BOOK REVIEW

SURVIVING THE BATTERED READER'S SYNDROME, OR: A CRITIQUE OF LINDA G. MILLS' INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE[1]

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I. ON THE FORM OF ARGUMENT: "IF YOU THINK I'M WRONG, THAT PROVES I'M RIGHT, AND YOU'RE SICK."

In *The Interpretation of Dreams*, Sigmund Freud famously develops his theory of dreams as wish fulfillment. According to Freud, no matter how unwished-for our dreams may seem, they gratify our innermost desires. Freud analyzes a number of his own and his patients' dreams, giving more or less plausible interpretations of them as wish fulfillments. Eventually, he tells us a story of an old school-friend of his — now a barrister — who tells him he's been dreaming that he loses every single one of his cases. How, asks the barrister, could such dreams possibly be the fulfillment of his wishes? The barrister is sure he *doesn't* want to lose all the time. Though he's careful not to insult his friend, Freud explains to us that insofar as the barrister's dream appears

1. LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE (2003).

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to refute his theory, it actually proves it. The dream was the fulfillment of the barrister's repressed wish to see his (more successful) friend, Freud, fall flat on his theoretical face. Freud writes: "I evaded the issue by telling him that after all one can't win *all* one's cases. But to myself I thought: 'Considering that for eight whole years I sat on the front bench as top of the class while he drifted about somewhere in the middle, he can hardly fail to nourish a wish, left over from his school-days, that some day or other *I* may come a cropper.'"[3] Though few would mistake Linda Mills for a trained psychoanalytic theorist, she makes ample use of the psychoanalytic stratagem of purporting to dispose of objections by casting them as proof of both her theory and her opponent's psychoses. The central claim of Mills' book *Insult to Injury: Rethinking Our Responses to Intimate Abuse* is that, in the context of domestic violence, mandatory arrest and prosecution are very bad and restorative justice circles are, on the whole, very good. After quoting a number of authors who support mandatory policies because of the difficulty of telling whether a complainant's desire to drop charges is authentic or is a product of intimidation, Mills explains: "When professionals react this way, they may simply be expressing countertransference reactions: their unconscious need to silence or mask their own feelings of guilt, rage, and shame associated with violence in their own personal or even professional lives."[4]

A second core claim of Mills' book is that, in responding to domestic violence, it is wrong for the law to focus on men's physical violence to the exclusion of women's aggression.[5] Mills casts those who believe a complainant's alleged provocation of a domestic assault should be irrelevant to the law's response as likely to be engaged in unconscious projection and counter-transference.[6] Mills writes:

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3. SIGMUND FREUD, THE INTERPRETATION OF DREAMS 235 (James Strachey trans., Angela Richards ed., Penguin Books 1991) (1976).

4. MILLS, *supra* note 1, at 48.

5. For example, see *id.* at 76 where Mills writes: "Studies of women's aggression suggest that emotional abuse is one of women's most powerful weapons. If emotional abuse is such an integral part of physical violence, and even an independent threat, then why has it been completely ignored by the law?"

6. Discussion of projection and countertransference is peppered throughout the book, with a primary explanation of the theory located early in the work, *id.* at 51-57. In her discussion of transference and countertransference, Mills draws primarily on research done in the context of the client-therapist relationship, where the client is a holocaust survivor and the therapist may or may not be a holocaust survivor. Yael Daneili, *Confronting the Unimaginable: Psychotherapists' Reactions to*

> I believe that the focus on men's physical violence that mainstream feminists advocated, for the benefit of the judiciary and society, may actually have been a form of countertransference called projection — an unconscious effort by mainstream feminists to distance themselves from the abuse they could not face in their own lives and from their own abusive tendencies.[7]

Mills employs similar thinking to interpret others' disagreement with her. Mills tells us more than one story about how audiences were outraged by her presentations. She attributes their distaste to their symptoms. Mills writes: "Another example of projection involved an experience I had in 2001 when performing a typical academic function — delivering a paper."[8] It seems that the audience at this "prominent law school"[9] didn't like Mills' paper very much. Mills explains their negative response this way:

> Interestingly, each of the three professors who reacted most strongly to my argument that projection explained the juror's attitudes toward Brenda Aris[10] later revealed to me that they

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Victims of the Nazi Holocaust, in HUMAN ADAPTATION TO EXTREME STRESS: FROM THE HOLOCAUST TO VIETNA 219 (John P. Wilson et al. eds., 1988); Emanuel Tanay, *Initiation of Psychotherapy with Survivors of Nazi Persecution, in* MASSIVE PSYCHIC TRAUMA 219, 225 (Henry Krystal ed., 1968). Without offering any argument as to why this should be the case, Mills assumes this research on counseling holocaust survivors to be directly transposable to the context of domestic violence. However, I would think that the difficulties in the client-therapist relationship in the context of Nazi persecution and survival of the camps would be very particular and that one would have to be very careful in applying these finding to other contexts. For another instance where Mills uses Danieli's conclusions about the holocaust as directly relevant to the context of domestic violence, see MILLS, *supra* note 1, at 47-48.

7. MILLS, *supra* note 1, at 78. Mills also writes:

> Projection, as one form of countertransference, helps us understand how mainstream feminists have narrowed intimate abuse to serve their political and social goals. By projecting onto men the aggression they reject in themselves . . . mainstream feminism has succeeded in repressing the ways women's aggression may be contributing to the intimate abuse dynamic.

Id. at 12. *See also id.* at 11 ("Countertransference, the personal reactions of mainstream feminists and professionals to their clients' stories based on their own histories of abuse, may help answer this question. Mainstream feminists' lack of reflection on their own histories limited their capacity to encourage a more empowering approach."); *id.* at 79 ("Here I want to argue that mainstream feminists projected onto men their own repressed aggression while exculpating women.").

8. *Id.* at 81.

9. *Id.*

10. Brenda Aris was the first battered woman convicted of murdering her husband to receive clemency in California. *See 48 Hours Investigates: Wrongfully Accused?* (CBS television broadcast, Sept. 13, 2003) *available at* http://www.cbsnews.com/stories/2003/08/26/48hours/main570187.shtml (on file with UCLA Women's Law Journal).

> had been exposed to intimate abuse during childhood. Each also denied that their histories affected their professional judgment . . . . One prominent law professor . . . admitted he was not prepared to do this work [of working through his history of violence] on himself.[11]

Later, in explaining why two people walked out of a film she made, Mills writes: "These lawyers could not face, understand, or learn from the violence; they could only reject it."[12]

In an almost comical double-whammy, Mills tells us that mainstream feminists' mental illness is what makes them think battered women are mentally ill. She writes: "Countertransference and projection can no longer be ignored. Due to these influences, mainstream feminism labels victims as helpless, dependent, and ill."[13] There can be no end to this sort of one-upmanship. The next move is obvious: Mills' repressed anger towards the all-powerful mother figure unconsciously causes her to lash out against mainstream feminist advocates for mandatory arrest of batterers — labeling them as so many bundles of countertransference and projection. (I'm kidding. Although, hey — come to think of it — that sounds pretty good.)

But seriously, whether it comes from Sigmund Freud or Linda Mills, this form of argument has no place in credible scholarship. Even Freud was a little embarrassed by it. He started that story like this: "I have ventured to interpret — without any analysis, but only by a guess — a small episode which occurred to a friend of mine . . . ."[14] Freud knew he was on thin ice. Mills doesn't. In fact, she seems quite comfortable pairing up this manner of argumentation with shameless, self-congratulatory self-dramatization. Mills thanks Oprah Winfrey for having the "courage" to have her on her show.[15] And she casts her supporters as recognizing the superiority of her approach, yet cowering at the prospect of facing the wrath of the mainstream feminist that she so heroically faces. Mills writes:

> I was consistently comforted . . . by people who felt brave enough to tell me I must keep going, because my work was urgently needed . . . . As people working in the field began to resonate with what I was saying and, in whispers, to tell me that they, too, were worried about the ways we judge women when they return to abusive relationships and the ways we

11. MILLS, *supra* note 1, at 81.
12. *Id.* at 147.
13. *Id.* at 126.
14. FREUD, *supra* note 3, at 235.
15. MILLS, *supra* note 1, at xii.

> judge the men they return to, I became clearer in my convictions.[16]

Mills seems to think that others' hostility to her is fuelled by two sources: the revolutionary nature of her claims and her opponents' inability or unwillingness to take a self-reflective look at the violence in their own lives. But I wonder whether Mills hasn't misinterpreted her critics. My sense is that what really gets some peoples' hackles up is her undisciplined scholarship that more often than not misses the mark. Let me try to show you why I think that's so.

II. MANDATORY POLICIES, INTIMATE ABUSE CIRCLES AND THE CASE OF MONIQUE AND JIM BROWN.

Mills is singularly ungenerous to her opponents. Though quick to dispense her armchair diagnoses, she never credits her opponents with any subtlety of understanding. Mills caricatures her straw woman — the mainstream feminist — as one who is constantly making wildly implausible generalizations.[17] Mills writes: "A related assumption of mandatory interventions is that battered women are not only too weak to protect themselves but also too fragile, mentally ill, unruly, or indecisive to be able to protect themselves or to participate in their healing."[18]

Having worked in the area of domestic violence law reform,[19] my observations are that the vast majority of profession-

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16. *Id.* at 144.

17. Mills conveniently doesn't cite any particular feminist theorist in drawing her caricature here. In fact, in one of the few instances where Mills actually cites any authority for a claim she attributes to the "mainstream feminist," she cites Evan Stark who, interestingly, is a man. MILLS, *supra* note 1, at 37 n.20 (citing Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics, in* DO ARRESTS AND RESTRAINING ORDERS WORK? 115, 127-28 (Eve S. Buzawa & Carl G. Buzawa eds., 1996)).

18. MILLS, *supra* note 1, at 48.

19. In 1994-95, I was Special Counsel to the Alberta Law Reform Institute working on recommendations for civil responses to domestic violence. During the course of the project, I spent a number of months interviewing police officers, social workers, shelter workers, prosecutors, defense counsel, anger management counselors, parole officers, battered women, and persons convicted of domestic assault. I authored an institute report for discussion. DOMESTIC ABUSE, *supra* note 2. The report was immediately taken up by the Alberta Government and culminated in the passage of the Protection from Family Violence Act, R.S.A., ch. P-27 (2000) (Can.). The purpose of the Act was to make available cheaply and quickly a wide variety of civil remedies for victims of domestic violence *whether or not they chose to invoke the criminal process.* Most American states have similar statutes. *See* PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT (U.S. Dep't of Justice, Issues and Practices in Crimi-

als who support mandatory policies view them as the lesser of a number of evils. Let me put this in the first person. I ambivalently support mandatory arrest and prosecution policies for the following two reasons. First, although many police departments are now developing extremely sophisticated and sensitive means of effecting domestic violence interventions,[20] many police officers and prosecutors still turn up their noses at domestic assault. In a world of scarce resources, harried schedules, and ambivalent complainants, they prefer to drop domestic cases. (One police officer I interviewed, in explaining why he had decided to make an arrest, told me that when the perpetrator opened the door and saw him standing there, he [the perpetrator] punched him [the police officer] in the face. The officer said to me: "I don't give a shit if he hits her. But this asshole hit me. So I arrested him.") Mandatory policies prevent law enforcement officials from sweeping domestic violence under the rug, which they otherwise often have both the power and the incentive to do.

The second reason I, with hesitation, support mandatory policies is that they at least aspire to protect victims of domestic violence from being pressured by their partners into withdrawing charges. Obviously, if the decision of whether to prosecute rests with the victim, the perpetrator has a big incentive to try to persuade — in whatever way seems most likely to succeed — the victim to withdraw the charges. I admit this rationale may credit domestic abusers with too much rationality. Perhaps perpetrators use coercion to force their victims to recant and commit perjury just as much when the decision to proceed is out of the victim's hands as they use coercion to get the victims to drop the charges when the decision about whether or not to proceed is in the victim's hands. It would be nice to get accurate research on this point, but I doubt that it is possible to do so. Though Mills presents some interesting and important statistics about the dif-

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nal Justice, 1990); BARBARA J. HART, STATE CODES ON DOMESTIC VIOLENCE: ANALYSIS, COMMENTARY AND RECOMMENDATIONS (Nat'l Council of Juvenile & Family Court Judges, Juvenile & Family Court Journal Vol. 43 No. 4, 1992); Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61 (1984).

20. My own experience here is with the Edmonton Family Violence Follow-Up Team. *See* EDMONTON POLICE SERVICE, THE FAMILY VIOLENCE FOLLOW-UP TEAMS: REDUCING REPEAT DOMESTIC VIOLENCE (1994), *available at* http://www.popcenter.org/Library/Goldstein/1994/94-07(F).pdf (last visited Jan. 4, 2005) (on file with UCLA Women's Law Journal). The team was composed of specially trained police officers and social workers.

ferent results of mandatory arrests in black and white communities, none of the statistics she quotes addresses precisely the point of whether perpetrators use coercive intimidation as much to prevent their spouses from testifying under mandatory policies as they do to persuade them to drop charges.[21]

Mills' discussion of the case of football star Jim Brown and his wife Monique shows that she overlooks this aspect of the rationale behind mandatory policies — that they try to protect victims from being pressured to withdraw charges. Mills uses the Brown case as a set piece to demonstrate the shortcomings of mandatory policies. She writes: "I believe that the now-hegemonic interpretation, meant to help women in abusive relationships, paradoxically hurts them. To show how, I offer a celebrated, intimate abuse case."[22] She goes on to describe how Monique Brown called 911 alleging that her husband had broken the window of her car with a shovel and was threatening to kill her. The case proceeded to trial. There Monique Brown changed her tune and told the jury that she had called 911 for no reason other than to punish her husband for having an affair. Commenting on Monique Brown's decision to recant, Mills writes:

> Jim Brown's wife, Monique, journeyed through the criminal justice system and faced all the challenges and paradoxes of a mandatory system. Mrs. Brown had two options: she could protect herself by testifying against her husband, or she could protect her husband by not testifying against him. Mrs. Brown made the decision most women make: she chose to protect her husband. By doing this, she rendered ineffective the prosecutor's efforts to hold Jim Brown responsible for the domestic violence crimes he had allegedly committed. Jim Brown was eventually acquitted of 'threatening to kill' his wife and therefore convicted of a less significant crime. It was Los Angeles's mandatory prosecution policy that helped Brown escape these more serious charges. Through these policies, the prosecutor was forced to bring the case to trial rather than to find a middle ground with Monique Brown that may have held

21. I take all these statistics with a grain of salt because it is impossible to tell whether statistical increases in violence reflect actual increases of violent incidents or increases in reporting. It may be, in fact, that the statistic showing that mandatory arrest correlates to an increase in violence may actually mean that mandatory arrest increases reporting and not necessarily the overall amount of violence. It could be because, with mandatory arrest, victims are less cynical about the reporting process, and so they report more frequently. I don't know. But, I do think that the unfortunate truth in this area is that statistics are extremely difficult to interpret reliably.

22. MILLS, *supra* note 1, at 24.

> her husband more accountable for the intimate violence he committed in ways that addressed the violence rather than judged it.[23]

First, Mills conceptualizes Monique Brown's dilemma as a choice between protecting herself and protecting her husband. This way of framing Monique Brown's choices under a mandatory policy gives mandatory policies both too much and not enough credit. By suggesting that Brown could protect either herself by testifying or her husband by not testifying, Mills assumes that (a) Monique Brown's testimony would secure a conviction, and (b) a conviction would secure Monique Brown's safety. Neither of these assumptions is necessarily true. It appears that Monique Brown did not suffer injuries in the case and, even with Monique's cooperative testimony, Jim Brown's defense counsel might well have been successful in securing an acquittal — at least on the more serious charge.

Secondly, even if a conviction had been secured, the sentence would not likely have been severe or long. Brown was charged with making terrorist threats and vandalism.[24] Brown would probably have been charged under sections 422 and 594 of the California Penal Code. Section 422 of the California Penal Code reads as follows:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.[25]

This section gives defense counsel ample room to maneuver. Observe the number of adjectives. Each adjective represents a potential way out for the accused. First, the prosecution must

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23. *Id.* at 25-26.

24. *Jury Selection Begins in Trial of Former Football Star Jim Brown*, CNN.com, Aug. 24, 1999, *at* http://edition.cnn.com/US/9908/24/jim.brown.trial (Aug. 24, 1999) (on file with UCLA Women's Law Journal).

25. CAL. PENAL CODE § 422 (West 1999).

prove that the threat was uttered and that the victim reasonably feared for her safety. Secondly, the threat must be shown to have been "so unequivocal, unconditional, immediate and specific,"[26] that it conveyed a "gravity of purpose"[27] and "immediate prospect of execution."[28] Further, the victim's fear must be proved to have been not just "reasonable"[29] but also "sustained."[30] Moreover, the maximum penalty is one year in prison. Given the range of conduct that the section covers, it would not appear to be likely that a threat, such as the one initially alleged by Monique Brown, would carry the maximum penalty. Section 594 prohibiting vandalism likewise carries a maximum sentence of one-year imprisonment.[31] Here again, Brown's conduct was likely to be at the lower end of the scale of what is covered by the section.[32]

So, what would an over-zealous-counter-transferring-mandatory-policy-loving-mainstream-feminist prosecutor's best case scenario be here? Ideally, if Monique Brown gave credible testimony consistent with her 911 call, and the jury were to find all the elements of the offences had been proved, Jim Brown would have been convicted of both threats and vandalism. Yet

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. CAL. PENAL CODE § 594(b)(1) (West 1999 & Supp. 2004).
32. The relevant statute states:

> (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:
> (1) Defaces with graffiti or other inscribed material.
> (2) Damages.
> (3) Destroys.
> Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, furnishings, or property belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.
> (b) (1) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than fifty thousand dollars ($50,000), or by both that fine and imprisonment.

CAL. PENAL CODE § 594(a)-(b)(1) (West 1999 & Supp. 2004).

both charges have a maximum penalty of one-year imprisonment and both cover a range of conduct which, at the most severe end, is much more severe than that of which Brown was allegedly guilty. Therefore, the prosecutor could probably not have hoped to get a term of imprisonment for any more than six months. With good behavior, Brown would likely have been out of jail on probation much sooner. The sentence actually imposed by the Los Angeles County Superior Court was one year of domestic violence counseling, three years probation, four hundred hours of community service and a $1,800.00 fine to be paid to a domestic violence shelter[33] — pretty stiff actually. When Brown refused to take domestic violence counseling he was sentenced to six months in prison for violating the court order and was out in four months. (During the time he was in jail, Brown described himself as a "political prisoner.")[34]

My point here is that even the most severe sentence available, if Brown had been convicted under both provisions, would not have protected Monique Brown from violent retaliation a few months down the road. So again, Mills' statement that under a mandatory policy Monique could choose to protect herself by testifying is naïve. Monique couldn't secure her own long-term safety by cooperating with the criminal process. She probably knew this.

Ironically, Mills credits mandatory policies with a protective power that they don't actually have. In making this error, Mills also obscures the possibility that Monique Brown may have had self-protective reasons for recanting. Instead of Mills' romanticized interpretation of Brown's about-face as a gesture of love

33. *Food for Thought: Former Football Star Fasting in Jail*, SI.com, Mar. 28, 2002, *at* http://sportsillustrated.cnn.com/football/news/2002/03/28/brown_fast_ap (Mar. 28, 2002) (on file with UCLA Women's Law Journal). Other reports state that Brown's driver's license was also suspended for one year. *See* Larry Schwartz, *Jim Brown was Hard to Bring Down*, ESPN.com, *at* http://espn.go.com/classic/biography/s/Brown_Jim.html (last visited Jan. 4, 2005) (on file with UCLA Women's Law Journal).

34. John Saraceno, *True Manhood and Perspective Elude Brown*, U.S.A. TODAY, Apr. 9, 2002, *available at* http://www.usatoday.com/sports/comment/saraceno/2002-04-10-saraceno.htm (last updated Apr. 9, 2002) (on file with UCLA Women's Law Journal). Saraceno writes that Brown stated from jail that:

> 'There's no doubt that I'm a political prisoner, but race in America is always under the surface. . . . If I were domesticated, I would be accepted racially. I'd have approval if I stayed in my place. The worst thing an African-American man can do is be as free as those more powerful than he is.'

Id.

and altruism toward her husband, Monique Brown might well have told the jury a different story than she told the 911 operator in order to save her own life.

This is a problem with mandatory policies. They try to take the decision-making power out of the complainant's hands, and they hope this will do something towards protecting her from her partner's revenge. They don't and can't always accomplish that goal. But, let me reiterate: my experience is that most people working in the legal system recognize that mandatory policies are the lesser of a number of evils. And this is where Mills fails to give mandatory policies enough credit. Under the mandatory policy, Brown was arrested, prosecuted, convicted, and mandated by the court to take domestic violence counseling. He refused to attend counseling and was then sentenced to six months in jail for violating the court order.[35] He was released after serving four months of the sentence.[36] Monique made the choice to recant, and as a result, we can hope that she didn't get any really nasty payback from her husband. All things considered, this is not a bad outcome for Monique, given the difficulty she was in.

What Mills also obscures in her analysis of the case — and where she also doesn't give mandatory policies enough credit — is that the alternative might well have been that the police would have arrived at 1851 Sunset Plaza Drive,[37] asked Jim Brown for his autograph, apologized to him, and left. Mills doesn't take this seriously as a potential downside of doing away with mandatory policies. Instead, Mills imagines a different alternative. Let's reread what she says here because it is tricky:

> It was Los Angeles's mandatory prosecution policy that helped Brown escape these more serious charges. Through these policies, the prosecutor was forced to bring the case to trial rather than to find a middle ground with Monique Brown that may have held her husband more accountable for the intimate violence he committed in ways that addressed the violence rather than judged it.[38]

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35. *Id.*

36. *Id.*

37. *Larry King Live: Jim Brown Accused of Threatening His Wife and Vandalism, but Couple Denies Incident Constituted 'Domestic Violence'* (CNN television broadcast, Aug. 4, 1999), *available at* http://www.ancpr.org/jimbrown.htm (last visited Jan. 4, 2005) (on file with UCLA Women's Law Journal) [hereinafter *Larry King Live*].

38. MILLS, *supra* note 1, at 26. Mills clearly doesn't like it when people are "judgmental" about perpetrators of domestic violence. She writes: "Most professionals working with women in abusive relationships are consciously or uncon-

Mills then writes: "Rather than heeding Monique Brown's request to 911 that the police help her 'fix her troubled marriage,' they arrived with 'shotguns, bulletproof vests, and cold stares.'"[39] No such request for help with her marriage appears on the 911 tape and Monique claimed that the reason it wasn't there was that the police had doctored the tape.[40] Shouldn't we at least give Monique credit for lying? Isn't it insulting to Monique to suggest that she really was so clueless as to call 911 to say: "It's an emergency. I think my husband is having an affair. I need the police to come over and help fix our troubled marriage."

Aside from casting Monique Brown as completely out of touch with reality, what exactly does Mills think happened in the case? She says that the mandatory policy contributed to Jim Brown's escape from accountability for his "more serious" actions. So that must mean that she thinks he is guilty of the section 422 charge. But, she *also* seems to believe that Monique *did* ask the 911 operator for help with her marriage. Since that request is *not* on the 911 tape, Mills must also believe that Monique was telling the truth to the jury that he did not threaten her after all and that the police had falsified the 911 tape.[41]

It is impossible to grasp exactly what Mills takes to be the real story here. But, an even more perplexing question is: how, in Mills' view, would the removal of mandatory policies have helped to both protect Monique and hold Jim accountable for his (more serious) actions? What exactly is Mills envisioning when she says that, without the mandatory policy, the prosecutor and Monique might have found this happy middle ground? Without mandatory *something*, how are we going to get from the world

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sciously judgmental of the men who abuse them . . . . One precondition for a narrative therapy approach is to self-reflect on the judgments we carry about men who abuse women." *Id.* at 126.

39. *Id.* at 26 (quoting Monte Morin, *Jim Brown's Wife Testifies that She Lied about Abuse*, L.A. TIMES, Sept. 2, 1999, at B1).

40. Morin, *supra* note 39.

41. The recording of the 911 tape was played on Larry King Live at the beginning of the show. *Larry King Live*, *supra* note 37. If you read the 911 transcript carefully, you will see that Monique actually doesn't tell the operator on her own that her husband is threatening her life. The operator asks her if he has threatened her and she said yes. Monique never independently says "he threatened to kill me." It was only in response to the operator's direct, and as we say "leading," questions about threats that Monique answered in the affirmative. This, of course, would also cause problems with getting a conviction under California Penal Code section 422, CAL. PENAL CODE § 422 (West 1999), even if Monique had not recanted when she got to court.

where the cops ask for Brown's autograph and leave to the world in which the prosecutor and Monique autonomously negotiate a solution where Brown can be held accountable without being judged?

This is where Mills' restorative justice Intimate Abuse Circle comes in. She refers to it as the IAC. Let me interpose a warning here: you are about to be soused in alphabet soup. I apologize. But it is a big part of Mills' aesthetic. As Mills explains in Part II, ideally, under her restorative justice model, a couple in a violent intimate relationship (like Jim and Monique) would be sent to confer with the "Intimate Abuse Assessment Team" — the IAAT.[42] Now here is an interesting question: Would Jim and Monique *have* to go to this meeting? Would it be *mandatory*? And how are the police going to get Jim and Monique to the meeting with the IAAT? Arrest him, maybe? Will they have to arrest him even if Monique doesn't want him to have to go to the IAAT?

Mills doesn't tell us how the couple gets from the 911 call to the IAAT conference. Mills does, however, explain that:

> First, an Intimate Abuse Assessment Team, made up of mental health professionals who are trained in listening techniques and assessment, is assigned to each case. . . . The overall goal of the Intimate Abuse Assessment Team is to assess the appropriateness of the IAC for these particular parties by evaluating whether both parties are participating voluntarily and whether there is any risk of lethality if the more abusive party is not incarcerated.[43]

Then, once the IAAT has decided that everybody wants to play[44] and that nobody is going to get killed,[45] they go on to the next stage, the Intimate Abuse Circle:

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42. MILLS, *supra* note 1, at 104.

43. *Id.*

44. Mills' commitment to the requirement of voluntary participation of both victim and offender waivers toward the end of the book. Mills writes:

> I am aware that this healing work is accomplished only when it is done voluntarily and with everyone's eyes open. That is why it is not for everyone and should not be imposed on those who reject it, *at least early on.* Although I admit that healing is my preferred response, I am not *yet* prepared to impose it on persons who believe that punishment will accomplish the justice they seek. I believe that, in time, the power of healing — and the examples the IACs are sure to engender — will persuade others of its value.

Id. at 136 (emphasis added).

45. Mills makes the following statement about what the IAAT should do if they think there is a "risk of lethality":

> Second, an IAC is convened. It becomes a place where the parties, along with the Intimate Abuse Circle Team,[46] made up of professionals and a community of friends and family, can participate in dialogue, taking responsibility for aggression and abuse, making plans for the future, and healing.[47]

This is how Mills thinks that we could hold Jim Brown accountable without judging him. Great idea; but, let's take another closer look at this requirement of mutual consent to the process. Suppose Jim Brown wouldn't want to get together with Monique, their community of family and friends, and some professionals to talk about responsibility for abuse and plans for the future. And, suppose too that Jim Brown would be just as angry at Monique for putting him in the situation where he had to go to the IAAT or the IACT as he would have been for putting him in the situation where he had to go to court. And, suppose further that Jim might tell Monique that if she makes the IAAT think he's going to kill her, he's going to kill her. And, suppose that Monique might think that, in all the circumstances of the case, it would be best for her to explain to the mental health professionals that she was lying to the 911 operator and that all she really wanted to do was punish her husband for having an affair. And, what if the conversation with the IAAT mental health professionals about the risk of lethality were to go something very like Monique Brown's interview with Larry King? (Only substitute the professional skilled listener for Larry, if you can. Also, remember that, as with the hypothetical IAAT interview, Jim is present.) The interview went as follows:

KING: Did he ever hit you?

M. BROWN: No, he did not. . . .

> The team should more cautiously advise the use of an IAC in situations involving life-threatening violence because these abusers may need to be incarcerated to protect their partners and may not be helped by any amount of conversation or healing. James Gilligan's findings — that education can rehabilitate even the most hardened offenders — suggest that the IAC coupled with education might be an effective response, even to life-threatening violence.

Id. at 107. For a much more sophisticated analysis of the potential safety risks of restorative justice in the context of family violence, see Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice, in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42, 56-58, 60 (Heather Strang & John Braithwaite eds., 2002); see also Ruth Busch, *Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong, in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 223, 229-230, 243-244 (Heather Strang & John Braithwaite eds., 2002). Mills doesn't cite Busch anywhere within the book.

46. Notice that we now have a new team here.

47. MILLS, *supra* note 1, at 104.

> KING: Did you ever, Monique, fear your physical well being?
> M. BROWN: No, not at any point. I never feared for my life, for my safety.
> KING: What were you fearing during that phone call?
> M. BROWN: I was fearing he was going to leave, and I wasn't — and be with some — in my mind, that was the reality at that point, that he was going to leave town, and I was fearing the end of our marriage, and I was — yes.[48]

How would the IAAT assess lethality here? Would Monique really have less of an incentive to lie to the IAAT than she does to the jury? If Jim was going to beat her for sending him to jail, why exactly wouldn't he beat her for sending him to the IAC with his community of family and friends? Would Jim Brown see these outcomes so differently that he would think that Monique was deserving of comeuppance for inflicting one on him and not the other?

Mills tells us that if a woman in the position of Monique Brown preferred to pursue criminal charges, that option should remain available to her. She writes:

> Some people coming into the system would still prefer to pursue criminal action, because of the severity of the injury or the desire for state involvement, or even to seek revenge for their previous suffering. So long as the Intimate Abuse Assessment Team has conversed with the person filing the complaint and with his or her partner before the case goes forward and has described the strengths and weaknesses of the criminal process, the criminal justice option should still be provided, should the complaining party prefer it.[49]

But, what if Monique were to say to the IAAT something like this: "Thanks very much, but I really don't want to participate in an IAC, and I don't want to proceed with criminal charges either. I am not afraid right now, and there is no risk of him killing me at present. What I do really want, however, is to be able to call 911 when I need the police. I want them to come and help me out of the situation of immediate danger, and then I want them to go away and stay away unless I call them again, in which case I want them to come immediately. I want them to be available to stop him from hurting me in a crisis, and then I want them to go away and leave us alone." What then, Professor Mills? Back to mandatory arrest and prosecution? Or do we just comply with this kind of request?

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48. *Larry King Live*, *supra* note 37.

49. MILLS, *supra* note 1, at 104.

The fact is that often the victim, the perpetrator, the police and the prosecution *all* want to keep the incident private.[50] Nonetheless, victims still want protection. This is the thorny aspect of domestic violence intervention that mandatory policies are trying — obviously imperfectly — to address. Perhaps the police force should just comply with the kind of request I am imagining Monique Brown might make. However, it seems clear to me that the prospect of having to go to a restorative justice encounter group might, for many perpetrators and victims of domestic violence, be just as distasteful as going through the criminal justice system, and just as likely to inspire in perpetrators retributive plans to get back at their partners for putting them in that pickle.

Indeed, when we look at Mills' discussion of her own violent relationship, it is not at all clear that she has asked herself the question: "Would I have wanted to go to the IAAT and the IAC with my partner?" Nor is it clear that her answer to that question would be yes. She writes:

> Nearly twenty years ago, I was involved with an exciting and brilliant man who worked in violence prevention. The abuse in our relationship began three months after we became a couple and continued until I ended the relationship one and a half years later . . . . Whenever I reflect on this experience, I ask myself, what if the neighbors had called the police? (I would never have called.) I would have been mortified and horrified. An arrest would have ruined his life, robbed him of his work, and destroyed his reputation. I would have sided with him and lied for him. Even now, with all that I have learned, I would choose to protect him. Most mainstream feminists would say this is patriarchy talking, and that I still have not realized my feminist consciousness."[51]

I don't care a straw about whether Mills has realized her feminist consciousness, but I want to know whether being sent to the IAAT would have been any less mortifying and horrifying for her, and whether she would have chosen to participate in an IAC with her partner. She is saying that just an arrest — not even a conviction — would have ruined his life, his work and his reputation. What would it have meant for his work, his reputation and

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50. At times the police and prosecutor's reluctance to pursue the domestic violence cases is a direct result of their awareness of the victim's unwillingness to cooperate. They don't want to pour a lot of energy into the case when they know the victim doesn't want to proceed. At times, prosecutors and police still rely on the age-old assumption that domestic violence is between a man and his wife.

51. MILLS, *supra* note 1, at 144-45.

his life to have his family and friends participate with the two of them in an IAC? Would she have called the police if she expected they would be sent to confer with the IAAT, a bunch of violence prevention professionals who might well be her partner's colleagues? Mills doesn't tell us the answer to that question. She just tells us about her compassion for her partner. She tells us that "his mother contributed a great deal to his violent reactions" and that "I used whatever emotional resources I could to hurt him."[52] OK, I feel sorry for the guy. But would his and her desire for privacy in their violent relationship have evaporated if asking for help had meant being sent to meet with the IAAT and the IACT instead of going off to the courthouse?

Consider this. What if we were to poll victims of domestic violence and ask them which kind of system they would prefer?

a) A system in which if you call 911 and the police on arrival have reasonable and probable grounds to believe that an offence has been or is being committed, then there will be mandatory arrest and mandatory prosecution.
b) A system in which if you call 911 and the police, on arrival, think you have a violent relationship (it's unclear in Mills' analysis what the police have to think here), then they send you and your partner to the IAAT and at the IAAT determines whether you should go to the IAC to work things out with the IACT.
c) A system in which if you call 911, someone explains to you the strengths and weaknesses of (a) and then you get to choose between (a) or (b). Or,
d) A system in which you can call 911 and the police will come to protect you, quiet the situation, ensure your immediate safety, maybe apologize to your partner and call him "Sir" so he's not as angry about your calling, and then leave you and your partner alone. Options (a) and (b) will be made available to you and the strengths and weaknesses of both will be explained. However, if you don't like the looks of either (a) or (b) and you just want to be left alone with your partner, this will not jeopardize your right to immediate emergency police protection on as many future occasions as you call to request it.

My guess is that option (d) would be a pretty popular choice. If I'm right, this means that a really difficult question in domestic

52. *Id.* at 145.

violence situations — one which Mills completely fails to address — is: are we going listen to and respect the voices of victims of violence when what they want is immediate emergency intervention, no arrest, no prosecution, and definitely no IAAT, IACT, or IAC? If not, Mills' approach is no better than mandatory arrest and prosecution, on the score of listening to and respecting the wishes of victims of intimate violence and not paternalistically shoving hobbyhorse solutions down their throats.

There are many reasons why option (d) has not been taken up as a realistic option in most policy discussions about the law's response to domestic violence. Let's look at two. First, there are not enough funds allocated to domestic violence prevention to make that kind of system possible. Secondly, we sympathize with the legitimate frustration busy police and prosecutors feel toward victims who repeatedly call for emergency protection and may even repeatedly want to embark on the road towards prosecution, but who also repeatedly back out of the process and decide that they'd now prefer that the state get out of their bedrooms.

These problems lead us to the single greatest obstacle to getting a system that responds to intimate abuse effectively: money. In fleshing out the details of the IAAT, IACT, and IAC, Mills envisions a world in which there are infinite resources to fund all of these "teams." They sound pretty expensive to me. However, Mills has this to say about funding:

> Intimate Abuse Circles can also help conserve the state's fiscal resources. Under the Violence Against Women Act, $59 million was spent on "grants to encourage arrest" in 2001 . . . . There is another reason, however, to be concerned that the state is not spending its precious resources wisely . . . . [O]f the 59 percent of women who chose not to use any battered women's services after the arrest of their partners because they "had no need for them," 44 percent said the services were unnecessary because "they had support from friends, family or church members instead." Additionally these women reported that they were very "unlikely to face more assault and tended to feel 'very safe.'" This shows the strength and support that a community of care can offer to women who have experienced violence in their intimate relationships. We need to take advantage of these important and inexpensive resources and develop them to address violence.[53]

So, maybe we don't need all those expensive mental health professionals to staff the IAAT and the IACT after all. Maybe

53. *Id.* at 140.

the state can just delegate this whole IAC process to friends, family and church. Inexpensive indeed. Moreover, in the study Mills is quoting here, the men discussed had been arrested. Is it possible that the reason some of these women didn't need services and weren't afraid of assault was that their partners were in jail? In any event, Mills initially promotes her system assuring us that there would be multiple state funded teams available to go in on every domestic assault call and to stay in communication and contact with the family over a prolonged period of time. Then she does a bait-and-switch, suggesting that maybe the same results can be achieved without the state and that we can substitute family, friends, and church people for the pricey professionals.

The ambiguities in Mills' funding discussion lead to another serious problem with her argument. Mills is comparing a real world practice to an imaginary ideal. In such comparisons, reality generally doesn't fare very well. She is looking at the practice of mandatory arrest and prosecution that goes on under conditions of scarce resources, and she doesn't think it stacks up against her imaginary and (at least in her initial descriptions of it) fabulously well-funded alternative.

Again, I will draw on my own experience. My own observation is that lack of resources for victim support appears to be a major factor in complainants refusing to cooperate with the criminal process after arrest. I've suggested that one of the reasons why victims of intimate violence refuse to cooperate with the criminal process is fear of reprisals from their partners. Another reason is that they are intimidated by the prospect of the criminal courts. They don't understand the system, and there is nobody to help them as they stumble through it. Prosecutors often have only a matter of minutes to spend preparing for each case. The prosecutor doesn't have time to interview the complainant more than once or to discuss the process with her on the phone. After the initial arrest, the complainant is unlikely to have any more contact with the police. So there she is. She knows nothing about the court system, she's in the hands of a prosecutor who doesn't have time to talk to her, and she has no idea what the likely outcome of the court case will be. So, she doesn't want to go. Who can blame her?

Now, let me construct a counter-utopia in opposition to the one constructed by Mills. Let's imagine a world in which the police answer the domestic violence call and, having found reasonable grounds to believe an offense has been committed, they

arrest the perpetrator. Once the perpetrator is arrested, the victim is put in touch with the Here's All the Help You Need Team (HATHYNT). The HATHYNT is staffed with lots of doctors, counselors, prosecutors, and police officers who all have lots of time. The victim first will be taken to a doctor to ensure she gets any necessary medical attention.[54] Then, the victim will go to the counselor, where she will be able to talk about the ways in which the violence has affected her and her family and about her fears and anxieties about going through the court process. Then, the victim will meet with the lawyer, who will give a frank and detailed assessment of the likely outcome of the case based on the evidence and will explain the court process to the victim and will brief the victim on what she can expect. The victim then will meet with police officers to discuss safety issues and will formulate a plan to ensure the victim's safety before trial, after trial in the event that the perpetrator is acquitted, and after the perpetrator is released from jail if he is convicted. The victim will be offered the option of an effective witness protection program. The victim will be able to communicate with any or all of these professionals as much as she needs to in the time leading up to the trial and after her partner is released from custody. But, here's the kicker: if the evidence is sufficient without the victim's testimony, the prosecution has to go ahead with or without the victim's cooperation.

My guess is that if this kind of support was provided to victims of domestic assault, the incidence of recanting and non-cooperation, victim dissatisfaction, as well as the incidence of retaliatory violence would substantially decrease. However, the sad fact is that domestic violence would probably not be particularly difficult to eliminate if governments were willing to fund intervention sufficiently generously. Indeed, going back to option (d) in my imaginary poll — if there were infinite funds for domestic violence prevention — why not just give domestic assault panic buttons to anyone who requests one, and when the button is pushed, why not provide that person with private, confidential, discrete but effective emergency intervention? And why not provide that as often as it is requested? Why not? In fact, maybe *that* is my real utopia. That, plus the option for the victim of either proceeding with criminal charges or having a restorative

54. Of course, I mean "he or she." But as the construction is awkward and annoying I will go with what I take to be the most common case. I refer to the perpetrator as "he" for the same reason.

justice circle if they really want one. That strikes me as a genuinely good utopia. But no government would fund it.

So, let's try to stretch our imaginations further and think about what would happen if Mills carried the day — mandatory policies were done away with but governments, enticed by her promise that IACs would be cheaper, wanted to implement her plan. Well, they'd have to find a way to make it cheaper. Perhaps they'd fund IACs to some lesser extent than they now fund mandatory polices. At this level of funding, would the IAAT mental health professionals have more than a half an hour to spend on each case? Might governments decide that they could only fund professionals for the IACT in the most severely violent of cases? Is it possible that after the initial half hour consultation with the IAAT, nobody would have the time to talk to the victim and she would just be told to show up at church to face her family, friends, partner and a minister to "work it through?" Might she want to back out of this just as much as she now wants to back out of the court date?

III. On the Benefits of Reading the Law.

Many of Mills' errors stem from the fact that she doesn't read the law. In fact, she tends either to disregard or misrepresent it. Consider Mills' example of Nate and Sandra Stanford, another of her set piece cases designed to demonstrate the superiority of the IAC. Nate, Mills tells us, likes to think of himself as the king of his castle and he likes Sandra to have dinner ready for him when he gets home.[55] Sandra is tired of making dinner for Nate and she wants to get a job and expand her horizons.[56] Mills explains that Nate and Sandra are now in conflict about the agreement on which their relationship is based, and she says that depending on what Nate and Sandra are like, violence could be the result.[57]

Mills, without telling us what kind of violence or abuse is supposedly taking place, goes on to describe how beneficial the IAC would be for Sandra and Nate:

> In the context of the IAC, Sandra would be encouraged to think about the ways she only half bought into the 'I am king' discourse from the beginning but nonetheless went along with it in the name of family harmony .... Marking the ways San-

55. *Id.* at 121.
56. *Id.*
57. *Id.* at 122.

> dra acts out those conflicts through aggression or other means (such as refusing to cook dinner to his specifications) is enlightening for her and involves Sandra taking responsibility for her actions . . . . This therapeutic work done in the context of the IAC and under the gaze of the care community prepares Sandra for consciously recognizing their dynamic of intimate abuse."[58]

Nate is going to find it very helpful too:

> Similarly, Nate would have the opportunity in the context of the IAC to deconstruct the overriding significance of the 'I am king' discourse for him and to question the biographical meaning of his aggressive reactions . . . . Nate would need reassurance of Sandra's love for him if he were to feel comfortable giving Sandra the movement she desired. This is where the care community in the IAC can be very useful."[59]

Mills then tells us about the processes of deconstruction and reconstruction within the IAC. From there, she then moves into a discussion of how helping professionals can learn to practice the kind of narrative therapy that Mills is promoting — how they can avoid the pitfalls of countertransference, projection, lack of self-reflection and judgmental attitudes towards perpetrators.[60] Then, Mills gives us two hypothetical character sketches — one of Lauren Fisher, the (bad) lawyer, and one of Darlene Smith, the (good) counselor.[61]

For our purposes we are only concerned with Lauren. (Darlene looks to be a clone of Mills).[62] Lauren had an abusive father.[63] Lauren has no self-reflective distance on her family history. Mired in self-delusion, Lauren "enjoys domestic violence work because she thinks she is making a difference."[64] However,

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58. *Id.* at 122-23.

59. *Id.* at 123-24.

60. *Id* at 125-27.

61. *Id* at 127-31.

62. *Id.* at 129. Mills writes:

> Darlene has her own history of family violence . . . . She was angry for a long time, and in the end Jim's violence simply proved too much for her . . . . Darlene has many residual feelings toward Jim . . . . She has worked hard in therapy and has come to understand her relationship with Jim and how it affects her work. Darlene, although still angry about the abuse, views herself as an agent of her own destiny. She believes women have to make their own decisions about the violence in their intimate lives and that doing so will give them clarity and strength to carry on as women and mothers.

Id.

63. *Id* at 127.

64. *Id.*

"she is still very angry about what happened to her as a child."[65] Lauren is guilty of countertransference and projection. This means that she has lots of pent-up hostility towards Nate and wants to see him "nailed," and she sees Sandra as weak, irrational and contemptible.[66]

Remember that so far in this story, Mills has not told us anything about what kind of abuse is taking place in Sandra and Nate's relationship. Here is the first (and *only*) point at which Mills fleshes this story out with any details of Nate's violence. I need to quote Mills at length:

> Should a case involving a couple such as Sandra and Nate come to Lauren's attention — let us assume it is alleged that Nate threw several plates of food around the house when he came home from work and that Sandra, fearing that Nate was going to hit her called the police — she would pursue it to the full extent of the law. Lauren would ignore Sandra's pleas for leniency toward Nate and would assume that they were her learned helplessness talking. Behind Sandra's pleas, Lauren would assume, are Nate's threats. Sandra would be viewed as weak and under Nate's influence . . . . Mainstream feminists who support mandated prosecution would agree with Lauren's reaction to Sandra and Nate's situation — after all it is important to remember what Nate did to Sandra. Nate's behavior and Sandra's perceived weakness are all Lauren needs to hold Nate accountable for his heinous crime. If children are involved, the decision would be simple: they should be removed from this family.[67]

Okay, you've convinced me that Lauren is a real monster.[68] But here is my question: what is she going to charge Nate with? Making a food mess in the house? There clearly is no battery. How about assault? I doubt it. Section 240 of the California Penal Code defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."[69] (Not very elegant — but there it is.) Mills tells us that Nate threw the plates around the house, not that he threw them at Sandra.[70] Sandra was just afraid that he was going to hit her.[71] So, it doesn't look as though there was any attempt to "commit a violent injury on" Sandra. Are we back to section 594 of the

65. *Id.* at 128.
66. *Id.*
67. *Id.* at 128.
68. I'm not honestly fully convinced that she's so bad. *See infra* Part IV.
69. CAL. PENAL CODE § 240 (West 1999).
70. MILLS, *supra* note 1, at 128.
71. *Id.*

California Penal Code dealing with vandalism that Brown was charged with? Well, whose plates were they? Does food count as property you can damage or destroy under the statute? Far from being a heinous crime, there most likely is no crime at all here. And, I doubt that Lauren — if she has even half a brain in her countertransferring little head — is going to think she's got a shadow of a hope of getting a conviction here on either vandalism or assault.

Moreover, Mills seems to suggest that Nate would have been arrested as a result of Sandra's 911 call. Usually, in order to make an arrest without a warrant, the officer needs to be present during the commission of the offence.[72] This is the case unless the officer has probable cause to believe a *felony* has been committed.[73] Some states also allow police officers to treat a domestic assault as though it were a felony and arrest even though the officer was not present to witness the offence, as long as the officer has probable cause to believe that the offence has been committed.[74] But in this case, Sandra's allegations that Nate had

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72. *See, e.g.*, CAL. PENAL CODE § 836(a) (West 1985 & Supp. 2004).

> A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, may arrest a person whenever any of the following circumstances occur:
>
> (1) The officer has probable cause to believe that the person to be arrested has committed a public offence in the officer's presence.
>
> (2) The person arrested has committed a felony, although not in the officer's presence.
>
> (3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

Id.

73. *Id.*

74. *See, e.g.*, CAL. PENAL CODE § 836(d) (West 1985 & Supp. 2004).

> Notwithstanding paragraph (1) of subdivision (a), if a suspect commits an assault or battery upon a current or former spouse, fiancé, fiancée, a current or former cohabitant as defined in Section 6209 of the Family Code, a person with whom the suspect currently is having or has previously had an engagement or dating relationship, as defined in paragraph (10) of subdivision (f) of Section 243, a person with whom the suspect has parented a child, or is presumed to have parented a child pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code), a child of the suspect, a child whose parentage by the suspect is the subject of an action under the Uniform Parentage Act, a child of a person in one of the above categories, any other person related to the suspect by consanguinity or affinity within the second degree, or any person who is 65 years of age or older and who is related to the suspect by blood or

thrown food around the house would not likely count as probable cause to believe any offence had taken place.

What Mills consistently fails to appreciate is that mandatory policies cannot increase the legal and constitutional limits on police powers of arrest. They only can deny the police the discretion not to arrest when, under the law, they have the power to do so. Any law, let alone any police department policy, that purported to grant the power to arrest in absence of probable cause to believe an offence had been committed would be unconstitutional.

Recall that Mills says Lauren also wants to yank the children from the family. This is a wild impossibility heaped upon impossibility. How is she going to do that? Is there a jurisdiction anywhere in the world where the courts could order removal of children from their home because their father threw plates of food around one night? I really don't think so. Courts are often loath to remove a child from the home even in the face of substantial evidence of prolonged and severe child abuse.[75]

> legal guardianship, a peace officer may arrest the suspect without a warrant where both of the following circumstances apply:
> (1) The peace officer has probable cause to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed.
> (2) The peace officer makes the arrest as soon as probable cause arises to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed.

Id. There is a sort of sweet but basically comical provision in section 836(b) which says that:

> Any time a peace officer is called out on a domestic violence call, it shall be mandatory that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest. This information shall include advising the victim how to safely execute the arrest.

CAL. PENAL CODE § 836(b) (West 1985 & Supp. 2004). The abused spouse should be sure to listen to those instructions on how to execute the citizen's arrest safely.

75. In Alberta for example section 2 of the Child, Youth, and Family Enhancement Act reads as follows:

> If a child is in need of intervention, a Court, an Appeal Panel and all persons who exercise any authority or make any decision under this Act relating to the child must do so in the best interests of the child and must consider the following as well as any other relevant matter:
> (a) the family is the basic unit of society and its well-being should be supported and preserved;
> (b) the importance of stable, permanent and nurturing relationships for the child;
> (c) the intervention services needed by the child should be provided in a manner that ensures the least disruption to the child;
> (d) a child who is capable of forming an opinion is entitled to an opportunity to express that opinion on matters affecting the child, and

No system governed by the rule of law could ever live up to the kind of totalitarian punitive state that Mills imagines. So, what is she doing here? Mills is trying to scare us into agreeing with her theory by telling us that mandatory policies grant arbitrary and limitless powers. But nobody's got the kind of power Mills wants us to believe prosecutors like Lauren have. Who wouldn't oppose a system in which someone like Lauren could revenge herself on her father for getting angry and throwing things around by imprisoning a man like Nate and taking his children away from him because he threw some plates of food around? Having attempted to stir up that fear, Mills then tries to get us to run for cover into the caring arms of the IAC as the safer and saner alternative. There's not much integrity in this way of trying to persuade us.

What is even more alarming about Mills' agenda is that it is quite possible that Mills is envisioning a world in which "indirect aggression,"[76] which according to Mills is in evidence when women "lock their partners out of the house, and/or refuse to prepare meals or otherwise engage with their partners,"[77] should render a person liable to state intervention to correct their (up until now) non-criminal part in the "dynamic of intimate abuse." It is far from clear whether this is what Mills has in mind. Indeed it is unclear that Mills wants to move from the real world, in which the state can't do anything to Nate for throwing food around his house, to a world in which the state can haul Nate and

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> the child's opinion should be considered by those making decisions that affect the child;
> (e) the family is responsible for the care, supervision and maintenance of its children and every child should have an opportunity to be a wanted and valued member of a family, and to that end
> (i) *if intervention services are necessary to assist the child's family in providing for the care of a child, those services should be provided to the family, insofar as it is reasonably practicable, in a manner that supports the family unit and prevents the need to remove the child from the family*, and
> (ii) *a child should be removed from the child's family only when other less disruptive measures are not sufficient to protect the survival, security or development of the child.*

Child, Youth, and Family Enhancement Act,, R.S.A., ch. C-12, § 2(a)-(e) (2000), amended by ch. 16, 2003 S.A. 4 (Can.) (emphasis added). These provisions have been interpreted as advice to the courts that removal of a child from the home should be the absolute last resort and that the benefits of remaining with family — however dysfunctional and abusive — often outweigh the harm of being uprooted and placed in foster care.

76. MILLS, *supra* note 1, at 72.

77. *Id.*

Sandra into the encounter room and make them talk to the IAAT and the IACT about Nate's food throwing, as well as Sandra's grumbling about having to make dinner.[78]

Indeed, Mills seems to suggest that the law gets it wrong both for holding the man criminally responsible for his physical violence *and* for letting the woman off the hook in relation to the indirect aggression that triggered his assault. Insult causes injury and it takes two to tango, so both parties should be held responsible.[79] We can see this view in her discussion of the increase in arrests of women as a result of mandatory policies. She tells us that mandatory arrest policies have caused a greater increase in arrests of women than of men. Then she says:

> Most mainstream feminists would argue that the problem of dual arrest . . . lies with a police officer who fails to identify the primary aggressor (the man) and therefore arrests both parties to satisfy the mandate that someone be arrested when a domestic violence crime has occurred . . . . To respond to the dual-arrest problem, supporters of mandatory arrest policies have pushed for 'primary aggressor' laws that more clearly assign blame to the male perpetrator. Here I ponder a different and more troubling reason for the statistics. What if some part of the reason women are being arrested is because they are involved in a dynamic of intimate abuse?[80]

Again, being involved in a dynamic of intimate abuse isn't a crime — so you can't be arrested for it. In explaining elsewhere the "dynamic of intimate abuse" Mills says this:

> What if men really do feel that women cause them to become violent because 'women complain too much and nag and harass them for no good reason'?
>
> Researchers Eisikovits and Buchbinder confirm that these feelings not only are present in the abusive relationship but also represent an important feature of the dynamic of intimate abuse. Although, on the surface the male partner appears in control, and the female partner appears under his control, the reality is much more complicated.[81]

The reality is more complicated and nagging and complaining can be annoying. But, (thank God) the police have no

78. On the weakness of Mills' commitment to the voluntariness of the restorative process see *infra* note 35. And see MILLS, *supra* note 1, at 76-79, for Mills' criticisms of the law for failing to address emotional abuse.

79. John Braithwaite's blurb on the back cover of Mills book articulates this disturbing interpretation of Mills' title. He writes: "With compassionate insight, she reveals how insult can lead to injury and outlines a practical alternative path to healing and safety."

80. MILLS, *supra* note 1, at 68.

81. *Id.* at 95-96.

power to arrest anybody for nagging or complaining because these things are not against the law. If what Mills suggests here is true, and women are getting arrested because their nagging and complaining is contributing to a dynamic of intimate abuse, then some very serious violations of women's constitutional due process are taking place.

Again, I don't have the statistics on this, but my sense is that mutual arrests have increased because of the combination of mandatory policies and the increase in mutual protection orders.[82] When there is a mutual restraining order in place, it is often difficult for the police to determine which party is in breach. In this context, an example of the kind of "primary aggressor laws" that Mills seems to disapprove of is found in the section 836(c)(3) of the California Penal Code:

> In situations where mutual protective orders have been issued under Division 10 (commencing with Section 6200) of the Family Code liability for arrest under this subdivision applies only to those persons who are reasonably believed to have been the primary aggressor. In those situations, prior to making an arrest under this subdivision, the peace officer shall

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82. For example, chapter three of the Violence Against Women Office's Toolkit to End Violence Against Women tells us that:

> When confronted with a mutual order, enforcing officers are often reluctant to assess probable cause and determine who is the primary aggressor. As a result, law enforcement officers often enforce mutual orders against both parties or refuse to enforce the orders. The consequences of arrest for victims who have committed no violent or criminal act but who are bound by a mutual order are profound. Victims may lose their good reputation, may lose custody of children or employment, may be evicted by landlords, or may be unable to post bail.

VIOLENCE AGAINST WOMEN OFFICE, U.S. DEP'T OF JUSTICE, ENHANCING THE RESPONSE OF THE JUSTICE SYSTEM: CIVIL REMEDIES (Toolkit to End Violence Against Women Series, 2001), *available at* http://toolkit.ncjrs.org/files/chapter3.txt (last visited Jan. 5, 2005). Likewise, Joan Zorza writes:

> Mutual orders confuse the police and give them no guidance on which party is guilty. . . . Usually such orders give the police no guidance on how to enforce the order, with the result that when police are summoned, they either do nothing, or threaten to or actually arrest both parties . . . . When police threaten to or do arrest both parties, the victim learns that help will only be given at an unfair and unacceptable price to the victim, i.e., the victim's arrest. Unfortunately, many batterers are quite willing to risk their own arrest if their victim will also incur punishment.

Joan Zorza, What's Wrong with Mutual Orders of Protection?, in DOMESTIC VIOLENCE REP. (1999), *available at* http://www.scvan.org/mutual_orders.html (last visited Jan. 5, 2005) (on file with UCLA Women's Law Journal). *See also* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1074-78 (1993).

> make reasonable efforts to identify, and may arrest, the primary aggressor involved in the incident. The primary aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the primary aggressor, an officer shall consider (A) the intent of the law to protect victims of domestic violence from continuing abuse, (B) the threats creating fear of physical injury, (C) the history of domestic violence between the persons involved, and (D) whether either person involved acted in self-defence.[83]

This sounds sensible to me.

IV. AN INTERLUDE.

Before considering more of Mills' mistakes of law, allow me the indulgence of two little digressions. I'll try to keep them short. The first questions Mills' sense of herself as a pioneer of original insight into women's aggression in intimate relationships and the dynamic of intimate abuse. The second raises another question about Mills' condemnation of Lauren, the "bad" lawyer discussed in Part III.

Here's the first one. From 1855 to 1867, Anthony Trollope wrote his Barchester series of novels. The series is dominated by one of the most memorable characters in all literature: Mrs. Proudie, the wife of the Bishop of Barchester. In novel after novel, Mrs. Proudie ridicules, humiliates and tyrannizes her mild-mannered husband. Toward the end of the series, her treatment of him becomes so merciless it is almost unendurable for the reader. In Mills' terminology, Mrs. Proudie emotionally abuses her husband. In the terminology of the batterers Mills sympathizes with, Mrs. Proudie is always "nagging,"[84] she is "going on and on,"[85] and she most definitely is always "failing to 'shut up.'"[86] Her conduct is so believable and so brutal that I doubt there has been a single reader (in well over a century of Trollope's popularity) who has not — at least for a second — longed for the Bishop to haul off and plow Mrs. Proudie. And, if the Bishop were to do so, no one would withhold their sympathy from him, though some, such as I, might still think he ought to be punished. However, the Bishop doesn't hit her. (In fact, the reason he doesn't is because he doesn't have the guts to.)

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83. CAL. PENAL CODE § 836(c)(3) (West 1985 & Supp. 2001).
84. MILLS, *supra* note 1, at 95.
85. *Id.*
86. *Id.*

Close to the end of *The Last Chronicle of Barset,* Mrs. Proudie dies. We are, for the most part, thrilled that she's gone and have to resist the impulse to break into a chorus of "Ding Dong, the Witch is Dead!" But, here is what Trollope has to say about her husband's feelings of loss:

> Yes, he was a widower, and he might do as he pleased. The tyrant was gone, and he was free. The tyrant was gone, and the tyranny had doubtless been very oppressive. Who had suffered as he had done? But in thus being left without his tyrant he was wretchedly desolate. Might it not be that the tyranny had been good for him? — that the Lord had known best what wife was fit for him? Then he thought of a story which he had read, — and had well marked as he was reading, — of some man who had been terribly afflicted by his wife, whose wife had starved him and beaten him and reviled him; and yet this man had been able to thank God for having mortified him in the flesh. Might it not be that the mortification which he himself had doubtless suffered in his flesh had been intended for his welfare, and had been very good for him? But if this were so, it might be that the mortification was now removed because the Lord knew that his servant had been sufficiently mortified. He had not been starved or beaten, but the mortification had been certainly severe. Then there came words — into his mind, not into his mouth — 'The Lord sent the thorn, and the Lord has taken it away. Blessed be the name of the Lord.' After that he was very angry with himself, and tried to pray that he might be forgiven.[87]

Now, that is what I call a nuanced and honest look at female aggression and the dynamics of intimate abuse. That is what I call a sophisticated look at a victim's conflicted emotions about their abuser. That is what I call a delicate, sensitive and illuminating analysis of the bond between victim and abuser.

So what's my point? Well, first, I don't deny that women can be horribly abusive to men in intimate relationships. Second, I think it is true that the bond between intimate victim and abuser is often both intense and authentic and this is something worthy of very close observation. Thus, when I compare the sensitivity of Trollope's insight here to the kind of pop-psychology that Mills urges on us my reaction is to say: "Yes, we need to study this phenomenon — but if you really want to learn something about the 'dynamic of intimate abuse,' start with somebody

87. ANTHONY TROLLOPE, THE LAST CHRONICLE OF BARSET 286-87 (Oxford University Press, 1932).

like Trollope who has a genuinely refined understanding of human relations and a genius for articulating it."[88]

Additionally, the complexity, intricacy and intensely private nature of the Bishop's feelings should give us some cause for skepticism about the possibilities of intimate abuse circles. It is an utterly farcical, and even disgusting thought experiment — but just imagine the Bishop of Barchester, Mrs. Proudie and the rest of the people of Barchester (Archdeacon and Susan Grantly, The Dean and Mrs. Arabin, The Reverend and Mrs. Crawley, Septimus Harding, and the rest) all getting together for an IAC to address the abuse in the Proudies' relationship. Even assuming away the reserve of Victorian culture, wouldn't it be a gross violation of the Bishop's (or anyone's) privacy and dignity to ask him to articulate his feelings about his wife's treatment of him in front of family, friends and professionals? He struggles to articulate these things to himself, even in the emotional intensity of the moment of her death. How then can we expect victims to be able to narrate these kinds of feelings, *not* just in the context of a private therapeutic relationship, or even in the context of marriage counseling, but in the context of what appears to be a highly public meeting where community and family and multiple professionals are present? Okay, that's the end of the first digression.

The second digression is about Mills' condemnation of Lauren the prosecutor. In Part III, I claimed that Mills had convinced me that Lauren was a monster. But, honestly I'm not sure that Lauren is rotten to the core. Certainly, her contempt for victims of domestic violence is bad; and, her plan to trump up charges on Nate is as despicable as it is doomed to fail. But, what about the way that Lauren remembers the pain of her own abuse and harnesses that pain to energize her work as a prosecutor? What if she transfers her anger towards her dad onto those who abuse others? Is that really so bad? Should we really go along with Mills' pathologization of that element of Lauren's psychol-

88. There are many interesting analyses of the bond between lovers in violent intimate relationships in Victorian literature. Two more that spring to mind are *Janet's Repentance*, GEORGE ELIOT, *Janet's Repentance, in* SCENES FROM CLERICAL LIFE 128 (Penguin Books, 1998) (1858), and of course, the horrific relationship between Heathcliff and Isabella Linton in *Wuthering Heights*, EMILY BRONTE, WUTHERING HEIGHTS (Penguin Books, 1994) (1847). ANTHONY TROLLOPE, BARCHESTER TOWERS 384 (Penguin Classics, 1993) (1857), also contains a memorable scene in which the genteel widow Emily Bold slugs the insufferable Obadiah Slope.

ogy? In gesturing toward an answer to that question, let me quote from someone who was arguably one of the most (at least theoretically) influential opponents of inequality and injustice in the western world in the last millennium, Jean-Jacque Rousseau. In recalling the brutal beatings he and his cousin were given by his uncle in their childhood Rousseau writes:

> While I write this I feel my pulse quicken, and should I live a hundred thousand years, the agitation of that moment would still be fresh in my memory. The first instance of violence and oppression is so deeply engraven on my soul, that every relative idea renews my emotion: the sentiment of indignation, which in its origin had reference only to myself, has acquired such strength, and is at present so completely detached from personal motives, that my heart is as much inflamed at the sight or relation of any act of injustice (whatever may be the object, or wheresoever it may be perpetrated) as if I was the immediate sufferer. When I read the history of a merciless tyrant, or the dark and the subtle machination of a knavish designing priest, I could on the instant set off to stab the miscreants, though I was certain to perish in the attempt.[89]

Is this projection talking? Counter-transference? If so, are we sure we don't need more of it in the world? I concede that when it comes to self-congratulatory self-dramatization, Mills has nothing on Rousseau. But, surely we do not want to do away with protectiveness of others fueled by our own memories of injustice. Surely if we could eradicate that psychology we would have far fewer people who were interested in combating injustice and inequality. That's the end of the second digression and the end of the interlude.

V. BACK TO THE LAW.

Throughout her discussion, Mills also makes it appear as though victims of domestic violence have only the criminal law to turn to. In fact, most American states have enacted domestic violence statutes that provide victims of domestic violence with a number of flexible and quickly available non-criminal remedies for domestic violence.[90] Moreover, victims can turn to the com-

89. JEAN-JACQUES ROUSSEAU, THE CONFESSIONS OF JEAN-JACQUES ROUSSEAU (W. Conyngham Mallory trans., 1782), *available at* http://www.swan.ac.uk/poli/texts/rousseau/confa.htm (last visited Jan. 5, 2005). This incident is *not* to be confused with one he relates earlier in book one, where a spanking he received as a child from a woman he had a crush on inspired in him a life-long desire to be spanked by his lovers.

90. *See* HART, *supra* note 19; FINN & COLSON, *supra* note 19; Lerman, *supra* note 19.

mon law of tort, which they can engage without ever having anything to do with the criminal process.[91] Mills' discussion completely ignores the possibility of recourse to noncriminal statutory and common law civil remedies.

Mills makes another subtle but telling mistake when she says: "Spousal abuse was not legally prohibited until the end of the nineteenth century."[92] In fact it was wife abuse that was permitted. William Blackstone wrote:

> The husband (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with the power of restraining her, by domestic chastisement. . . . The civil law gave the husband the same, or a larger, authority over his wife; allowing him, for some misdemeanors, *flagellis et sustibus acriter verberare uxorem* [with flails and cudgels to beat the wife energetically], for others, *only modicam castigationem adbibere* [to apply limited punishment].[93]

Thus, law had, in a sense, privatized control over wives and given both control and responsibility for their conduct to their husbands. The state delegated its monopoly on violence to husbands within the marital relation. In Mills' zeal to try to cast domestic violence as gender neutral, she overlooks this important aspect of its legal history.

Another place where Mills gets her law wrong is in her discussion of the South African Truth and Reconciliation Commission (TRC). Mills, in touting the South African experience as a model to follow in the domestic violence context, says this:

> Rather than sending the perpetrators to jail, they could garner the wages of the perpetrators to support the victims' families. Other requests from the families of victims included honesty about what happened, an apology, or the mounting of a gravestone. The fact that the victims' families could dictate even an aspect of the outcome in an otherwise violent situation helped them to feel at least partially restored.[94]

Mills gives no authority for this claim, and it is hard to know where to begin in explaining all the ways in which it is wrong.

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91. Linda K. Meier & Brian K. Zoeller, *Taking Abusers to Court: Civil Remedies for Domestic Violence Victims*, TRIAL MAG., June 1995, *available at* http://www.smith-lawfirm.com/domestic_violence_article.html (last visited Jan. 5, 2005) (on file with UCLA Women's Law Journal).

92. MILLS, *supra* note 1, at 33.

93. WILLIAM BLACKSTONE, COMMENTARIES on the Laws of England Book I Chapter 15 (1765), http://www.lonang.com/exlibris/blackstone/ (last visited Nov. 19, 2004).

94. MILLS, *supra* note 1, at 135.

The TRC had no power to garnish the wages of perpetrators.[95] Victims could not dictate any aspect of the outcome of the amnesty proceedings.[96] Victims and their families were entitled to be notified if a perpetrator whose actions had harmed them was applying for amnesty so that they could be present, confront the perpetrator, and give their own account of what happened.[97] However, after the amnesty hearing, either the Commission granted complete civil and criminal amnesty to the perpetrator or it did not.

The South African TRC was created by the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. This Act divided the commission into three committees:[98] The Human Rights Violation Committee, which identified victims of human rights violations and then referred them to the Reparation and Rehabilitation Committee; the Reparation and Rehabilitation Committee, which was to consider applications from victims for reparations and make recommendations to Parliament about how reparations should be made; and, the Amnesty Committee, which heard applications of perpetrators for amnesty. The Promotion of National Unity and Reconciliation Act required the committee to grant amnesty from both criminal and civil prosecution in the following circumstances:

> 20. (1) If the Committee, after considering an application for amnesty, is satisfied that —

95. Promotion of National Unity and Reconciliation Act, No. 34 of 1995, *available at* http://www.doj.gov.za/trc/legal/act9534.htm (last visited Jan. 5, 2005) (on file with UCLA Women's Law Journal).

96. *Id.*

97. *Id.* at § 19(4). The relevant section reads as follows:

> If an application has not been dealt with in terms of subsection (3), [subsection (3) allows the Amnesty Committee to grant or refuse amnesty without a hearing under certain conditions] the Committee shall conduct a hearing as contemplated in Chapter 6 and shall, subject to the provisions of section 33-
>
> (a) in the prescribed manner, notify the applicant and any victim or person implicated, or having an interest in the application, of the place where and the time when the application will be heard and considered;
>
> (b) inform the persons referred to in paragraph (a) of their right to be present at the hearing and to testify, adduce evidence and submit any article to be taken into consideration;
>
> (c) deal with the application in terms of section 20 or 21 by granting or refusing amnesty.

Id.

98. *See The Committees of the TRC*, Truth the Road to Reconciliation: Official Truth and Reconciliation Commission Website, *at* http://www.doj.gov.za/trc/trccom.htm (last visited Jan. 5, 2005) (on file with UCLA Women's Law Journal).

> (a) the application complies with the requirements of this Act;
> (b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and
> (c) the applicant has made a full disclosure of all relevant facts, it shall grant amnesty in respect of that act, omission or offence.[99]

Apology was never a condition of amnesty. Again, the amnesty was both civil and criminal.[100] Provision for reparations from individual perpetrators to individual victims formed no part of the legal framework of the Amnesty Committee. With respect to the Reparations and Rehabilitation Committee, victims could make representations and ask for various forms of compensation. However, the committee only had the power to make recommendations to the government about the sort of reparations that ought to be made. Reparations were to come from the government, not the perpetrators. The theory was that since it was the government that granted perpetrators' amnesty, it was the government that owed the victims reparations.[101] Madeleine Fullard,[102] a senior research analyst for the TRC from 1996-2002, explains the outcome of the Reparations process:

> Regarding financial reparations, the Commission recommended that the government should pay those victims identified through the TRC process R3 billion, in annual instalments over a 6 year period (this total figure represents 0.001% of the country's annual R300 billion budget, which translates into R136 000 per individual). However, the South African government has only agreed to pay R30 000 per individual, in a once off payment. The Commission also recommended that business and other apartheid beneficiaries should pay a once-off wealth tax and that the country's inherited apartheid debt

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99. Promotion of National Unity and Reconciliation Act, *supra* note 77, at §20.

100. *See id.* at § 20(7)(a).

> No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

Id.

101. *See* Azanian Peoples Organization v. President of the Republic of South Africa 1996 (8) BCLR 1015 (SA), *available at* http://www.concourt.gov.za/files/azapo/azapo.pdf (last visited Nov. 19, 2004).

102. *Public Culture Fellow Madeleine Fullard Contemplates Her Work with South Africa's Truth and Reconciliation Commission*, Office of International Affairs News: Emory in the World, *at* http://www.emory.edu/OIA/news/features/oct03/fullard.html (last visited Jan. 5, 2005) (on file with UCLA Women's Law Journal).

> (which accounts for approximately 20% of the government's annual budget) should be restructured in order to free up money for development and redistribution. Again, the government chose to ignore these recommendations. This has left victims feeling betrayed. It also does not bode well for long-term reconciliation.[103]

Again, Mills tries to seduce us into accepting of her ideas by giving us inaccurate information. Many people criticized the TRC for its failure to provide a process in which individual perpetrators could be required to pay reparations to their victims. However, the TRC simply did not provide for that.

VI. MILLS' PLACE IN THE LITERATURE ON DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE.

A further difficulty with Mills book is that she tends to ignore the existing scholarship on domestic violence and restorative justice. For example, Heather Strang and John Braithwaite's collection of essays entitled *Restorative Justice and Family Violence*,[104] which contains a number of sophisticated analyses, both pro and con, of restorative justice in the context of intimate violence, is largely ignored by Mills. She cites this collection only four times and does not discuss any of the essays in it at any length. She drops two footnotes to Julie Stubbs' essay "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice,"[105] citing Stubbs' work as an example of the predictable and standard but misguided objections "faced by practitioners of therapeutic and restorative justice who work in family violence."[106]

Let's consider some of the objections Stubbs raises. First, Stubbs notes that:

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103. MADELEINE FULLARD, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, DIS-PLACING RACE: THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION (TRC) AND INTERPRETATIONS OF VIOLENCE (Race and Citizenship in Transition Series, 2004), *available at* http://www.csvr.org.za/papers/paprctp3.htm (last visited Jan. 5, 2005).

104. RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 45.

105. Stubbs, *supra* note 45. Mills references to Stubbs are found at page 103, note 6 and page 135, note 9. She also makes a brief reference to Joan Pennell and Gale Bulford's article "Feminist Praxis: Making Family Group Conferencing Work," Joan Pennell & Gale Bulford, *Feminist Praxis: Making Family Group Conferencing Work*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 108 (Heather Strang & John Braithwaite eds., 2002). Mills' references to Pennell and Bulford are at page 136 and 140.

106. MILLS, *supra* note 1, at 136.

> Much of the literature on restorative justice seems to assume a discrete incident between a victim(s) and offender(s) who are unknown to each other . . . . This is evident in claims that restorative justice offers benefits such as: to allow the victim to meet the offender and to learn that they were not specifically targeted but were chosen more randomly; that the consequences of the violence were unintended or not fully appreciated by the offender; that the offence is not likely to be repeated. Such assumptions typically are not valid in domestic violence cases and may need to be challenged for other forms of victimization.[107]

Far from being adequately answered by Mills, Stubbs' point is so hopelessly lost on her that Mills actually argues this:

> Fitting the restorative justice model to the problem of intimate abuse may not be without its problems. Since the IACs do not depend on locking the offender away, they may increase victim fears of revictimization. However, it has been shown that in other models of restorative justice, decreased fears of revictimization are twice as common as increases.[108]

In the stranger offender context, Victim Offender Mediation gives victims the opportunity to view the perpetrator in a new and demystifying setting. The picture of the perpetrator sitting nicely at the conference table participating in the meeting just isn't as scary as the one drawn from the victim's shadowy and panicked memory of the moment of the offence. When the offender tells the victim that he really didn't think that, say, the

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107. Stubbs, *supra* note 45, at 43 (citations omitted).

108. MILLS, *supra* note 1, at 141. As an authority for this proposition she quotes John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, *in* 25 CRIME AND JUSTICE 81-82 (Michael Tonry ed., 1999). Take a look at what Braithwaite actually says. He is talking about different objections to restorative justice and the one he is addressing here is the objection that restorative justice practices can increase victims' fears of revictimization. *Id.* He writes:

> The studies reported in Section VIIA clearly establish that this can happen. However, they also establish that a reduction of victim fears of revictimization appears to be about twice as common. While victims are mostly surprised to learn how shy, ashamed, and inadequate offenders are, some offenders are formidable and scary. Such cases can destabilize restorative justice programs in the media. Our worst case in Canberra involved an offender who threatened a woman with a syringe filled with blood. The conference was not well run and feelings between victim and offender deteriorated. Subsequently, the victim found a syringe left on the dashboard of her car, which she took to be a threat from the offender (though this allegation was never proved) . . . . [T]his is the only case of escalated victim fear that hit the media. But one can be enough. Restorative justice programs need to offer much more comprehensive support to victims who face such traumas.

Id.

robbery would cause that much trouble and that the loss would be covered by insurance, the victim's anxiety about the offence may be quieted. The victim becomes less fearful because the mundane setting of the conference helps to fill in the victim's vague perception of the offender as all powerful and malevolent with new details of the offender as potentially both vulnerable and courteous. This sort of epiphany is not going to happen in the intimate context where the victim is already well aware of the offender's vulnerabilities and charms.

Another of Stubbs' concerns is that restorative justice often relies on processes of apology and forgiveness. Stubbs writes:

> Some restorative justice scholars see the giving and accepting of an apology as the hallmarks of restorative justice . . . . Yet often there is little basis for trust since domestic violence is commonly characterized by repeated offending and apology. Domestic violence perpetrators often are adept at using apology to manipulate their partners and others. This over-emphasis on the value of the offender apology has been labelled "the cheap justice problem."[109]

Mills stresses the importance of forgiveness to healing and the potential for the IAC to inspire forgiveness without ever recognizing the problems of the seductive power of apology and forgiveness in the violent relationship. She writes: "Intimate Abuse Circles may offer a unique opportunity to regain in the intimate relationship what the violence has so deeply marred. If a person is frank about the damage he or she did and takes responsibility for it, both partners can begin the process of forgiving and healing."[110] Again, Mills has substituted platitudes for actual argumentative responses to the kinds of concerns Stubbs raises.

Lastly, let me give you one more example. Stubbs questions the notion of the community of care, so central to the theory of restorative justice in general and Mills' IAC in particular. She writes:

> It should not be assumed that 'communities' have the capacity or the collective will to offer tangible support to victims or to exercise surveillance and control over offenders. Communities, however defined, will differ in their capacity to respond to the demands of restorative justice. For many victims of domestic violence having responsibility for their welfare sheeted back to the community may be hollow and unsatisfying.[111]

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109. Stubbs, *supra* note 45, at 58 (citations omitted).

110. MILLS, *supra* note 1, at 114-15.

111. Stubbs, *supra* note 45, at 60-61.

Here again, Mills blithely asks us to take it on faith that it will be possible to round up the community of caring family and friends who will want to come to the IAC and that their participation will be helpful.

Strang and Braithwaite's collection contains a number of interesting and well-written essays. These essays, far more than Mills' book, give reasoned support to the idea that restorative justice initiatives, if very carefully crafted and coupled with well-thought-out measures for ensuring the safety of those at risk, could help to decrease family violence. The collection also provides the reader with detailed and intelligent discussion of the potential drawbacks and risks of restorative justice in the context of private violence. The reader with a serious interest in this topic will find *Restorative Justice and Domestic Violence* to be vastly more rigorous and informative than is Mills' book.

VII. A FINAL PERSONAL REFLECTION (WITH ALL DUE APOLOGIES TO MY PARENTS).

In Chapter One of *Insult to Injury*, entitled "The Ground Zero of Intimate Abuse," Mills frames her discussion of our response to intimate abuse within a discussion of our responses to September 11th. Mills writes: "There is a striking similarity between how we as a nation react to such mass violence as September 11 and how we as individuals and collectively respond to intimate abuse."[112] Mills goes on to tell the story of how her son was a kindergarten student in lower Manhattan on September 11th.

With no small dose of self-congratulation, Mills describes what a hash all the other parents made of trying to help the kids to recover from the trauma. Then, Mills sets up a sort of allegory to her discussion of intimate abuse. In the aftermath of September 11th, one little girl in this kindergarten class named Sara was experiencing terrible anxiety about fires. Sara's mom tried and tried to comfort her and calm her fears, but no amount of reassurance seemed to help. Eventually, Sara's mom decided that, instead of just telling Sara over and over that everything was going to be alright, she should try a different tack. Sara's mom took Sara to the fire station and got the firefighters to explain their equipment and how they would work to save people in a fire. Then, she took Sara to ground zero and talked to her about

112. MILLS, *supra* note 1, at 19.

how such a terrible tragedy could have happened. Sara's fears subsided.[113] Throughout the book, Mills posits Sara's mother's enlightened response to Sara's fears as a parallel to Mills' own enlightened response to intimate violence.

Coincidentally, when I began reading Mills' book, my mother happened to be visiting me. She decided that she wanted to read the book too. One evening my mom looked up from *Insult to Injury* and she said to me:

> She's right, you know. That's what happens. I am mean to your father, and he's mean back to me, and then I'm mean to him again. And on and on it goes — day after day — year after year. So what are you going to do? How do you stop it? This woman thinks we should all go to the fire station . . . . I don't know if that will help.

113. *Id.* at 21-22.