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**Title**

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**Journal**

UCLA Women's Law Journal, 7(2)

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**Publication Date**

1997

**DOI**

10.5070/L372017673

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# INTUITION AND INSIGHT: A NEW JOB DESCRIPTION FOR THE BATTERED WOMAN'S PROSECUTOR AND OTHER MORE MODEST PROPOSALS

Linda G. Mills\*

The relation between two persons, which was, so to speak, co-natural to the feminine, becomes a process that has to be conquered. Woman has to seek out the values of exchange and communication, as does man, but for different reasons. He has to overcome the priority he gives to the accumulation, possession, or at best the exchange of objects, while she must avoid the risks of hierarchy and submission, of fusion between persons, of losing her identity in the impersonality of *one*.<sup>1</sup>

## I. INTRODUCTION

Many battered women's lawyers and advocates believe that the most effective method for eradicating domestic violence is to arrest, prosecute, and jail perpetrators of intimate abuse, regardless of a battered woman's<sup>2</sup> preference to avoid criminal intervention.<sup>3</sup> While this response may be appropriate for a small, or

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\* Assistant Professor of Social Welfare and Law, UCLA School of Public Policy and Social Research. Controversy cultivates friendship. Donna Wills welcomed my students into the Los Angeles County District Attorney's office and inspired a model program. Christine Littleton paved the way for a more radical approach. Michelle Ahnn and the dedicated editors of the *UCLA Women's Law Journal* richly contributed to my articulation. And finally, my friendship with Peter Goodrich always enlivens these polemics.

1. LUCE IRIGARAY, *I LOVE TO YOU: SKETCH FOR A FELICITY WITHIN HISTORY* 76 (Alison Martin trans., Routledge 1996).

2. I use the terms "victim," "survivor," and "battered woman" conveniently and interchangeably. No word adequately represents any woman's personal experience of intimate abuse. I therefore apologize for the essentializing quality of each of the terms, none of which are offered as generalizations.

3. See generally Lisa A. Frisch, *Research that Succeeds, Policies that Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209 (1992); Cheryl Hanna, *No Right to Choose: Mandated*

even growing number of battered women, I contend in this Essay that these essentializing policies do not respond to the unique needs of individual battered women. Instead, I propose alternative methods to the one-size-fits-all mandatory prosecution strategy which, in Irigaray's words, help to "avoid the risks of hierarchy and submission,"<sup>4</sup> and facilitate the battered woman's ability to recapture her identity. My goal is to design a criminal process that is flexible enough to help battered women realize their need to take affirmative steps to reduce the violence in their lives.

Domestic abuse affects each person differently. Many women stay in abusive relationships because they are culturally pressured to endure violence.<sup>5</sup> An Orthodox Jewish woman who files for divorce could be accused of violating Jewish law, even if she wishes to divorce her husband because he abuses her.<sup>6</sup> When experiencing abuse at the hands of men of color, African-American women, Asian Pacific women and Latinas must confront the layered identities of gender and culture in the context of a racist society prepared and ready to label or blame. African-American women and Latinas who complain that their partners are violent fear they will be ostracized for contributing to racial stereotypes.<sup>7</sup> Cultural pressures to identify with the larger Asian Pacific community may influence Asian Pacific women to fear rejection for revealing their secret.<sup>8</sup> Violence is all too often the price women may pay for preserving their cultural identity. In other cases, women stay because they are too scared, poor, or unskilled to leave,

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*Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

4. IRIGARAY, *supra* note 1.

5. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1251-65 (1991) (describing how women of color's specific "raced" and "gendered" experiences define and confine the interests of the entire group); see also Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1313-19 (1991) (discussing the Pacific-Asian community's denial of violence against women. Despite the diversity of Pacific-Asian cultures, their beliefs about the family and the role of women within the family work to make violence against women acceptable and result in the "legitimate" victimization of women).

6. Beverly Horsborough, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 174, 177-80 (1995) (examining "the blatant and more subtle forms of intra-group oppression in the Jewish culture that foster the mistreatment of women").

7. See Crenshaw, *supra* note 5.

8. See Rimonte, *supra* note 5, at 318-19.

or because they love a man who is only occasionally violent.<sup>9</sup> In addition, women who are sympathetic to the traumas of their violent partners, especially those who are aware of a history of abuse in the batterer's family, may experience their lovers' violence differently than those of us who are less tolerant or understanding.<sup>10</sup>

Mandatory arrest and prosecution policies, which are emblematic of a "law and order approach," are designed to fit a stereotypical battered woman's conundrum. Generally speaking, supporters of mandatory criminal interventions are most concerned with punishment under the guise of safety. As a result, they are less attentive to the often overriding financial, cultural, or emotional issues that plague battered women's lives.

Mandatory prosecution, like mandatory arrest, disempowers women by forcing a decision upon them without taking into account their individual needs. "Mandatory arrest" forces the police to detain a perpetrator of intimate abuse when there is evidence of violence such as bruises, cuts, or stab wounds. The battered woman's claims no longer matter<sup>11</sup> — the police arrest regardless. "Mandatory prosecution," sometimes called a "no-drop" policy, requires a prosecutor to bring charges against the batterer regardless of the desire of the battered woman to pursue the prosecution.<sup>12</sup> Some variation among no-drop jurisdictions does exist. A "hard" no-drop policy never takes the victim's preference into consideration. A "soft" no-drop policy permits victims to drop the charges under certain limited circumstances, such as if the victim has left the batterer.<sup>13</sup> In a hard no-drop jurisdiction, the battered woman's preference is irrelevant, ex-

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9. See Jim Hackler, *The Reduction of Violent Crime Through Economic Equality for Women*, 6 J. FAM. VIOLENCE 199, 205, 210-13 (1991) (arguing that economic factors which make it difficult for a woman to leave a dangerous family situation contribute to the potential violence); Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201, 205-06 (1996).

10. See EVAN STARK & ANNE FLITCRAFT, *WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH* 62-63 (1996) (describing sociologists Suzanne K. Steinmetz and Murray A. Straus' theory of the "family as a cradle of violence," first proposed in 1973).

11. See generally *The Symposium on Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992).

12. See Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?* 63 FORDHAM L. REV. 853 (1994); see also EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 171-86 (James A. Inicardi ed., 2d ed. 1996).

13. See BUZAWA & BUZAWA, *supra* note 12, at 175-81.

cept to the extent that she helps, or does not help, win the prosecutor's case.<sup>14</sup> In these situations, prosecutions are pursued against the batterer by forcing the woman to testify,<sup>15</sup> sometimes leading to recantion, blurring, or rearrangement of the facts by the victim.

If current abuse patterns continue, 50% of all women will be victims of domestic violence at some point in their lives.<sup>16</sup> Statistics aside, I too have been a victim. I never reported these incidents to the police, nor would I have prosecuted the two men who were abusive to me. If I had, I would have wanted the choice to proceed, or not to proceed, as I wished. Indeed, had anyone forced me to bring charges, I would have resisted them. When I shared my resistance to criminal intervention with other women, professional and non-professional, poor and middle class, of color and white, inside prison and out, far too many had never considered involving law enforcement, although they too had been stalked, struck, and even sexually tortured.<sup>17</sup> These invisible faces compel me to take this controversial stand in their (our) defense.<sup>18</sup>

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14. This problem is particularly acute in prosecutions of battered women for murder. According to several women inmates at the California Institution for Women at Frontera, California, prosecutors do not take the time to discern what actually happened — they are only interested in obtaining a conviction. These inmates complain that the history of battering almost always goes undetected by prosecutors.

15. One study reports that 92% of prosecutorial agencies will use their subpoena power to require victim testimony. See BUZAWA & BUZAWA, *supra* note 12, at 179. See also FAMILY VIOLENCE DIVISION, L.A. COUNTY DISTRICT ATTORNEY'S OFFICE: PLEDGE TO VICTIMS (1996) ("We hope to convince you to cooperate with our efforts, but *we will proceed with or without your cooperation . . .*").

16. See Corsilles, *supra* note 12, at 854 n.6 (citation omitted).

17. My work in domestic violence and women's freedom of expression within it often generates intimate conversations between myself and other victims. I have worked with battered women in numerous capacities, and this experience has given me additional insight into a battered woman's experience. As Executive Director of The Hawkins Center of Law and Services for the Disabled, I often represented battered women in their efforts to obtain Social Security disability benefits. In connection with this work, battered women shared the intimate details of their violent lives. More recently, my work has focused on supervising students who work with battered women, both in a restraining order clinic in Santa Monica and in the Los Angeles District Attorney's office. In addition, I have received a federal grant titled, "Training for Child Welfare Workers," in which I have designed an empowerment intervention strategy for child protective services workers whose caseloads involve battered women. In connection with this grant, I am meeting with "Convicted Women Against Abuse," a victim group at the California Institution for Women. We discuss issues such as mandatory arrest and prosecution, which they generally favor.

18. Many battered women's advocates believe this topic is taboo and should not be the subject of public discourse. Like abortion advocates, they fear that any expression of doubt or misgiving will empower our opponents to advocate for political

This Essay explores three correlative themes. First, I contend that far too many battered women silently suffer at the edge of love's cliff and that their silence should be met with love, not fear, and connection, not rejection. Second, I argue that domestic violence advocates and prosecutors should begin to understand that each battered woman's story demands a specialized and tailored response. Finally, I suggest, within the limited context of the American criminal justice system, a model for rethinking prosecution strategies in intimate abuse cases.<sup>19</sup>

## II. THE NEED FOR A FLEXIBLE APPROACH TO DOMESTIC VIOLENCE

The multifaceted nature of domestic violence demands that we adopt a more flexible approach to this problem. I begin with the assumption that many battered women deny that their intimate relationships are violent. For some women, a police response to a domestic violence call or prosecution forces them to realize that they have been abused and have legal recourse. However, for other women, such criminal intervention reinforces their denial by sending them further underground. In the 1980s, one study revealed that less than 15% of battered women report severe incidents of violence.<sup>20</sup> My concern is that the other 85% of battered women never report the abuse for fear that they will be met with a response which takes the violence "out of their control."

A small but growing number of feminists are beginning to worry that universally applied strategies, such as mandatory prosecution, cannot take into account the reasons women stay in

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indifference. I believe these conversations are necessary to ensure the safety of those battered women whose lives are literally threatened by the intensified intervention of law enforcement.

19. In other work, I have described a completely new model for domestic violence justice, which I call a domestic violence commission. See Linda Mills, *Empowering Battered Women Transnationally: The Case for Postmodern Interventions*, 41 SOC. WORK 261, 265-66 (1996) [hereinafter Mills, *Empowering Battered Women*] (proposing domestic violence commissions that acknowledge the shifting uncertainty of a survivor's experience). My previous research also has explored the relationship between battered women's advocates, including lawyers, and the victim. See Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1257-60 (1996) [hereinafter Mills, *On the Other Side of Silence*] (describing the form that the relationship between advocate and client should take).

20. See RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 144, 258 (1988) (discussing results of The Second National Family Violence Survey conducted by Gelles and Straus in 1985).

abusive relationships<sup>21</sup> or the reasons for their denial.<sup>22</sup> These feminists fear that the State's indifference to this contingent of battered women is harmful, even violent.<sup>23</sup>

Ironically, results from studies which focus on mandatory interventions, such as arrest and prosecution, are indeterminate. The first study to assess the effectiveness of arrest on recidivism revealed that arrest did, in fact, reduce future violence.<sup>24</sup> This study inspired a national response as mandatory arrest became the call of battered women's advocates across the country.<sup>25</sup> Despite this initial finding, however, none of the subsequent arrest studies confirmed these results.<sup>26</sup> Although the studies revealed

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21. See Cynthia Grant Bowman, Comment, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201, 202-04 (1992).

22. Christine Littleton, *Women's Experience and the Problem of Transition*, in FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 261, 268-69 (Martha Minow ed., 1993).

23. By violent, I refer to the institutional violence inflicted through the competitive dynamic that dominates the relationships between the State, the survivor, and the batterer. The State, in its obsession to punish the batterer, often uses the battered woman as a pawn for winning the competition. This destructive dynamic is abusive in itself to the woman. See generally ROBERT COVER, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., University of Mich. Press 1st paperback ed. 1995) (1993). See also Peter Margulies, *The Violence of Law and Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 179, 184-88 (1996) (examining Robert Cover's perspective in civil and criminal remedies for woman abuse and the ambiguous relations between courts, violence and creation of the law). "[O]nce a survivor sets the remedial process in motion, there are partial constraints on her ability to restore the status quo." *Id.* at 184. For an insightful analysis of the shortcomings of the criminal process, see BUZAWA & BUZAWA, *supra* note 12, *passim*.

24. Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REP., Apr. 1984, at 1; Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 267 (1984) (describing field experiment on domestic violence where three police responses to simple assault were arrest, advise, or separation. Suspects' behavior was tracked for six months after the police intervention. Recidivism measures showed that the arrested suspect manifested significantly less subsequent violence).

25. See generally Peter Jaffe, *Impact of Police Charges in Incidents of Wife Abuse* 1 J. FAM. VIOL. 137 (1986).

26. These subsequent studies include: Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170 (1992); Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spouse Assault*, 83 J. CRIM. L. & CRIMINOLOGY 120 (1992); J. David Hirschel & Ira W. Hutchison III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73 (1992); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992).

that arrest deterred "good risk perpetrators,"<sup>27</sup> the studies documented that arrest actually increased violence to some women, particularly for those whose batterers were unemployed or had previously been arrested.<sup>28</sup>

The sole study of mandatory prosecution was done by Ford and Regoli ten years ago and involved 480 cases in Indiana.<sup>29</sup> It also revealed that mandatory prosecution may be harmful to women in some cases. Indeed, the researchers found that a battered woman was most likely to ensure her subsequent safety when she could drop the charges and yet chose not to.<sup>30</sup> Ford and Regoli

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27. See Berk et al., *supra* note 26, at 181; Sherman et al., *supra* note 26, at 167-68 (describing good risk perpetrators as those who had ties to the community. Marriage, military service and employment status were key indicators of such ties).

28. These studies revealed complex results. To better understand the tradeoffs between policies for employed and unemployed batterers, and arrest or warnings, researchers have performed a cost benefit analysis. Assuming most batterers arrested were employed, a pro-arrest approach would contribute to lowering incidents of repeat violence. However, in Milwaukee, where most of the suspects were unemployed, mandatory arrest actually failed to produce the greatest good for the greatest number. See Sherman et al., *supra* note 26, at 160; see also Berk et al., *supra* note 26, at 198-200.

Despite these subsequent studies, no refinement of mandatory criminal policies has been proposed. Indeed, the call for a unidimensional mandatory approach continues nationwide. See Hanna, *supra* note 3; see also Corsilles, *supra* note 12.

29. David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 150-51 (N. Zoe Hilton ed., 1993) (describing a study involving 480 men charged with misdemeanor assault of a conjugal partner. These men were assigned to one of three tracks: diversion, prosecution with a recommendation of counseling, and prosecution with presumptive sentencing. The study found that the type of prosecution policy employed in a case can affect batterer behavior). Ford and Regoli also found that victims in the drop-permitted category who chose not to prosecute had the greatest risk of reabuse, even greater than those who were placed in the no-drop prosecution category. *Id.* at 156.

30. *Id.* However, the generalizability of Ford and Regoli's results is limited. First, they looked only at "eligible" misdemeanor assault cases; they did not consider cases involving defendants with prior records of violence against the victim, defendants with criminal histories of felony violence, or defendants who posed a serious threat of imminent danger. Second, only some victims in the study were actually permitted to drop the charges. The victims who filed the complaint themselves were allowed to drop the charges if they wished, whereas those victims whose complaints were filed by the police, rather than the victims themselves, were not allowed to drop the charges. Third, the study did not examine the effects of what happened in a case, only how the case was tracked (i.e., diversion, prosecution with a recommendation of counseling, and prosecution with presumptive sentencing). Finally, the small sample of 480 defendants as well as regional variations limit the generalizability of their results to other jurisdictions. See also Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, CRIM. JUST. & BEHAV. (forthcoming 1997) (on file with author).



explained that under these conditions, the battered woman could express her power in the situation and such expression had a positive effect on the battering relationship by actually decreasing the violence in her life.<sup>31</sup>

So why have we implemented policies that actually increase the violence in some battered women's lives? Such policies largely are in effect due to the lobbying efforts of battered women's and feminist organizations.<sup>32</sup> They believed a strong stance taken by the State would deter violence. They believed that a policy where the State prosecutes men for beating their neighbors, but does not prosecute men for beating their wives, is unfair. Until prosecutor's offices are willing to cooperate in studies which will reveal whether no drop prosecution policies actually decrease or increase violence to all women, and until we have evidence that state intervention is in fact a deterrent to all intimate abuse, we must implement a more flexible approach when criminalizing domestic violence.

Mandatory prosecution might initially appear to be a simple and preferable solution to domestic violence because it is easier to follow and forces police and prosecutors to take domestic violence seriously.<sup>33</sup> However, the problem is that the policies backfire. When we force arrest and prosecution on battered women, they often recant and lie. One prosecutor in Los Angeles, who will remain anonymous, estimated that most battered women are reluctant witnesses who are willing to perjure themselves when they are put on the stand against their will.<sup>34</sup> Perversely, in all

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31. Ford & Regoli, *supra* note 29, at 157. Ford and Regoli hypothesized that victims who chose not to drop the charges in a drop-permitted jurisdiction were the most likely to experience increased safety due to the victim's "personal power." They suggest that the power is derived from three sources: using the prosecution as a bargaining chip with the batterer, providing women with a means of allying with others including the police, prosecutors, and judges, and providing women a voice in determining sanctions against the batterer. *Id.*

32. I am one of few feminists who have spoken out against mandatory policies. In the 1996 UCLA School of Law Legislative Forum held on September 27, 1996, at the UCLA School of Law, which sparked this Essay, support for mandatory prosecution was well articulated by the Los Angeles County District and City Attorneys' Offices and by California Assemblymember Sheila Kuehl. I was the sole voice advocating for a more tempered response.

33. History tells us that without mandatory arrest and prosecution, the police, and even prosecutors, are reluctant to take domestic violence seriously. As recently as 30 years ago, injunctions were only available to "married" women and no criminal penalties against a spouse ensued from violation of that injunction. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 52-53 (1992).

34. Interview in Los Angeles, Cal. (Jan. 28, 1997) (notes on file with author).

too many cases, the effect of mandatory policies is to align the battered woman with her batterer, to protect him, and to further entrench her in the abusive relationship. The State, even with a policy of mandatory prosecution, cannot ensure that the batterer will be locked away forever, nor can it ensure that the battered woman will be free from his violence. Therefore, it is critical we teach the battered woman to yearn for her safety and to take whatever internal and external steps are necessary to achieve it.

Ironically, the opportunity to make that choice may be just the power the battered woman needs to stop the violence in her life. The decision regarding whether to prosecute may be her first opportunity to take an affirmative step in a relationship in which she previously has felt powerless. A system is needed that allows her this control, rather than replacing, as so often seems to be the case, the control of the batterer with the control of the prosecutor.

I suggest inflexible policies must be reformed to reflect the diversity of battered women's experiences and to expose the possibility that some battered women will need a legal response that does more than arrest and prosecute the batterer. Some battered women need a response that is intuitive to and insightful of their personal conundrum. I believe we should have a system that is flexible enough to respond to these varying needs when necessary. We need to recognize the hidden strengths of battered women and to acknowledge the need for legal interventions that help them find ways to reduce the violence in their lives.

Under such a system, women would be invited to file complaints in informal and confidential settings: with social workers

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Don Rebovich has studied the problem of conflicts between prosecutor and victim in no drop prosecution. He reports that many large prosecutor's offices had considerable problems with uncooperative victims. Thirty-three percent of the prosecutors who responded claimed that over 55% of their cases involved uncooperative victims. Sixteen percent of them believed that 41-55% of their victims were uncooperative and 27% of the respondents believed that 26-40% of their victims were uncooperative. Only 27% of the prosecutors reported a 0-25% lack of cooperation by victims. See BUZAWA & BUZAWA, *supra* note 12, at 179 (citing Rebovich's 1994 study).

These statistics could mean one of two things: either the victim is too afraid to testify or she isn't ready to prosecute. If she is too afraid, the prosecutor should negotiate a safe situation with her; if she is not yet ready, the prosecutor should respect her desire to choose, relying on the assumption that when she is ready, she will take the necessary steps not only to prosecute, but to change her life. This analysis assumes that victims are capable of acting on their own behalf, an assumption not held by many prosecutors or battered women's advocates who support mandatory interventions.

in hospital emergency rooms, at women-run police facilities,<sup>35</sup> or on battered women's hotlines. These reports could be retained for verification of patterns of abuse. For women who want them, restraining orders and other legal remedies would be available. Other safety measures, including shelter stays and house surveillance, would be available on request through battered women's service centers. Criminal or civil actions could be provided, but would be pursued only when and if the battered woman is physically and emotionally prepared to take that step.<sup>36</sup> This kind of flexible system could effectively combat domestic violence by empowering battered women to design their own course of action to eradicate violence from their lives. Battered women need an array of options and a timeline that respects the uncertainty generated by conflicting loyalties. If they are not given the opportunity to leave their batterers at their own pace, then they may face more abuse, and possibly death.

Such a flexible approach, which I term an "affective" approach, requires that our intervention strategies proceed without the prejudgment pervading current policies. It demands we accept that a battered woman may not yet be ready to acknowledge her denial and that we embrace her regardless of her desire to return to the abuse. It means we must take the time to nurture and empower the battered woman toward her own decision, rather than to compel her to do something she may not be ready to do.<sup>37</sup>

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35. I suggest women run police offices because law enforcement tends to be unsympathetic to female victims. Kathleen J. Ferraro, *Cops, Courts and Woman Battering*, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS* 165 (Pauline B. Bart & Eileen Geil. Moran eds., 1993). I believe that it is possible to train police officers, particularly female officers, to be sensitive to a battered woman's circumstance. In Sao Paulo, Brazil, the state's 41 women-staffed police stations have proven very effective in increasing the numbers of complaints filed by battered women. See Luiza Nagib Eluf, *A New Approach to Law Enforcement: The Special Women's Police Stations in Brazil*, in *FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD* 199, 204-12 (Margaret Schuler ed., 1992) (describing the innovative program adopted in Brazil).

36. See Mills, *Empowering Battered Women*, *supra* note 19, at 266 (describing these strategies in more detail).

37. This approach reminds me of my four month old son who must learn to self-soothe in order to sleep a full night. Feeding him the bottle every two hours on demand will never help him help himself to sleep.

### III. PERSONAL OBSERVATIONS OF PROSECUTORIAL AGENCIES<sup>38</sup>

Through my thirteen years of experience as a public interest lawyer and four years of experience in working on domestic violence issues, I have gained several insights into the work of prosecutors. Such reflections and observations are valuable in order to determine the best way to reform domestic violence criminal policy.

First, I have observed that prosecutorial agencies usually have difficulty responding in an individualized manner to domestic violence crimes, or to any crimes for that matter. Typically, prosecutors are trained to use a strategy of prosecution and jail time as a bargaining tool. As one prosecutor put it, she "had a bigger stick than the batterer" (the threat of incarceration), and she intended to use it.<sup>39</sup> This approach assumes incarceration is the only effective deterrent to future crime. Ironically, most batterers receive, on average, only a few days or a few weeks in jail.<sup>40</sup>

Second, prosecutors and other attorneys are trained in law schools which encourage unidimensional responses to social problems.<sup>41</sup> Law students are taught to value reason over emotion and objectivity over subjectivity. They are taught to value the written word, the law, more than the welfare of their clients.

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38. This section of the Essay focuses primarily on prosecutors. These suggestions, however, have implications for all law enforcement officers.

39. Comment by one of the Los Angeles prosecutors present at the UCLA School of Law Annual Legislative Forum (Sept. 27, 1996) (notes on file with author).

40. See Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 79 (1994); Hanna, *supra* note 3, at 1879; Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2166 (1995); Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 954 (1994).

41. Law schools tend to teach the law as the final solution to problem solving. It is always easier to rely on doctrine to solve societal ills, rather than on a multifaceted approach that deals with the real complexities of people's lives. See, e.g., Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 38 (David Kairys ed., 1990).

Numerous articles address the idea that law schools train students for a hierarchy which is embedded in male norms. See, e.g., Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 83 n.5 (1996); Peter Goodrich, *Twinings Tower: Metaphors of Distance & Histories of the English Law School*, 49 U. MIAMI L. REV. 901, 914-15 (1995).

Indeed, after three years of education and several more of working in a legal setting, some lawyers become even less comfortable addressing their clients' feelings.<sup>42</sup> This training has the unwitting effect of hardening prosecutors to the individual narratives of the victims who rely on them.

Third, and most compelling, I have observed that prosecutors are profoundly constrained by their work environments.<sup>43</sup> Budget and time limitations can force prosecutors to become mechanical, legalistic, and uninterested in those victims who are unwilling to help pursue a perpetrator. Prosecutors often are reluctant to take valuable time from their already overburdened schedules to help the victim come to terms with her abuse. After all, the State, not the victim, is the prosecutor's client. Their goal is to prosecute the defendant and to win. Therefore, their solutions to the problems of domestic violence are limited by these deeply ingrained constraints. Prosecutors have sometimes incorporated alternative remedies, such as mental health treatment, into their repertoire of solutions. However, they generally are unwilling to radically transform the legal system to address the unique nature of intimate abuse. To them, intimate abuse is just another crime.

Prosecutors generally oppose the suggestion that they should use more affective strategies when lawyering. Their most vigorous response is that "it's not our job." Furthermore, they contend that they are trained as lawyers and advocates for the State, not as social workers or therapists for the victims of crimes. Because of this lack of training, they argue that they are not

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42. Most lawyers, probably as many as 80%, avoid the feeling world altogether by doing legal work in areas other than public interest. *See, e.g.*, STACY M. DEBROFF, PUBLIC INTEREST JOB SEARCH GUIDE: HARVARD LAW SCHOOL'S HANDBOOK & DIRECTORY FOR LAW STUDENTS AND LAWYERS SEEKING PUBLIC SERVICE WORK 5 (6th ed. 1995) (documenting that 9-12% of Harvard's graduating class take public interest jobs immediately upon graduation and an additional 5% of each class begin their public service work after completing judicial clerkships). "Public interest" is defined broadly to include "public spirited service" on behalf of individuals and causes often not served by the for-profit bar and entailing financial sacrifice. *Id.* at 7. I am assuming that law graduates at other law schools show similar or parallel interest. *See also* Mills, *On the Other Side of Silence*, *supra* note 19, at 1228-29 (arguing that lawyers can be trained in the techniques of "Affective Lawyering," which gives the lawyer the tools necessary to "crawl inside" their clients and feel the oppression neither the lawyer nor the client may have the language to vocalize).

43. This observation is consistent with the research on organizational behavior. *See, e.g.*, Joseph A. Nunn, Professional and Lay Respondent Attitudes Toward Status Offenders 86-93 (1990) (unpublished Ph.D. dissertation, University of California (Los Angeles)) (on file with author).

equipped to address the trauma of a victim's suffering. These arguments reject the notion that emotional aspects of lawyering are relevant or useful when prosecuting perpetrators of crime, especially intimate abuse crimes. In addition, each of these arguments parallels my observations discussed in this section regarding the prosecutor's approach to domestic violence.

In prosecuting perpetrators of crimes, especially intimate abuse crimes, the attorneys should deliberately embrace affectivity as a method for providing individualized treatment of victims and for understanding their particular circumstances. Lawyers cannot both compartmentalize their feelings and be effective advocates — prosecutors should commit to nurturing the victim emotionally, with the overall goal of reducing domestic violence. Prosecutors must recognize that domestic violence patterns will continue if the battered woman does not realize, in her own language, how she can “manage”<sup>44</sup> or escape the violence in which she is ensnared. Prosecutors' offices can no longer be solely concerned with prosecuting individual crimes. Law enforcement should be focused on seeing the larger criminal picture and its victims. Prosecutors should be committed to a grander vision of taking steps which have the possibility of helping women imagine a life without violence. An approach which takes into account the relationship between the two parties, perpetrator and victim, batterer and battered woman, is the only system likely to engage the parties long enough to have any long-lasting and significant effect.

The affective approach which I advocate has been successfully implemented in other countries. For example, in Great Britain and Australia, victims of juvenile crime are given the chance to confront their perpetrators and to impose their own sentences.<sup>45</sup> In a recent example in England, a victim confronted a 16 year old burglar. After some initial resistance, the victim felt sympathetic toward the youth and asked only for an apology and a promise that he stay in school. On reflection, the burglar felt he had done something wrong and felt badly about it. “I

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44. Battered women “manage” the violence in countless ways. The most intriguing method I have heard of is that some women actually drug their batterers' drinks in the effort to take the edge off his violence.

45. Jo Knowsley, *Victims Come Face-to-Face with Offenders: Juveniles “Sentenced” by People They Tormented*, SUNDAY TELEGRAPH, Oct. 13, 1996, at 8. Cf. EDWARD HUMES, *NO MATTER HOW LOUD I SHOUT: A YEAR IN THE LIFE OF JUVENILE COURT passim* (1996) (describing juvenile justice in Los Angeles and the pressing need for this kind of institutional change).

promised [the victim] that I would try and be a better person."<sup>46</sup> In New South Wales, Australia, where the program was first pioneered, they have seen a 50% reduction in the number of juvenile offenders in court and a 40% reduction in recidivism.<sup>47</sup>

#### IV. PROPOSALS FOR CHANGE

My observations of prosecutorial agencies demonstrate the limitations on what seems institutionally plausible. Hence, I begin with an interim proposal, a limited project which could be adopted by prosecutors who are interested in incremental change. Ultimately, however, a systemic change, one which suggests a dramatic restructuring of the prosecutor-victim relationship and which transforms the lawyer and the battered woman through a process of empowering the victim through her relationship with her attorney should be adopted.

##### A. *An Interim Proposal*

Given the resistance described above, an interim proposal for reform would involve only minimal change on the part of prosecutors. Prosecutors should move toward affectivity by connecting with the victims of the crimes they prosecute. Prosecutors should use the emotional involvement which comes naturally to a "sensitive" lawyer rather than remaining emotionally detached. I suggest that the prosecutor working on domestic violence cases become aware of the special emotional issues battered women are likely to face.<sup>48</sup> These needs are apparent because battered women enter the system particularly vulnerable<sup>49</sup> and shattered,

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46. Knowsley, *supra* note 45.

47. *Id.* I am not suggesting that domestic violence cases are easily disposed of with an apology. Instead I am suggesting that unique strategies should be devised that both take the crime of domestic violence seriously and respect the battered woman's needs and wishes when inflicting punishment on the batterer.

48. One prosecutor, who will remain anonymous, complained that battered women are too traumatized when they enter the system and that they should be "more together." Telephone Interview (Jan. 7, 1997) (notes on file with author).

49. Battered women are not the only vulnerable crime victims. Victims of stranger rape and other violent crimes also suffer from similar traumas. The difference is that battered women and victims of date rape know their perpetrators, making the circumstances of domestic violence and date rape unique. I vehemently disagree with those who argue that the circumstances of victims of domestic abuse or survivors of other crimes involving a perpetrator the victim knows are not unique. While in the end, both known and unknown perpetrators may receive similar sentences, the fact that the victim knows the defendant changes the complexion of the case. At the very least, prosecutors have to deal with the problem of the witness who is afraid to testify, for the perpetrator is privy to every intimate detail of her

and because the perpetrators often are inextricably intertwined in most, if not all, aspects of their lives. This change towards affectivity is necessary for reasons other than the laudable goal of helping the victim heal; it will also help obtain the victim's honest testimony. Without taking the time to work with the victim and to understand her unique dilemma, the prosecutor may alienate her — making her a reluctant or even perjurious witness.<sup>50</sup> Clearly, then, the affective dimensions of lawyering should be recognized and enhanced, ultimately making the prosecutor more effective in both prosecuting criminals and deterring future crime.<sup>51</sup> By connecting with the victim emotionally,<sup>52</sup> the prosecutor can create the possibility of having both a committed and credible witness, as well as a safer victim.

So what does it mean that prosecutors should be more emotional?<sup>53</sup> I have previously argued that "countertransference," a technique for critical self-reflection, is necessary when working with battered women.<sup>54</sup> Countertransference, a Freudian and Jungian invention, forces psychoanalysts and therapists to reflect on how their own life experience or story is evoked by the patient or client. In the legal context, prosecutors should rely on this technique to explore their own preconception or history of violence. This process would force prosecutors to feel what the victim evokes in them, emotionally speaking, to reflect on how those feelings become enmeshed in their reaction to the battered woman, and to understand why they might emotionally resist engaging the victim. Countertransference is helpful because, through its use, the prosecutor comes to understand how her un-

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whereabouts. See Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L.J. 27, 30-31 (1996).

50. The Los Angeles County District and City Attorney's offices estimate that over 50% of their victims "recant," which means that once they are forced to take the stand against their batterers, the victims deny ever being battered. Donna Wills, Head Deputy of the Family Violence Unit of the Los Angeles County District Attorney's Office, Presentation at the 1996 UCLA School of Law Legislative Forum (Sept. 27, 1996). Moreover, one prosecutor, who will remain anonymous, has suggested that cases are more successful when the woman recants, because juries tend not to believe battered women who tell their stories. Interview in Los Angeles, Cal. (Jan. 28, 1997) (notes on file with author). However, a successful prosecution of a batterer does not ensure a safe victim. Based on Ford and Regoli's tentative findings, the battered woman's honest testimony against the batterer may be the variable that keeps her safe. See *supra* text accompanying notes 29-31.

51. See Mills, *On the Other Side of Silence*, *supra* note 19, at 1228-29, 1258.

52. *Id.*

53. *Id.*

54. *Id.* at 1244 n.98 (describing the countertransference technique).



conscious assumptions and judgments about the victim may alienate her from the prosecutorial process and allows the prosecutor to engage the survivor to really begin the process of helping her help herself. Indeed, the ability to reflect on one's own history and to lend insight and intuition to the prosecution of a victim's batterer is so important that such qualities should be considered when hiring prosecutors to work with victims of domestic abuse.

Prosecutors working in domestic violence units should have access to therapists who could help them manage their own complex emotions which are likely to arise when working with victims of intimate abuse.<sup>55</sup> The therapist could assist the battered woman in becoming a credible and involved witness, as well as help the prosecutor who lacks the tools to work more directly with battered women.<sup>56</sup> Together, the lawyer's more emotional response and the resources of a trained therapist should accomplish the limited goal of engaging the victim. They also should be able to better involve her in the process of prosecuting the batterer. They could thereby initiate the healing process rather than adding to the victim's suffering by inflicting institutional violence.<sup>57</sup>

### B. *A More Radical Proposal*

This alternative therapeutic lawyering I have previously described is the ideal to which we should all strive. My next proposal goes beyond the countertransference, intuition, and insight suggested by the more modest proposal. Instead, it involves training prosecutors in social work or psychoanalytic techniques

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55. This suggestion was made by a prosecutor who will remain anonymous. Telephone Interview (Jan. 15, 1997) (notes on file with author).

56. My proposal is not to involve more victim's advocates who are hired to assist the victim through the criminal process. These advocates, based on my personal experience, work for the prosecutor's office and therefore are accountable to the institutional influences I have described. My proposal is to hire therapists who can assist the battered woman in making her own decision to testify. Therapists, having been trained in identifying countertransference, and without institutional pressures, should be better equipped to help the battered woman make an informed and safe decision. See Lori Heise & Jane Roberts Chapman, *Reflections on a Movement: The U.S. Battle Against Women Abuse*, in *FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD*, *supra* note 35, at 257, 272.

Currently, a special volunteer program at the Los Angeles County District Attorney's Office is being offered to UCLA law students who are interested in working on the emotional issues victims face which often prevent them from ensuring their own safety.

57. See *supra* note 23 and accompanying text.

so that they can fully incorporate these ideas into their practice. Under this model, prosecutorial agencies would require their deputies either to have joint degrees or to attend a semester-long training course in therapeutic techniques.

This training course must include skills in working through the following complex issues: the battered woman's need for flexibility, the challenge she faces in the conflict between her love or commitment to her batterer, her cultural identity, her need to forego safety in the face of seemingly more pressing concerns, and her desire to maintain a family despite the violence she tolerates. Issues such as racism and financial dependence should also be seen as relevant considerations that warrant attention. Therefore, prosecutors should be trained in techniques which would enable them to identify the specific conflict of a particular victim and to understand how this complex picture affects a victim's willingness or reluctance to testify against her batterer. The prosecutor's ultimate goal should be deterring future violence, not just prosecuting *this* crime.

If this radical proposal were to be adopted, prosecutors would be ready and able to represent both the State and the victim. They would be trained to make prosecutorial decisions based on the many voices a truly democratic process demands, in a way that is empowering and likely to help the battered woman actually avoid future violence. Thus, the prosecutors would be able to participate in effective crime prevention and in preventing violence against women.

## V. CONCLUSION

The criminal justice system must be overhauled to respond to the changing complexion of our class, cultural, and emotional landscape. The issue of domestic violence provides an opportunity to rethink how prosecutors work with victims, to rework the whole system of criminal justice, and to retool institutions to be prepared for the evolving environment. As Luce Irigaray suggests in the quote with which I began this Essay, the prosecution of domestic violence should capture the battered woman's identity instead of losing it, and should avoid the fusion or "impersonality of one"<sup>58</sup> that violence against women so often fosters.

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58. IRIGARAY, *supra* note 1.

