

# Reconsidering State Intervention in Domestic Violence Cases

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This review assesses a law and criminal justice based approach to domestic violence from the vantage of recent reports from the advocacy movement in the United States (DasGupta, 'Safety and justice for all') and Amnesty International (It's in your hands: stop violence against women) and the work of legal scholar Linda Mills. The US movement is hardly alone in wrestling with how to reconcile the state's indispensable role in securing safety, support and liberty for victims with its equally undeniable role in perpetuating the patterns of sex, race and class inequality and privilege from which woman abuse stems and from which it continues to derive legitimacy.

Three decades after the first refuges opened, there are mounting questions about whether the huge investments in state intervention to stem partner violence against women via legal and criminal justice intervention are worthwhile. As concern grows about the efficacy and political implications of 'partnering' with the state, conservatives who oppose treating 'intimate' abuse as a crime have been joined by a number of feminist scholars, particularly in law (Rivera, 1994; Renzetti, 1998; Coker, 2000, 2001; Ritchie, 2000; Schneider, 2000; Maguigan, 2003; McMahon and Pence, 2003). The prevailing sentiment favours radically rethinking the partnership between the autonomous women's movement and state institutions. Critics also agree that everything changes when law enforcement comes to the table. To many in the advocacy community, the dilemmas that arise from the movement's 'partnership' with law are symptomatic of a new interdependency between the battered women's movement and the service establishment that saps activist energy from grass-roots shelter organisations, narrows their political agenda, alienates potential allies in other facets of the justice struggle, reduces advocacy to missionary casework and makes shelters players in the social service game they originally hoped to change.

## **The critique: Linda Mills**

The most radical proposal, that domestic violence be decriminalised and returned to community-based counselling and mediation for solution, comes from Linda Mills, a professor of law and social work at New York University (Mills, 1996, 1998a, 1998b, 1999, 2003). In an influential article in the *Harvard Law Review*, Mills (1998) argued that state mandates for action in domestic violence cases 'visit upon these victims an entirely distinct violent interaction' (which she calls 'emotional violence') that deprives them of independence through a pattern akin to battering, 'killing them', albeit 'softly'. Elsewhere, she (1996, 1998a, 1998b, 1999, 2000) extends her critique of criminalisation to the

'mainstream feminists' she believes are responsible for this policy. In *Insult to Injury* (2003), she goes further, contending that the harms caused by mandated justice interventions are examples of 'violence' against victims by mainstream feminists who use the state as a proxy to exert power over women because they have not processed the violence in their own lives. Mills proposes that all but 'life-threatening cases' be counselled in 'Intimate Abuse Circles' (IAC), a mode of therapeutically fostering reconciliation loosely modelled after the Truth and Reconciliation Commission in South Africa and first introduced in the lesbian community. The specific therapeutic regime Mills proposes has limited applicability outside the US. However, community-based modes of dispensing justice, so-called 'restorative justice', are an appealing alternative to police intervention in areas with strong communal traditions, in rural areas (for example, in Nicaragua) with little access to formal justice, where the state is dominated by right-wing, military, fundamentalist elites, and among sexual, ethnic and other minorities who face more danger from police intervention than from abuse (Coker, 1999). Here, I consider Mills' major empirical claims, that the current strategy harms victimised women and minorities, largely because progressive advocates and feminist legal scholars echo these concerns.

The claim that interventions cause 'secondary battering' (Pagelow, 1981) reflects a core feminist argument designed to close the 'gender gap' in services to battered women (Schechter, Oct. 1978; Dobash and Dobash, 1979; Stark, Flitcraft and Frazier, 1979); Rieker and (Hilberman) Carmen, 1984). Mills' starts from a different premise, that it is the *intimate* and *individualised* nature of domestic violence that makes punitive state interventions inappropriate. She argues that mandatory interventions undermine women's agency (for example, their right to choose how police will respond), disempower men as well as women, and subsume the diverse needs of violent couples to a stereotyped conception of 'victims' as helpless and dependent and a formula for what victims *should* do (call police, get a protection order, 'separate' and press charges). Victims who 'fail' to fit this mould or select other options, such as choosing to remain with the abusive partner, are stigmatised.

Although lacking in convincing empirical evidence, Mills makes a persuasive case against a 'one size fits all' approach that ignores the range of abusive experiences women present. Her critique of the dominant victimisation narrative is also compelling: the images of battered women promoted by the advocacy movement often over-emphasise injury and psychological dependence and discount female aggression and resistance. Projecting such images at shelters or in public education campaigns can disempower battered women who have not been seriously hurt, who respond aggressively to abuse, who have done their best to retain their dignity within the rigid confines of an abusive relationship or who decide to 'take a beating' and get on with their lives rather than refocus their energies on 'getting out'.

Despite Mills' legal training, she is stunningly naive about basic justice issues, choosing at every point to subsume 'rights' and equity issues to individualist and clinical criteria. She would attune incarceration to its 'effect on the specific perpetrator' (2003: 106), for instance, an approach that stems from the contention that arrest and incarceration reduce violence only with white, employed males who have a 'stake' in the system. Even if true, predicating punishment on a perpetrator's class, race or employment status is a gross violation of equity principles such as the equal protection clause in the 14th Amendment to the US Constitution. Much criticism of state intervention is grounded in a variant on the clinical conceit, the view that individual agency and 'choice' are the

foundation of 'empowerment' and, therefore, that interventions are properly assessed by whether they respect women's choices and ameliorate suffering. Choices are not made in a social vacuum. By abstracting individual volition from the structural context that constrains both the capacity to choose and the options available, the clinical conceit privileges private solutions through which persons become 'reconciled' to their reality over collective political or justice strategies designed to expand available options. 'Agency' is a byproduct of the rights and resources persons bring to available options. Where a woman who rejects 'bad bargains' in relationships faces homelessness, impoverishment, or risks an 'honor killing', reconciliation and therapy are much more attractive than calling the police. This is why it is so critical to combine individual empowerment with system change. Conversely, interventions will 'work' only when the inequalities that reproduce battering as a viable way for men to defend traditional privileges are greatly reduced. More global questions than whether interventions 'work', therefore, are whether the politics that surround their formulation improve the prospects for women's liberation generally and whether the issues and reforms we introduce unsettle the disciplinary mainstream on which sexual inequality depends, open new spaces where an autonomous women's movement can thrive or lead to de facto improvements in women's overall status.

*Does mandatory arrest increase violence and racial bias?*

Two empirical claims underlie criticism of current criminal justice policies: that mandating arrest leads to an escalation in domestic violence against women and vulnerable populations and that it increases racial bias in policing – hurting the very people we want to protect. Is it possible that some subgroups among the small proportion of men arrested become *more* violent as a result?

The 'strong empirical evidence' for this contention cited by Mills (2003: 37) and other critics comes from a single source, one of the five National Institute of Justice (NIJ) experiments designed to replicate the Minneapolis finding that arrest significantly deterred repeat partner violence. Police at each NIJ research site were randomly assigned to arrest or implement other interventions in misdemeanor cases. According to victim interviews, the most reliable measure of actual deterrence, arrest had a significantly greater deterrent effect than other police interventions in two cities, had a slightly greater deterrent effect in a third, and made no difference in the fourth. But in Milwaukee, the deterrent effect of arrest evaporated 30–60 days after the initial call and was actually reversed after six months. Moreover, in Colorado Springs and Omaha, but most markedly in Milwaukee, unemployed and unmarried men (who were disproportionately black), had higher rates of recidivist domestic violence than married and employed men, leading Sherman *et al.* (1992) to claim a 54 per cent 'increase'.

Neither this study nor other research supports the argument that arrest *increases* violence, even among black men. Researchers employed a cross-sectional, incident specific design. So, there is no record of violence prior to the index event with which to compare violence after the arrest. The NIJ data suggest that arrest was less effective in *reducing* violence in Milwaukee after six months than other forms of police involvement, and was less effective among blacks than whites. Cited frequently is Sherman's (1993) interpretation that 'for whites, arrest cuts the frequency of repeat violence in half. For blacks, arrest increases the frequency of repeat violence by a third' (p. 179). But, he also

admits that 'when the effects of unemployment are controlled there is no difference in arrest effects by race' (p. 180). Early, he concedes that 'It is not at all clear why racial differences might explain the differences in these results, or even that they do. When the social correlates of race are controlled, the race effects tend to disappear, at least within cities' (p. 149). Sherman believes employed men reduce their violence more than unemployed men after an arrest because they have more to lose. But it is likely these men were more violent to start with, possibly because, since unemployed men have fewer resources than employed men, they rely on violence rather than coercive control. Much of this debate is academic, however, because repeat violence was extraordinarily common among *all* groups in the experiments. In Charlotte, one of the replication sites, almost a third (31 per cent) of victims reported experiencing another assault within two weeks of arrest and by six months, the proportion had almost doubled (62 per cent) (Hirschel and Hutchison, 1996). This is the lower limit of *failure* because it excludes offenders who substituted control for violence, waited six months before their next assault, separated from their victims or who abused new partners. Critics claim that punishment 'backfires' against women (Coker, 2001). To the contrary, given the fact that only one arrested perpetrator in every 100 was punished with jail in Milwaukee, it is remarkable that incident-specific arrest had any effect whatsoever. Yet, so-called 'short' or 'three hour arrests' reduced the probability that a victim would be re-assaulted when police left or the man got out of jail from 7 per cent to 2 per cent, a change that translates nationwide into the prevention of hundreds of thousands of assaults (Schmidt and Sherman, 1996).

#### *Does mandatory arrest enhance racial bias?*

Black and Latina men and women are proportionally more likely than whites to be arrested for domestic violence crimes and more likely to be charged with aggravated battery versus a less serious offense (Stark, 2003). Mandatory arrest may contribute to these racial differences, but so may differences in violent behavior, reporting, police bias and the greater use of 'control' tactics relative to violence by those with more resources. Because minority women historically have used police to restore order during domestic disturbances, some feel betrayed where arrest is mandated. Critics who emphasise discriminatory arrest practices neglect the fact that, except where violence occurred in public, police bias was expressed historically through *non*intervention and *non*protection of black women and men. A dramatic result of this 'failure to protect' is that partner homicide is the leading cause of death for black women under age 45. Moreover, when the shelters opened, black men and white women had the highest rates of partner caused fatality. Critics of state intervention fail to factor in the devastation wrought by domestic assault and coercive control on minority ethnic communities.

Research suggests that mandates reduced bias in arrest, increased the willingness of black women to call the police and had a dramatic protective effect for black men. Where black women were less likely to report domestic violence prior to the introduction of mandatory arrest policies, black and Hispanic women currently report their victimisation at higher rates (67 per cent and 65 per cent respectively) than white women (50 per cent) or any other group (Rennison and Welchans, 2000). Mills argues that black women call police because they have few alternatives, not because they want a partner arrested. But when police relied on victim discretion in making arrests in Detroit, an approach critics

favour, the largely black minority who were dissatisfied with police decisions favoured *more* aggressive behavior, not less (Buzawa, Austin, Banon and Jackson, 1992). It is likely that the ready availability of shelter for black women and the greater probability that police would intervene if called contributed to the 77 per cent decline in fatal partner assaults on black men since 1976.

If anything, mandatory arrest policies reduced police bias in arrest (Steinman, 1991). In Duluth, Minnesota in 1981, when police had full discretion in arrest, minority ethnic men comprised 32 per cent of those arrested, about four times their proportion in the population. Arrest of all groups increased sharply when 'pro-arrest' policies were introduced and again when arrest was mandated, but the *proportion* of minority men arrested dropped to 13 per cent when arrest was encouraged and to 9 per cent when it was mandated, approximately the same as the proportion of black people and American Indians in the population (Zorza, 1994). Mandating arrest appears to also increase 'dual' arrests, largely because police feel pressured to intervene in couple fights, where there may be no clear 'victim'. But the group that suffers most from dual arrests are young, unmarried white women, not black people (Martin, 1997).

### Safety and justice for all

'Safety and justice for all' (DasGupta, 2003), a report of a 'summit' of US advocates convened by the Ms. Foundation in 2001, attempts to assess the effects of the movement's partnership with the state's legal apparatus and to consider alternatives. Two linked realities drove this unusually sober self-examination: that increasing dependence on state services has curtailed movement activism and that institutional services have become increasingly unresponsive to women's needs. The movement should gradually 'divest' from the partnership with criminal justice, the meeting concluded, replace 'mandatory' arrest with victim discretion, restore the emphasis on 'community-based' interventions, reshape efforts to meet the needs of poor and minority victims primarily, and forge alliances with progressive constituencies that have been alienated by the partnership with 'law and order'. In arguing that mandatory arrest harms victims and minorities, the advocates relied on the same confusing data as Mills and echoed many of the same themes, including the need for 'greater fairness to men'. But instead of reprivatisation of domestic violence, the report favours new leadership to combine innovative community-based approaches with heightened and broad-based political activism

'Safety and justice for all' poses questions that are fundamental to restructuring the current response. 'What... is the appropriate role of the state', the report asks '... in preventing violence against women?'

Are we over-relying on the criminal legal system? Have we gone too far or not far enough in developing and utilizing legal strategies for addressing violence against women? Would a questioning of legal intervention turn back the clock to the 'old days' when the state would not intervene at all in abuse of women within families or on the streets? (p. 2)

Of the four alternatives considered, two have already been critiqued: that we 'de-criminalise' abuse because 'any reliance on the criminal legal system is over-reliance' and that we eliminate mandates because of their effect on victim 'choice', minorities and on men. The third alternative is to fine-tune the current system to make it more responsive, an

option reflected in recent attempts in the US to repackage existing services into 'one stop' 'justice' centers and consolidated 'family violence courts'. My view is that system reform is unlikely to make services more effective unless the incident-specific, violence-based definition of battering is replaced by a nuanced response that differentiates common fights, frank assaults and coercive control, which more closely resembles the combination of ongoing physical abuse, isolation, intimidation, exploitation and direct regulation ('coercive control') that most battered women in the US experience (Johnson, 1995; Stark, 2002). It is the final alternative that is most promising, that we would hold government accountable for protecting women through law enforcement, but rely on advocacy and activism to do so rather than the current 'partnership'. 'Ownership' for ending violence against women would be returned to communities where programmes could broaden available options to include forms of counselling, compensation, 'restorative justice', education or intervention not currently available. On a larger front, the battered women's movement would align with a range of progressive organisations to shape a broader, more comprehensive state responsibility for the justice concerns of oppressed people. The report only hints at the elements of such a strategy. At a minimum, it would involve the re-activation of a political movement focused on the multiple issues that constrain women's lives, including but extending beyond violence to housing, employment, health and family support. In place of the 'narrow, punitive focus of criminal legal strategies', the report calls on government 'to assume broader responsibility and accountability for guaranteeing the basic human, economic, civil, political and cultural rights of all human beings' (Das Gupta, 2003: 19). Except for its de-emphasis on the economy of victim and perpetrator, this is a more self-conscious version of the vision that rooted the shelter movement at its birth.

The greatest challenge is to devise concrete programmes and reforms that respond to the structural dimensions of women's oppression in personal life as well as to violence. What does it mean to favour 'community-based' initiatives, for example, and how would these initiatives be linked to the broad-based political movement the advocates favour? One model was reflected in the early shelters, where direct service to a diverse constituency was combined with an empowering experience of collective self-help and advocacy for system change. If 'safety' was an immediate palliative, systems change was the antidote to continued vulnerability and the provision of service the means to build a constituency for political action on an expanded scale. The shelter's role as an incubator for activism and collective self-management offered minority and low-income women a welcome alternative to the demeaning experience associated with other human services.

The second model of 'community' programmes is more traditional and disconnected from systems' change. Here, paid or volunteer staff deliver a programme component (food, clothing, education, counselling, shelter, and so on) to a distinct target population, usually in lieu of the assumption of this function by the private or governmental sector. Even when such programmes perform a vital service – shelter or food for the homeless, for example – their top-down delivery reinforces the very dependence the service is designed to reduce. Moreover, they lack the organic connection to the community needed for true accountability or to ensure the commitment needed for an ongoing problem such as woman battering. Because such programmes often depend on the good graces of the community in which they are nested, their capacity for adversarial political action is limited, particularly with respect to community norms and values. Thus, they are rarely 'owned' by the community or shaped by the constituencies they serve.



The 'community-based' alternatives to criminal justice offered in the advocacy report are of the second, more conventional type, ranging from uncontroversial educational efforts in the schools to an 'alternative 911 that rushes community residents to a crisis scene' and 'community squads to intervene with batterers'. Apart from their insensitivity to privacy rights and their naiveté about the dangers posed in abusive situations, these are programmes 'in' rather than 'of' the community and rely on the same incident-specific 'emergency' to individual victims currently envisioned in domestic violence law. This is criminal justice by other means: a victim may be 'rescued' or a 'batterer' confronted, but the community and its norms remain unchanged. Moreover, confronting individual perpetrators finesses the larger issues of sexual inequality and support for male privilege at the root of battering. Nor is it clear how these programmatic proposals would be linked to the economic agenda designed to help the poor. Missing are the proximate organisational forms that would link politics, advocacy and service and so translate the 'immediate needs' of women into the planks in a feminist and human rights agenda.

Positioning politics in communities suggests a positive alternative to government run, bureaucratically organized services. But 'community control' has as often been the battle cry of right-wing and fundamentalist opponents of racial and social justice programmes (such as busing to achieve integration), as of progressives seeking 'participatory democracy'. Terms like 'community ownership' which are meant to convey a sense of collective empowerment also echo their entrepreneurial origin in the Nixon Presidency, when vastly under-funded, neighborhood-based Community Development Corporations (CDCs) were offered to low-income and ghetto communities as self-help alternatives to federal entitlement programs. 'Ownership' of a problem is a negative privilege for low-income communities that already are owned literally by business and other elites.

The advocates correctly stress the importance to battered women of a broad welfare and social justice agenda in which ending violence takes its place alongside the equally pressing needs for jobs, housing, health insurance, civil rights, environmental justice and peace. But they omit the structural forms of discrimination – such as sex segregated jobs or the lack of pay equity – that underlie women's vulnerability to battering, presumably because raising these issues would alienate the civil rights groups, unions, peace and other justice organisations we want as new partners. In fact, these groups have been relatively silent on pay equity, reproductive or gay rights, and other feminist issues, let alone on violence against women. However critical such alliances may be, they are likely to prompt political compromises every bit as challenging to feminist ideals as our partnership with the state.

### **Community activism in the human rights context**

The 2004 report launching Amnesty International's campaign to stop violence against women is a useful compliment to *Safety and Justice for All*. If 'Stop violence against women: it's in your hands' (2004) lacks a coherent conceptual framework, it provides exacting documentation from dozens of countries on state-sponsored gender violence, violence against women 'in the community' (which extends from harassment and assault at work through trafficking and rape by armed groups), and violence in the family as well as how countries have responded. It does two things the report from the US does not. It offers a conception of abuse that lends itself to a broad concern with economic and social justice and emphasises community-level activism that addresses cases of abuse in ways

that link directly to the state reforms in law and policy with which human rights activists have been traditionally concerned.

Amnesty International takes its working definition from the UN Declaration on the Elimination of Violence against Women, a document that includes 'arbitrary restrictions on liberty' among its foci, explicitly roots violence in unequal power and highlights its role in reproducing male domination and female subordination. Ironically, although Amnesty is forced by its diverse cultural audience to withhold support for abortion and other traditional feminist concerns, the human rights literature on which it draws is unapologetic in its feminism, a marked contrast to the US advocacy report. The political understanding reflects the evolution in how 'human rights' violations in woman battering are understood. Following Western political theory, the concept of human rights initially developed to protect individual rights to autonomy and freedom, expanded to protect these individual rights from state intrusion in the international context, and subsequently was enlarged to include state responsibility where its agents committed rape or other instances of gender violence or failed to prosecute such instances where this failure could be traced to discrimination (Beasley and Thomas, 1994; Bond and Phillips, 2001). The most recent iteration of human rights theory broadens the notion of gender violence to include isolation, limitations on autonomy and other prominent dimensions of coercive control. Alongside the state's affirmative responsibility to intervene, this report highlights the role of community-level activism in pressuring states to act and in directly preserving women's autonomy in lieu of state action.

The International Covenant on Civil and Political Rights included the right to liberty and security and other rights clearly violated by coercive control. But these were initially treated as 'negative rights' designed to counter state interference and only slowly extended to violence against women. Amnesty International (2004) did not classify the rape of women prisoners as a form of torture until 1991, for instance. The broad definition first appeared in *Violence against Women in the Family*, a literature review published by the UN Commission on the Status of Women in Vienna in 1989, which concluded that:

Not only are women denied equality but also they are often denied liberty and dignity, and in many situations suffer direct violations of their physical and mental autonomy. (UN Report 1989: 3, cited in Beasley and Thomas, 1994: 329.)

In 1992, the Committee on the Elimination of Discrimination against Women (CEDAW) identified gender-based violence as a form of discrimination that 'seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men' and argued that rape and domestic violence are causes of women's subordination rather than simply its consequence, an argument that was given official standing in 1993 by the World Conference on Human Rights in Vienna. That same year, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women which included 'psychological' violence and intimidation in community settings, such as at work or in schools, alongside more traditional forms of physical coercion, and targeted government inaction to protect women from these forms of violence as a human rights abuse. Among international agencies, the World Organization Against Torture, an international coalition of non-governmental organizations (NGOs) has come closest to grappling with the nonviolent dimensions of battering, highlighting the extent to which battered women,



like torture victims, are held in '*incommunicado* detention', in isolation from family, friends and others (Benninger-Budel and Lacroix, 1999: 43).

The continuum of dominance expressed in this broad definition provides an excellent starting point for building a politicised community movement that targets the causes of women's entrapment in everyday life rather than 'victims' and 'perpetrators'. Addressing the fact that a victim is denied money in a relationship or the right to work provides a natural segue to a broader discussion about employment opportunities for women, particularly in 'nontraditional' jobs, as well as pay equity, for instance. Going 'beyond' violence to consider liberty and justice dimensions of women's oppression may also mean reconceptualising 'shelter' as a space opened within the community where 'victims' live and treating their immediate oppression as a signal of the condition affecting all women in that world.

Amnesty recognises the risks implicit in endorsing community solutions. The report counterposes use of parallel legal regimes at the village level to oppress women with restorative justice approaches by Native American and other indigenous communities to protect them (see also Coker, 2000). By contrast with the conventional domestic violence initiatives described in the US report (the type II service model), Amnesty offers an example from Senegal that employs a participatory model in a village-level human rights education program. Involving the entire community, villagers were taught about their human rights, including those in CEDAW, engaged in problem-solving discussions about their needs (including their needs for reproductive health), which invariably identified female genital mutilation as a problem, and then invited to debate how to end the practice. The process led to massive support for ending genital mutilation.

In advocating mandatory arrest and 'no drop' prosecution, the battered women's movement struggled to reconcile the critique of state services as disempowering with the equally pressing need to end the marginalisation of domestic violence at two decision points where it was most evident. There is little evidence to support the claim that we were wrong to do so. The 'partnership' with state institutions appears to have muted the activist face of the battered women's movement without producing a corresponding improvement in women's overall safety or status. Dismantling the criminal justice response would effectively nullify the state's commitment to protect adult citizens from harm in personal life. 'Divestment' is a less radical approach. In the version outlined in the Ms. Report, we would not abandon law or the state as arenas for action but ground structures to hold state actors accountable in a reinvigorated political movement that draws its support from its constituent base, not from the institutions it strives to change. While the US advocates remain bound to a remedial model of community response, women in other countries are developing ways to address the problems faced by individual women through an enhanced social awareness of how battering and other forms of gender discrimination restrict liberties common to all.

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