” (“use of alternatives other than arrest [on] behalf of *both* disputants”) in domestic violence cases.<sup>48</sup> The author offered ten reasons why a policy of adjustment might be superior to arrest in “domestic disturbance” cases, all stemming from the fact that these disturbances occurred “between relatives or others living in family-like intimacy.”<sup>49</sup> The first reason explained that victims themselves might prefer adjustment to arrest. “The victim frequently does not want the offender arrested,” but instead calls the police to scare him, get him temporarily out of the house, establish power over him, or get help accessing medical assistance.<sup>50</sup>

Assumptions about the private nature of domestic violence also informed legislative responses. In 1962, New York passed the Family Court Act (“FCA”), which established the New York Family Court and granted it exclusive jurisdiction “over any proceeding concerning acts which would constitute disorderly conduct or an assault between spouses or between parent and child or between members of the same family or household.”<sup>51</sup> The Court did not have criminal jurisdiction. Instead, it was entitled to grant orders of protection and support and to “contemplate[ ] conciliation proceedings,”<sup>52</sup> an informal procedure to promote conciliation between parties “whose marriage is in trouble.”<sup>53</sup> In cases where such remedies were inappropriate, the Court was entitled to transfer jurisdiction to the criminal court. It did so in only two percent of cases.<sup>54</sup>

The FCA justified its alternative approach to managing domestic violence on the basis that such cases were exceptional:

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47. Morton Bard & Bernard Berkowitz, *Training Police as Specialists in Family Crisis Intervention: A Community Psychology Action Program*, 3 *Community Mental Health J.* 315, 317 (1967) (emphasis added).

48. Raymond I. Parnas, *The Police Response to the Domestic Disturbance*, 1967 *Wis. L. Rev.* 914 (1967).

49. *Id.* at 930–31.

50. *Id.*

51. N.Y. FAM. CT. ACT § 812 (McKinney 1963).

52. N.Y. FAM. CT. ACT § 811 (McKinney 1963).

53. N.Y. FAM. CT. ACT § 911 (McKinney 1963).

54. See Terry L. Fromson, *The Case for Legal Remedies for Abused Women*, 6 *N.Y.U. REV. L & SOC. CHANGE* 135, 155 n.141 (1977).

In the past, wives and other members of the family who suffered from disorderly conduct or assaults by other members of the family or household were compelled to bring a “criminal charge” to invoke the jurisdiction of a court. Their purpose, with few exceptions, was not to secure a criminal conviction and punishment, but practical help. The family court is better prepared to render such help.<sup>55</sup>

The FCA assumed that in most domestic violence cases, the traditional law enforcement aim of criminal conviction did not apply. Apparently complainants in these cases did not want this result, a fact that distinguished these cases from assaults by strangers.

By the late 1970s, the FCA was under attack by feminists who challenged the exceptionality of domestic violence cases. In 1977, the FCA was amended to confer concurrent jurisdiction over family violence to the criminal court.<sup>56</sup> This achievement signaled the feminist effort to push domestic violence even further into the public realm by inviting arrest, prosecution, and conviction by the state, an effort I explore in Part V.

## II. FAMILY VIOLENCE THEORY

By the early 1970s, it was becoming clear that domestic violence was a significant problem. Crime statistics confirmed that the majority of serious violence occurred among family members, and the President’s Commission on Law Enforcement and the Administration of Justice reported that “family altercations . . . are probably the single greatest cause of homicide.” These findings opened the topic up to renewed inquiry: What did all of this violence in the home mean? Sociologists were ready to provide answers. In the early 1970s, a new field of study was born: “family violence.” Its principal researchers were Murray Straus, Richard Gelles, and Suzanne Steinmetz.

Family violence theorists rejected the psychological approach to domestic violence, focusing instead on “social forces” to explain the phenomenon. Feminists, entering the scene shortly after, adopted a similar theoretical orientation. However, feminists were critical of the family violence theorists’ reference to multiple social factors to explain domestic violence.<sup>57</sup> Feminists

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55. N.Y. FAM. CT. ACT § 811 (McKinney 1963).

56. N.Y. FAM. CT. ACT § 812 (Westlaw through 2014 Leg.).

57. See R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY, 19–20 (1979) [hereinafter DOBASH & DOBASH, VIOLENCE AGAINST WIVES].

claimed that failing to place gender inequality front and center led to misguided and sexist assumptions.<sup>58</sup>

### A. Structural Stress

Family violence theorists argued that rather than “a relatively rare type of behavior traceable to individual pathology,”<sup>59</sup> domestic violence was a widespread phenomenon born of “social” forces.<sup>60</sup> Richard Gelles, for example, posited that husband-wife and parent-child violence were functions of two major conditions: structural stress and socialization experience—with situational context as an intervening variable.<sup>61</sup> According to this model, violence is an adaptation or response to structural stress.

Sexism was also considered in the analysis. According to Gelles, sexism was relevant to role expectations (especially for the husband), which contributed to social stress. For example, where a husband did not have the resources to perform as a breadwinner, he was more likely to resort to violence.<sup>62</sup> But sexism was only one factor. Sexism, for example, did not explain violence against husbands. Nor did it account for child abuse, which was theorized according to the same framework as domestic violence. According to Gelles, “the bulk of conjugal violence and violence toward children occurs in families with low income, low educational achievement, and where the husband has low occupational status.”<sup>63</sup> The more social disadvantages experienced by a family, the more stress they are likely to feel; and the more stress a family feels, the more likely violence is to occur.<sup>64</sup> Efforts to combat family violence, therefore, needed to focus on ameliorating all forms of social disadvantage, not only sexism.<sup>65</sup>

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58. *Id.*; see also discussion *infra* Part II.B.

59. Murray A. Straus, *Foreword* to RICHARD J. GELLES, *THE VIOLENT HOME: A STUDY OF PHYSICAL AGGRESSION BETWEEN HUSBANDS AND WIVES* 13 (1974).

60. *Id.* at 16.

61. RICHARD J. GELLES, *THE VIOLENT HOME: A STUDY OF PHYSICAL AGGRESSION BETWEEN HUSBANDS AND WIVES* 184–85 (1974).

62. *Id.* at 136–37.

63. *Id.* at 192.

64. *Id.* at 189.

65. See *id.* at 188–90. Susan Schechter, one of the early battered women’s advocates, urged the same point. She warned against focusing solely on male domination as the cause of domestic violence, and criminal justice intervention as the solution. In 1979, Schechter wrote: “I suggest that solutions to current problems are sometimes being posited within confining boundaries. In addition to examining male domination, I feel it is necessary to ask, ‘What forms of social organization maintain violence against women in the home?’ If I can better understand the forms of social organization that maintain violence, I may better understand strategies for change and be able to develop a broader set of alternatives for women to struggle against this violence.” Schechter believed that just as important to sexism in explaining men’s

Although Gelles' theory was a "social structural theory of violence," it retained an important emphasis on individual action. Gelles believed that victim behavior played a central role in domestic violence. In his chapter, "It Takes Two," he explained: "the role of the victim in intrafamily violence is an important and active one":

Interfering with one partner's attempt to punish the children, nagging, arguments over drinking and gambling, using vile names, verbal criticisms of sexual performance, and escalating family arguments by bringing past and present conflicts into a fight are all part of the role of the victim in family violence.<sup>66</sup>

The actions of the victim were "vital intervening events" between structural stresses that led to the violence itself.<sup>67</sup> Domestic violence was somewhat predictable: victims had a sense of which words or actions would trigger violence in their partner.<sup>68</sup> Thus, while ameliorating structural stress was necessary to reduce family violence, modification of individual behavior—including the victim's—was also necessary.

### *B. Mutual Violence*

Feminist theorists rejected Gelles' victim provocation theory as "justifying physical violence."<sup>69</sup> They were also critical of his hypothesis that social stress contributes to domestic violence.<sup>70</sup> However, the most sustained and aggressive feminist critique of the family violence approach concerned its treatment of mutual violence. In 1976, Straus, Gelles and Steinmetz conducted the first National Family Violence Survey. Consistent with earlier findings from smaller samples, the authors found that female-to-male domestic violence occurred at nearly the same rate as male-to-female vio-

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violence toward women was capitalism: "most men are exploited at work. . . . I think that some combination of this exploitation, plus the privatization of the family and male right to beat lead to extraordinarily dangerous conditions for women. I would urge that we look at these processes as interrelated parts of a totality, rather than consider them in isolation of each other." Susan Schechter, *Towards an Analysis of the Persistence of Violence Against Women in the Home*, AEGIS – MAGAZINE ON ENDING VIOLENCE AGAINST WOMEN (Feminist Alliance Against Rape, D.C.) July/Aug. 1979, at 48, 52.

66. GELLES, *supra* note 61, at 155, 157.

67. *Id.* at 155.

68. *Id.* at 157.

69. DOBASH & DOBASH, *Provocation*, *supra* note 19, at 66.

70. SCHECHTER, *supra* note 1, at 211.

lence.<sup>71</sup> The study also found mutual violence—where husbands and wives physically attack each other—to be the most common form of domestic violence.<sup>72</sup>

In an article highlighting the findings, Straus expressed a number of reservations.<sup>73</sup> To measure family violence, the authors had developed the Conflict Tactics Scale (CTS), a questionnaire which quantified the different ways family members responded to conflict (i.e. discussion, hostility, or violence). Straus explained that the CTS could not measure the proportion of violent acts committed by wives in response to violence initiated by husbands (i.e. self-defense). There were also real differences in the nature of husband-to-wife versus wife-to-husband violence. For example, husbands committed the most dangerous and injurious forms of violence.<sup>74</sup> Also, because of differences in physical strength, wives were more likely to be injured by domestic violence than husbands.<sup>75</sup> Finally, Straus noted that economic and social constraints made leaving abusive relationships more difficult for wives.<sup>76</sup> He therefore recommended that wife abuse “be the focus of the most immediate remedial steps.”<sup>77</sup>

Steinmetz published an article in the same journal provocatively titled, “The Battered Husband Syndrome,” in which she reviewed available empirical data on husband abuse.<sup>78</sup> Steinmetz argued that the stigma for men in reporting as well as “selective inattention” to the problem by researchers and the media meant that husband abuse was overshadowed by wife abuse, and urged a more comprehensive approach to the study of “family” violence.<sup>79</sup> A “Comment and Reply” section in the same volume featured criticism by feminist researchers, who called Steinmetz’s reporting “incorrect” and “irre-

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71. MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 24, 36–37 (1980).

72. This finding is consistent with more recent studies. *See, e.g.*, MICHAEL P. JOHNSON, *A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE* 60 (2008) (“[B]y far the most common type of intimate partner violence [is] situational couple violence . . . [t]his type of intimate partner violence [is] almost as likely to be initiated by the woman as it is by her partner.” In situational couple violence, “a conflict between the partners leads to an argument, the argument escalates and becomes verbally aggressive, and the verbal abuse leads to violence.”).

73. Murray A. Straus, *Wife Beating: How Common and Why?*, 2 *VICTIMOLOGY* 443 (1978).

74. *Id.* at 449.

75. *Id.*

76. *Id.*

77. *Id.*

78. Suzanne K. Steinmetz, *The Battered Husband Syndrome*, 2 *VICTIMOLOGY* 499 (1978).

79. *Id.* at 499.

sponsible.”<sup>80</sup> The section quoted an open letter from Susan Schechter who accused Steinmetz of “giv[ing] people the opportunity to quibble over numbers and allow[ing] them to ignore the real suffering and lack of alternatives in women’s lives.”<sup>81</sup> In a report to the U.S. Commission on Civil Rights, Lisa Leghorn, a battered women’s shelter member, called Steinmetz’s research “[p]erhaps the most blatant example of misallocation of [National Institute of Mental Health] funds.”<sup>82</sup> Leghorn explained that what Steinmetz called “husband abuse” was actually self-defense: “most women who have been violent towards their husbands have done so only as a last resort, in self-defense against long-standing terror and abuse from their husbands.”<sup>83</sup>

Richard Gelles has since explained how the release of the 1976 data caused the family violence research group to become “nonpersons” among battered women’s advocates.<sup>84</sup> Conference invitations dried up, and sites at which members of the group were speaking received bomb threats.<sup>85</sup> Each researcher received death threats. Gelles says Steinmetz “received the brunt of the attacks.”<sup>86</sup> Individuals petitioned her university to deny her tenure, and the NIMH received pressure to rescind her research funding.<sup>87</sup>

Despite this fall-out, Gelles and Straus repeated the survey in 1985, this time adjusting the questions to consider which spouse hit first, and whether the violence resulted in injury.<sup>88</sup> The findings were consistent: “Assaults by women on their male partners occur at about the same rate as

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80. Elizabeth Pleck et al., *The Battered Data Syndrome: A Comment on Steinmetz’ Article 2* VICTIMOLOGY 680, 680 (1978).

81. *Id.* at 683.

82. Lisa Leghorn, *Grassroots Services for Battered Women: A Model for Long-term Change*, in U.S. COMM’N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 444, 450 (1978).

83. *Id.* at 451.

84. Richard J. Gelles, *The Missing Persons of Domestic Violence: Battered Men*, 21 WOMEN’S QUARTERLY 18, 20 (1999). See also Murray A. Straus, *The National Family Violence Surveys*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 3, 11 (Murray A. Straus & Richard J. Gelles eds., 1990). Straus points out that, “[i]ronically, coincidental with attacks from feminists, I was also denounced by political and religious conservatives such as Jerry Falwell as being antifamily for arguing that eliminating the concept of the husband as the ‘head of household’ would reduce wife beating.” *Id.*

85. Gelles, *supra* note 84, at 20.

86. *Id.*

87. *Id.*

88. Murray A. Straus & Richard J. Gelles, *How Violent Are American Families? Estimates from the National Family Violence Resurvey and Other Studies*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 95, 96, 104 (Murray A. Straus & Richard J. Gelles eds., 1990).

assaults by men on their female partners.”<sup>89</sup> Moreover, women were found to initiate violence about as often as men.<sup>90</sup> Again, Straus and Gelles sounded caution. They explained it was not possible to know the context surrounding the violence, and therefore what proportion of female violence was committed in self-defense.<sup>91</sup> Moreover, the results indicated that women were more likely than men to be physically and psychologically injured by domestic violence.<sup>92</sup>

These caveats did not appease feminist critics. In the foreword to the 1988 collection, *Feminist Perspectives on Wife Abuse*, Diana Russell, a rape scholar, noted that many of the collected articles were dedicated to critiquing the CTS and National Surveys, and, she argued, “deservedly so.”<sup>93</sup> It was “distressing,” she lamented, that after “ten years of debate and criticism,” the family violence researchers continued to “refus[e] to listen and learn from dialogue.”<sup>94</sup> According to Russell, the CTS resulted in a National Survey finding that “severe husband abuse is a more prevalent problem than severe wife abuse,” a result that “contradicts all previous research, clinical experience, and gender sensitive theories of violence.”<sup>95</sup> She suggested that “our” understanding of the problem would be more developed and the solutions clearer once wife abuse research informed by a feminist perspective replaced “patriarchal research on ‘family violence.’”<sup>96</sup>

### III. RAPE AS A PATRIARCHAL TOOL

To understand the emergence of the feminist understanding of domestic violence as patriarchal force, we need to appreciate not only theories of domestic violence that came before but also early feminist theories on *other* topics. Domestic violence did not come first on the feminist agenda, chronologically speaking—rape did. In 1976, Diana Russell commented, “[i]t is

89. *Id.* at 110.

90. *Id.* at 104–05. According to wives, husbands struck first in 53% of cases, and wives in 42%, with 5% of wives not remembering. Husband reports suggested women initiated violence at about the same rate as men. *Id.*

91. *Id.* at 98.

92. *Id.*

93. Diana E.H. Russell, *Foreword* to FEMINIST PERSPECTIVES ON WIFE ABUSE 7, 7–8 (Kersti Yllö & Michele Bograd eds., 1988).

94. *Id.* at 8.

95. *Id.*

96. *Id.* (“It becomes clear that just as the problem of battered wives cannot be eradicated as long as men have the power in the family and in society, so the problem of patriarchal research on ‘family violence’ will not easily be transformed by feminist critiques”); *id.* at 8–9 (“I believe we’d be much further along in our understanding of this problem and what to do about it if all research on wife abuse was informed by a feminist perspective.”).

quite remarkable how much attention has been given to the issue of rape in the United States in the past few years, and how little to the problem of woman-battery.”<sup>97</sup> Del Martin, who wrote the first feminist book on domestic violence, observed: “the women’s movement has made progress in changing attitudes towards rape. Now women are turning their attention to violent crimes within the home.”<sup>98</sup> In this Part, I show how radical feminist theorizing about rape informed the feminist understanding of domestic violence.

### A. Violence Against Women as Patriarchal Force

Rape emerged as a political issue in the early 1970s. At the time, the women’s movement was roughly divided into two factions: “reformers” aligned with the National Organization for Women (NOW), and the “radicals” of Women’s Liberation.<sup>99</sup> NOW was a dues-paying membership organization with a hierarchical governance structure that relied on traditional forms of protest. Women’s Liberation was a network of small, leaderless groups dedicated to analysis and theory. Whereas NOW welcomed male participation, the presence of men in Women’s Liberation was “unthinkable.”<sup>100</sup> NOW’s central cause was equal opportunity in employment.<sup>101</sup> Radical feminists claimed the issues of rape and domestic violence.<sup>102</sup>

One of the earliest feminist accounts of rape came from Kate Millett in her 1970 classic, *Sexual Politics*.<sup>103</sup> Millett argued that sex, like race, is a status category with political implications.<sup>104</sup> It is the basis upon which one group—men—controls another—women. In patriarchal societies, sexual dominance is “the most pervasive ideology” and the “most fundamental concept of power.”<sup>105</sup> According to Millett, patriarchy (like racism and colonialism) relies on the use of force for its maintenance. Rape is one example of this type of force; domestic violence is another.<sup>106</sup>

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97. Diana E.H. Russell, *Introduction* to DEL MARTIN, *BATTERED WIVES* ix (1976).

98. MARTIN, *supra* note 36, at 6.

99. SUSAN BROWNMILLER, *IN OUR TIME* (1999).

100. *Id.* at 7–8.

101. *Id.*

102. *Id.* at 94. According to Brownmiller, rape theory and the campaign against domestic violence “were radical feminism’s most successful contribution[s] to world thought.”

103. KATE MILLETT, *SEXUAL POLITICS* (1970).

104. *Id.* at 24.

105. *Id.* at 25.

106. *Id.* at 44; *see also* ANDREA DWORKIN, *RIGHT-WING WOMEN* 223 (1978) (arguing that rape, as well as battery, is one of the “crimes of the sex-class system against women . . . the crimes that keep women in an immovable system of sex hierarchy.”).

Other radical feminists echoed Millett's theory linking rape and sexism. Argued Diana Russell: "Just as lynching may be seen as the supreme political act of whites against blacks, so rape may be seen as the supreme political act of men against women."<sup>107</sup> Likewise, the editors of the Feminist Alliance Against Rape (FAAR) newsletter asserted: "Rape is a mechanism used to terrorize and subjugate women in much the same way that lynching has been used against blacks."<sup>108</sup> Susan Brownmiller, in her landmark text, *Against Our Will: Men, Women and Rape*, offered a similar analysis, suggesting rape was "nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear."<sup>109</sup> For radical feminists, rape was patriarchy fully expressed.<sup>110</sup>

### B. Male Myths and Victim Blaming

Brownmiller and Russell both identified the role of "male ideology" in sustaining the practice of rape. Most powerful was the "rape myth": the belief that women cannot be raped because all women secretly desire male aggression.<sup>111</sup> The rape myth caused women to be blamed for men's bad behavior. Explained Brownmiller, "'She was asking for it' is the classic way a rapist shifts the burden of blame from himself to his victim."<sup>112</sup> Shifting blame away from perpetrators allowed rape to go unchecked.<sup>113</sup> If Millett is right that rape is a patriarchal tool, then blaming the rape victim, a tactic that encourages rape by failing to condemn it, upholds the system of male domination.

The editors of the FAAR newsletter accepted this logic. In 1976, the publication began devoting a column to wife abuse on the basis that "rape and wife abuse are very related."<sup>114</sup> First, the editors explained, rape and domestic violence both involved male violence against women.<sup>115</sup> Second,

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107. MARTIN, *supra* note 36, at 231.

108. Jackie MacMillan & Freada Klein, *F.A.A.R. Editorial*, NEWSLETTER (Feminist Alliance Against Rape, D.C.) Sept./Oct. 1974, at 1.

109. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975).

110. Thus, even male-on-male rape could be explained as "a microcosm of the female experience with heterosexual rape." *Id.* at 265.

111. *Id.* at 312-13.

112. *Id.* at 312.

113. Brownmiller acknowledged that the rape myth had two versions. One was that "there is no such thing as rape at all," in which case male sexual aggression is ignored. The other is that "all women want to be raped," which carried the same implication that what the rapist did was permissible. In either case, the actions of the man go unchallenged. *Id.* at 313.

114. Lois Yankowski, *Wife Abuse*, NEWSLETTER (Feminist Alliance Against Rape, D.C.) Winter 1976, at 2.

115. *Id.*

neither was met with an adequate criminal justice response: women could not convict their rapists and the police refused to arrest and the courts to restrain wife-beaters.<sup>116</sup> Finally, “[i]n both areas, myths have evolved to place the blame for these acts of men on the women they victimize. In rape, it’s that women want to be raped . . . . In wife-beating, it’s that women are masochistic . . . .”<sup>117</sup> Writing for the column, Lisa Leghorn<sup>118</sup> explained that blaming battered wives and blaming rape victims served the same function: “to blame the victim for crimes perpetrated against her,” meant “avoid[ing] questioning or confronting men as individuals and male supremacy as a system.”<sup>119</sup> In other words, victim blaming maintained the patriarchy.

Like Brownmiller, Leghorn saw individual instances of wife beating as connected to the oppression of all women:

I consider the batterers, just as I see the rapists (to coin Susan Brownmiller’s phrase) to be the shocktroopers of a male supremacist society. The fact that some women are raped and three times as many battered, means that we are *all* afraid of men’s violence, and all of us, even if we haven’t admitted it to ourselves yet, carry this silent knowledge with us, of our limits . . . . Our male-dominated culture has defined for us our role . . . . If we are beaten or raped, we are believed to have provoked or deserved the attack for stepping out of our place.<sup>120</sup>

To restate the claim, the fact that individual wives are beaten makes all women afraid. This fear, combined with victim blaming, causes all women to adjust their behavior. Circumscribing women’s actions to accommodate patriarchal norms “maintain[s] a power relation between men and women.”<sup>121</sup> In other words, widespread male violence plus victim blaming fosters male domination.

Radical feminists traced victim blaming to psychoanalysis. According to Brownmiller, “it wasn’t until the advent of Sigmund Freud and his fol-

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116. *Id.*

117. *Id.*

118. Recall also that Leghorn was a vocal opponent of the family violence theorists’ claim of mutual violence. See Leghorn, *supra* note 82, at 450–53.

119. Lisa Leghorn, *Social Responses to Battered Women, Part 1*, NEWSLETTER (Feminist Alliance Against Rape, D.C.) Mar./Apr. 1977, at 23.

120. Lisa Leghorn, *Social Responses to Battered Women, Part 2*, NEWSLETTER (Feminist Alliance Against Rape, D.C.) May/June 1977, at 16 (hereinafter, *Social Responses, Part 2*); see also Leghorn, *supra* note 82, at 446 (“[T]he institution of violence against women in this country acts to influence, control, and repress the behavior of all women.”).

121. *Social Responses, Part 2, supra* note 120, at 16.

lowers that the male ideology of rape began to rely on the tenet that rape was something women desired.”<sup>122</sup> Brownmiller singled out Helene Deutsch and her theory of female masochism. Deutsch’s suggestion that women find pleasure in pain led her to become, in Brownmiller’s view, “the ultimate authority for sex-crime experts who wished to explain away the victims of rape.”<sup>123</sup> Because masochism was referenced in accounts of domestic violence written from the psychological perspective, feminists were more inclined to view such accounts as patriarchal victim blaming.<sup>124</sup>

### C. *Victim Blaming and False Consciousness*

Part of the power of the male rape myth lay in its popularity among women. As Helene Deutsch’s work illustrated, women also engaged in “victim blaming.”<sup>125</sup> Outside psychoanalysis, victim blaming manifested in women who held themselves and other victims responsible for acts that could have been perceived by a male sexual aggressor as an invitation.<sup>126</sup> This behavior was a measure of patriarchy’s success, argued Brownmiller, since “to make a woman a willing participant in her own defeat is half the battle.”<sup>127</sup>

By denying the reality of rape, women allowed the practice to continue, thus helping to maintain the overall system of male domination. At the same time, it was the system that prevented women from seeing rape for what it really was. Russell explained:

In a society dominated by men, it would be difficult for women’s view of rape to differ greatly from that of men. Therefore it is not surprising that many women also accept the myth that there is no such thing as rape. But it serves a different function for them. Women have always been dependent on men. It is

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122. BROWNMILLER, *supra* note 109, at 315; *see also* MILLETT, *supra* note 103, at 194 (“It is ingenious [for Freud] to describe masochism and suffering as inherently feminine . . . it justifies any conceivable domination or humiliation forced upon the female as mere food for her nature.”).

123. BROWNMILLER, *supra* note 109, at 315.

124. *See* Michele Bograd, *Family Systems Approaches to Wife Battering: A Feminist Critique*, 54 AM. J. ORTHOPSYCH. 558, 558 (1984) (“Feminist scholars and clinicians have demonstrated that early psychoanalytic models of wife battering were biased against women: they blamed the victim, focused on internal traits (such as masochism) to the exclusion of social realities, and implicitly sanctioned violence.”).

125. *See supra* Part I.A.

126. *See* BROWNMILLER, *supra* note 109, at 312–13.

127. *Id.* at 312.

much more comfortable for women to deny that men are really brutal toward women.<sup>128</sup>

In other words, so long as male domination was the rule, women would have difficulty recognizing rape as a patriarchal tool.

This idea is similar to the notion of “false consciousness”—what women believe to be true is actually a truth imposed upon them by the dominant system, in this case the patriarchy.<sup>129</sup> Catharine MacKinnon, a radical feminist, offered a comprehensive description of false consciousness under patriarchy in a pair of articles published in 1982 and 1983.<sup>130</sup> MacKinnon argued that what we “know” is what the male perspective constructs and then presents to us as truth.<sup>131</sup> This includes women’s experiences: “The perspective from the male standpoint enforces women’s definition, encircles her body, circumlocutes her speech, and describes her life.”<sup>132</sup> In other words, what women experience is often the female experience as determined by the male point of view.

The trouble with false consciousness is that women’s beliefs come to be viewed with suspicion. Women who do not experience male sexual or physical aggression as male domination can be dismissed as unseeing. While battered women do not usually claim pleasure in the physical violence they experience, the decision to stay with an abusive man *because of love* could be construed as similar: these women claim to experience pleasure in spite of the pain.<sup>133</sup> In both cases, women fail to see male violence for what it really is: patriarchal force that reinforces a larger system of male domination.

Charges of false consciousness mean that *other women*, specifically radical feminists, dismiss the beliefs of “unseeing” women. This dismissal can take on a paternalistic quality. Because radical feminists claim a monop-

128. MARTIN, *supra* note 36, at 258–59.

129. The concept of false consciousness was originally described by Friedrich Engels. See Letter from Frederick Engels to Franz Mehring in Berlin, (July 14, 1893), in KARL MARX AND FREDERICK ENGELS: SELECTED WORKS, 699, 700 (1968) (“Ideology is a process accomplished by the so-called thinker consciously, it is true, but with a false consciousness. The real motive forces impelling him remain unknown to him; otherwise it simply would not be an ideological process. Hence he imagines false or seeming motive forces.”).

130. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (Spring 1982); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* [hereinafter MacKinnon, *Feminist Jurisprudence*] 8 SIGNS 635 (Summer 1983).

131. See MacKinnon, *Feminist Jurisprudence*, *supra* note 130, at 636.

132. *Id.*

133. See, e.g., MILLS, INSULT TO INJURY, *supra* note 4, at 29 (claiming the description of domestic violence as patriarchal does not resonate for many women, such as those who love their partners).

lized view on the oppression other women experience, they can purport to know what is best for them. In the case of male violence, where the oppression of *all* women is at stake, what is best for an individual woman is also best for women as a group.

False consciousness can be read as a distinctly feminist version of victim blaming. The key function of victim blaming is to sustain male domination by allowing patriarchal force to continue.<sup>134</sup> A battered woman suffering false consciousness who refuses criminal justice intervention to end the abuse can be blamed for allowing male domination in general to continue. This view is contingent on two claims: first, that domestic violence is patriarchal force; second, that criminal justice intervention is the way to end domestic violence. The next two Parts explain how these claims became feminist truths, and how these truths, combined with feminist victim blaming through assumptions of false consciousness, lent feminist support to mandatory criminal intervention in domestic violence cases.

#### D. *The Private Family, the State, and the Law*

The final link that radical feminists identified between rape and domestic violence was their location in the family.<sup>135</sup> At the time Russell and Brownmiller were writing, it was a crime to force sexual intercourse on a woman, *unless that woman was your wife*.<sup>136</sup> Radical feminists initially understood domestic violence as *wife* abuse, with the *husband* as perpetrator.<sup>137</sup> These two examples of violence in the home laid the groundwork for a powerful radical feminist attack on the family, and especially on marriage.

Radical feminists saw the family as both a mirror and an agent of patriarchal society. It was, according to Millett, “a patriarchal unit within a patriarchal whole.”<sup>138</sup> Control exercised by husbands over wives reflected and reinforced control exercised by men as a class over women.<sup>139</sup> As patriarchy’s “chief institution,” the family’s most important function was socialization of the young.<sup>140</sup> In the patriarchal family, children learned the roles, temperament, and status appropriate for their gender.

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134. See *supra* Part III.B.

135. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 178 (1989).

136. In the 1970s, most states granted immunity to husbands for the crime of rape against their wives, either by statute or using a common law exception. See Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 308 (1977).

137. Yankowski, *supra* note 114, at 2.

138. MILLETT, *supra* note 103, at 33.

139. *Id.*

140. *Id.*

The family was also significant because of its location in the private sphere. According to liberal thought, social life can be divided into two spheres: the public and the private.<sup>141</sup> The public is the domain of the state, the private the domain of the family. This distinction has traditionally cautioned against state intervention into the home.<sup>142</sup> The public/private distinction also divided male from female: the public sphere was associated with the masculine, the private with the feminine.<sup>143</sup> Radical feminists contested the public/private distinction.<sup>144</sup> They redefined what was personal/private/feminine as political and therefore public.

Central to recognizing the personal as political was recognizing the role of privacy in women's oppression. Because privacy is a legal doctrine as well as a spatial concept, it is important to note the radical feminist orientation toward law, and therefore the state. In Millett's view, the patriarchal family, society, and the state were "interrelated."<sup>145</sup> Society and the state depended on the family: society for the family's role in socialization, the state for its hierarchical arrangement. According to Millett, state governance necessitated family patriarchs:

Serving as an agent of the larger society, the family not only encourages its own members to adjust and conform, but acts as a unit in the government of the patriarchal state which rules its citizens through its family heads. Even in patriarchal societies where they are granted legal citizenship, women tend to be ruled through the family alone and have little or no formal relation to the state.<sup>146</sup>

Millett suggested that the state's relationship to the family is mediated through the husband. He alone possesses legal standing to negotiate with the state. Wives are positioned as limited rights holders in relation to their husbands. As limited rights holders, their ability to appeal directly to the state to have their rights enforced is diminished. Though Millett did not mention violence in this passage, she implied that the limited legal status of wives prevents them from appealing to the state for protection against abu-

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141. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

142. *Id.* at 150.

143. *Id.* at 1499.

144. MacKinnon, *Feminist Jurisprudence*, *supra* note 130, at 656: "[F]eminist consciousness exploded the private."

145. MILLETT, *supra* note 103, at 33.

146. *Id.*

sive husbands. This implication was certainly true at the time for cases of rape.<sup>147</sup>

Domestic violence did not fit perfectly into Millett's analysis. In contrast to rape, physical assault of one's wife *was* a crime in the 1970s.<sup>148</sup> The criminalization of domestic violence suggested wives could appeal directly to the state to have their right to protection enforced against their husbands. In reality, however, the state rarely intervened.<sup>149</sup> Feminists blamed privacy law in part.<sup>150</sup>

The right to privacy guarded against state intervention into intimate activities—reproduction, child rearing—that took place in the home.<sup>151</sup> As a result, the home became positioned legally and ideologically as a regulation-free zone. Notably, the home was also the sphere of women. Since the state could not enter, husbands could abuse wives with impunity. According to MacKinnon, “when women are segregated in private, one at a time, a law of privacy will tend to protect the right of men ‘to be let alone,’ to oppress [women] one at a time.”<sup>152</sup> The law of privacy reinforced male control over women.

MacKinnon did not see changing the law to facilitate state intervention in the home as the solution. Neither the law nor the state in which it originates, she claimed, are neutral; both are “male”:

[T]he state is male in the feminist sense. The law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the in-

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147. See Note, *supra* note 136, at 309–11.

148. See Elizabeth Truninger, *Marital Violence: The Legal Solutions*, 23 *Hastings L.J.* 259, 262–67 (1967) (In the 1970s, domestic violence could be prosecuted under a variety of criminal statutes, including assault and battery provisions and provisions specifically proscribing wife beating.).

149. *Id.* at 264; see also Parnas, *supra* note 48, at 917–22 (discussing arrest-avoidance policy of Chicago Police Dept. for domestic violence disputes).

150. See, e.g., Reva B. Siegel, “*The Rule of Love*: Wife Beating as Prerogative and Privacy,” 105 *YALE L.J.* 2117 (1996) (arguing the legal doctrine of privacy essentially replaced the legal doctrine of chastisement in the nineteenth century to allow wife abuse to continue).

151. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing a constitutionally protected liberty interest in the bringing up of children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (recognizing a constitutionally protected liberty interest in directing a child's education); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a constitutional right to privacy over birth control decisions among married persons).

152. MacKinnon, *Feminist Jurisprudence*, *supra* note 130, at 657 (internal citation omitted).

terest of men as a gender, through its legitimating norms, relation to society, and substantive policies.<sup>153</sup>

MacKinnon's theory is structural: the law works through the state to construct an entire social order in which men control women. MacKinnon was therefore understandably skeptical of attempts to liberate women through law in a way that engaged the state. She instead favored private legal action, for example tort claims, which would empower women rather than the state.

Other radical feminists were more optimistic. They believed that by changing law to reflect women's experiences, the state could become a major player in women's liberation.<sup>154</sup> These feminists were not interested in abandoning law or the state. Instead, they wanted to shift some of the power vested in these male institutions to women. Brownmiller recommended a program of robust law reform as the first line of attack.<sup>155</sup> In her view, it was imperative to replace "man's law" with "law that reflects the female reality."<sup>156</sup> Brownmiller clearly believed that engaging with the state was preferable to avoiding it. In fact, she considered women's control of the criminal law *necessary* for women's liberation.<sup>157</sup> Many advocates for battered women agreed, believing that harnessing the power of the state to combat domestic violence was the best way to end women's subordination.<sup>158</sup>

#### IV. EARLY FEMINIST THEORIES OF DOMESTIC VIOLENCE

Early feminist theories of domestic violence, like family violence theories, were sociological: they rejected individual factors in favor of social conditions.<sup>159</sup> Feminist theories diverged from family violence theories, however, in their identification of male domination as the primary source of domestic violence. I begin this Part by exploring two early feminist texts on domestic violence: *Battered Wives* by Del Martin,<sup>160</sup> and Rebecca and Russell Dobash's *Violence Against Wives: A Case Against the Patriarchy*.<sup>161</sup> While

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153. *Id.* at 644 (internal citation omitted).

154. *See infra* Part V.A.

155. BROWNMILLER, *supra* note 109, at 388; *see also infra* Part V.A.

156. *Id.* at 388 ("I am convinced that the battle to achieve parity with men in the critical area of law enforcement will be the ultimate testing ground on which full equality for women will be won or lost.").

157. *Id.*

158. *See infra* Part V.

159. *See, e.g.,* DOBASH & DOBASH, *VIOLENCE AGAINST WIVES*, *supra* note 57.

160. MARTIN, *supra* note 36.

161. DOBASH & DOBASH, *VIOLENCE AGAINST WIVES*, *supra* note 57.

both texts identified male domination as central to domestic violence, the respective authors differed in their understanding of its function. While Martin envisioned domestic violence as a reaction to gender inequality, the Dobashes saw it as maintenance of male control. It was the Dobashes' perspective, I argue, that informed the feminist position in favor of mandatory criminal interventions.

At the same time, another author was laying the groundwork for the mandatory intervention campaign. Lenore Walker was not concerned with the etiology of domestic violence but rather with why women stayed in abusive relationships.<sup>162</sup> Walker was a psychologist, but rejected traditional psychological theories, including masochism, as anti-feminist. Walker avoided implicating women in domestic violence, arguing instead that women stay with abusive men in part because the abuse renders them psychologically incapable of leaving.<sup>163</sup> This claim ultimately encouraged feminist disregard for the preferences of battered women who refused criminal intervention.

*A. Domestic Violence and Sexism: Battered Wives and  
Violence Against Wives*

In *Battered Wives*, Del Martin set out a theory of domestic violence that placed not only sexual inequality but also marriage front and center.<sup>164</sup> Following the radical feminists, Martin described marriage as “the mechanism by which the patriarchy is maintained.”<sup>165</sup> Like Millett, she emphasized socialization, and it was here that Martin made the connection to wife beating. According to Martin, wife beating was a consequence of sex roles, which developed out of marriage.<sup>166</sup> Concepts of “masculinity” and “femininity” came from the traditional roles of husband and wife.<sup>167</sup> She argued that gender roles are not natural, but instead a product of the institution of marriage. Men and women struggle to live up to the socially constructed expectations of their gender, and this struggle creates conflict. Each intimate partner expects the other to act according to a socially prescribed role and becomes frustrated when they do not. When violence erupts, the woman—as the physically disadvantaged partner—is more likely to be injured.<sup>168</sup>

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162. See generally, LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

163. *Id.* at ix.

164. MARTIN, *supra* note 36, at 36.

165. *Id.*

166. *Id.* at 42–43.

167. *Id.* at 43 (“Men are seen as dominant (and thus strong, active, rational, authoritarian, aggressive, and stable), and women as dependent (and thus submissive, passive, and nonrational).”).

168. *Id.*

This explanation sounds blame-neutral, and in fact Martin did not single men out for reproach.<sup>169</sup> In Martin's formulation, men and women were *both* victims of sexism.

In describing sex roles as frustrating, Martin sounded similar to Gelles, who suggested that socially defined sex roles create stress that leads to marital violence.<sup>170</sup> Unlike Gelles, however, Martin was not prepared to factor stresses other than sexism into her analysis. She explicitly denied the suggestion that wife beating was more prevalent among the poor,<sup>171</sup> a denial that would continue in future feminist advocacy.<sup>172</sup>

For Martin, marriage not only contributed to wife beating, it also condoned the practice.<sup>173</sup> Traditional beliefs about marriage confined wife beating to the private sphere, which allowed the practice to continue. Speaking of the criminal justice system, Martin explained, "A man's home is his castle, and police, district attorneys, and judges hesitate to interfere with what goes on behind that tightly closed door."<sup>174</sup> Moreover, the perceived intimacy between a husband and wife caused wife-beating cases to be treated as exceptional: "The husband never faces the harsh penalties he would suffer if found guilty . . . for assaulting a stranger."<sup>175</sup> Finally, belief in the sanctity of marriage informed policies that encouraged reconciliation of spouses over separation.<sup>176</sup> Martin offered New York's FCA as an example. "In New York," she reported, "a woman seeking protection or trying to escape from her violent husband is forced to rely on a system intent on 'stabilizing' her family."<sup>177</sup> Social service agencies adopted a similar stance: "the view that reconciliation is the only answer is . . . all too prevalent among representatives of the social system."<sup>178</sup> The problem with promoting reconciliation, in Martin's view, was that it pushed domestic violence back into the private

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169. *Id.* at xv ("Many husbands who batter their wives in anger and frustration are really striking out against a system that entraps them, too.")

170. See GELLES, *supra* note 61, at 137.

171. MARTIN, *supra* note 36, at 54. In Martin's view, any indication that domestic violence was common among poor families could be explained by discrepancies in reporting; violence in lower class families was simply more *visible* since they were more likely to seek public assistance than middle class families.

172. See, e.g., Woods, *supra* note 20, at 11 ("[H]usbands of all economic levels assault their wives regularly[.]").

173. MARTIN, *supra* note 36, at 87, 104.

174. *Id.* at 87.

175. *Id.* at 104.

176. Throughout this Article, "separation" is used to describe permanently ending an intimate relationship.

177. MARTIN, *supra* note 36, at 104.

178. *Id.* at 146.

sphere. Once again private, domestic violence was protected, and thereby encouraged.<sup>179</sup>

But what about women who chose not to separate from their husbands after experiencing violence? According to Martin, “Battered wives give many reasons or rationalizations for staying, but fear is the common denominator. Fear immobilizes them, ruling their actions, their decisions, their very lives.”<sup>180</sup> She appears to argue that battered women cannot think rationally; if they could, they would leave. This was not the whole story, however. Martin explained that battered women’s judgment is also clouded by gender role expectations. Women, she argued, are socialized to believe that wifehood is their greatest calling.<sup>181</sup> Thus, even a woman with the means to leave an abusive relationship might be psychologically blocked from doing so: “a woman with her *own* money! What can she be thinking when she says she *needs* a man who takes her money and her will? . . . *The fact is, she may not be thinking for herself at all.*”<sup>182</sup> This is false consciousness: it is a feminist claiming that another woman cannot see how the oppression under which she lives distorts her worldview. It is distinct from the argument that fear prevents women from leaving abusive relationships, but the result is the same: women’s psychology—even if a product of sexism or abuse—leads to the irrational conclusion that staying with an abusive partner is preferable to leaving.

The Dobashes argued that marriage was significant because it granted husbands control over their wives.<sup>183</sup> This control was historically and socially constructed. Male control was historically constructed through the patriarchal family in which husbands exercised power over wives.<sup>184</sup> Socially, it was constructed through institutions and ideology. Echoing Martin (and Millett), the Dobashes explained that gender roles conditioned girls to become submissive wives, and boys to become authoritarian husbands.<sup>185</sup> Institutions, like the formal economy that limited women’s participation in the workforce, ensured that wives would remain financially dependent on husbands and, thus, under their control.<sup>186</sup>

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179. *Id.* at 147 (“If reconciliation is regarded as the only solution or goal, wife-beating will only be perpetuated.”).

180. *Id.* at 76.

181. *Id.* at 81.

182. *Id.* at 85 (emphasis added to last sentence, first emphasis in original).

183. DOBASH & DOBASH, VIOLENCE AGAINST WIVES, *supra* note 57, at 15 (“We propose that the correct interpretation of violence between husbands and wives conceptualizes such violence as the extension of the domination and control of husbands over wives.”).

184. *Id.* at 48–74.

185. *Id.* at 75–81.

186. *Id.* at 76.

But social forces alone were not to blame. Violence against wives was also an expression of what the Dobashes called “coercive control” on the part of husbands: “The use of physical force against wives should be seen as an attempt on the part of the husband to bring about a desired state of affairs. *It is primarily purposeful behavior . . .*”<sup>187</sup> From this perspective, violence against wives was not a reaction to gender inequality but a concentrated effort on the part of husbands to perpetuate it. Husbands were not victims of sexism, as Martin had claimed; they were perpetrators.

The Dobashes’ conception of wife beating as “coercive control” is analogous to the radical feminist notion of violence against women as patriarchal force. Domestic violence, like rape, is a means of keeping women subordinate to men. While the Dobashes did not make this point explicitly, they seemed to view individual instances of domestic violence as reinforcing not only a husband’s domination of his wife, but also male domination of women generally. Other feminists of the time certainly did.<sup>188</sup> The Dobashes believed wife abuse to be an expression of male domination.<sup>189</sup> They also viewed wife abuse as socially condoned, writing that, “men who assault their wives are actually living up to cultural prescriptions that are cherished in Western society—aggressiveness, male domination, and female submission—and they are using physical force as a means to enforce that domination.”<sup>190</sup>

The Dobashes were sociologists, like the family violence researchers. However, from the Dobashes’ perspective, family violence theory failed to account for the social and historical context in which domestic violence occurred.<sup>191</sup> By doing so, family violence theory gave short shrift to male domination, which, for the Dobashes, was central to explaining domestic violence.<sup>192</sup> This led family violence theorists to erroneously group wife abuse with other forms of family violence.<sup>193</sup> It also drove spurious hypotheses about “husband abuse.” The suggestion that husbands and wives abuse each other at similar rates was, according to the Dobashes, simply not true.<sup>194</sup>

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187. *Id.* at 23–24 (emphasis added).

188. *See, e.g.*, SCHECHTER, *supra* note 1, at 20 (“Violence against women is the underlying, ever present force that maintains male power and domination.”).

189. DOBASH & DOBASH, *VIOLENCE AGAINST WIVES*, *supra* note 57, at ix (“The use of physical violence against women in their position as wives is not the only means by which they are controlled and oppressed but it is one of the most brutal and explicit exercises of patriarchal domination.”).

190. *Id.* at 24.

191. *Id.* at 25.

192. *Id.* at 11–12.

193. *Id.* at 9–10.

194. *Id.* at 19–20.

The Dobashes' emphasis on male domination as the foundation of wife abuse informed their view of "victim blaming." They noted two forms: "female provocation" and female masochism.<sup>195</sup> Interpreted through the lens of male domination, both forms could be properly read as acts of resistance by wives.<sup>196</sup> However, without a feminist framework, victim blaming was effectively deployed to maintain the patriarchal status quo, an argument familiar from radical feminist rape discussions.<sup>197</sup> For example, "The idea of provocation is a very powerful tool used in justifying the husband's dominance and control and in removing moral indignation about his resort to force in securing, maintaining, and punishing challenges to his authority."<sup>198</sup> Shifting the locus of blame toward the wife allowed the husband's violence to continue. It also guaranteed his control. The notion of female provocation was based on an assumption that a wife should not challenge her husband's authority, because doing so could lead to violence.<sup>199</sup> To the Dobashes, this view was naïve, representing "a failure to see the marital relationship within which the wife must negotiate with her husband in order to conduct her daily life and to see that she must do so from a greatly disadvantaged position."<sup>200</sup> From the Dobashes' perspective, a wife who "provokes" her husband is simply resisting his control.<sup>201</sup>

A similar interpretation was offered for female masochism. Like provocation, masochism shifts blame away from husbands towards innocent wives, "It removes the moral outrage over the wife's victimization and it means outsiders can quietly ignore the problem without feeling guilty."<sup>202</sup> Deploying female masochism to blame wives means the husband's exercise of control goes unchecked.

Because male domination was the problem, combating male domination was the solution.<sup>203</sup> Members of the helping and legal professions had to rethink their responses. To challenge male domination, professionals had to "stop denying the seriousness of the offence, blaming the victim, and/or seeking causes in the man's supposed mental aberrations," or "more insidiously," in the woman's "personal pathologies."<sup>204</sup> The implication was that

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195. *Id.* at 133–37, 159–60.

196. *Id.* at 135; *see infra* notes 202–203 and accompanying text.

197. *See supra* Part III.B.

198. DOBASH & DOBASH, VIOLENCE AGAINST WIVES, *supra* note 57, at 136.

199. *Id.* at 135.

200. *Id.*

201. *Id.* at 136.

202. *Id.* at 160.

203. *Id.* at 243. The authors' close: "[t]he problem lies in the domination of women. The answer lies in the struggle against it." *Id.*

204. *Id.* at 238.

legal and mental health responses that focused on psychological factors or implicated women in abuse were anti-feminist.

While Martin and the Dobashes' positions were generally in agreement, there were two exceptions. The first, already mentioned, was disagreement over the relative culpability of men. As I demonstrate in the next Part, it was the Dobashes' interpretation that eventually became more popular among feminists advocating for greater criminal justice involvement in domestic violence cases. A second tension lay in the reasons offered for why wives stay with abusive husbands. On this issue, the Dobashes' perspective did not become the popular view. The Dobashes relied on their interpretation of wife abuse as male control to reinterpret the act of staying.<sup>205</sup> Unlike Martin, they did not rely on fear. Women had good reason to *choose* to stay with violent husbands, argued the Dobashes, most often lack of material and personal support.<sup>206</sup> Women who left and then returned to violent husbands were also depicted as rational. The Dobashes described these women as attempting to shift the relationship's balance of power in their favor by demonstrating that they could walk away.<sup>207</sup> These were not women incapable of thinking for themselves, but rational agents challenging their husbands' authority.

### B. *The Battered Woman*

Susan Brownmiller has called the question, "Why doesn't she leave?" the battered women's movement's "bugaboo."<sup>208</sup> It has been a problem from the beginning: Martin and the Dobashes each devoted an entire chapter to the question.<sup>209</sup> It was a question that had to be answered. If, as feminists claimed, domestic violence were a serious crime warranting a traditional criminal response, why were some battered women acting otherwise? Every time a woman stayed or returned to an abusive partner, it undermined the movement's agenda.

One option was to explain a woman's decision to stay with sociological factors, most importantly lack of resources. The Dobashes favored this approach.<sup>210</sup> But as Martin pointed out, this explanation could not account

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205. *Id.* at 144–60.

206. *Id.* at 156–60.

207. *Id.* at 238 ("When the woman returns, if she wishes to return, she often enters on new terms; the husband may be somewhat apprehensive that his wife will leave again and he may feel more of a need to constrain his own behavior.").

208. BROWNMILLER, *supra* note 99, at 276.

209. MARTIN, *supra* note 36, at 72–86 ("The Victim—Why Does She Stay?"); DOBASH & DOBASH, VIOLENCE AGAINST WIVES, *supra* note 57, at 144–60 ("Staying, Leaving, and Returning.").

210. DOBASH & DOBASH, VIOLENCE AGAINST WIVES, *supra* note 57, at 144–60.

for women of means.<sup>211</sup> The fact that women with resources also returned to violent relationships suggested a deeper problem. This quandary pushed theorists—like Martin—in the direction of psychology.<sup>212</sup> For battered women’s advocates, this was a very dangerous course. From the feminist perspective, psychology, and especially its concept of female masochism, was in large part to blame for allowing violence against women to continue.<sup>213</sup> Advocates wanted to steer clear of explanations for why women stayed in abusive relationships that redirected blame toward the victim.

In 1979, Lenore Walker published *The Battered Woman*, a study of “the psychology of battered women as victims.”<sup>214</sup> The book introduced “the battered woman syndrome,” a set of psychological characteristics common to battered women, including low self-esteem, feelings of guilt, and traditional views about marriage and gender.<sup>215</sup> It also elaborated on two theories: the psychosocial theory of learned helplessness,<sup>216</sup> and the cycle theory of violence.<sup>217</sup>

Walker believed her findings could answer the question, “Why doesn’t she leave?” *The Battered Woman* leads with two propositions: one, “that the problem [of battering] is far more pervasive—and terrible—than it was ever thought to be,” and two, “that the myths which had previously rationalized” battering were “untrue.”<sup>218</sup> Here she addressed and countered the idea of female masochism. “Most people label [battered] women ‘masochistic,’ for not leaving the relationship,” she explained, “unaware or preferring to ignore the battered woman’s *inability to help herself*.”<sup>219</sup>

Walker attributed a battered woman’s inability to help herself to learned helplessness, a concept from the field of experimental psychology.<sup>220</sup> Applied to battered women, it referred to the belief that a woman has no control over what happens to her, a state of consciousness that develops after multiple “battering cycles”:

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211. MARTIN, *supra* note 36, at 85.

212. *Id.*

213. See WALKER, *supra* note 162, at 15.

214. *Id.* at xi.

215. See also LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 75–94 (1984).

216. Walker first applied this theory to battered women in an earlier article. See Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525 (1977–78).

217. This theory was developed in an earlier book chapter. See Lenore E. Walker, *Treatment Alternatives for Battered Women*, in THE VICTIMIZATION OF WOMEN 143, 146–54 (Jane Roberts Chapman & Margaret Gates eds., 1978).

218. WALKER, *supra* note 162, at ix.

219. *Id.* at ix (emphasis added).

220. *Id.* at 45.

The battered woman does not believe anything she does will alter any outcome, not just the specific situation that has occurred. She says, “No matter what I do, I have no influence.” She cannot think of alternatives. She says, “I am incapable and too stupid to learn how to change things.” Finally, her sense of emotional well-being becomes precarious. She is more prone to depression and anxiety.<sup>221</sup>

It was not that women enjoyed violence. Nor was the violence not serious enough to warrant separation. According to Walker, it was the traumatic nature of the abuse that left women believing they could not leave.<sup>222</sup>

Walker offered a psychological explanation, but did not implicate personal pathology. There was nothing in the battered woman’s psychological makeup to predispose her to abuse.<sup>223</sup> Her psychological deficiencies came *after* the abuse, according to Walker.<sup>224</sup> A battered woman’s psychology was the reason the violent relationship continued, but the continuation was not her fault.

While individual women were not prone to victimization, women as a class were more likely to experience learned helplessness.<sup>225</sup> This was especially true for married women.<sup>226</sup> The culprit, again, was gender inequality, a sociological fact. However, it manifested, according to Walker, in women’s psychology.<sup>227</sup> In a patriarchal system, girls are socialized to be more passive than boys.<sup>228</sup> They therefore enter marriage with a “psychological disadvantage.”<sup>229</sup> The social and legal institution of marriage, which confers power over wives, compounds this disadvantage.<sup>230</sup> Married women come to believe they have limited control over their lives.<sup>231</sup>

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221. *Id.* at 49–50.

222. *Id.* at 49. Martin also described battered women as those who had continuously endured life-threatening incidents. MARTIN, *supra* note 36, at xiv.

223. WALKER, *supra* note 162, at 16 (“Pairing up with a batterer must be considered *purely accidental* if *one out of two women* will be battered in their lifetimes.”).

224. *Id.* at 21 (“Battered women’s *survival behaviors* have often earned them the misdiagnosis of being crazy.”) (emphasis added). Walker connected the claim that battered women are mentally ill to the “myth” of sadomasochism and argues that women who become mentally unstable because of abuse improve after separation, suggesting their mental health was intact prior to the relationship. *Id.* at 20–21.

225. *Id.* at 51–52.

226. *Id.*

227. *Id.* at 51.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 51–52.

Just as a particular woman's psychology did not make her vulnerable to abuse, neither did her socioeconomic status. Walker's agenda included debunking the "myth" that wife battering was a problem of the poor.<sup>232</sup> What made a woman vulnerable to battering was her gender. "Battered Women," Walker explained, "are found in all age groups, races, ethnic and religious groups, educational levels, and socioeconomic groups. Who are the battered women? If you are a woman, there is a 50 percent chance it could be you!"<sup>233</sup> Indeed, under this high estimate it would be impossible for battering to be concentrated among one socioeconomic group.

Identifying gender as the common denominator supported a feminist theory of domestic violence. It also lent support to feminist reforms. For example, if domestic violence were a socioeconomic problem, the solution would be a reduction in poverty. If domestic violence were a product of sexism, the solution had to be eradication of male domination. Walker's estimate of wife-beating's prevalence made finding a solution all the more pressing. With "as many as 50 percent of all women [becoming] battering victims at some point in their lives," the problem was pervasive.<sup>234</sup>

Bound up with Walker's theory of learned helplessness was her cycle theory of violence. Walker defined a battered woman as one "who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."<sup>235</sup> Walker's description resembled the Dobashes' account, which defined domestic violence as a conscious effort by men to subordinate women.<sup>236</sup> Battered women are those who have experienced at least two battering cycles.<sup>237</sup> Walker envisioned the battering cycle as comprised of three phases: (1) tension building, (2) the acute battering incident, and (3) loving contrition.<sup>238</sup> In the first phase, friction between the couple builds. The husband acts aggressively toward the wife, and the wife attempts to placate the husband. Eventually the tension becomes so intense that violence erupts, and the couple enters the second stage.<sup>239</sup> Walker noted that sometimes the wife triggers the second stage.<sup>240</sup> Knowing abuse is on the horizon (she has been through this cycle before), but suffering because she cannot predict when it will come, the wife *provokes* the husband in order to

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232. *Id.* at 144 ("I am interested in demonstrating that socioeconomic level does not protect a woman from being battered.").

233. *Id.* at 19.

234. *Id.* at ix.

235. *Id.* at xv.

236. DOBASH & DOBASH, VIOLENCE AGAINST WIVES, *supra* note 57, at 24.

237. WALKER, *supra* note 162, at xv.

238. *Id.* at 55.

239. *Id.* at 59.

240. *Id.* at 60.

get it over with.<sup>241</sup> This is another feminist re-reading of female provocation. Women might provoke violence but it is not their fault. They do it to exercise some control over their violent spouse.<sup>242</sup> In the third stage, the couple returns to a calmer place.<sup>243</sup> The husband expresses remorse for his actions and promises reform. The woman, reminded of happier times, agrees to stay, hoping this time things will be different.<sup>244</sup>

While there is overlap between learned helplessness and the cycle theory of violence (i.e. cycles of violence contribute to learned helplessness), the theories can be understood as offering distinct answers to the question, “Why doesn’t she leave?” According to learned helplessness, women exposed to systemic abuse become psychologically incapable of helping themselves. Under the cycle theory of violence, women stay because they believe their husbands will change.

Walker first introduced the cycle theory of violence in 1978.<sup>245</sup> After reviewing the three phases, she offered a morbid prediction: if, in individual cases, the cycle of violence was not broken, the likely outcome was death. “The [battered] woman,” according to Walker, “sees death as the *only way out* of her situation, either the batterer’s death or her own. The batterer similarly would rather die or kill her than voluntarily leave.”<sup>246</sup> This assessment supported Walker’s claim that domestic violence was more “terrible” than previously imagined.<sup>247</sup> It also supported her choice of remedy: separation. Because staying in a battering relationship was likely to lead to death, a woman could only save herself by leaving.<sup>248</sup>

Other commentators have suggested that learned helplessness is victim blaming from a feminist perspective.<sup>249</sup> It is a substitute for female masochism, and like female masochism it rests on women’s mental pathology. The cycle theory of violence’s explanation for why women stay could also be an example of feminist victim blaming. Women’s experiences in the phase of loving contrition can be interpreted as false consciousness. Rather than seeing domestic violence for what it is—an act of male domination—the battered woman interprets the actions of her husband as anomalous. She fails to see that violence inflicted upon her is not a demonstration of weakness by an individual man but a concerted effort to control her as a woman.

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241. *Id.*

242. *Id.*

243. *Id.* at 65.

244. *Id.* at 67–68.

245. Walker, *supra* note 217, at 146.

246. *Id.* at 155 (emphasis added).

247. Walker, *supra* note 162, at ix.

248. Walker, *supra* note 217, at 155.

249. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 34–43 (1991).

If victim blaming perpetuates domestic violence, and if, as I argue, a woman's decision to stay in a relationship can sometimes be explained by false consciousness, then leaving is not only self-protective but it is also a remedy to victim blaming. According to Walker, a woman who stays in an abusive relationship with the (erroneous) hope that her partner will change "becomes an accomplice to her own battering."<sup>250</sup> Like society's "*laissez faire* attitude" toward battering, a woman who stays encourages a batterer's violent behavior.<sup>251</sup> Through "passive acceptance" she allows the violence to continue.<sup>252</sup> From a feminist perspective, this has broader implications. If domestic violence is patriarchal force—like rape—then allowing it to continue against an individual woman reinforces male control over women as a class.<sup>253</sup> Thus, separation is required not only for the individual woman's safety, but for the liberation of the group.

Separation, not surprisingly, was also Walker's remedy for learned helplessness. The research Walker relied upon was based on experiments with dogs.<sup>254</sup> Walker believed analogies could still be drawn. Just as dogs "could *only* be taught to overcome their passivity by being dragged repeatedly out of the punishing situation and shown how to avoid the shock," battered women could only be cured of learned helplessness by being forcefully separated from their abusive partners.<sup>255</sup> "This 'dragging' [of battered women]," explained Martin, "may require help from outside, such as the dogs received from the researchers."<sup>256</sup> It did not take long for Walker's prescription to become reality.

#### V. FEMINIST THEORY BECOMES CRIMINAL LAW

The previous four Parts of this Article demonstrate how early feminist theories of domestic violence were based on a rejection of alternative psychological and family violence theories, and informed by the radical feminist position on rape. I emphasized the development of a strong anti-victim-blaming stance, traceable to radical feminist theories of rape and a rejection of psychological theories of domestic violence. I highlighted the feminist

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250. WALKER, *supra* note 162, at 69.

251. *Id.* at 57.

252. *Id.*

253. *See supra* Part III.A.

254. WALKER, *supra* note 162, at 45–46.

255. *Id.* at 53 (emphasis added). Immediately after, Walker adds, "[j]ust as the dogs have helped us understand why battered women do not leave their violent situations voluntarily, perhaps they can also suggest ways the women can reverse being battered. A first step would seem to be to persuade the battered women to leave the battering relationship or persuade the batterer to leave." *Id.*

256. *Id.*

focus on male domination as the primary explanation for domestic violence, based on the notion that domestic violence is a patriarchal tool. This emphasis on male domination was an explicit rejection of family violence theory. In this Part, I will show how this foundation contributed to the feminist “turn” to criminal law as a preferred solution to domestic violence.

My second objective in this Part is to explain how this turn to criminal law developed into feminist support for mandatory criminal interventions. I argue that once criminal intervention became the solution to domestic violence, radical feminist notions of false consciousness helped advocates overcome reservations about overriding individual women’s preferences. The feminist understanding of domestic violence as patriarchal force again played a significant role. If domestic violence was a tool to keep all women subordinate, individual women who refused criminal intervention—the solution—threatened the interests of women as a class. Because such women could be perceived as blind to the reality of domestic violence, feminists could more easily advocate policies they perceived as being in the individual woman’s—and all women’s—best interests.

#### A. *Domestic Violence as Crime*

So far I have been discussing domestic violence primarily as a theoretical matter. I have focused on how various theorists, including feminists, understood its etiology. But domestic violence was (and is) a real problem. Women were injured by male partners, and sometimes killed. For battered women’s advocates, the first priority in the fight against domestic violence was protecting individual women.

In this first section, I discuss the feminist turn to criminal law. This turn was an effort to protect women from male violence. Also important, I argue, was the promise criminal law held for women’s liberation. Many advocates believed that criminal justice intervention could end domestic violence and promote women’s equality.

While criminal statutes in the late 1970s offered provisions under which abusive husbands could be charged, specific statutory requirements and police reluctance to interfere in domestic disputes meant few arrests were made.<sup>257</sup> For example, in the case of misdemeanor offenses, which include simple assault and battery and constitute the bulk of domestic violence incidents, most state statutes required police officers to witness an offense before making a warrantless arrest.<sup>258</sup> In contrast, for felony offenses, police officers could make warrantless arrests where there was probable

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257. See Parnas, *supra* note 48, at 917–22; Truninger, *supra* note 148, at 271–73.

258. MARTIN, *supra* note 36, at 90; see, e.g., CAL. PEN. CODE § 836 (West Supp. 1971).

cause to suggest an offense had been committed.<sup>259</sup> For both types of crimes, however, police could exercise their discretion and decline to arrest.

Prosecutorial discretion was another barrier to effective criminal justice intervention. While there were few arrests in domestic violence cases, there were even fewer prosecutions.<sup>260</sup> Feminists attributed the low prosecution rate to prosecutors' sexist beliefs about the nature of domestic violence.<sup>261</sup> However, a significant reason for the low prosecution rate was that victims frequently refused to testify.<sup>262</sup> Feminists nevertheless blamed male domination, explaining that threats from batterers and discouragement from sexist prosecutors were to blame.<sup>263</sup>

From the beginning of the battered women's movement, the use of criminal law, and by extension the police, to fight domestic violence was controversial. Feminists were mindful of the role the criminal justice system played in legitimizing various forms of oppression.<sup>264</sup> Early feminists, including those engaged in the anti-rape movement, voiced concern over substituting one form of oppression, male domination, with another: state control.<sup>265</sup> Supporting the oppression of men was seen as contrary to feminists' liberation ideals.<sup>266</sup> Because feminists attributed official inaction to systemic male domination—the criminal justice system's failure to respond to domestic violence reflected the fact that men and masculine ideals controlled the system's institutions—they were not surprisingly reluctant to place battered women's protection in men's hands.<sup>267</sup> Finally, a small con-

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259. MARTIN, *supra* note 36, at 90; *see, e.g.*, CAL. PEN. CODE § 836(3) (West Supp. 1971).

260. *See* LISA G. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE, 26–27 (Center for Women Policy Studies, 1981).

261. *See* Woods, *supra* note 20, at 10.

262. LERMAN, *supra* note 260, at 35; *see also* Raymond I. Parnas, *Judicial Response to Domestic Violence*, 54 MINN. L. REV. 585, 594 (1969) (“[I]n over half of these cases [the female victim] either requests dismissal of the charges or fails to appear at all when the case is called.”).

263. *See* Woods, *supra* note 20, at 10.

264. *See, e.g.*, Schechter, *supra* note 65, at 47–48 (“While making wife-beating a crime directly attacks women's oppression within the family, it, at the same time, re-legitimizes existing institutions—institutions that are sometimes racist and hostile to poor people. We, as a movement, have been left with trying to deal with this dilemma.”).

265. *See, e.g.*, Letter from Linda Kupis to Female Alliance Against Rape, in *More Power for the State*, NEWSLETTER (Feminist Alliance Against Rape, D.C.) Sept./Oct. 1974, at 13 (“Because we know the horror and frustration of oppression and exploitation, we must decide if the only way of alleviating our own is to cooperate with the criminal justice system, to shift this burden of oppression onto other shoulders.”) (emphasis in original omitted).

266. *Id.*

267. *See* discussion *supra* Part III.D.

tingent of advocates recognized that battered women might not want the state involved in their private lives.<sup>268</sup>

Battered women's advocates also worked to establish non-criminal remedies. One strategy was to establish shelters that offered a space for women fleeing abuse.<sup>269</sup> A second strategy was to increase battered women's access to civil protection orders.<sup>270</sup> In the mid-1970s, women could typically only obtain an order directing a partner to refrain from abuse as part of a divorce proceeding.<sup>271</sup> Civil protection orders were not yet available to unmarried women or women not seeking divorce. In 1975, battered women's advocates drafted and later helped pass the Pennsylvania's Protection from Abuse Act (PFA), which enabled women to file for orders of protection against non-spouses.<sup>272</sup> Similar legislation in other states soon followed.<sup>273</sup> Advocates quickly learned, however, that civil protection orders were effectively useless without police enforcement.<sup>274</sup>

In 1976, two companion class actions were filed on behalf of battered women against police departments in New York (*Bruno v. Codd*)<sup>275</sup> and California (*Scott v. Hart*).<sup>276</sup> The complaints alleged police failure to respond to battered women's calls for help.<sup>277</sup> The plaintiffs argued that domestic violence was a crime like any other, and its victims were therefore entitled to the same legal protections as other victims of crime, including protection through a perpetrator's arrest, prosecution, and conviction.<sup>278</sup> Laurie Woods and Pauline Gee were attorneys in the respective cases, and each wrote articles advising advocates interested in bringing similar suits.<sup>279</sup>

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268. See, e.g., Barbara E. Sanson, Comment, *Spouse Abuse: A Novel Remedy for a Historic Problem*, 84 DICK. L. REV. 147, 157 (1979–80).

269. See SCHECHTER, *supra* note 1, at 56.

270. See Margaret Klaw & Mary Scherf, *Feminist Advocacy: The Evolution of Pennsylvania's Protection From Abuse Act*, 1 U. PA. J. L. & SOC. CHANGE 21 (1993).

271. MARTIN, *supra* note 36, at 102.

272. 35 PA. STAT. ANN. §§ 10182, 10186 (repealed 1990) (West through 2014 Reg. Sess. Acts).

273. See, e.g., CAL. PENAL CODE § 273.5 (West Supp. 1979); 1977 Conn. Acts 77–336 (Reg. Sess.).

274. Klaw & Scherf, *supra* note 270, at 22–23.

275. *Bruno v. Codd*, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978). The complaint also alleged violations by actors in the Family Court and Probations Department in regards to the issuance of protective orders, which were subsequently dismissed. *Bruno*, 407 N.Y.S.2d at 167.

276. Complaint, *Scott v. Hart*, No. C-76-2395 (N.D. Cal. Oct. 28, 1976).

277. See Woods, *supra* note 20, at 7; see Pauline W. Gee, *Ensuring Police Protection for Battered Women: The Scott v. Hart Suit*, 8 SIGNS 554, 556, 564 (1983).

278. See Woods, *supra* note 20, at 7, 18–19; Gee, *supra* note 277, at 558–59.

279. Woods, *supra* note 20 (attorney for plaintiffs in *Bruno v. Codd*); Gee, *supra* note 277 (attorney for plaintiffs in *Scott v. Hart*).

The articles provide a unique glimpse into how feminist lawyers viewed the function of the criminal law and arrest more specifically. They demonstrate feminists' belief in the potential of criminal justice intervention to protect women from abusive partners and end domestic violence and male domination more generally.

Woods and Gee both viewed domestic violence from a feminist perspective and believed that the nature of domestic violence warranted a criminal justice response:

The perception of the cause of woman-assault determines the solution one offers to the problem. As one commentator has pointed out, if one believes that men assault women because of job stress, then one would believe that changing the economic conditions and working conditions of men, by either legislative reform or by revolution, would provide both the short and long term solution. If one believes the cause to be psychological abnormalities in the man or in the woman, one would look for the solution in counseling for either or both.<sup>280</sup>

Woods' support for criminal remedies came from her rejection of psychological and family violence perspectives of domestic violence. Economic stress did not cause "women-abuse" because the phenomenon occurred across all socioeconomic classes.<sup>281</sup> Moreover, women, more likely to be poor, "do not assault their husbands."<sup>282</sup> Neither was men's psychology to blame. It was not possible to describe half of all men who live with women, the apparent percentage of abusers, as "abnormal."<sup>283</sup> No, Woods argued, "the cause of woman-assault is both simpler and deeper: men beat women because society and its institutions encourage and permit woman-assault."<sup>284</sup> Woods went on to explain how this permission flowed from sexist ideals.<sup>285</sup>

Woods' theory is consistent with an understanding of domestic violence as patriarchal force. Woods viewed male domination as *the* cause of domestic violence. She dismissed theories grounded in socioeconomics (i.e. family violence) and psychology, and the solutions that followed from

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280. Woods, *supra* note 20, at 11.

281. *Id.*

282. *Id.*

283. *Id.* at 12. Woods cited ROGER LANGLEY & RICHARD C. LEVY, *WIFE BEATING: THE SILENT CRISIS* (1977), which claimed that half of all married women will become a victim of domestic violence. See also WALKER, *supra* note 162, at ix, for a similar statistic of female victimization.

284. Woods, *supra* note 20, at 12.

285. *Id.* at 9, 12.

them.<sup>286</sup> The more apt solution was “challenging the social sanctions that permit, encourage, and condone” domestic violence.<sup>287</sup> This solution, according to Woods, required increased arrest, prosecution, conviction, and sentencing of wife-assaulters.<sup>288</sup> So long as men correctly perceived that they would not be arrested or prosecuted, domestic violence would continue.<sup>289</sup>

Woods envisioned a connection between the actions of individual batterers and the overarching system of male domination. Every time a batterer was arrested, sexist beliefs were challenged. For example, according to Woods, police failure to arrest was based on the assumption that women were the “private” property of men, a description that invoked the radical feminist critique of the family.<sup>290</sup> Arrest challenged this belief, and with it the system of male domination it supported. Fighting domestic violence was therefore a way to combat male domination; and combating male domination in turn fought domestic violence. Once the beliefs that supported the system were challenged, men could no longer justify their violence against women.<sup>291</sup>

Woods’ prescription of holding men criminally accountable corresponded with the Dobashes’ view of domestic violence as a deliberate act that maintained male domination rather than a reaction to the strictures of sexism. She drew a clear distinction between women as victims and men as perpetrators, signaling not only a departure from family violence theory but also a firm stance against victim blaming. Argued Woods, it is “the man, who is, after all, the problem.”<sup>292</sup>

For Woods, criminal justice intervention and victim blaming were explicitly linked. Comparing mediation/adjustment with arrest, Woods argued that mediation was inappropriate for two reasons. First, true mediation requires voluntary participation of both parties, which, she argued, presupposes equality of power.<sup>293</sup> According to Woods, equality of power is inconceivable in domestic violence cases where “[t]he victim is physically weaker,” economically dependent on her husband, and “trapped by fear.”<sup>294</sup> Second, mediation “implies that both parties are at fault.”<sup>295</sup> Woods flat out rejected this possibility. “Men assault women,” she explained, “on the

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286. *Id.* at 11.

287. *Id.* at 12.

288. *Id.*

289. *Id.* at 12–13.

290. *Id.* at 9; *see also* discussion *supra* Part III.D.

291. Woods, *supra* note 20, at 12–13.

292. *Id.* at 8.

293. *Id.* at 9.

294. *Id.*

295. *Id.*

slightest ‘excuse’ and often with no ‘excuse’ at all.”<sup>296</sup> In other words, there is no such thing as female provocation.<sup>297</sup>

By rejecting mediation as victim blaming, Woods positioned arrest as the non-victim-blaming alternative. The same was true of prosecution. Like police reluctance to arrest, official failure to prosecute domestic violence cases rested on sexist beliefs. Prosecutors accepted the myth that battered women resisted prosecution.<sup>298</sup> This myth was grounded in assumptions that women prefer to reconcile and/or view domestic violence as a “family dispute” rather than a public crime. Neither were true, Woods argued: “The real reason [women fail to prosecute], is more likely that the woman is pressured into dropping the charges, either by her husband, or by the very police and district attorneys who criticize her for doing so.”<sup>299</sup> The result is that victims “are discouraged from prosecuting and then *blamed* for dropping prosecutions.”<sup>300</sup>

Finally, Woods believed criminal justice intervention was preferable to non-criminal alternatives.<sup>301</sup> She considered only one alternative: the establishment of battered women’s shelters. With half of all women who live with men becoming victims, however, there would never be enough: “To meet the need we would need a shelter on almost every block.”<sup>302</sup> Moreover, while shelters were important in providing immediate respite for individual women, they could not be a long-term solution to domestic violence.<sup>303</sup> After all, shelters did nothing to challenge the institutions that supported male domination.

Gee focused on the legal technicalities of bringing a class action suit like *Scott v. Hart*.<sup>304</sup> Like Woods, she defended criminal remedies in domestic violence cases, insisting they were more effective than civil options: “the protections and remedies afforded by the civil law cannot substitute for effective enforcement of protections and remedies available under the criminal justice system.”<sup>305</sup> Gee was thinking of protection,<sup>306</sup> as well as deterrence: “individual civil actions for money damages do not punish or deter batterers

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296. *Id.*

297. Woods makes a point similar to this earlier in the article when considering the different terms to describe domestic violence, arguing none fit since “all focus on the woman and ignore the man, who is, after all, the problem.” *Id.* at 8.

298. *Id.* at 10.

299. *Id.*

300. *Id.* (emphasis added).

301. *Id.* at 12.

302. *Id.*

303. *Id.* (“[S]helters do not address or attack the cause of the problem[.]”).

304. Gee, *supra* note 277.

305. *Id.* at 556.

306. *Id.*

who are willing to pay for their license to beat.”<sup>307</sup> Without the involvement of the criminal justice system—and especially the police—the opposite of deterrence happened: the batterer’s criminal behavior was “sanction[ed].”<sup>308</sup>

In emphasizing the importance of criminal deterrence and the danger of institutional sanctioning, Gee was aligned with Woods; however, she took her analysis further by introducing the state as a neutral arbiter of power.<sup>309</sup> In Gee’s configuration, men have power and women do not. Domestic violence exacerbates this inequality; she noted the “overwhelming *powerlessness* of women who are physically abused by men.”<sup>310</sup> By punishing batterers, the state neutralizes this difference.<sup>311</sup> In this arrangement, the state is not “male”; it is aligned with women. The state, through its criminal law, exercises power to limit men’s dominance over women. Criminal justice intervention again becomes a path to women’s liberation.

An article published by long-time battered women’s advocate Barbara Hart along with Lauren France made this connection explicitly.<sup>312</sup> Hart and France described the use of mediation in criminal domestic violence and child sexual abuse cases. The authors then asked, “Sounds very feminist-like, no?”<sup>313</sup> They immediately provided an answer: “No.”<sup>314</sup>

The authors drew analogies between mediation of domestic violence cases and “adjustment,” the use of counseling techniques by police officers to avoid arrest.<sup>315</sup> They argued that mediation, like adjustment, discourages criminal justice intervention and therefore pushes domestic violence back into the private sphere: “After years of struggle and work to bring battering to the public eye and to affect changes in the justice system so that perpetrators are held criminally liable . . . mediation now threatens to once again ‘privatize’ and decriminalize these violent assaults.”<sup>316</sup> This privatization was significant because, as the radical feminists had argued, keeping domestic

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307. *Id.*

308. *Id.*

309. *Id.* at 555.

310. *Id.* (emphasis added).

311. *Id.* at 567 (“[L]egal intervention in the cycle of domestic violence is vitally important, for it is the legal system . . . which has the power (that women and children do not presently have) to impose serious consequences on those who batter.”).

312. Barbara Hart & Lauren France, *Mediation: Consider the Odds*, AEGIS – MAGAZINE ON ENDING VIOLENCE AGAINST WOMEN (Feminist Alliance Against Rape, D.C.) 1985. Incidentally, Hart would later write an article supporting mandatory arrest. See Barbara Hart, *Arrest: What’s the Big Deal?*, 3 WM. & MARY J. WOMEN & L. 207 (1997).

313. Hart & France, *supra* note 312, at 55.

314. *Id.*

315. See Parnas, *supra* note 48, at 915.

316. Hart & France, *supra* note 312, at 57.

violence private guarantees its continuation.<sup>317</sup> Hart and France suggested that criminal justice intervention—a quintessentially public response—was the way to end domestic violence.

In Hart and France's formulation, decriminalization was also tied to family preservation. Like Walker, the authors believed separation was the preferred strategy in domestic violence cases. They rejected mediation as an attempt to keep the family together.<sup>318</sup> From the beginning, feminists viewed family preservation efforts as a way to keep domestic violence private, thus facilitating its continuation.<sup>319</sup> By tying reconciliation to mediation, Hart and France suggested that any effort to preserve a relationship in which violence is occurring is anti-feminist. Moreover, reconciliation was apparently *not* what abused women wanted.<sup>320</sup> The goal of family preservation was, according to the authors, "somewhat antithetical to the needs of the battered woman."<sup>321</sup>

### B. Mandatory Criminal Interventions

The cases of *Bruno* and *Scott* were real turning points in the feminist campaign against domestic violence. In 1978 and 1979, the actions settled with police stipulations that "domestic violence would be treated like any other criminal behavior."<sup>322</sup> A key component of this de-exceptionalization was increased arrest. In *Scott*, the police agreed to exercise a no arrest-avoidance policy.<sup>323</sup> They further undertook to advise women of their right to make a citizen's arrest.<sup>324</sup> The police in *Bruno* agreed not to mediate or attempt to reconcile the parties.<sup>325</sup> Where an officer had reasonable cause to believe a husband had committed a misdemeanor offence against his wife, or had witnessed the husband committing a misdemeanor, the officer could not refuse to arrest the husband without justification.<sup>326</sup> Finally, the consent

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317. *See supra* Part III.D.

318. Hart & France, *supra* note 312, at 57.

319. *Id.* at 137–38.

320. Hart & France, *supra* note 312, at 57.

321. *Id.*

322. Gee, *supra* note 277, at 562. *See also* Woods, *supra* note 20, at 28 ("[T]he terms of the police agreement guarantee to battered women the same police protection and assistance afforded by the state local law to other victims of crimes.").

323. Gee, *supra* note 277, at 561–62.

324. *Id.* at 562.

325. Woods, *supra* note 20, at 28.

326. Woods, *supra* note 20, at 29. The police agreed not to rely on four factors in making the decision to arrest, *to wit*: (1) the parties are married; (2) the victim has not sought or obtained an order of protection from the family court; (3) the victim may choose a particular court (i.e. family court versus criminal court) in which to proceed; (4) the officer believes it is preferable to mediate the parties. *Id.*

decree imposed a mandatory duty on the police to arrest a husband where there was reasonable cause to believe he had committed a felony against his wife or violated an order of protection.<sup>327</sup> According to Woods, the plaintiffs agreed that the victim should have no say in the arrest decision.<sup>328</sup> There was no way, she explained, to determine if the woman's expressed desire was real or grounded in fear of retaliation by her husband.<sup>329</sup>

*Bruno* and *Scott* spurred similar actions across the country. In 1980, the Police Executive Research Forum, a research, policy and support organization for law enforcement departments, released a report recommending arrest at least in cases of domestic disputes involving serious injury (including misdemeanors), use of a deadly weapon, and violation of a protection order.<sup>330</sup> The report explained that the move to reshape the police response to domestic violence was in part a reaction to class action suits brought by battered women against police agencies.<sup>331</sup>

Legislative reform was also taking place at the time the *Bruno* and *Scott* cases were being litigated, due in large part to the efforts of battered women's advocates. By 1981, twenty-one states had amended their statutes to permit warrantless arrests in domestic violence cases involving misdemeanor offences (i.e. an officer no longer had to witness the offence to make an arrest).<sup>332</sup> Another fourteen allowed warrantless arrest where there was probable cause to believe an abuser had violated a protection order.<sup>333</sup> By 1988, all but two states had enacted these reforms.<sup>334</sup>

Empirical support for pro-arrest law and policy came soon after. In 1984, data from the Minneapolis Domestic Violence Experiment was re-

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327. *Id.* at 28.

328. *Id.* at 29.

329. *Id.*

330. NANCY LOVING, RESPONDING TO SPOUSE ABUSE & WIFE BEATING: A GUIDE FOR POLICE (Police Executive Research Forum, 1980). While the report recommended increased arrest, it was careful to not advocate a mandatory policy, "[i]t would be unrealistic and unproductive to suggest that arrest should be used in every spouse abuse or wife beating case, particularly for those misdemeanor cases which are clearly victim-precipitated or involve victims who adamantly refuse to press charges." *Id.* at 61-62.

331. *Id.* at v. The report also credited feminists with pushing police to reform, stating "[f]eminist groups . . . are in the forefront of those demanding more sensitive handling of these cases by police." *Id.* at iv.

332. Lisa G. Lerman, *State Legislation on Domestic Violence*, 4 RESPONSE TO VIOLENCE IN THE FAMILY 3 (Sept./Oct. 1981).

333. SCHECHTER, *supra* note 1, at 159. According to Schechter, these changes were "a result of the [battered women's] movement." *Id.*

334. Alabama and West Virginia did not allow for warrantless misdemeanor arrests. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859 (1996).

leased comparing the deterrence values of arrest, ordering the offender away from the premises, and adjustment.<sup>335</sup> The findings suggested that arrest was the most effective response.<sup>336</sup> While the study's authors were careful not to advocate that arrest be required in misdemeanor assault cases,<sup>337</sup> they recommended a "presumption of arrest," meaning policies stipulating that "an arrest should be made unless there are good, clear reasons why an arrest would be counterproductive."<sup>338</sup> This was the stipulation agreed to by the police defendants in *Bruno*.<sup>339</sup>

Citing the Minneapolis study, the Attorney General's Task Force on Family Violence recommended that "the chief executive of every law enforcement agency should establish arrest as the preferred response in cases of family violence."<sup>340</sup> However, empirical data alone did not drive the recommendation. Favoring feminist theory over family violence research on mutual violence, the Task Force explained that arrest was preferable to mediation since the latter incorrectly "[a]ssumed that the parties involved are of equal culpability."<sup>341</sup>

The value of pro-arrest and mandatory arrest policies, however, depended on prosecutorial follow-through. If prosecutors failed to file charges or filed and then dropped charges, arrest offered little deterrent value. Moreover, if prosecutors were unlikely to proceed with a case, the police were less likely to make the effort to arrest. As a result, increasing the rate of prosecution in domestic violence cases became tied to pro-arrest and mandatory arrest policies.<sup>342</sup> However, there was an additional hurdle for prosecution: many women, after charges were filed, requested that prosecutors drop the

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335. The Minneapolis Domestic Violence Experiment was a study funded by the National Institute of Justice and conducted by the Minneapolis Police Department and the Police Foundation to assess the effectiveness of police responses to domestic violence. LAWRENCE SHERMAN & RICHARD BERK, POLICE FOUND. REP., THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT (1984), <http://www.policefoundation.org/content/minneapolis-domestic-violence-experiment>.

336. *See id.* at 7.

337. *Id.* at 8. ("Until subsequent research addresses that issue more thoroughly, it would be premature for state legislatures to pass laws requiring arrests in *all* misdemeanor domestic assaults.") (emphasis added).

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

339. *See Woods, supra* note 20, at 29.

340. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 22 (1984).

341. *Id.* at 23.

342. *See Hanna, supra*, note 334, at 1860 (discussing how mandatory arrest laws led to reform efforts aimed at greater prosecution in domestic violence cases).

charges.<sup>343</sup> Case attrition was therefore a product of victim and prosecutorial reluctance (feminists connected the two, arguing, as Laurie Woods did, that prosecutors pressured women to drop charges).<sup>344</sup> In the late 1970s, a few jurisdictions—some with funding from what was then the federal Law Enforcement Assistance Administration—began experimenting with “no-drop” prosecution policies.<sup>345</sup> Such policies either discouraged (“soft no-drop”) or prevented (“hard no-drop”) prosecutors and victims from dropping a case. In hard no-drop jurisdictions, victims who did not wish the case to proceed and therefore refused to testify faced penalties—including jail—for contempt.<sup>346</sup>

### 1. No-Drop Prosecution

In 1981, the Center for Women and Policy Studies (CWPS) published a report recommending hard, no-drop prosecution policies in domestic violence cases.<sup>347</sup> The CWPS was not exactly a feminist organization. Battered women’s advocate Betsy Warrior accused the CWPS of becoming involved in women’s issues only after they had become “‘credible,’ ‘fashionable,’ and, even more importantly, ‘fundable.’”<sup>348</sup> Warrior claimed the CWPS’s goals were at odds with those of battered women’s advocates.<sup>349</sup> The Feminist Alliance Against Rape newsletter accused the CWPS of “representing itself as a feminist organization” to get funding for rape research

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343. The Center for Women and Policy Studies, for example, interviewed prosecutors in three counties in three states (Pennsylvania, California, and Florida) and found approximately 80% of criminal charges filed were dismissed prior to disposition because the victim requested dismissal or failed to appear. LERMAN, *supra* note 260, at 18.

344. Woods, *supra* note 20, at 10.

345. The Law Enforcement Assistance Administration (LEAA) was created in 1968 to provide federal funding to states to improve the criminal justice response to crime (it existed until 1980). In 1978, the LEAA established the Family Violence Program, which directed funding specifically to domestic violence programs. A portion of this funding went to programs aimed at increasing prosecution rates in domestic violence cases. Some of these programs experimented with no-drop prosecution policies. See LERMAN, *supra* note 260.

346. *Id.* In 1981, a few cases of battered women in North Carolina being jailed for refusing to testify were reported.

347. LERMAN, *supra* note 260.

348. Betsy Warrior, *National Directory – a Rip Off?*, NEWSLETTER (Nat’l Comm’n for the Elimination of Violence Against Women, D.C.), Dec. 1977, at 6.

349. *Id.* (“[P]erspectives and goals [of CWPS] are often different from those of the initiating groups – to the detriment of the target population.”).

while failing to make itself accountable to feminists, and for failing to conduct research from a feminist perspective.<sup>350</sup>

Despite this ideological tension, the CWPS report relied on the feminist understanding of domestic violence as patriarchal force to recommend no-drop prosecution. The report's author, Lisa Lerman, suggested that domestic violence was neither a psychological problem,<sup>351</sup> nor a product of social stress,<sup>352</sup> but was instead traceable to institutional sanctioning,<sup>353</sup> which she connected to sexist ideology.<sup>354</sup> This understanding led Lerman to support criminal intervention as the solution.<sup>355</sup> Accepting the necessity of criminal justice intervention, Lerman turned to ways to increase the number of domestic violence prosecutions. She acknowledged that prosecution rates were low because of victim non-cooperation.<sup>356</sup> She explained that prosecutors attributed a victim's request to have domestic violence charges withdrawn to reconciliation: "passions have cooled," and the "relationship returns to normal."<sup>357</sup> Reconciliation did happen, Lerman admitted, but not in the way envisioned by prosecutors. Citing Lenore Walker, Lerman explained that reconciliation was a product of the cycle of violence. During the phase of "loving respite," victims "accept their mates' apologies and promises never to hit them again and withdraw from prosecution."<sup>358</sup>

Lerman saw no-drop prosecution as a way to overcome batterers' control over victims.<sup>359</sup> She recommended, for example, that prosecutors should

350. *LEAA Research – East . . .*, NEWSLETTER (Feminist Alliance Against Rape, D.C.), Fall 1975, at 3-5. Susan Schechter described the CWPS newsletter *Response* as "focused largely on the criminal justice, hospital, social service, and federal responses to rape and battering," while she called *Aegis* (formerly the FAAR newsletter) "the only journal dedicated to preserving and building a feminist analysis and grassroots movement." SCHECHTER, *supra* note 1, at 135.

351. LERMAN, *supra* note 260, at 14 ("Battering can no longer be regarded merely as an 'individual' problem or a 'relationship' problem[.]").

352. *Id.* ("[S]pouse abuse is epidemic in the United States, pervading every race and ethnic group, every economic class, every geographic area.").

353. *See id.* ("Battering . . . must be viewed as perpetrated, at least in part, by inadequate or inappropriate responses by the institutions from which violent families seek help."). Lerman argued that failure to prosecute domestic violence cases "communicates to victims and batterers that family violence is not a serious crime," which in turn, "gives batterers tacit permission to continue their behavior." *Id.* at 14.

354. *See id.* at 17.

355. *Id.* at 147 ("[B]y prosecuting spouse abuse cases, prosecutors may influence . . . social service agencies which still treat wifebeating as a characteristic behavior of 'the multiproblem family' and [therefore] fail to respond in a useful way.").

356. *Id.* at 13.

357. *Id.* at 20.

358. *Id.*

359. Lerman attributed low rates of prosecution in domestic violence cases in part to victims' "fear of, or emotional attachment to the abuser." LERMAN, *supra* note 260,

avoid asking victims to sign charging complaints in order to “deprive the batterer of his power to manipulate the criminal justice system by intimidating the victim.”<sup>360</sup> This recommendation assumes that women’s requests to withdraw criminal complaints are coerced. Placing Lerman’s argument for no-drop prosecution in the context of her cycle of violence discussion, she also seems to claim that no-drop prosecution could prevent women from making the misguided decision to return to an abusive partner who is likely to re-offend. Lerman also appears to support no-drop policies as a means of challenging male domination. Finally, because Lerman dismisses a victim’s decision to return to an abusive spouse as either coerced or misguided, it is easy for her to disregard the victim’s preference not to prosecute.

Prosecutors began implementing no-drop prosecution policies in earnest in the late 1980s, and by the 1990s such policies were widespread.<sup>361</sup> In 1996, two thirds of prosecutors’ offices reported having adopted no-drop prosecution policies (though the majority were soft no-drop policies).<sup>362</sup> That year, law professor (and former domestic violence prosecutor) Cheryl Hanna published an article defending hard no-drop policies.<sup>363</sup> Like Lerman, Hanna connected battering to the larger system of male domination. For example, she believed that prosecution of individual batterers, even if unsuccessful, weakened the sexist ideology on which male domination rested: “the goals of prosecution should be defined broadly. Reducing recidivism is an important goal, but it may not always be possible. Still, by penalizing [battering], the criminal justice system communicates strong educational and social messages.”<sup>364</sup>

In Hanna’s view, no-drop prosecution policies promoted women’s interests as a class.<sup>365</sup> Forcing a battered woman to testify protected that woman and other women who might have future relationships with the batterer.<sup>366</sup> Protection was not the only goal, however: “The societal benefits

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at 18. Lerman’s support for no-drop prosecution can therefore be interpreted as a remedy to individual male control. *See id.* at 13.

360. *Id.* at 148.

361. Andrea J. Nichols, *No-Drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy*, 20 J. INTERPERSONAL VIOLENCE 2114, 2116–17 (2014).

362. *Id.* at 2117 (“A ‘soft’ no-drop policy generally assumes prosecution, but allows for an assessment of risk factors and contextual concerns, including the victim’s voice. . .”).

363. Hanna, *supra* note 334.

364. *Id.* at 1889–90, 1907 (“In the long term, such decisions to mandate [battered women’s] participation will begin to erase the misconception that these cases are not worth pursuing criminally because domestic violence is a private family matter, not a crime.”).

365. *See id.* at 1888.

366. *Id.* at 1895.

gained through [no-drop prosecution] far outweigh any short-term costs to women's autonomy *and collective safety*.<sup>367</sup> Sacrificing the autonomy (and perhaps protection) of individual women also promoted all women's equality: "we should choose the solution that best promotes long-term equality for women in the current stage of women's progress and our ideal concept of gender."<sup>368</sup> Prosecuting batterers thus promoted all women's liberty interests.

Hanna's linking of domestic violence with male domination, and individual instances of battering with widespread male oppression, informed her understanding of battered women's refusals to testify. Like Lerman, Hanna explained this refusal in terms of male control: women asked to have cases dropped because men pressured them to do so.<sup>369</sup> Hanna also intimated that a woman's reluctance to testify could stem from a deeper source. She referenced the case of Maudie Wall, who was jailed after refusing to testify against her abusive husband.<sup>370</sup> Feminists were, not surprisingly, disturbed by this outcome.<sup>371</sup> Hanna thought the result was justified as a wake up call, "Ms. Wall's overnight stay in jail may have been the first time that she recognized the seriousness of the abuse against her."<sup>372</sup> This is a claim of false consciousness. From Hanna's perspective, without state intervention, Ms. Wall was incapable of seeing domestic violence for the serious crime it was. Hanna's willingness to perceive battered women who refuse to testify as unseeing supported her argument for no-drop prosecution not only as a way to protect individual battered women but also to liberate women as a class. Assuming a victim's decision not to testify was misinformed, and accepting the connection between prosecuting batterers and challenging male domination, Hanna could more easily promote no-drop prosecution as a way of improving all women's status.

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367. *Id.* at 1857 (emphasis added).

368. *Id.* at 1886.

369. *See id.* at 1891.

370. *Id.* at 1866. Maudie Wall, a domestic violence victim, filed an abuse complaint against her husband, but later refused to testify and was jailed pursuant to Anchorage, Alaska's no-drop prosecution policy. Wall was released after one night, once her husband agreed to probation and counseling. See John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J., Aug. 22, 1983, at 4, for further discussion about the case.

371. Hanna, *supra* note 334, at 1892. According to Hanna, "[m]uch of that criticism is misplaced." *Id.*

372. *Id.*

## 2. Mandatory Arrest

Mandatory arrest laws, which require police to make an arrest where there is reasonable cause to believe domestic violence has occurred, proliferated alongside no-drop prosecution policies. By 1989, thirteen states had implemented mandatory arrest provisions.<sup>373</sup> By 2007, an additional seven states and the District of Columbia mandated arrest in certain domestic violence cases.<sup>374</sup>

In addition to feminist advocacy and the results of the Minneapolis Experiment, the proliferation of mandatory arrest laws can be traced to two events. In 1984, a federal court refused to dismiss Tracey Thurman's claim that the Torrington, Connecticut police department should be held liable for injuries she sustained in an assault by her estranged husband.<sup>375</sup> The court held that the police department's failure to respond to Thurman's repeated calls to have her husband arrested could be a violation of her right to equal protection.<sup>376</sup> Ultimately, the department paid Thurman \$1.9 million in to settle the lawsuit.<sup>377</sup> Connecticut and other states quickly enacted mandatory arrest laws to avoid similar liability.<sup>378</sup> The second boost came in 1994, with passage of the Violence Against Women Act ("VAWA").<sup>379</sup> Enacted as part of the Violent Crime and Law Enforcement Act, VAWA encouraged criminal justice intervention as the preferred strategy in domestic violence cases.<sup>380</sup> The bulk of VAWA's funding (\$800 million) was allocated to Services for Training Officers and Prosecutors (STOP) grants, which were meant to encourage "widespread apprehension, prosecution, and adjudication of persons committing violent criminal acts against women."<sup>381</sup> Significantly, an additional \$120 million was made available to states for "encouraging arrest policies," including implementing "mandatory arrest or pro-arrest programs and policies in police departments, including

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373. See EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 154 (James A. Inciardi ed., 2d ed. 1996).

374. American Bar Association Commission on Domestic Violence, Domestic Violence Arrest Policies by State (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic\\_Violence\\_Arrest\\_Policies\\_by\\_State\\_11\\_07.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.authcheckdam.pdf). There is some variation by state. For example, in practice, New Jersey's statute may only mandate arrest in felony cases. See *id.*; N.J. Stat. Ann. § 2c:25-21.

375. *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1529 (D. Conn. 1984).

376. *Thurman*, 595 F. Supp. at 1529.

377. Eileen McNamara, *Batterers Win Another Round*, BOS. GLOBE, May 13 1998, at B1.

378. See GOODMARK, *supra* note 4, at 106-07.

379. 42 U.S.C.A. § 13981 (Westlaw through Pub. L. 113-45).

380. GOODMARK, *supra* note 4, at 21.

381. 42 U.S.C.A. § 13981 (Westlaw through Pub. L. 113-45).

mandatory arrest programs and policies for protection order violations.”<sup>382</sup> The purpose of these grants, according to the Act, was to encourage states to “treat domestic violence as a serious violation of criminal law.”<sup>383</sup>

Joan Zorza, senior attorney at the National Center on Women and Family Law (NCWFL), and board member of the National Coalition Against Domestic Violence (NCADV), testified in Congress in favor of the mandatory arrest provision.<sup>384</sup> She drew from a report co-authored with Laurie Woods, counsel for the battered women plaintiffs in *Bruno* and director of the NCWFL.<sup>385</sup> Mandatory arrest, Zorza testified, “convey[ed] the message to the abuser, [the] victim, their children, and to all of society that domestic violence [was] a crime which society [would] not tolerate.”<sup>386</sup> Deterrence was not the only goal, however. Mandatory arrest was also important for dispelling myths about domestic violence, including those held by women: “If more women understand that abuse is wrong, that is a success.”<sup>387</sup>

By 1994, the Minneapolis Experiment’s findings had been called into question. Shortly after the Experiment, the National Institute of Justice sponsored six replication studies, and the results became available in the early 1990s.<sup>388</sup> The replication studies found that the deterrent effect of arrest in domestic violence cases decreased over time, and that only certain

382. *Id.*

383. *Id.* See Rachele Brooks, *Feminists Negotiate the Legislative Branch: The Violence Against Women Act*, in *FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE* 65, 76–77 (Cynthia R. Daniels ed., 1997), for the allocation of grants per VAWA provision in the Act’s final version. In 2005, section 102 of VAWA, the section that concerns the award of grants to encourage arrest, was amended by removing the text “mandatory arrest.” Grants to encourage arrest are now allocated to states implementing pro-arrest policies.

384. *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 35 (1994) (testimony of Joan Zorza, Senior Attorney, Nat’l Center on Women and Family Law), 1994 WL 313567 [hereinafter *Hearing*].

385. JOAN ZORZA & LAURIE WOODS, NAT’L CENTER ON WOMEN & FAMILY LAW, NAT’L BATTERED WOMEN’S LAW PROJECT, MANDATORY ARREST: PROBLEMS AND POSSIBILITIES (1994).

386. *Hearing*, *supra* note 384.

387. *Id.* Demonstrating the link between feminist advocacy and mandatory arrest law, shortly after VAWA passed, then-Senator Joe Biden (D-DE) sent “Joan” a note saying, “thank you and all the members of the National Battered Women’s Law Project for your tireless efforts on behalf of the Violence Against Women Law. Your dedication was invaluable—this important legislation would not have become law without you.” Letter from Joseph R. Biden Jr. to Joan Zorza (Dec. 15, 1994) (on file with Schlesinger Library, Harvard University).

388. FAGAN, *supra* note 12.

offenders (employed, married, white men) were deterred by arrest.<sup>389</sup> For other offenders, arrest had the potential to *increase* violence.<sup>390</sup> Thus, Zorza's emphasis on the communicative as opposed to deterrent effect of mandatory arrest made sense.<sup>391</sup>

Zorza's focus on communication suggests there is more at stake in mandatory arrest than simply protecting individual women. In 1992, while Zorza was a board member of NCADV, the organization published *A Current Analysis of the Battered Women's Movement*.<sup>392</sup> The document perfectly demonstrates the feminist understanding of domestic violence as patriarchal force. First, the publication rejected alternative psychological and family violence theories: "While there are some shared reactions to the experience of being battered (which are sometimes called "a battered women's syndrome") there is no particular *background* or *personality* that makes a woman more likely to be battered."<sup>393</sup> According to the text, the *only* factor predisposing women to domestic violence was biological sex.<sup>394</sup> To underline this point, the publication continued, "A battered woman may be of any race/ethnicity, religions, educational or socioeconomic background . . . None of us is exempt from the risk."<sup>395</sup>

Saying all women are equally likely to suffer domestic violence represents an anti-victim-blaming stance. Since personality and background are irrelevant, women cannot be accused of selecting abusive partners, a claim reinforced by the suggestion that women cannot predict which men will become batterers.<sup>396</sup> Furthermore, because personality defects observed in the battered woman are symptoms of abuse and not pre-existing flaws, batterers can be held responsible for women's behaviors attributable to the "battered woman syndrome." For the NCADV, domestic violence was about male domination. The group explained that, "the best work of the

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389. See generally, Sherman et al., *supra* note 12.

390. *Id.* at 139, 154–56.

391. Zorza and Woods rejected the findings of the replication studies. See JOAN ZORZA & LAURIE WOODS, NAT'L BATTERED WOMEN'S LAW PROJECT, ANALYSIS AND POLICY IMPLICATIONS OF THE NEW DOMESTIC VIOLENCE POLICE STUDIES 2–5 (1994).

392. See NAT'L COALITION AGAINST DOMESTIC VIOLENCE, BATTERED/FORMERLY BATTERED WOMEN'S TASK FORCE: A CURRENT ANALYSIS OF THE BATTERED WOMEN'S MOVEMENT (1992) [hereinafter CURRENT ANALYSIS]. According to the publication, the analysis took more than three years to complete. *Id.* at i.

393. *Id.* at 1 (emphasis added).

394. *Id.* at 1 ("The best predictor of whether you will be battered is whether you were born female."). The Task Force awkwardly added that "[a]lthough some males are battered too[]" in parentheses, but victims are described as female at every other point in the text. *Id.*

395. *Id.* at 1–2.

396. CURRENT ANALYSIS, *supra* note 392, at 2 ("It is often not possible to know in the early stages of a relationship whether a particular partner will be a batterer.").

Battered Women's Movement is the work based on an analysis and approach which . . . recognizes battering as an issue of power and control."<sup>397</sup> This theory was grounded in women's experiences: "We must, as a movement, remind ourselves that we do not need statistics and research to know the truth about battering, batterers, or battered women . . ." <sup>398</sup> In dismissing analyses based on quantitative data, the NCADV implicitly rejected family violence theory.<sup>399</sup>

The NCADV saw the relationship between male domination and domestic violence as both particular and general. On the particular level, battering was about individual men controlling their female partners.<sup>400</sup> On the general level, the actions of individual batterers were connected to the larger system of male control. First, *systemic* male domination encouraged individual acts of battering: "Violence is tolerated and maintained in the patriarchy through the interlocking structures of individual beliefs, institutional response, and social/cultural attitudes."<sup>401</sup> Here, the paper presumably refers to sexist ideology and the inadequate criminal justice response to battering. Second, and most significantly, individual acts of battering *reinforced* the larger system of male domination: "Widespread violence, including battering, is one important way the patriarchy maintains the power of men and the oppression of women."<sup>402</sup> Domestic violence affects *all* women, not just individual victims. Ending domestic violence therefore becomes one way to liberate women *as a class*.

This understanding of domestic violence as patriarchal force led the NCADV writers in the direction of criminal law. The "best work" of the battered women's movement, according to the publication, included not only that which recognized battering as an issue of power and control but also work that "establishe[d] battering as a crime."<sup>403</sup> While the publication did not discuss mandatory arrest specifically, its analysis seems to have provided the theoretical foundation for Zorza's support of the policy. By ac-

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397. *Id.* at 10. In addition to recognizing battering as an issue of power and control, NCADV recognized 13 other bases necessary for the Battered Women's Movement to be successful. See *id.* for full enumeration.

398. *Id.* at 14.

399. See, for example, STRAUS ET AL., *supra* note 71, who conducted a nationwide study of over 2000 families to attempt to explore the extent, patterns, and causes of domestic violence.

400. CURRENT ANALYSIS, *supra* note 392, at 1 ("Battering is a system of coercive behavior that uses fear and intimidation, including physical abuse or threats in an attempt to gain and sustain power over a woman and coerce her into behaving as the batterer wishes.").

401. *Id.* at 4–5.

402. *Id.* at 4.

403. *Id.* at 10.

cepting criminal justice intervention as the solution to ending domestic violence, the NCADV linked criminal justice intervention with women's liberation.

#### CONCLUSION

Over the course of four decades, our popular understanding and legal approach to domestic violence has shifted dramatically. There has been a shift from the "private" response, where domestic violence was considered a product of relationship dysfunction, to a fully "public" campaign in which the state takes the lead in combating domestic violence through arrest and prosecution of abusers. This shift, I have argued, reflects a feminist understanding of domestic violence as patriarchal force. This understanding grew out of a rejection of alternative understandings of domestic violence, namely those offered by psychological and family violence theory, and was informed by earlier radical feminist theorizing on rape.

While my account is descriptive, it carries important normative implications. Since the 1960s, our response to domestic violence has been informed by our interpretation of the problem. My account suggests that our current system of criminalization, marked by mandatory criminal intervention policies, reflects a distinctly feminist interpretation of domestic violence as patriarchal force. Feminists looking to move away from mandatory policies will need a new way of understanding domestic violence. The alternative theories I canvass in the article offer some possibilities. Drawing from the psychological and family violence approaches, feminists may wish to consider the possibility of multiple types of domestic violence, stemming from a variety of factors, including structural stress, psychology, and inter-relational dynamics.<sup>404</sup> Being mindful of the legacy and destructive power of victim blaming, feminists may also want to ask about violence initiated by women, and try to understand the role of women in relationship conflict more generally. By developing an alternative to the feminist understanding of domestic violence as patriarchal force, feminists may discover (or come to

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404. See JOHNSON, *supra* note 72, at 60 (arguing situational couple violence, violence escalating out of minor disagreement, is the most common source of intimate partner violence); see also Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476 (2008) (discussing different types or patterns of intimate partner violence). Cf. Deborah M. Capaldi & Hyoun K. Kim, *Typological Approaches to Violence in Couples: A Critique and Alternative Conceptual Approach*, 27 CLINICAL PSYCHOL. REV. 253 (2007) (arguing a typological approach alone has little utility in explaining the cause and development of partner violence).

support)<sup>405</sup> options for managing the problem of domestic violence in ways that do not threaten the autonomy interests of individual women. ❀

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405. Professor Linda Mills, for example, does not believe feminists should necessarily abandon psychological perspectives of domestic violence as “victim blaming.” Mills, a long-time advocate for battered women, suggests there is value in understanding domestic violence as a relationship dynamic in which both partners are engaged. MILLS, VIOLENT PARTNERS, *supra* note 13, at 97–100. By considering the role of women in abuse, Mills argues, we open up possibilities for interventions that move beyond the standard criminal justice response, interventions that may better respond to the needs of individual women. *See id.* at 31–32.