Introduction

The telephone rings. Your daughter—or sister, or friend—is on the other end, describing how her partner abused her and asking for your advice. What would you tell her? To call the police, press charges, seek a protective order or divorce? The chances are good that one of the options that immediately came to mind involved the legal system. Even if your initial response was not legal, it is virtually certain that if your daughter or sister or friend chose to disclose the abuse to anyone else, she would come into contact with the legal system at some point. While shelter, counseling, and other services are available for women subjected to abuse, no other intervention is as frequently invoked as the law—indeed, access to other services may only be available if a woman subjected to abuse pursues some sort of legal remedy against her partner. Women subjected to abuse are steered toward the legal system, assured that the system will keep them safe, offered a proscribed set of choices reflecting prevalent notions of what an appropriate intervention in a case involving domestic violence should be, and expected to choose one of those options.

That there is a legal response to domestic violence at all is, for some, a victory in and of itself. Historically, domestic violence was treated as a private affair, an extension of the husband’s right to control the behavior of his wife, to be handled within the confines of the home. Only in the last 40 years or so has American society—pushed by the feminists, activists, and women subjected to abuse who made up the early battered women’s movement—acknowledged that public systems and institutions have a responsibility to address abuse, and chosen the legal system as the primary vehicle for doing so.

Convinced that the state should intervene on behalf of women subjected to abuse, advocates urged the state to assume responsibility for policing and prosecuting domestic violence. The drive to criminalize domestic violence, the focus on police response, and the development of civil and criminal laws specifically designed to address domestic violence were policy choices proposed and endorsed by many, although not all, within the battered wom-
en’s movement. These policy initiatives dovetailed with a growing societal desire to get “tough on crime” and attracted backers interested in channeling resources into police and prosecution. The Violence Against Women Act of 1994 articulated the state’s priorities in addressing domestic violence: law-related services, particularly within the criminal justice system, received exponentially greater funding than counseling, shelters, transitional housing, or other non-legal assistance for women subjected to abuse.

This turn to the law was consistent with the worldview of the women advocating for state involvement in combating domestic violence. The early battered women’s movement was a feminist movement, and feminism has long relied on the law to redress women’s subordination. The equality feminists of the 1970s turned to the courts to fight laws and policies that treated men and women differently in a variety of contexts, including receipt of alimony, administering estates, serving on juries, and eligibility for public benefits. Feminists fought for equality in the workforce and education, giving teeth to Title VII of the Civil Rights Act of 1964’s ban on discrimination in employment on the basis of sex and the requirement in Title IX of the Education Amendments of 1972 that men and women have equal access to a range of educational opportunities, from university admissions to high school athletics. While there has certainly been criticism of feminism’s reliance on the law, it is undeniable that using the law to fight discrimination brought huge gains for women throughout the 1970s and 1980s. That feminists would again turn to the law to address abuse in the home, therefore, was not terribly surprising.

The particular bent of domestic violence law, however, is attributable not to equality feminism, but to the prevailing feminist ideology of the 1980s and 1990s, when many of these laws were enacted: dominance feminism. Dominance feminists, led by law professor Catharine MacKinnon, contended that male domination of women in the sexual sphere was the primary vehicle for women’s continued subordination. MacKinnon argued that “our male-dominated society, aided by male-dominated laws, had constructed women as sexual objects for the use of men.” Dominance feminists cast the unwillingness of the law to confront issues of sexual harassment, rape, and domestic violence as a manifestation of men’s assertion of dominion over the sexuality of women. But for all of its discourse around law as a reflection of male desires, norms, priorities, and mores, dominance feminists were surprisingly willing to rely on the law and on the men charged with enforcing the law—police, prosecutors, lawyers, and judges—to protect women from societal expressions of male domination. Dominance feminists seemed to assume that state
intervention on behalf of women would yield a net positive result, and, in keeping with that belief, turned to the state to fight women's subordination.

To justify the need for a state response, dominance feminists argued that women were victims of patriarchal authority within the home, an authority frequently asserted through the use of physical, psychological, and sexual violence without societal sanction or repercussions. Domestic violence was seen as part of a system of societal norms that granted men dominion over their homes and everything within them, including their families, norms that tacitly gave men the ability, if not the right, to use physical violence to maintain control over their possessions. Deeply held beliefs about the state's powerlessness to intervene in private family matters enabled men to abuse their wives with impunity. To break a man's hegemony over his abused spouse, dominance feminists argued, required the state to pierce the veil of privacy, to challenge men's presumptive authority to "discipline" their wives, and ultimately, to intervene in the life of the family using the power of the legal system to send the message that the continued domination and control of women through abuse would not be permitted by the state. These arguments have been spectacularly persuasive in erecting a criminal and civil legal response to domestic violence. Today, every state has both criminal and civil laws that enable the state to intervene on behalf of women subjected to abuse, provide women subjected to abuse with protection, punish men who abuse their partners, and consider domestic violence in a variety of legal settings.

The feminists who fought for laws and policies to address domestic violence looked at domestic violence through the lens of dominance feminism. That lens colored the advocacy choices that they made. Domestic violence law and policy reflects the influence of dominance feminism in its definitions of domestic violence, its images of "victims" and "perpetrators," its preference for separating women subjected to abuse from their partners, and its emphasis on the role of the state in righting power imbalances between women subjected to abuse and their partners. Legal definitions of domestic violence, informed by dominance feminism's conception of women as subordinated through force and the threat of force, focus disproportionately on physical abuse. Stereotypes of women subjected to abuse as passive, weak, and powerless grew from dominance feminism's theoretical construct of women as (potential or actual) victims. Within the domestic violence literature, the portrait of a subordinated woman in need of salvation anchored laws and policies that assumed that all women subjected to abuse do want or should want separation from their partners. That belief in the passivity
of women subjected to abuse and the state’s responsibility to intervene to save subordinated women has been used to justify mandatory interventions that deprive women subjected to abuse of autonomy and agency in the name of protection. These theories, and the policy choices that stem from them, have shaped the legal response to domestic violence: excessively focused on physical violence rather than the totality of a woman’s experience of abuse, concerned primarily with separating women from their partners, regardless of the effectiveness of such policies or the desires of individual women, and bound to stereotypes of women subjected to abuse that take power from individual women and validate intrusions on women’s autonomy.

The belief that the legal system is best placed to respond to domestic violence has become a cultural norm. That norm, in turn, has created expectations that women will use the legal system and that the system will provide women with the protection and support that they need. Both of those premises are open to challenge, however. The willingness of women subjected to abuse to use the legal system turns on a number of contextual variables, including race, class, sexual orientation, immigration status, relationship status, disability, geographic location, and previous experience with the law. Openness to engaging the system also varies by which part of the system is at issue—the criminal or civil justice system. The law is simply not a one size fits all solution. Moreover, legal remedies are sometimes insufficient to protect women subjected to abuse. The media are replete with stories of women who called the police, obtained protective orders, assisted with the criminal prosecution of their partners, or sought the assistance of the family courts, only to be further abused, sometimes fatally. Worse still, in seeking the assistance of the legal system, many women are forced to endure the scorn and skepticism of the police, prosecutors, lawyers, and judges they believed were there to help them.

The time has come to reevaluate the legal system’s responsiveness to the complex and variable needs of women subjected to abuse. One way to engage in such a reexamination is to shift the theoretical lens through which domestic violence law and policy is viewed. The dominance feminist perspective has been challenged by feminist theorists who argue that the experiences of individual women, rather than a stereotyped universal woman—the subordinated victim—must be at the center of feminist theorizing and policy-making. Anti-essentialist feminists argue that there is no unitary women’s experience; how women of color experience domestic violence may be vastly different from white women, or poor women different from those with greater means. The attempt to shoehorn all women’s experiences into that
of the über-woman, anti-essentialist feminists contend, has privileged the experiences of white, middle-class, heterosexual women over those of others. Instead, anti-essentialists argue, women stand at the intersection of the various identities that construct them: race, sexual orientation, socioeconomic class, disability, and other defining characteristics. Laws and policies must be attentive to this intersectionality; only then can those policies meet women’s needs. Although anti-essentialist feminism has taken root among feminist legal theorists, it has yet to permeate the legal structures, laws, and policies that make up the legal response to domestic violence.

Examining domestic violence law and policy through an anti-essentialist lens surfaces its underlying dominance feminist roots. Anti-essentialist feminist theory prompts questions about why the law defines domestic violence as it does and whose interests are protected (and whose ignored) by domestic violence law and policy. Anti-essentialism rejects the notion that one set of solutions is appropriate for every woman subjected to abuse, requiring instead that efforts to address domestic violence create space for individual women to express their own needs, goals, and values and make their own choices. Anti-essentialist feminism brings the voices of underrepresented women to the fore. Using this lens makes it difficult to defend a system that operates under a restrictive definition of domestic violence, sees all women subjected to abuse as the same, assumes that they all want the same things, and embraces a set of policies intended to serve these presumptive goals. After its dominance feminist assumptions have been unearthed and critiqued, anti-essentialist feminism provides a theoretical framework for reconstructing domestic violence law and policy and for seeking solutions beyond the legal system.

The question of whose goals the legal system serves is a crucial one. Even those women who find a modicum of safety through the legal system may find that the pursuit of those remedies comes at a very real price. The legal system’s response is structured around society’s goals in addressing domestic violence—inmediate deterrence and punishment of abusers and separation of abusers from their partners. But the goals of a woman subjected to abuse may be very different, and whether her interaction with the legal system is a positive one depends, in large part, on what her goals for the interaction are. In a 1997 article entitled "Arrest: What’s the Big Deal?” Barbara Hart, one of the founders of the battered women’s movement, articulated six goals for intervention by the legal system in cases involving domestic violence. Those goals were safety, first and foremost; followed by stopping the violence; holding perpetrators accountable; challenging the perpetrator’s belief in his right
to control his partner; restoration of women subjected to abuse—economically as well as to health, to life without fear, to relationships severed by the perpetrator; and enhancing the agency of women subjected to abuse. Those goals certainly make sense from the societal perspective, given that the legal system is charged with maintaining public order and ensuring that citizens comply with its laws. Indeed, most advocates for women subjected to abuse would likely agree with those goals, perhaps even in that order. A different question, though, is whether women themselves would agree with these priorities. Women subjected to abuse might not rank safety first among their goals, and different women would almost certainly make different choices at different times, which can make policymaking difficult, given the need to create laws that govern behavior throughout society. Women subjected to abuse might also suggest that a number of goals are missing, including the desire to maintain a relationship with a partner despite the abuse and the desire to co-parent with an abusive partner.

The battered women’s movement has ceded control over the responses to domestic violence, enabling the state, through the legal system, to take primary responsibility for addressing domestic violence and to determine the objectives of that response. Developing that legal response to domestic violence has profoundly shaped domestic violence policy. Millions of dollars have been poured into police and prosecution, parole and probation, and legal services. Funding has also flowed to research on the effectiveness of these interventions, research which questions just how well this money has been spent. In a zero-sum world of dollars for responses to domestic violence, overreliance on the legal system has stunted the development of other options.

This book will explore how the legal response to domestic violence evolved in the United States, why that response has proven problematic for many women, and what a better system might look like. Chapter 1 documents the growth of the legal response to domestic violence in the United States. The chapter begins with a discussion of dominance feminism and traces the dominance feminist influence on the evolution of domestic violence law and policy. The chapter also introduces the concept of governance feminism, explaining how feminists were able to so significantly influence the direction of domestic violence law and policy. The chapter then turns to a consideration of the disproportionate support for legal, particularly criminal, interventions to address domestic violence among feminists and politicians, leading to the passage of the Violence Against Women Act in 1994. The influence of the Violence Against Women Act’s funding priorities on
the societal response to domestic violence is explored, as are troubling issues created or exacerbated by the government response: the embrace of an essentialist vision of women subjected to abuse and the professionalization of the battered women’s movement.

Chapters 2 through 5 critique various aspects of the current legal response to domestic violence. Chapter 2 focuses on the definition of domestic violence in the law, examining how the groundbreaking work of psychologist Lenore Walker influenced the legal definition of domestic violence and grounded that definition in women’s experiences of physical abuse, an influence that continues today. The chapter then turns to more recent social science research defining domestic violence and examines why the law has been slow to incorporate these new understandings of domestic violence. The chapter argues that domestic violence law and policy could better reflect the lived experiences of women subjected to abuse by redefining abuse within the law and suggests a new definition. Chapter 3 turns to the stereotypes of women that currently infect the legal system and the ramifications of those stereotypes for women subjected to abuse who seek the system’s assistance. Chapter 3 maps the construction of the paradigmatic victim, a construction informed by Walker’s theory of learned helplessness and enshrined in the law through battered woman syndrome. The chapter ends with a discussion of the consequences of the failure to conform to this stereotype for women subjected to abuse. Chapter 4 explores the normative preference for separation-based domestic violence law and policy—the assumption that women should and do want to separate from their abusive partners and that they will separate from their partners given the opportunity to do so. The chapter highlights the risks of separation, details and examines the effectiveness of various separation-based remedies, and notes the paucity of assistance available to women who choose to remain in relationships with men who abuse. Finally, chapter 5 considers how mandatory policies, including mandatory arrest, no-drop prosecution, and mediation bans, operate to deprive women subjected to abuse of autonomy and agency when they come into contact with the legal system. The chapter concludes that these policies undermine a fundamental principle of the early battered women’s movement—the empowerment of women subjected to abuse—and details the ways in which women experience these policies as disempowering. These chapters all highlight the influence of the dominance feminist perspective on various aspects of the development of domestic violence law and policy, arguing that that orientation is in part to blame for the problems some women face when they turn to the legal system and that it explains why others choose not to use the system at all.
The final three chapters of the book advocate for a shift in our theoretical frame of reference from dominance to anti-essentialist feminism, and reconstruct domestic violence law and policy using that lens. Chapter 6 posits a set of anti-essentialist principles to guide the reconstruction of domestic violence law and policy, arguing for a system that is woman centered and attentive to the diversity among women subjected to abuse and that humanizes men who abuse, maximizes the options available for women subjected to abuse, and looks beyond the law both to aid women subjected to abuse and to address domestic violence. Chapter 7 imagines how a hypothetical case might move through an anti-essentialist legal system. Chapter 8 envisions an extra-legal response to domestic violence, one that provides women with opportunities to seek justice without employing the state-run justice system, creates opportunities for women’s economic empowerment, engages meaningfully with men who abuse their partners without subjecting them to state sanction, and enlists the wider community in establishing accountability for domestic violence.

The current legal response to domestic violence serves some women well. But it serves many women poorly, and some women not at all. Shifting the theoretical frame highlights problems within the system, provides a different vantage point for considering these issues, and spurs thinking about how to address them. If our goal is to create a system that is more responsive to women subjected to abuse, shifting perspectives is a good place to start.