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The Stereotyped Offender: Domestic Violence and the Failure of Intervention

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Articles

The Stereotyped Offender: Domestic Violence and the Failure of Intervention

Carolyn B. Ramsey*

Abstract

Scholars and battered women's advocates now recognize that many facets of the legal response to intimate-partner abuse stereotype victims and harm abuse survivors who do not fit commonly accepted paradigms. However, it is less often acknowledged that the feminist analysis of domestic violence also tends to stereotype offenders and that state action, including court-mandated batterer intervention, is premised on these offender stereotypes. The feminist approach can be faulted for minimizing

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or denying the role of substance abuse, mental illness, childhood trauma, race, culture, and poverty in intimate-partner abuse. Moreover, those arrested for domestic violence crimes now include heterosexual women, lesbians, and gay men; abuse is as common in same-sex relationships as in their heterosexual counterparts. Failure to take such factors into account perpetuates a one-dimensional image of the batterer as a controlling, heterosexual, male villain—a stereotype that impedes efforts to coordinate effective responses to domestic violence and entrenches gendered hierarchies that affect men, as well as women.

This Article begins by placing the feminist paradigm of the batterer in historical context. Although feminists transformed the dialogue about domestic violence by locating it in patriarchy and gender inequality, the offender stereotype that the Battered Women's Movement used to spur a vigorous state response and that still drives domestic violence policy shares some limitations with earlier paradigms of the wife beater—the hot-headed sinner in Puritan New England or the drunken brute of Temperance discourse. Like these earlier stereotypes, the image of the coercive, controlling male batterer is too one-dimensional and too closely tied to other sociopolitical agendas to yield a practical approach to prevent domestic violence and change the behavior of its perpetrators.

Drawing on historical, sociological, and psychological materials, as well as insights from masculinities studies, this Article suggests limits to our understanding of those who commit intimate-partner abuse and to the laws and policies—especially court-mandated batterer intervention programs (“BIPs”)—currently in place. It presents an original analysis of 46 sets of state and local standards for BIPs to show that, although these standards are starting to be more inclusive, they still tend to impose a “one-size-fits-all” formula designed for heterosexual male offenders. The “one-size-fits-all” approach ignores crucial differences—not only in intimate-partner violence committed by women, as opposed to men, and homosexuals, as opposed to heterosexuals—but also between heterosexual male offenders and the types of abuse they inflict. Recognizing these differences would facilitate the effective tailoring of BIPs to achieve long-term behavioral change in a variety of participants. The Article concludes by offering preliminary suggestions for transforming pro-feminist interventions to encourage accountability and rehabilitation and to reduce recidivism without stereotyping domestic violence offenders.

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INTRODUCTION

For more than two centuries, the government has failed to prevent and punish domestic violence adequately, not because it has refused to intervene in violent intimate relationships, but because it has not engaged in *effective* intervention. Batterers reoffend because the laws and programs designed to hold them accountable rely on offender stereotypes

that provide only a partial picture of who perpetrates domestic violence and why.

Scholars and battered women's advocates now recognize that many facets of the legal response to intimate-partner abuse stereotype victims and harm abuse survivors who do not fit commonly accepted paradigms.¹ However, it is less often acknowledged that the feminist analysis of domestic violence also tends to stereotype offenders and that state action, including court-mandated batterer intervention, is premised on these offender stereotypes. Although feminism provided an important theory and dedicated leadership that spurred government protection of victims and punishment of batterers, the feminist approach can be faulted for minimizing or denying the role of substance abuse, mental illness, childhood trauma, race, culture, and poverty in intimate-partner abuse. These variables do not *cause* men to become batterers, but they may *contribute* to batterers' use of gendered violence and their tendency to recidivate, even after being arrested and ordered to participate in batterer intervention programs ("BIPs"). Moreover, those arrested for domestic violence crimes now include heterosexual women, lesbians, and gay men; abuse is as common in same-sex relationships as in their heterosexual counter-

1. See, e.g., Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J. L. & FEMINISM 75, 76 (2008) (The stereotypical domestic violence victim is "a passive, middle-class, white woman cowering in the corner as her enraged husband prepares to beat her again. This woman never fights back The battered woman who fights back simply is not a victim in the eyes of many in the legal system."); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 797 (2007) ("[D]omestic-abuse discourse and policy tended to assume a burning-bed-type stereotype of a meek, serially abused, non-poor, white woman."); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 241 (2005) (arguing that the conservative, prosecutorial element within the Battered Women's Movement has had the effect of "reifying the cultural stereotypes of the incapacitated and irrational woman—stereotypes that confine women to, rather than liberate women from, oppressive homes"); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 584 (1999) ("Mandatory interventions, such as arrest, prosecution, and reporting, treat battered women as fragile, uncooperative, mentally ill, and/or indecisive."); Adele M. Morrison, *Changing the Domestic Violence (Dis)course: From White Victim to Multicultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1078 (2006) ("The domestic violence victim identity—the 'battered woman'—has been constructed in direct opposition to the identities of other subordinated groups. The essential victim of domestic violence, the essential battered woman, is a white, heterosexual, middle-class woman. She is the essential battered woman because society imagines that it is she who needs protection."). See also ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAW-MAKING 120 (2000) (describing how case law, statutes, and defense strategies limit who is deemed a "battered woman" and which battered women can claim self-defense). Schneider acknowledges the diversity of abuse victims' experiences, but she also asserts "the need for a form of 'strategic essentialism'—recognition of an important commonality to women's experiences of battering in response to postmodern and essentialist challenges." *Id.* at 64–65.

parts.² Failure to take such factors into account perpetuates a one-dimensional image of the batterer as a controlling, heterosexual, male villain—a stereotype that impedes efforts to coordinate effective responses to intimate-partner abuse and entrenches gendered hierarchies that affect men, as well as women. This Article calls attention to offender stereotypes, shows how they have operated over time, and explains why they have been especially detrimental to one aspect of modern domestic violence policy—the court-mandated participation of offenders in BIPs as part of pretrial diversion, probation, or a criminal sentence that includes jail time.

Part I shows how offender stereotypes have long hampered state intervention in domestic violence. Historically, men who physically assaulted their wives and girlfriends bore labels that fit then-current social ideologies. The Puritans of the seventeenth century viewed wife beaters as sinners who threatened the godly community by failing to maintain order in their households. The Temperance and Prohibition Movements of the late nineteenth and early twentieth centuries associated drunkenness with wife beating. The Battered Women's Movement of the late twentieth century demanded, and eventually achieved, concerted state action against batterers to an extent that these earlier movements did not. Yet it too can be criticized for taking an unduly narrow view of the factors contributing to intimate-partner abuse. According to the feminist analysis, the male batterer uses physical violence—often combined with economic, psychological, and sexual coercion—as a systematic expression of control over his female partner. Guided by this understanding of domestic violence, batterer intervention follows a feminist model that strives to teach men to respect their partners and promote equality, rather than exert dominance, in their intimate relationships.

However, as Part II explains, the feminist stereotype of the batterer often translates into policies that are ill suited to prevent recidivism by individuals who have committed non-fatal domestic violence offenses. Mandatory arrest laws increasingly result in the arrest of heterosexual women, members of the LGBT community, and people who exhibit mental illness, substance abuse, poverty, and other contextual problems. In some states, statutory domestic violence offenses that result in court-mandated participation in a BIP include property damage, harm to pets, and a broad array of other conduct.³ Thus, even if the feminist analysis

2. See *infra* notes 388–389 and accompanying text.

3. See, e.g., COLO. REV. STAT. § 18-6-800.3 (2015) (defining “domestic violence” to include “any . . . crime against a person, or against property, including an animal . . . when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship”). Under Colorado law, completion of a BIP is mandatory for any person who

of heterosexual male violence were completely accurate, it would still provide an insufficient guiding principle for modern batterer intervention.

Part II presents the first comprehensive analysis in more than a decade of 46 sets of state and local standards for BIPs to show that, although these standards are starting to be more inclusive, they still tend to impose a “one-size-fits-all” formula designed for heterosexual male offenders. The “one-size-fits-all” approach ignores crucial differences—not only in intimate-partner violence committed by women, as opposed to men, and homosexuals, as opposed to heterosexuals—but also between heterosexual male offenders and the types of abuse they inflict. Recognizing these differences would facilitate the effective tailoring of BIPs to achieve long-term behavioral change in a variety of participants.

Drawing on historical, sociological, and psychological materials, as well as insights from masculinities studies, this Article suggests limits to our understanding of those who commit intimate-partner abuse and to the interventions—especially court-ordered BIPs—currently in place. Part III supplements the Article’s historical and theoretical contributions with preliminary suggestions about how to transform pro-feminist interventions to encourage accountability and rehabilitation and to reduce recidivism without stereotyping domestic violence offenders.

I. THE HISTORY OF DOMESTIC VIOLENCE OFFENDER STEREOTYPES

In every era in which the state has intervened to curb domestic violence, such intervention has been shaped and limited by dominant social beliefs about the type of men who abuse their wives and the reasons they do so. Part I first illustrates how stereotypes of the wife beater hampered effective laws and policies in two eras of American history: New England during the colonial period and the United States during the late 1800s and early 1900s.⁴ In these historical eras, men policed other men for exceeding a husband’s legitimate use of authority to control his wife;

commits an offense that includes an act of domestic violence. COLO. REV. STAT. § 18-6-801 (2015).

4. These historical periods were chosen, not because they were the only eras in which the government intervened in violent relationships, but because they provide clear examples of how domestic violence offender stereotypes limited the effectiveness of public responses. I have previously shown that police, prosecutors, and criminal courts continued to intervene against abusive husbands at least up to 1930. Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860–1930*, 86 IND. L.J. 185, 188, 207–208, 225 (2011) (presenting evidence that men who violated norms of masculinity by beating or killing their wives were charged with crimes and punished, though with little deterrent effect, in the late 1800s and early 1900s) [*hereinafter* Ramsey, *Domestic Violence and State Intervention*].

such policing also served to enforce religious, class, and racial distinctions among men.

Part I then turns to the Battered Women's Movement of the late twentieth century and the comparatively recent legal reforms sparked by the feminist campaign against domestic violence. The feminist stereotype of the patriarchal male batterer shares a common flaw with the explanations of domestic violence offered in colonial New England and the nineteenth-century United States. Like those earlier stereotypes, the image of the domestic violence offender guiding modern laws and policies, and especially court-mandated BIPs, is too one-dimensional and too closely tied to ideologies designed to serve other sociopolitical goals to deter recidivism or rehabilitate individuals convicted of intimate-partner abuse.

This Article seeks to improve, rather than refute, feminist approaches to domestic violence. It also owes a debt to masculinities studies. Masculinities scholarship offers the critical insight that, rather than being monolithic, cultural structures of masculinity enforce distinctions between men along the lines of race, socioeconomic class, and sexual orientation.⁵ Such factors place men in positions of dominance or subordination to each other, even as they exercise power over the women in their lives.⁶ Men are further rendered insecure by their desire to attain seemingly unattainable proximity to the ideal of hegemonic masculinity that reigns in their particular era and geographic locale.⁷ Examining the treatment of domestic violence offenders through the lens of masculinity reveals how the stereotype of the male batterer became an instrument of social control, and sometimes even social change, in various eras of American history, while the prevention of intimate-partner abuse remained subsidiary to other agendas.

A. *Wicked and Abusive Carriage: The Wife Beater in Puritan New England*

In the eyes of Puritan New Englanders, wife beaters were hot-headed sinners who failed to exercise proper household government and,

5. See Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 782–89 (2000).

6. *Id.* at 788.

7. See Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J. L., GENDER & SOC'Y 201, 208, 210 (2008); Harris, *supra* note 5, at 780; Ann C. McGinley & Frank Rudy Cooper, *Introduction: Masculinities, Multidimensionality, and the Law: Why They Need One Another*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 1, 5 (Frank Rudy Cooper & Ann C. McGinley, eds. (2012)). See also generally Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) (showing how structures of masculinity lead to the subordination of women and gender-nonconforming men in the workplace).

by analogy, risked upsetting the social and political order. Men who beat their wives had not attained the central achievements of manhood—“rationality, self-control, and mastery over whatever was passionate, sensual, and natural in the male self.”⁸ A wife beater broke divine law by abusing the authority granted to the male head of a household. His inability to keep the peace in his own home jeopardized the Puritan community by provoking God.⁹ Cleric Benjamin Wadsworth wrote:

If therefore the *Husband* is bitter against his wife, beating or striking her (as some vile wretches do) or in any unkind carriage, ill language, hard words, morose, peevish, surly behavior; nay if he is not kind, loving, tender in his words and carriage to her; he then shames his professions of Christianity, he breaks the Divine Law, he dishonours God, by this ill behavior. The same is true of the *Wife*, too.¹⁰

Both Massachusetts Bay and Plymouth colonies had laws against spouse beating,¹¹ which reflected the Puritan view that man and wife should maintain a harmonious union that was at once spiritual, economic, and sexual. In contrast to later times, when courts and commentators treated husband beating as a joke,¹² colonial Americans took seriously a wife’s abuse of her husband. Indeed, if either spouse neglected their duties, “they not only wrong[ed] each other, but they provoke[d] God by breaking his law.”¹³

A manly Puritan provided financially for his wife and children. His ability to support his family through productive labor constituted the

8. ANNE S. LOMBARD, *MAKING MANHOOD: GROWING UP MALE IN COLONIAL NEW ENGLAND* 9 (2003).

9. See ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 5 (1987).

10. EDMUND S. MORGAN, *THE PURITAN FAMILY: RELIGION & DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* 47–48 (1966) (quoting BENJAMIN WADSWORTH, *THE WELL-ORDERED FAMILY* 36 (Boston, 1712)).

11. MASSACHUSETTS BODY OF LIBERTIES 51, Liberty no. 80, reprinted in 1 WILLIAM H. WHITMORE, *A BIOGRAPHICAL SKETCH OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686* (1890) (“Every married woman shall be free of bodily correction or stripes by her husband, unless it be in his own defense upon her assault.”). The law was subsequently changed to include women striking their husbands. 2 WILLIAM H. WHITMORE, *A BIOGRAPHICAL SKETCH OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686 (The Account of the Legislation from 1641 to 1642, including the Two Revisions of the Laws in 1649 and 1660)* 88 n.40 (1890). See also PLECK, *supra* note 9, at 21–22.

12. See Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379, 420–35 (2015) (arguing that, contrary to the canonical academic narrative, courts in the early twentieth century denounced wife beating but regarded abused husbands with amusement, contempt, and uncertainty).

13. MORGAN, *supra* note 10, at 30 (quoting WADSWORTH, *THE WELL-ORDERED FAMILY* at 40).

yardstick by which his social worth was measured.¹⁴ A good wife helped by working in the home and garden (or by managing servants who did this labor), and she conserved the resources her husband produced.¹⁵ Because she was supposedly less rational and weaker in the mind than her husband, she owed him “a reverend subjection.”¹⁶ Yet, in actual practice, many men acknowledged that their spouses kept the books and responded more calmly than they did to the crises that beset the family.¹⁷

Whatever the reality of the man’s mental and emotional control, compared to the woman’s, Puritan society viewed the husband as the governor of the household. However, it insisted that he exercise his authority with moderation and that he embody an ideal of rationality in his dealings with his wife.¹⁸ Some Puritan ministers exhorted men to use only verbal correction on their wives; others thought corporal punishment should be reserved for the most extreme provocations.¹⁹ Yet, despite some difference of opinion over the place of violence in family government, there was widespread agreement that a man who lost his temper and inflicted excessive violence on his wife tarnished his honor and even undermined the social and political order. Neighbors, church leaders, and secular authorities saw the family and the state as roughly analogous; hence, they regarded a man’s treatment of his wife as a matter of concern to the community.²⁰ The Puritans had settled in New England to escape the tyranny and religious intolerance of the English king. Thus, in the Puritan belief system, the cruel autocrat was a despised figure—not a model ruler of the family or the state.²¹

14. See LOMBARD, *supra* note 8, at 98.

15. See *id.* at 98–100; MORGAN, *supra* note 10, at 42.

16. JOHN DEMOS, *FAMILY LIFE IN PLYMOUTH COLONY* (2nd ed. 2000) (quoting 1 *THE WORKS OF JOHN ROBINSON* 239–40 (Robert Ashton ed., Boston, 1851)).

17. For example, Puritan diarist Samuel Sewall admitted that his wife Hannah had “a better faculty than I at managing affairs.” MORGAN, *supra* note 10, at 43 (quoting 2 *SAMUEL SEWALL, DIARY OF SAMUEL SEWALL: 1674–1729*, at 93 (1879)). Across the sea in London, Puritan matron Grace Wallington “had to provide an example of steadiness and to comfort her despairing husband as one child after another sickened and died during her decade of childbearing.” PAUL S. SEAVER, *WALLINGTON’S WORLD: A PURITAN ARTISAN IN SEVENTEENTH-CENTURY LONDON* 86 (1985).

18. LOMBARD, *supra* note 8, at 115;

19. Susan Dwyer Amussen notes this contrast in the views of English clerics William Gouge and William Whately, whose works would have been familiar to Puritan New Englanders. See Susan Dwyer Amussen, “*Being Stirred to Much Unquietness*”: *Violence and Domestic Violence in Early Modern England*, 6 *J. WOMEN’S HIST.* 70, 72 (1994).

20. See PLECK, *supra* note 9, at 18; Amussen, *supra* note 19, at 73.

21. See Carolyn B. Ramsey, *The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 *YALE J. L. & HUMAN.* 191, 200 (1998) (criticizing the simplistic equation of Puritan ideas about the social and political order with patriarchy).

Indeed, when Puritan New Englanders described a bad husband, they pointed to two central failings: his violence toward his wife and his failure to provide for her financially.²² A man who physically abused his spouse in anger subverted the ideal of male self-control that gave him the authority to govern. Loss of self-control was sometimes labeled madness, but rarely in an exculpatory way. Rather than excusing the abusive husband's actions, "loss of control resembling madness was equated with lack of manliness."²³ As to the second failing (failure to provide), a husband who was lazy or improvident with money ignored the most basic element of his duty to his family—economic support²⁴—and burdened the community with hungry mouths to feed. In short, an adult male who failed at household government could not be considered a true man. His ineptitude not only undercut his claims to respect as a husband and father; it also threatened colonial society with God's wrath by upsetting the divinely-mandated order.

In colonial New England, domestic violence offenders might be brought before a magistrate, bound over, and sentenced to a variety of punishments that often included public shaming.²⁵ Whipping, a fine, the stocks, or some combination of these penalties appear to have been the most common sentences for wife beaters. In 1672, for example, Henry Harwood of Suffolk County, Massachusetts was "convicted for abusing [and] beating his wife who was great with child; the court sentenced him to be whipped with ten stripes or pay five pounds in money fines to the court & fees of court, standing committed til [sic] the sentence be performed."²⁶ The previous year, a Plymouth court ordered Richard Marshall to "sit in the stocks" for "abusing his wife by kicking her from a

22. See LOMBARD, *supra* note 8, at 116.

23. See Elizabeth Foyster, *Male Honour, Social Control, and Wife Beating in Late Stuart England*, 6 *TRANSACTIONS ROYAL HIST. SOC'Y* 215, 221 (1996). Similarly, in the late nineteenth century, many wife murderers went to the gallows despite claiming insanity or delirium tremens as an excuse. See Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 *U. COLO. L. REV.* 101, 155–56 (2006) (showing that nineteenth- and early-twentieth century courts applied provocation and insanity defenses narrowly when men were charged with killing their female intimates, while women often obtained mitigation and even acquittal by depicting their homicidal conduct as self-defense, insanity, or killing in defense of honor) [*hereinafter* Ramsey, *Intimate Homicide*].

24. LOMBARD, *supra* note 8, at 101; see also MORGAN, *supra* note 10, at 41–42.

25. See DEMOS, *supra* note 16, at 93 (indicating that public whipping was a common punishment for spouse abuse); MORGAN, *supra* note 10, at 39–40 (stating that courts in colonial New England enforced laws against spousal violence "on numerous occasions").

26. 1 RECORDS OF THE SUFFOLK COUNTY COURT, 1671–1689, in 29 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS, at 114 (1933) [*hereinafter* SUFFOLK CTY. CT. RECS.]. For the sake of clarity, this Article modernizes spelling and grammar in quotations from primary sources on the colonial period.

stool into the fire."²⁷ Ralph Earle had to pay a fine of 20 shillings for dragging his wife "in an uncivil manner on the snow."²⁸

Women were also presented to colonial courts for violence against their husbands. Joan Miller received punishment in Plymouth Colony in 1655 for "beating and reviling her husband, and egging her children to help her, bidding them knock him in the head, and wishing his victuals might choke him."²⁹ Courts may have preferred simply to admonish women charged with spouse abuse, rather than to inflict corporal punishment upon them.³⁰ Yet wives sometimes were whipped, as Ursula Edwards learned the hard way when she was "presented for striking her husband and [engaging in] abusive carriage and language."³¹

Colonial courts occasionally allowed women to separate from husbands who repeatedly assaulted them.³² However, due to the Puritan emphasis on the reciprocal obligations of husbands and wives, the authorities often blamed both spouses for their inability to live together peaceably.³³ In Plymouth Colony in 1662, for example, George Barlow and his wife "were both severely reprov'd for their most ungodly living in contention with each other, and admonish'd to live otherwise."³⁴ Another couple spent an hour in the stocks after a court faulted the wife for neglecting the farm animals and the laundry and the husband for his cruel punishment of her.³⁵ The Puritans thus tended to characterize domestic violence as mutual conflict or as provoked excess in the husband's administration of discipline.

The Puritan stereotype of the wife beater as a sinful, irresponsible governor created a dilemma that undermined legal and social efforts to prevent domestic violence. Two ramifications flowed from the common advice to a man to "make his government of [his wife], as easy and gen-

27. 5 RECORDS OF PLYMOUTH COLONY, COURT ORDERS: 1668-1678, at 61 (Nathaniel B. Shurtleff, ed., 1856).

28. 4 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND, COURT ORDERS: 1661-1668, at 47 (Nathaniel B. Shurtleff, ed., 1855) [*hereinafter* NEW PLYMOUTH RECS.].

29. 3 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND, COURT ORDERS: 1651-1661, at 75 (Nathaniel B. Shurtleff, ed., 1855).

30. *Id.* at 116 ("Mary Thorne presented for abusing and striking her husband the presentment not being fully proved the court sentenced her to be cautioned."); *id.* at 330 ("Anne Wampus bound over to the court to answer for abusing & striking her husband the court upon giving her an admonition ordered her to pay fees of court & so discharged her.").

31. 1 SUFFOLK CTY. CT. RECS., *supra* note 26, at 116.

32. See DEMOS, *supra* note 16, at 94 (discussing the 1665 case of John Williams of Scituate).

33. LAUREL THATCHER ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750 107-108 (1982).

34. 4 NEW PLYMOUTH RECS., *supra* note 28, at 10.

35. ULRICH, *supra* note 33, at 107-108.

tle as possible; and strive more to be loved than feared; though neither is to be excluded."³⁶ First, despite condemnation of violent husbands, an ideology that deemed men the heads of their households also had to accord them some discretion in how they maintained their authority. The disobedient wife was at least as great a source of popular anxiety in colonial New England as the abusive husband. Hence, men who beat their wives often argued that, instead of striking in unbridled anger, they were simply punishing insubordination by their unruly spouses.³⁷ Second, even if a husband were deemed to have used excessive violence, Puritan authorities usually failed to protect the woman he assaulted.

Neighbors and magistrates rarely thought a wife's failure to perform household duties warranted extreme violence in response, however. Indeed, pamphlet literature chronicling the capital punishment of domestic killers sometimes cited men's tendency to blame their murdered spouses as evidence of their sinfulness. In an English example, Matthias Brinsden's lack of remorse for stabbing his wife to death was criticized as follows:

[D]uring the whole time that he lay at condemnation, he never once appeared at prayers; when he was upon his trial it was thought remarkable, and a token of a savageness and barbarity of nature that . . . instead of bursting into tears for the loss of the partner of his bed, his joys and griefs; he insisted on trifling allegations, said his wife loved brandy and Geneva, disobeyed his commands, and would not be easy to live as he lived . . .³⁸

The prosecution and punishment of male perpetrators of domestic violence thus delineated sinful men from God-fearing ones, capable family governors from violent autocrats, and civilized men from barbarians.

Yet, in more routine cases of non-fatal beating, the attitude of early modern people toward wife abuse seems to have been more lenient. Although the settlers of colonial New England did not condone brutal discipline, they could understand it.³⁹ Such empathy may have resulted in the under-enforcement of domestic violence statutes in the Puritan colonies.⁴⁰ The stereotype of the cruel, sinful wife beater who acted out of

36. MORGAN, *supra* note 10, at 46 (quoting WADSWORTH, *THE WELL-ORDERED FAMILY*, at 36).

37. See LOMBARD, *supra* note 8, at 117.

38. *The Ordinary of Newgate's Account of the Behavior, Confession, and Last Dying Speech of Matthias Brinsden, Who was Executed at Tyburn, on Monday, the 24th of September, 1722, for the Murther of his Wife Hannah Brinsden, on the 16th Day of July, Last, in the Parish of St. Anne, Black-Fryars* 2-3 (1722), available in Eighteenth Century Collections Online.

39. ULRICH, *supra* note 33, at 107-108.

40. Historian Elizabeth Pleck found only four complaints of wife beating in Plymouth Colony courts between 1663 and 1682 and "one complaint per decade between 1683

passion, rather than reason, primarily served an expressive function: it told men what kind of behavior to avoid and disparaged the manliness of household heads who could not keep order without resorting to violence. The relevant criminal statutes and the stern moralizing of Puritan divines used the symbol of the wife beater to police the conduct and gender performance of other men. Yet such a stereotype did not go far toward explaining domestic violence, nor did it give the authorities a set of practical tools for facilitating either prevention or rehabilitation.

Finally, the Puritan approach failed to protect abused women. A society that required the cohabitation of married couples and rarely allowed them to divorce⁴¹ provided few options for wives whose husbands beat them. Aside from a peace bond imposed by a court of law or a public whipping that might lead to violent retaliation, “[t]he practical remedy in most such cases was for neighbors to send the woman back home and to admonish the husband to behave in a manner more befitting a rational Christian husband.”⁴² The goal was to induce the man to govern better and to censure him publicly for his inferiority to other men, not to help his wife escape him.

B. Drunkenness and Domestic Violence: The Brutish Man in Nineteenth-Century Temperance Ideology

In contrast to colonial New Englanders, who saw wife beaters as irresponsible, violent-tempered sinners, nineteenth-century Americans offered a different diagnosis. Against a backdrop of Temperance reform, wife beating was associated with drunkenness. The Victorian ideal of the industrious Christian husband echoed the Puritan standard, but nineteenth-century society placed greater emphasis on conjugal love than female obedience and recast the wife beater’s unbridled anger as alcohol addiction. While Temperance activists primarily targeted liquor sellers and brewers, judges in the late 1800s and early 1900s punished wife beaters with fines, brief jail sentences, and even whipping.⁴³ However, in this period (as in other eras), the criminal justice response to domestic

and 1702.” PLECK, *supra* note 9, at 29. She suggested that the small number of wife beating cases was indicative of lax enforcement, rather than low incidence of assaults on wives. However, she estimated that the most extreme kind of domestic violence, spousal murder, occurred very infrequently in the New England colonies—only 0.1 per 100,000 in Massachusetts Bay Colony between 1630 and 1692, compared to 3.7 per 100,000 in Philadelphia, Pennsylvania, in 1970. *See id.* at 19.

41. *See* DEMOS, *supra* note 16, at 92 (noting laws against spouses living separately in Plymouth Colony); *see also* PLECK, *supra* note 9, at 23–24 (discussing the limited availability of divorce in colonial New England).

42. LOMBARD, *supra* note 8, at 118.

43. *See infra* notes 56–60 and accompanying text.

violence often played second fiddle to other social and political agendas and was hampered by a stereotypical view of both victims and offenders.

The beaten wife became a pitiful symbol of the Temperance campaign.⁴⁴ She was a pure, innocent victim, shrieking and trembling as her drunken husband terrorized her,⁴⁵ rather than a disorderly woman who partially deserved her bruises. While colonial courts often found fault with the behavior of both spouses, the stereotypes promoted by the Temperance Movement contrasted the brutish husband with the blameless wife.⁴⁶ Men who suffered physical and emotional abuse were ridiculed.⁴⁷ Yet, despite the centrality of the abused wife as a rallying image for the campaign to ban liquor sales, her wellbeing was not the main goal of the Temperance Movement. Nor did the Victorians probe more deeply than the perceived causal relationship between drinking and domestic violence to remedy structural or psychological factors that contributed to the problem.

According to Temperance activists, brutishness arose from alcohol-fueled degeneration, rather than being rooted in men's primal nature. Newspaper articles on wife beating cases echoed the view that domestic violence was episodic and fueled by drink—not systematic, coercive, and instrumental. A man named Brown “was always a hard drinker, and when under the influence of liquor would beat his wife in a shocking manner,” reported the *Rocky Mountain News* in 1881 about Brown's conviction and sentence of 30 days' imprisonment for assault and battery.⁴⁸ After the turn of the century, public discourse continued to espouse a causal connection between drunkenness and wife abuse. In 1910, for example, the *Los Angeles Times* stated that “[h]ot weather and cold liquors were the contributory causes” of “[t]wo cases of wife beating, both bordering closely on murder.”⁴⁹

44. See Jerome Nadelhaft, *Wife Torture: A Known Phenomenon in Nineteenth-Century America*, 10 J. AM. CULTURE 39, 40 (1987) (discussing the image of the beaten wife in Temperance discourse).

45. See *id.* at 40.

46. A wide variety of newspapers depicted “horrors, of which men are the authors and women the victims,” and Temperance songs evoked “images . . . of innocent wives, some murdered, some only beaten, whose only responsibility was in an unspoken criticism which made husbands feel guilty.” *Id.* at 42, 53. There seems to have been a more frank recognition on the part of nineteenth-century judges and juries that injured and slain women might have been unfaithful wives and slovenly housekeepers, but that such shortcomings did not justify or excuse brutal violence against them. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 212–13, 225–28.

47. See Katz, *supra* note 12, at 420–35; see also Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 210 & nn.136–37.

48. *Wedded Woe: A Brutal Wife Beater Sentenced to Jail*, ROCKY MOUNTAIN NEWS (Denver, CO), Apr. 8, 1881, at 3 col. C.

49. *Women Brutally Beaten by Brutal Men*, L.A. TIMES, Apr. 18, 1910, at III.

According to Temperance rhetoric, abusive husbands *could* have been kind spouses and productive breadwinners, if excessive drinking had not put them on the path to sloth and viciousness. Ohio temperance activist Eliza “Mother” Stewart sought to make saloon owners pay civil damages to a woman if her husband “drowned out all his manhood” with drink.⁵⁰ Stewart published a sketch of a drunkard’s wife who lamented “[the] neglected business, the going down, down, the loss of our little Eden, the gradual change in my husband’s nature, from one of the most tender and loving, to a moody, morose, abusive husband and father.”⁵¹ Liquor made the husband a brute and “an object of loathing and terror to those who once were thrilled with delight by the sound of his approaching footsteps.”⁵²

Journalists in the late Victorian and Progressive Eras also underscored how drink wrecked respectable households. For example, in 1887, the *Rocky Mountain News* reported that George Patterson had been charged with battering and threatening his wife during one of his binges: “Patterson is a tinner, capable of earning good wages, but his love for rum makes a brute of an otherwise good man.”⁵³ Commentators in the late 1800s and early 1900s tended to associate wife abuse primarily with physical violence. Yet, like the Puritans, they also faulted men for failing to provide economically for their families. Wife beaters were labeled unmanly men who failed to approximate the middle-class ideal of the sober breadwinner and devoted husband.

The brutishness of intemperate husbands was a cliché that obfuscated other factors causing or contributing to abuse. The cliché raised genuine public concern about drinking and wife beating, but such concern was marshaled toward the primary reform goals of Temperance, Prohibi-

50. ELIZA DANIEL STEWART, *MEMORIES OF THE CRUSADE: A THRILLING ACCOUNT OF THE GREAT UPRISING OF THE WOMEN OF OHIO IN 1873, AGAINST THE LIQUOR CRIME* 45 (Arno Press Inc. 1972) (1890); see also Erin M. Masson, *The Woman’s Christian Temperance Union, 1874–1898: Combating Domestic Violence*, 3 WM. & MARY J. WOMEN & L. 163, 171–72 (1997) (describing Mother Stewart’s role in bringing cases against liquor sellers under the Adair Law).

51. STEWART, *supra* note 50, at 48 (quoting her editorial in the *REPUBLIC*, entitled *An Appeal to the Women of Springfield*); see also PLECK, *supra* note 9, at 53 (“Most of those who expressed an opinion held that men were not by nature brutish, but that drink caused them to degenerate.”).

52. STEWART, *supra* note 50, at 48.

53. *A Wife Beater: George Patterson in the Role of the Most Despicable of Human Beings*, *ROCKY MOUNTAIN NEWS* (Denver, CO), Oct. 22, 1887, col. F, at 6. Similar articles commonly appeared in newspapers in the early twentieth century, as well. See, e.g., *Justice is Tempered*, *L.A. TIMES*, Oct. 25, 1913, at I11 (noting that a defendant charged with wife beating “is a peaceable hard-working man except when he tackles John Barley-corn”).

tion, the prevention of cruelty to children,⁵⁴ and a middle-class crime control agenda. Domestic violence prevention was only a subsidiary objective. As described below, even the feminist wing of the Temperance Movement, which first associated wife beating with the legal subordination of women, avoided shining a spotlight on either the specific needs of abused wives or factors—aside from patriarchy and alcohol—that contributed to domestic violence.⁵⁵

Public and private condemnation of domestic violence thus owed much to the image of the brutish drunkard from the Temperance literature. The corporal punishment of one's wife had been criminalized across the United States by the 1870s,⁵⁶ and both court records and newspaper articles reveal a surprising amount of intervention by police, prosecutors, and judges.⁵⁷ Criminal punishments were often substantial—a combination of non-trivial fines and several months in jail.⁵⁸ As early as the 1830s, Samuel Chipman found that three of four inmates in one New York jail were wife beaters.⁵⁹ A few states even imposed whipping on the grounds that corporal punishment was the best way to deter violent husbands without depriving their families of economic support.⁶⁰ Yet accounts of criminal cases confirm, in various ways, that courts saw alcohol as the root cause of domestic violence. Some men

54. Linda Gordon has shown that women whose husbands beat or raped them sometimes succeeded in obtaining assistance from nineteenth-century child protection societies, but that these societies were, first and foremost, dedicated to helping abused children. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880–1960*, at 7 (1988). Alcohol consumption was blamed for all family violence problems, including cruelty to children. See *id.* at 20.

55. See *infra* notes 75–79 and accompanying text (discussing how nineteenth-century feminists located domestic violence in the larger context of the social and legal oppression of women, but favored suffrage and the reform of marital property laws over targeted responses to wife beating and wife murder).

56. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2129–30 (1996) (discussing the persistence of spousal abuse, despite official condemnation, in the late nineteenth-century United States).

57. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 199–204, 206–208, 216–20 (describing domestic assault cases involving male defendants in the American West between 1870 and 1930); see also Katz, *supra* note 47, at 405–20 (relying on newspaper sources from 1910–1920 to show that wife beaters were prosecuted and punished in many states during that decade).

58. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 406–408.

59. See Nadelhaft, *supra* note 44, at 55 (citing SAMUEL CHIPMAN, *REPORT OF AN EXAMINATION OF POOR-HOUSES, JAILS, &C., IN THE STATE OF NEW-YORK, AND IN COUNTIES BERKSHIRE, MASSACHUSETTS, LITCHFIELD, CONNECTICUT, AND BENNINGTON, VERMONT, &C.* 76–77 (4th ed. 1836)).

60. See PLECK, *supra* note 9, at 111; see also Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 216–17.

who assaulted their wives were simply ordered to abstain from liquor.⁶¹ In 1913, a Los Angeles judge “gave James Walters, charged with wife-beating, a suspended sentence of six months . . . on [the] condition that he keep out of saloons, refrain from drinking and keep up his payments on his home.”⁶²

Domestic assault prosecutions transcended class boundaries, implicating wealthy and middle-class men, as well as the working class and the poor.⁶³ Class and ethnicity did not solely define the concept of “respectability.” Nevertheless, the cultural association of domestic violence with non-elites seems to have affected prosecution and punishment. Legal historian Reva Siegel infers a nexus between racial discrimination and the prosecution of wife beaters in the Reconstruction South from judicial opinions expressly denouncing “a belief among the humbler class of our *colored* population of a fancied right in the husband to chastise the wife.”⁶⁴ Similarly, the whipping post may have become an implement for the social control of poor, minority men in a few states; one scholar reports that fifteen blacks, compared to only six whites, were whipped for beating their wives between 1901 and 1942.⁶⁵ However, several other legal histories have found evidence regarding the role of racial bias in domestic violence cases too sparse and contradictory to draw firm conclusions.⁶⁶

There was a more definite class bias to the offender stereotypes of the late 1800s and early 1900s. In late nineteenth-century New York City, for example, at least 12 of the 17 men convicted of first-degree domestic murders between 1879 and 1893 were working-class or unemployed.⁶⁷ Men from the working class, low-earning white-collar work-

61. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 202 & n.90.

62. *Justice is Tempered*, *supra* note 53. Nevertheless, courts and juries refused to accept alcohol as grounds for acquittal. Men who relied on intoxication or alcoholic insanity as a defense to murder discovered that, while drunkenness was seen as the cause of domestic violence, it was not deemed legally exculpatory, nor did it spare wife-killers from the gallows. See Ramsey, *Intimate Homicide*, *supra* note 23, at 155–56.

63. See Katz, *supra* note 47, at 408; Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 201 & n.85.

64. Siegel, *supra* note 56, at 2136 (quoting *Harris v. State*, 14 So. 266, 266 (Miss. 1894)) (emphasis added).

65. See PLECK, *supra* note 9, at 119–20.

66. See Katz, *supra* note 47, at 404–405. In my research on intimate-partner homicide, I found anecdotal evidence of racial bias, particularly in the way newspapers described defendants of color, but my sources did not allow a systematic analysis of the role of race. See Ramsey, *Intimate Homicide*, *supra* note 23, at 173 & n.381; see also Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 229, 246–48.

67. See Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1374–77 (2002) [hereinafter Ramsey, *Discretionary Power*] (describing the male offenders’ lower class status).

ers, and artisans predominated among those executed; only three were members of racial minorities.⁶⁸ Temperance discourse also associated drunken assaults on women with the working class and the poor. The drunkard was usually depicted as unemployed, or at least he squandered the family's meager earnings on alcohol. Some Temperance songs explicitly bemoaned the beatings that women endured because they refused to give their husbands money for drink or because the cupboard contained no food when the man staggered home from the bar.⁶⁹

This connection between alcohol, poverty, and domestic violence permeated American culture beyond the Temperance Movement and influenced the way journalists and eyewitnesses described criminal cases. For example, more than half of the men executed for domestic murders in turn-of-the-century New York were portrayed as drunks who depended on the meager earnings of their female intimates for liquor money.⁷⁰ Although domestic violence defendants included wealthy and middle-class men,⁷¹ the lasting image was that of crowded tenements, dirty children, and wives fending off blows from their intoxicated husbands. When elite men were involved, moralizing narratives associated both alcohol consumption and domestic violence with downward social mobility: formerly respectable husbands turned to the bottle, started bludgeoning their wives, and the family descended into poverty and disgrace.⁷² In short, the law-and-order approach to domestic violence in the late 1800s and early 1900s sought to define the boundary between respectable and unrespectable, sober and drunk, industrious and idle, in ways that also reinforced class and racial distinctions among men.

Both the official criminal justice response to wife beating and popular punishments like tarring and feathering⁷³ constituted efforts to police

68. See Ramsey, *Intimate Homicide*, *supra* note 23, at app. G at 190–91. “[A]bout twenty percent of all men who received severe punishment for killing intimates in [New York City and Denver between 1880 and 1920] belonged to racial minorities, even though such minorities constituted a tiny percentage of the total population.” *Id.* at 173 & n.381.

69. See Nadelhaft, *supra* note 44, at 42.

70. See Ramsey, *Discretionary Power*, *supra* note 67, at 1375–76 & n.364.

71. See Katz, *supra* note 47, at 408; Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 201 & n.85.

72. See *supra* note 51–52 and accompanying text (quoting Mother Stewart’s description of the declining fortunes of a drunkard’s family).

73. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 209 & n.129. Historians of early modern England, Europe, and America have documented rough-music rituals, prior to the nineteenth century, that involved costumed neighbors, beating on pots and pans or making other riotous noise, who forced a violator of social mores to ride a pole, endure various forms of ridicule, or even suffer communally-inflicted violence. See E.P. THOMPSON, *CUSTOMS IN COMMON* 469–71 (1991) (describing rough music in England and on the Continent). In early modern England, such rituals frequently targeted wives who beat or nagged submissive husbands. See *id.* at 477, 492–

men—often members of racial minorities or the working class—who deviated from prescriptive ideals of masculinity. Yet, despite the strong terms with which abusive husbands were condemned, the historical record from this period abounds with cases of repeat offenders brought to court on multiple occasions, only to escalate their abuse and even kill their wives after several court appearances.⁷⁴ The campaign against domestic abuse committed by drunken brutes failed miserably to the extent that it sought to curb wife beating and not merely galvanize support for the crusade against alcohol or enforce hierarchical demarcations between men.

C. *Feminist Campaigns Against Domestic Violence: Patriarchy as the Root of the Problem*

As we have seen, the Temperance Movement deployed the stereotype of the drunken brute assaulting his innocent wife to spur various reforms, including the closing of saloons. First- and second-wave feminists also created images of the abusive man to mobilize support for larger political and social causes. Rather than entrenching gendered hierarchies by censuring husbands for abusing their authority over their wives, feminists identified the patriarchal social structure as the root, not

93. Yet, as official condemnation and punishment of wife beaters waned, communities also used rough music to shame and even expel abusive husbands. *See id.* at 493 (listing “[w]ife-beating or other ill-treatment of the wife by the husband” as one type of offense that occasioned rough music); *see also* Brendan McConville, *The Rise of Rough Music: Reflections on An Ancient New Custom in Eighteenth-Century New Jersey*, in RIOT AND REVELRY IN EARLY AMERICA 87–106 (William Pencak, Matthew Dennis & Simon P. Newman eds., 2002) (describing the use of rough music against wife beaters in colonial New Jersey).

74. *See, e.g.*, Katz, *supra* note 47, at 411 (“[M]any of these [wife beaters] were repeat offenders; fines and jail time did not seem to deter them.”); Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 217–18, 221 (discussing the failure of criminal penalties to prevent retaliatory beatings or the escalation of domestic violence). Attacking the supposed root cause—drinking—did not seem to be a panacea either. One study found that the rate of wife murder actually increased in Chicago between 1920 and 1933, the era when the law banned the sale and consumption of alcohol in the United States. Cynthia Grant Bowman & Ben Altman, *Wife Murder in Chicago: 1910–1930*, 92 J. CRIM. L. & CRIMINOLOGY 739, 779 (2002). These authors admit that Prohibition did not put a stop to drinking. However, their research only indicates that Prohibition laws failed to curb intimate violence against women, not that there was no correlation between drinking and wife murder. *See id.* at 779. Other factors besides the flawed attribution of domestic violence to alcohol consumption played a role in the ineffectiveness of late nineteenth- and early twentieth-century policies. The dearth of professionalized police forces, the gradual decline of neighborly assistance in some regions, and the lack of a social safety net for women whose husbands beat them also contributed to the failure of domestic violence prevention during this period. *See* Ramsey, *Intimate Homicide*, *supra* note 23, at 165; *see also* Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 215–16.

only of domestic violence, but also of gender inequality in a broader sense. Indeed, the central achievement of the Battered Women's Movement of the late twentieth century lay in showing the interconnection between stopping violence against women and securing women's rights more broadly. This second-wave movement almost inevitably relied on a simple but potent image—the man who violently asserts his dominance over his powerless female victim—to raise public awareness about the gendered harms of intimate partner abuse and to galvanize state action against it.

1. The Nineteenth-Century Women's Rights Movement

Although early feminists participated in the Temperance Movement, their emphasis differed significantly from that of more moderate Temperance leaders. For first-wave feminists, the problem was not alcohol itself, but the legal structure of marriage, which allowed a drunken husband to terrorize his wife, virtually without bounds. Because feminist leaders thought marital violence was rooted in male dominance, they advocated law reforms to empower women—to grant them the right to vote, easier access to divorce, and the rights to hold property in marriage, keep their earnings, make contracts, and file suit in their own names.⁷⁵

First-wave feminists focused on giving women the legal means to escape an abusive marriage, or at least to hold greater power within it, but despite offering a comparatively sophisticated structural analysis of domestic violence, they neglected to develop a less one-dimensional understanding of the wife beater.⁷⁶ The nineteenth-century feminist solution was exit: Amelia Bloomer, a leading nineteenth-century women's rights and Temperance advocate, even contended that abused women should be required by law to divorce their husbands.⁷⁷ With the notable exception of post-bellum temperance leader Lucy Stone, who unsuccess-

75. See Siegel, *supra* note 56, at 2128.

76. For example, Elizabeth Cady Stanton advocated divorce reform by invoking the cliché of children hiding “from the wrath of drunken, brutal fathers, but . . . [rushing] out again at their mother's frantic screams, ‘Help! oh, help!’ . . . [as she was] dragged about the room by the hair on her head, kicked and pounded, and left half dead and bleeding on the floor.” Siegel, *supra* note 56, at 2149 (quoting Elizabeth Cady Stanton, Address on the Divorce Bill, Before the Judiciary Committee of the New York Senate, in the Assembly Chamber 8 (Feb. 8, 1861) (Albany, Weed, Parsons & Co. 1861)).

77. See PLECK, *supra* note 9, at 55–58. Today, commentators claiming to support women's empowerment continue to suggest solutions that amount to others making decisions on abuse victims' behalf. See, e.g., Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L. J. 605, 641–57 (2000) (“Guardianship, bounded by adequate procedural safeguards, can balance the interests of the state with those of a battered woman and can protect both her interest and society's interest in ending intimate violence.”).

fully introduced protection order legislation in Massachusetts,⁷⁸ the nineteenth-century Women's Rights Movement offered no concrete strategies to deter men from assaulting women in the future⁷⁹ or to rehabilitate them to live non-violently with wives who did not want a divorce.

Perhaps more importantly, in the United States, the nineteenth-century feminist analysis had less impact on criminal justice responses to domestic violence over the next hundred years than did mainstream Temperance rhetoric and the paternalistic views of judges, police officers, and journalists. In the late 1800s and early 1900s, public scrutiny of domestic violence occurred precisely because such violence threatened the ideology of the separate spheres, according to which a man earned a livelihood so his wife could remain a protected angel of the house. Expressing indignation at "[t]he sight of the burly wife beater and his disfigured little wife"⁸⁰ was rarely a matter of gender equality, at least not in the modern sense.

2. The Battered Women's Movement

Like nineteenth-century women's rights leaders, second-wave feminism attributed domestic violence to male domination. When battered women's shelters were established in the 1970s, abuse victims who compared their experiences identified patterns of violence, control, and humiliation that made it seem like batterers "followed a shared script."⁸¹ From many individual stories, scholars and advocates distilled archetypal batterer behavior—a "culture of battering" in which the man enforces female subordination in the intimate relationship.⁸² Such tactics go beyond physical assaults to encompass financial control, social isolation, humiliation, an intricate set of rules and punishments, and, frequently, escalating violence if the woman resists or tries to preserve a small area of autonomy for herself.⁸³ According to Evan Stark, coercive control al-

78. See PLECK, *supra* note 9, at 102–104.

79. For example, nineteenth-century feminist proposals to increase women's autonomy, including the ability to divorce an abusive husband, did not squarely or effectively address the need to protect women from retaliatory violence by men who wanted to keep them trapped in a coercive relationship. See Ramsey, *Domestic Violence and State Intervention*, *supra* note 4, at 216 (describing the obstacles to leaving a marriage that late nineteenth-century women faced, despite the expansion of the legal grounds for divorce).

80. *A Wife Beater*, ROCKY MOUNTAIN NEWS (Denver, CO), Nov. 28, 1883, col. A, at 3.

81. See EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 29 (2007).

82. See Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2117–42 (1993).

83. See ANN JONES & SUSAN SCHECHTER, WHEN LOVE GOES WRONG 13 (1992); STARK, *supra* note 81, at 205–18, 227–77; Fischer, Vidmar & Ellis, *supra* note 82, at 2126–40.

so involves “[t]he micromanagement of how women enact gender.”⁸⁴ By regulating the woman’s clothing, housekeeping, child rearing, sexuality, and career choices, the man reduces her to a stereotypically domestic role and then devalues her performance of domesticity.⁸⁵

Most second-wave feminist activists presumed that perpetrators of intimate-partner abuse were men and theorized that law, religion, and popular culture in a capitalist society trained them to expect and demand female subordination.⁸⁶ Susan Schechter wrote, for example: “Violence is only one of the many ways in which men express their socially structured right to control and chastise.”⁸⁷ According to battered women’s advocates, men derive benefits from controlling their female partners. In this view, abuse is instrumental. The man uses controlling behavior to obtain financial authority; to prioritize his own needs and desires; and to extract free labor, sex, and other rewards from his spouse.⁸⁸ The exertion of control may actually be the desired end. Stark suggests that some batterers’ tactics “yield no proximate benefit other than the feeling of dominance itself.”⁸⁹

The feminist paradigm of the domestic violence offender also has a racial dimension. As tough-on-crime conservatives joined the campaign against domestic violence in the 1980s, efforts to protect defenseless, white women led to the assumption that the perpetrators were mostly white males.⁹⁰ Feminists lobbying for law reform did not resist this racial stereotype of the batterer because, either consciously or unconsciously, they saw the issue from the perspective of their own socioeconomic and racial status: that of middle-class white women.⁹¹ Thus, one aspect of feminist exceptionalism is that it stereotyped a special category of criminals—domestic violence offenders—as predominantly white, despite the general cultural association of criminality with men of color.

Beyond the creation of the iconic image of the controlling male batterer, there has been relatively little inquiry, from a feminist perspective, into what motivates batterers and whether different types of abuse call for different explanations. There are several reasons for this neglect.

84. STARK, *supra* note 81, at 211.

85. *Id.* at 211, 213.

86. See LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 317–33 (2002) (describing “the making of an abusive man”); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT 216–31 (1982).

87. SCHECHTER, *supra* note 86, at 219.

88. See BANCROFT, *supra* note 86, at 151–58.

89. STARK, *supra* note 81, at 281. See SCHECHTER, *supra* note 86, at 219 (describing violence as a practical tool that men use to coerce and frighten women and to derive pleasure from their fear).

90. See Gruber, *supra* note 1, at 797.

91. See *id.*

First, in the late 1970s and early 1980s, the Battered Women's Movement pushed for the reform of legal responses to domestic violence, especially the mobilization of criminal justice resources.⁹² To jump-start more vigorous and less discretionary enforcement by police and prosecutors, activists needed to make patterns of abuse visible and get the public to take them seriously. The image of the controlling husband or boyfriend was politically powerful, and it lent support to other feminist causes, such as defining date rape as a crime.⁹³ Second, the sharp focus on explaining why some women do not or cannot leave their abusers and why they use violence in self-defense came at the expense of opportunities to seek more nuanced answers to the question: "Why do men batter?" Third, the Battered Women's Movement emphasized batterer accountability, rather than treatment. Keeping women safe and helping them escape abusive relationships, along with educating the public about the harms of domestic violence, also headed the Movement's goals.⁹⁴

Battered women's advocates turned to the criminal justice system to demand that domestic violence be labeled a crime, not just a family conflict, and that its perpetrators be arrested and punished.⁹⁵ Because insisting on accountability from batterers constituted a primary objective of feminist law reform, many factors associated with intimate-partner violence—including substance abuse, mental illness, exposure to abuse as a child, and the role of racism and poverty—were dismissed as myths or excuses.⁹⁶

Battered women's advocates reluctantly embraced BIPs in an effort to prevent abusers from reoffending, but they viewed such programs with skepticism.⁹⁷ There were several reasons for the lukewarm acceptance of court-mandated programs for abusive men. First, some of the programs that proliferated in the United States in the early 1980s were run by mental health practitioners who were reluctant to acknowledge the shortcomings of marriage counseling and mediation or the problematic use of anger management skill-building without a concomitant emphasis on the unacceptability of violence and the negative consequences of engaging in

92. See Tineke Ritmeester, *Batterers' Programs, Battered Women's Movement, and Issues of Accountability*, in ELLEN PENCE & MICHAEL PAYMAR, *EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL* 169, 173 (Ellen Pence & Michael Paymar eds., 1993).

93. Some of the first American activists inspired by the establishment of battered women's shelters in England were involved in the anti-rape movement. See *id.*

94. See SCHECHTER, *supra* note 86, at 315 (describing how the Battered Women's Movement empowered abuse survivors); SCHNEIDER, *supra* note 1, at 199 (emphasizing the importance of "the public education campaigns that have been galvanized by the struggles for legal reform" on the issue of domestic violence).

95. See STARK, *supra* note 81, at 37.

96. See BANCROFT, *supra* note 86, at 23-48; SCHECHTER, *supra* note 86, at 209-16.

97. See STARK, *supra* note 81, at 67.

it.⁹⁸ Second, battered women's advocates were unsure that abusive men could be rehabilitated; they believed that batterers feel entitlement to control their partners and that they lack "motivation to change."⁹⁹

As we shall see, early pro-feminist programs dedicated to re-educating abusive men centered on acceptance of responsibility and unconditional acknowledgment of the wrongfulness and intentional nature of controlling behavior.¹⁰⁰ They made little provision for contextual issues that might contribute to recidivism. One author estimated that, in the early 1990s, the Duluth Domestic Abuse Intervention Project ("DAIP"), which is still the prevailing model for batterer intervention across the country,¹⁰¹ spent 75 percent of its budget on interagency communication to keep abused women safe and only 25 percent of its budget on treating male batterers.¹⁰²

In short, as batterer intervention protocols developed, they tended to rely upon and entrench the view that domestic violence is committed by men against women and that it occurs because of the values and power dynamics of a sexist, male-dominated society. Since same-sex abuse fits uncomfortably with the feminist paradigm and "complicates its woman-centered goals," it threatened the Battered Women's Movement.¹⁰³ Hence, the Battered Women's Movement, the vigorous criminal justice response that it inspired, and the BIPs that courts order offenders to attend typically ignore same-sex intimate-partner violence, as well as male victims of female aggressors and women whose reaction to abuse involves angry, defensive "fighting back."¹⁰⁴ These forms of violence fall

98. See Poco Kernsmith, *Treating Perpetrators of Domestic Violence: Gender Differences in the Applicability of the Theory of Planned Behavior*, 52 *SEX ROLES* 757, 758 (2005); Ritmeester, *supra* note 92, at 173.

99. EDWARD W. GONDOLF, *THE FUTURE OF BATTERER PROGRAMS* 17 (2012) [hereinafter GONDOLF, *FUTURE*].

100. See BANCROFT, *supra* note 86, at 334-43.

101. See Julia C. Babcock, Charles E. Green & Chet Robie, *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 *CLINICAL PSYCHOL. REV.* 1023, 1026 (2004); SHELLY JACKSON, LYNETTE FEDER, DAVID R. FORDE, ROBERT C. DAVIS, CHRISTOPHER D. MAXWELL & BRUCE G. TAYLOR, *NAT'L INST. FOR JUSTICE, U.S. DEP'T OF JUSTICE, NJC 195079, BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE?* 1 (2003) [hereinafter N.I.J. SPECIAL REP.]; see also GONDOLF, *FUTURE*, *supra* note 99, at 3 (stating that the prevailing model, nationwide, is a gender-based, cognitive-behavioral approach that focuses "on exposing the thought patterns related to abuse and violence, restructuring those patterns, and developing alternative behaviors").

102. Ritmeester, *supra* note 92, at 170.

103. See Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 *S. CAL. REV. L. & WOMEN'S STUD.* 81, 90 (2003).

104. See *id.* at 109-10.

through the cracks in a system designed to address sexist, controlling men and their stereotypically passive, female victims.

II. COURT-MANDATED BATTERER INTERVENTION PROGRAMS: A “ONE-SIZE-FITS-ALL” APPROACH TO DOMESTIC VIOLENCE OFFENDERS?

I have argued elsewhere that, in cases of intimate-partner homicide, the criminal law ought to express the wrongfulness of a killing that constitutes the ultimate act of control of an abuser over his partner: such homicides should be labeled murder, not manslaughter.¹⁰⁵ Yet, at the less serious end of the spectrum, especially in cases of misdemeanor domestic violence, the legal system should be concerned with prevention and rehabilitation, as well as blame. Finding effective alternatives to imprisonment for less serious domestic violence offenders may also serve societal and victim interests in reducing the myriad costs of incarceration—including the personal costs to victims who are connected to their abusers by bonds of financial (inter)dependence, shared parenting duties, fear of retaliation, and love. Court-mandated BIPs seek to achieve these goals.¹⁰⁶

However, the protocols used in BIPs have generated bitter debates in the sociological and psychological literature, relatively little of which has been recognized in legal academic scholarship. Part II explains this debate and provides an update on the content of BIPs across the United States. Part III then makes preliminary suggestions for improving such programs based on a new understanding of domestic violence that avoids offender stereotypes.

105. See Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 35–36, 92–93, 98–100 (2010).

106. Although firearms prohibitions and completion of a BIP may be mandated by statute, even for domestic violence misdemeanors, the judge often has considerable discretion over the amount of imprisonment to which the batterer is sentenced. See Susan L. Miller, Carol Gregory, & LeAnn Iovanni, *One Size Fits All? A Gender-Neutral Approach to a Gender-Specific Problem: Contrasting Batterer Treatment Programs for Male and Female Offenders*, 16 CRIM. JUST. POL'Y REV. 336, 337, 339 (2005) (stating that most participants in BIPs are men ordered to complete the program in lieu of incarceration). In some jurisdictions, domestic violence offenders are even eligible for pretrial diversion programs with components that include a BIP, which allows them to avoid a criminal record and to circumvent targeted gun-control laws. See Rebecca G. Goddard, Note, *When It's the First Time Every Time: Eliminating the “Clean Slate” of Pretrial Diversion in Domestic Violence Crimes*, 49 VAL. U. L. REV. 267, 296–301 (2014) (arguing that pretrial diversions pose unacceptable barriers to accountability and victim safety). Finally, many courts use completion of a BIP as a post-conviction probation condition.

A. *Feminism, Anti-Feminism, and the Polarized Debate about Batterer Intervention*

The controversy about the most desirable and effective approach to batterer intervention pits two camps against each other: the proponents and the critics of the Duluth model. However, increasingly, other voices also seek to be heard. These voices suggest that there may be several types of intimate-partner violence, only one of which is characterized by the terroristic control of women by their male partners.¹⁰⁷ Some also emphasize the importance of cultural competence—including sensitivity to racial, ethnic, socioeconomic, and religious context—in successful interventions against battering.¹⁰⁸ Finally, the Duluth approach may be less monolithic and impervious to change than its detractors claim. Edward Gondolf argues, for example, that critics of the Duluth model “attack a caricature.”¹⁰⁹ He writes: “I certainly agree—as do many Duluth proponents—that the field needs to move further ahead, especially in identifying, treating, and containing the unresponsive batterers with compounding problems. But I disagree that the Duluth model is necessarily an impediment to moving ahead.”¹¹⁰ To understand the debate and identify a path forward, it is first necessary to unpack the competing approaches and their criticisms of each other.

107. See MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 2, 5–6 (2008).

108. See generally Rhea V. Almeida & Jacqueline Hudak, *The Cultural Context Model*, in PROGRAMS FOR MEN WHO BATTER 10-1, 10-1 to 10-24 (Etiony Aldarondo & Fernando Mederos eds., 2002) (describing a model that “addresses gender, skin color, ethnicity, spiritual practice, sexual orientation, age, and socioeconomic class, in a manner that places these issues at the core of family intervention”); Julia L. Perilla & Felipe Pérez, *A Program for Immigrant Latino Men Who Batter Within the Context of a Comprehensive Family Intervention*, in PROGRAMS FOR MEN WHO BATTER, *supra*, at 11-1, 11-1 to 11-31 (explaining the goals and protocols of Caminar Latino, a program for Latino immigrant families affected by domestic violence in Atlanta, Georgia); Antonio Ramírez Hernández, *CECEVIM—Stopping Male Violence in the Latino Home*, in PROGRAMS FOR MEN WHO BATTER, *supra*, at 12-1, 12-1 to 12-30 (describing the CECEVIM program, which was “created in 1996 out of a need to establish a culturally appropriate intervention model for Latino men who are abusive to their partners”) (CECEVIM stands for ‘Centro de Capacitación para Erradicar la Violencia Intrafamiliar Masculina’ or Training Center to Eradicate Masculine Intrafamily Violence); Denise A. Donnelly, Linda G. Smith & Oliver J. Williams, *The Batterer Education Program for Incarcerated African-American Men, 1997–2000*, in PROGRAMS FOR MEN WHO BATTER, *supra*, at 13-1, 13-1 to 13-18 (discussing a program, primarily for black males, that was first developed at the DeKalb County Jail in Decatur, Georgia).

109. Edward W. Gondolf, *Theoretical and Research Support for the Duluth Model: A Reply to Dutton and Corvo*, 12 AGGRESSION & VIOLENT BEHAV. 644, 645 (2007) [hereinafter Gondolf, *Theoretical and Research Support for the Duluth Model*].

110. *Id.* at 653.

1. The Duluth Domestic Abuse Intervention Project and its Impact in the United States

The DAIP was founded in Duluth, Minnesota in the early 1980s in response to the expanded number of men who were arrested for domestic violence offenses and convicted in courts that remained reluctant to impose jail sentences on first-time offenders unless aggravating circumstances existed.¹¹¹ The re-education of batterers to avoid violence in their intimate relationships became an alternative, or in some cases, a supplement to incarceration. From the beginning, the DAIP sought to coordinate multiple agencies to minimize their employees' discretion, open their records to DAIP scrutiny, and hold batterers accountable, rather than enabling their violence.¹¹² The DAIP was designed to play "a monitoring and coordinating role . . . to prevent community collusion with abusers."¹¹³ The nine agencies under the project's umbrella adopted written guidelines, policies, and procedures governing the responses that police, courts, and human service agencies used in domestic assault cases in Duluth.¹¹⁴

Starting in 1984, the DAIP's founders also began to develop a model to understand abusive men by interviewing women in battered women's shelters or in classes that such shelters offered. The insights gleaned from these interviews led to the creation of the Power and Control Wheel, a diagram that depicts typical behaviors used by abusers.¹¹⁵ This diagram shows that psychological tactics and other conduct besides physical violence comprise patterns of intimate-partner abuse.¹¹⁶ The DAIP eventually established a 26-week program "[t]o help men change from using the behaviors on the Power and Control Wheel, which result in authoritarian and destructive relationships, to using behaviors on the Equality Wheel, . . . which form the basis for egalitarian relationships."¹¹⁷

The DAIP's interagency approach to batterer intervention centered on accountability.¹¹⁸ According to the underlying philosophy of the DAIP, batterers have been socialized in a society that grants men privi-

111. ELLEN PENCE & MICHAEL PAYMAR, *EDUCATION GROUPS FOR MEN WHO BATTER* xiii (1993).

112. *Id.* at 17–19.

113. *Id.* at 19.

114. *Id.* at 17; see Gondolf, *Theoretical and Research Support for the Duluth Model*, *supra* note 109, at 645.

115. PENCE & PAYMAR, *supra* note 111, at 2–3.

116. See Gondolf, *Theoretical and Research Support for the Duluth Model*, *supra* note 109, at 647.

117. PENCE & PAYMAR, *supra* note 111, at 7.

118. *Id.* at 4–5.

leges based on their gender and tacitly condones their violence by blaming their female partners.¹¹⁹ To change such men, the DAIP model pioneered a curriculum designed to eliminate behaviors on the Power and Control Wheel.¹²⁰ The curriculum reflected “a movement away from the anger-management focus of earlier batterer-intervention programs, and toward men’s understanding of the violence and taking responsibility for it.”¹²¹ In addition to re-educating male offenders to reject attitudes believed to underpin gendered abuse, the DAIP also monitored offenders’ compliance with court orders and scrutinized police and prosecutors’ work to make sure criminal justice agencies treated domestic violence as a crime.¹²² In this way, the DAIP sought to make both the offender and the relevant agencies in each case accountable for domestic violence and their complicity in allowing it to go unchecked.¹²³

The Duluth approach thus framed battering as a component of patriarchy and construed it, not as episodic, but as “an expression of systematic male control which, along with emotional, economic, sexual, and verbal abuse, functions to intimidate and subjugate women.”¹²⁴ Abuse arises from free will and intent—not a loss of self-control—even though some batterers may feel that they were overcome by emotion when they used violence.¹²⁵ Hence, although the Duluth model is sometimes self-described as “a group rehabilitation process,”¹²⁶ from the outset the DAIP’s message to batterers was punitive and focused on deterrence: “Either stop it or lose increasing amounts of your personal freedom.”¹²⁷

The basic Duluth format, which many BIPs continue to use, can be described in the following manner. Batterer participation in the education group usually starts with a referral from criminal court, within about five days of a sentencing hearing, or from a civil court that has issued a protection order.¹²⁸ Batterers go through a group intake process with

119. *Id.* at 4–7.

120. *See infra* notes 128–146 and accompanying text.

121. Ellen Pence, *The Duluth Domestic Abuse Intervention Project*, in PROGRAMS FOR MEN WHO BATTER, *supra* note 108, at 6-1, 6-13, 6-46.

122. *See* PENCE & PAYMAR, *supra* note 111, at 18–19.

123. *See id.* at 19 (discussing the importance of preventing “community collusion” with abusers).

124. Eric S. Mankowski, Janice Haaken & Courtenay S. Silvergleid, *Collateral Damage: An Analysis of the Achievements and Unintended Consequences of Batterer Intervention Programs and Discourse*, 17 J. FAM. VIOLENCE 167, 171 (2002) (providing a critical description of the Duluth model).

125. *See* PENCE & PAYMAR, *supra* note 111, at 2.

126. *Id.* at 19.

127. *Id.* at 18.

128. *Id.* at 19. DAIP batterer education groups do have some voluntary participants, but only 10% of them complete the program. *Id.* at 24.

several other men.¹²⁹ Participants are screened, either at intake or when problems arise, for a variety of factors, including substance abuse and mental health issues.¹³⁰ However, under the DAIP's philosophy, abusers are not allowed to lean on such factors as excuses.¹³¹ Some disruptive behaviors prevent men from participating in the regular group, but the DAIP also offers a special group for disruptive men, which uses a lecture-based curriculum.¹³² If a court-mandated batterer's behavior prevents his participation in this special group, he can be referred back to court for noncompliance with of the court's order.¹³³

The 26-week Duluth curriculum is based on eight themes depicted on the Equality Wheel: *Non-threatening Behavior; Respect; Trust and Support; Honesty and Accountability; Responsible Parenting; Shared Responsibility; Economic Partnership; and Negotiation and Fairness.*¹³⁴ In contrast, the Power and Control Wheel illustrates behaviors that abusers employ to control their partners.¹³⁵ The first week of each unit consists of a check-in during which the men briefly describe progress on their "action plans"—written records of individual goals toward change to which each participant commits himself and the steps needed to achieve those goals.¹³⁶ A facilitator then uses videos, lectures, role play, and discussion to define a theme from the Equality Wheel.¹³⁷ The facilitator distributes "control logs" so each participant can record and analyze abusive incidents that occur in his intimate relationship and the non-violent alternatives he could have chosen.¹³⁸ The second week explores how specific acts of abuse are used as control tactics, and after check-in, the session focuses on the participants' control logs.¹³⁹ The third week typically involves role play of alternatives to abusive behavior that could be substituted in the concrete incidents the men have described in their logs.¹⁴⁰

The facilitator of the weekly group discussion plays a key role in the Duluth program because the facilitator is charged with creating a compassionate atmosphere in which batterers learn to engage in reflection and critical thinking.¹⁴¹ However, the facilitator must also ensure

129. *Id.* at 21.

130. *Id.* at 23–24.

131. *See id.* at 4.

132. *See id.* at 23–24.

133. *See id.*

134. *Id.* at 30–31 & Fig. 3.1.

135. PENCE & PAYMAR, *supra* note 111, at 30-31 & Fig. 3.2.

136. *See id.* at 32–33.

137. *See id.* at 32.

138. *See id.* at 32.

139. *See id.*

140. *See id.*

141. *See id.* at 67, 71–72.

that participants do not minimize or deny their controlling, abusive conduct or hold fast to sexist beliefs.¹⁴² Whether Duluth-style programs shame participants remains a point of controversy. According to some descriptions of the Duluth approach, it is necessary for abusers to feel guilt and shame so they can take the first step toward change—accepting responsibility for their behavior.¹⁴³ In contrast, the Duluth model’s official website denies that shaming is part of its methodology.¹⁴⁴ In any event, the DAIP seeks to avoid offender-facilitator collusion because a facilitator who colludes with group members may inadvertently encourage their excuses and prevent them from being held accountable for their violence.¹⁴⁵ The Duluth model instructs facilitators to confront minimization, denial, and prejudiced views in a respectful manner and to send habitually uncooperative participants to the special group for disruptive men, so that they do not impede their classmates’ journey to accepting responsibility for domestic abuse.¹⁴⁶ Inadvertent facilitator collusion and the ability of batterers to “talk the talk” in a superficial way, rather than genuinely changing their attitudes and conduct, represent major obstacles to program success.¹⁴⁷

Although alternatives exist, the Duluth model continues to be the prevailing approach to batterer intervention in the United States today.¹⁴⁸ Programs influenced by the DAIP are variously described as using a feminist psycho-educational curriculum¹⁴⁹ or a gender-based cognitive-behavioral model that includes skill-building components.¹⁵⁰ In practice

142. See *id.* at 78.

143. See Gondolf, *Theoretical and Research Support for the Duluth Model*, *supra* note 109, at 648.

144. See *Frequently Asked Questions*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <http://www.theduluthmodel.org/about/faqs.html#shame> (last visited June 15, 2015).

145. See PENCE & PAYMAR, *supra* note 111, at 77–83.

146. See *id.* at 81. Edward Gondolf believes that confrontation is necessary to overcome batterers’ denial and resistance. In his view, “the question about confrontation is not *should* it be done, but *how* is it to be done.” Gondolf, *Theoretical and Research Support for the Duluth Model*, *supra* note 109, at 648. See also Mankowski, Haaken & Silvergleid, *supra* note 124, at 170 (stating, in a critical description of the Duluth model, that group facilitators are supposed to be “vigilant for and routinely confront the men’s sexist and controlling attitudes”).

147. See Miller, Gregory, & Iovanni, *supra* note 106, at 341–49; Douglas P. Schrock & Irene Padavic, *Negotiating Hegemonic Masculinity in a Batterer Intervention Program*, 21 GENDER & SOC’Y 625, 635–36, 641, 643–44 (2007). While Part II (A) (2) of this Article will describe criticisms of the Duluth model’s feminist ideology, poor implementation—rather than poor design—is arguably a greater weakness on the ground. One research team found that “facilitators’ deference [to batterers’ diversionary tactics and locally hegemonic masculine attitudes] . . . affirmed men’s sense of entitlement to women’s subservience, counter to the curriculum’s aims.” *Id.* at 636.

148. See *supra* note 101. See also *infra* note 203 and accompanying text.

149. N.I.J. SPECIAL REP., *supra* note 101, at 1.

150. See GONDOLF, *FUTURE*, *supra* note 99, at 3.

there is some overlap;¹⁵¹ modern standards for the certification of BIPs increasingly allow a combination of the two.¹⁵² As Part II.B explains, the majority of state standards espouse a power-and-control theory of domestic violence that depicts the abuse of women as rooted in patriarchy and the “complex psychological tendency toward misogyny” that underpins it.¹⁵³ Duluth-style programs generally take a law-and-order approach to domestic violence that prioritizes the safety of female victims and the accountability of male offenders.¹⁵⁴ If men fail to comply with court referral to the education groups, or if they abuse their intimate partners or children while they are enrolled in the program, they face further consequences, including additional criminal charges and jail time.¹⁵⁵

2. The Limited Achievements of the Duluth Model

Empirical studies of Duluth-style BIPs indicate that their achievements are limited. Attrition rates hover between 40 and 75 percent, even though program completion is a probation condition for many participants.¹⁵⁶ Recidivism also remains a problem for those who finish the program.¹⁵⁷ A meta-analytic review published in 2004 found that batterer intervention had a small effect on recidivism rates and that “[t]here were no significant differences in average effect size between Duluth-type and cognitive-behavioral batterer intervention programs.”¹⁵⁸ A male offender who completes a BIP based on either model is only five percent

151. See Amie Nichole Zarling, *A Preliminary Trial of ACT Skills Training for Aggressive Behavior* 19 n.6, (May 2013) (unpublished Ph.D. dissertation, University of Iowa), <http://ir.uiowa.edu/cgi/viewcontent.cgi?article=4801&context=etd> (stating that many BIPs combine Duluth-style components with cognitive-behavioral techniques grounded in social-learning theory).

152. For examples of state standards that blend the feminist Duluth model with anger management and other skills training, see N.J. COAL. FOR BATTERED WOMEN, BATTERER’S PROGRAM STANDARDS 3, http://www.biscmi.org/other_resources/nj_bip_stds.pdf (last visited July 17, 2015); SAN DIEGO CTY. [California] TASK FORCE ON DOMESTIC VIOLENCE, *Treatment and Intervention Standards* 17–18, BATTERER INTERVENTION SERVS. COAL. OF MICH., http://www.biscmi.org/other_resources/docs/san_diego.html (last visited July 17, 2015); Rules of Domestic Violence State Coordinating Council [Tennessee] 12–13, Rule 0490-1-.06(2) & (3) (1999), <http://www.share.tn.gov/sos/rules/0490/0490-01.pdf>. See also *infra* notes 213–214 and accompanying text.

153. GONDOLF, *FUTURE*, *supra* note 99, at 21. See also *infra* note 203 and accompanying text.

154. See GONDOLF, *FUTURE*, *supra* note 99, at 23–25.

155. See *id.* at 24.

156. See Babcock, Green & Robie, *supra* note 101, at 1028–30; BILL WOODWARD & KRISTEN BECHTEL, UNDERSTANDING RESEARCH EVALUATING THE EFFECTIVENESS OF BATTERERS’ INTERVENTION PROGRAMS, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORRECTIONS 3 (2008) (unpublished report), <http://nicic.gov/Library/Files/023363.pdf>.

157. See Babcock, Green & Robie, *supra* note 101, at 1044.

158. *Id.* at 1043–44.

less likely to re-assault his female partner than a man who has only been arrested and convicted in the criminal justice system.¹⁵⁹

A study of male offenders court-ordered to attend a Duluth-style program in Broward County, Florida, concluded that the program “had no clear and demonstrable effect on offenders’ attitudes, beliefs, or behavior. Evidence of severe physical abuse still existed, even 6 and 12 months after sentencing.”¹⁶⁰ Indeed, attendance at some, but not all, of the counseling sessions actually made it more likely that batterers would be rearrested.¹⁶¹ Another study tracked the results of a Duluth-type batterer intervention program in Brooklyn, New York, for domestic violence misdemeanants who agreed to participate.¹⁶² These researchers concluded, “[t]he results of this study do not support the view that treatment leads to lasting changes in behavior. . . . [Rather, they] support the view that batterer intervention merely suppresses violent behavior for the duration of [the] treatment.”¹⁶³ Some scholars have even suggested that such programs increase women’s risk of victimization because they create a false sense of security among abused women whose partners have gotten treatment.¹⁶⁴

Although the studies described above have methodological flaws,¹⁶⁵ supporters of the Duluth model admit that it has experienced only modest success when measured anecdotally by the views of battered women’s shelter providers¹⁶⁶ or by empirical analyses of recidivism.¹⁶⁷ One pro-

159. *Id.* at 1044.

160. N.I.J. SPECIAL REPORT, *supra* note 101, at 12.

161. *Id.* at 12–13.

162. *See id.* at 19.

163. *Id.* at 20.

164. *See* Babcock, Green & Robie, *supra* note 101, at 1024; Schrock & Padavic, *supra* note 147, at 644.

165. For example, Shelly Jackson points out that both the Brooklyn and Broward County studies had high dropout rates, which could make the results appear too positive, if only the attitudes and recidivism rates of men who completed the program were measured. *See* N.I.J. SPECIAL REP., *supra* note 101, at 23. Jackson also emphasizes the importance of tracking *when* a re-offense occurs because “[i]f the offender batters again during the first week of treatment, it cannot be said that the program had no effect; rather, the program had *no opportunity* to affect the batterer.” *Id.* at 25 (emphasis added). The Brooklyn study controlled for this factor, but the Broward County study did not. *Id.* However, the Brooklyn study was flawed by the compromises the experimental program made—getting the misdemeanants’ consent and offering a shorter program to accommodate some of the men’s objections. *See id.* at 24. Finally, neither study tested whether the batterers’ programs implemented the Duluth curriculum in the intended manner. *See id.* at 25. Still, Jackson used the Brooklyn and Broward County study results to conclude, “[t]he stakes for women’s safety are simply too high to rely heavily on the use of BIPs without stronger empirical evidence that they work.” *Id.* at 26.

166. Ritmeester, *supra* note 92, at 176–77 (reporting that almost half of 76 American and Canadian battered women’s shelters surveyed in the early 1990s felt the BIPs did not decrease physical violence against women and 88 percent thought BIPs had no impact on or even increased emotional abuse).

ponent of the Duluth model, Edward Gondolf, presents more optimistic findings. His multi-site evaluation of batterer programs, which included a four-year longitudinal follow-up, claimed to show a “clear de-escalation of reassault and other abuse over time, with the vast majority of men reaching sustained non-violence.”¹⁶⁸ However, Gondolf’s recent book on batterer intervention acknowledges a need for reform. He admits that dropout rates may be as high as 70 percent and that “[e]xperimental results and meta-analyses suggest that batterer programs have little or no effect[.]” even on the men who complete them.¹⁶⁹ Because statistical modeling presents a more encouraging picture, he surmises: “Perhaps the two sets of findings supplement one another. Arguably, the experiments suggest that simply sending men to a batterer program is not sufficient in itself, and the statistical modeling indicates that some men warrant enhanced intervention of some sort [e.g. court oversight, alcohol treatment, or other supplemental programming].”¹⁷⁰ Yet Gondolf concedes that, as they are currently designed and implemented, batterer programs do not change the behavior of some especially dangerous, violent men who often drop out of education groups and are likely to recidivate.¹⁷¹

3. The Duluth Model’s Critics

The Duluth model has incurred heated criticism from several directions. First, battered women’s advocates have long feared that group education sessions do not go far enough toward combating societal acceptance of violence against women.¹⁷² To increase accountability, some program directors favor more court oversight, probation supervision, and penalties for noncompliance, including incarceration for serious and/or repeated assaults.¹⁷³ In this view, the prevailing model is too lenient.

Second, advocates of a multicultural approach to batterer intervention find Duluth-style programs insufficiently sensitive to “obstacles to change such as racial discrimination, economic disadvantage, and trau-

167. See, e.g., Melanie Shepard, *Evaluation of Domestic Abuse Intervention Programs*, in EDUCATION GROUPS FOR MEN WHO BATTER, *supra* note 92, at 163, 166–67 (reporting the results of an early DAIP study that assessed abusive behavior over a five-year period following completion of a batterer education group).

168. Gondolf, *Theoretical and Research Support for the Duluth Model*, *supra* note 109, at 652.

169. GONDOLF, *FUTURE*, *supra* note 99, at 71, 125.

170. *Id.*

171. See *id.* at 6, 72, 125, 191, 237.

172. *Id.* at 1.

173. *Id.* at 15.

matic experiences.”¹⁷⁴ Moreover, while DAIP founders acknowledge that women and members of the LGBT community are also arrested for domestic violence, and the DAIP does offer a women’s group, abusive men nonetheless remain the Duluth model’s nearly exclusive focus.¹⁷⁵ In contrast, a “new psychology” of battering that has started to emerge rejects the “one-size-fits-all” structure and philosophy of the feminist approach in favor of more individualized interventions.¹⁷⁶

The most strenuous objections to feminist batterer programs come from proponents of psychodynamic treatment or couples counseling, who claim that family violence is gender-neutral, and from advocates of evidence-based practice, which demands protocols with empirically demonstrated effectiveness.¹⁷⁷ Some of these critiques seem, quite frankly, to be motivated by hostility to feminism. Yet, rather than simply dismissing their concerns as backlash, it is worth addressing whether they contain at least some validity. Ken Corvo, Donald Dutton, and others charge the Duluth model with being ineffective and excessively ideological. In addition to these overarching claims, the detractors fire three specific criticisms at feminist BIPs. First, they claim that the philosophy and curricula of the programs vilify batterers.¹⁷⁸ Second, they contend

174. *Id.* at 20 (summarizing the views of Fernando Mederos). *See also* N.I.J. SPECIAL REP., *supra* note 101, at 25 (stating that some researchers believe treatment approaches “need to be tailored to serve specific populations” and that the Duluth model “based on white feminist theory” may not work with offenders from minority groups).

175. PENCE & PAYMAR, *supra* note 111, at 5–6; Pence, *supra* note 121, at 6–10. The DAIP approach holds that “battering is not a gender-neutral issue.” PENCE & PAYMAR, *supra* note 111, at 5. Women’s use of violence is largely seen as self-defensive or as an angry response to abuse, not as battering, though the DAIP has worked with a few women who committed dangerous assaults on their male partners. *See id.* at 5–6. Pence and Paymar’s book is limited to describing batterer education programs for men, however. Similarly, although Pence and Paymar acknowledge the existence of same-sex domestic violence, they state that “[d]ealing with gay and lesbian battering is beyond the scope of this book.” PENCE & PAYMAR, *supra* note 111, at 5. Despite the DAIP’s relative lack of attention to women arrested for domestic violence, compared to men, a few commentators credit the DAIP with employing an effective combination of education and advocacy for women who use force, in contrast to other programs. *See, e.g.*, Lisa Young Larence, *When She Hits Him: Why the Institutional Response Deserves Reconsideration*, 5 VIOLENCE AGAINST WOMEN NEWSL. 10, 17 (2007) [*hereinafter* Larence, *When She Hits Him*].

176. *See* GONDOLF, *FUTURE*, *supra* note 99, at 5, 124–25 (offering a critical assessment of the “new psychology” of battering).

177. *See id.* at xii, 5, 15–19 (noting salient characteristics of various critiques). *See also, e.g.*, Donald G. Dutton & Kenneth Corvo, *Transforming a Flawed Policy: A call to revive psychology and science in domestic violence research and practice*, 11 AGGRESSION & VIOLENT BEHAV. 457, 459 (2006) (complaining that “a ‘one-size fits all’ approach, based on a contraindicated political model of male domination prevails [in batterer intervention programs]”).

178. *See* Ken Corvo & Pamela J. Johnson, *Vilification of the “batterer”: How blame shapes domestic violence policy and interventions*, 8 AGGRESSION & VIOLENT BEHAV.

that the programs are ineffective and that one reason for their ineffectiveness is the corrosive effect of confrontation on the facilitator-client relationship.¹⁷⁹ Third, they argue that the hegemony of the feminist paradigm has had a chilling effect on scholarship presenting alternative theories of domestic violence and on the certification of batterer programs grounded in other models.¹⁸⁰

Ken Corvo and Pamela Johnson identify the stereotyping of offenders as one of the central failures of the feminist model. In their view, Duluth-style interventions lump all domestic violence perpetrators under the batterer rubric “as if they represent the worst of the behavior . . . that occurs in family violence, ignoring and/or collapsing important distinctions along various dimensions of the problem—degree of severity, for example, or periodicity of occurrence.”¹⁸¹ For Corvo and Johnson, the vilification of the batterer is troubling, not only because it leads to ineffective psycho-educational or cognitive-behavioral programs, but also because it blames poor program results on the offender’s supposedly incorrigible nature.¹⁸² Alluding to the historical stereotypes described in Part I of this Article, Corvo and Johnson claim that the feminist model “is at once reminiscent of Calvinistic notions of unregenerate sinners unable to resist further wrongdoing, and of addiction and disease models in which decline is seen as inevitable, progressive, and irreversible.”¹⁸³ Despite relatively recent research positing the existence of multiple types of domestic violence,¹⁸⁴ feminist approaches still adhere to the belief that, without punitive intervention, partner abuse will inevitably escalate. To paraphrase legal scholar Jeannie Suk, all domestic violence misdemeanants are viewed as potential O.J. Simpsons—purposeful, controlling, strategic, and ultimately murderous in their use of violence.¹⁸⁵ Such vil-

259, 260 (2003) (criticizing the dynamic by which the “vilification of the ‘batterer’ has become an acceptable and strategic frame within which to address perpetrators of domestic violence.”); Dutton & Corvo, *supra* note 177, at 477 (claiming that, under the Duluth model, “men and women are reduced to socially scripted automatons, without painful personal histories, without current frustrations, and inevitably without meaningful inner lives”).

179. See Dutton & Corvo, *supra* note 177, at 463.

180. See Corvo & Johnson, *supra* note 178, at 260; Dutton & Corvo, *supra* note 177, at 459, 461, 478.

181. See Corvo & Johnson, *supra* note 178, at 261; see also Dutton & Corvo, *supra* note 177, at 464 (“Essentially, the Duluth model views every man convicted as equivalent to the worst man [] without gradations or nuance.”).

182. Corvo & Johnson, *supra* note 178, at 261.

183. *Id.*

184. See generally, e.g., JOHNSON, *supra* note 107 (positing the existence of three types of domestic violence: intimate terrorism, violent resistance, and situational couple violence).

185. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 44 (2006).

lains are not worthy of “treatment”; the Duluth model instead speaks of confrontation and re-education.¹⁸⁶

The use of confrontational tactics by Duluth-style program facilitators lies at the heart of Corvo’s critique of feminist batterer intervention. In his view, the confrontational nature of the Duluth curriculum impedes the establishment of trust between the facilitator and the batterer and leads to high levels of program attrition.¹⁸⁷ Dutton and Corvo claim that the Duluth approach is based on shaming; that it requires batterers to accept “male sex role conditioning” as the cause of intimate-partner abuse; and that it will not allow them to explore any other understanding of their violence.¹⁸⁸ These authors write, “[no] therapeutic bond can [be] form[ed] and clients who comply will feel judged and disbelieved. Empathy is impossible, change is unlikely, group process is subverted, and clients’ commitments to change are rarely internalized. It is a ‘take it or leave it’ posture and many clients do just that: leave.”¹⁸⁹

The Duluth model’s one-dimensional explanation for why domestic violence occurs may have negative effects beyond its limited success in changing batterers. According to Dutton and Corvo, the hegemony of feminist ideology also chills research that might produce other understandings and approaches to intervention; “[t]he bureaucrat/activists of certifying agencies and ‘batterer’ treatment programs have become ‘true believers,’ disregarding research that does not support their views.”¹⁹⁰ Critics also note that theories of domestic violence seem to be separated by a firewall from research on the causes of *other* types of violence, which may discourage important crossover in our understanding of how

186. See Corvo & Johnson, *supra* note 178, at 261. Here, Corvo and Johnson appear to misconstrue the DAIP’s reasons for preferring the term “education” to “treatment” or “therapy.” In the feminist conception, battering is not a form of psychological deviance, but rather a socially condoned method of controlling women that is rooted in patriarchal privilege. Corvo corrects his error in a more recent article, co-authored with Donald Dutton. See Dutton & Corvo, *supra* note 177, at 462 (“The Duluth model avoids utilizing the term ‘therapy’ because therapy implies there is something wrong with clients, whereas, according to the Duluth philosophy they are normal, simply following cultural dictates.”).

187. Dutton & Corvo, *supra* note 177, at 463.

188. *Id.*

189. *Id.* Dutton and Corvo cite a 2002 study for the statistic that 40 to 60% of men attending the first session of a Duluth-style education group fail to complete the program, even when failure to comply is a probation violation that may lead to incarceration. *Id.* (citing Frederick P. Buttell & Michelle M. Carney, *Psychological and Demographic Predictors of Attrition Among Batterers Court Ordered into Treatment*, 26 SOC. WORK RES. 31, 31–41 (2002)).

190. *Id.* at 478.

to prevent battering and change the behavior of those who perpetrate it.¹⁹¹

Scathing criticisms from the family-violence camp (which believes that women are just as violent as men) and advocates of evidence-based practice (that is, interventions shown empirically to be effective) target “a distorted stereotype” of Duluth-style programs.¹⁹² However, it is still worth inquiring whether the batterer intervention classes of the twenty-first century are based on adequate analysis of who engages in domestic violence and how offenders’ behavior can be changed. To date, the feminist paradigm (like Puritan and Victorian efforts to police violent masculinity in earlier eras) has been grounded in an understanding of why intimate-partner abuse occurs that is too one-dimensional and too subordinate to other sociopolitical agendas to prevent such abuse and alter the behavior of its perpetrators.

The result has been a myopic focus on mandatory criminal justice responses that assumes the binary of an aggressive male perpetrator and a weak victim who cannot make rational decisions in her own self-interest. This binary has been paired with feminist batterer intervention curricula that discourage inquiry into other contributors to intimate-partner abuse and that are also ill suited to treat the heterosexual women and same-sex batterers increasingly arrested for domestic violence. In short, there has been an insufficient effort to modify intervention programs to keep pace with nascent indications that there are various types of batterers and categories of abuse, as well as myriad factors (including substance abuse, mental illness, socioeconomic status, and racial and cultural identity) that affect the offender’s perpetration of violence and amenability to change.¹⁹³

B. A Systematic Analysis of Modern Batterer Intervention Program Standards

The adoption of mandatory arrest laws by the District of Columbia and at least 22 states, starting with Oregon in 1977, led to a dramatic increase in the number of domestic violence arrests.¹⁹⁴ Although policy-

191. See *id.* at 464 (citing JEFFREY FAGAN, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT: THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 1 (1996)).

192. See GONDOLF, *FUTURE*, *supra* note 99, at 236.

193. Legal scholar Leigh Goodmark raises a similar concern in a brief section on batterer intervention in her recent book. See LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 151 (2012).

194. Devon Gray Thacker Thomas, *Mandatory Arrest Laws for Intimate Partner Violence: The Scales or the Sword of Justice* 7–8 (2013) (unpublished Ph.D. dissertation, University of Colorado). Six more states have preferred arrest policies that encourage, but

makers anticipated that an increased number of men would be arrested, the arrest of straight and lesbian women for domestic violence constituted an unexpected result of such laws.¹⁹⁵ Indeed, female arrestees exhibited a larger proportional increase in arrest rates than men;¹⁹⁶ in some jurisdictions, women constitute as many as one-quarter of the total arrests for domestic violence.¹⁹⁷ Court-ordered batterer intervention, based on the paradigm of the male batterer, thus fits uncomfortably with the reality of mandatory criminal justice laws and policies. Nevertheless, in some states, statutory law compels judges to sentence anyone convicted of a crime that includes an act of domestic violence to complete a BIP.¹⁹⁸ In Colorado, such acts encompass property damage, threats, harm to animals, and any other conduct toward a current or former intimate partner that might be construed as punishment, intimidation, or coercion.¹⁹⁹ Such expansive definitions of domestic violence mean that courts order an assortment of perpetrators who engaged in varied behaviors to take batterer education classes.

The concern that straight women, lesbians, and gay men arrested for intimate-partner violence may not be effectively reached by modern BIPs (not to mention that some heterosexual men are very resistant to the programs' message) prompted the following analysis of 46 sets of state and local standards for batterer intervention across the country.²⁰⁰ The majority of these standards establish mandatory criteria for the certification of programs that treat court-ordered offenders, though some merely propose best practices.²⁰¹ The goal of Part II.B is to provide an updated assessment of the types of programs the standards require or suggest. This analysis allows us to gauge whether batterer intervention remains rooted

do not require, officers to make domestic violence arrests if they had probable cause to do so. *Id.*

195. *Id.* at 14.

196. *Id.* (citing other studies that showed a 500% increase in the arrest of women for domestic violence in California and a 12-fold increase in Kenosha, Wisconsin, in the early days of mandatory arrest).

197. *Id.* (citing Kris Henning and Brian Renauer, *Prosecution of Women Arrested for Intimate Partner Abuse*, 20 VIOLENCE & VICTIMS 361 (2005)).

198. See, e.g., COLO. REV. STAT. § 18-6-801 (West, Westlaw through 2015 First Reg. Sess. of 70th Gen. Assemb.); IOWA CODE ANN. § 708.2B (West, Westlaw through 2015 Reg. Sess.).

199. COLO. REV. STAT. § 18-6-800.3 (West, Westlaw through 2015 First Reg. Sess. of 70th Gen. Assemb.).

200. See *infra* notes 201–227 and accompanying text and, *infra*, Appendix A.

201. See Appendix B, available electronically in the Research Data series (Submissions from 2016) of the Colorado Law Faculty Scholarship Collection maintained by the William A Wise Law Library, University of Colorado Law School, <http://scholar.law.colorado.edu/research-data/1>. Appendices B-T to this Article, which present tables summarizing the author's findings about state and local BIP standards in the United States are all available electronically in this Research Data series.

in a stereotype that impedes rehabilitation and prevention, or whether the programs have adapted to new theories and empirical realities about the offenders ordered to participate in them. Admittedly, analysis of standards does not yield complete information about how BIPs function in practice. Nevertheless, these documents establish a floor for uniformity of program content and quality, as well as coordination with other agencies.

Despite the acrimonious struggle between feminist psycho-educational and non-feminist therapeutic theories of batterer intervention, many states' standards show practical movement toward an understanding of the multifaceted identities of offenders and the need to address this complexity to change their behavior. The evolution has been incomplete, however. As Part II.B will demonstrate, few states have gone beyond allowing homosexual offenders to participate in BIPs and requiring separate educational groups for women. In the vast majority of jurisdictions that have promulgated standards, the nature of the curricula that should be provided to non-stereotypical offenders remains sketchy, at best.

To assess the standards that currently govern BIPs, I identified 46 jurisdictions, mostly at the state level, that have promulgated such standards.²⁰² The vast majority of these standards specify a feminist model of group-based education that sees domestic violence as an instrument of power and control over one's intimate partner.²⁰³ The standards generally were established to achieve program uniformity, offender accountability, and victim safety and to facilitate coordinated community responses to domestic violence.²⁰⁴ More than half seek to ensure safety and accountability by notifying the victim about imminent danger from the batterer²⁰⁵ and informing the criminal justice system about any assaults or threats that occur during the intervention program.²⁰⁶ The majority also provide for some kind of quality-control monitoring to encourage service providers' compliance with the standards.²⁰⁷

202. See *infra* Appendix A for citations to the BIP standards analyzed in this Article. Most standards are promulgated at the state level; however, in a few states, including California, county probation departments or other local entities establish their own standards.

203. See Appendix C, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

204. See Appendix D, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

205. See Appendix E, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

206. See Appendix F, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

207. See Appendix G, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

Only three jurisdictions list the therapeutic rehabilitation of the offender as a goal.²⁰⁸ The focus on accountability, rather than treatment, is evident in the methods group facilitators are instructed to use. Almost 100 percent of the standards require facilitators to confront participants about their excuses for abusing their partners and their attempts to deny or minimize the harm they have inflicted.²⁰⁹ Very few of the standards allow contextual problems to be explored as causes of abuse.²¹⁰ Most strongly disfavor couples counseling,²¹¹ the few states that affirmatively allow it often specify, as Wyoming does, that couples counseling should only occur after the batterer has made significant progress in the BIP and refrained from violence for a long period of time and if the victim consents, without any coercion, to participate.²¹² The teaching of skills—such as anger, stress, or conflict management—is more commonly supported. Almost half of the 46 jurisdictions allow such skill-building,²¹³ but often with the caveat that rage and loss of control do not cause or excuse abuse.²¹⁴ The Duluth model's detractors appear to be correct when they complain that psychodynamic therapy for batterers has been almost universally rejected by standard-setting bodies and that cognitive-behavioral programming is usually offered, if at all, with a strong dose of feminist ideology.

208. N.D. COUNCIL ON ABUSED WOMEN'S SERVS. ET AL., NORTH DAKOTA ADULT BATTERER TREATMENT STANDARDS 4, 21 (2012), <http://cawsnorthdakota.org/wp-content/uploads/2014/09/BT-Standards-2011-CAWS.pdf>; SAN DIEGO CTY. TASK FORCE ON DOMESTIC VIOLENCE, TREATMENT AND INTERVENTION STANDARDS, *supra* note 152, at 5, § 2.5; GOVERNOR'S DOMESTIC VIOLENCE ELIMINATION (DOVE) COUNCIL, STANDARDS FOR MALE BATTERER INTERVENTION IN THE STATE OF WYOMING 4 (2010), http://www.biscmi.org/other_resources/DoVE_Council_BIP_Intervention_Standards_Final_02_18_10.pdf [hereinafter STANDARDS FOR MALE BATTERER INTERVENTION IN THE STATE OF WYOMING].

209. See Appendix H, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

210. For a comparison of the jurisdictions that clearly do not allow offenders to explore personal experiences they believe caused them to be abusive with the few that do, see Appendix I, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>. San Diego County, California, is unusual, not only in making therapy for the offender an express goal, but also in establishing standards that describe family-of-origin violence, the influence of the abuser's peer group, environmental stressors, and the abuser's psychological makeup as causal factors. See SAN DIEGO CTY. TASK FORCE ON DOMESTIC VIOLENCE, *Treatment and Intervention Standards*, *supra* note 152, at 1.1.

211. See Appendix J, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

212. See, e.g., STANDARDS FOR MALE BATTERER INTERVENTION IN THE STATE OF WYOMING, *supra* note 208, at 26, § 6.4.

213. See Appendix K, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

214. See, e.g., MO. COAL. AGAINST DOMESTIC & SEXUAL VIOLENCE, STANDARDS AND GUIDELINES FOR BATTERER INTERVENTION PROGRAMS 7-8 (2006), http://www.biscmi.org/other_resources/BIP_Service_Standard_June_2006.pdf.

Nevertheless, the standards take a less stereotyped view of domestic violence offenders than critics have charged. As of 2015, the majority of jurisdictions have made some effort to account for the variety of individuals ordered to participate in intervention programs, but the provision of specialized curricula and other forms of individualization for various types of batterers remains largely unregulated or unavailable. For example, although more than 70 percent of the standards (34 out of 46 jurisdictions) contemplate the participation of women,²¹⁵ only 26 jurisdictions clearly require separate programs for female participants, and very few of these describe a specialized curriculum for women.²¹⁶ Similarly, while approximately two-thirds of the standards are not limited to heterosexual batterers,²¹⁷ only about six jurisdictions plainly require separate groups for homosexual participants.²¹⁸ Colorado seems to be one of the few states (and perhaps even the *only* state) to offer a complete discussion of how programming for gays and lesbians should differ from that for heterosexual batterers.²¹⁹

Analysis of standards for BIPs shows that they are evolving toward greater cultural competence and sensitivity. Although only about half of the standards take the race of the offender into account,²²⁰ more than 70 percent acknowledge the influence of culture in some way.²²¹ Some standards simply strive for greater inclusivity by adding a non-discrimination statement.²²² Others contain a requirement that culture, race, or ethnicity (and especially the experience of prejudice) be consid-

215. See Appendix L, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

216. See Appendix M, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

217. See Appendix N, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

218. See Appendix O, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

219. See COLO. DOMESTIC VIOLENCE OFFENDER MGMT BD., STANDARDS FOR TREATMENT WITH COURT ORDERED DOMESTIC VIOLENCE OFFENDERS, App. B-I (2013) [hereinafter COLO. DVOMB STANDARDS], <https://cdpsdocs.state.co.us/dvomb/Standards/standards.pdf> (“Specific Offender Population Best Practice Guidelines for Providing Court-Ordered Treatment to Domestic Violence Offenders in Same-Sex Relationships”).

220. See Appendix P, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

221. See Appendix Q, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

222. See, e.g., IND. COAL. AGAINST DOMESTIC VIOLENCE, BATTERERS’ INTERVENTION PROGRAM STANDARDS & CERTIFICATION GUIDELINES 11 (2013), <http://www.icadvinc.org/wp-content/uploads/2010/08/Batterers-Intervention-Program-Standards-7.2013.pdf> (“There will be no discrimination on the basis of race, class, age, national origin, sexual orientation or handicaps in hiring of employees or in providing services to batterers.”).

ered as part of the situation in which the offender engaged in intimate-partner abuse.²²³ Some standards require facilitators to reflect the cultural, racial, or ethnic composition of the community.²²⁴ Nevertheless, it is common to specify that membership in a marginalized population shall not be used as an excuse for violence and abuse.²²⁵

Almost all jurisdictions mandate screening for substance abuse and mental illness at intake, but few provide for the treatment of mental disorders, alcoholism, or drug addiction within the batterer program. Individuals with such contextual problems are referred to outside treatment before they are allowed to enroll, required to receive such treatment concurrently, or totally barred from participation in the BIP, depending on the severity of their mental illness or addiction.²²⁶ Other screening items—such as lethality, criminal history, and past perpetration of domestic violence²²⁷—relate to ensuring the safety of victims and program staff, rather than tailoring the intervention to achieve successful preventive and rehabilitative outcomes for various types of abusers.

III. THE PATH AWAY FROM OFFENDER STEREOTYPES

Part I showed that, during the colonial period and the nineteenth century, men used the arrest, prosecution, and punishment of wife beaters to enforce hegemonic masculine ideals of self-control, sobriety, breadwinning, and benevolent family governance. Although feminists transformed the dialogue about domestic violence by locating it in patriarchy and gender inequality, the batterer paradigm that the Battered Women's Movement used to spur a vigorous state response and that still drives domestic violence policy shares some limitations with earlier stereotypes of the wife beater. Part II.B showed that BIP standards have done little to alter the feminist paradigm of the male offender who abuses his female intimate partner.²²⁸ The program curricula are overwhelming-

223. See, e.g., OR. ADMIN. R. 137-087-0055 (2016) (BIP staff should acknowledge that offenders may have been subject to oppression but should also be vigilant for ways that culture can support battering and hinder positive change).

224. See e.g., ILL. ADMIN. CODE tit. 89, § 501.90 (2016) (“Co-facilitation team composition shall mirror the race, ethnicity, and cultural considerations of the population served.”).

225. See, e.g., 920 KY. ADMIN. REGS. 2:020 § 6(f) (2016) (“[C]ultural background is not an explanatory cause of domestic violence but can influence the batterer’s behavior.”).

226. For jurisdictions that require mental health screening, see Appendix R, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>. For substance abuse screening, see Appendix S, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

227. For the kinds of risk assessment screening that various jurisdictions require, see Appendix T, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

228. See *infra* Part II.B.

ly designed for straight male offenders. Furthermore, with regard to men, who still constitute the majority of individuals arrested for domestic violence,²²⁹ the standards make little provision for contextual factors, aside from sex-role conditioning in a patriarchal society, that contribute to abusive behavior.

Part III explores how we might develop a new, inclusive understanding of intimate-partner abuse that steers away from offender stereotypes and helps dismantle gender hierarchies that harm men as well, as women. This Part turns to the question of how pressures and frustrations arising from gender hierarchies shape the behavior of domestic violence offenders today and considers how current batterer intervention protocols could be modified to achieve permanent changes in offenders' behavior, given the diversity of individuals that mandatory arrest laws bring into the criminal justice system.

Although this Article primarily focuses on the ineffectiveness of laws and policies rooted in offender stereotypes, there may be other important goals beyond reducing recidivism, which is difficult to measure. A more empathetic recognition of the offender's humanity (and the hurdles he or she faces to acknowledging and altering abusive behavior) constitutes one of these additional goals.²³⁰ The need to adopt BIP protocols that reduce resentment and increase long-term change is also closely connected to the goal of avoiding reliance on incarceration for less serious domestic violence crimes.

Law professor and former prosecutor Cheryl Hanna argued that "[t]oo few, not too many, men are incarcerated for severe and chronic violence against their intimate partners."²³¹ I certainly agree with Hanna that "[u]nessentializing men who batter" is a crucial step towards improved sentencing.²³² However, while Hanna saw rehabilitation as a sentencing goal that only benefits the offender and characterized BIPs as a

229. See Kris McDaniel-Miccio, *Confronting the Gendered State: A Feminist Approach to Gender Inequality and Gender Violence in the United States and the Irish Republic*, 30 WIS. J.L. GENDER & SOC'Y 23, 32 n.44 (2015) (stating that arrest records after the passage of mandatory arrest laws in the majority of American states indicate "that most batterers [are] male and most victims [are] female"). See also Marianne Hester, *Portrayal of Women as Intimate Partner Domestic Violence Perpetrators*, 18 VIOLENCE AGAINST WOMEN 1067, 1067 (2012) (noting that in the United Kingdom, as in the United States, "the majority of incidents of IPV reported to the police involve male-to-female abuse").

230. See GOODMARK, A TROUBLED MARRIAGE, *supra* note 193, at 146–51.

231. Cheryl Hanna, *The Paradox of Hope: The Crime And Punishment Of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1577 (1998).

232. *Id.* at 1562. However, in contrast to Hanna's focus on male batterers, this Article emphasizes that not all individuals arrested for domestic violence are heterosexual males.

soft option (treatment, not punishment),²³³ this Article's criticism of BIP standards takes a different tack. To my mind, rehabilitation can have the Utilitarian goal of ensuring the offender is safe to return to society and maybe even to the abuse survivor, assuming he or she wants to reconcile. Ideally, BIPs should embody a theory of punishment that combines accountability with a forward-looking emphasis on societal benefits.

Unfortunately, existing approaches now result in a revolving door of court-ordered BIP enrollment and re-assault, especially for high-risk offenders. These offenders will eventually be imprisoned if they are subject to a rigorous system of monitoring.²³⁴ But while some period of incarceration may be appropriate, prison and jail are not ideal places to learn non-violence. The system cannot and should not pursue a strategy of long-term incapacitation for domestic violence offenders if their crimes fall short of murder. Rather, it is imperative to find an efficacious method of changing their behavior. To this end, BIPs should be reformed, not abolished.²³⁵

A. *"Incorrigible" Male Offenders: The Role of Categories and Contextual Factors*

Duluth-style programs do not effectively reach some especially dangerous men. These men often drop out of BIPs and, even if they complete the requisite number of classes, they continue to offend and may eventually escalate their violence.²³⁶ One response to the dilemma that high-risk men pose might be to beef up coordinated community responses—that is, to strengthen ties with the criminal justice system to ensure that probation officers and courts demand compliance with program rules, as well as a cessation of intimate-partner abuse.²³⁷ However, this Article also advocates tailoring program content to fit various categories

233. See *id.* at 1540–41.

234. Cf. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1621–25 (2012) (explaining how specialized domestic violence courts, based on intensive judicial monitoring of offenders ordered to attend batterer education classes, may increase the likelihood of incarceration without significantly reducing recidivism).

235. The authors of one of the most prominent meta-analytic reviews, presenting pessimistic conclusions about the efficacy of batterer treatment, remain reluctant to conclude that BIPs have been a total failure. See Babcock, Green & Robie, *supra* note 101, at 1048 (“Results showing a small effect of treatment on violence abstinence do not imply that we should abandon our current battering intervention programs.”). Indeed, even without modification, the five percent decrease in violence that this study reported “would equate to approximately 42,000 women per year no longer being battered.” *Id.* at 1044. Improved BIP design and implementation might significantly augment these numbers.

236. See GONDOLF, *FUTURE*, *supra* note 99, at 6, 72, 237.

237. *Id.* at 192, 196.

of batterers, to the extent that resources allow, rather than simply wielding a bigger club over potential recidivists.

An important theoretical insight supporting the categorization of batterers is the recognition that individuals who resort to domestic violence are not uniformly powerful and controlling, nor are they all straight men. Masculinities scholarship shows that cultural structures of masculinity are often hierarchical and that they include race, class, and sexual orientation, as well as gender.²³⁸ According to Angela Harris, “all men experience pressure not to be women and not to be ‘faggots.’ The instability of masculine identity in the face of all these pressures makes violence in defense of self-identity a constant possibility.”²³⁹ Heterosexual men not only use violence to police other men and announce their own superiority, but also to subordinate women. Men who rank low in various power hierarchies due to poverty, class status, race, and effeminate physical characteristics may be especially likely to use violence against women to exert power and control over the domestic aspect of their lives. Even if a relatively powerless man does not employ intimate-partner abuse as a tool of coercion, he may develop alcohol or drug addictions and exhibit other contextual problems, such as unemployment, that contribute to situational conflict in his relationships. In either case, a man who feels insecure or oppressed may resist identifying his behavior with the Power and Control Wheel and remain unwilling to change more than superficially to comply with a strict Duluth-style approach.²⁴⁰ The key to improving BIPs for men may lie in integrating a structural understanding of how gendered hierarchies affect men with greater empathy for their individual emotions and experiences, including their experience of powerlessness.²⁴¹

Categorizing male domestic violence offenders does not necessarily mean scrapping feminist educational components. Indeed, it remains essential to steer male offenders away from blaming their victims and to demand that they accept responsibility for the harms they have inflicted. However, improving batterer intervention does require feminists to retreat from their unwillingness to explore how factors like alcoholism, drug addiction, poverty, unemployment, family-of-origin abuse, cultural background, and racial bias contribute to domestic violence. The links between such factors and men’s abuse of women needs further research,

238. See Harris, *supra* note 5, at 779.

239. *Id.* at 780.

240. Cf. Johnna Rizza, Comment, *Beyond Duluth: A Broad Spectrum of Treatment for a Broad Spectrum of Domestic Violence*, 70 MONT. L. REV. 125, 133 (2009) (making a comparable point, based on the view that not all domestic violence is severe or controlling).

241. See Mankowski, Haaken, & Silvergleid, *supra* note 124, at 176.

so that interventions with a greater likelihood of changing batterers' behavior can be developed. Finally, BIPs should consider reducing their emphasis on confrontation and shaming, in favor of more empathetic, motivational methods.²⁴²

Male batterers and the abuse they inflict can be categorized along several dimensions. First, at least one leading researcher has suggested that there are multiple forms of intimate-partner violence—only one of which involves the type of patriarchal terrorism that has been the focus of feminist scholars and the Battered Women's Movement.²⁴³ Both men and women may engage in situational couple violence that arises, not from cycles of coercive control and violent resistance, but from particular situations like tension over money or unemployment in a lower-income family.²⁴⁴ The second dimension along which categories might be constructed involves contributors to domestic violence—or seen from another angle, major obstacles to rehabilitation and deterrence. These include substance abuse; mental illness; the effects of family-of-origin violence; and the influence of culture, class, race, and ethnicity. Scholars, policymakers, and service providers need to take a serious look at the

242. At least one state—Iowa—recently reformed its approach to batterer intervention in response to concerns that confrontational tactics and refusal to explore the offender's experience of emotions have failed to produce positive outcomes. The approach to community-based batterer intervention now used in Iowa, Achieving Change Through Value Based Behavior ("ACTV"), is grounded in Acceptance and Commitment Theory ("ACT"), which constitutes a shift away from traditional cognitive-behavioral therapy. See IOWA DEP'T OF CORRECTIONS STANDARDS FOR IOWA DOMESTIC ABUSE PROGRAM 4 (2014) [hereinafter IDAP] (on file with the author); Zarling, *supra* note 151, at 34, 18–25. In her influential doctoral dissertation, supervised by Dr. Erika Lawrence, Amie Zarling proposed ACT as an alternative to the Duluth model, which she criticized for its use of confrontational tactics and its failure to consider the offender's own experiences as anything other than excuses. See Zarling, *supra* note 151, at 16–19. Writing under a former name, she and Lawrence previously described the need for "an evidence-based theoretical framework" for understanding intimate-partner violence and "a more empirically-guided approach to IPV interventions." Amie Langer & Erika Lawrence, *Toward an Integrated, Empirically Supported Theory of Intimate Partner Violence*, in INDIRECT AND DIRECT AGGRESSION 357, 369 (K. Osterman, ed., 2010), <http://psychology.uiowa.edu/files/psychology/groups/lawrence/files/Toward%20an%20Integrated.pdf>. ACT, the new approach that Zarling advocates, seeks to teach domestic violence offenders that their thoughts and feelings do not have to control their behavior, rather than to change their thoughts and feelings. See IDAP, *supra*, at 4; Zarling, *supra* note 151, at 28–34, 92. Zarling, who is now an assistant professor at Iowa State University, worked with the Iowa Department of Corrections to implement the ACTV program based on her research findings for male domestic violence offenders. Vanessa Franklin, *Stopping domestic violence: New program works with offenders*, IOWA STATE DAILY (Oct. 1, 2014), http://www.iowastatedaily.com/news/article_d61a016e-48cb-11e4-a976-3b5a11bf3ee.html.

243. See JOHNSON, *supra* note 107, at 2–12.

244. See *id.* at 64 ("The stresses of economic marginality produce difficulties that can lead to arguments that can escalate into violence from either or both partners."); *infra* text accompanying notes 353, 355–359 (discussing women's situational use of force).

role these contributors play and how intervention programs can address them, so that they do not impede the offender's progress toward accepting responsibility for the harm he has inflicted and making a permanent change in his behavior.

Although stratifying BIP programming according to risk level has shown promising effects on recidivism,²⁴⁵ Colorado is one of the only states to require this type of approach in its BIP certification standards. Colorado offenders are placed in one of three levels of treatment based on an initial risk assessment.²⁴⁶ They can move between levels with the consensus of their treatment team.²⁴⁷ The initial risk assessment considers many factors, including substance abuse, mental health issues, and criminal history—as well as asking whether the offender engaged in an ongoing pattern of abuse and whether he or she has a pro-social support network.²⁴⁸ Only offenders deemed suitable for the least intensive treatment enroll in a program that is predominantly psycho-educational.²⁴⁹ The moderate and high-risk offenders are instead placed in groups that focus on cognitive-behavioral changes and treatment for contextual problems like mental disorders and substance abuse.²⁵⁰ The Colorado approach is not perfect,²⁵¹ but it takes strides toward modifying BIPs to account for the diversity of offenders ordered to attend them and the differing obstacles to genuine behavioral and attitudinal change they face.

Although the recommendation to avoid “one-size-fits-all” programming might seem to cater to batterers' excuses, rather than their blameworthiness and the imperative of protecting victims, it is not intended to have that effect. Rather, tailoring interventions to better fit the problems that afflict certain categories of abusers might reduce recidivism where the feminist educational curriculum has failed. Practically speaking, fine-grained assessment of offenders might be best achieved by

245. See WOODWARD & BECHTEL, *supra* note 156, at 5.

246. COLO. DVOMB STANDARDS, *supra* note 219, at 5-1, 5-15, 5-33.

247. *Id.*

248. *Id.* at 5-6 to 5-10, 5-33.

249. Compare *id.* at 5-15 (describing weekly group sessions that address psycho-educational and other content for those in Level A treatment), with *id.* at 5-16 to 5-17 (indicating that those in Levels B and C attend weekly sessions using cognitive-behavioral treatment, paired with monthly substance abuse, mental health, or other interventions).

250. *Id.* at 5-16 to 5-17.

251. Risk assessment raises several red flags. Chief among them is the well-known problem of false positives and false negatives. Errors due to the type of risk assessment instrument used, or mistakes by the people implementing it, may stigmatize and over-police men who do not actually fit in the “especially dangerous” category. At the other extreme, risk assessment may fail to predict some men's escalation from minor to severe battering (or even homicide).

BIPs at intake, rather than by judges.²⁵² But such screening and categorization is not impossible, as Colorado's experience demonstrates.²⁵³

1. Substance Abuse

In contrast to the Victorian and Prohibition eras, the Battered Women's Movement rejected alcohol as a cause of intimate-partner violence.²⁵⁴ A central concern is that batterers will use their drinking to avoid responsibility. Yet some research indicates that a perpetrator's intoxication actually increases the likelihood of his being blamed and arrested for domestic violence.²⁵⁵ Furthermore, multiple studies across the disciplines of sociology, criminology, and psychology "reveal a consistent and robust association between alcohol use and the occurrence of [intimate partner abuse]."²⁵⁶

Research places the co-occurrence rate of substance abuse and domestic violence between 25 and 50 percent.²⁵⁷ Some scholars believe that the connection between drinking and domestic violence varies according to the sex of the offender. For example, a study of domestic violence perpetrators in Tennessee found that the men were more likely to have had prior treatment for substance abuse than the women.²⁵⁸ About half of the men in BIPs have substance abuse problems, and they are more

252. Treatment evaluations conducted before sentencing or at intake into a BIP already affect sentencing in some states. For example, a Colorado statute requires judges to sentence any person to batterer treatment if that person has committed a crime "the underlying factual basis of which has been found by the court. . .to include an act of domestic violence" or a property crime used as a method of coercion and control. COLO. REV. STAT. § 18-6-801 (2015). But treatment evaluations may help the court determine the appropriate sentence or choose an alternative disposition if the evaluation "discloses that sentencing to a treatment program would be inappropriate[.]" *Id.*

253. See COLO. DVOMB STANDARDS, *supra* note 219, at 5-12 to 5-17.

254. See *supra* notes 43-74 and accompanying text (describing how wife beating was attributed to drunkenness in Victorian and Prohibition Era America); *supra* note 96 and accompanying text (noting that battered women's advocates regarded the connection between substance abuse and intimate partner violence as a myth or excuse).

255. See Keith C. Klostermann & William Fals-Stewart, *Intimate Partner Violence and Alcohol Use: Exploring the Role of Drinking in Partner Violence and Its Implications for Intervention*, 11 *AGGRESSION & VIOLENT BEHAV.* 587, 592-93 (2006); see also *supra* note 62 (discussing how men were convicted of murdering their wives and girlfriends in the nineteenth century despite raising intoxication or delirium tremens as a defense).

256. See Klostermann & Fals-Stewart, *supra* note 255, at 588.

257. Larry Bennett & Patricia Bland, *Substance Abuse and Intimate Partner Violence*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 2 (2008), http://www.vawnet.org/Assoc_Files_VAWnet/AR_SubstanceRevised.pdf.

258. Kris Henning, Angela Jones & Robert Holdford, *Treatment Needs of Women Arrested for Domestic Violence: A Comparison with Male Offenders*, 18 *J. INTERPERSONAL VIOLENCE* 839, 846 (2003).

likely to batter when they have been drinking.²⁵⁹ Drunkenness also appears to be one of the strongest predictors of recidivism on the part of men court-ordered to enroll in a BIP.²⁶⁰

Nevertheless, no consensus exists about the precise nature of the relationship between substance abuse and domestic violence. There is controversy over whether alcohol plays a causal or merely facilitative role. A prominent model describes drinking as the proximate cause of violence (i.e., the effects of alcohol *produce* aggression).²⁶¹ In this view, alcohol disrupts cognitive function, reducing the drinker's ability to interpret social cues and react appropriately.²⁶² Scholars offering alternative explanations fall into several groups: (1) those who believe the effect of alcohol is indirect and situational (i.e., "alcohol use creates an environment that sets the stage for partner conflict and, ultimately, partner violence");²⁶³ (2) those who see substance abuse as a separate condition that co-occurs with domestic abuse and other factors like mental disorders and poverty;²⁶⁴ and (3) those who posit that alcohol serves as a means of gaining power and control (or at least a *feeling* of power and control).²⁶⁵

According to the third theory, men use alcohol excessively to compensate for lack of self-confidence about their masculinity. Like domestic violence, alcohol abuse is a manifestation of men's "underlying need for power and control."²⁶⁶ An alcohol-abusing batterer drinks heavily to show that he is tough and virile—a real man who can hold his liquor. He beats his wife or girlfriend to put her in her place in the gendered hierarchy.²⁶⁷ Thus, rather than being causally linked, alcohol abuse and domestic violence are both the product of a society that privileges men over women but makes men feel insecure about their grip on power.²⁶⁸ The link between social disempowerment and alcohol abuse likely involves non-stereotypical abusers, too, because drinking often makes people—

259. Bennett & Bland, *supra* note 257, at 1.

260. *Id.* at 5–6 (citing EDWARD W. GONDOLF, *BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS* (Nancy Hale et al. eds., 2002)).

261. *See id.* at 4; Klostermann & Fals-Stewart, *supra* note 255, at 591.

262. *See* Bland & Bennett, *supra* note 257, at 4.

263. *See* Klostermann & Fals-Stewart, *supra* note 255, at 590; *see also* JOHNSON, *supra* note 107, at 65 ("[I]t is highly likely that much of the effect of alcohol on situational couple violence has to do with the arguments that are precipitated by one partner's objections to the other partner's excessive drinking.").

264. *See* Bennett & Bland, *supra* note 257, at 4 (citing studies that fit this theory); Klostermann & Fals-Stewart, *supra* note 255, at 590 (same).

265. *See* Edward W. Gondolf, *Alcohol Abuse, Wife Assault, and Power Needs*, 69 *SOC. SERV. REV.* 274, 276 (1995) [*hereinafter* Gondolf, *Alcohol Abuse*]; *see also* Bennett & Bland, *supra* note 257, at 4 (describing "power motive" theories).

266. *See* Gondolf, *Alcohol Abuse*, *supra* note 265, at 276.

267. *See id.* at 276–79.

268. *See id.* at 276.

male or female, straight or homosexual—feel more powerful and assertive.²⁶⁹ Individuals who are disadvantaged on the basis of race, socioeconomic or employment status, sexual orientation, physical characteristics, or other factors may try to compensate for their insecurity with alcohol and intimate-partner abuse.

The majority of certification standards require BIPs to make referrals for substance abuse treatment through external programs, either consecutively or concurrently with batterer intervention,²⁷⁰ though the trend favors either closely coordinated or integrated services.²⁷¹ Substance abuse treatment and batterer intervention may be grounded in very different paradigms—the former emphasizing a disease/addiction theory and the latter presenting intimate-partner violence as a bad choice that the batterer is socially conditioned to make but that he can avoid.²⁷² While the extant research does not demonstrate which approach to treating substance abuse by batterers is most effective,²⁷³ a coordinated model in which professionals in each program have knowledge of the other's field ought to produce better results than one in which the BIP and the substance abuse treatment provider have little or no contact.²⁷⁴ An integrated approach is arguably the most efficient because it does not require the offender to pay for and complete two separate programs, and it allows staff to keep close track of each participant. However, housing the two types of counseling under one roof poses safety concerns for the victim and other risks if the staff is not sufficiently trained in the danger and accountability issues inherent in domestic violence.²⁷⁵ The question of concurrent versus consecutive substance abuse treatment is also a thorny one. Although alcohol or drug impairment makes it difficult for an offender to learn in a BIP, some jurisdictions lack authority over low-level

269. See *infra* note 428 and accompanying text (noting the possibility that lesbians are especially vulnerable to excessive drinking for several reasons, including their social disempowerment). Some straight women arrested for domestic violence also engage in substance abuse. See Penny A. Leisring, Lynn Dowd & Alan Rosenbaum, *Treatment of Partner Aggressive Women*, 7 J. AGGRESSION, MALTREATMENT, & TRAUMA 257, 267 (2003).

270. See *supra* note 226 and accompanying text; Appendices R & S *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

271. See Bennett & Bland, *supra* note 257, at 7.

272. See Gondolf, *Alcohol Abuse*, *supra* note 265, at 281; Lisa Lightman & Francine Byrne, *Courts Responding to Domestic Violence: Addressing the Co-Occurrence of Domestic Violence and Substance Abuse: Lessons from Problem-Solving Courts*, 6 J. CTR. FOR FAM., CHILD. & CTS. 53, 59–61 (2005).

273. See Bennett & Bland, *supra* note 257, at 7.

274. See Lightman & Byrne, *supra* note 272, at 66–67.

275. See *id.* at 66.

misdeemeanants for a sufficient length of time to monitor the completion of two consecutive programs.²⁷⁶

Treating addiction and substance abuse in a synchronized way does not necessarily mean a return to a flawed, mono-causal explanation of domestic violence like the Temperance and Prohibition Movement's direct attribution of wife beating to alcoholism. Whether drinking and drug use plays a causal or merely contextual role, failure to address an offender's drug or alcohol problem undermines the effectiveness of batterer intervention. Substance-abuse treatment should be part of an integrated or at least closely coordinated response.

2. Mental Disorders

A complete discussion of the role of mental illness lies beyond the scope of this Article, but the psychological health of domestic violence offenders presents a similar challenge to their abuse of alcohol and drugs. Domestically violent men are generally more likely than non-violent men to exhibit depression, psychopathy, or evidence of borderline or antisocial personality disorders.²⁷⁷ Some men—jealous, emotionally dependent intimate terrorists, for example—tend to present both mental disorders and substance abuse problems.²⁷⁸ Yet “no consensus on a psychological profile [for batterers] has emerged from the research community.”²⁷⁹

Most state standards for batterer intervention already specify screening for mental illness, as well as substance abuse, at intake and the referral of people in need of treatment to outside providers, either sequentially or in parallel with the BIP.²⁸⁰ However, under some state standards, a ban on BIP participation by offenders who are currently experiencing addiction or a severe mental disorder²⁸¹ raises the concern that

276. See *id.* at 67–68.

277. See Etiony Aldarondo & Fernando Mederos, *Common Practitioners' Concerns About Abusive Men*, in PROGRAMS FOR MEN WHO BATTER, *supra* note 108, at 2-1, 2-7.

278. See JOHNSON, *supra* note 107, at 80.

279. Aldarondo & Mederos, *Common Practitioners' Concerns About Abusive Men*, *supra* note 277, at 2-7.

280. See *supra* notes 226 and accompanying text; Appendices R & S, *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

281. See, e.g., DEL. DOMESTIC VIOLENCE COORDINATING COUNCIL, DOMESTIC VIOLENCE INTERVENTION STANDARDS 19–20 (2012) (stating that providers may refuse to serve offenders whose “[c]hronic substance abuse or chemical dependency requires completion of an intervention program” or whose extensive psychiatric, developmental, or cognitive problems preclude participation in the BIP); CHILD & FAMILY SERV., PARENTS & CHILDREN TOGETHER, HAW. STATE JUDICIARY, HAWAII BATTERER INTERVENTION PROGRAM STANDARDS 28 (2010), http://www.ncdsv.org/images/HI_BIPS-Standards_December2010.pdf (providing that severe mental health problems or severe chemical dependence are grounds for exclusion from a program); N.M. COAL. AGAINST

such offenders will fall between the cracks—that neither their violence nor their contextual problems will be adequately resolved in a coordinated manner.

Categorization and differential assignment of batterers to programs tailored to maximize effectiveness for their particular psychological profile would be a more promising approach.²⁸² In Colorado, for example, offenders with psychological problems are assigned to higher-intensity treatment levels; the Colorado standards also recommend against empathy-based treatment for offenders, in the highest intensity level, who manifest psychopathic behavior.²⁸³

3. Family History of Abuse

Most men who were abused or who witnessed abuse in their family of origin do not grow up to become domestic violence offenders.²⁸⁴ Nevertheless, there may be a strong correlation between intimate terrorism and being subjected to family violence in childhood,²⁸⁵ “about one-third of men in BIPs report witnessing or experiencing violence in their families of origin.”²⁸⁶ This correlation is not limited to men. Women

DOMESTIC VIOLENCE & PARTNERS, NEW MEXICO DOMESTIC VIOLENCE OFFENDER TREATMENT/INTERVENTION PROGRAM STANDARDS 11 (2013), <http://www.nmcadv.org/wp-content/uploads/2012/09/20130306-NM-DVOTI-Standards-FINAL.pdf> (“[I]ndividuals whose psychiatric symptoms prevent their full participation” may be excluded from the program.); NORTH DAKOTA ADULT BATTERER TREATMENT STANDARDS, *supra* note 208, at 232 (listing “[p]ersons with untreated alcohol or drug addictions” and “[p]ersons with in active psychosis” among those who should not participate in the program).

282. One well-known psychological typology divides batterers into family-only, borderline and generally violent/anti-social categories. See Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCHOL. BULL. 476, 476 (1994). The first group—the family-only batterers—tend to engage in the least severe violence and abuse; they are thought to be more treatable and more readily deterred by criminal sanctions than offenders in the other two categories. See *id.* at 482. The second group—borderline batterers—often have personality disorders and substance abuse problems that require rigorous, integrated treatment. See *id.* These men use violence in an effort to avoid losing their partners. Finally, antisocial batterers inflict the most severe violence, use weapons, often have long rap sheets, and do not confine their violence to the family. See *id.* Research indicates that feminist cognitive intervention programs are more likely to change the behavior of anti-social batterers, who use violence to get their way, whereas dependent, borderline personalities respond better to psychodynamic intervention. See JOHNSON, *supra* note 107, at 79 (citing Daniel G. Saunders, *Feminist-Cognitive-Behavioral and Process-Psychodynamic Treatments for Men Who Batter: Interactions of Abuser Traits and Treatment Model*, 4 VIOLENCE & VICTIMS 393 (1996)).

283. COLO. DVOMB STANDARDS, *supra* note 219, at 5-14 to 5-16.

284. See JOHNSON, *supra* note 107, at 68.

285. See *id.* at 34.

286. Aldarondo & Mederos, *Common Practitioners' Concerns About Abusive Men*, *supra* note 277, at 2-7 (citing Edward W. Gondolf, *Characteristics of Court-Mandated*

ordered to participate in BIPs also show high rates of childhood victimization.²⁸⁷ According to at least one study, a comparison of male and female offenders showed more similarities than differences with regard to family-of-origin violence.²⁸⁸

Childhood victimization or even witnessing intimate-partner violence as a child has several deleterious effects. First, it may make it difficult for the individual to form normal intimate relationships as an adult, due to anxiety about abandonment, and second, if adult role models use physical aggression toward their partners, a child may grow up believing that domestic violence is normal.²⁸⁹ In either case, BIP facilitators should make sensitive assessments of participants and allow participants who have histories of family-of-origin violence to explore its role in their perpetration of intimate-partner abuse as adults, which only a few state standards analyzed in Part II.B currently allow.²⁹⁰

Because confrontational facilitator styles may cause participants to resist learning non-violence or comply very superficially with the facilitator's expectations, a more empathetic approach is desirable. This does not mean that batterers should be allowed to excuse their behavior, but neither should factors conditioning their bad choices to use aggression be ignored. Sentencing judges and BIP providers need to consider the total picture of each offender, including whether he suffered and/or witnessed abuse in his family of origin.

4. Race, Ethnicity, National Origin, Class, and Culture

African-Americans, Latinos, and other men of color account for a disproportionately high percentage of the offenders who come into contact with the criminal justice system, though studies that control for demographic factors, such as unemployment and poverty, suggest little or no correlation between domestic violence and membership in a racial or

Batterers in Four Cities: Diversity and Dichotomies, 5 VIOLENCE AGAINST WOMEN 1277-93 (1999).

287. See Leisring, Dowd & Rosenbaum, *supra* note 269, at 262 (reporting the results of three studies of heterosexual women court-mandated to treatment for intimate-partner aggression).

288. See Henning, Jones & Holdford, *supra* note 258, at 850.

289. See *id.*

290. See NEV. ADMIN. CODE § 228.185 (2015) (requiring a discussion of intergenerational patterns of violent behavior in program curricula); NORTH DAKOTA ADULT BATTERER TREATMENT STANDARDS, *supra* note 208, at 21 (similar). However, some jurisdictions that make learning about intergenerational abuse part of the BIP expressly state that acceptance of responsibility means "the offender has stopped using excuses such as being . . . abused as a child." COLO. DVOMB STANDARDS, *supra* note 219, at 5-24.

ethnic minority group.²⁹¹ Socioeconomic status seems to play a bigger role.²⁹² Nevertheless, as Aya Gruber has noted, “although domestic violence reform became a reality because of the desire to protect white women, [mandatory laws and policies have] resulted in the widespread incarceration of minority men.”²⁹³ This distributive justice issue might call for more radical reform, but the present concern of this Article is the modification of BIPs to increase their ability to change the behavior of culturally diverse participants.

BIPs that offer culturally appropriate curricula for offenders from specific ethnic or racial backgrounds embody the view that lumping offenders into a one-dimensional paradigm makes it difficult to teach them non-violence.²⁹⁴ Examination of current state standards reveals that this is an emerging area of reform and that most states have made efforts to ensure a greater degree of cultural competence and inclusivity than in the past. Those that are striving to accommodate diversity typically envision that BIPs will provide staff, instructional materials, and/or teaching strategies with marginalized groups in mind²⁹⁵ and not that members of such groups will be segregated within the program, unless they face a language barrier. However, as described below, there has been some experimentation with culturally and racially specific group education. Fur-

291. See JOHNSON, *supra* note 107, at 36; Aldarondo & Mederos, *Common Practitioners' Concerns About Abusive Men*, *supra* note 277, at 2-5.

292. See JOHNSON, *supra* note 107, at 35-36; Aldarondo & Mederos, *Common Practitioners' Concerns About Abusive Men*, *supra* note 277, at 2-5.

293. Gruber, *supra* note 1, at 798.

294. See, e.g., Ramírez Hernández, *CECEVIM—Stopping Male Violence in the Latino Home*, *supra* note 108, at 12-3, 12-8 (“It is easy to see batterers as uni-dimensional, but this view is judgmental and not useful because it assumes that abusers will never stop their abuse [I]t is also a superficial view because many survivors do not see their abusers as uni-dimensional. In many instances they do not want to separate from them, they want the abuse to stop and be able to enjoy the parts of the relationship that are nurturing.”).

295. See, e.g., HAWAII BATTERER INTERVENTION PROGRAM STANDARDS, *supra* note 281, at 13-14; ILL. ADMIN. CODE tit. 89, §§ 501.30, 501.90 (2016); BATTERERS' INTERVENTION PROGRAM STANDARDS & CERTIFICATION GUIDELINES, *supra* note 222, at 19; EXEC. OFFICE OF HEALTH & HUMAN SERVS., DEP'T OF PUBLIC HEALTH, COMMONWEALTH OF MASS., GUIDELINES AND STANDARDS FOR THE CERTIFICATION OF INTIMATE PARTNER ABUSE EDUCATION PROGRAMS 4-5 (2015), <http://www.mass.gov/eohhs/docs/dph/com-health/violence/bi-guidelines.pdf>; NEW MEXICO DOMESTIC VIOLENCE OFFENDER TREATMENT/INTERVENTION PROGRAM STANDARDS, *supra* note 281, at 6-7; NORTH DAKOTA ADULT BATTERER TREATMENT STANDARDS, *supra* note 281, at 25; OR. ADMIN. R. 137-087-0055 (2016); S.C. DEP'T OF SOCIAL SERVS., STANDARDS OF CARE FOR BATTERERS TREATMENT 3, 8 (2005), <http://dss.sc.gov/content/customers/protection/dv/scbt.pdf>; Rules of Domestic Violence State Coordinating Council [Tennessee], *supra* note 152, at 14, 16, Rules 0490-1-.06(5) & 0490-1-.07(2)(d); COAL. FOR THE TREATMENT OF ABUSIVE BEHAV. & VA. SEXUAL AND DOMESTIC ACTION ALL., VIRGINIA STANDARDS FOR BATTERER INTERVENTION PROGRAMS: RESPONDING TO MALE VIOLENCE AGAINST WOMEN 15 (revised 2010), <http://www.vabipboard.org/assets/bipstandards.pdf>.

thermore, certain communities of color may be disproportionately represented in BIPs due to the demographics of domestic violence arrests in a particular locale.²⁹⁶

Although sensitivity to culture, race, and ethnicity might be confused with cultural defenses at criminal law,²⁹⁷ intervention programs grounded in these types of contextual factors still emphasize accountability. They posit that social and cultural factors make men from minority groups prone to compensate for their subordination to white males by exerting dominance over women.²⁹⁸ A few sets of standards also expressly consider the role of socioeconomic class and geographic marginalization. For example, Ohio's standards direct BIPs to train their staff to work effectively with members of Appalachian communities that face such challenges as "geographic isolation, high unemployment, lack of public transportation, and high levels of poverty."²⁹⁹ Ideally race, ethnicity, socioeconomic class, and culture will be used as an explanatory framework—not an excuse—for minority men's violence and as an idiom for communicating with them, so that they can learn to change their attitudes and behavior.

296. For example, 84.2 percent of the men and women participating in a BIP in Shelby County, Tennessee, were African-American. Henning, Jones & Holdford, *supra* note 258, at 845, 853.

297. On tensions between cultural defenses and the feminist campaign against domestic violence, see generally Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995).

298. For example, the Cultural Context Model ("CCM") pioneered in New Jersey recognizes that men may be subject to racism, classism, and homophobia and that women from many cultures are conditioned to excuse the violence of male household heads. Almeida & Hudak, *The Cultural Context Model*, *supra* note 108, at 10-2, 10-3, 10-8. However, while the criminal justice system perpetuates these hierarchies, "accountability is a central theme of the CCM, threaded into all of its components." *Id.* at 10-14. Scholars encouraging the development of "progressive black masculinities" make a similar point. For example, Patricia Hill Collins writes:

[B]lack male violence against women, against gay men of all races, and among themselves constitutes a triad of aggressive behavior that takes on added importance for African American men whose power within the broader political economy remains compromised. At the same time, black men's adoption of violence as evidence of strength harms them and others.

Patricia Hill Collins, *A Telling Difference: Dominance, Strength, and Black Masculinities*, in *PROGRESSIVE BLACK MASCULINITIES* 73, 86 (Athena D. Mutua ed. 2006).

299. BATTERER'S INTERVENTION COMM., OHIO DOMESTIC VIOLENCE NETWORK, OHIO STANDARDS FOR BATTERERS INTERVENTION 12 (2010), http://www.odvn.org/Uploads/Documents/BI_Standards_2010_Final3_Ohio.pdf (quoting LISA CONTOS SHOAF, OHIO OFF. OF CRIM. JUST. SERVS., *DOMESTIC VIOLENCE IN APPALACHIAN OHIO: THE VICTIM'S PERSPECTIVE* (2004)).

Several older models developed for Latino batterers provide examples of both the strengths and potential pitfalls of culturally sensitive BIPs. Founded in 1990, Caminar Latino is a state-certified program in Atlanta, Georgia, for Latino immigrant families affected by domestic violence.³⁰⁰ Most participants immigrated to the United States from Mexico or Central America; they tend to be poor and have little formal education.³⁰¹ The guiding philosophy of Caminar Latino suggests that “the abuse of men against women (in the overwhelming majority of cases) is a behavior that males have learned through modeling at home and in a society in which violence is an accepted way of resolving differences.”³⁰² Latino men are strongly affected by *machismo*—a set of beliefs and expectations about male behavior that endorses the supremacy of men over women.³⁰³ Although positive aspects of *machismo* accord value to a man’s loyalty, respect, sense of honor, and a commitment to provide for his family, *machismo* also imposes gender-based double standards about sexual fidelity, alcohol consumption, and the use of violence.³⁰⁴

Although Caminar Latino recognizes that “[a]n immigrant Latino has few male role models for whom the negative use of power against women is not an effective weapon,” the program nevertheless demands accountability from abusers.³⁰⁵ Latino batterers choose to engage in domestic abuse, and they must bear responsibility for their actions. A man who uses physical violence against his partner during the program has to start the program over again, and the court is notified of the new act of violence.³⁰⁶ Caminar Latino deploys a *concientización* model to teach men to stop using violence, to examine their abuse of women critically in a social and cultural context, and to join a network of other men striving for change in their community.³⁰⁷

Many of the program’s specific protocols are derived from insights about Latino culture. For instance, because Latinos generally learn to respect their elders, the program uses older or middle-aged women as facilitators of men’s groups.³⁰⁸ The program also depends on rote memorization, experiential learning, and oral discussion because many of its par-

300. See *History*, CAMINAR LATINO, <http://caminarlatino.org/about-us/history/> (last visited May 6, 2015).

301. See Perilla & Pérez, *supra* note 108, at 11-3, 11-26.

302. *Id.* at 11-3.

303. See *id.* at 11-8.

304. See *id.*

305. *Id.* at 11-5.

306. See *id.* at 11-14.

307. See *id.* at 11-3 to 11-6. *Concientización* is a Spanish term for critical consciousness-raising. See *id.* at 11-3.

308. See *id.* at 11-9.

ticipants have low levels of literacy.³⁰⁹ Finally, while Caminar Latino does not necessarily encourage families to stay together, it “derives from the reality [that] the overwhelming majority of Latina immigrants who come to our program . . . still live with their batterers and do not wish to end their relationship.”³¹⁰

The program provides concurrent services for women and children and claims that the safety of these vulnerable clients is paramount.³¹¹ Its current website disavows couples counseling because of the dangers such interactions pose.³¹² However, in the past, Caminar Latino did permit men to attend the women’s sessions,³¹³ which seems risky and likely to result in intimidation or even violence, precluding the women from expressing their feelings candidly. Still, Caminar Latino operates on the important principle that “the possibility for a violence-free home environment is predicated on the men also receiving help.”³¹⁴

Another program for Latino men—Training Center to Eradicate Intrafamily Violence or CECEVIM, which is based in San Francisco³¹⁵—also gleans insights from the study of Latino masculinities. According to this analysis, Latino men value certain traits (e.g., lack of emotion) that are the opposite of the feminine (e.g., crying) in reaction to their history of oppression by an imperial power.³¹⁶ While some aspects of Latino culture make domestic violence difficult to eradicate, CECEVIM embraces other aspects—the value placed on community building for example—that enhance the effectiveness of group therapy.³¹⁷ Religion or spirituality can also become an agent of transformation.³¹⁸ Lastly, CECEVIM uses an egalitarian structure in which the group, rather than a confrontational facilitator or expert, imposes accountability on each batterer.³¹⁹ This avoids a hierarchical dynamic that would recall the colonial people’s superficial compliance with the demands of their conquerors.³²⁰

309. *See id.*

310. *Id.* at 11-2, 11-27.

311. *See* Perilla & Pérez, *supra* note 108, at 11-2, 11-28.

312. *FAQ, CAMINAR LATINO*, <http://caminarlatino.org/about-us/faq/> (last visited May 6, 2015).

313. *See* Perilla & Pérez, *supra* note 108, at 11-6.

314. *Id.* at 11-27.

315. *See* CECEVIM, <http://www.cecevim.org/cecevim> (last visited May 6, 2015). The acronym, CECEVIM, comes from the Spanish name for the training and consulting agency: Centro de Capacitación para Erradicar la Violencia Intrafamiliar Masculina. *Id.*

316. *See* Ramírez Hernández, *CECEVIM—Stopping Male Violence in the Latino Home*, *supra* note 108, at 12-4 to 12-6.

317. *See id.* at 12-15.

318. *See id.* at 12-12.

319. *See id.* at 12-14 to 12-17.

320. *See id.* at 12-14 to 12-15 (explaining why CECEVIM eschews facilitator control tactics). Caminar Latino also uses an egalitarian model in which facilitators and partici-

The emphasis on cultural context carries with it the potential to backfire: proponents of Latino-specific programs admit that convincing batterers to stop blaming their violence on external factors constitutes a major hurdle to guiding batterers to *concientización*.³²¹ Nevertheless, there have been efforts to spread the CECEVIM model nationally and even internationally,³²² and preliminary studies of Caminar Latino indicate high completion rates and low levels of recidivism.³²³

Programs for African-American males also seek to combine accountability with a frank acknowledgment of the marginalization, poverty, and racial bias that many black men face and the special vulnerability of black women, who experience higher rates of victimization than any other racial group.³²⁴ Batterer intervention for African-American males has the potential to channel the reasoning of Progressive Black Masculinities scholars. For example, Athena Mutua argues that, when black men embrace sexism and engage in gendered violence, they “reinforc[e] structures of domination that have complicated and negative consequences for black women but also for black men.”³²⁵

Black males exhibit low completion rates in traditional BIPs that do not use culturally competent curricula.³²⁶ Hence, programs like the one begun at the DeKalb County Jail in Decatur, Georgia, in 1997 were developed as an alternative. The DeKalb program largely served black male inmates during the three years it was in use, but it is supposedly adaptable to non-institutionalized populations and other men whose racial or ethnic background gives them a unique experience of domestic violence and who are unlikely to change their behavior in response to a “one-size-fits-all” intervention strategy. Program facilitators in the DeKalb County Jail program did not provide therapy; rather, they offered

pants are supposed to show mutual respect and treat each other as peers. See Perilla & Pérez, *supra* note 108, at 11-28.

321. See Ramírez Hernández, *CECEVIM—Stopping Male Violence in the Latino Home*, *supra* note 108, at 12-16.

322. See *id.* at 12-2. The CECEVIM model is being used in several locations in Mexico (Mexico City, Morelia, Michoacan, and Puebla), as well as by programs in San Francisco, Atlanta, Portland, Baltimore, and Oklahoma. See CECEVIM, <http://www.cecevim.org/cecevim> (last visited May 6, 2015).

323. See Perilla & Pérez, *supra* note 108, at 11-29 (reporting that about 90% of court-mandated men complete the program, and at a six-month follow-up, 97% of men who have completed the program have not re-entered the court system).

324. See, e.g., Donnelly, Smith & Williams, *supra* note 108, at 13-4 (describing a program first developed largely for African-American men in the DeKalb County Jail in Decatur, Georgia). The authors of the DeKalb study note that program facilitators were supposed to emphasize personal responsibility for intimate-partner violence, rather than allowing participants to blame racism or learned behavior. See *id.* at 13-3, 13-6 to 13-7.

325. Athena D. Mutua, *Theorizing Progressive Black Masculinities*, in *PROGRESSIVE BLACK MASCULINITIES*, *supra* note 298297, at 3, 4.

326. Donnelly, Smith, & Williams, *supra* note 108, at 13-3.

an educational format designed to teach inmates of African-American heritage to live violence-free.³²⁷

The diversity of court-ordered participants in BIPs has resulted in vague provisions for cultural competence in state standards. Yet some states show a nascent understanding of the connection between masculinities, domestic violence, and government intervention to eradicate it. For example, Ohio's standards assert that "patriarchy does not only support sexism but also supports racism, heterosexism, classism, and other oppression that allows one group's dominance over another."³²⁸ Ohio now encourages its BIPs to move away from the mainstream, middle-class, white, heterosexual model on which they were founded to acknowledge the experiences of all offenders ordered to participate in them.³²⁹ Such inclusivity is not supposed to come at the price of victim safety or offender accountability, though that it is the delicate balance that more inclusive BIPs must figure out how to strike. Making these programs effective for racial and cultural minorities constitutes a worthy goal that will help prevent domestic violence sentencing from defaulting to a two-track model in which more affluent white offenders avoid jail time, while minority offenders disproportionately face incarceration.

B. *Women Who Use Force*

Although mandatory arrest laws have led to dramatic increases in the number of women arrested for domestic violence, research into the causes of and contributors to such violence has focused almost exclusively on male offenders.³³⁰ Even more importantly, "the applicability of available theories and treatments to women arrested for domestic violence remains unknown."³³¹ A bitter and seemingly intractable divide exists between researchers who rely on national survey data to claim that there is gender parity in the initiation of violence, and scholars who cite Bureau of Justice Statistics data, which consistently suggests that "women are five times more likely than men to have been the victims of domestic violence."³³² A complicating factor is that heterosexual men may

327. *See id.* at 13-3, 13-5, 13-14.

328. OHIO STANDARDS FOR BATTERERS INTERVENTION, *supra* note 299, at 3. Colorado incorporates the concept of intersectionality in its treatment of female offenders, as well, indicating that the "[p]erceived or actual social, racial, and/or class injustices" that some women experience should be a topic in the women's curriculum. COLO. DVOMB STANDARDS, *supra* note 219, at App. B-II-4.

329. OHIO STANDARDS FOR BATTERERS INTERVENTION, *supra* note 299, at 11-12.

330. *See* Henning, Jones & Holdford, *supra* note 258, at 839-40.

331. *Id.* at 840.

332. Michelle Carney, Fred Buttell & Don Dutton, *Women Who Perpetrate Intimate Partner Violence: A Review of the Literature with Recommendations for Treatment*, 12 AGGRESSION & VIOLENT BEHAV. 108, 108-9 (2007). *See also* Russell P. Dobash, R. Em-

underreport being abused by women because society does not take male victimization seriously.³³³ However, the studies purporting to show gender parity fail to account for qualitative differences in why violence occurred, how severe it was, and whether it was part of an ongoing pattern of coercive control.³³⁴ For this and other reasons, survey data based on the Conflict Tactics Scale yields an incomplete and even erroneous comparison of men's and women's intimate violence that strips it of its context.³³⁵

To develop appropriate treatment protocols for female offenders, resolving the numbers debate matters less than determining what legal outcomes are appropriate for women who use force against their male partners and whether intervention programs can help them avoid being rearrested in the future. Police, prosecutors, judges, probation officers, and BIP providers increasingly encounter these questions because mandatory arrest laws bring female arrestees under their jurisdiction. Yet due to the comparative dearth of research on intimate-partner violence committed by women, the answers remain frustratingly tentative and sparse.³³⁶ Courts today often order women convicted of domestic vio-

erson Dobash, Margo Wilson & Martin Daly, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 72 (1992) (arguing that "claims of sexual symmetry in marital violence are exaggerated, and that wives' and husbands' uses of violence differ greatly, both quantitatively and qualitatively").

333. Carney, Buttell & Dutton, *supra* note 332, at 111. *See also supra* notes 12 & 47 and accompanying text (noting that, historically, judges and others ridiculed men who complained that their wives had abused them).

334. For articles criticizing a gender-neutral response to intimate-partner abuse, see, e.g., Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1377-82 (2002); Larence, *When She Hits Him*, *supra* note 175, at 10.

335. If feminist scholars can be criticized for being tethered to ideology, the approach of the "gender parity" camp has its own shortcomings—mostly notably, reliance on a survey methodology that failed to track such qualitative factors as whether the violence was ongoing and patterned, why it was used, and whether the person who "initiated" the incident started the argument or the physical fight. *See* L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VIOLENCE & VICTIMS 125, 127 (1994). According to critics of the "gender parity" thesis, objective evidence from the records of police, emergency rooms, and domestic violence shelters consistently shows that women are much more likely than men to be assaulted and injured by their intimate partners. *See* Dobash, Dobash, Wilson, & Daly, *supra* note 332, at 74. In contrast, the Conflict Tactics Scale, on which the "gender parity" thesis relies, defines acts of domestic violence in subjective terms which are meaningless when stripped of their context, *see id.* at 78-80, and yields inconsistent descriptions of the same incidents by husbands and wives. *See id.* at 77-78.

336. *See* Leisring, Dowd & Rosenbaum, *supra* note 269, at 260 ("Without sufficient research examining women's aggression, clinicians working with partner aggressive women cannot look to the literature for effective interventions.") Miller, Gregory, & Iovanni, *supra* note 106, at 352 ("Despite the national increase in treatment programs established for women arrested for domestic violence, very little research . . . has explored the context and effectiveness of [female offender programs].").

lence offenses to participate in BIPs designed for male offenders.³³⁷ Although about two-thirds of state standards mandate separate groups for women, very few explain how interventions for women should differ from those for men.³³⁸ Even the family-violence scholars who claim that women are as violent as men find this situation “less than ideal.”³³⁹

The prevailing view in the academic literature is that women arrested for domestic violence usually acted self-protectively, or in retaliation for past abuse, and that this fact differentiates them from male arrestees.³⁴⁰ As many as 60 to 80 percent of women mandated to complete BIPs used violence to respond to harm to themselves or their children.³⁴¹ Michael Johnson notes that it is more correct to refer to this type of female behavior as “violent resistance,” rather than “self-defense,” since the latter term denotes a legal category with narrow, doctrinal elements.³⁴² Violent resistance also encompasses retaliatory conduct in which the woman seeks retribution for depression and pain arising from a long period of subordination at the hands of her partner.³⁴³ Some states require police officers to determine which member of the couple was the “primary aggressor,” rather than making a dual arrest; however, such laws and policies fail to shield women who reacted to their partner’s past or prospective violence, since they did not face a threat the law deems imminent.³⁴⁴

337. Carney, Buttell & Dutton, *supra* note 332, at 112; see Leisring, Dowd & Rosenbaum, *supra* note 269, at 260, 263. In some jurisdictions, treatment programs for women were developed because the alternative had been disparate, unfairly harsh outcomes for female offenders, compared to men; the latter were ordered to counseling with the incentive of reduced fines or dropped charges if they completed the program. Hamberger & Potente, *supra* note 335, at 130. In other parts of the country, courts refer both men and women to batterer intervention classes, but the classes remain grounded in a protocol aimed to re-socialize men to reject their historical privilege and adopt nonviolent, egalitarian ways of relating to their intimate partners. See Dasgupta, *supra* note 334, at 1368; see also Laranca, *When She Hits Him*, *supra* note 175, at 10.

338. See Appendix M, *supra* notes 201 and 216, available at <http://scholar.law.colorado.edu/research-data/1>.

339. Carney, Buttell & Dutton, *supra* note 332, at 112.

340. See Hamberger & Potente, *supra* note 335, at 128, 134–35; see also Henning, Jones & Holdford, *supra* note 258, at 841–42, 851.

341. See Kernsmith, *supra* note 98, at 760. See also JOHNSON, *supra* note 107, at 52 (citing SUSAN L. MILLER, VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN’S VIOLENCE IN RELATIONSHIPS 120–21 (2005) for the estimate that 65% of women ordered to attend a BIP were resisting their abusers).

342. JOHNSON, *supra* note 107, at 52.

343. See *id.* at 53.

344. See Leigh Goodmark, *Law is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 23 n.93 (2004) (citing Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1045 (2000)). Some jurisdictions have “predominant aggressor” laws that instruct police to arrest the person who caused the most violence, rather than assuming the initial (or “pri-

Should female offenders be deemed “batterers”? Just because a woman is convicted of a domestic violence offense does not mean she abused her partner as a control tactic. Indeed, researchers and service providers have found that women rarely use force to coerce their husbands or boyfriends into long-term behavioral change.³⁴⁵ Rather, according to one observer, female offenders’ stated motivations for using force include “the desire to defend their self-respect against their partners’ verbal and/or emotional attacks; to defend their children; a refusal to be victimized again; being passive did not work so maybe using violence will; and to gain short-term control over a chaotic/abusive situation”³⁴⁶ Moreover, a woman who gets arrested for domestic violence might have been trying to assert the autonomy necessary to leave the intimate relationship. One study found that female offenders were twice as likely as male offenders to feel uncertain about whether they wanted to stay with their partners.³⁴⁷ The same research indicated that while men in the sample were as likely as women to have experienced clinically significant relationship stress, the cause of that stress differed with the sex of the arrestee: “[W]omen’s relationship dissatisfaction . . . may be largely influenced by their partners’ abusive behavior, whereas relationship dissatisfaction for men may derive primarily from concerns about abandonment and loss of control.”³⁴⁸ In sum, women tend to act violently as a survival strategy, and this strategy often backfires because their male partners, who rarely fear them, retaliate in ways that make them even more vulnerable. Accordingly, it is an error to refer to most female offenders as batterers.³⁴⁹

mary”) aggressor was at fault. See Thacker Thomas, *supra* note 194, at 6 (citing STOP ABUSIVE AND VIOLENT ENVIRONMENTS (SAVE), PREDOMINANT AGGRESSOR POLICIES: LEAVING THE ABUSER UNACCOUNTABLE? (2010)). Predominant aggressor laws might be slightly more successful in protecting women who are actually victims, since another qualitative difference between men and women who engage in intimate-partner violence is that women are less likely than men to inflict serious injury. Hamberger & Potente, *supra* note 335, at 125.

345. See Dasgupta, *supra* note 334, at 1378; see also Hester, *supra* note 229, at 1072–73; Larance, *When She Hits Him*, *supra* note 175, at 13; Miller, Gregory, & Iovanni, *supra* note 106, at 347.

346. Larance, *When She Hits Him*, *supra* note 175, at 14.

347. Henning, Jones & Holdford, *supra* note 258, at 851 (describing the results of a study of 3,200 men and women arrested, convicted, and placed on probation for heterosexual domestic violence between January 1999 and April 2001 in Shelby County, Tennessee).

348. *Id.*

349. See Dasgupta, *supra* note 334, at 1366–68, 1378; see also Larance, *When She Hits Him*, *supra* note 175, at 11, 13. Lisa Larance admits that some women have the capacity to be batterers, but she contends that “the majority of heterosexual women in VISTA [the female offender program that Larance designed] used their force in intimate relationships to regain short-term control over their situations, not to exert ongoing coercion and control over their partners [M]ost women’s use of force is separate, dis-

This understanding of women's use of force is not uncontested. Some researchers point to longitudinal studies, combined with national survey data, to claim that domestic violence perpetrated by women often "has a long developmental history, preceding the current adult relationship, so it cannot be dismissed as self-defense" or even retaliation.³⁵⁰ From this perspective, the similarities between male and female arrestees—abuse of alcohol or drugs, prior aggression, the ability to inflict serious injury (especially if the woman uses a weapon), and demographic factors, including mental health history and childhood exposure to violence—outweigh the differences.³⁵¹

Are these conflicting analyses of women's violence irreconcilable? Michael Johnson has argued that feminist scholars and activists (who believe that women's violence is overwhelmingly self-defensive, while men's is coercive and terroristic) and family violence researchers (who see gender parity) are actually talking about different phenomena.³⁵² Intimate terrorists are primarily men, whereas women engage in two other types of violence in Johnson's three-part typology—"violent resistance" and "situational couple violence."³⁵³ Violent resistance encompasses pushing back against an abusive partner in ways that often do not qualify as self-defense under the criminal law.³⁵⁴ Pragmatically, because women with a history of victimization may lash out in retaliation and pain, which still constitutes a crime, BIPs should be equipped to counsel them differently than they would the archetypal male batterer.

The second type of violence that women use, situational couple violence, shows great variability. It can be perpetrated by men as well as women. It may occur in a single, anomalous incident, or it may be ongoing.³⁵⁵ Some couples engage in minor physical fights, inflicting minimal injury, but situational couple violence can also be lethal.³⁵⁶ Perhaps most

tinct behavior from battering...and demands different intervention." Lisa Young Larance, *Serving Women Who Use Force in Their Intimate Heterosexual Relationships: An Extended View*, 12 VIOLENCE AGAINST WOMEN 622, 625 (2006) [hereinafter Larance, *Serving Women*]. See also *supra* note 175 (describing the DAIP's work with the few women in the program whose assaults on their male partners were not a response to abuse).

350. Carney, Buttell & Dutton, *supra* note 332, at 110.

351. See *id.* at 112, 114; Henning, Jones & Holdford, *supra* note 258, at 847-48, 850-51 (finding that both women and men had experienced "clinically significant relationship distress" and exposure to violence as children).

352. JOHNSON, *supra* note 107, at 3.

353. *Id.* at 2, 51-52, 60.

354. Cf. Larance, *Serving Women*, *supra* note 349, at 627-28 (2006) (describing the motivations of female participants in the VISTA Program in New Jersey, which only serves women who engaged in non-self-defensive violence).

355. JOHNSON, *supra* note 107, at 62.

356. See *id.* at 60-62.

importantly, rather than being rooted in male domination and misogyny (as intimate terrorism is), situational couple violence arises from myriad factors. These include tensions over relationship status, financial troubles, child-rearing, and the household's division of labor; substance abuse; verbal aggression; communication deficits; mental disorders; family histories of violence; education (or lack thereof); and differences in cultural background.³⁵⁷ Johnson notes that “[a]t times the problem has less to do with one individual and more to do with how the couple communicates.”³⁵⁸ If the legal system intervenes in such relationships at all, a highly punitive response seems unwarranted, except in severe cases. Treatment or counseling may offer the best chances of success. However, intervention programs for female offenders that explain participants’ conduct solely by reference to violent resistance are unlikely to be effective for women who have engaged in situational couple violence, which does not involve efforts to resist coercive control.³⁵⁹

How have women arrested for domestic violence been treated thus far? Despite the ostensible gender neutrality of the criminal law, the perceptions of a female arrestee and those around her may soften the stigma of being charged with a domestic violence offense. In a study of BIP participants in Los Angeles County, California, several women reported that their use of violence would be viewed with approval because they were trying to protect themselves and their children.³⁶⁰ Another researcher found that, even if a female arrestee was not resisting abuse, friends, family, and criminal justice personnel still treated her like a victim, and the woman might deploy discourses of feminine victimhood to resist being labeled a criminal.³⁶¹ Police officers bound by mandatory arrest laws also expressed concern that their lack of discretion forced them to make wrongful arrests.³⁶² Finally, as we shall see, BIPs that ac-

357. *Id.* at 63–68.

358. *Id.* at 70.

359. *See id.* at 61 (“Situational couple violence is not driven by a general motive to control, but arises out of the dynamics of particular situations.”). The needs of the minority of women who initiate violence likely differ from those of women act in response to abuse. Kernsmith, *supra* note 98, at 769.

360. Kernsmith, *supra* note 98, at 767.

361. *See* Thacker Thomas, *supra* note 194, at 65–75, 92–121.

362. *Id.* at 154–56. However, in her study of intimate partner violence cases in England, Marianne Hester found that “the police appeared more ready to arrest women despite patterns of violent behavior that were less intense or severe than the patterns exhibited by men”; they seemed to treat the female perpetrator cases more seriously and to construe the woman as the main problem even when the man in the couple had been the perpetrator in more incidents; and they failed to recognize that women were acting self-defensively because they did not take the larger pattern of abuse into account. Hester, *supra* note 229, at 1074–75.

cept female participants often treat women differently than male offenders.³⁶³

Current standards for batterer intervention that address female offenders often specify that education groups should be segregated by sex.³⁶⁴ However, the standards rarely provide information about the content or goals of the separate women's groups. Indeed, one of the most significant problems with the treatment of women arrested for domestic violence is that, aside from requiring gender-specific groups, state standards provide few or no signposts for how women's programs should be structured, what specialized topics they should cover, and whether female offenders should be further categorized on the basis of factors in addition to their sex. A mere handful of states, including Colorado and Iowa, have adopted best practices guidelines for treating female offenders.³⁶⁵

While only a minority of standards distinguish interventions for female offenders from those for males, those that differentiate men's programs from women's do so in two ways. First, the underlying assumptions about the causes of and contributors to women's violence are different. The current BIP standards in several jurisdictions suggest that female participants may have acted in self-defense and that abusers and victims should not be placed in the same education group.³⁶⁶ For instance, the 2012 edition of the North Dakota Adult Batterer Treatment Standards expressly adopts the view that "[w]omen typically use violence in self-defense" and "women's use of violence is preceded by severe acts of violence by their partners."³⁶⁷ Second, the few certification standards that provide requirements or guidance for female-only pro-

363. See *infra* text accompanying notes 368–386. The views of BIP staff may also have subtle effects on interactions with female participants, regardless of official program content. See Miller, Gregory, & Iovanni, *supra* note 106, at 343 (stating that, although the facilitator of a female offender program the authors observed knew the women in the group had been charged with crimes, she seemed to believe "that most arrested women are not the primary perpetrators of violence in their relationships").

364. About two-thirds (or 26) of the 46 jurisdictions analyzed take this approach. See Appendix M, *supra* notes 201 and 216, available at <http://scholar.law.colorado.edu/research-data/1>.

365. See COLO. DVOMB STANDARDS, *supra* note 219, at App. B-II ("Specific Offender Population Best Practice Guidelines For Providing Court-Ordered Treatment to Female Domestic Violence Offenders"); IOWA DEP'T OF CORRECTIONS STANDARDS FOR THE MOVING ON FEMALE OFFENDER PROGRAM 15 (2006) (on file with the author).

366. For jurisdictions that require separate programs or groups for women, see Appendix M, *supra* notes 201 and 216, available at <http://scholar.law.colorado.edu/research-data/1>. The assumption that many women ordered to complete BIPs only used force in self-defense is discussed in the text accompanying notes 340–344, *supra*, and notes 367 & 379, *infra*.

367. NORTH DAKOTA ADULT BATTERER TREATMENT STANDARDS, *supra* note 281, at 10.

grams indicate that women should be taught different skills than men; indeed, the focus on skill building, rather than confrontation and attitudinal change, is often expressly precluded for male offender groups.³⁶⁸

The association of domestically violent women with past abuse has important implications for program content. Unlike BIPs for men, female offender programs, in practice, tend to adopt a therapeutic style that places the violent incidents for which the women were arrested in the context of past abuse and other “life stressors.”³⁶⁹ In the few jurisdictions that have established a special, standardized curriculum for female participants, a common requirement is that women arrested for domestic violence receive training in safety planning, assertiveness, anger management, non-violent parenting, and non-aggressive communication skills³⁷⁰—components often absent, by design, from batterer intervention programs for men.³⁷¹ Colorado’s standards direct providers to consider the impact of woman-specific experiences like “abortion, miscarriage, stillbirth, . . . rape, . . . [and] sexual harassment.”³⁷² They also suggest attention to other topics that may be especially important for female offenders, including appropriate ways of expressing “anger as [a] healthy response to injustice/violence” that they suffered as children or in abusive adult relationships in the past.³⁷³

Although state certification standards are usually silent about the curricula of female offender programs, there has been experimentation with special content for women at the level of individual BIPs. For example, the standards promulgated by the Massachusetts Department of Public Health do not explain how women’s groups should differ from men’s,³⁷⁴ but over the years, a program for partner-aggressive women at

368. See *infra* notes 370–373 and accompanying text.

369. Miller, Gregory, & Iovanni, *supra* note 106, at 342–43 (noting that, in the program they observed, women’s use of violence was contextualized by reference to unemployment, poverty, substance abuse, and concerns about housing, transportation, and child care, as well as past victimization).

370. Iowa is one of the few states to promulgate separate standards for women. Its all-female Moving On programs teach a variety of skills (problem solving, creative and critical thinking, social skills, assertiveness, and deep relaxation) and strive to help women understand the “contextual, situational, and personal factors” that contributed to their criminal behavior. IOWA DEP’T OF CORRECTIONS STANDARDS FOR THE MOVING ON FEMALE OFFENDER PROGRAM, *supra* note 365, at 15.

371. See *supra* notes 203–214, 226–227 and accompanying text (discussing standards governing programs primarily designed for male offenders). *But see* Leisring, Dowd & Rosenbaum, *supra* note 269, at 264, 266 (indicating that anger management and effective communication skills training are components that could be borrowed from the University of Massachusetts Medical School’s programs for men).

372. COLO. DVOMB STANDARDS, *supra* note 219, at App. B-II-4.

373. *Id.* at App. B-II-3 to -4.

374. See generally GUIDELINES AND STANDARDS FOR THE CERTIFICATION OF INTIMATE PARTNER ABUSE EDUCATION PROGRAMS [MASS.], *supra* note 295.

the University of Massachusetts Medical School has gradually placed less emphasis on power and control, on the theory that women rarely frighten men into compliance, and more emphasis on such practical considerations as finding affordable housing and being prepared for a quick escape from danger.³⁷⁵ According to this approach, female participants should be re-directed to alternative ways of handling situations that cause them to feel anger, fear, stress, or depression.³⁷⁶ Similarly, the VISTA program in New Jersey helps women develop a safety plan and identify non-violent strategies for addressing anger that are likely to succeed in their specific relationships. VISTA also encourages participants to explore how family-of-origin conflict might have contributed to their use of force and how women's socialization to subordinate their welfare to that of their family sucks them into an ineffective cycle: they feel inferior and angry, use violence and/or shouting, and then make profuse apologies for their behavior.³⁷⁷

As these examples show, many women's programs are "structured to avoid any implication that domestically violent women . . . [are] no different from male batterers."³⁷⁸ This distinction often arises from the assumption that female offenders used force in response to an attack or threat.³⁷⁹ However, more recently, program providers and scholars have begun to cast their net wider to develop a more complicated analysis of women's use of force.³⁸⁰ Lisa Larance, who founded the VISTA Program in New Jersey and the RENEW program in Michigan, gives exam-

375. Leisring, Dowd & Rosenbaum, *supra* note 269, at 268–69, 271. As early as the 1990s, Miller, Gregory, & Iovanni observed a female offender program on the East Coast that taught participants about anger management, support networks and other resources, as well as equipped them to negotiate the criminal justice process in the future without being pushed into pleading guilty. Miller, Gregory, & Iovanni, *supra* note 106, at 345.

376. *Id.* at 264, 270 (indicating that such strategies might include getting treatment for woman-specific conditions like menopause or premenstrual syndrome).

377. Larance, *Serving Women*, *supra* note 349, at 633, 636–37.

378. Hamberger & Potente, *supra* note 335, at 130 (describing the Kenosha Domestic Abuse Intervention Project's program for women in Wisconsin).

379. According to a study conducted in the 1990s, for example, the Kenosha Domestic Abuse Intervention Project in Wisconsin taught women that "their use of violence stems from the abuse of power and control to which they have been *subjected* by their partners." *Id.* at 131 (emphasis added).

380. For instance, legal scholar Jamie Abrams criticizes what she calls a limited strategy of containment that approaches women's violence as a potential threat to the feminist paradigm of battering and the practical achievements of the Battered Women's Movement in generating services for female victims and punitive responses for male perpetrators. Abrams suggests that a frank exploration of how and why women use force, in a variety of contexts from intimate relationships to sports and even acts of terrorism, might actually strengthen the feminist movement and make it more relevant to a society on the cusp of recognizing gender nonconformity. See generally Jamie R. Abrams, *The Feminist Case for Acknowledging Women's Acts of Violence*, 22 YALE J. L. & FEMINISM 287 (2016).

ples of women who committed violent acts against innocent partners to express unresolved anger at past abuse by other people, including previous husbands and parents.³⁸¹ Using the extended time frame that VISTA favors, Larance found that, in addition to being arrested for self-defensive or retaliatory violence,³⁸² female offenders used force to make an intimate partner listen or refrain from leaving during an argument, to regain self-respect, and as a strategy in child custody battles.³⁸³ Although the women in VISTA are deemed not to have acted in self-defense, the program helps participants realize that they are victims and survivors, as well as violators of the law.

Special programming for women does not have to be incompatible with accountability. For instance, despite VISTA's emphasis on women's victimization, VISTA staff treat female participants as responsible actors who are capable of seeking nonviolent options.³⁸⁴ Because the women's use of force had bad results—including arrest, legal bills, shame, and other collateral consequences of a conviction, as well as retaliatory battering—many of them want to avoid a replay of the scenarios that led to their involvement with the criminal justice system.³⁸⁵ According to Larance, “[t]he benefit of encouraging [participants to take] responsibility—if done supportively, nonjudgmentally, and proactively—for the consequences of their use of force is that women can begin to feel less like passive, dependent agents and more like empowered, skilled individuals able to navigate a relationship in a manner that serves them over the short and long term.”³⁸⁶

The establishment of intervention programs for court-ordered female participants need not preclude training police officers to avoid the arrest of domestic violence survivors who lashed out in self-defense or providing affirmative legal defenses that better fit such women's predicament. Nor would it be an error to design different programs and curricular content for female offenders who primarily used violence in re-

381. Larance, *When She Hits Him*, *supra* note 175, at 13–16; see Larance, *Serving Women*, *supra* note 349, at 630. See also Hester, *supra* note 229, at 1068 (noting research suggesting that some women who were victimized in the past by their parents or other partners used force in subsequent intimate relationships).

382. Larance, *Serving Women*, *supra* note 349, at 628.

383. See *id.* at 628, 631.

384. See *id.* at 634–35. See also Hamberger & Potente, *supra* note 335, at 129–31 (describing a similar approach in Kenosha, Wisconsin).

385. See Larance, *Serving Women*, *supra* note 349, at 635; Hamberger & Potente, *supra* note 335, at 130.

386. Larance, *Serving Women*, *supra* note 349, at 634. The Kenosha, Wisconsin program also aspired to achieve the objectives of accountability, specific deterrence, and rehabilitation, and the researchers who studied it found it to be largely successful. See Hamberger & Potente, *supra* note 335, at 136 (“Compliance in the Kenosha program is extremely high, indicating that the program has perceived value to the clients.”).

sponse to abuse, as opposed to initiating it. Helping women take responsibility for their own aggression and choose non-violent solutions to domestic stressors, traumas, and fears is not the same as victim blaming, though in some situations, the woman may have acted in a blameworthy manner. Finally, female offenders exhibit some of the same contextual problems as men: for instance, high rates of psychological and mood disorders, as well as suicidal ideation, among female offenders³⁸⁷ suggest that coordination with appropriate mental health treatment should also be available for women.

C. *Same-Sex Abuse*

According to one estimate, physical violence and/or psychological abuse occurs in approximately 25 to 33 percent of all same-sex relationships, which makes the incidence of intimate-partner abuse in the LGBT community comparable to its incidence among heterosexuals.³⁸⁸ Another estimate puts the rate of abuse at about 12 to 50 percent for both same-sex and heterosexual couples.³⁸⁹ Transgender victims also suffer intimate-partner violence,³⁹⁰ and they are especially vulnerable to discrimination when they seek help. Nevertheless, support services for LGBT victims and BIPs for same-sex abusers remain sparse.³⁹¹ Same-sex abuse

387. Leisring, Dowd & Rosenbaum, *supra* note 269, at 269–70; *see* Henning, Jones & Holdford, *supra* note 258, at 846–48.

388. NAT'L CTR. FOR VICTIMS OF CRIME & THE NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, WHY IT MATTERS: RETHINKING VICTIM ASSISTANCE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER VICTIMS OF HATE VIOLENCE & INTIMATE PARTNER VIOLENCE 5 (2010) [hereinafter WHY IT MATTERS]; Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & C.R. L. REV. 325, 330 (1999); Morrison, *supra* note 103, at 117.

389. Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 FAM. CT. REV. 287, 287 (2006). The variation in statistics on the incidence of abuse likely arises from differing definitions of what “abuse” means. Restrictive definitions that encompass only physical violence yield lower numbers than more expansive understandings of abuse that cover patterns of physical and emotional harm.

390. “Transgender people [constituted] at least 4.7 percent of the survivors accessing services through members of the National Coalition of Anti-Violence Programs (NCAVP) in 2009.” Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 55 (2013).

391. *See supra* notes 217–219 and accompanying text and Appendices N & O (describing the dearth of standards providing appropriate programs for lesbian and gay offenders, as of 2015), *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>; WHY IT MATTERS, *supra* note 388, at 6, 9–14; Morrison, *supra* note 103, at 82. In the 1990s, former San Diego Deputy City Attorney Kathleen Finley Duthu used to “ask the court to order gay and lesbian defendants to attend one year of counseling with a private therapist since there [was] no certified batterer’s treatment program for gay men or lesbians in San Diego County.” Kathleen Finley Duthu, *Why Doesn’t Anyone Talk about Gay and Lesbian Domestic Violence?*, 18 T.

involves some unique behaviors and strategies, such as threatening to “out” the victim, capitalizing on societal homophobia, and manipulating the victim’s internalized guilt about being homosexual to isolate and intimidate him or her.³⁹² These differing facets of same-sex abuse make curricula designed for straight men inadequate for gay and lesbian batterers.

Most BIP standards do not exclude homosexual participants, but they rarely offer separate groups and specially tailored curricula for LGBT offenders.³⁹³ Some states still place same-sex offenders in heterosexual groups.³⁹⁴ Others anticipate the need for individual counseling and/or outside referrals for homosexual BIP participants;³⁹⁵ they may allow a choice among these approaches, based on offender characteristics and/or provider resources and competence.³⁹⁶ Even states that require some kind of special programming for same-sex abusers tend to be vague about what that programming should entail. For example, Ohio recognizes the potential dangers of failing to segregate LGBT participants in individual counseling or LGBT-specific groups and provides for group facilitators from LGBT communities.³⁹⁷ But aside from stating broadly that BIPs “shall reflect the experience of LGBTQ communities in the program materials by adjusting the language, including LGBTQ scenari-

JEFFERSON L. REV. 23, 39–40 (1996). BIPs in some states still refer LGBT offenders for individual counseling. See *infra* notes 395–396 and accompanying text.

392. See Duthu, *supra* note 391, at 31–32; Knauer, *supra* note 388, at 337; Rohrbaugh, *supra* note 389, at 293. Another complicating factor is that the abuse victim may not want to “out” his or her abuser by revealing the nature of their relationship to family, friends, doctors, therapists, or legal authorities. See Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbians and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 286 (1993).

393. See *supra* notes 217–219 and accompanying text; Appendices N & O *supra* note 201, available at <http://scholar.law.colorado.edu/research-data/1>.

394. See, e.g., NORTH DAKOTA ADULT BATTERER TREATMENT STANDARDS, *supra* note 281, at 23.

395. Tennessee takes this approach, for example. See Rules of Domestic Violence State Coordinating Council [Tennessee], *supra* note 152, at 7, Rule 0490-1-.05(1)(e)(1).

396. See, e.g., IOWA DEPARTMENT OF CORRECTIONS STANDARDS FOR IOWA DOMESTIC ABUSE PROGRAM 8 (2014) (on file with the author); NEB. DOMESTIC VIOLENCE SEXUAL ASSAULT COAL., DOMESTIC VIOLENCE OFFENDER PROGRAM STANDARDS 9 (2012), http://www.ndvsac.org/wpcontent/uploads/General/BIP/Final_State_Standards_revision_6_15_12.pdf; TEXAS DEP’T OF CRIM. JUST., CMTY. ASSISTANCE DIV., BATTERING INTERVENTION AND PREVENTION PROGRAM (BIPP) ACCREDITATION GUIDELINES App. G at 51 (2014), http://www.tdcj.state.tx.us/documents/BIPP_Accreditation_Guidelines.pdf. Alternatively, in some jurisdictions, the service provider can apply for a variance to modify the program for homosexual participants. See, e.g., STATE OF RHODE ISLAND BATTERERS INTERVENTION PROGRAM STANDARDS OVERSIGHT COMM., BATTERERS INTERVENTION PROGRAM COMPREHENSIVE STANDARDS 9.2.1.1 (amended 2007), <http://sos.ri.gov/documents/archives/regdocs/released/pdf/BIPSOC/4993.pdf>.

397. See OHIO STANDARDS FOR BATTERERS INTERVENTION, *supra* note 299, at 14.

os in group work, and creating policies that are LGBTQ inclusive,”³⁹⁸ the Ohio standards do not go far beyond those that simply bar BIPs from discriminating on the basis of sexual orientation.³⁹⁹ There is little or no information in most standards about what causes same-sex partner abuse, how it differs from heterosexual partner abuse, and what interventions are appropriate to prevent reoffending.

Colorado is one of the few states that not only provides LGBT offender groups, but also spells out in some detail the topic areas to cover with same-sex abusers and the minimum competencies that the facilitators of LGBT groups must attain. Facilitators in Colorado must be able to assess the offender’s “stage of coming out”; level of acceptance or rejection by family, friends, and employer; degree of internalized homophobia; “vulnerability to hate crimes”; and “level of access to LGBT support resources”—among other factors.⁴⁰⁰ The curriculum for same-sex groups in Colorado includes topics related to the marginalization and discrimination that LGBT people face and the unique ways in which their abusers can victimize them.⁴⁰¹

Part III.C contends that, in addition to developing education groups specifically for same-sex offenders when the demand is sufficient to form them, researchers and service-providers need to discover why lesbians and gay men abuse their intimate partners and whether such abuse can be explained by reference to the gendered power-and-control paradigm on which the Duluth model relies.⁴⁰² This is imperative because, beyond being underserved by victim assistance and batterer programs, LGBT partner violence is also under-theorized. LGBT abusers should not be ordered to enroll in existing Duluth-style programs—even in separate groups from heterosexual, cisgender offenders—without significant

398. *Id.*

399. For examples of BIP standards in which the provision of services for same-sex abusers is limited to a non-discrimination statement, see, e.g., S.C. DEP’T OF SOC. SERVS., STANDARDS OF CARE FOR BATTERERS TREATMENT, *supra* note 295, at 3; WASH. ADMIN. CODE § 388-60-0105 (West 2016); 2007 MALE BATTERERS TREATMENT STANDARDS FOR WISCONSIN BATTERERS TREATMENT PROVIDER ASSOCIATION CERTIFIED DOMESTIC ABUSE BATTERERS TREATMENT 5, IV(B)(6) (2007), http://www.wcadv.org/sites/default/files/resources/WBTPA%20Standards_2007.pdf.

400. COLO. DVOMB STANDARDS, *supra* note 219, at App. B-I-1 to -2.

401. *Id.* at App. B-I-3. A few other states acknowledge that same-sex abusers may use special methods of control and intimidation, such as threatening to “out” their partners, and that heterosexist and homophobic attitudes facilitate same-sex partner abuse. See, e.g., N.H. GOVERNOR’S COMM’N ON DOMESTIC & SEXUAL VIOLENCE, BATTERERS INTERVENTION STANDARDS 5, 16 (2002).

402. Some BIP standards claim to be limited to heterosexual males due to lack of knowledge about appropriate interventions for female and LGBT offenders. See, e.g., GOVERNOR’S TASK FORCE ON BATTERER INTERVENTION STANDARDS, BATTERER INTERVENTION STANDARDS FOR THE STATE OF MICHIGAN 7 (1998).

inquiry into whether intimate-partner violence in their relationships has the same foundations as men's violence against women.

1. Lesbian Partner Violence and the Feminist Paradigm of the Batterer

Lesbian partner violence has long been under-reported by its victims, hushed by the lesbian community, and ignored by feminist activists.⁴⁰³ Intimate-partner violence in lesbian relationships "shakes the very foundations of cultural or 'different voice' feminism," which celebrates the positive values associated with women, including their supposed non-violence.⁴⁰⁴ Thus, recognizing same-sex abuse threatens the positive image of an alternative, egalitarian "all-woman space" that the lesbian community has worked hard to promote.⁴⁰⁵ According to one lesbian writer, "We fear fueling society's hatred and myths by speaking openly about lesbian battering."⁴⁰⁶

The fact that lesbians abuse each other seems to contradict the core assumption of the Battered Women's Movement that domestic violence arises from patriarchy and is always inflicted on women by men. In light of same-sex partner abuse, some experts now define domestic violence as "an abuse of power that can happen in any type of intimate relationship, regardless of gender or sexual orientation."⁴⁰⁷ Although lesbian partner violence is sometimes deemed "milder" than its heterosexual counterpart,⁴⁰⁸ abuse in lesbian relationships is still patterned behavior linked to jealousy, emotional dependency, and power imbalances between members of the couple.⁴⁰⁹ The majority of abused lesbians experience both physical and psychological harm.⁴¹⁰ Thus, in some respects,

403. See Knauer, *supra* note 388, at 326, 328, 331; Morrison, *supra* note 103, at 83.

404. Knauer, *supra* note 388, at 328.

405. Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 195, 217 (Martha Albertson Fineman & Roxanne Mykiutiuk eds., 1994); Knauer, *supra* note 388, at 331.

406. DAVID ISLAND & PATRICK LETELLIER, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* 101 (1991) (quoting KERRY LOBEL, *NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING* 200 (1986)).

407. Rohrbaugh, *supra* note 389, at 292.

408. *Id.* at 291.

409. CLAIRE M. RENZETTI, *VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS* 116-17 (1992); Rohrbaugh, *supra* note 389, at 293, 295.

410. In a survey of 100 lesbian respondents, 87 percent of the women claimed to have experienced both physical and psychological abuse. Respondents reported greater frequency of psychological abuse, but more than half had experienced pushing and shoving (75 percent) and blows with fists or an open hand (65 percent). RENZETTI, *supra* note 409, at 20-21.

violence between lesbians is qualitatively similar to heterosexual intimate-partner violence.

But there are important differences. Fearing the prejudice of society in general, as well as pressure not to air the dirty laundry of the LGBT community, lesbian, gay, bisexual, and transgender victims are less likely to seek help than women battered by men.⁴¹¹ When lesbian partner violence does get reported, police officers who are ignorant of the dynamics of abuse between women often have difficulty identifying the primary aggressor.⁴¹² Judges are also more likely to issue mutual orders of protection in cases of lesbian couples, both because the judge perceives the situation as a girl fight, involving violence on both sides, and because an abusive lesbian may try to characterize herself as a victim of blows that, in reality, her partner struck in self-defense.⁴¹³ Lack of shelter space, the homophobia of service providers, and uncertainty about whether domestic violence laws cover same-sex relationships⁴¹⁴ all inhibit lesbians from seeking help when they suffer intimate-partner violence. Because the 2013 reauthorization of the Violence Against Women Act (“VAWA”) expressly includes same-sex couples in two important provisions—the definition of “underserved populations” and a non-discrimination clause barring any program funded wholly or partially by VAWA money from discriminating “on the basis of gender identity . . . [and] sexual orientation”—such oversights, biases, and errors now stand a better chance of being corrected.⁴¹⁵

Yet, to respond effectively to lesbian partner violence, theorists and service providers must first seek to understand why it occurs and how it compares to the paradigm of heterosexual abuse inflicted by men. This is an area of controversy. Some scholars believe that lesbian partner vio-

411. Morrison, *supra* note 103, at 116.

412. See Duthu, *supra* note 391, at 34–35; Knauer, *supra* note 388, at 333–34; Lundy, *supra* note 392, at 283–84.

413. See Shannon Little, *Challenging Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN’S L.J. 259, 263 (2008).

414. On this latter problem, see generally *id.* at 259, 263 (arguing that domestic violence statutes “should be amended to include explicit language incorporating relationships of all types and to account for broader understandings of the abusive acts themselves”).

415. See Ashley LeBrun, Note, *Are We There Yet?—VAWA 2013: Same-Sex Legal Acceptance*, 39 SETON HALL LEGIS. J. 101, 106–107 (2015). Along these lines, in 2013, the state of California adopted a legislative finding that “the problem of domestic violence in the gay, lesbian, bisexual, and transgender community [is] of serious and increasing magnitude” and “existing domestic violence services for this population are underfunded and that members of this population are underserved or underserved in the state.” CAL. PENAL CODE § 13823.17(a) (West 2013). As a result, California has established a special grant program “for the development and support of domestic violence programs and services [including batterer intervention] for the gay, lesbian, bisexual, and transgender community.” CAL. PENAL CODE § 13823.17(b)(4).

lence can be explained without abandoning the paradigm of patriarchal power. Adele Morrison argues, for example:

Choosing to act out abusively toward an intimate partner is coded as an aspect of being a man. Being a victim of that abuse is coded as an aspect of being a woman. The individual's biological sex (or actual self-identified gender) is irrelevant. Thus same-sex domestic violence—all domestic violence—is rooted in sexism.⁴¹⁶

In short, Morrison believes that the feminist gender paradigm is accurate, but she suggests that “one must define ‘battering’ not as ‘male’ (the sex), but as behavior that is an aspect of the ‘socially constructed’ (gendered) man’s behavior, which can be committed regardless of biological sex, sexual orientation or sexual community of the offender.”⁴¹⁷ The lesbian who acts as the aggressor is female as a matter of biology and gender identity; yet, when she inflicts violence on her partner, she displays male attributes and seeks “the social rewards that go with exhibiting a behavior that is assigned to a man.”⁴¹⁸ Failing to recognize that same-sex violence is gendered may yield legal and policy changes with unintended bad consequences.

In contrast to scholars who seek to fit lesbian partner abuse into the feminist model of male dominance, other theorists criticize the gender-based approach for imposing a heteronormative framework on lesbian relationships. Mary Eaton calls instead for a lesbian-specific model that accounts for unique aspects of intralesbian violence, including its sexualized nature and the fact that lesbians experience multiple forms of oppression or even total erasure in a society that does not want to acknowledge their existence.⁴¹⁹ She criticizes feminist theory for exacerbating heterosexist stereotypes about lesbians’ need to imitate male and female gender roles to have a satisfying sexual relationship.⁴²⁰ From this perspective, lesbian partner violence is still about control, but it is arguably not a manifestation of male dominance in society or the historical oppression of women. In support of this lesbian-centered analysis, experts note that same-sex abuse does not correlate to the masculine appearance of the aggressor or to disparities in physical size or strength between intimate partners.⁴²¹ As Claire Renzetti emphasizes, it is a myth that “only ‘butch’ or very masculine lesbians batter.”⁴²²

416. Morrison, *supra* note 103, at 139.

417. *Id.* at 91.

418. *Id.* at 152.

419. See Eaton, *supra* note 405, at 200, 206, 215, 219.

420. See *id.* at 207.

421. See Rohrbaugh, *supra* note 389, at 292–93.

422. RENZETTI, *supra* note 409, at 103; see Eaton, *supra* note 405, at 207.

Existing BIPs aimed at the feminist re-education of men are ill suited to change the behavior of lesbians. First, due to mistakes in identifying the primary aggressor and the continued practice of mutual arrest in same-sex cases,⁴²³ some lesbians whom law enforcement detains will actually be victims. Second, even if the arrestee *was* the primary aggressor, she is unlikely to be rehabilitated, and may actually be harmed, in a program designed for heterosexual male batterers, who “tend to be overtly homophobic.”⁴²⁴ At least one state expressly acknowledges this concern by providing separate groups for women and same-sex offenders “to ensure *safety* and appropriate interventions.”⁴²⁵ Although the Power and Control Wheel used in Duluth-style programs could probably be adapted for lesbian batterer education, facilitators need to be trained to interact knowledgeably and sensitively with lesbian participants, and program standards must do more than simply add sexual orientation to a politically-correct list of traits in a non-discrimination statement.

Finally, same-sex domestic violence offenders, like their heterosexual counterparts, often have mental disorders and histories of being abused or neglected as children; they also tend to exhibit secondary abusive behaviors, like excessive alcohol or drug use.⁴²⁶ The sparse research on substance abuse among homosexual batterers suggests that it is just as prevalent as among heterosexuals.⁴²⁷ According to Renzetti, “A lesbian motivated to drink (or use drugs) because she believes the alcohol (or drug) makes her more powerful and assertive may act out these beliefs by becoming abusive toward her partner while under the influence.”⁴²⁸ Substance abuse and past experiences of family violence are probably facilitators, not causes, of lesbian partner abuse,⁴²⁹ and allowing an offender to lean on such problems as a crutch defeats the goal of making her accept responsibility for her aggressive conduct. Nevertheless, contextual problems like substance abuse, mental illness, and the effects of childhood trauma must be addressed before she can become fully rehabilitated and unlikely to reoffend.

423. See Morrison, *supra* note 103, at 94.

424. RENZETTI, *supra* note 409, at 128.

425. 89 ILL. ADMIN. CODE tit. 89, § 501.30(b)(7) (2016) (emphasis added).

426. See Ned Farley, *A Survey of Factors Contributing to Gay & Lesbian Domestic Violence*, in *VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS* 35, 36 (Claire M. Renzetti & Charles Harvey Miley eds., 1996); see also Rohrbaugh, *supra* note 389, at 295 (discussing Farley’s findings).

427. See Bennett & Bland, *supra* note 257, at 9 (summarizing the extant studies).

428. RENZETTI, *supra* note 409, at 66.

429. See *id.* at 116–17.

2. Intimate-Partner Abuse by Gay Men

A growing body of scholarship on masculinities emphasizes that “violent acts affirm the offender’s normative masculinity, and can be perpetrated on men as well as women.”⁴³⁰ In their pioneering book on intimate-partner abuse by gay men, David Island and Patrick Letellier argue that gay male batterers confuse being male with negative images of masculinity in American popular culture:

For some men, becoming nonviolently masculine in our society is difficult because in many ways our society links masculinity *with* violence. Hollywood, television, sports, the military, advertising, music, and many visible male heroes and leaders are all guilty of making this unfortunate connection Negative ideas about masculinity popular in America include acting tough at all times, not showing tender feelings at all. The lean, mean, super-cool, stoic cowboy is a perfect example of this (distorted) Hollywood view of masculinity. Another particularly obnoxious interpretation of masculinity teaches men to get their way by flexing their muscles, drinking to excess, getting angry, and hitting people.⁴³¹

Island and Letellier characterize abusive gay men as insecure, jealous, controlling individuals who have trouble managing their anger and frustration and who overcompensate for their perceived weaknesses by using violence.⁴³² The “failed macho complex”⁴³³ that gay batterers exhibit is in many respects similar to that of heterosexual male abusers: “It is not difficult to ascribe to gay men who batter all of the values and characteristics of heterosexual male batterers who develop in a patriarchal culture.”⁴³⁴

In the final analysis, however, Island and Letellier generally eschew a gender-based, sociopolitical explanation in favor of a psychological

430. Giovanna Shay, *[Including But Not Limited To] Violence Against Women*, 42 Sw. L. Rev. 801, 809–10 & n.51 (2013). See generally Frank Rudy Cooper, “Who’s the Man?”: Masculinities, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671 (2009) (discussing how Terry stop-and-frisk procedures are often “masculinity contests” in which the police officer uses violence and harassment to subordinate other men); Harris, *supra* note 5, at 781–88 (explaining how the precariousness of masculine identity causes men to use violence against other men, as well as against women).

431. ISLAND & LETELLIER, *supra* note 406, at 50.

432. *Id.* at 76–80.

433. *Id.* at 51 (quoting EDWARD W. GONDOLF, RESEARCH ON MEN WHO BATTER: AN OVERVIEW, BIBLIOGRAPHY, AND RESOURCE GUIDE 4 (1988)).

434. *Id.* at 68. Other experts believe that abusive lesbians and gay men compensate for pain, insecurity, and self-loathing arising from internalized homophobia by seeking to dominate and inflict abuse on their intimate partners. See Dan Byrne, *Clinical Models for the Treatment of Gay Male Perpetrators of Domestic Violence*, in VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS, *supra* note 426, at 107, 109–10.

one: “Domestic violence remains best explained as caused by perpetrators, of either gender, who have serious psychological problems, as well as problems with power and control.”⁴³⁵ These authors advocate the psycho-diagnostic categorization of gay batterers by treatment providers.⁴³⁶ Nevertheless, they contend, abusers engage in criminal conduct, and double messages that hold gay male batterers accountable, but blame “our screwed up society” for causing their behavior, are destined to be counterproductive.⁴³⁷ Island and Letellier thus favor a combination of mental health treatment and criminal liability for gay men who abuse their partners.⁴³⁸ Although their book was written more than twenty years ago, it may still contain the seeds of an improved approach that acknowledges structural influences on gay men’s behavior but seeks solutions in individualized treatment and monitoring ordered by a criminal court.

LGBT scholars often express concern about the punitive effect of the criminal justice response on non-traditional victims and its effacement of their objectives in calling the police. For example, Morrison argues that “[k]eeping a perpetrator employed, living at home and participating in family life, but not abusing, is often what a victim truly wants.”⁴³⁹ Although Morrison does not analyze the effectiveness of batterer intervention programs,⁴⁴⁰ BIP standards that address the particular context of gay and lesbian intimate-partner violence and that require separate groups or at least individual counseling sessions for same-sex offenders, depending on resources and demand, have the potential to achieve many LGBT victims’ goals.

Like heterosexual offenders, lesbians and gay men who abuse their partners probably fit several different psychological profiles. For this reason, they might be most effectively treated by a BIP that offers sever-

435. ISLAND & LETELLIER, *supra* note 406, at 254. Other scholars and practitioners suggest that “domestic violence must be understood as both a social *and* a psychological phenomenon” and that the two are “not necessarily mutually exclusive.” Gregory S. Merrill, *Ruling the Exceptions: Same-Sex Battering and Domestic Violence Theory*, in *VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS*, *supra* note 426, at 9, 14.

436. *See id.* at 60.

437. *See id.* at 60–63.

438. *Id.* at 85.

439. *Id.* at 151. Morrison is less confident than Island and Letellier that criminal justice solutions are appropriate. She blames governance feminism for entrenching a narrow, conventional, heteronormative approach to domestic violence and giving “police another reason to enter already over-policed communities and to arrest and prosecute those who are already most arrested and prosecuted.” Morrison, *supra* note 103, at 106. In her view, the system needs to adopt the values of the queer community, which would include training law enforcers and service providers to recognize gender fluidity and discard derogatory views of LGBT people. *See id.* at 135–46.

440. *See id.* at 158.

al curricular tracks, rather than a single feminist psycho-educational model, and that takes seriously the need for coordination with substance abuse and mental health treatment. This Article's recommendations for heterosexual programs are thus applicable to LGBT offenders with the added imperative of training BIP staff and providing special curricular content to address the causes and manifestations of same-sex partner abuse.

CONCLUSION

Throughout this Article, insights from masculinities studies guided the discussion of how men in earlier historical periods used wife-beating prosecutions to police other men and how, in recent times, the pressures that shape men's (and women's) behavior have been obscured by a mono-causal explanation of intimate-partner abuse as rooted in male dominance over women. At various points in American history, the government took steps to censure men who beat their wives. However, such efforts were usually made in service of larger sociopolitical objectives and relied on offender stereotypes to achieve their ends. The Puritans exhorted men to be good governors of their wives and children, lest bad family governance provoke the wrath of God against the whole community. The wife beater was sinful, unable to control his emotions—and, hence, less than a true man—and his wife often provoked his ungodly rage. However, the dual shaming and punishment of spouses who failed to live in harmony with each other neither protected victims, nor effectively prevented marital violence. In the late 1800s and early 1900s, Temperance crusaders identified alcohol as the root cause of domestic violence. The prosecution and punishment of wife beaters underscored the need to curb liquor selling and consumption. Moreover, the stereotype of the drunken brute who skipped work and beat his wife when he returned from the saloon used the social problem of wife beating to demarcate class and racial boundaries.

Starting in the late nineteenth century, feminists associated domestic violence with male dominance and gender inequality. The Battered Women's Movement of the late twentieth century took the greatest strides to harness the apparatus of the state to arrest and prosecute batterers. Yet, as in previous eras, battered women's advocates created a stereotype to achieve their ends. The image of the coercive, controlling male abuser was used to foster sweeping reforms. Court orders for domestic violence offenders to participate in intervention programs accompanied mandatory laws and policies requiring the police to arrest batterers and prosecutors to charge them with crimes.

In the area of domestic violence law enforcement, feminism has ceased to be a grassroots political reform campaign. It now exercises substantial influence over government action to arrest, convict, and punish offenders. From this position of authority, feminist-inspired policies risk entrenching the very hierarchies that feminism sought to combat. BIPs offer a means of reducing reliance on imprisonment to make batterers accountable for their crimes and to protect their victims from re-assault; yet state standards for batterer intervention have evolved too slowly and incompletely to achieve these goals with regard to the diversity of individuals that mandatory arrest laws bring into the criminal justice system. This Article has argued that court-mandated batterer intervention should be modified to account for offenders, including heterosexual women and same-sex abusers, who do not neatly fit the feminist paradigm; the contextual factors contributing to intimate-partner abuse; and the need to develop new approaches to prevent recidivism by high-risk male offenders who are ineffectively reached by the leading feminist curriculum. Feminism played an essential role in bringing intimate-partner abuse to the forefront of public attention and governmental action, but it is now time to abandon the stereotype of the coercive, controlling, heterosexual, male batterer in favor of a more nuanced understanding of why domestic violence occurs, what behavior it encompasses, and how it can be prevented.

APPENDIX A:**CITATIONS TO STATE AND LOCAL STANDARDS FOR BATTERER INTERVENTION PROGRAMS****Alabama**

- E-mail from Jawandalyn Brooks, Project Dir., Ala. Coal. Against Domestic Violence, to Jennifer Sisk, research assistant to Carolyn B. Ramsey, Professor of Law, Univ. of Colo. Law Sch. (March 25, 2015) (noting that standards have been removed and reforms are under consideration).

Alaska

- ALASKA ADMIN. CODE tit. 22, §§ 25.010–25.090 (1998).

Arizona

- ARIZ. ADMIN. CODE §§ R9-20-201–R9-20-208 (2013).

California

- SAN DIEGO CTY. TASK FORCE ON DOMESTIC VIOLENCE, TREATMENT AND INTERVENTION STANDARDS.
- SANTA CLARA CTY. PROBATION DEP'T, STANDARDS FOR BATTERERS PROGRAMS AND CERTIFICATION (2014).

Colorado

- COLO. DOMESTIC VIOLENCE BD., STANDARDS FOR TREATMENT WITH COURT ORDERED DOMESTIC VIOLENCE OFFENDERS (2005).

Delaware

- DEL. DOMESTIC VIOLENCE COORDINATING COUNCIL, DOMESTIC VIOLENCE INTERVENTION STANDARDS (2012).

Florida

- FLA. STAT. ANN. § 741.325 (West 2014.)
- BATTERER INTERVENTION CERTIFICATION MINIMUM STANDARDS, FL. ADMIN. CODE, Ch. 65H-2 (2007) (rule repealed, but providers may continue to use it as a guide to best practices).

Georgia

- GA. COMP. R. & REGS. 125-4.9.01–125.4.9.14 (2003).

Hawaii

- CHILD & FAMILY SERV., PARENTS & CHILDREN TOGETHER, AND HAWAI'I ST. JUDICIARY, FIRST CIRCUIT, HAWAI'I BATTERER INTERVENTION PROGRAM STANDARDS (2010).
- CHILD & FAMILY SERV., DOMESTIC VIOLENCE CLEARINGHOUSE & LEGAL HOTLINE, HAWAII ST. JUDICIARY, FIRST CIRCUIT, HAWAII ST. COAL. AGAINST DOMESTIC VIOLENCE, PARENTS & CHILDREN TOGETHER, DOMESTIC VIOLENCE TASK FORCE GROUP, AND DOMESTIC VIOLENCE WORKING GROUP, HAWAII BATTERERS INTERVENTION PROGRAM STANDARDS FOR THE ISLAND OF OAHU, HAWAII (2002).

Idaho

- IDAHO COUNCIL ON DOMESTIC VIOLENCE & VICTIM ASSISTANCE, MINIMUM STANDARDS FOR DOMESTIC VIOLENCE OFFENDER INTERVENTION PROGRAMS (2011).

Illinois

- ILL. ADMIN. CODE. tit. 89, § 501 (2001).

Indiana

- IND. COAL. AGAINST DOMESTIC VIOLENCE, MINIMUM STANDARDS FOR BATTERERS' INTERVENTION PROGRAMS CERTIFICATION AND IMPLEMENTATION GUIDANCE (2015).
- IND. COAL. AGAINST DOMESTIC VIOLENCE, MINIMUM STANDARDS FOR BATTERERS' INTERVENTION PROGRAMS BIP PARTICIPANT NOTICE OF RIGHTS (2015).

Iowa

- IOWA DEP'T OF CORR., STANDARDS FOR IOWA DOMESTIC ABUSE PROGRAM (2014) (on file with author).

Kansas

- KAN. OFFICE OF ATTORNEY GEN., BATTERER INTERVENTION PROGRAM (2012–2016).

Kentucky

- KY. CABINET FOR HEALTH & FAMILY SERVS., DEP'T OF CMTY. BASED SERVS., BATTERER INTERVENTION (2013).

Maine

- 03-201-15 ME. CODE R. §§ 1–6 (LexisNexis 1998).

Maryland

- GOVERNOR’S FAMILY VIOLENCE COUNCIL, OPERATIONAL GUIDELINES FOR ABUSER INTERVENTION PROGRAMS IN MARYLAND.

Massachusetts

- COMMONWEALTH OF MASS., EXEC. OFFICE OF HEALTH & HUMAN SERVS., DEP’T OF HEALTH, GUIDELINES AND STANDARDS FOR THE CERTIFICATION OF INTIMATE PARTNER ABUSE EDUCATION PROGRAMS (2015).

Michigan

- GOVERNOR’S TASK FORCE ON BATTERER INTERVENTION STANDARDS, BATTERER INTERVENTION STANDARDS FOR THE STATE OF MICHIGAN (1998).

Minnesota

- MINN. STAT. § 518.B02 (2014).

Missouri

- MO. COAL. AGAINST DOMESTIC & SEXUAL VIOLENCE, STANDARDS AND GUIDELINES FOR BATTERER INTERVENTION PROGRAMS INCLUDING A SELF-EVALUATION TOOL FOR BATTERER INTERVENTION PROGRAMS (2006).

Montana

- MONT. CODE ANN. §§ 45-5-206, 45-5-231– 45-5-234 (West 2012).

Nebraska

- NEB. DOMESTIC VIOLENCE SEXUAL ASSAULT COAL., DOMESTIC VIOLENCE OFFENDER PROGRAM STANDARDS (2012).

Nevada

- NEV. ADMIN. CODE, § 228 (West 1998).

New Hampshire

- GOVERNOR'S COMM'N ON DOMESTIC & SEXUAL VIOLENCE, BATTERERS INTERVENTION SUBCOMM., BATTERERS INTERVENTION STANDARDS (2002).

New Jersey

- N.J. COAL. FOR BATTERED WOMEN, BATTERER'S PROGRAM STANDARDS (2004).

New Mexico

- N.M. DOMESTIC VIOLENCE OFFENDER TREATMENT/INTERVENTION, PROGRAM STANDARDS (2013).

North Carolina

- 17 N.C. ADMIN. CODE .0701 (West 2016).

North Dakota

- N.D. ADULT BATTERER TREATMENT FORUM, NORTH DAKOTA ADULT BATTERER TREATMENT STANDARDS (2012).

Ohio

- SUPREME COURT OF OHIO, COURT CHECKLIST FOR BATTERER INTERVENTION PROGRAMS.

Oklahoma

- OKLA. ADMIN. CODE §§ 75:25-1-1-75:25-1-5 (2011).

Oregon

- OR. ADMIN. R. 137-087-0000 (2016).

Rhode Island

- BATTERER'S INTERVENTION PROGRAM STANDARDS OVERSIGHT COMM., BATTERER'S INTERVENTION PROGRAM COMPREHENSIVE STANDARDS (2007).

South Carolina

- S.C. DEP'T OF SOC. SERVS., STANDARDS OF CARE FOR BATTERERS TREATMENT (2005).

Tennessee

- TENN. COMP. R. & REGS. 0490-1-.01-0490.1.09 (1999).

Texas

- TEX. DEP'T OF CRIMINAL JUSTICE CMTY., JUSTICE ASSISTANCE DIV., BATTERING INTERVENTION AND PREVENTION PROGRAM (BIPP) ACCREDITATION GUIDELINES (2014).

Utah

- UTAH DEP'T OF HUMAN SERVS., OFFICE OF LICENSING, OUTPATIENT TREATMENT RULES CHECKLIST (1998), <http://hslic.utah.gov/docs/checklist%20%20outpatient%20treatment.pdf>.
- UTAH DIV. OF CHILD & FAMILY SERVS., DOMESTIC VIOLENCE PRACTICE GUIDELINES (2010).

Vermont

- VT. DEP'T OF CORR. AGENCY OF HUMAN SERVS., VERMONT DOMESTIC ABUSE TEAMS AND PROGRAMS.
- VT. COUNCIL ON DOMESTIC VIOLENCE, VERMONT STATEWIDE STANDARDS FOR PROGRAMMING FOR MEN WHO BATTER WOMEN (2010).

Virginia

- VA. SEXUAL & DOMESTIC ACTION ALL., VIRGINIA STANDARDS FOR BATTERER INTERVENTION PROGRAMS (2010).

Washington State

- WASH. ADMIN. CODE § 388-60-0245 (2001).

Washington, DC

- COURT SERVS. & OFFENDER SUPERVISION AGENCY FOR D.C., STRATEGIC PLAN FISCAL YEARS 2014–2018 (2013).

West Virginia

- W.VA. CODE R. §§ 191-3-1–191-3-3 (2003).

Wisconsin

- WIS. BATTERERS TREATMENT PROVIDER ASS'N, WIS. COAL. AGAINST DOMESTIC VIOLENCE, MALE BATTERERS TREATMENT STANDARDS FOR WISCONSIN BATTERERS TREATMENT PROVIDER ASSOCIATION (2007).

Wyoming

- GOVERNOR'S DOMESTIC VIOLENCE ELIMINATION COUNCIL, STANDARDS FOR MALE BATTERER INTERVENTION IN THE STATE OF WYOMING (2010).