

A FEMINIST CRITIQUE OF MANDATORY ARREST: AN ANALYSIS OF RACE AND GENDER IN DOMESTIC VIOLENCE POLICY

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I. INTRODUCTION

Men have beaten their wives and partners for centuries with no retribution from the criminal justice system.¹ Only recently has domestic violence been targeted by the government as a problem warranting criminal sanctions.² For example, in the past two decades many states have enacted mandatory arrest statutes.³ These statutes are designed to send the message that domestic violence is unacceptable and will be punished severely. Although many feminists argue

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This article is dedicated to the memory of my father, who proudly supported my pursuit of law and always encouraged me to speak my mind.

1. See generally, *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1502 (1993) [hereinafter *Legal Responses to Domestic Violence*] (describing the history of domestic violence and the inadequate legal response to this widespread problem).

This paper only discusses heterosexual domestic violence. While I am aware of lesbian and gay battering, a discussion of that problem is beyond the scope of this analysis.

2. See *id.* (noting that only within the last 25 years have adequate legal remedies become available to battered women).

3. Mandatory arrest laws eliminate police discretion in responding to domestic violence by requiring that the police arrest the offender if there is probable cause to believe that an offense occurred. Carol Wright, *Immediate Arrest in Domestic Violence Situations: Mandate or Alternative*, 14 CAP. U.L. REV. 243, 253 (1985); see *infra* note 44 and accompanying text (citing states that have mandatory arrest statutes).

for mandatory arrest laws in order to address crimes against women,⁴ these laws also perpetuate racist law enforcement.⁵

This article analyzes the interconnections between gender and race and evaluates state and feminist responses to domestic violence in terms of this analysis. As a feminist and an aspiring criminal defense attorney, I confront the contradiction between the desire to end the subordination of women and the desire to work toward a new model of the criminal justice system—one that does not mete out punishment based upon factors such as race, class, and gender.⁶

Domestic violence is clearly a very serious problem in the United States; one which activists must work to end.⁷ In spite of the best intentions of many domestic violence activists, who are mostly white women, the interests of many Black women are not served by asking the state for protection such as mandatory arrest laws.⁸ The criminal

4. See Wright, *supra* note 3, at 253 (listing the goals of mandatory arrest advocates, which include victims of domestic violence receiving "prompt, effective aid from the police and court system").

5. See *infra* notes 48-49 and accompanying text (discussing how mandatory arrest laws allow the perpetuation of racist law enforcement).

6. Kathleen Daly aptly illustrates the contradiction between the desire to end violence against women and the desire to eradicate racism in the criminal justice system:

As feminists seek a larger role for the state in protecting women and children from abusive men, we should ask, what role is desirable? We might also see the danger in reconstructing criminal law and justice practices from the standpoint of victims alone. A victim-centered strategy can easily [sic] lead to a feminist law and order stance, and we should be wary of this for several reasons. It can spill over to a more punitive treatment of women defendants, and it can have especially harsh consequences for racial or ethnic minority men.

Kathleen Daly, *Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice*, 17 INT'L J. SOC. L. 1, 13 (1989). Daly calls for a feminist conception of criminal justice which does not ignore the factors of race and class. *Id.*

7. In the United States, an estimated four million women are battered by their partners each year. Council on Scientific Affairs, American Medical Association, *Violence Against Women: Relevance for Medical Practitioners*, 262 JAMA 3184, 3185 (1992). A survey of married couples in 1985 estimated that 3,400,000 relationships involved severe violence. MURRAY A. STRAUS & RICHARD J. GELLES, *How Violent Are American Families? Estimates From the National Family Violence Resurvey and Other Studies*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 95, 97 (1990). Straus and Gelles suggest that "rates could be as much as double" as those reported and estimated. *Id.* Elizabeth Schneider points out that "[a]buse of women by male partners is the leading cause of injury to women in the United States." Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 523 (1992). More recently, Demie Kurz, co-director of the women's studies program at the University of Pennsylvania, stated that "an estimated 3,000 women are killed each year by their husbands or boyfriends." Judy Mann, *The Lessons of Lorena*, WASH. POST, Jan. 21, 1994, at E3.

8. Pamela Smith analyzes the effect of high incarceration rates of Black men on Black women, noting that while white women may consider disproportionate incarceration of Black men unfortunate, Black women are more likely to be personally affected by these statistics. Pamela J. Smith, *We Are Not Sisters: African-American Women and the Freedom to Associate and Disassociate*, 66 TUL. L. REV. 1467, 1488 n.138 (1992). She points out that these men are the "brothers, fathers, uncles, nephews, and potential mates for the African-American woman." *Id.* Smith proposes that Black women should at times disassociate from white women due to racism

justice system has always targeted Black people. As a result, Blacks experience unjust criminal sanctions.⁹ When battered women's advocates turn to the police for aid and support tougher laws and punitive measures, they deny the complexity of a problem which involves issues of race as well as gender. Domestic violence activists, therefore, must also challenge the racism endemic in our criminal justice system.

Part II briefly examines some of the historical tensions between Black¹⁰ and white women. Part III provides a brief history of domestic violence and explores how it affects Black and white women differently. Part IV discusses ways in which both the government and women's advocacy groups have responded to domestic violence. Part V examines the recent movement calling for mandatory arrest in domestic violence situations and suggests that this movement

and their differences with white women. *Id.*

I reluctantly include an explanation here of why I choose to focus on Black women and not include all "minorities"—or even mention "Asians" and "Latinos"—in this discussion. Most progressive literature on women's issues tends to group all minorities together as people with the same conditions as "women." Women used in this context clearly means white women, since women are part of every minority group. I focus on Blacks because they have particular historical, social, political, and economic conditions in the United States that other minority groups do not. Even though these other groups have suffered, and continue to suffer, great oppression as well, the conditions of Blacks are *different*, not necessarily better or worse. I also think it is an insult to Black men and women to merge their particular history with the history of all "minorities," rather than allowing Black history and social conditions to stand on their own. This may be applied equally to any discussion of "Asians" and "Latinos"—Vietnamese, Chinese, and Japanese people are different culturally, historically, and socially from each other, as are Cubans, Salvadorans, and Peruvians from each other.

9. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 340 (3d ed. 1992) (noting that Black men are more likely than white men to be killed, shot, or wounded by police, and more likely to be prosecuted to the fullest extent of the law). Almost one in four black men between ages 20 and 30 are involved with the criminal justice system, as compared to 1 in 16 white men. *Id.* Statistics reveal further that Black offenders are more likely to be convicted and sentenced than similarly situated white offenders. *Id.* at 340 n.36.

10. I use the word Black rather than African-American, but do not in any way mean that racism and racist oppression are based merely on "skin color." While some choose the term African-American to denote a particular history and culture, I use Black with the same understanding. I capitalize the word Black intentionally, and borrow from Catharine MacKinnon the reasons for this: "I do not regard Black as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity. It acquires its meaning under specific social conditions, one of which is racism, one of which is politically self-conscious struggle against racism." CATHARINE A. MACKINNON, *Not By Law Alone: From A Debate With Phyllis Schlafly* (1982), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 21, 25 n.12 (1987). Addressing the reason for not capitalizing "white", MacKinnon states that being white does not involve "affirmative self-identification." *Id.* Furthermore, "[c]apitalizing [white] would . . . communicate an equality that is now false, and would take no side toward making the equality a true one." *Id.*

Angela Harris relates a personal story in a feminist setting which illustrates the very real difference between white and Black women: "At a 1988 meeting of the West Coast 'fem-crits,' Pat Cain and Trina Grillo asked all the women present to pick out two or three words to describe who they were. None of the white women mentioned their race; all of the women of color did." Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 603 (1990).

unwittingly serves to increase racial oppression. Part V contends further that mandatory arrest does not deter domestic violence from recurring, refuting an argument commonly advanced in favor of mandatory arrest policies. Part VI concludes by offering an alternative, feminist model to arrest and prosecution, maintaining that a new vision of the role of the criminal justice system is needed in order to effectively combat domestic violence.

II. SOURCES OF TENSION BETWEEN BLACK AND WHITE WOMEN

In order to fully assess the problems of mandatory arrest programs, it is necessary to engage in an analysis of the historical and current antagonisms between Black and white women in their relationship to the law. This article suggests that attempts to protect women via the criminal justice system conflict with concerns about racial oppression in the criminal justice system, particularly in the areas of rape and domestic violence. Several feminist theorists have noted that there is a conflict between the feminist goals of eradicating domestic violence and achieving racial justice.¹¹

Many feminist lawyers and law students will agree that the criminal justice system is racist, and, despite some recent changes, sexist.¹² Yet when these same feminists are presented with a hypothetical rape or domestic violence situation, they often respond with a strong reaction that suggests that the gender oppression evident in those crimes is somehow more important, or at least more personal, than the racist oppression of the criminal justice system.¹³ By actively working with the criminal justice system to protect all women from violence, white women reinforce their racial privilege over Black men and women and, consequently, maintain a place for white women as

11. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 35 (1993) (suggesting that Black women experience a conflict between an alliance with Black men in their pursuit of racial justice, and an alliance with white women in their pursuit of gender equality). Roberts, a Black feminist, notes that:

[o]ur unity with men in the struggle for Black liberation is grounded in the reality that being Black in America is part of *our* identity, critical to what it means for us to be women. We are bound to Black men through the day-to-day struggles of living in a racist society. We know that our liberation as women is linked to the liberation of Black people as a group.

Id. See also SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE 275 (1982) (quoting Curdina Hill's statement that "[w]e are dealing with an entire people, including men, who are racially and ethnically oppressed. We can't separate out the inequities against us as women and those due to race and class.").

12. This observation comes from personal conversations with my colleagues in law school.

13. In her critique of Catharine MacKinnon's "color-blind" approach to rape, Angela Harris states that MacKinnon "simultaneously recognizes and shelves racism, finally reaffirming that the divide between men and women is more fundamental and that women of color are simply 'women plus'." Harris, *supra* note 10, at 597.

oppressors of Black women and men.¹⁴ Therefore, white women must consciously assess their alliances with the state to ensure that they do not inadvertently contribute to the oppression of other groups, including Black women.

A. *An Overview of White Women's Domination Over Black Women*

Although the focus of this paper is the relationship of white and Black women in the context of domestic violence, an examination of other areas in which white women dominate Black women is useful for gaining a perspective on their relationship. Tensions between Black and white women started during slavery, and escalated during the 20th century women's liberation movement.¹⁵ During slavery, the state was prepared to protect the white race through the patriarchal notion of vulnerable white womanhood,¹⁶ but it was not prepared to extend protection to white women in the framework of domestic violence.¹⁷

White women had an interest in preserving their social status as oppressors of Black men and women, but at the same time the white supremacist patriarchy relegated white women to an inferior social status to that of white men.¹⁸ Historically, the interests of white women as a group were linked to the racial oppression of Blacks, rather than to the liberation of Black women from white supremacist

14. See Smith, *supra* note 8, at 1473 (stating that "white women can be as racist as white men"). As Smith notes:

[a]lthough white women have been the victims of sexist oppression, a white woman's race determines to what extent she will be dominated and to what extent she can dominate. Being oppressed does not mean that one cannot be an oppressor as well. White feminists have labored under the misconception that by identifying themselves as oppressed, they are unable to oppress.

Id. bell hooks explains that "white racial imperialism grants all white women, however victimized by sexist oppression they might be, the right to assume the role of oppressor in relationship to black women and black men." BELL HOOKS, *AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM* 123 (1981).

15. HOOKS, *supra* note 14, at 153.

16. The complexity of white women's oppression of Black women is evident in the context of slavery. "[T]he cruelty white men inflicted on female slaves in the presence of white women served as a warning to their wives, sisters, and daughters to remain obedient Thus, the subjugation of Black women encouraged white women's allegiance to the patriarchy." Roberts, *supra* note 11, at 30-31.

17. See Roberts, *supra* note 11, at 31 (suggesting that white women had a stake in the maintenance of this system because it allowed them clearly defined racial privileges over their slaves). Roberts explains that the patriarchy protected white women from both Black men and the injustices suffered by Black women slaves. This complicated relationship ensured white women's "acquiescence in their own inferior status." *Id.*; see also HOOKS, *supra* note 14, at 93 (asserting that Black women also supported and accepted the patriarchy, because of their rage at Black men's refusal to assume the role of the sole economic provider in the family—a role that the white male assumed).

18. See Roberts, *supra* note 11, at 30 (stating that some white women compensated for their inferior status by exerting power over slaves owned by their husbands).

male domination. This historical relationship continues to be the basis for white women's privilege over Black women.¹⁹

Conflicts between white and Black women transcend the criminal context, permeating many other spheres. Perhaps these tensions are better understood as manifestations of the inequalities that exist between white and Black women. For example, throughout history poverty and unemployment rates have been and continue to be higher for Black women than for white women.²⁰ Discord between Black and white women has also resulted in the fragmentation of "women's" organizations. In the 1920s and 1930s, when Black women asked the National Women's Party for its support with their right-to-vote campaign, the "white feminists rejected their petitions, arguing that this was a race concern and not a women's concern."²¹

Pamela Smith describes another example of this organizational exclusion. She recounts an incident where a group of women of color walked out in protest of an annual meeting of the National Women's Studies Association.²² They asserted that "white women had ignored their cries and pleas for equal time."²³ The women of color created a separate organization, tentatively called the International Women of Color Association.²⁴

The mainstream feminist movement today has made attempts to redress the past and include issues of racial justice in its agenda. Nevertheless, there are still underlying prejudices which infiltrate mainstream actions. One recent example was the national pro-choice

19. Roberts, *supra* note 11, at 31. The alliance of white women with the patriarchy allowed them to ignore the racism that, in part, motivated the attacks on Black women. *Id.*

20. See Judy Scales-Trent, *Black Women and the Constitution: Finding a Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 9 (1989) ("[T]he poverty rates for black women, even controlling for age and education, are higher than the poverty rates for white women and black men."). Unemployment patterns also disproportionately affect Black women. This latter problem has become worse in the last thirty years. While in the 1960s Black women were twice as likely to be jobless as white women, they were four times as likely by the 1980s. Mary Huff Stevenson, Barry Bluestone & Chris Tilly, *Labor Market Outcomes of Young Black and White Women: The 1960s and the 1980s* 9 (May 15-16, 1992) (presented at the Third Women's Policy Research Conference) (unpublished manuscript on file with *The American University Journal of Gender & the Law*). Black women also earn less than white women. In 1991, Black women's median weekly earnings were \$323, compared to \$374 for white women. Janita Poe, *Black Women Join to Chip Away at Their Unique Problems*, CHI. TRIB., May 18, 1992, at C1.

21. Elsa Barkley Brown, *Womanist Consciousness: Maggie Lena Walker and the Independent Order of Saint Luke*, 14 SIGNS 610, 612 (1989). Brown suggests that such fragmentation encouraged the establishment of a false dichotomy between racism and sexism. *Id.*

22. Smith, *supra* note 8, at 1479.

23. See Smith, *supra* note 8, at 1479 (claiming that historical treatment of Black women in the women's movement has involved the perpetuation of inequality between Black and white women, and the denial of racism).

24. Smith, *supra* note 8, at 1479-80 n.76.

march of April 1992.²⁵ The National Organization for Women (NOW) was the leading organizer of this march. Latina, Black, and indigenous women's groups were angry that their voices were not included among the principal organizers. Some representatives of these groups were asked to speak at the march, but they were not included among the board that sponsored the march, nor were they able to make policy decisions for the march.²⁶ Patricia Ireland, President of NOW, emphasized that individual women of color served on NOW's board.²⁷ Individual tokenism, however, will not improve the conditions for the vast majority of Black women; rather, only collective community power will help advance the struggle for equality.

Although many white and Black women desire a women's movement that transcends race and class, the reality has been anger and mistrust among women. As Black women organize and struggle against racist and sexist subjugation, white women must recognize the power over Black women that their racial privilege confers. The call for mandatory arrest and subsequent prosecution stems from an understandable desire to have crimes against women treated as seriously as other crimes.²⁸ In the context of a criminal justice system that already treats offenders differently because of race, class,²⁹ and gender, however, it is not truly feminist to demand for more prosecution because it ultimately excludes Black women from the feminist struggle.³⁰

25. See *Who's Sorry NOW? Women of Color Protest Pro-Choice March*, MS., July/Aug. 1992, at 88-89 (investigating the tension between NOW leader Patricia Ireland and leaders of groups such as the National Black Women's Health Project, the Native American Women's Health Education Resource Center, and the National Latina Health Organization).

26. *Id.*

27. *Id.*

28. See DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION IN THE LAW* 242 (1989) (noting that in the late 1970s the goal of the women's movement was to "make legal decision-makers treat domestic violence as a significant criminal offense").

29. Although class disparity is a critical element of racial oppression, I do not specifically discuss class in this paper because I believe that race is the principal factor in the oppression of Black men and women. It is essential to discuss racial oppression first because being identified as middle-class or upper-class does not automatically eliminate the vestiges of racial discrimination. See Smith, *supra* note 8, at 1478 (noting that "membership in the African-American middle-class provides no protection from racism").

30. See Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 137-38 (1983) (stating that the feminist goal of increasing rape convictions only perpetuates racism in the criminal justice system and furthers white feminists' supremacy over Black women); see also Smith, *supra* note 8, at 1472 (quoting, in the context of women's solidarity, Angela Davis, who observed that racism must be addressed thoroughly in order to achieve "empowerment for the masses of women in our country").

B. Black Women and White Women: Their Divergent Perspectives of the Role of the Criminal Justice System

The racist legacy of the criminal justice system³¹ cannot be ignored when battered women's advocates propose to use that system as a solution to the problem of violence against women. The relationship of Black men and women to the criminal justice and legal system continues to be quite antagonistic. Since the days of slavery, the conduct of Black men has been criminalized, while sympathetic police have permitted white men to escape arrest.³²

The criminal justice system continues to provide Black women with less protection than white women. Black women suffer greater harm at the hand of the judicial system in various contexts. When a Black woman is raped, regardless of whether the accused is white or Black, the police do not take her case as seriously as when the victim is a white woman.³³ Likewise, a pregnant Black woman who is found to be addicted to drugs or alcohol when arrested or arraigned is much more likely to be convicted of a crime than a similarly situated white woman.³⁴

In contrast, white women's relationship to the criminal justice system is ambivalent because the patriarchal law serves as both oppressor and protector of white women.³⁵ The criminal justice

31. See BELL, *supra* note 9, at 338 (asserting that the criminal justice system has imposed discriminatory criminal sanctions on Blacks since the days of slavery, when Slave Codes established separate and more severe punishment for slaves).

32. See Tony Jefferson, *Discrimination, Disadvantage and Police Work*, in OUT OF ORDER? POLICING BLACK PEOPLE 178 (Ellis Cashmore & Eugene McLaughlin eds., 1991) (stating that police records and public surveys, relating mostly to London, suggest that Black males are more likely to be stopped than white males); BELL *supra* note 9, at 340 (concluding that the police power to stop and frisk has been a powerful tool for harassing Black and Latino citizens); Lynne Duke, *When Race is Equated with Crime*, WASH. POST, Oct. 21, 1993, at A3 (discussing how the police rely on race as an indicator of criminal suspects).

33. See Wriggins, *supra* note 30, at 117 (noting that racism and sexism have denied the notion that Black women could be raped from the time of slavery to the present day). Law enforcement officers take Black women's claims of rape less seriously than those of white women because of a perceived lack of credibility and myths concerning Black sexuality. *Id.* at 122.

The case of Desiree Washington's successful prosecution of Mike Tyson for rape is a recent example of a court recognizing that a Black woman can be raped. See Michael Madden, *Justice Served In Heartland*, BOSTON GLOBE, Mar. 27, 1992, at 43 (commenting that the Tyson case was a watershed in date rape cases because an unknown complainant was successful in prosecuting one of the world's most famous athletes). Had her accused rapist been a white man, especially a famous sports figure, the chances of a conviction would have been slim. See generally PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 117 (1984) (stating that white men are rarely convicted of raping Black women because of the perception that Black women have been and are still sexually accessible to white men).

34. See Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J.L. & FEMINISM 239, 240 (1990) (explaining the historical acceptance of racially-based justifications for governmental coercion).

35. See *supra* notes 16-19 and accompanying text.

system has protected white women in cases of stranger rape when the accused perpetrator was Black,³⁶ but offered little relief in cases when the accused was white.³⁷ Mandatory arrest laws will inevitably result in increased prosecution and consequently, increased oppression for Black men and women in the criminal justice system.

Some advocates argue that mandatory arrest policies benefit all women equally because women suffer discrimination based on their gender and not their ethnic or racial identity. A bitter debate has ensued over whether women can be stripped bare of their race and class, to be left with a gender identity that is essentially "woman," transcending all other socially constructed identities.³⁸ Feminists refer to the reduction of women's experiences to those based only on gender as gender essentialism.³⁹

When theorizing about women, one must avoid the tendency to understand "woman" as an "essential" identity; reducing gender to an "essential" form, devoid of any ethnic or racial identities, hinders one's ability to see the oppression that women can impose on other women by virtue of their race. Proponents of mandatory arrest policy, who are also gender essentialists, do not fully acknowledge that white women can indeed be the oppressors of Black men and women in their alliance with the state.⁴⁰

The interconnection of racial and sexual domination means that white women can simultaneously be oppressed and be oppressors.⁴¹ This is apparent in the context of current domestic violence policy, where white women can be oppressed in their abusive relationships, and at the same time, participate in the state's oppression of Black men by calling on the criminal justice system to mandate arrest in

36. See GIDDINGS, *supra* note 33, at 27-28 (discussing the widely-held belief that Black men had a particular proclivity for raping white women, which was used in many cases as a justification for lynching Black men).

37. See GIDDINGS *supra* note 33, at 27-28 (declaring that the patriarchal court system treats white defendants with more leniency than Black defendants due to the legacy of racism and property rights).

38. See Roberts, *supra* note 11, at 2 n.6 (characterizing Catharine MacKinnon as a gender essentialist because MacKinnon understands the system of gender domination to include all women in the same way, although women actually experience this domination in different ways). See also Harris, *supra* note 10, at 585 (arguing that both Catharine MacKinnon and Robin West rely on "gender essentialism," thereby silencing the voice of Black women's experiences).

39. See Harris, *supra* note 10, at 585 (defining gender essentialism as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.").

40. See Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 15 (1991) (describing treatment "as a woman" without explicit mention of race). MacKinnon writes that the "subordination of women to men is socially institutionalized . . . [T]he group women can be seen to have a collective social history of disempowerment, exploitation and subordination extending to the present." *Id.*

41. See *supra* notes 16-19 and accompanying text.

intrafamily abuse situations. Support for mandatory arrest statutes excludes Black women because these statutes conflict with the goals of eradicating racism and violence against women. Women demand protection from a male-controlled patriarchal state; and as this demand is met, it appears as if "women" are gaining equality. Black women, however, do not have the same access to the protections of the state, and, in fact, are often themselves the victims of zealous police and prosecutors.⁴²

C. *Intersection of Race and Gender in Mandatory Arrest Statutes*

At least forty-eight states and the District of Columbia authorize or require the police to make warrantless arrests, when there is probable cause, in misdemeanor domestic violence incidents.⁴³ Mandatory arrest statutes, however, require the police to arrest if there is probable cause that a family violence crime was committed.⁴⁴

42. See Wriggins, *supra* note 30, at 121-22 (discussing how the criminal justice system—judges, prosecutors, and law enforcement officials—views the rape of Black women less seriously than the rape of white women); Roberts, *infra* note 71 (finding that prosecutors are more likely to bring charges against Black, drug-addicted mothers than similarly situated white women).

43. See The Law Enforcement Training Project of the Victim Services Agency of New York City, *State Legislation Providing for Law Enforcement Response to Family Violence*, 12 RESPONSE TO THE VICTIMIZATION OF WOMEN AND CHILDREN 6, 6 (1989) [hereinafter Law Enforcement Training Project] (explaining that many of these jurisdictions require "some additional qualifier" to be present before the police may make a warrantless arrest in a misdemeanor family violence case).

For states that authorize discretionary warrantless arrest if the officer has probable cause to believe that physical abuse has occurred, *see, e.g.*, HAW. REV. STAT. § 709-906(2) (1985 & Supp. 1993); ILL. ANN. STAT. ch. 750 para. 60-301(a) (Smith-Hurd 1993); IOWA CODE ANN. § 236.12.2(a) (West 1985 & Supp. 1993); MICH. STAT. ANN. § 28.874(1) (Callaghan 1985); MINN. STAT. ANN. § 629.341 (West 1983 & Supp. 1994); MISS. CODE ANN. § 99-3-7(3) (1973); MO. ANN. STAT. § 455.085(1) (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 173-B:9 (1990); N.J. STAT. ANN. § 2C:25-21(b) (West Supp. 1993); N.M. STAT. ANN. § 40-13-7(B)(5) (1993); N.D. CENT. CODE § 14-07.1-11(1)(b) (1981 & Supp. 1993); OHIO REV. CODE ANN. § 2935.03(B) (Anderson 1993); WYO. STAT. § 7-20-102(a) (1993).

For states that authorize discretionary warrantless arrest when the officer has probable cause to believe that a civil protection order has been violated, *see, e.g.*, ILL. ANN. STAT. ch. 750 para. 60-301 (Smith-Hurd 1993); MD. [FAMILY LAW] CODE ANN. § 4-509(b) (Supp. 1993); MISS. CODE ANN. § 99-3-7(3) (1993); N.D. CENT. CODE § 14-07.1-11(1)(a) (Supp. 1993); WYO. STAT. § 7-20-102(b) (1993).

The state of Tennessee requires that the officer see the violence, or that the officer have probable cause to believe that an offense has occurred and that the fear of continued violence is present. In addition, both the plaintiff and the defendant must be present when the officer arrives. TENN. CODE ANN. § 40-7-103(7)(A)(ii) (1990 & Supp. 1993).

44. At least twenty-two states and the District of Columbia have statutes stipulating mandatory warrantless arrests in domestic violence situations. Under these statutes, there are five circumstances that are grounds for such arrests: (1) when there is probable cause to believe violence has occurred or is likely to occur; (2) when there is probable cause to believe a protection order has been violated; (3) when a violation of a protection order occurs in the officer's presence; (4) when there is probable cause of aggravated battery; and/or (5) when the officer observes a physical injury. *See* COLO. REV. STAT. § 14-4-104 (1987 & Supp. 1993) (stating that arrest is mandatory when the officer has probable cause to believe that there is a protection order violation); CONN. GEN. STAT. ANN. § 46b-38b (West 1993) (requiring arrest when the

Some jurisdictions mandate dual arrest if there is probable cause to believe that the woman attacked her partner.⁴⁵ Therefore, even if the man is the principal perpetrator, the woman may also be at risk of arrest if she injures him in self-defense. Other jurisdictions have recognized the injustice of this result. The state of Washington, for example, amended its statute in 1985 "so that mandatory arrest applied only to the primary physical aggressor."⁴⁶

officer, using speedy information, determines a crime of family violence has occurred); D.C. CODE ANN. § 16-1031(a)(1) (Supp. 1993) (mandating arrest when the officer has probable cause to believe that violence occurred); KY. REV. STAT. ANN. § 403-760(2) (Baldwin Supp. 1992) (stating that arrest is mandatory when the officer has probable cause to believe that there is a protection order violation); LA. REV. STAT. ANN. § 46:2140(1) (West 1993) (mandating that the officer use all reasonable means, including arrest, when there is reason to believe a family/household member has been abused and when there is probable cause of aggravated battery); ME. REV. STAT. ANN. tit. 19, § 770(5) (West 1981 & Supp. 1993) (requiring that an arrest be made based on probable cause that domestic violence has occurred); MASS. ANN. LAWS ch. 209A, § 6 (Law. Co-op. 1981 & Supp. 1992) (stating that the officer shall arrest when there is reason to believe a family member has been or is likely to be abused and that an officer shall arrest if there is reason to believe a protection order has been violated); MINN. STAT. ANN. § 518B.01.14-(b) (West 1990 & Supp. 1993) (providing that an arrest shall be made if probable cause exists that a protection order has been violated); MO. ANN. STAT. § 455.085(2) (Vernon's 1993) (requiring that the officer arrest if there is an act of abuse in violation of a protective order); NEB. REV. STAT. § 42-928 (1992) (requiring an arrest based on a violation of a protection order); NEV. REV. STAT. § 33.070(1) (Michie 1992) (requiring that the officer arrest if a violation of a protective order takes place in the presence of the officer); N.J. STAT. ANN. § 2C: 25-21(a)(1)-(3) (West 1993) (requiring that an arrest be made if there is probable cause to believe that there is physical injury, a violation of a protection order, or an arrest warrant); N.M. STAT. ANN. § 40-13-6(c) (Michie 1993) (stating that if a protection order has been violated, the officer shall make an arrest); N.C. GEN. STAT. § 50B-4(b) (1989) (providing that an arrest shall be made when there is probable cause to believe that a protection order violation has occurred); OKLA. STAT. ANN. tit. 22, § 40.3(B) (West 1992 & Supp. 1994) (requiring that an arrest be made when an officer observes a recent physical injury); OR. REV. STAT. § 133.310(3)(a)-(c) (1991) (providing that an arrest be made when there is probable cause a protection order has been violated); 23 PA. CONS. STAT. ANN. § 6113(a) (1991) (stating that the officer shall make an arrest when there is probable cause to believe that there is a protection order violation); S.D. CODIFIED LAWS ANN. § 23A-3-2.1(2) (1993) (providing that an arrest shall be made if the officer has probable cause to believe that violence has occurred and/or if the officer has probable cause to believe that a protection order has been violated); TENN. CODE ANN. § 36-3-611(a)(2) (1991) (stating that the officer shall make an arrest if there is reasonable cause to believe that there is a protection order violation); TEX. [FAM.] CODE ANN. § 14.03(b) (West Supp. 1993) (requiring that the officer arrest if a violation of a protective order takes place in the presence of the officer); UTAH CODE ANN. §§ 30-6-8, 77-36-2 (1989 & Supp. 1993) (stating respectively that all reasonable means shall be used, including arrest, if there is probable cause that a violation of a protection order has occurred and/or there is probable cause that violence has occurred); WASH. REV. CODE ANN. § 10.31.100(2)(a)-(b) (West 1990 & Supp. 1992) (requiring that an arrest be made if probable cause exists that violence has occurred and/or that a protection order has been violated and/or if the officer observes a recent physical injury); WIS. STAT. ANN. §§ 813.125(6)(b), 813.12(7)(b), 968.075 (West 1993) (stating respectively that an arrest shall be made where there is probable cause to believe that there is a protection order violation and/or there is reasonable grounds to believe that violence has occurred or is likely to occur and/or the officer observes a recent physical injury).

45. CONN. GEN. STAT. § 46b-38b(a) (the police officer "shall arrest the person or persons suspected of [committing a family violence crime] and charge such person or persons with appropriate crime").

46. Wash. Rev. Code Ann. § 10.31.100(2)(b) (West 1990); see also, Law Enforcement Training Project, *supra* note 43, at 9 ("The determination of the primary physical aggressor is

Mandatory arrest statutes implicate gender inequality precisely because of the fact that the vast majority of primary aggressors of domestic violence are men.⁴⁷ Racial oppression is also implicated because even though the statutes mandate arrest, which theoretically should remove the possibility of a racist application of the law by the police, the police must still determine if "probable cause" exists.⁴⁸ In the absence of obvious physical injuries, this leaves some discretion to the police. Because the initial threshold of probable cause must still be determined, the danger remains that the police will arrest Black perpetrators at a greater rate than white perpetrators.⁴⁹

The fact that mostly white women advocate for mandatory arrest laws highlights the different ways in which white and Black women may perceive the role that the criminal justice system should play in alleviating domestic violence.⁵⁰ White women often incorrectly assume that Black women will identify first with other women, rather than with their race, and support laws which purport to better the treatment of women.⁵¹ Susan Schechter quotes a minority woman who asserted that "[m]ost third world women identify with their race first."⁵² White women also identify with their own race, in other words, with white men, before they identify with Black women. Patricia Hill Collins describes the historical basis for this group identification, contending that although "united by biological sex, women do not form the same type of group as do African-Americans, Jews, Native Americans, Vietnamese, or other groups with distinct histories, geographic origins, cultures, and social institutions."⁵³

not based on who hit first, but takes into account the relative severity of the parties' injuries.").

47. See Schneider, *supra* note 7, at 540 (rebutting some earlier theorists' assertions that women batter as much as men, and asserting that violence is "overwhelmingly" directed against women).

48. See *supra* note 44.

49. See BELL, *supra* note 9, at 340 (reviewing racially discriminatory practices in law enforcement which demonstrate that Blacks are more likely to be arrested or convicted than whites for the same crime).

50. See SCHECHTER, *supra* note 11, at 120, 271-81 (discussing the difficulty of opening up the battered women's movement to minority women). Schechter notes that the battered women's shelters were run by predominantly white women, and that "women of color" were reluctant to visit many of these shelters because of the "white middle class bias of most battered women's programs." *Id.* at 272. See also Schneider, *supra* note 7, at 532 (noting that, until recently, the battered women's movement was "largely shaped by the experiences and understanding of white women").

51. See Smith, *supra* note 8, at 1470-71 (advocating that Black women exclude white women "from their associations when necessary to heal or gain empowerment").

52. SCHECHTER, *supra* note 11, at 275 (quoting Renae Scott's statement during an interview). In her book *WOMEN AND MALE VIOLENCE*, Schechter does not distinguish between Black women and women from third world countries, but rather uses the phrases "black women," "third world women," and "women of color" interchangeably. *Id.* at 120, 271-81.

53. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 27 (1991).

While women do indeed share similar experiences, these are not the same, historically, as the experiences that racial and ethnic groups share.⁵⁴

III. DOMESTIC VIOLENCE POLICY: AN ANALYSIS OF RACE AND GENDER

An analysis of race and gender in the context of domestic violence reveals that for white women, gender is the principal source of oppression, while for Black women, race is the principal source of oppression.⁵⁵ Black feminists have challenged the notion that Black women can separate or prioritize their concurrent oppressions,⁵⁶ recognizing that the situation of Black women in America is far more complex than is suggested by a layering of oppressions in any particular order. Nevertheless, it is important to examine the sources and relative importance of oppression in order to better understand the relationship between Black women and white women.

Domestic violence policy is a good vehicle for the consideration of the hierarchical complexities of race and gender, because it goes to the heart of questions about state intervention and the criminal justice system. Mandatory arrest laws must be examined because they are a solution to which many domestic violence advocates are eagerly turning.⁵⁷ Arresting batterers, however, is a poor strategy for curtailing domestic violence. At the same time, there is conflicting evidence on the efficacy of deterring violence.⁵⁸ Not only will mandatory arrest statutes increase incarceration rates for Blacks and

54. *Id.* 27-28; see also, *supra* notes 14-27 (discussing the historical conflicts between Black and white women).

55. This assertion does not ignore the sexist oppression that Black women suffer, but rather acknowledges that issues of race and gender cannot be so easily separated for Black women. See Smith, *supra* note 8, at 1484 (noting that Black women are doubly burdened because they "face racism and sexism simultaneously").

56. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics* [1989], in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 57, 57 (Katharine T. Bartlett & Rosanne Kennedy eds., 1990) (arguing that Black women are "multiply-burdened" and cannot be relegated to a mere subset of either Blacks or women); COLLINS, *supra* note 53, at 222 (explaining that Black feminist thought views the distinctive systems of oppression, such as those based on race, sexual orientation, and class as part of "one overarching structure of domination"). In a recent interview, Surgeon General of the United States Dr. M. Joycelyn Elders was asked whether "she felt more oppressed as a woman than as a black." In response, Dr. Elders stated: "No. I feel that I am who I am because I'm a black female." Claudia Dreifus, *Joycelyn Elders Toughs It Out*, N.Y. TIMES, Jan. 30, 1994, § 6 (Magazine), at 16, 18 (second emphasis added).

57. See RHODE, *supra* note 28, at 242-43 (discussing mandatory arrest as an effective option); Wright, *supra* note 3, at 249.

58. See *infra* part VI and accompanying text.

contribute to the continued oppression of Black men,⁵⁹ but arrest as a strategy fails to address the patriarchal justification for state intervention. In fact, increased state controls over family relations, however abusive or oppressive, strengthen the patriarchy from which feminists struggle to free themselves.

Domestic violence, also called wife battering or wife abuse, has been an accepted practice for centuries.⁶⁰ Domestic violence includes physical and sexual abuse, as well as psychological torture.⁶¹ It typically takes the form of men beating their partners; however, there are cases of women instigating abuse against their partners as well as abusing their partners in self-defense.⁶² The first reported case of a woman who took her husband to court for domestic violence is *Neffeld v. Neffeld*, a fourteenth-century, English case.⁶³ In that case, a woman appealed to the court for justice and was denied relief.⁶⁴ Instead, she was sent back to her husband to endure a marriage filled with beatings.⁶⁵ While there are no comprehensive statistics on the multitude of domestic violence incidents, there is general agreement

59. See Debra L. Dailey, *Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761, 761 (1993) (noting that the United States incarcerates "African-American males at four times the rate of South Africa"); see generally Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993) (stating that although the proportion of Black to white persons in prison varies widely from state to state, the "aggregate disproportionality," or national average ratio, is seven Black persons to one white person in prison).

60. For a concise history of domestic violence, see RHODE, *supra* note 28, at 237 (declaring that women have been battered for centuries, but only in recent decades has this become a public concern). See also, SCHECHTER, *supra* note 11, at 29-30 (claiming that the women's movement was a response by activists in the early 1970s to the systematic abuse of women in society).

61. There are many accounts of the horrors of being abused. See THE NEW OUR BODIES OURSELVES, UPDATED AND EXPANDED FOR THE '90s 137 (1992) [hereinafter THE NEW OUR BODIES, OURSELVES] ("I have had glasses thrown at me . . . I have been whipped, kicked and thrown, picked up and thrown down again . . . I have been slapped for saying something about politics, having a different view about religion . . .").

62. I do not focus on the latter here, simply because the vast majority of the cases are man-on-woman violence. A study by The Bureau of Justice Statistics indicates that approximately 95% of all domestic violence victims are women. BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE (1983). One author examines the question of how to label violence against women, noting:

On the one hand, 'wife abuse' or 'wife beating' are undeniably more accurate but such terms are not empowering for women as they underscore the idea of woman as eternal victim. On the other hand, 'spousal abuse' suggests a non-existent neutrality, although the term 'domestic violence' itself disguises which sex is responsible for the preponderance of the battering.

Margaret Thornton, *Feminism and the Contradictions of Law Reform*, 19 INT'L J. SOC. L. 453, 460 (1991) (citation omitted).

63. M.D.A. Freeman, *Domestic Violence: The Limits of Effective Legal Action*, 20 CAMBRIAN L. REV. 17, 17 (1989).

64. *Id.*

65. *Id.*

that millions of American women are beaten annually.⁶⁶ Another often cited statistic is that a woman is beaten in her home every eighteen seconds.⁶⁷ It is now accepted that women of all classes and races are abused, and that men of all races and classes batter.⁶⁸ There is no stereotypical victim or perpetrator of domestic violence. The women and families who experience intrafamily violence come from a variety of racial and socio-economic groups.⁶⁹

The private sphere of the traditional family structure has allowed men to batter without fear of state intervention, based on the theories that domestic violence is a family matter and that victims of domestic violence provoke the battering incident.⁷⁰ The conceptualization of privacy, however, and its implications for women in the family, are different for Black women than for white women, because the potential for state intervention and governmental coercion into the private sphere of the family is of greater concern for Black women than for white women.⁷¹ An article examining the consequences of arrest programs in Britain makes an important point about governmental intrusion into Black and immigrant women's lives. The authors suggest that:

[w]omen may perceive public control as even more dangerous than private, since it may entail surveillance, not only by the criminal justice system, but by other state agencies as well, for example, those dealing with immigration and child welfare which have the power to deport and remove children, respectively. This is a civil

66. See RHODE, *supra* note 28, at 237 (estimating that 10 to 20 percent of American women are beaten by an intimate male partner annually); *supra* note 7 (citing statistics on domestic violence in the United States).

67. Note, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 CRIM. & CIV. CONFINEMENT 337, 338 (1991) [hereinafter Note] (citing GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, GENDER BIAS COMMITTEE OF THE SUPREME COURT OF MASSACHUSETTS 79 (1989)).

68. See THE NEW OUR BODIES, OURSELVES, *supra* note 61, at 137 (acknowledging that women from all socio-economic backgrounds are battered by men of all walks of life); Note, *supra* note 67, at 340 ("Wife beating knows no socio-economic boundaries.").

69. See Deana Jang, Debbie Lee, & Rachel Morello-Frosch, *Domestic Violence in the Immigrant and Refugee Community: Responding to the Needs of Immigrant Women*, 13 RESPONSE 2, 3 (1990) ("Violence transcends cultural lines, yet it is not considered 'the norm' in any one community."). *Id.* at 3.

70. See *Legal Responses to Domestic Violence*, *supra* note 1, at 1502-03.

71. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1470 & n.251 (1991) (stating that the government's intrusive presence in Black women's lives is testimony to the privacy critique's shortcomings asserted by some white feminist scholars). "Feminist legal theory focuses on the private realm of the family as an institution of violence and subordination. Women of color, however, often experience the family as the site of solace and resistance against racial oppression." *Id.* at 1470-71. Roberts notes that the prosecution of drug-addicted mothers and coerced sterilization are examples of government power that pose a much greater threat to Black women than to white women. *Id.* at 1471.

liberties issue of particular significance for poor, working class and ethnic minority women, since state surveillance is more likely to be forced upon them than upon their middle-class and/or white sisters.⁷²

The very conceptualization of the family, and its potential benefits and harms, is different for white and Black women.⁷³ For Black women, the family provides protection and solace from the state, while white women do not need such solace because they are not subject to the same governmental coercion.⁷⁴ In the context of mandatory arrest laws, governmental intervention into Black family homes has grave consequences for Black women, resulting in the removal of their partners, who are often a source of income and support for the family.

Although men of all classes and races batter, only men who are poor and Black are routinely punished for it because the criminal justice system generally targets minority men for punishment.⁷⁵ Some critics of mandatory arrest laws argue that these laws do not serve the needs and wishes of many battered women anyway because they fail to accommodate the economic or domestic concerns of the victim.⁷⁶ While the goal of the criminal system is to arrest and

72. Rebecca Morley & Audrey Mullender, *Hype or Hope? The Importation of Pro-Arrest Policies and Batterers' Programmes from North America to Britain as Key Measures for Preventing Violence Against Women in the Home*, 6 INT'L J.L. & FAM. 265, 272 (1992); see also Jang, Lee & Morello-Frosch, *supra* note 69, at 5 (stating that most immigrant and refugee women hesitate to go to the police out of a well-founded fear that they or their partners will be deported).

73. Roberts, *supra* note 71, at 1470 & n.254.

74. See Roberts, *supra* note 71, at 1470-71 (arguing that the family can be a source of strength and place of refuge for Black women who are faced with government interference in areas such as reproductive rights and child custody). Poor white women are also subject to more governmental intrusions than middle- and upperclass white women. See Elisabeth Schillinger, *Dependency, Control, and Isolation: Battered Women and the Welfare System*, 16 J. CONTEMP. ETHNOGRAPHY 469, 476 (1988) (reporting that in a study of eleven white women on welfare who had left their battering spouses, all eleven women traded abusive homes for the protection of the state in the form of welfare). Schillinger further notes that the government control to which these poor white women were subjected included "such aspects of the women's lives such as job referrals, living arrangements, child care, and job-training programs." *Id.* at 478.

75. See Dailey, *supra* note 59, at 766 (illustrating that Black men are arrested and convicted for violent crimes, including domestic violence, 10% more than white men); see also Daly, *supra* note 6, at 12 (concluding that "the state's power to accuse and punish wrongdoing is disproportionately visited on economically marginalized and ethnic minority men and women"); BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE—1991 (Timothy J. Flanagan & Kathleen Maguire eds., 1991) (noting that 30.3% of those arrested in 1990 for "offenses against family and children" were Black, while 65.7% were white). In 1990, Blacks between the ages of 18-44 made up only 12.4% of the total population, while whites made up 79.0%. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992 (112th ed. 1992). Consequently, Blacks were arrested at rates far greater than their relative proportional representation in the total population.

76. See Wright, *supra* note 3, at 243 (examining the feasibility of mandatory arrest policies around the country). The author suggests that mandatory arrest policies "ignore the role of the victim's values and disregard her perceptions of the problem." *Id.* at 261.

prosecute, the battered woman seeking immediate relief may not necessarily wish to send her abuser to prison because she may rely on her abuser for financial support or fear retribution.⁷⁷

IV. ADDRESSING THE NEEDS OF BATTERED WOMEN

A. *State Responses to Domestic Violence*

Until recently, the federal, state, and local governments failed to protect women from violence suffered at the hands of their husbands or boyfriends.⁷⁸ Many formal laws and informal codes of behavior reinforced the male privilege to beat their wives without punishment.⁷⁹ The patriarchal state made it both easy and acceptable to practice domestic violence because the oppressors controlled the legislature and the judicial system. American courts have only recently started to consider seriously both civil and criminal remedies against abusive husbands and boyfriends.⁸⁰

The connection between rape and domestic violence is important when analyzing state responses to violence against women because it demonstrates how the law treats Black and white women differently. Rape has traditionally been considered a violent act that is usually perpetrated by a stranger. In fact, rape, as well as domestic violence,

77. I encountered this response from numerous women when I volunteered as a criminal victim's advocate at the D.C. Coalition Against Domestic Violence in the District of Columbia. Many women are simply ambivalent about their relationship with the batterer, and are unwilling to follow through with judicial proceedings. Often times the battered woman is scared to press charges for fear of retaliation in the form of more violence. See *Legal Responses to Domestic Violence*, *supra* note 1, at 1540. Although this may be true in some situations, the woman's decision not to press charges must still be respected, especially where she is making as informed a choice as possible based upon her economic and social needs.

78. See Note, *supra* note 67, at 339 (observing that the judicial system has historically ignored the problem of domestic violence because the family has been viewed by society as a refuge from the problems of the world); Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. REP. 7, 9 (1978) (chastising the police and court officials for treating violence as a "private privilege of marriage which does now [sic] warrant state interference because women are viewed as their husbands' property.").

79. See Note, *supra* note 67, at 338 (citing the criminal justice system's refusal to respond to domestic violence as the equivalent of silent approval for men to beat their partners). The "rule of thumb" is the most commonly cited example of such a law. *Id.* This rule allowed a husband to beat his wife, as long as the stick with which he beat her was no thicker than his thumb. *Id.*

80. While I do not develop the point in this paper, it is worth noting that there have also been successful civil suits filed against police departments for failure to intervene in a domestic abuse situation when the woman repeatedly requested police protection. See *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (holding that the Torrington Police Department could be sued for failing to restrain plaintiff's husband from viciously attacking her in the presence of police officers); see also Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 53-60 (1992) (noting that police departments are providing sensitivity training on domestic violence to officers as a result of law suits brought against law enforcement officers who fail to protect domestic violence victims).

is most often perpetrated by someone whom the victim knows.⁸¹ The historical social separation of whites and Blacks facilitated white women's ability to falsely accuse Black men of raping them. While all women who were subjected to domestic violence were without recourse to the state, white women were protected in cases of stranger rape, especially if the accused rapist was Black.⁸² Insidious myths about the sexual promiscuity of Black women, however, meant that they could not be raped.⁸³

The oppression that white women experience within a violent relationship is principally gender oppression because the vast majority of intimate relationships are interracial.⁸⁴ Moreover, when white women accuse the state of complicity in its system of oppression that condones battering, it is the *male* state that is at issue.⁸⁵ For Black women oppressed by both domestic violence and governmental intrusions into their lives, it is the *white, male* state that is their primary oppressor.⁸⁶

The campaign for mandatory arrest laws benefits white women without the same negative consequences that affect Black women and men.⁸⁷ Consequently, because state intervention operates primarily

81. See *Most Female Crime Victims Knew Attackers, Study Finds*, WASH. POST, Jan. 31, 1994, at A5 [hereinafter *Most Female Crime Victims*] ("Two-thirds of attacks against women are committed by someone they know . . .").

82. See ANGELA Y. DAVIS, *WOMEN, CULTURE, & POLITICS* 44 (1989) (stating that the double standard of the court system in prosecuting Black men more severely than white men made Black women more reluctant to join the movement against domestic violence). "If, throughout our history in this country the rape of Black women by white men has constituted a political weapon of terror, then the flip side of the coin has been the frame-up rape charge directed at Black men. Thousands of terroristic lynchings have been justified by the myth of the Black rapist." *Id.*

83. See Nell Irvin Painter, *Hill, Thomas, and the Use of Racial Stereotype*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY*, (Toni Morrison ed., 1992) (stating that the Jezebel image of the Black woman, meaning that "black women are always ready for sex and, as a consequence, cannot be raped" still persists); see also Cassia Spohn & Jerry Cederblom, *Race and Disparities in Sentencing: A Test of the Liberation Hypothesis*, *JUSTICE QUARTERLY* 305, 322 (1991) (observing that research in 1989 indicated that rape cases where the offender is Black and the victim is white are treated more harshly than other configurations, especially where both the offender and the victim are Black).

84. In 1992, 50,873 million of the 53,512 million married couples were "same race couples." U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1993 54 (113th ed. 1993).

85. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 161-62 (theorizing that the "state is male in the feminist sense: the law sees and treats women the way men see and treat women.").

86. See Crenshaw, *supra* note 56, at 77 n.46 (suggesting that universalizing the white woman's experience of oppression conceals the fact that Black and other minority men are not part of the public system of domination, and may themselves be victimized by it). Crenshaw further states that "[e]fforts to think more clearly about when Black women are dominated as women and when they are dominated as Black women are directly related to the question of when power is male and when it is white male." *Id.*

87. See *supra* notes 57-59, 73-75 and accompanying text.

to the benefit of white women, feminists need to consider more carefully the implications of racism within the criminal justice system when searching for solutions to domestic violence.⁸⁸ Battered women who kill their abusers also receive different treatment of their defenses based on their race. Black women have met with less success than white women in asserting the battered woman syndrome defense.⁸⁹ The battered woman syndrome is constructed so that the woman defendant must appear weak and helpless in order for a jury to acquit her of a murder charge.⁹⁰ Sharon Allard suggests that Black women are not generally viewed as weak, and therefore, the construction of the defense excludes Black women.⁹¹

Not only does the state address domestic violence from a dominant, white perspective, thereby excluding any analysis of race, but so does the battered women's movement.⁹² Women who turn to the courts and police for protection are complying with a patriarchal system which often still allows men to batter their wives with little or no consequence.⁹³ Even where courts and legislatures are responding to the problem of domestic violence,⁹⁴ white women primarily benefit.

B. Responses to Battering by Battered Women's Advocates

It is now commonly recognized that Black women have been excluded from feminist debates and campaigns about domestic

88. See DAVIS, *supra* note 82, at 50 (asserting that we who are "militant activists challenging violence against women, we must also fulfill our duties as fearless fighters against police violence, and we must express our passionate solidarity with the racially and nationally oppressed people who are its main targets.").

89. Battered woman syndrome may sometimes be offered at trial to show that the defendant, a woman accused of murdering her abuser, experienced a history of battering, and therefore demonstrates a reasonable fear for her life which would allow a self-defense theory. LENORE WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS*, 201, 209-10 (explaining how the myths concerning Black women's sexuality and strong image weaken their assertion of a "battered woman" syndrome defense for victims who murder their abusers).

90. Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 193-94 (1991). Allard notes that the battered woman syndrome "relies on prevailing gender characterizations of dominant, white society." *Id.* at 195.

91. *Id.* at 197 (stating that the image of white women as helpless, fragile and non-aggressive allows them to successfully use the battered woman syndrome defense, whereas the image of Black women as strong and angry excludes them from the same defense).

92. *Id.* at 197-98.

93. See RHODE, *supra* note 28, at 241 (noting that many judges' attitudes regarding domestic violence have not changed, thus reinforcing the public/private distinction discussed *supra* notes 71-75).

94. One way in which courts and legislatures have responded is by recognizing the validity of the battered woman syndrome defense. RHODE, *supra* note 28, at 241. See generally, *Legal Responses to Domestic Violence*, *supra* note 1, at 1530-47 (discussing the development of judicial responses such as tort actions, stalking statutes, arrest policies, and prosecution policies to domestic violence).

violence.⁹⁵ Likewise, Black women have not always embraced the struggles of the women's movement because they were working with Black men to fight "more oppressive beasts like hate crimes and legal segregation."⁹⁶ Several accounts of the battered women's movement address the exclusion of Black women's voices and experiences from this movement.⁹⁷

Advocates of mandatory arrest argue that once the abuser is in custody, the battered woman will have an opportunity to pursue whatever options she may have in order to extricate herself from the battering situation.⁹⁸ These options include obtaining civil protection orders,⁹⁹ finding a battered women's shelter,¹⁰⁰ or staying with family. Advocates of mandatory arrest also support swift and vigorous prosecution of domestic violence cases, believing that this will send a message to society that domestic violence will no longer be tolerated.¹⁰¹ Some advocates seek a "no-drop" policy from the prosecutor's office. Such a policy provides that once charges have been brought against the batterer, the case will not be dropped, even if the complaining witness changes her mind about testifying for the state.¹⁰² The implications of these arguments should be apparent to feminists: the victim is stripped of control and decision-making with respect to the criminal case. This is yet another example of the patriarchal protection of the legal system.¹⁰³

95. See Poe, *supra* note 20, at C1 (asserting that white women created the word feminism from a white perspective). White women's interpretation of feminism tends to exclude Black women because white women's view of feminism does not always recognize that Black women are discriminated against based on both their race and sex. *Id.*

96. Poe, *supra* note 20, at C1.

97. See SCHECHTER, *supra* note 11, at 275 (describing the exclusion's effect on Black and minority communities); Allard, *supra*, note 90 (finding that Black women were excluded from the battered woman syndrome defense).

98. See *Legal Responses to Domestic Violence*, *supra* note 1, at 1506-27 (presenting the advantages and disadvantages of the traditional devices of shelters and civil protection orders and suggesting the need for a combination of these mechanisms along with state and federal support). A woman's socio-economic class may determine what type of help she seeks. Middle- or upper-income victims are "better able to shield their abuse by going to private hospitals or a relative's home rather than seeking help from a battered women's shelter." Note, *supra* note 67, at 340.

99. *Legal Responses to Domestic Violence*, *supra* note 1, at 1509-11.

100. *Legal Responses to Domestic Violence*, *supra* note 1, at 1506-07.

101. *Legal Responses to Domestic Violence*, *supra* note 1, at 1513.

102. *Legal Responses to Domestic Violence*, *supra* note 1, at 1540.

103. But see Sarah Mausolf Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 223-24 (1988) (arguing that officer-initiated arrest actually empowers the victim by reinforcing the idea that society values her and her needs).

V. MANDATORY ARREST FAILS TO DETER REPEAT VIOLENCE

Mandatory arrest policies will not eliminate a deeply-rooted societal problem such as domestic violence.¹⁰⁴ Even battered women's advocates have been bitterly divided about whether to provide treatment for batterers or simply seek criminal punishment.¹⁰⁵ Consequently, there is a division among advocates as to the best method for solving the social problem of domestic violence:

Within the domestic violence community, there are two distinct schools of thought concerning the proper prioritization among substantive responses to domestic violence. One school advocates "control" strategies, which would punish and restrain assailants; the other favors a more community-based (for the victim, focusing on shelter and assistance) and treatment-oriented (for the victim and assailant) approach.¹⁰⁶

If the goal is simply punishment, then mandatory arrest is sensible, because widespread arrest of abusers temporarily punishes them for their abusive behavior.¹⁰⁷ If, on the other hand, the goal is the

104. Statistics and reports on the efficacy of mandatory arrest laws in eliminating domestic violence are very erratic. See LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 14 (1992) (admitting that "while [domestic violence] reports are going up, the actual number of incidents may be going down—or up, or remaining unchanged. *The question has not yet been investigated by empirical research.*" (emphasis added)). In New Jersey, a reported decrease in domestic violence was due to missing statistics, rather than an actual decrease in these crimes. *Police Say Clerk Hid Abuse Data*, N.Y. TIMES, Dec. 12, 1993, at 53 (reporting that a clerk hid 4,630 domestic violence reports, which led to the false report that domestic violence crimes decreased by 26% in the first half of 1993).

105. See David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 176 (Kersti Yllo & Michele Bograd eds., 1988) (analyzing five different treatment models and recommending profeminist treatment for batterers). The profeminist model provides a broader definition of violence, which is "any act that causes the victim to do something she does not want to do, prevents her from doing something she wants to do, or causes her to be afraid." *Id.* at 191-196. This definition includes physical and psychological abuse. Its analytic function focuses on the controlling effects on behavior. Treatment, therefore, concentrates on identification and elimination of violent and controlling behaviors as well as on sexist expectations and attitudes. *Id.* But see Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 220 (1992) (arguing that both civil and criminal intervention are necessary, and further stating that "mediation [or treatment options] ignores the criminality of the abuser's behavior").

106. *Legal Responses to Domestic Violence*, *supra* note 1, at 1521.

107. If criminal charges are filed after the arrest, the process involves arraignments, pre-trial hearings, plea negotiations, continuances, and eventually trial. Wright, *supra* note 3, at 255. The defendant is rarely held in jail pending his trial unless he has committed or commits another serious offense. During their study on the effect of arrest on domestic violence in Minneapolis, Sherman and Berk discovered that

of those [batterers] arrested, 43 percent were released within one day, 86 percent were released within one week, and only 14 percent were released after one week or had not yet been released at the time of the initial interview. Clearly, there was very little incapacitation, especially in the context of the six-month follow-up. Indeed, virtually all those arrested were released before the first follow-up interview.

Sherman & Berk, *infra* note 111, at 268.

eradication of domestic violence and its causes, then criminal sanctions provide only a brief hiatus, because unless the general sexual domination of women by men is addressed and eradicated, the violence will recur.¹⁰⁸

Not only does mandatory arrest perpetuate the racist patriarchal nature of the criminal justice system, but it also fails to meet its own stated goal of deterrence. Advocates for mandatory arrest claim that arresting the batterer sends a strong message to both him and society that violence will not be tolerated, and therefore, mandatory arrest will deter further domestic violence.¹⁰⁹ Battered women's advocates, however, called for police intervention in domestic violence well before any studies were completed to determine whether or not an arrest policy would reduce future violence.¹¹⁰

The seminal study of the impact of arrest on recidivism in domestic violence cases was conducted in Minneapolis.¹¹¹ The Minneapolis

108. See Wright, *supra* note 3, at 255 ("Our present criminal system has not been particularly successful in accomplishing objectives applicable to domestic violence, such as deterrence, prevention, or rehabilitation."); see also Gary Paquin, *Social Support as Protection: Reactions to Neighbor's Domestic Quarrels and Violence*, 20 FREE INQUIRY IN CREATIVE SOC. 171, 176 (1992) (showing that in a study conducted in Alameda County, California, "respondents who contacted the police felt satisfied that the police handled the matter well in the short-run, but emphasized the recurring nature of the violence." (emphasis added)). The criminal process is not the best system for solving the social problem of domestic violence for several reasons:

The components of the criminal-justice model—arrest, arraignment, the release on bond or recognizance, trial, jail—best fit those crimes against person or property in which "rational" or "economic" factors predominantly motivate the offenders. The justifications for the criminal process become steadily weaker as the problems with which it must deal become more personal, more emotional, and more intense.

Martha H. Field & Henry F. Field, *Marital Violence and the Criminal Process: Neither Justice Nor Peace*, 47 SOC. SERV. REV. 221, 227 (1973).

109. Wright, *supra* note 3, at 253. Wright acknowledges that there are potential problems with a mandatory arrest policy because such a policy views domestic violence as a crime and not as a complex social problem. *Id.* at 254-59.

110. See Woods, *supra* note 78, at 7-8 (criticizing the law enforcement agencies in general for not arresting domestic abusers and emphasizing the inappropriateness of that response); see also LAWRENCE W. SHERMAN, NATIONAL INSTITUTE OF JUSTICE CRIME FILE STUDY GUIDE: DOMESTIC VIOLENCE (noting that historically, arresting domestic assailants was based on retributive beliefs because of the seriousness of the crime and the moral appropriateness of the response of prosecution and punishment). Sherman also notes that "[t]he call for more reliance on arrest policies was not seen as a means of deterring repeat violence or as a means of deterring other potential offenders." *Id.*

111. Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AMER. SOC. REV. 261 (1984). Sherman and Berk's study only applied to misdemeanor "domestic assaults, where both the suspect and the victim were present when the police arrived." *Id.* at 263. The National Institute of Justice commissioned six studies to replicate the Minneapolis study. The results have been published from the Omaha, Charlotte, Milwaukee, Metro-Dade (Miami), and Colorado Springs studies. Milwaukee, Omaha, and Charlotte found an increase in violence after arrest, and Colorado Springs showed some deterrent effect, but this was based only on victim reports. SHERMAN, *supra* note 104, at Appendices 1 & 2, 269-382. Victim reports are problematic because they are often unreliable. If the reports are in the form of phone calls, the abuser may be in the room at the time and control the woman's ability to speak freely. *Id.* The woman might also fear that the abuser would open and screen her

study randomly assigned one of three different methods of addressing family abuse to the police assigned to respond to domestic violence calls.¹¹² The assigned methods included mediation, temporary separation, and arrest.¹¹³ The abuse recidivism rate was then assessed after six months.¹¹⁴

The study was not designed to test for a general deterrent effect, but rather was designed to test a specific deterrent effect. In other words, the abuser must batter the same victim within six months of the first reported incident in order for it to be counted as recidivist behavior.¹¹⁵ Testing for specific deterrents within a six-month period ignores the realities of the dynamics of domestic violence, including the fact that in long-term abusive relationships there is often a pattern of long calm periods in between violent episodes.¹¹⁶ Furthermore, this approach could not account for whether the man would abuse other women in subsequent relationships.

Although the Minneapolis study found that the women reported fewer repeat incidents after their abusers were arrested, the authors never recommended mandatory arrest as a solution to the problem of domestic abuse. Rather, they suggested that a pro-arrest presumption appeared to be supported by the evidence produced in the investigation.¹¹⁷ One author of the study, however, made clear that additional studies needed to be conducted in order to substantiate the applicability of the Minneapolis results and whether or not mandatory arrest laws were the appropriate remedy for domestic violence.¹¹⁸

The Minneapolis experiment was widely publicized in the media and academic journals,¹¹⁹ whereas the "equally valid and compelling" results of the Omaha study, which showed an increase in

outgoing (and incoming) mail. *Id.*

112. Sherman & Berk, *supra* note 111, at 263.

113. Sherman & Berk, *supra* note 111, at 263.

114. Sherman & Berk, *supra* note 111, at 263.

115. Sherman & Berk, *supra* note 111, at 263.

116. SHERMAN, *supra* note 104, at Appendix 1, 276. Lenore Walker, an expert on battered woman syndrome, found that battering occurred in "repeated cycles," each consisting of three phases:

The first phase is a period of tension-building which leads up to phase two, or the acute battering incident. The third phase consists of kind, loving, contrite behavior displayed by the batterer toward the woman, which provides the reinforcement for the cycles.

LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME 2* (1984). This cyclical pattern of alternating violence and love allows the abuser to exercise a unique form of power and manipulation over the battered woman.

117. Sherman & Berk, *supra* note 111, at 270.

118. SHERMAN, *supra* note 104, at 125-140.

119. SHERMAN, *supra* note 104, at 20-21.

violence after arrest, were published in a remote academic journal and ignored by the media.¹²⁰ Consequently, and perhaps most importantly, a large number of police officers and women's advocacy groups do not even know of the Omaha study or its results.¹²¹ This demonstrates that battered women's advocates made uninformed decisions about the efficacy of mandatory arrest laws based, in part, on a "law and order" theme of the criminal justice system.

More recent studies on the efficacy of arrest policies in deterring domestic violence have concluded that arrest does not deter repeat violence.¹²² One such study determined that arrest has a different impact on recidivism depending upon the employment status, marital status,¹²³ and residence of the people involved.¹²⁴ In cities with large concentrations of Blacks, arrest did not deter, but rather, increased the possibility of repeat attacks.¹²⁵ This finding suggests that the implementation of mandatory arrest policies placed Black women at risk for further violence.¹²⁶ Battered women's advocates who support mandatory arrest programs need to address findings such as these, and reassess arrest policies in light of data that suggests that white and Black women are affected differently by mandatory arrest laws.

120. SHERMAN, *supra* note 104, at 20-21.

121. See SHERMAN, *supra* note 104, at 20-21 (arguing that, as a result, the Omaha study had little or no influence on domestic violence policy).

122. See, e.g., J. David Hirschel, Ira W. Hutchison, & Charles W. Dean, *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RES. CRIME & DELINQ. 7 (1992) (showing that arrest is no more effective than temporary separation of the couple, or issuing a citation to the offender); Franklyn W. Dunford, David Huizinga & Delbert S. Elliot, *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990) (citing the results of the Omaha study to show that arrest did not, by itself, deter subsequent battering); see also Joan McCord, *Deterrence of Domestic Violence: A Critical View of Research*, 29 J. RES. CRIME & DELINQ. 229 (1992) (critiquing existing research and offering new approaches to the study of domestic violence).

123. See Lawrence W. Sherman, Douglas A. Smith, Janell D. Schmidt & Dennis P. Rogan, *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680, 680 (1992) (finding that the effect of arrest on recidivism was not affected by race, but arrest did increase recidivism when the batterer was unemployed and/or unmarried).

124. See SHERMAN, *supra* note 104, at 3 (emphasizing the difference between the cities where arrest deters and where arrest does not deter: more Blacks live in the cities where arrest increases the statistical chances of violence recurring, and more whites live in the cities where arrest decreases the chances of further violence).

125. See SHERMAN, *supra* note 104, at 3 (listing Milwaukee, Charlotte and Omaha as examples); see also *Most Female Crime Victims*, *supra* note 81, at A5 (stating that young Black women living in inner cities are more likely to be raped or attacked than women in suburban and rural areas).

126. Since the majority of married couples are same race couples, U.S. BUREAU OF THE CENSUS, *supra* note 84, at 54, Black women are at a greater risk in areas with large concentrations of Blacks.

VI. A NEW VISION FOR A FEMINIST RESPONSE TO DOMESTIC VIOLENCE

Due to the racist and sexist oppression of the criminal justice system, as well as the evidence that arresting abusers may not deter but can actually increase repeat violence, an alternative, community-based model to the current system of governmental intervention into domestic violence situations is necessary. This section envisions a social reality where men do not beat women. Men and women working to build a new construction of gender and race can advance society to a point of less violence. A law and order approach will not significantly reduce violence in the short-term, and will not eradicate it in the long-term. Only a feminist, anti-racist, political struggle will effect this new reality.¹²⁷

Susan Schechter analyzes the economic conditions in the United States and shows how the private realm of the family, and thus female subordination, relies on the capitalist private economy.¹²⁸ She questions whether certain material conditions, which she deems necessary to end domestic violence, are possible under the capitalist structure.¹²⁹ These material conditions include jobs, shelter, free health care for everyone, affordable decent housing, and child care.¹³⁰ Schechter's vision may not seem very realistic in today's society, but it merits consideration when discussing methods for ending domestic violence that extend beyond criminal punishment of the abuser.

The very construction of the family should expand to include members of the community at large.¹³¹ Such community-based family would be accountable to the entire community for the health and welfare of its members. This new familial structure provides a way for abused women to look outside the narrow, patriarchal construction of the traditional family unit and seek support from the

127. See SCHECHTER, *supra* note 11, at 238 ("Since male supremacy is the historical source of battering, and class domination perpetuates male privilege, a long-range plan to end abuse includes a total restructuring of society that is feminist, anti-racist, and socialist.").

128. SCHECHTER, *supra* note 11, at 238. In a capitalist society the value of women's work does not exist, and women themselves are degraded because the economic system makes them subject to their husbands' whims and isolates them from other women. *Id.* "Patriarchy in the modern capitalist welfare state is marked by an increased devaluation of motherhood that cuts across racial lines." Roberts, *supra* note 11, at 27.

129. SCHECHTER, *supra* note 11, at 238.

130. SCHECHTER, *supra* note 11, at 238.

131. SCHECHTER, *supra* note 11, at 239 (expanding these forms would then encompass homosexual families, single-women headed families, and non-nuclear families).

community.¹³² Elimination of the separation between family and community might encourage women to come out of isolation and assert their right to live free from violence.

Domestic violence has its deep roots in the patriarchy, which is both a racist and sexist system of white male domination. Consequently, a family structure that includes the larger community, thereby extending beyond the private realm of the traditional family structure, would allow women to assert their independence from domination by abusive husbands. The women could find material and emotional support in the community; the community would also be responsible for helping the abuser understand and stop his violent behavior.¹³³ A system should be created from the understanding that domestic violence is not an individual, private problem that some men have in controlling their anger. It is, rather, a manifestation of a social problem that is founded upon male control over women, and white male control over social rules and institutions.

This model may be best structured by considering how other cultures have dealt with domestic violence. One cross-cultural analysis of wife battering observes that when women have significant economic power outside the home, there is less battering in that society.¹³⁴ While men of all classes and races batter in the United States, cross-cultural studies have found that systemic battering does not occur in all societies.¹³⁵ Significant is the finding that in communities with no or very low incidents of domestic violence "[t]here are significant community level sanctions against battering clearly demonstrated by active community and/or kin intervention when beating begins to escalate to battering."¹³⁶

Jacquelyn Campbell suggests that in the United States "it is [now] time to start applying sanctions at the neighborhood level."¹³⁷ She

132. SCHECHTER, *supra* note 11, at 239 (comparing this new form of family to the present one in privatized society that separates family from community, isolates women, and creates unresolvable problems concerning violence against women).

133. See Jacquelyn C. Campbell, *Prevention of Wife Battering: Insights From Cultural Analysis*, 14 RESPONSE 18, 20 ("In some societies female groups provide the active community intervention against potential beating, for instance, presenting a compelling image of the women of a village surrounding a home where there is marital conflict until the wife comes outside with them.").

134. *Id.* at 19. This observation was countered by other evidence that even in two societies where wives have economic independence, battering continues. *Id.* at 19-20.

135. *Id.* at 18 (distinguishing between beating, which is a singular act of physical aggression, and battering, which is a "phenomenon almost exclusively directed toward women").

136. *Id.* at 20; see also James P. Brady, *Sorting Out The Exile's Confusion: Or Dialogue on Popular Justice*, 5 CONTEMP. CRISES 31, 36 (1981) (stating that "the informal sanctions of the community and the mobilization of public consensus can be a powerful, and yet relatively non-coercive form of social control").

137. Campbell, *supra* note 133, at 24.

further advocates making "individual batterers known to their communities, their churches, their schools, and their job sites for public censure. Let us work toward forming community and neighborhood level groups of women, both for economic solidarity and solidarity against men who batter."¹³⁸

While Campbell offers these suggestions as corollaries to official state sanctions,¹³⁹ perhaps this model could replace state sanctions such as arrest and incarceration. Otherwise, the neighborhood community sanctions would only serve as additional aid and power to the police, thus continuing the cycle of racist oppression. Under my proposal, community residents will not become agents in their own oppression, but rather, will take control of their lives and come to one another's aid.

This proposal might appear vigilantilist¹⁴⁰ upon first glance, but not if the implementation of these neighborhood justice programs is based upon a democratic process by which leaders or facilitators of these programs would be elected. The civil rights movement, in its struggle for voting rights and the more recent calls for proportional representation of minority communities, should serve as an example.¹⁴¹

The community would first elect to have a community justice system. In the spirit of Lani Guinier's voting rights proposals,¹⁴² the women of the community could have cumulative voting power to vote for the initial implementation of the program.¹⁴³ In other words, the women could pool their votes and thus elect the new system into

138. Campbell, *supra* note 133, at 24.

139. See Campbell, *supra* note 133, at 24 (stating that in some communities, neighbors who are aware of or watch for any indications of violence before it begins, can call the police on behalf of the woman who is being beaten).

140. I remind the reader that there is no real police accountability to the community in the first place. The beatings of Rodney King in Los Angeles and Malice Green in Detroit are just two examples that readily come to mind. See, Annette Haddad, *L.A. Mayor Calls for Police Chief "Accountability"*, LOS ANGELES TIMES, Mar. 12, 1991; Dane Parsons, *Who'll Police the Police When It Comes to Brutality?*, LOS ANGELES TIMES, Mar. 20, 1991, at B1; *Two Detroit Officers Convicted of Murder; Third is Acquitted in Beating of Black Motorist*, STAR TRIB., Aug. 24, 1993, at 1A.

141. See generally Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993) (advocating proportional or semiproportional representation instead of districting in order to achieve political fairness for minority communities). "Proportionate interest representation takes the idea of democracy by consensus and compromise and structures it in a deliberative, collective decision-making body in which the prejudiced white majority is disaggregated." *Id.* at 1171.

142. "Unlike race conscious districting, which predetermines voting options based on a concept of group representation, these alternative electoral systems allow contenders to win representation based on their proportion of the votes actually cast." *Id.* at 1135-1136.

143. *Id.* at 1137. Guinier suggests that under the current system, minority votes are diluted because votes cast for the losing candidate are wasted, rather than used to represent proportional strength. *Id.*

place in their community.¹⁴⁴ This process, of course, would require that the local police abide by this vote and be held accountable to the community for any infringement on the community control of domestic violence. Examples of neighborhood organizations for the purposes of zoning and property laws abound.¹⁴⁵ We must envision a new kind of community organization that embraces concern and responsibility for one's neighbors and their physical well-being, rather than mere property concerns.

VII. CONCLUSION

Women, whether Black or white, undoubtedly want the violence to stop. Domestic violence is a dangerous reality which all women may face. Violence in the home is not limited to poor and Black families, but it is those men and women who most often come within the control of the legal system. The complexities of domestic violence policy include contradictions of power among white and Black women. While white women suffer abuse at the hands of their husbands and hold an inferior social position because of patriarchy, white women as a group are also in a position to oppress Black women and men. Black women also suffer abuse at the hands of their husbands, but coming face-to-face with state intervention in the form of mandatory arrest often proves more dangerous than helpful.

An understanding of race and gender power relations is critical for feminists working toward a safer society for all women. Furthermore,

144. Cumulative voting is one strategy that Lani Guinier suggests to empower minority groups.

Cumulative voting lowers the threshold of representation to encourage local political organizations to form. Minority political organizations might then reclaim, at a newly invigorated grassroots level, the traditional party role of mobilizing voter participation. Additionally, locally based political parties might then organize around issues or issue-based coalitions. Since the potential support for the minority political party is not confined to a geographic or racial base, cross-racial and pangeographic coalitions are possible.

Id. at 1170.

145. See, e.g., Kenneth L. Turchi, Note, *Municipal Zoning Restrictions on Adult Entertainment: Young, Its Progeny, and Indianapolis' Special Exceptions Ordinance*, 58 IND. L.J. 505, 527 (1983) (noting that neighborhood organizations in Indianapolis joined together on a campaign to close adult bookstores); Peter W. Salsich, Jr., *A Decent Home For Every American: Can The 1949 Goal Be Met*, 71 N.C. L. REV. 1619, 1645 (1993) (suggesting that efforts to remove artificial exclusionary zoning barriers should be undertaken by coordinating a coalition of neighborhood organizations); Scott Schrader, Book Note, 89 MICH. L. REV. 1789, 1791 (1991) (reviewing JOHN C. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989)) (stating that neighborhood organizations were successful in using historic preservation law to affect local zoning, thereby preventing the demolition of a historic mansion); Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 338 n.10 (commenting that HUD recognized that the relationships between neighborhood organizations, local government, and the private sector are very important to the revitalization of communities).

an understanding of the complexity of mandatory arrest is crucial for feminists who are working toward eradicating domestic violence. Mandatory arrest laws represent a policy supporting a white woman's perspective of the state and its role in protecting them against violence. Domestic violence policy must be more inclusive and sensitive to the needs of Black women and cognizant of the racism inherent in our criminal justice system.

