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## ARTICLES

# CONFRONTING THE AGENCY IN BATTERED MOTHERS

ELAINE CHIU\*

### I.

Domestic violence is no longer a new social issue for Americans. For the past three decades, there has been an undeniable rise in awareness about the problem in the national consciousness.<sup>1</sup> Today, many Americans confront domestic violence daily through extensive media coverage of homicides, sensational trials, other serious incidents, and purposeful public education campaigns by the government and other interested institutions. Accompanying this rise in public awareness have been numerous improvements in how law enforcement, social service agencies, and courts respond to domestic violence. These improvements include legislation authorizing warrantless arrests in domestic violence misdemeanors,<sup>2</sup>

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\* Research Fellow at Columbia Law School. This Article was written while the author was a Climenko Thayer Teaching Fellow at Harvard Law School from 1999–2000. From 1994–98, she was an Assistant District Attorney in the New York County District Attorney's Office. The author would like to thank the following people for their support and encouragement of this Article: Professors Martha Minow and Todd Rakoff of Harvard Law School, Professor Joseph Liu of Hastings Law School, Catherine Claypoole, Meryl Kessler, Emily Manove, Jeffrey Seul, Shaun Spencer, and Amy Chan.

1. See ETHEL KLEIN, JACQUELYN CAMPBELL, ESTA SOLER, & MARISSA GHEZ, ENDING DOMESTIC VIOLENCE: CHANGING PUBLIC PERCEPTIONS/HALTING THE EPIDEMIC 8–9, 95–96 (1997). The most dramatic increase in public concern for domestic violence occurred in the summer of 1994 when the O.J. Simpson trial became “a national ‘teach-in’ on the issue of domestic violence.” *Id.* In a November 1995 poll, more participants regarded domestic violence as an extremely or very important problem. *Id.* at 8–9, 12 thl.1.6. In that poll, domestic violence was ranked higher in importance than any other social issue, including street crime and children living in poverty. *Id.*

2. See *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1536–37 (1993). The only two states without such statutes are Alabama and West Virginia, where police officers can make a warrantless arrest for a domestic violence misdemeanor only if the

increased numbers of shelters<sup>3</sup> for battered women<sup>4</sup> and their children, and more sensitive custody rules in family courts.<sup>5</sup> The rise in public awareness and the accompanying improvements are due in large part to the efforts of the feminist movement, which has consistently kept domestic violence at the forefront of its agenda.<sup>6</sup>

Despite the progress of the last three decades, the American public and even feminists remain caught in a web of ambivalence and contradictory attitudes and beliefs about battered women. Are battered women traumatized victims who suffer at the hands of their individual abusers and from the systemic failures of a male-dominated culture? Are they, therefore, unable to save themselves or their children? In contrast, are these women survivors who manage to protect themselves as best they can under uniquely difficult circumstances? Do they deserve recognition for their efforts, or do battered women somehow contribute to or exacerbate their own abuse and, therefore, share the blame for their violent predicaments? Conflicting beliefs about battered women have translated into conflicting policies and laws in the battle against domestic violence.

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crime occurred in their presence. *See id.* In addition to warrantless arrest powers, an equally important improvement in arrest policies has been the adoption of mandatory arrest laws in more than half the states. Joan Zorza, *Mandatory Arrest for Domestic Violence: Why It May Prove the Best First Step in Curbing Repeat Abuse*, CRIM. JUST., Fall 1995, at 2, 4.

3. In 1992, there were approximately 1,200 shelters in the United States with a persistent need for more. *See* Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, § 6 at 23. Many of these shelters reported turning away three out of four women in need of help. *Id.*

4. The focus of this Article will be on battered women, since men are the abusers and women are the victims in the vast majority of domestic violence incidents. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983) (stating that, between 1973-77, men committed 95% of all assaults on spouses or ex-spouses). More recent data indicate that women are the victims roughly 85% of the time when the perpetrator is an intimate partner. *See* CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 2000, at 8 tbl.4. While acknowledging instances of abuse in same-sex relationships and abuser-victim gender role reversal, this Article will refer to abusers as male and to victims as female.

5. *See* Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES (Aug. 1998), at <http://www.vaw.umn.edu/vawnet/custody.htm>. A growing number of states have included domestic violence as one factor to consider in the best interests of the child, and by 1997, thirteen states had even established a "rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with" the batterer. *Id.*

6. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 26 (1991). Specifically, domestic violence awareness grew out of the women's liberation segment of the feminist movement, as opposed to the women's rights wing. *See id.* (citing SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 32-33 (1982)).

This Article focuses on one conflict in particular: how policies and laws deal differently with the choices of battered women. The legal system gives, but also denies, battered women choices in a variety of ways. It acknowledges, but also refuses to acknowledge, the past choices of battered women. For example, some policies, particularly in the criminal justice system, consider battered women to be weak and helpless. These policies, consequently, deny women any choice, even though crucial decisions that seriously affect their lives are involved. Other laws, such as those concerning restraining orders, typically require battered women to make choices and to take the initiative in order to successfully resist their abusers. Still other practices are even more harsh because they retrospectively denounce the "choices" battered women have made, effectively punishing the women personally for their responses in situations that did not permit true choices. Do battered women have choices? "Always," "Sometimes," and "Never" are each correct responses in the present hodgepodge of policies.

The absence of consistency on the issue of choice for battered women stems from each policy's exclusive reliance on one simplistic image of battered women. The inconsistent and unsophisticated images are both troubling aspects of the recent legal and policy innovations in the movement to end domestic violence. As stated by Susan Hirsch:

[F]oundational constructs were powerful tools for changing consciousness and providing new policy directions, yet they elided other ways of seeing the problems and imagining solutions. Theories built on particular images always mask or foreclose others. And the images themselves are at risk of turning perverse, as illustrated by painful, paradoxical examples: a battered woman who loses custody of her children because, in the eyes of the law, her injuries preclude her from providing for them adequately.<sup>7</sup>

Arguably, the only consistency in the present system is that battered women always end up with the short end of the stick: either being denied a voice by the system that is supposedly acting in their best interest or being blamed for abuse that they cannot completely control when the consequences of such abuse are extreme, or, worst of all, being denied sufficient support from a social services system that has only paid lip service to the enormous domestic violence problem thus far.

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7. Susan F. Hirsch, *Introduction to Sec. I.: Images of Violence* in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 3, 3 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

Like many people, I too began with mixed beliefs about the role and choice that battered women actually have within their relationships and that they should have within the larger movement to eradicate domestic violence. From 1994 to 1998, as an Assistant District Attorney in the New York County District Attorney's Office, I worked with numerous battered women in prosecuting misdemeanor and felony offenses. During this time, there were mandatory and warrantless arrest policies in the New York City Police Department<sup>8</sup> and a no-drop prosecution policy, meaning that cases were not dropped simply because a battered woman refused to cooperate. Instead, prosecutors in the office decided whether and how long to pursue each case of domestic violence and considered the wishes of the battered woman as only one of many factors.<sup>9</sup> In felony cases, prosecutors regularly used their power to subpoena a battered woman to the grand jury and occasionally to the witness stand at trial;<sup>10</sup> at the same time, prosecutors frequently dismissed cases of domestic violence, stating on the record that they could not prove the criminal charges beyond a reasonable doubt without the cooperation of the battered woman. Such dismissals occurred mostly with misdemeanor offenses. Regardless of the ultimate disposition,<sup>11</sup> there was a uniform policy requiring each individual prosecutor to make strenuous efforts to meet and interview every

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8. See, Celestine Bohlen, *Domestic Violence Arrests Quadruple in New York City*, N.Y. TIMES, Dec. 28, 1988, at B3. The mandatory arrest policy requires the arrest of batterers who are still present when the police arrive if there is probable cause. See *id.* Prior to this policy, individual police officers had discretion to arrest batterers, to remove the batterer from the premises, to attempt to arbitrate between the parties, or even to do nothing. See *infra* notes 13–17 and accompanying text.

9. For a description of some relevant factors prosecutors consider in evaluating domestic violence cases, see LISA G. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 41–44 (1981).

10. In a national survey of local prosecutors' offices, 92% of prosecutors reported that subpoena power was the most common method used to deal with uncooperative battered women. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 186 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

11. During my tenure at the District Attorney's Office, there were very few domestic violence trials on either the felony or misdemeanor levels. Instead, many of these cases were plea-bargained, which usually demanded intensive negotiations and cooperation among prosecutors, defense attorneys, and judges. This is an interesting contrast to other jurisdictions, such as in Massachusetts, where almost every domestic violence case, including misdemeanors, goes to trial. In addition, only a minority of offenders received serious sentences, such as jail or supervised probation. Many dispositions involved treatment programs for both violence and substance abuse, or even delayed dismissals, especially in misdemeanor matters. Whatever the final disposition, abusers were frequently subject to restraining orders for the duration of the criminal proceedings and as part of their final sentences. For further analysis of the effects of New York's mandatory arrest policy, see New York State Office for the Prevention of Domestic Violence, *Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions, Third Interim Report to the Governor and the Legislature* (Oct. 2000), [http://www.opdv.state.ny.us/criminal\\_justice/police/execsumm00.html](http://www.opdv.state.ny.us/criminal_justice/police/execsumm00.html).

complainant in a domestic violence case before deciding on the appropriate course of action. As a result of all these policies, I met with many battered women and even developed relationships with some of them through frequent interaction over the lives of their cases.

Often, my meetings with battered women were longer and more thorough than the appointments I had with victims of non-domestic violence crimes. Like many of my colleagues, my approach was to try and understand not only the most recent violent incident, but also the history and dynamics of the relationship. What struck me as I listened to their life stories was that for all of these women, there were numerous instances during their relationships in which they had to make decisions. For instance, battered women often had to decide between telling their friends and family about the abuse or keeping it a secret, or between seeking professional medical treatment or trying to self-treat their injuries. For the majority of the women I interviewed, the instant decision that brought them to my office was whether or not to call the police during the most recent outbreak of violence.<sup>12</sup> All of these decisions were difficult ones and yet very familiar to most battered women.

The women that had perhaps the most trying decisions to make were the battered mothers whose children lived with them and, thus, shared in the horrors of the violence at home. Very often, due to the almost universal lack of child care, I had the privilege of also meeting the children. They sat outside my office in the hallway and patiently waited for their mothers to talk to me. Sometimes, I also interviewed the children. For this special subset of abused women, their decisions impacted not only themselves, but also their children. For many battered mothers, the primary motivation in their decisions was the well-being of their children. This motivation, however, worked both ways: sometimes it encouraged battered mothers to leave their abusers; while other times, it encouraged them to stay.

This Article aims to draw attention to all the micro- and macro-level decisions that battered women, and particularly battered mothers, make throughout their experience of domestic violence. These decisions are opportunities for both the women and domestic violence policymakers. By understanding the motivations behind the decisions and incorporating those motivations into laws and policies, policymakers can do more by

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12. Some cases drew the attention of the police through emergency phone calls for help or other contacts from the battered women themselves. There was, however, a significant number of cases where neighbors, teachers, or social workers initiated reports that led to arrests and prosecutions by the district attorney's office.

recognizing the choices of battered women, while heavily influencing their decisions. The system needs to identify and eliminate the troubling conflicts in its present policies by squarely confronting the agency that battered women have, accepting the agency, and using it to an advantage in battling domestic violence. The choices battered women make are significant ones and policies should aim to improve them. This is especially true of battered mothers whose actions impact not only themselves, but also their children.

Part II of this Article begins with an examination of some current policies in the fight against domestic violence and their contrary positions on the choices of battered women and on the victim-agent debate.

Part III then explores in detail the history and contours of the victim-agent debate, including the significant contributions of Lenore Walker and Elizabeth Schneider in moving the image of battered women closer to reality.

The agency of battered women should not be feared or merely punished in hindsight; instead, as Part IV explains, it should be recognized, accepted, and assisted by both feminist theorists and policymakers.

Finally, the Article concludes in Part V by focusing on battered mothers and failure to protect proceedings as a prime example of where agency can be used effectively to interrupt the vicious cycle of family violence. It specifically proposes that where evidence of abuse against mothers exists, there be a mandatory probationary period of intensive counseling and support services for battered mothers prior to any removal of the children, and prior to definitive findings of child neglect or child abuse, or any termination of parental rights.

## II.

Over the past thirty years, there have been many significant changes in how the criminal justice, family court, and social service systems handle domestic violence. A brief review of some prominent reforms reveals an uncoordinated mixture of positions on the choices of battered women. These positions can be roughly organized into three categories: policies that deny the choices of battered women, policies that empower women by giving or even requiring them to make choices, and policies that evaluate the decisions made by battered women, mostly in hindsight, and punish allegedly bad ones.

## A. DENYING CHOICES

In this first category, battered women have no voice. They have no say. Decisions that may have serious repercussions on their lives are made by others without their consent or contribution. The most notorious of these policies are the mandatory arrest policies of police departments and the no-drop policies of prosecution offices.

Inspired by costly lawsuits<sup>13</sup> and a series of arrest experiments originating with the Sherman and Berk study in Minneapolis,<sup>14</sup> mandatory arrest policies spread across police departments in the 1980s.<sup>15</sup> Such policies require, either by law or by practice, a police officer to arrest a batterer who remains on the scene after the officer has arrived, if there is probable cause to believe that the batterer has committed a domestic violence crime. The police officer is authorized to do so in most states without an arrest warrant, even for misdemeanor domestic violence crimes.<sup>16</sup> The police officer cannot simply remove the batterer from the household or attempt to calm down the batterer. The primary purpose of the mandatory arrest policies is to remove the discretion of individual police officers to arrest or not to arrest domestic violence batterers; the secondary effect, however, has also been to remove or ignore the choices of battered women.

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13. One such lawsuit concerned the police department in a small town in Connecticut. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). In 1984, Tracey Thurman won a \$2.3 million judgment against the City of Torrington, Connecticut for the police department's failure to protect her from her husband's violence. Nat Hentoff, *Battered Wives and the Fourteenth Amendment*, WASH. POST, Jul. 27, 1985, at A23. A Torrington police officer stood by and observed while the husband kicked Tracey Thurman in the head, dropped her child on her, and kicked her again. *Thurman*, 595 F. Supp. at 1526. This lawsuit led to the adoption of mandatory arrest laws in Connecticut in 1986 and a remarkable 99% rise in domestic violence arrests in nine months following the passage of the law. Jacqueline Weaver, *Arrests Rise for Violence in the Home*, N.Y. TIMES, Aug. 30, 1987, § 11CN, at 1.

14. Conducted from 1980-83, the Minneapolis experiment had police officers randomly use three different responses in attending to domestic violence calls where the abuser was still present. LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE 2* (1992). Used with equal frequency, these three responses included immediate arrest of the abuser, removal of the abuser from the residence, and attempts to calm the battered woman and the abuser. *See id.* After tracking the specific couples for a period of six months after the arrest, Sherman and Berk observed that the arrest response was more effective than the other two responses because it reduced the risk of repeat violence against the woman by half during the next six months. *See id.* Later studies in cities like Omaha, Charlotte, Milwaukee, Miami, and Colorado Springs tried to replicate the results of the Minneapolis experiment and had mixed results. Zorza, *supra* note 2, at 4-9, 51-52 (attributing mixed results of the replication studies to design defects and explaining why mandatory arrest policies are still warranted).

15. By 1995, "more than half of the states and the District of Columbia requir[ed] police to arrest on probable cause for at least some domestic violence crimes." Zorza, *supra* note 2, at 4.

16. *See supra* note 2 and accompanying text.



When a battered woman calls for assistance, the reason for the call is not necessarily that she wants to have the police involved or to have the police arrest the abuser. To the contrary, in my experience, plenty of women who called for help desired only medical assistance or physical removal of the abuser from their home. They were surprised and even angered by the police officers' insistence on arrest and strongly opposed the arrest and subsequent prosecution in my office a few days, or even hours, later.<sup>17</sup> In addition, there were also numerous cases where a neighbor, relative, or child had called the police, who still had to arrest the batterers in spite of the women's wishes. This is exactly the point of mandatory arrest policies. It does not matter who called the police or whether the concerned victims wanted the arrest of the perpetrators. If there is probable cause, then arrest is the only permitted response. Mandatory arrest policies do not accommodate the wishes of battered women, and thus deny them any choice in the matter.

Supplementing mandatory arrest policies are the no-drop policies of prosecutors' offices.<sup>18</sup> After all, mandatory arrest policies would be less effective in deterring domestic violence crime if prosecutors routinely dismissed the domestic violence cases. Batterers would have only the arrest itself to fear and not any subsequent criminal prosecution. For some batterers, arrest itself may be enough of a deterrent, but for others, only arrest followed by criminal prosecution and the threat of a criminal conviction and punishment would work.

Sixty-six percent of prosecutors' offices in large urban areas reported adoption of some form of a no-drop policy.<sup>19</sup> There are numerous variations of no-drop policies, but the common denominator is the imposition of rules or policies that strive to keep the discretion to prosecute within the purview of the prosecutor and not the battered woman.

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17. Before the mid-1980s, when the New York City Police Department began its mandatory arrest policy, many police officers may have asked the women whether they wanted to have the abusers arrested and followed their wishes accordingly. After the institution of the mandatory arrest policy, all police officers were under command not to consult with the women and, instead, to ignore the desperate pleas of battered women, who begged them not to arrest their abusers. Initially, some of the battered women may have been angered and confused because they were unaware of the change in policy. Battered women continued to be angry and confused by the mandatory arrest policy as late as 1994-98, when I was at the District Attorney's office. I observed that there were always some battered women whose wishes were incompatible with the mandatory arrest policy.

18. No-drop policies "may constitute the judicial equivalence of a mandatory arrest policy [because victim autonomy is restricted in the higher interest of specific or general deterrence of offenders." EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 178 (2d ed. 1996).

19. Rebovich, *supra* note 10, at 182-83.

“Soft”<sup>20</sup> no-drop policies ignore the preferences of battered women in the first instance, but also use support services and outreach to encourage and support battered women. If a woman still decides not to cooperate in the prosecution after availing herself of the support services and there is insufficient evidence without her cooperation, then the prosecutor will dismiss the charges.<sup>21</sup> The woman will not be subject to any punishment for her decision not to cooperate. Informal surveys indicate that most prosecutors’ offices feature “soft” no-drop policies.<sup>22</sup>

In contrast, “hard” no-drop policies use every available legal tool to mandate victim participation in cases where there would be sufficient evidence to prove criminal charges only if that evidence included victim testimony. The most controversial tools used in “hard” policies are the subpoenas issued to bring the women to court, the arrest or bench warrants issued against women who ignore the subpoenas and do not show up in court, and finally, imprisonment of battered women who are brought to court on the warrant and still refuse to cooperate.

Prosecutors under both “hard” and “soft” no-drop policies will continue to pursue the charges against abusers if there is sufficient evidence without the cooperation of battered women, even if the women do not desire the prosecution. Such evidence could include independent eyewitnesses like neighbors or bystanders, photographs of physical injuries and property damage, audio tapes of emergency 911 calls, official medical records, and any excited utterances.<sup>23</sup> The pursuit of criminal convictions under such circumstances leads perhaps to the most curious silencing of battered women. Because the welfare of the woman need not be a consideration, the entire proceeding can take place without her.

On the surface, “soft” and “hard” no-drop prosecution policies share the goal of keeping the decision-making power within the prosecutor’s office and away from battered women, and hence, are categorized as policies that deny the choices of battered women. Deeper analysis,

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20. Naomi Cahn bifurcates no-drop policies into “soft” and “hard.” See Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in *DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE* 161, 168 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

21. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1864 (1996).

22. *Id.* at 1863.

23. While supporting “hard” no-drop policies, Hanna also advocates the increased collection and use of evidence that is independent of battered women. She believes that such a strategy helps to overcome the troubling theoretical problems raised by forcing victim participation in domestic violence prosecutions. See *id.* at 1900–01.

however, reveals some interesting contrasts in how these policies approach the subject of choice for battered women. First, the choices of battered women have some impact, albeit limited, on the decisions of "soft" prosecutors' offices as to whether or not to criminally pursue the abusers; "hard" no-drop policies are more akin to mandatory arrest policies in that these prosecutors make their decisions independently of the battered women. Second, "soft" no-drop policies utilize only positive influences in the form of victim and support services to encourage women to cooperate, whereas "hard" policies incorporate negative and punitive influences to force women to cooperate.<sup>24</sup> Despite these underlying differences, no-drop policies generally deny the choices of battered women because under all such policies the discretion to prosecute remains within the purview of the prosecutor and not the battered woman. Is this purposeful refusal to consider their desires or preferences in mandatory arrest and no-drop policies the key to their success?<sup>25</sup>

#### B. PROVIDING CHOICES

In contrast to the mandatory arrest and no-drop prosecution policies, there have been other systematic reforms in the fight against domestic violence that seek to empower battered women. Perhaps the most widely known policy of this type has been the restraining order.<sup>26</sup> All fifty states and the District of Columbia currently provide civil restraining orders in cases of domestic violence.<sup>27</sup> Indeed, some states have been so impressed with the restraining order that they have allowed both civil and criminal

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24. See *infra* Part I.L.C. (discussing policies that punish the choices of battered women).

25. Recent commentary has questioned the efficacy of policies that deny choice to battered women. See, e.g., Eve S. Buzawa & Carl G. Buzawa, *Introduction to DO ARRESTS AND RESTRAINING ORDERS WORK?* 1, 12 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996) (blaming the particularly indifferent and resilient batterer population that the arrest and restraining order policies target for their ineffectiveness and advocating greater acknowledgment of victims' preferences over societal interests). Supporters of such policies continue to argue that while these policies arguably disempower battered women, it is far worse to be reabused and even killed. See, e.g., Andrew R. Klein, *Re-Abuse in a Population of Court Restrained Male Batterers*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 192, 210 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996).

26. A restraining order is also known as a civil protection order and a variety of other names, depending upon the jurisdiction. David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1170 n.91 (1995). Essentially, a restraining order is a formal court order against a particular individual that typically forbids that individual from engaging in particular conduct for a fixed period of time. See, e.g., BLACK'S LAW DICTIONARY 1314 (West 6th ed. 1990); Zlotnick, *supra*, at 1170.

27. All fifty states have civil restraining orders for spouses, while approximately half of the states also have civil restraining orders for unmarried or unrelated household members. Zlotnick, *supra* note 26, at 1171 n.93.

restraining orders for domestic violence cases,<sup>28</sup> while other states have vested more than one court in their judicial system with the authority to issue civil restraining orders.<sup>29</sup>

Restraining orders, particularly civil ones, are creative empowering legal tools for battered women for several reasons. First, instead of taking away choice from battered women, they create choices. As documented by many domestic violence specialists and studies, battered women are understandably reluctant to initiate or participate in criminal proceedings, especially as their first step in trying to stop the violence or end the relationship.<sup>30</sup> Thus, a system that offers as its only option the criminal courts through mandatory arrest and no-drop prosecution policies is, for many battered women, no option at all. The criminal justice system's preoccupation with punishment and greater community deterrence goals does not appeal to many battered women.<sup>31</sup> In contrast, these same women may feel more comfortable with a civil proceeding and its exclusive concern with the individual parties at hand and the accommodation of more limited goals, such as elimination of the violence without removal of the batterer. Whether it is an alternative or an addition to the criminal justice system, the mere existence of the civil restraining order enhances the options available to battered women.

Even on a micro level, the entire framework of the civil restraining order is built around the choices of battered women. For instance, it is almost always the initiative of the battered woman that begins the process

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28. Examples of states with criminal restraining orders include New York, Alaska, Illinois, Minnesota, Ohio, South Dakota, and Utah. See Christopher R. Frank, Comment, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 922 & n.9 (1996). The distinction between criminal and civil restraining orders is that a criminal court issues a criminal restraining order as part of its power to set bail conditions during the pendency of a criminal matter and then as part of its power to determine the sentence at the conclusion of the criminal proceeding. A civil court uses its equitable powers to issue a civil restraining order upon a specific petition for such an order by one private party against another. Because of their origins in separate judicial systems, criminal and civil restraining orders are subject to different burdens of proof and do not have identical purposes. See generally Frank, *supra* (providing a critical examination of criminal restraining orders).

29. For instance, Chapter 209A in Massachusetts creates an elaborate system for civil restraining orders in domestic violence, whereby four different courts have the authority to issue such orders to battered women. See MASS. GEN. LAWS ch. 209A § 1 (1999).

30. See Barbara Hart, *Battered Women and the Criminal Justice System*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 98, 102-03 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (describing numerous reasons for reluctance of battered women).

31. See *id.* at 101.

of obtaining a civil restraining order.<sup>32</sup> She is the petitioner in the court proceeding that is now entitled, "She" v. "He." Immediately upon petitioning for a civil restraining order, the battered woman must make numerous decisions. She must decide which court to apply for such a petition,<sup>33</sup> whether to request a full "stay away" order or a limited "stop the abuse" order, and whether to ask only for a restraining order or to also ask for child custody or support.<sup>34</sup> Because these are not simple decisions and because most battered women are not legal experts, domestic violence advocates in some jurisdictions have striven to assist women in making well-informed choices and in effectively using this opportunity to have an impact on the legal proceedings.<sup>35</sup> Perhaps in recognition of the importance of enabling and honoring battered women's choices, some states mandate by statute that the women be repeatedly informed of their rights and options in seeking a restraining order.<sup>36</sup>

In addition to its existence as an alternative to the criminal justice system and its inclusion of battered women's decisions, restraining orders are also important for battered women because they are emotionally empowering. One study conducted by Karla Fischer in 1990 and 1991 surveyed battered women who sought restraining orders in a mid-western, medium-sized urban county court with the help of a local shelter.<sup>37</sup> The

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32. See, e.g., NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE § 301 (allowing only victims to file for a petition for an order of protection).

33. For example, the Family Protection and Domestic Violence Intervention Act of 1994 in New York State gave battered women the right to proceed either in family court, in criminal courts, or in both courts simultaneously. See N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 2000).

34. In New York State Family Court, petitioners can apply for a restraining order alone or can initiate custody and support proceedings along with the restraining order. See N.Y. DOM. REL. LAW § 240 (McKinney 2000). The court has the authority, even at the ex parte stage of an initial petition, to issue temporary custody and support orders without a demonstration of immediate or emergency need and without information about the batterer's assets or income. See N.Y. FAM. CT. ACT §§ 828(1), (4), 842 (McKinney 2000). The Probate and Family Court in Massachusetts shares similar ex parte powers on custody and support. See MASS. GEN. LAWS ch. 209A § 3 (1999).

35. Advocates play a critical role in helping women make these decisions because they offer their familiarity and experience with the court systems and legal proceedings, both of which are usually overwhelming for battered women. For example, students and attorneys at the Domestic Violence Institute at the Northeastern School of Law generally advise women not to request restraining orders from the Superior Court in Massachusetts because of the court's geographic inconvenience, its overly formal atmosphere, and the competition for attention amidst the serious criminal felonies and civil matters concerning more than \$25,000. See Interview with Karen Raye, Clinical Teaching Fellow at the Domestic Violence Institute at Northeastern School of Law, in Boston, Mass. (Sept. 29, 1999).

36. For example, various actors such as judges, prosecutors, and police officers are required by law to inform battered women in New York State of their right to proceed in Family Court, the criminal courts, or both. See N.Y. CRIM. PROC. LAW § 530.11(2), (2-a), (6) (McKinney 2000).

37. Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 415, 428 n.1 (1995).

purpose of the study was to achieve a greater understanding of the fears and motivations battered women had in seeking restraining orders.<sup>38</sup> The most striking conclusion of the study was that restraining orders were psychologically meaningful for many battered women because they represented symbols of the women's own strength and voice.<sup>39</sup>

The order of protection becomes, for many women, a symbol of her own internalized strength; it represents the time she stood up to her abuser and told him, through the judge who signed her order, that she refused to "take it" anymore. As nearly all battered women are silenced about the abuse and the impact it has on their lives, the legal system becomes an enabling factor that allows them to find their own voices again.

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... Women repeatedly expressed that they felt as if they have constantly told him that they do not like the abuse, they are not going to stand for it, they want him to leave them alone, and that, in fact, he cannot abuse them. Whereas their voices were silenced or simply not heard, the force behind the legal paper communicated for them, in language to which the abuser was forced to respond.<sup>40</sup>

By placing a powerful legal tool within the control of battered women, the restraining order regime not only respects the choices of battered women, but also enhances them. It remains unclear whether a restraining order regime based upon women's decisions is effective at reducing or eliminating domestic violence or whether its effectiveness is compromised by reliance on women's choices.<sup>41</sup>

### C. PUNISHING CHOICES

In addition to denying and providing choices for battered women, there is a third position upon which some policies are based: critiquing past decisions made by individual battered women and punishing the "bad" decisions. The two most commonly recognized practices that fall within this third category are the criminal prosecution of battered women who kill their abusers and the civil termination of parental rights of battered

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38. *See id.* at 414–15.

39. *See id.* at 424.

40. *Id.* at 424–25.

41. A study of male batterers brought to court for civil restraining orders in Quincy, Massachusetts concluded that the ineffectiveness of restraining orders was mostly related to the character of the batterer population and not the involvement of battered women. *See Klein, supra* note 25. "[N]ot only do they [the batterers] have prior records like criminals and have abused their current spouses/partners like criminals, but they also re-abuse and reoffend at high rates, just like active criminals." *Id.* at 205.

mothers. Societal goals that are distinct from the elimination of domestic violence motivate both of these practices. For example, criminal prosecutions of battered women are brought in the interest of the state to punish all murderers and to deter future homicides. Similarly, parental right terminations are instituted on behalf of the children, often by state child welfare agencies. Despite these external interests, it is unmistakable that such proceedings have a tremendous impact on battered women, whether purposeful or not. Both types of legal proceedings are judgmental in nature and the subject of their judgment are the past decisions and choices of battered women. Because Part IV of the Article will focus exclusively on the termination of parental rights, the following discussion will briefly discuss only criminal prosecutions of battered women who kill.

Unlike mandatory arrest policies and restraining order systems, such criminal prosecutions are not new. Indeed, infamous prosecutions of battered women who killed their abusers date back to the late nineteenth century.<sup>42</sup> Female defendants used a variety of defenses, including lack of motive, that did not necessarily emphasize the domestic violence.<sup>43</sup> The rise of the feminist movement in the 1960s, however, inspired greater and more honest awareness of the prevalence of domestic violence and led to an increased desire to use the domestic violence in a new defense for battered women.

Criminal prosecutions, in and of themselves, already asked decision-makers, such as the jurors or judges, to engage in a comprehensive examination of an accused person's prior intentions, actions, statements, and states of mind. The new strategy was not to use a plea of insanity but to introduce a modification of another long-standing defense strategy, namely self-defense. Prompted by the landmark work of Lenore Walker,<sup>44</sup> this new permutation of self-defense became widely known as the "battered woman syndrome."

A woman suffering from the classic syndrome experiences a pattern of physical and psychological abuse that occurs in a three-stage cycle.<sup>45</sup> First,

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42. One case in particular was the trial of Fanny Hyde in 1872 in Brooklyn, New York, on charges of murder of her employer and lover, George Watson. By pleading insanity and testifying about Watson's abuse, Fanny Hyde was able to avoid conviction. See ANN JONES, *WOMEN WHO KILL* 163-66 (1980).

43. See *id.* at 93-102.

44. Walker is a renowned psychologist who began her in-depth interviews of battered women and domestic violence advocates in the mid-1970s and published her findings in two prominent books. See LENORE E. WALKER, *THE BATTERED WOMAN* (1979) [hereinafter WALKER, *BATTERED WOMAN*]; LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

45. See WALKER, *BATTERED WOMAN*, *supra* note 44, at 55.

there is the tension-building stage with isolated, yet escalating incidents of abuse.<sup>46</sup> Second, there is an acute battering stage with uncontrollable outbreaks of intense violence.<sup>47</sup> Third, the abuser is contrite and acts lovingly and seeks forgiveness.<sup>48</sup> This three-stage cycle repeats itself again and again, eventually leading to certain behavioral and psychological traits in the woman.<sup>49</sup> She has very low self-esteem and is continually guarded and fearful of another episode of abuse.<sup>50</sup> Over time, she develops "learned helplessness," a condition in which she believes that she has no control over these episodes or her future and has no real option to leave her abuser; she is paralyzed into staying with him.<sup>51</sup>

Domestic violence advocates were inspired by the gravity of saving battered women from death row or life imprisonment for killing their abusers. Under the umbrella of battered woman syndrome, they launched the most intense study of battered women ever undertaken. As a result, the behavior, options, and decisions of battered women were repeatedly reviewed, surveyed, evaluated, and discussed. Through numerous studies and the testimony of expert witnesses,<sup>52</sup> judges and jurors were better able to comprehend this syndrome and accept the desperation (or rationality) of the "choices" of the battered woman. They more willingly opted not to impose any criminal liability or to impose a lesser degree of liability. This new defense served to eliminate the sex-bias in traditional self-defense theory and to enable judges, jurors, and prosecutors to better understand the particular accused person: the battered woman.<sup>53</sup> Perhaps because of a

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46. *Id.* at 55, 56–59.

47. *Id.* at 55, 59–65.

48. *Id.* at 55, 65–70.

49. *See id.* at 55.

50. *See id.* at 69.

51. *See id.* at 55–70.

52. Throughout the 1980s, the admissibility of expert testimony on battered woman syndrome was the primary legal issue for appellate courts in women's self-defense work. *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 *WOMEN'S RTS. L. REP.* 213, 215, 218 (1992). Most of the reviewing courts ruled in favor of admissibility and now, defense attorneys use expert testimony at many stages of the criminal process, including grand jury, motions to dismiss, sentencing as well as trial. *Id.* at 219, 224.

53. Traditional self-defense theory is replete with requirements that make no sense when applied to a combat situation between a battered woman and her abuser. Two such requirements include the duty to retreat and the use of force that is proportionate to the threatened harm. *See, e.g.,* Douglas A. Orr, *Weiland v. State and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, *FLA. B.J.*, June 2000, at 14 (supporting the Florida Supreme Court's decision in March 1999 to remove the absolute duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee as an overdue accommodation for battered women claiming self-defense). Before this appellate ruling, Dr. Lenore Walker had testified about battered woman syndrome at the trial of Kathleen Weiland



human need to understand how domestic violence could lead to such tragic or horrific consequences, the American public embraced these efforts to understand the battered woman. Since its ambitious beginnings, the theory of the battered woman syndrome has gained much acceptance and is still being used in the courts today;<sup>54</sup> however, its attempt to capture the experience of the battered woman in a comprehensible theory that could primarily serve as a successful criminal defense has come under attack by several critics over the past decade.

In the spectrum of positions that domestic violence policies take on the subject of choice and battered women, this third category of punishing their choices is unique because of two critical distinctions. First is its retrospective perspective. As opposed to the denial or enhancement of future choices of battered women, this third type of policy focuses on their past decisions. It is not forward-looking, but rather backward-looking. The second unique feature is its punitive nature. Some battered women in these criminal prosecutions or civil terminations will be punished for their past choices. This powerful combination of past perspective and potential for punishment renders the policies in this third category particularly troublesome for battered women. This, perhaps, explains why it was the criminal prosecution of battered women, and not any other domestic violence policy, that inspired the most intense examination of battered women over the last thirty years.

#### D. WHY SO MANY CHOICES ON CHOICES?

This brief survey of some of the most visible reforms in the recent movement against domestic violence easily demonstrates the current ambivalence and inconsistency on the subject of choice and battered women. Battered women are justifiably confused and puzzled. Do they have choices or not? Will others be making decisions for them? What is their role in this movement against domestic violence? As discussed above, there is a minimum of three distinct positions. In certain contexts, such as the criminal justice system, abused women do not have a say on the issue of arrest or criminal prosecution of their abusers. In contrast, many restraining order regimes depend upon battered women to take the initiative and make critical decisions. Still other policies hold battered women

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who shot and killed her husband; due to the duty to retreat requirement, the jury, however, rejected the self-defense claim and convicted Kathleen Weiland of second degree murder. *See id.*

54. *See, e.g.,* *People v. Seeley*, 720 N.Y.S.2d 315 (N.Y. Sup. Ct. 2000) (discussing the three-stage cycle of battered woman syndrome in ruling that the defendant was entitled to offer expert testimony about the syndrome.

accountable for their alleged choices by punishing in hindsight those choices that offend other interests of the state. It defies common sense and fairness to have some policies ignore battered women while other reforms depend upon them, and still other policies punish them. After all, it is the same battered women that all these policies concern.

Why is there such inconsistency on the subject of choice and battered women? The answer lies in the continuing evolution of the identity of the battered woman. Despite the work of thirty years, this evolution has yet to reach a final, definitive state.<sup>55</sup> Underlying the inconsistency on choice and battered women is one of the most central debates in this identity evolution: understanding the battered woman as an agent or as a victim. Are they purely agents, purely victims, or a combination of both? Do abused women suffer violence exclusively at the hands of their batterers or do they contribute to the persistence of the violence in subtle and indirect ways? Are the women blameless or somehow blameworthy for their problems? Elizabeth Schneider wrote in 1992 that we have gone "back and forth between these two images without any real public engagement on the problems underlying battering."<sup>56</sup> In the time since her comment, there has still been no resolution.

This debate concerning the nature of the role (or the lack of a role) the woman has in the abusive relationship is highly controversial because it

55. Indeed, the search for an identity may never reach a final state and may be forever evolving. After all, the reality of a battered woman is most likely complex and naturally defies categorization or accurate description through theory and scholarly musings. This does not mean, however, that the search should be abandoned. Laws and policies need these images or "foundational constructs." See *supra* pp. 1224–25. Martha Fineman warns about the limitations of the law as a tool for social change:

[T]he process of lawmaking relies on the generation of broad generalizations about groups or classes of things and people at the legislative level. On the individual case level, law is also a process of classification—courts make decisions using analogies and distinctions within the context of precedent and *stare decisis* . . .

. . . As classification involves line-drawing and assessments of similarity and difference, it seems clear that both as a process and in terms of fashioning responses, classification should be understood to be of a political nature. Those who have disproportionate power will disproportionately influence lawmaking and implementation.

Even if one believes in the abstract possibility of change and progress, it is not likely that widespread redistribution of power within families or between women and men will be accomplished by mere legal restructuring.

Martha Albertson Fineman, *Preface* to *THE PUBLIC NATURE OF PRIVATE VIOLENCE*, at xi, xvi (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). Nevertheless, truly effective laws and policies should be based at a minimum on a uniform understanding of battered women. There is no justification for inconsistencies. We should use our best efforts to create images that bring us as close as possible to the reality of battered women.

56. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 549 (1992). Neither portrayal of women as solely agents or solely victims is adequate, and there must be more effort made to capture the complex reality of women's experiences while allowing for change. *Id.* at 549–50.

draws upon fundamental principles within the various camps of feminism and within the greater American culture itself. Equally noteworthy is the fact that the debate directly affects the question of how much choice battered women actually have in their abusive relationships and how much of a voice battered women should have in the larger systemic battle against domestic violence. If battered women are victims, then they do not contribute to the violence and should not be penalized in any way; as victims, they are too debilitated to make their own choices. On the other hand, if battered women are active agents, then policies should examine, and perhaps, even punish their choices. The agency paradigm also suggests, somewhat paradoxically, that battered women are capable of making their own choices and should be permitted greater autonomy in decisionmaking. Clearly, the victim-agent debate has tremendous ramifications for domestic violence policies. Part Three of the Article continues with a closer look at this victim-agent debate, with a particular emphasis on the efforts of Lenore Walker and Elizabeth Schneider to introduce more reality to the identity of battered women and, hopefully, bring more consistency to domestic violence policies.

### III.

Victim or agent? The search for an honest and accurate identity for battered women gnaws at the foundation of our domestic violence policies, and until we confront the basic issue of victim or agent purposefully and knowingly, these policies will remain confused and inconsistent. The best place to begin an exploration of this debate is with an understanding of the terminology involved.

#### A. DEFINITIONS

What do the terms "agent" and "agency" mean? These words are commonly used in the law to describe a particular relationship "between two persons . . . where one (the agent) may act on behalf of the other (the principal) and bind the principal by words and actions."<sup>57</sup> In the context of the victim-agent debate, the words take on a different meaning. Instead of describing a type of relationship between two individuals, the words "agent" and "agency" are used to describe only one individual and the conditions under which that individual lives. Agency refers to "the

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57. BLACK'S LAW DICTIONARY 62 (West 6th ed. 1990).

functioning of an atomistic, mobile individual"<sup>58</sup> and is imbued with "liberal visions of autonomy, individual action, individual control and mobility."<sup>59</sup>

In contrast, a "victim" lives under strikingly different conditions. Indeed, the terms "victim" and "agent" are usually understood to represent the opposing categories of a dichotomy. An agent is "a self-determining individual . . . who is not victimized by others"<sup>60</sup> while a victim is an oppressed individual who is not free to act but is, instead, acted upon by her oppressors. Her oppressors can include both her personal abuser and the greater patriarchal society in which she lives.

### B. THE RISE OF VICTIMIZATION

Historically, the origins of the agency terminology date back to the nineteenth and early twentieth centuries when the public perceived these women to be "agents—as cause or provocateur[s] of [their own] battering."<sup>61</sup> Abused women were not being harmed, but were enjoying or deriving pleasure from the violence. If they were not deriving pleasure, they had committed some wrongs to deserve the violent abuse.<sup>62</sup> Even through the 1940s and 1950s, social workers often attributed complaints of domestic violence to the woman's sexual frigidity or her need to undermine authority.<sup>63</sup> These beliefs allowed society to justify its policies and practices that condoned or ignored such violent behavior and to continue turning a blind eye to the true horrors. This all changed with the feminist movement of the 1960s.

In the 1960s, the activism of the feminist movement, particularly the "women's liberation" wing, raised community awareness of domestic violence.<sup>64</sup> Women from social service groups such as Al-Anon and even

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58. Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 59, 59 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

59. Schneider, *supra* note 52, at 240.

60. Mahoney, *supra* note 58, at 60.

61. Schneider, *supra* note 56, at 549. This formerly predominant view can still be found today. *Id.* at 548–49.

62. See, e.g., *Poor v. Poor*, 8 N.H. 307 (1836) (holding that an abused woman was not entitled to divorce on grounds of extreme cruelty because the abuse which included horsewhipping, assaults on the head, and imprisonment in the cellar was due to her own misconduct). See also LINDA GORDON, *HEROES OF THEIR OWN LIVES* 281–83, 286 (1988).

63. See GORDON, *supra* note 62, at 282 (describing the influence of Freudian thought).

64. See Mahoney, *supra* note 6, at 26.

battered women themselves helped to expose the violence.<sup>65</sup> The efforts of all these groups inspired a closer and more honest examination of domestic violence and revealed that domestic violence was a far greater problem than decades of purposeful ignorance had cajoled people into believing. Its shockingly high incidence exposed the woeful inadequacies of the agent portrayal of the battered woman.

In response, the feminist movement offered up a new understanding. Such women were not agents or provocateurs, rather they were victims. They were victims of their batterers and victims of a patriarchal society that failed to act and thereby tacitly approved or conspired with their batterers' violence. Many within the feminist movement seized upon the theory of victimization and accelerated its development.

Perhaps the most prominent proponent of the victimization theory is Lenore Walker. Numerous courts have relied on her definition of the battered woman and her expert testimony in this field.<sup>66</sup> Walker, in 1979, defined a battered woman as:

a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.<sup>67</sup>

One of the earliest sociologists to study domestic violence, Mildred Daley Pagelow, described battered women as:

[A]dult women who were intentionally physically abused in ways that caused pain or injury, or who were forced into involuntary action or restrained by force from voluntary action by adult men with whom they

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65. Al-Anon organizations were among the first in the United States to open shelters for battered women and two battered women opened their own home as the first shelter in Boston. Mahoney, *supra* note 6, at 26 (citing SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 5, 55-57 (1982); Susan Schechter, *Building Bridges Between Activists, Professionals, and Researchers*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 299 (Kersti Yllö & Michele Bograd eds., 1988).

66. See *Weiland v. State*, 732 So. 2d 1044, 1048 (Fla. 1999) (describing expert testimony of Lenore Walker that defendant, Kathy Weiland, suffered from battered woman syndrome). See also *Havell v. Islam*, 718 N.Y.S.2d 807, 811 (N.Y. Supp. Ct. 2000) (relying on Walker's description of the harm suffered by a battered woman to hold that domestic violence is a proper consideration in an equitable distribution matter in a divorce proceeding).

67. See *WALKER, BATTERED WOMAN*, *supra* note 44, at xv.

have or had established relationships, usually involving sexual intimacy, whether or not within a legally married state.<sup>68</sup>

Both definitions clearly emphasize the lack of freedom and the coercion in the living conditions of battered women. Both either downplay or avoid any mention of self-initiated acts or voluntary conduct that encourages or contributes to domestic violence. Early on in the movement against domestic violence, the exclusive portrayal of these women as wholly victims and not agents was arguably necessary for several reasons. First, a rigid and insistent victim image was essential to counter the historical avoidance of the problem and the long-standing antipathy towards battered women. Second, the new identity of battered women had to serve a very specific purpose. Defenders of battered women who had killed their abusers were desperately searching for a sympathetic and convincing defense for their clients, and the victimization theory seemed to fit the bill. It eventually evolved into the battered woman syndrome. Such women did not freely kill their spouses or boyfriends as independent agents; rather, the *women* were victims of their spouses or boyfriends whose escalating violence led to emotional paralysis and perceptual inabilities in the women and, ultimately, to the tragic deaths.<sup>69</sup>

Because of the heightened sensationalism and surrounding media frenzy, the American public, as well as the American legal system, have learned about battered women mostly from these tragic homicide cases.<sup>70</sup> The particular context of these homicide cases create a distorted and exaggerated view of battered women. In order to satisfy the legal requirement that experts only testify about those subjects that jurors cannot understand by themselves, experts emphasize the most extreme and bizarre aspects of the battered woman syndrome in such cases.<sup>71</sup> Furthermore,

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68. MILDRED DALEY PAGEDOW, *WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES* 33 (1981).

69. See ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 182-83 (1987).

Like victims of other types of trauma, women in the homicide group responded to these assaults with reactions of depression, denial, shock, and a sense of helplessness and fear . . .

. . . Subjected to frequent attacks and living with a constant awareness of danger, their perceptions of alternatives to their violent situations narrowed, based on their knowledge of the abusers' abilities to control and to harm.

*Id.* at 182.

70. See Mahoney, *supra* note 6, at 35 (identifying the sources of information as including the rise of expert testimony on battered woman syndrome in court and popular accounts such as the book and movie about Francine Hughes' experience, *THE BURNING BED*). See also, KLEIN, *supra* note 1, at 8. The obsession with battered women who kill their abusers is also shared by legal scholars and feminists who have written prolifically about these cases. See, Mahoney, *supra* note 6, at 35 & n.141.

71. See Mahoney, *supra* note 6, at 37.

judges and jurors in homicide cases do not want to believe that *every* abused woman has the right to defend herself by killing her abuser; instead, they want to believe that only exceptionally troubled battered women suffer from such debilitating victimization and deserve to be excused. As a result of these pressures in these homicide cases, Americans perceive battered women almost exclusively as extreme victims. They focus heavily on their learned helplessness, passivity, and inability to perceive and act rationally. The battered woman is helpless, irrational, emotionally distressed, or, as Martha Mahoney has suggested, "utterly dysfunctional."<sup>72</sup> In an almost complete about-face from her beginnings as an agent-as-cause, the image of battered woman became that of an extreme victim.

Initially, feminists so embraced the victimization theory that it quickly spread to other proceedings involving battered women. For example, the battered woman syndrome or variations on the victim image appeared in other domestic violence contexts, such as disputes about child custody, criminal prosecutions against batterers, and termination of parental rights.<sup>73</sup> Indeed, the image of the female victim became so popular that it was also used outside of domestic violence in other feminist movements against sexual harassment, rape, and pornography.<sup>74</sup> The new era of victim feminism had arrived in full force.

Early suggestions that battered women had any role or hand in the violent nature of their relationships were rigorously attacked and denounced as anti-women. Such suggestions, feminists contended, could be interpreted to mean that these women had done something to provoke or to continue the abuse. For instance, in her 1981 book, sociologist Mildred Daley Pagelow attempted to explain why some women are battered only once, and others are battered repeatedly.<sup>75</sup> Using social learning theory, she theorized that the key difference lies in the reaction that a woman has to the first instance of violence.

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72. *Id.* at 39. See also *id.* at 38–39 & nn.160–68 (summarizing the tone of descriptions of battered women from various court opinions, including *Fennell v. Goolsby*, 630 F. Supp. 451, 456 (E.D. Pa. 1985); *Ibn-Tamas v. United States*, 407 A.2d 626, 634 (D.C. 1983); *Smith v. State*, 277 S.E.2d 678, 680 (Ga. 1981); *People v. Emick*, 103 A.D.2d 643, 654 (N.Y. App. Div. 1984); *People v. Torres*, 488 N.Y.S.2d 358, 361 (Sup. Ct. 1985); *State v. Kelly*, 685 P.2d 564, 567 (Wash. 1984); *State v. Allery*, 682 P.2d 312, 315 (Wash. 1984)).

73. See *infra* notes 72–73 and accompanying text and Part V.A.1.

74. Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 387 (1993).

75. PAGELOW, *supra* note 68, at 42 (asking, "What are the characteristics (social and personal) that distinguish among women who are never battered, never battered a second time, or battered repeatedly? . . . And if a man batters a woman once, does he always repeat this behavior?").

The responsibility for taking decisive action at the first occurrence of battering appears to fall almost entirely on the woman. If a man responds to frustration, anger, or stress in a manner he has learned to believe is appropriate and this behavior appears to be accepted by his spouse because of lack of negative feedback, he is most likely to continue it. . . .

. . . If there is no retaliation or termination of a conjugal relationship following battering, the batterer is very likely to continue battering.<sup>76</sup>

Critics objected to the implication that battered women were somehow responsible for the continuation of violence.<sup>77</sup> Such thinking was dangerous and eerily reminiscent of the patriarchal denial that predated the feminist exposure of domestic violence.

Over time, however, victim feminism itself came under fire. Both feminist scholars and activists gained important insights as the victim image aggressively took over many areas of the feminist movement. In addition, the American public became more familiar with the victimization theory and were better able to evaluate its merits. Inevitably, a backlash developed between segments of feminists and the general public.<sup>78</sup> The criticisms ranged from particular comments and suggestions for improvement on the inner workings of the battered woman syndrome to sweeping calls for new theories to replace victimization. This Article focuses on the criticisms that disapprove of the simplicity and inaccuracy of an "all-or-nothing" victim identity where a battered woman is solely a victim and not at all an agent. The Article also discusses those proposals that call for more realistic resolutions of the victim-agent debate.

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76. *Id.* at 44–45.

77. *See, e.g.,* Mahoney, *supra* note 6, at 32 (disapproving Pagelow's theory because "it obscures [power and control as issues] again by indirectly holding the woman responsible for the batterer's continued control efforts").

78. The two authors whose works have received the most attention for rejecting victim feminism are Katie Roiphe and Naomi Wolf. Both wrote books that did not deal with domestic violence, but rather date rape and sexual harassment. KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993); NAOMI WOLF, *FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY* (1993). In advocating the view that feminism had become overly obsessed with victimization, both authors struck a raw nerve and appealed to sentiments that had heretofore been hidden or silenced in the American populace. The incredible amount of media attention was telling. *See* Schneider, *supra* note 74, at 392–95 & nn.27–41. Schneider reports that a computer search in the spring of 1994 on the topic of victim feminism produced more than 1000 articles in national newspapers and magazines in the United States. *Id.* at 392 n.27.



## C. A CALL FOR GREATER COMPLEXITY

## 1. A Failure to Describe

The specific criticisms of the exclusive identification of the battered woman as a victim can be loosely organized into several groups. The first group attacks the "all-or-nothing" identity as a failed tool of description. Critics point specifically to the sole focus on victimization and the exclusion of agency as the fundamental causes of that failure. Initial dissatisfaction with the rigidity of the "all-or-nothing" victim image as a descriptive tool began logically with the battered woman syndrome as a defense in homicide cases. Advocates and scholars gradually realized the inherent weaknesses of victimization theory as they gained more experience with each homicide case. Elizabeth Schneider described the fundamental problem with the battered woman syndrome as the exclusively victimized image it presents of battered women and thus, its resultant inability to explain the final act of homicide.

Expert testimony which emphasizes or is heard to emphasize only battered women's helplessness or victimization is necessarily partial and incomplete because it does not address the crucial issue of the woman's action, or her agency in a prosecution for homicide—namely, why the battered woman acted. . . . Juries evaluating the claims of battered women who have killed their batterers are looking at women who have been both victims and actors. These women have acted to save their own lives.<sup>79</sup>

If a battered woman is rendered so helpless and passive by her abuser's violence, how then does she have the wherewithal to kill her abuser? Certainly, an answer to this question is critical to a successful defense for a defendant accused of homicide, yet the battered woman syndrome, or at least the current perception of the syndrome by courtroom

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79. Schneider, *supra* note 52, at 239. Interestingly, Schneider does not necessarily blame defense attorneys or expert witnesses for the lopsided understanding of the battered woman syndrome. As co-counsel for amicus curiae in a New Jersey homicide case, *State v. Kelly* 478 A.2d 364 (N.J. 1984), she was able to observe first-hand, *id.* at 368, that even though there were elements of agency in the testimony on battered woman syndrome, the court appeared to ignore those elements and to hear only the story of victimization. See Schneider, *supra* note 52, at 226–231.

One possible explanation is that the court finds it easier to focus on those aspects of the testimony which characterize the woman as passive and helpless . . . rather than active and violent but reasonable. . . .

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Courts appear to be willing to recognize the importance of expert testimony when the rationale for admission is women's individual and collective psychological "weakness."

*Id.* at 230.

decisionmakers, does not provide an adequate answer. Instead, battered women facing murder charges are placed in a difficult bind where they must choose between using the inadequate syndrome defense or incurring the risk of a more realistic self-description. A more realistic description that includes elements of agency is a gamble because jurors may no longer feel sorry for the battered women or even accept her story of victimization.

In addition to its inability to explain a final act of homicide, the "all-or-nothing" victim image is also problematic as a descriptive tool because it fails to acknowledge numerous other acts of battered women. This weakness became increasingly apparent as the victim identity extended itself into other legal contexts involving battered women. For example, since the early 1990s, family courts in the United States have been considering the effects of domestic violence on children and on battered women in child custody and visitation proceedings.<sup>80</sup> In this context as well, battered women face the failure of an exclusively victimized image to accurately explain the complexity of their lives and their ability to parent. As Janice Drye explains, women are caught between emphasizing their victimization so that family court judges will seriously consider the domestic violence and highlighting positive acts of parenting so that the same judges will award them custody of their children.

To prove she was actually battered, the victim must show dysfunctionality as a result of her long suffering abuse, her failure to report, or her failure to terminate the abusive relationship in a timely fashion. The fact that victims frequently reconcile with their batterers and are extremely dependent on them further indicates the dysfunctionality of the victim. This showing of dysfunctionality comes back to haunt the victim when she must prove that she has been the primary caretaker and the stable element in the children's lives; a fit parent to have the primary parenting functions. Consequently a victim who portrays herself as an effective parent may come across too well to the bench. Her stories of domestic violence are discredited because she does not appear helpless and dependent enough to fit the pattern.<sup>81</sup>

Because the rise of victimization has been so strong within the movement against domestic violence, judges, prosecutors, police officers,

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80. See Janice A. Drye, *The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System*, 34 GONZ. L. REV. 229, 240 (1998) ("Most states that require consideration of domestic violence in establishing custody and visitation rights either include domestic violence as a *factor* in making the custody decision or create a *presumption* against custody with the batterer."). For a description of the situation in the early 1990s, see Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

81. Drye, *supra* note 80, at 240.

advocates and other important actors, as well as the general public, are now conditioned to expect battered women to behave within the rigid dictates of the battered woman syndrome. These expectations underlie the lack of inclusion and accommodation in the mandatory arrest and no-drop prosecution policies that deny choices to battered women. This is problematic because the exclusive victim focus of the syndrome does not truthfully capture the greater complexity and inclusion of agency within the lives of abused women.

The failure of descriptive tools leaves battered women in difficult situations in varying legal contexts. Such double binds would be eliminated with the evolution of a more realistic identity for the battered woman. In its place, Schneider does not propose a complete abandonment of the battered woman syndrome, but instead urges a more conscious and purposeful effort by defense attorneys and experts to expand the identity of battered women from being solely victims to being actors *and* survivors whose actions are depicted as reasonable within the context of their victimization.<sup>82</sup> As she explains, the answer lies not in victimization *or* agency but in victimization *and* agency.

Portrayal of women as solely victims or agents is neither accurate nor adequate to explain the complex realities of women's lives. It is crucial for feminists and feminist legal theorists to understand and explore the role of both victimization and agency in women's lives, and to translate these understandings into the theory and practice that we develop.<sup>83</sup>

In agreement with this new approach, Edward Gondolf and Ellen Fisher offer the survivor theory as a possible replacement for the battered woman syndrome.<sup>84</sup> Under their theory, battered women are not helpless victims, but instead, are active survivors who are thwarted in their attempts to end the violence by community passivity and economic barriers.<sup>85</sup> Indeed, one battered woman recounted how she did try to manage the violence with some limited success as an agent subject to victimization.

You learn how to manage all those big things, but it's always the little things that you've got no control over. What I've learned since is that battered women become good managers, they manage situations. You do learn to manage the situation. You can control it, for weeks or maybe

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82. See Schneider, *supra* note 52, at 240.

83. *Id.* at 239.

84. EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 17-22 (1988).

85. See *id.* at 17-22.

months on end. But then the little things happen, you may have left too much fat on the steak, you've got no control over that whatsoever.<sup>86</sup>

Such evolved theories, which collapse the victim-agent dichotomy into a single unifying identity, can serve as a basis for improved domestic violence policies.

## 2. A Failure to Include

The second group of criticisms of the exclusively victimized image of battered women relate to the failure to describe. These criticisms are concerned with a failure to reflect and include the diversity of battered women. Earlier in history, when domestic violence was a hidden and ignored problem, the popular belief was that only poor women at the margins of society suffered from abuse at home. In addition to generally exposing the incidence of domestic violence, the feminist movement also revealed that domestic violence occurs at all rungs of the socioeconomic ladder.<sup>87</sup> Despite the early bias towards the lower socioeconomic classes, the battered woman syndrome and the victimization theory interestingly developed to focus on the limited perspective of the battered middle class, white woman.<sup>88</sup> As a result, the theory endows the "normal" battered woman with many traditional gender stereotypes from the dominant, white society: "very emotional, very submissive, very excitable in a minor crisis, very passive, very uncomfortable about being aggressive, very dependent, very gentle."<sup>89</sup>

This narrowly defined persona is not applicable to many subsets of battered women who are not white, not middle class, or neither. These "other" battered women not only lack these particular characteristics, but may also be handicapped by the intersection of other popular identities attached to their color, ethnicity, sexual orientation, or socioeconomic class. For example, juries and judges may not easily accept that a battered

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86. DEE DEE GLASS, 'ALL MY FAULT': WHY WOMEN DON'T LEAVE ABUSIVE MEN 115 (1995).

87. See Albert R. Roberts, *Introduction: Myths and Realities Regarding Battered Women* in *HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES* 3, 4 (Albert R. Roberts, ed., 1996) (explaining that while domestic violence takes place in all socioeconomic groups, it is more visible in lower socioeconomic classes because of more frequent reporting to the police and to hospital emergency rooms).

88. See Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 *UCLA WOMEN'S LJ.* 191, 194 (1991) ("while theories such as battered woman syndrome explain why a battered woman's behavior is reasonable, the definition of 'woman' which guides such theories is based upon limited societal constructs of appropriate behavior for white women").

89. *Id.* at 196.

African-American woman suffered from learned helplessness and acted in self-defense because of the “dominant images of Black women as domineering, assertive, hostile, and immoral.”<sup>90</sup> The lack of agency in victim feminism may be particularly inaccurate for these “other” battered women and, thus, may render the battered woman syndrome a less persuasive and less successful defense.

In addition to their problematic lack of agency, the victim identity and the battered woman syndrome also disappoint “other” battered women because of their failure to incorporate more complex and diverse stories of victimization and limited choice. Because the syndrome is based upon the white, middle class woman, it features a fixed script of victimization; it does not consider or accommodate other sources of oppression. For example, women of color are simultaneously victims of racism and of their abusers.

Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people. The home is not simply a man’s castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society. However, but for this “safe haven” in many cases, women of color victimized by violence might otherwise seek help.<sup>91</sup>

Cultural beliefs, too, can complicate the victimization of battered women. For instance, Asian and Asian American women are often silenced from reporting their abuse by the community pressures and family values of their ethnicity.<sup>92</sup> The absence of consideration of these additional complexities experienced by these “other” battered women is a significant weakness for the traditional victimization identity. The failure to include the diversity of battered women undermines the effectiveness of policies

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90. *Id.* at 204.

91. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

92. See Nilda Rimonte, *Domestic Violence Among Pacific Asians*, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 327, 328 (Asian Women United of California ed., 1989). “Traditionally Pacific Asians conceal and deny problems that threaten group pride and may bring on shame. Because of the strong emphasis on obligations to the family, a Pacific Asian woman will often remain silent rather than admit to a problem that might disgrace her family.” *Id.*

that provide choices for battered women, such as orders of protection, because they fail to consider the special obstacles faced by “other” women in even going to court. These criticisms further confirm the need to revamp the identity of battered women not only by recognizing agency, but also by being more open-minded about different experiences of victimization and expressions of agency.

### 3. A Failure to Focus

The third and final group of criticisms of the all-or-nothing victim image objects to the harsh spotlight victim feminism shines on the women while leaving the male batterers in the dark. The most telling evidence of this lopsided view is the stubborn persistence of the question, “Why doesn’t she just leave?” Throughout the development of awareness about domestic violence, this one question has continually captured the attention of Americans.<sup>93</sup> Curiosity about the seeming failure of the woman to abandon her abuser is typically the initial reaction for many Americans when they learn of the latest domestic violence incident in their community; it is almost instinctive. This is true even after decades of public education campaigns on the difficult situations battered women face in leaving their abusers.

Understandably, an immediate focus on the woman’s behavior or lack of behavior made sense during the early stages of the feminist movement. There was a pressing need to develop an identity for the battered woman to serve as an effective defense for those who were on trial for killing their abusers. The preoccupation with the behavior of the woman, however, has never been limited to these select homicide trials, and indeed, has not subsided at all since the initial exposure of the horrors of domestic violence.

The objections to this lopsided focus on the battered woman are the following: (1) that the focus on the behavior of the woman distracts and undermines the need to further explore and understand the blameworthy and egregious conduct of the man; and (2) that the query, “Why didn’t she leave?” is based upon an erroneous and misguided cultural emphasis on a unilateral termination of the battering relationship. This Article does not agree entirely with these objections and contends that the fascination with the behavior of women in abusive relationships is not misguided; instead, the fascination, accompanied by other improvements, has an extraordinary

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93. See Mahoney, *supra* note 6, at 61 (describing it as “[t]he shopworn question [that] persists in the cases, legal scholarship and social science literature”).

potential to motivate more effective policy solutions for the domestic violence epidemic.

The question, "Why didn't she leave?" is a superficial symptom of an underlying obsession with the battered woman and captures for many feminists the problem with the victim identity. They question why so much effort and attention has been paid to understanding battered women, especially in comparison to the little effort and attention that has been devoted to studying their batterers.<sup>94</sup> They have sought to replace the question of "Why didn't she just leave?" with "Why did he batter?" They argue that the feminist movement has not made much progress because the persistent fascination with the battered woman and her victim identity are simply contemporary versions of the historical blaming of women for domestic violence. This doubt about progress is legitimate. Have we really moved ahead if we are still looking to the woman, and not so much the man, for an explanation of the violence?

Feminists' concern about diverted attention and resources is based, however, upon the assumption that only one question and only one party to the battering can occupy the national consciousness. This assumption is closed-minded and does not sufficiently challenge the status quo. If the domestic violence problem is so large and entrenched that it requires the doubling of efforts, attention, and resources for truly effective policy solutions, then advocates and researchers must aspire for that doubling and not settle for anything less. Analyzing the battered woman in the relationship is not mutually exclusive of studying the abuser; both can and should be done. We need to understand the reasons why the woman does not leave as well as the reasons why the man continues to batter in order to create complete policy solutions. The difficult task is not to choose between the questions, "Why didn't the woman leave?" or "Why did the man batter?" Both questions are essential. The difficult task is to avoid getting distracted by unnecessary squabbles and to increase the awareness and available resources to work towards true, long term solutions.

The second objection feminists have to the question, "Why didn't the woman leave?" is the exclusive emphasis it places on the termination of the abusive relationship as the goal.<sup>95</sup> This Article does not advocate the

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94. *E.g.*, GONDOLF & FISHER, *supra* note 84, at 19 (comparing when a man assaults a person outside his home, the assumption is that there is something wrong with him and not the victim, versus "when a man assaults his wife or partner, the tendency is to focus first on why the victim doesn't have sense enough to avoid the violence").

95. *See, e.g.*, Mahoney, *supra* note 6, at 61 (objecting to the assumptions that separation is the right solution, that it is the woman's responsibility, and that the woman has the ability to achieve

position that exit is the solution for all such relationships; certainly, there are narratives of relationships that have successfully survived serious domestic violence. These narratives, however, are admittedly few amongst the overwhelming numbers of tragedies. There are understandably many complex reasons why a woman may prefer to stay with her abuser.<sup>96</sup> Quite frequently, though, these reasons originate from the political, societal and financial inequalities between the sexes and not from a purely emotional desire to work through an abusive relationship.

For many battered women, exit would be their ultimate goal if it were more financially practicable and physically safe. On a societal level also, exit is the preferred goal because it is the only one in the long term that provides for less physical, psychological, and emotional harm to the woman and any affected children and has the potential to break the vicious cycle of generational domestic violence. Policy solutions should have such ambitious goals and should therefore work towards exit as a viable option for all battered women.

Rather than leading us astray into victim feminism, the long-standing question, "Why didn't she leave?" has the potential to take us in a new direction in the victim-agent debate. All it takes is a slightly different interpretation. The question is not about blaming the woman but is about striving to understand her motivations and recognizing her opportunities, however limited, to try to end the violence in her life. It could be the starting point of a policy approach that seems to improve the woman's options so she can safely choose to exit her domestically violent relationship.

All three schools of criticism, whether it be the failure to describe, the failure to include, or the failure to focus, point to a pressing need to reshape the victim identity of battered women. The current identity neither accurately describes the experiences of battered women nor accommodates their diversity. Additionally, for some feminists, it places too much emphasis on the battered women, in comparison to their abusers, thus placing too much responsibility for ending the violence in the hands of the women. Victimization may have played a key historical role in bringing domestic violence to the forefront of the American consciousness;

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separation). In trying to keep the agency of women within the context of the power and control exerted by batterers on abused women, Mahoney proposes that several different questions be asked of the woman, such as "What did you do in your search for help?" "What happened to you when you left?" and "What did he do when you left?" *Id.* at 61-63.

96. See, e.g., *id.* at 19-21 (urging legal actors to accommodate the emotional commitment women may have to their relationships, as well as their fear).



however, it has outlived its initial utility and purpose. The various attacks from feminists demonstrate this.

The incredible inconsistency that our policies evince on the topic of choice and battered women is a direct consequence of the growing pains the domestic violence movement is undergoing with the victim image. Some policies, such as mandatory arrest and no-drop prosecution still follow the victim identity and deny any choices for battered women. Other policies, like the protection order regimes, have moved away from victimization, and instead, aim to enhance the active agency of abused women with better options. Policies that attribute decisions to battered women and punish them in hindsight, without acknowledging their victimization, are perhaps the worst. They recognize the opportunities battered women may have to decide or act but ignore the limitations on those opportunities. A more accurate and accommodating understanding of battered women is necessary to eliminate the present confusion of domestic violence policies. Effective and realistic solutions can only be based upon an identity that combines both elements of victimization and agency.

This Article argues that the reshaping of identity lies primarily in the recognition and acceptance of the agency that exists in a battered woman's life. In Part IV, the Article proposes a twist on the definition of the term "agency" and presents the use of this new identity as a powerful policy tool.

#### IV.

##### A. CULTURAL ACCEPTANCE AND PROGRESS

As described above, there are already at least three groups of criticisms that offer plenty of reason to abandon the exclusively victimized identity of battered women and to replace it with an image that includes agency. There are, however, two additional reasons why a combined victim-agent identity will succeed. The first is the greater cultural acceptance such an image would receive. The American political and social culture is imbued with ideals of freedom and self-determination, both social and economic. We perceive ourselves as being a mobile society whose members have much control over their lives and destinies. Indeed, "exit" is crucial to our distinct identity as a nation and culture. Thus, when confronted with the horror stories of domestic violence, there is immediate resistance to the notion that these women were trapped. Instead, there is an initial puzzlement at the persistence of these relationships. Perhaps we can

accept that she is a victim but not that she is a completely helpless victim. Complete helplessness is dissonant with the more comfortable and preferable self-image as a free and mobile society.

This preference for agency is even true of battered women themselves. Many academics and practitioners have documented that battered women often do not view themselves as battered women because they do not identify with the extreme victimization portrayed in such theories as the battered woman syndrome. The lack of identification may be due to a failure to describe or include, as discussed earlier,<sup>97</sup> but it may also be due to a lack of cultural acceptance from the women themselves. As Martha Mahoney observes, this lack of identification is dangerous because it encourages the common psychological response of denial that already delays help-seeking by many battered women.<sup>98</sup> The solution, however, is not to keep pushing an exclusive victim image onto abused women. Indeed, Martha Minow warns that overemphasis on victimization runs the risk of becoming a self-fulfilling prophecy.<sup>99</sup> Instead, if the exclusive victim identity does not fit, then it is time to craft a new identity. A new identity that uses a new understanding of agency and combines it with victimization will be more culturally resonant for Americans and more personally acceptable for battered women themselves. Both cultural resonance and personal acceptance are necessary for a successful identity.

The second reason why a combined identity will succeed is its ability to adjust to progress; the exclusive victim identity is either already outdated or will be in the very near future. Although there is still much more to do, tremendous progress has undeniably been made in both the law and societal attitudes towards domestic violence. With the help of earnest advocates, battered women have been empowered, and the possibility of leaving abusive relationships is more real than ever. Thirty years ago, shelters, mandatory arrest, orders of protection, counseling for batterers, domestic violence felonies, and custody presumptions against batterers were all visions of imagination. Today they are reality. Admittedly, this progress should not be exaggerated. Leaving a batterer is certainly still an immensely difficult and trying option for many women, particularly poor

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97. See discussion *supra* at Part III.C.1-2.

98. See Mahoney, *supra* note 6 at 15-19.

99. See Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1429 (1993). "[C]ontemporary victim talk tends to suppress the strengths and capacities of people who are victims. Victim talk can have a kind of self-fulfilling quality, discouraging people who are victimized from developing their own strengths or working to resist the limitations they encounter." *Id.*

and minority women.<sup>100</sup> Consequently, there remains a great need to do more to help these women and to dedicate more resources to them. The collective hope of all advocates and feminists is that progress will continue. As it does, battered women will seem less alone and, therefore, less completely helpless. Clearly, over time, an exclusive victim image will no longer be satisfactory and will simply be outdated. Only a new identity that combines elements of agency and victimization will accommodate this progress and, indeed, embrace it. Thus, in addition to overcoming the failures to describe, to include, and to focus, a combined identity will be an improvement because of its cultural appeal and ability to progress.

### B. A NEW DEFINITION OF AGENCY

The cornerstone of this new combined identity is the inclusion of agency. Instead of defining “agency” to mean the opposite of victimization in a rigid and polarized dichotomy, this Article proposes that “agency” refer to the opportunity to make affirmative decisions or take conscious actions that have some effect or are intended to have some effect on future violence. The decisions can be against something and the actions can be omissions, but the key ingredient is the consciousness of the decision or action. This does not mean that every decision or course of conduct has to be preceded by a long period of thought; indeed, the contemplation may take only a few seconds. The other essential ingredient is that the decision or action would influence or be intended to influence the violence. It may be on the amount, the timing, or the type of the abuse. This impact may be positive or negative. Finally, it is also important to note that, in contrast to the original definition of agency, it is not relevant to the new definition whether the battered woman has total freedom to act or decide. What matters is that the battered woman has some opportunity, even if limited.

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100. In coining the term “separation assault,” Mahoney emphasized the very real dangers of leaving an abusive relationship. Mahoney, *supra* note 6, at 65–68. At least 50% of women who leave their batterers are followed, harassed, or further attacked by them and more than 50% of the men who killed their spouses did so during a period of separation from their spouses. *Id.* at 64–65.

### C. MAKING AGENCY INTO A WORKABLE IDENTITY FOR DOMESTIC VIOLENCE POLICY

#### 1. Battered Women Have Opportunities and These Opportunities Can Be Targeted

In order to turn this proposed definition of agency into a new and workable identity for battered women, several premises must be recognized and accepted. First, intrinsic to the new definition of agency itself, battered women do have opportunities or moments in time when they are called upon to make decisions or to take actions that have the potential to affect the future course of their abuse. These decisions or actions could be extremely serious or consequential, such as going to a hospital emergency room to seek medical treatment or continuing to work outside the home. They could also operate on a more minute, everyday scale; for example, a battered woman may have to decide what to make for dinner that evening or how to keep the children quiet and calm. As revealed by the numerous women I interviewed at the District Attorney's Office, decisions they made in consideration of the violence in their lives were both major and minor.<sup>101</sup>

It is reasonable to predict that the above-described examples are all decisions or actions that have the potential to influence the future course of abuse, even if specific cases in hindsight may not have had any effect whatsoever. There has been a sufficient amount of research into numerous women's experiences of domestic abuse to enable policymakers to predict reasonably well which decisions or actions are critical for battered women and the future course of their abuse. Additionally, the studies of batterers so far can also be helpful.<sup>102</sup>

#### 2. Battered Women Are Still Victims, Albeit Not Exclusively

The second premise that must be recognized and accepted in order for this new identity to work successfully on behalf of battered women is that

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101. See *supra* text accompanying note 12. Indeed, one way to define a battered woman is to ask whether her thoughts, beliefs, or conduct have been affected by her abuser because such control and power is certainly the goal of the abuser. If she has modified her behavior in any way to avoid the violence, then she is a battered woman. See, Maboney, *supra* note 6, at 33.

102. Even with all this research, there will always be a margin of error in that policymakers may be over-inclusive and under-inclusive in their designation of what are the critical decisions and actions. For example, a battered woman may take actions or make decisions that suddenly escalate the violence even though these actions and decisions may have been overlooked as insignificant by policymakers. After thirty years of research, though, this margin of error is comfortably small enough to develop policies based upon reasonable predictions of the critical decisions and actions for battered women.

agency is not the same as control, and having a role is not the same as being blamed. It is prudent to note here what the first premise does not state. It does not state that these opportunities for decisions or actions are necessarily potent or consequential. In other words, it does not profess that battered women have the ability to control their abuse. Indeed, because this new and more comprehensive identity combines elements of both agency and victimization, it rejects the extreme characterization that is more consistent with the old definition of agency where an individual is completely atomistic and self-determining. All too often, conservatives and others who are tired of victim feminism interpret opportunity for action to be the same as control over the abuse, and therefore, believe it is justified to penalize battered women anytime they do not use their opportunities and control to end the abuse. Again, this ignores the victimization and simply latches onto an extreme agency perspective. The proposed victim-agent identity instead recognizes the opportunities for action or decision while simultaneously recognizing the insurmountable obstacles that may prevent actions and decisions from reducing, eliminating, or affecting the abuse at all.

Whether a woman's actions or decisions have any influence will depend upon factors that are too numerous to list here. In order to be fair to those who do not have such influence, policies based upon this new definition of agency and the proposed combined identity of battered women must also be open and inclusive in their understanding of victimization. In addition, the lives of battered women are complex, and there will be times when the goal behind an action or decision is not necessarily to avoid or affect future violence. Battered women may have other equally legitimate short-term and long-term goals. While coherence in policymaking may require the prioritization of certain goals above others, the victim-agent identity does not dictate such a prioritizing process; this new identity could also be the foundation of more flexible policies.

It is true that a new definition of agency, and consequently, the new combined identity are based upon the concept that domestic violence is a phenomenon that takes place between two people. It is a certain type of relationship between those two individuals, and like other relationships, each person plays a role and has the chance to affect the course of that relationship. Having a role or impact, however, does not necessarily translate into being blamed for the nature of that relationship; and recognition of the role does not necessarily lead to imposition of penalties.

[W]e should, as a matter of moral and social choice, validate the capacities and choices available to people who have been victimized—

but not treat this as a reason to shift all blame to them and away from others or vice versa. The fact that a woman could leave an abusive relationship should be explored and promoted, but not used as a basis for blaming her for being battered. . . . The problem is not blame and cause, but responsibility. How can our discussions move from placing blame to promoting the ability of people in different circumstances to respond to the problems that give rise to charges of victimization?<sup>103</sup>

The classic case of domestic violence involves an extremely inequitable relationship in which the batterer has introduced abuse and maintained most of the power and control in the relationship. The battered woman should not be blamed or punished for the limited agency that she may have been able to exercise simply on the grounds that she had some opportunities. What cannot be overlooked is that these opportunities may be limited ones. Policymakers hoping to use a new identity inclusive of agency need to be wary of such thinking.

### 3. Battered Women Are Rational

The final premise that must be recognized and accepted is that battered women are capable of acting rationally even while suffering the debilitating effects of their abuse.<sup>104</sup> This may not be true for all battered women at all stages of an abusive relationship,<sup>105</sup> but there is plenty of evidence of rational behavior among battered women, especially mothers and those who are in earlier stages of the abuse. This rationality can be seen in the multitude of interviews conducted with battered women or in their own narratives.<sup>106</sup> What initially appears irrational may be, upon

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103. See Minow, *supra* note 99, at 1441–42.

104. In urging a redefinition of the battered woman syndrome, one advocate described a battered woman as “a normal woman who finds herself in a defective or dysfunctional relationship, surrounded by the realities of life confronting a woman today.” Michael Dowd, *Dispelling the Myths About the “Battered Woman’s Defense:” Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 578 (1992).

105. Some advocates believe that domestic violence victims can be rendered completely helpless and irrational in extreme circumstances. A notorious example of a battered woman who was arguably too debilitated to act rationally is Hedda Nussbaum. Through severe physical abuse and control over her drug addiction, Joel Steinberg was able to completely control Hedda Nussbaum such that she no longer sought escape and instead believed that the worst thing for her would be to leave him. His control caused her to lie to the police and prevented her from seeking any help. Her autonomy had been entirely stripped by him. See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 605–09 (2000) (criticizing empowerment policies as ineffective for those battered women who are “coercively controlled” by their abusers and proposing a guardianship remedy as a means of restoring control to such women).

106. See Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the “Protected Child” in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1100–01 n.82 (1995) (concluding from countless cases handled at the Albany Law School Family

closer examination, rational. The rationality of battered women can easily be misconstrued as irrationality if there is a narrow conception of the goals towards which battered women are expected to be working. For example, Mahoney protests that, more often than not, the only conceivable goal is termination of the relationship. As a result, unsurprisingly, battered women may appear to act irrationally. Once the range of goals is expanded, the behavior of battered women can be better appreciated as rational. While there are always exceptions to this, policymakers should not design entire domestic violence strategies based on the exceptions; instead, successful policies should be built to target battered women early on in domestic violence and to work with them as rational agents.

#### D. AGENCY AS A FOUNDATION FOR POLICY

With these three premises, the new definition of agency can be easily incorporated into a new identity for battered women without undermining or downplaying their victimization. Because they are not defined as opposing categories in a rigid dichotomy, agency and victimization can co-exist in a more comprehensive image of the battered woman. Instead of having to choose between the simplistic characterization as an autonomous agent or an oppressed victim, a battered woman can be more realistically viewed as both. She has opportunities to make decisions and to take actions that will influence or try to influence the future course of the abuse, but these opportunities may be restricted in some fashion. The limitations may come from the abusive behavior of the batterer; the particular cultural, ethnic, or minority group values of the woman; the failings of the criminal justice system; or the lack of adequate social services and support. The limitations or restrictions may be real or merely perceived as such by the battered women. They may be complete obstacles to any effective action or only partial blockades.

This new victim-agent identity of battered women can be a powerful policy tool. Policymakers can identify those decision- and action-junctures they deem as critical to stopping or reducing the domestic violence. They then can rely on the rationality and agency of battered women by using both positive support and negative consequences to steer women into using these identified opportunities towards desirable outcomes. Positive support should include genuinely helpful social services that work towards long-

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Violence Clinic and the Center for Battered Women's Legal Services that battered women often engage in strategic acts to protect themselves and their children from harm, such as hiding or disposing of potential weapons, refusing to reveal where children are hidden, or stepping in between their children and batterers).

term solutions, such as useful job training and permanent housing options. Negative consequences can range from suspension of certain privileges at shelters to modification of visitation or custody rights.

It is critical, though, that such policies not operate in hindsight and that the positive support and negative consequences be implemented only in the following chronological order. Initially, it is imperative that domestic violence be identified in a household and that the battered woman and any children be stabilized in an environment safe and separate from the abuser. Safety and stabilization are critical at the beginning; otherwise, the battered woman will only be capable of acting as an agent within the limiting and debilitating confines of her victimization. Her efforts at moving towards desirable outcomes will only be frustrated by the uncontrollable behavior of her abuser. Once a battered woman and her children have been provided a safe and separate environment, her agency is enhanced and her victimization is reduced. She has a better chance of using her agency opportunities to move towards desirable outcomes.

At that point, policies can offer intensive, quality, positive support to the woman to encourage certain actions or decisions. She should be informed beforehand of any negative consequences if she makes contrary actions or decisions. In order to capture the full deterrent effect of these negative consequences, they must be known to the woman beforehand. They will become incentives for her to do what she can to contribute to an end to the domestic violence. Only if a woman decides or acts in a manner that definitively undermines the desired outcomes of such policies should she face very serious repercussions. This is fair so long as her situation has been stabilized and so long as she has had the benefit of positive support as she knowingly makes her critical choices. Still, decisionmakers who are in charge of such policies and their negative consequences should be open-minded and fair in judging a battered woman, while maintaining a reasonably firm grip on the ultimate policy objectives at hand. The final part of this Article offers an example of how such a policy built upon this new understanding of the battered woman could work within the context of failure to protect proceedings against battered mothers.



## V.

A. FAILURE TO PROTECT PROCEEDINGS AGAINST BATTERED MOTHERS:  
THE CURRENT SITUATION

Perhaps the most controversial topic in the domestic violence movement now is the rising trend of states charging battered women with the failure to protect their children from domestic violence. Battered mothers have faced these accusations of failure to protect for quite some time.<sup>107</sup> Indeed, there have been so many cases that battered mothers are now afraid of reporting domestic violence incidents to the authorities or shelters for fear of losing their children, especially in states with mandatory child abuse reporting statutes.<sup>108</sup> Ironically, it was the reforms within custody and visitation determinations that paved the way towards failure to protect proceedings against battered mothers.<sup>109</sup> In order to get state legislatures and family courts to approve presumptions against custody or visitation of children by abusers, domestic violence advocates needed to persuade them of the deleterious harms suffered by children from even witnessing the violence.<sup>110</sup> They managed to do this successfully by citing existing research and commissioning further studies to document such harms.<sup>111</sup> The same theories of harm then began to appear in failure to

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107. Two law review articles concerning this trend appeared as early as the mid 1990s. See, V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996); Miccio, *supra* note 106.

108. See The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORD. URB. L.J. 849 (2000) (protesting New York City Policy of immediate removal). In Massachusetts, the Department of Social Services observed an increase in child abuse reports and a decrease in help-seeking by battered women when they began using domestic violence as an indicia of child abuse without providing any follow-up training or clinical support. *Id.* at 857 (citing NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: EMERGING PROGRAMS FOR BATTERED MOTHERS AND THEIR CHILDREN 15 (1998)).

109. See The "Failure to Protect" Working Group, *supra* note 108, at 850-51.

110. It is estimated that every year, 3.3 million children witness acts of domestic violence and that children are present in almost half of all battery incidents. See DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 25, at 3 (explaining that children are the "hidden victims" of domestic violence).

111. Research on the effect on children of witnessing violence between their parents has been growing since the early 1980's and has included controlled studies. The general conclusion from these efforts is that children who are exposed to domestic violence tend to exhibit elevated levels of some measured symptoms, and therefore, have a diminished well-being. See Bonnie E. Carlson, *Children of Battered Women: Research, Programs, and Services*, in HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 172, 172-74 & Table 11.1 (Albert R. Roberts ed., 1996) (summarizing and citing 10 reports from 1986 to 1991). One such report, entitled "The Impact of Domestic Violence on Children," urges both lawyers and judges to protect children from the terrible impact of domestic violence. Released in 1994 by the American Bar Association, it cited to the statistics that 75% of boys who witness the beating of their mothers have demonstrable behavior problems, that 20 to 40% of

protect proceedings as family courts cited to the same studies, and even the legislative findings for the custody presumptions, as foundations for their findings against battered mothers.<sup>112</sup> This was certainly an unintended and unforeseen turn of events for both feminists and domestic violence advocates.

In addition to the documentation of harm to children from exposure to domestic violence, the trend of failure to protect proceedings was also motivated by the unequal and romanticized expectations that society places upon mothers and not fathers. Mothers in general are held to a standard of perfection that they can and should protect their children from all harm, even at risk of death or serious physical injury to themselves.<sup>113</sup> When it comes to domestic violence, the experience of battered mothers is exactly the same. In the inevitable search for whom to blame for the tragic experiences of abused and neglected children in domestic violence families, society has not stopped (or necessarily, started) with the abusers themselves but has expressed its wrath at battered mothers. Battered mothers who do not sacrifice their own lives and limbs on behalf of their children but, instead, strive for their own survival as well as the survival of their children are considered bad mothers who fail to protect their children. Exalting the uncompromising importance of child safety, society has rushed to place blame on these mothers without engaging in a serious and thoughtful analysis of the entire dynamics in a domestic violence situation.

### 1. The Different Types of Proceedings

Under the umbrella phrase, "failure to protect," there are actually four different types of legal proceedings in which battered mothers may face such accusations. They are (1) criminal prosecution; (2) civil termination of parental rights by the state; (3) civil lawsuits by parties other than the

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chronically violent teens lived in homes with domestic violence and that 63% of young men from ages 11 to 20 in jail on homicide charges had killed the batterers of their mothers. See Roberts, *supra* note 87, at 8. Children also suffer from increased incidence of psychological problems such as depression, anxiety, aggression, shyness, and lowered social competency. DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 25, at 3 (citing David A. Wolfe, Peter Jaffe, Susan Kaye Wilson, & Lydia Zak, *Children of Battered Women: The Relation of Child Behavior to Family Violence and Maternal Stress*, 53 J. CONSULTING & CLINICAL PSYCH. 657 (1985)).

112. See The "Failure to Protect" Working Group, *supra* note 108, at 852 (citing the opinion of In re Lonell J., 673 N.Y.S.2d 116 (App. Div. 1998)).

113. See G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 93 (1999).

state;<sup>114</sup> and (4) child custody and visitation proceedings in family court. In addition to these four procedural possibilities, the specific substantive accusations may also vary: a battered mother may be accused of failing to protect her children from actual abuse or neglect perpetrated by the batterer against the children or, more simply, failing to protect her children from being exposed to the abuse perpetrated by the batterer against herself. Whether the children have experienced abuse or neglect themselves at the hands of the abuser or whether they have merely witnessed the abuse of their mother is a significant determinant of which type of failure to protect proceeding the battered mother may face. Aside from the following brief descriptions of the other three types of proceedings, this Article is mostly concerned with civil termination of parental rights by the state.

Criminal prosecutions of battered mothers are typically reserved for those incidents in which a child has directly suffered abuse or neglect. As of 1996, forty-nine states and the District of Columbia had criminal child abuse laws.<sup>115</sup> In thirty-eight of these jurisdictions, the laws allow for the criminal prosecution of "omissions," where a person who has a duty to protect a child from abuse fails to do so.<sup>116</sup> Some of these statutes require that there be reckless knowledge or malicious intent behind the omission, but many of them do not require any level of intent whatsoever. In these states, battered mothers may be held strictly and criminally liable for the harms they fail to prevent.<sup>117</sup> In her attack on these criminal prosecutions, V. Pualani Enos describes several troubling assumptions and myths that underlie these proceedings, one of which is that knowledge of abuse is the same as the ability to stop the abuse and protect the child.<sup>118</sup> Without taking a closer look at the victimization and agency dynamics of a woman's domestic violence situation, such proceedings may unfairly require that she prevent all harm to her child, even when she has absolutely no control over the source of the harm and is herself being harmed by that same source. What is particularly exasperating is that, in some cases, the respective criminal punishments for the actual abuser and for the battered

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114. Although this is rare, there are some states in which victims of abuse can civilly sue not only their abusers, but also any other parties who were under a duty to protect them but did not do so. This could include a battered mother. One Michigan court recently permitted what may have been such a claim. *See Phillips v. Deihm*, 541 N.W.2d 566 (Mich. Ct. App. 1995).

115. Enos, *supra* note 107, at 236.

116. *Id.*

117. *See id.* at 237. In addition to the child abuse laws, most states have also used other criminal provisions such as murder, manslaughter, assault, battery, mayhem, endangering the welfare of a minor, and criminal child neglect to prosecute battered mothers. *See id.* at 238-39.

118. *Id.* at 240.

mother are strikingly similar although there clearly should be greater consideration of the violence and abuse also suffered by the mother.<sup>119</sup>

In these criminal prosecutions, emotions are often running high over the horrifying harms inflicted on an innocent child. There is little consideration or sympathy left over for the victimization the battered mother may have endured. There is only anger and outrage over the bit of agency she may have displayed or failed to display in an omission case. Similar to criminal prosecutions of battered women who kill,<sup>120</sup> criminal prosecutions of battered mothers punish the alleged choices of women without fair consideration of their victimization.

Emotions are also intense in the context of custody and visitation hearings. Even though there have been significant improvements in the consideration of domestic violence during such proceedings, battered mothers may still find themselves dealing with accusations of failure to protect. For instance, leaving her children behind in the common domicile when fleeing from a very real threat of death or serious physical injury may be a decision that comes back to haunt a battered mother in the worst way.

## 2. The Civil Termination of Parental Rights of Battered Mothers

Arguably more serious than the criminal prosecutions and the custody disputes are the civil proceedings brought by states to terminate the parental rights of battered mothers to their children. For some women, the terminations are the civil equivalent to the death penalty or life imprisonment.

The rights of parents to determine their children's upbringing and to be involved in their lives have both constitutional and emotional dimensions. The Supreme Court clearly endorsed this position in the seminal case of *Wisconsin v. Yoder* in 1972.<sup>121</sup> However, parental rights are not absolute; all fifty states have the power to remove children from their parents and to terminate all contact if the children are neglected, abused, or mistreated.<sup>122</sup> Typically, the agencies responsible for such

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119. See *id.* at 260–61 (protesting that battered mother received seven years in prison for her failure to stop her abuser from raping her daughter while the abuser/rapist received only ten and one-half years in prison in a plea bargain agreement for committing rape in the unreported case of Janice Loch in Minnesota).

120. See *infra* notes 42–54 and accompanying text.

121. *Wisconsin v. Yoder*, 406 U.S. 205, 213–15 (1972).

122. See, e.g., *id.*; *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

removals and terminations are local child welfare agencies acting under the authority of state laws.<sup>123</sup>

Numerous states now have statutes that specifically include failure to protect as one way in which parents or custodians may be found guilty of child neglect or abuse, and lose their parental rights.<sup>124</sup> These child protective laws have been used against battered mothers on the specific grounds that the mothers failed to protect their children from exposure to domestic violence. Courts in these states have approved of this application.<sup>125</sup> Of particular concern to both feminists and domestic violence advocates about the current practice is that some states are using a strict liability standard in these proceedings against battered mothers.<sup>126</sup> What this means, practically speaking, is that the child welfare agency need only prove two elements to achieve a finding of neglect or abuse: the relationship of mother to child and the existence of harm from exposure to domestic violence.<sup>127</sup> It is irrelevant under a strict liability standard what a battered mother's particular intentions or actions were. If there is harm and she is the mother, then she has failed to protect the children from the harm, and therefore, her parental rights should be negatively affected.<sup>128</sup> There is no consideration of her agency or victimization. Essentially, because courts and agencies are overwhelmed and angered by the sad plight of children living with domestic violence, they have closed their eyes to the complexities of the violence against the mother and, instead, have grasped at the easy and comforting solution of blaming the mother too. Without any real analysis, a battered mother is regarded as a danger to her children,

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123. These agencies are charged with the investigation of abuse and neglect allegations and with the care of children in danger. See MARK HARDIN & ROBERT LANCOUR, *EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS* 5 (1996).

124. See, e.g., N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 2000); COLO. REV. STAT. § 18-6-401(1) (1986 & Supp. 1996); CAL. WELF. & INST. CODE § 300(b) (West 1998); OHIO REV. CODE ANN. § 2919.22(A) (Anderson 1998).

125. See, e.g., *In re Lonell J.*, 673 N.Y.S.2d 116 (App. Div. 1998).

126. See Miccio, *supra* note 106, at 1092-96. See also The "Failure to Protect" Working Group, *supra* note 108, at 852-54; Miccio, *supra* note 113, at 107-10.

127. See Miccio, *supra* note 113, at 107.

128. In New York State, the watershed case establishing the strict liability standard was *In re Glenn G.*, 587 N.Y.S.2d 464 (N.Y. Fam. Ct. 1992). In that case, the court upheld a strict liability standard in establishing child neglect charges against a battered mother for failure to protect her children from domestic violence. See *id.* at 470. Admittedly, the same court did reject a strict liability standard for the child abuse charges on the grounds that a battered mother subject to victimization and abuse at the hands of the same abuser should not be held guilty of the abuse without any intent or guilty conduct. See *id.* There is, however, little difference between findings of child neglect or child abuse; in both scenarios, the battered mother's parental rights to her children are seriously compromised. See Miccio, *supra* note 113, at 108.

just as the abuser is, instead of being perceived as another victim of the abuser allied with her children.<sup>129</sup>

Beyond the substantive standard of liability, there are also troubling practices in the procedures of civil termination of parental rights. In New York City, for instance, the removal of children precedes the ultimate legal determination of abuse, neglect, or in some states, abandonment.<sup>130</sup> Even more troubling, the removal of children commonly precedes any offer or requirement of counseling for battered mothers, even when domestic violence has been identified in the household.<sup>131</sup> This is especially true in New York City where children have recently died or suffered severe injuries as a result of abuse in notorious cases that went undetected or were mishandled by the local agencies.<sup>132</sup> The political pressure is tremendously in favor of removal. Immediate removal into foster care has become the universal response for caseworkers, lawyers representing child welfare agencies, and judges, as each errs on the side of extreme caution and safety. "Better safe than sorry" has become the universal motto.

After the immediate removal, requirements may be imposed by the agency or the court for battered mothers to receive counseling and to maintain separate domicile from their abusers. Oftentimes, these requirements are imposed without any real offer of assistance.<sup>133</sup> Some women end up looking for counseling or services by themselves. In many jurisdictions, it is still extremely difficult to find decent counseling, services and shelter for domestic violence cases. Over a prolonged period of time, without the necessary positive support, many battered mothers find themselves still vulnerable to the abuse of their batterers or even worse, staying or reuniting with their batterers. Thus, long before any final hearing on termination of their parental rights, the practice of immediate removal has already punished battered mothers with separation from their children.

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129. See Miccio, *supra* note 113, at 108.

Strict liability as a legal standard is dangerous because it apportions responsibility based on status, not on conduct. The abused mother suffers the same consequences as the abusive father; therefore, the perpetrator and the victim are legally indistinguishable. Such reductionism obscures violence against the mother and the root causes of the harm to the child remain unchallenged and unchanged.

*Id.*

130. See Telephone Interview with Amy Chan, former attorney at Administration for Children's Services, (Sept. 29, 2000).

131. See *id.*

132. See *id.*

133. See *id.* See also The "Failure to Protect" Working Group, *supra* note 103, at 855-56.

## B. HOW TO IMPROVE THE CURRENT SITUATION FOR BATTERED MOTHERS AND THEIR CHILDREN

The strict liability standard and the immediate removal of children are only two of several problems with the current trend of failure to protect proceedings against battered mothers. The one theme that unifies many of the problems can be traced back to the earlier discussion of the inconsistency on choice and battered women exhibited by current domestic violence policies. Failure to protect proceedings fall into the third and final category of punishing the choices of battered women in hindsight. If society recognizes the victimization in battered women's lives, how then can society blindly blame these women for the domestic violence that their children observe without considering that victimization? How can society remove their children without first offering them assistance and an opportunity to demonstrate that they can protect their children from domestic violence with help? Punishing battered mothers without recognizing that they do not have complete control over their situation, and without offering much-needed assistance, is inconsistent with our knowledge of domestic violence and is patently unfair. It is cowardly to regress to the historical blaming and cultural expectations of perfection and self-sacrifice placed on battered women and, particularly, battered mothers.

So, what is the answer? Should states stop bringing all failure to protect proceedings against battered mothers? Should states never be allowed to infringe upon their parental rights? This Article proposes that the answer does not lie in such extreme measures because failure to protect proceedings themselves are not inherently problematic. What is problematic are the rules, regulations, and practices that currently dictate how these failure to protect proceedings are conducted. The rules, regulations, and practices are what need to be changed and improved, but the proceedings themselves are necessary and should stay.

### 1. The Intersection of Interests Between Battered Mothers and Their Children

One of the strongest camps of supporters for failure to protect proceedings, even against battered mothers, has been the advocates for children. For such groups, the paramount concern is the safety and welfare of children. They believe that the priority of children's safety and welfare justifies the immediate removal of children from their battered mothers, the

strict liability standards, and other harsh current practices.<sup>134</sup> Support has also come from the American public, which generally shares in the concern for children, and from legislators, judges, and policymakers who recognize that children are a powerful political motivator. It is true that children deserve our deepest commitment and attention, and that is why failure to protect proceedings must continue.

The problem with the current practices, rules, and regulations is that they fail to recognize that battered mothers have the same interests as their children. Mothers and their children, especially those caught together in domestically violent households, have a tightly woven relationship in three significant ways. First, both the battered woman and her children may be suffering abuse by the batterer. In a study of women who killed their abusers, 71% reported that the batterers “had physically and/or sexually abused the children by the end of the relationship.”<sup>135</sup> Second, studies and research in domestic violence have documented that children are naturally a great, if not the greatest, motivation for battered mothers.<sup>136</sup> Very frequently, battered mothers make their most serious efforts to leave their batterers when they realize that their children are being harmed by the domestic violence.<sup>137</sup> Mothers who decide to stay with their batterers also explain that they are doing so for the children. Even batterers realize that they can easily manipulate mothers through their children and frequently file counter-custody and visitation claims to further control the women.

Third, while both the women and the children are being victimized by the abuser, the women are in a superior position to the children simply because they are adults and the children are not. Children, especially young ones, have a limited understanding of what is happening and what is right or wrong. Even if they comprehend that the abuse is wrong, they then face the difficult task of figuring out how to get help or end the abuse. The children’s vulnerability is further compounded by the fact that domestic violence usually occurs within the privacy of homes, and thus is not open

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134. At times, immediate removal may be justifiable. For instance, research has documented an increased incidence of child abuse by battered mothers. See BROWNE, *supra* note 69, at 71 (“battered women are up to eight times more likely to abuse their children when they are with an abusive partner than when they are not in an abusive relationship”). These cases, however, do not justify the currently high levels of immediate removal or immediate removal as a default policy, as is currently the practice in many jurisdictions.

135. *Id.* at 70.

136. See, e.g., Mahoney, *supra* note 6, at 19–23.

137. See *id.* See also ANN GOETTING, GETTING OUT: LIFE STORIES OF WOMEN WHO LEFT ABUSIVE MEN 12–13 (1999). “Many women who leave batterers recall an incident involving the children as the point of no return. They simply will not tolerate the children either witnessing the abuse of their mother or being abused themselves.” *Id.*



and obvious to people outside the household. As a result of their position as the adult victim and as a result of the privacy of domestic violence, battered mothers are desperately needed by their children as protectors.

## 2. Using the New Agent-Victim Identity in Failure to Protect Proceedings

Given this powerful trio of factors, policymakers should take advantage of this tightly woven relationship and work with battered mothers as the most potent defenders of their children. Many of these children do not need to be separated from their non-violent parent; rather, these children, along with their non-violent parent, need support and assistance as they seek to create a safe and non-violent life together.

This Article proposes two procedural improvements to failure to protect proceedings. First, where there is evidence of abuse against the mother, there should be a mandatory probationary period. This period must include intensive counseling and positive support services for the mother and her children prior to any separation from the mother, any final findings of abuse or neglect, and any termination of parental rights. Once domestic violence is identified, a battered mother and her children should be secured together in a safe environment separate from the batterer. This can be achieved by removing the abuser from the household or by having the mother and children go to a shelter. Once residential arrangements have been stabilized, substantial positive support should be given to the battered mother. This should include any of the following: addiction counseling, emotional counseling, assistance in adjusting to any relocation, job training, applying for welfare and permanent housing, self-defense training, parenting classes,<sup>138</sup> petitioning for orders of protection, and for orders of custody and child support.<sup>139</sup>

Second, it should also be made clear during the probationary period that any act or decision the battered mother makes that unreasonably risks a reoccurrence of the domestic violence and cannot be justified will be subject to serious repercussions. She should be made aware of the

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138. Because children who witness domestic violence are more at risk for behavioral problems, parenting classes are very important, especially at shelters. The focus of such classes is on nonviolent forms of discipline, such as consistent limit setting and time outs. Such classes are mandatory at some shelters, including the Long Island Women's Coalition shelter in New York. See Carlson, *supra* note 111, at 184.

139. In summarizing the findings of her study of battered women, Pagelow emphasized the importance of positive responses from social institutions and the personal and material resources of the women in shortening the amount of time spent in abusive relationships. See PAGELow, *supra* note 68, at 220-21. Because her study was conducted in the mid to late 1970s, the most critical change in societal institutions during that time was the rise in shelters for battered women. See *id.* at 221.

possibility of removal of her children and suspension or permanent termination of her parental rights. Such negative consequences, though, will become a reality only after the intensive positive support services.

Some may question the need for the negative consequences or failure to protect proceedings. These serious consequences and proceedings are, however, necessary. After all, there will be some battered mothers who genuinely fail to exercise the reasonable care and protection needed for the children's welfare or who even abuse their children themselves. Failure to protect proceedings must continue to ensure the safety of these less fortunate children. Just as every battered woman does not have a right to kill her abuser, there should not be blanket immunity for battered mothers from such charges simply on the grounds of their being battered. Such a policy would signal a return to the exclusively victimized identity of women. Instead, a true understanding of the new combined victim-agent identity of battered women includes an acknowledgement that some women will not use their agency opportunities to decide or to act towards the goal of ending the violence.

These women are not necessarily being victimized or irrational. Domestic violence is a complicated phenomenon that occurs within the complex context of a relationship between two people. At different points in the process of extricating themselves from a domestically violent relationship, battered women may have different goals and hopes for their future.<sup>140</sup> There is not one straight and narrow path to ending domestic violence; rather, there are as many different paths as there are individual battered women. The proposal described above would encourage women at different forks in the road not to accept any chance of a reoccurrence of domestic violence at the risk of losing their children.

Although it is possible that batterers may still be emotionally abusing and controlling the women, the purpose of the substantial positive support is to reduce the effect of such abuse as much as possible. This Article also proposes improved termination or removal hearings that sincerely explore the individual circumstances of each battered mother and accommodate those who have plausible explanations for their seemingly contrary actions or decisions. Strict liability standards should be abandoned in favor of more subjective standards that accommodate and recognize the rational

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140. It is critical to understand that getting out of a battering relationship is a process as opposed to a singular event. See GOETTING, *supra* note 137, at 15 (citing studies that document that women leave abusive relationships an average of five times before a permanent termination and that the average length of time required to successfully leave is eight years).

steps that battered women take in the interests of their children. With the probationary period of substantial positive support, though, judges and agencies should feel justified in erring on the side of safety and welfare of the children over the parental rights of a battered mother.

Some feminists and domestic violence advocates may still object to the imposition of any negative consequences whatsoever. They equate such consequences with unfairly blaming the woman and attributing responsibility to her for the domestic violence. Recognizing the role that battered women have in their relationships is not, however, the same as labeling her as a blameworthy party. This new definition of agency would not involve, at least initially, any negative moral stigma. Domestic violence is an interaction between two people, and it is critical that policymakers try to prevent its occurrence by using both positive and negative consequences on both parties. Moral stigma may attach under this proposal after the woman has received substantial positive support and has been given a serious opportunity to free herself and her children of the violence.

That is why inadequate social services are not acceptable if there are to be fair and effective domestic violence policies. The positive support must be plentiful and substantial. A few jurisdictions in the United States have programs that can be models or starting points for this positive support. The most successful ones have used coordinated community efforts to build cooperation and coalitions between child and domestic violence victim advocates. These coordinated community efforts have been made at the local level and have involved child protective agencies, children's hospitals, prosecutors' offices, and welfare services. Some inspiring programs include The Dependency Court Intervention Program for Family Violence in Miami, Project Awake at Children's Hospital in Boston, the Family Violence Program in San Diego, and the Domestic Violence Unit of the Massachusetts Department of Social Services.

This proposal to improve the current rules and practices in the removal of children and termination of parental rights seeks to capitalize on the a understanding of battered women as both agents and victims. It is based on the reality that battered women do make decisions and take actions that can sometimes affect the future course of the violence; therefore, they may be able to exert some influence over the exposure of their children to it. Such choices and opportunities for choice should be recognized and seized upon by policymakers, but importantly, the proposal also recognizes that battered mothers cannot do this alone and that they need real support. They need help to get past the victimization of their batterers, to have more options,

and to make better choices for their future. Only then should society pass judgment on their actions and decisions—and not one moment before.

### C. CONCLUSION

Current domestic violence policies represent a random and inconsistent mix of positions on whether battered women are capable of making choices and whether their choices should be respected or punished. They send a confused message to battered women about their role in the movement against domestic violence and reflect the continuing difficulties that feminists, domestic violence advocates, and the American public have in moving beyond the inadequacies of an exclusively victimized identity of battered women. This Article has proposed a new understanding of the battered woman that respects both her agency and victimization. In turn, this understanding can be the foundation of improved policies that will effectively include and help the battered woman in the fight against domestic violence. This Article has proposed one area that is ripe for such a policy—the civil termination of parental rights of battered mothers. This is only one proposal. It is my hope that this Article inspires more.

