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Directions in Sexual Harassment Law

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Why Doesn't He Leave?
Restoring Liberty and
Equality to Battered Women

DIANE L. ROSENFELD

In 1994, I was serving as Acting Chief of the Women's Advocacy Division at the Illinois Attorney General's Office when a woman named Rhonda called me. She told me that the day after she had obtained an emergency order of protection¹ against her ex-boyfriend Steve, he followed her in his car, forced her off the road, and threatened to "rip her guts out" with a lug wrench that he held in his fist, poised in the air and aimed at her stomach. Rhonda's sixty-three-year-old father, who was with her, jumped out of the car and tried to restrain Steve. In response, Steve beat him so severely that he required a visit to an emergency room. Rhonda was terrified. Her immediate obstacle was a return to court the next day for a full hearing to extend the protection order. I agreed to accompany her to the hearing.

After the hearing, at which Steve received a month-long continuance to hire an attorney, Rhonda and I went to the cubicle of her court-assigned advocate where we discussed the need for a safety plan. Rhonda's eyes filled with tears, as she confessed that she had been sleeping in her car for the past four days. She was afraid to go to her apartment; Steve already had broken in. She also did not want to go to her father's house and risk further endangering him. Rhonda spoke of her need to hide from Steve with an air of inevitability—a fear that he would find her anyway. We all agreed she needed to go to a battered women's shelter.

At that moment the injustice of the situation suddenly became apparent to me. Why, after a woman has been beaten by her intimate partner, should she be forced to seek shelter outside of her home, while her abuser is free to roam the streets and terrorize her? Doesn't this arrangement just add insult to injury—the insult of leaving one's home to the injury of being beaten there? Why must she restrict her own freedom of movement out of realistic fear that he will stalk her and assault her again, while his freedom of movement remains relatively unfettered? How could—and should—the power of the state be used transformatively to redistribute the rights and responsibilities in this situation to reflect more fairly the conduct of the parties?

The answer, I propose, lies in the creation of batterer detention facilities to house batterers after a domestic assault. Detaining the abuser would appropriately redistribute liberty back to the woman who was victimized by the violence. Subject to a hybrid of civil commitment and criminal responsibility, the batterer would be both punished through the detention and treated through intense therapy. The woman, on the other hand, would be able to remain safely in her home and not be forced to uproot herself—and perhaps her children—in search of shelter.

The first section of this essay explores questions of citizenship, equal protection, and liberty with a focus on how a battered woman's interests are compromised under the current institutional structure and practice of the criminal justice system. In the second section, I locate batterer intervention facilities within the current legal regime surrounding domestic violence and assert that creating these facilities would be more consistent with battered women's preferences than the current structure in which they must run for their lives. I then describe how a batterer's detention facility would operate, incorporating the most current research on batterer intervention into a program with a housing component.² Finally, I conclude that changing the institutional structure of the criminal justice system's response to domestic violence would both change women's rights as citizens and would interrupt the pernicious and predictable cycles of family violence that plague so many of our homes.

Twenty years ago, Catharine MacKinnon analogized wife beating to sexual harassment, noting that "even acts that have been objectively illegal are systematically tolerated."³ Expanding on this theme, Duncan Kennedy has defined a sphere he refers to as the "tolerated residuum" of abuse that exists in many heterosexual relationships.⁴ This sphere includes the penumbral area of abuse that is legally prohibited but widely understood to be unpoliced. This occurs in a "legal system" that is set up "to condemn sexual abuse of women by men in the abstract but at the same time operating the system so that many,

many instances of clearly wrongful abuse are tolerated." The proposal to intervene to stop and treat abusive males is aimed specifically at changing the boundaries of the tolerated residuum, shrinking the sphere to reflect that such abuse is truly intolerable.

Prior to Catharine MacKinnon's articulation of the theory of sexual harassment, a woman whose male boss was making lewd suggestions or threatening to cut off or alter her employment usually had to accept the situation as "just life." She had no legal rights that would allow her to remain at her job and challenge the discriminatory behavior. Her choices were limited to accepting her lot or seeking employment elsewhere.

MacKinnon's theory transformed women's opportunities for participation in the workplace by giving the aggrieved party a legal right to stand her ground and work free of discrimination. The concept, theory, and practice of sexual harassment law have revolutionized the workplace by redistributing the set of entitlements with which a woman enters the market.

In a homologous fashion, it is unacceptable that women must suffer continued abuse at the hands of an intimate partner without meaningful state intervention and accept it as "just life."⁵ Using sexual harassment as a model of transformative legal theory, this essay is offered in the hope that a change in the institutional arrangements surrounding domestic violence would give meaning to the promise of equal protection.

Give Me Liberty

Domestic violence implicates a battered woman's interest in both liberty and equality. A narrow focus on a battered woman's situation when the system to which she has turned for help tells her to go into hiding at a shelter elucidates her acute loss of liberty. If the lens is moved to a wider angle, the denial of equal protection of the laws comes into focus. When women are told by the criminal justice system to leave their homes and seek shelter elsewhere while men are left largely unaccountable for their own criminal behavior, the systematic preference of men's rights over women's becomes vividly apparent. This is a denial of equal protection of the laws.

When law enforcement officers respond to a domestic assault, they usually take the batterer into custody while advising the victim to seek an order of protection. At the same time, law enforcement officers will provide the victim with a list of shelters or the name of a victim advocate who will guide her to such shelters. It is at this precise moment that the meaning of the state's promise of protection is called into question and its internal contradictions are

revealed. For if the state expected that the order of protection would be effective, why then does it recommend that the battered woman go into hiding for her life? A critical examination of this moment in domestic violence implicates the state's role in both denying a woman equal protection and being complicit in her loss of liberty. Not only does it condone such loss of liberty, it explicitly recommends it.

The order of protection represents the state's promise of equal protection to its citizens: For the state to recommend seeking shelter contemporaneously with issuing an order of protection is an implicit recognition that it is breaking its promise of protection as it is making it. In the context of domestic violence, liberty is a zero-sum game in which the state, by its deliberate inaction, sides with the batterer. Since the batterer's freedom is inversely related to his victim's, every act or omission by the state that preserves the batterer's freedom must be seen for what it also is — part of a systematic imposition on the liberty interests of an abused woman. Noteworthy here is the recognition that stalking laws anticipate the probability that an abuser will not be adequately restrained by the protection order, and will continue to seek out the victim. Instead of making the first state intervention as effective as possible, which the state would do if it took domestic violence seriously, it offers a series of responses that encourage the battered woman to continually seek piecemeal protection from the criminal justice system. The problem is that this response leaves her open to predictable reassault.⁶

Moreover, the state explicitly requires the battered woman to take responsibility for her own safety and for its own failure to protect her as a citizen. Battered women's shelters represent nothing less than a loss of a woman's liberty to move around freely because she, as a result of challenging the violent domination she faces at home, must now exist in hiding. She loses her freedom to go to work, to attend school, to participate in those daily activities that make up the normal texture of one's life. Through its reliance on a system that undermines the fundamental citizenship rights of an already besieged class, the state becomes complicit in not only the perpetuation of violence, but also in the maintenance of a silenced underclass. Not only are battered women implicitly told that their concerns will be ignored, but they are also denied the freedom necessary to successfully mobilize to have their rights protected.⁷

In what other crime is the blame and responsibility not only placed on the victim but also reflected institutionally? In this light, battered women's shelters can be seen as an institutionalized representation of the systematic denial of equal protection under the laws.

Indeed, the existence of battered women's shelters is an example of what

Reva Siegel calls a "status-enforcing regime" that transformed the practice of wife-beating without abolishing it, thus reinforcing male dominance.⁸ The way that this regime works is by passing laws prohibiting domestic violence, while at the same time supporting structures that maintain the status quo so that the new law, while well intentioned, will not give a battered woman a right to be free from the predictable violence committed against her by her intimate partner. Rather, these laws represent just enough superficial change to quiet public outcry and fail to either address the underlying causes of the problem or to alter the power dynamics between the parties.

It is not a coincidence that the rise in the number and power of battered women's shelters grew along with the rise in the number of laws and political initiatives to fight domestic violence. Shelters now form the epicenter of response to domestic violence — they are fully integrated into government response. But laws that purport to protect while telling you to fend for yourself are not likely to provide the "equal protection" they promise. Changing the structural arrangements around domestic violence by creating facilities that reflect the state's desire and ability to hold the offender accountable would be a transformative move aimed directly at eliminating the effect of battered women's shelters as status-enforcing regimes.

While a battered woman's liberty interests will be explored in this paper, notions of equal protection are just as relevant. The legal progress women have made in the past twenty-five years has been based on equality theory rather than on liberty interests. The development of sexual harassment law represents the most significant legal gain for women to date. The right to participate in the workforce free of sexual harassment is now part of every person's entitlement. In fact, sexual harassment law took away the male entitlement to dominate women in the workplace by exploiting their sexuality. Perhaps a real response to domestic violence, as suggested in this essay, would likewise take away male entitlement to dominate them physically at home.

In the post-*Morrison* legal world in which there is no longer a federally recognized right to be free from gender-motivated violence,⁹ women are, as Catharine MacKinnon puts it, sent back home to their abusers. Consider this analogy:

One way to describe the process of change in women's legal status from chattel to citizen is as a process of leaving home. The closer to home women's injuries are addressed, the less power and fewer rights they seem to have; the further away from home the forum, the more power and rights women have gained — and with them freedom of action, resources and access to a larger world. In experiential terms, women are least equal at home, in private; they

have had the most equality in public, far from home. It is in the private, man's sovereign castle, where most women remain for a lifetime, where women are most likely to be battered and sexually assaulted, and where they have no recourse because the private, by definition, is inviolable and recourse means intervention. . . . [O]ne way to describe this dynamic is to observe that men often respect other men's terrain as sovereign in exchange for those other men's respect for their own sovereignty on their own terrain. As a result of such balances that men with power strike among themselves, represented in the shape of public institutions, men have the most freedom at home, and women gain correspondingly greater equality, hence freedom, the further away from home they go.¹⁰

Despite formal legal and policy changes that supposedly reflect a more enlightened view of family and gender relations, as MacKinnon notes the home remains a bastion of male domination, most noticeably where violence is involved. The abused woman is explicitly told that to stand a legitimate chance of being protected from violence she must leave her home, that she will be heard only when she speaks with her feet.

Why does the system work this way? The reluctance many male judges have to telling a man what he can and cannot do in his own home to his "own" wife strongly supports MacKinnon's point. Indeed, isn't it possible that male sovereignty depends for its existence on this very notion—that men can accept hierarchy among other men as long as they all understand themselves to be superior to women?

Battered Women's Shelters: An Institutional Analysis

Historically, battered women's shelters were a desperate attempt by women to protect other women who were experiencing abuse, mostly from violent, alcoholic husbands.¹¹ The battered women's movement culminated in the establishment of the first battered women's shelter in England in 1974.¹² The shelter idea spread to the United States and generated pressure to change the law to criminalize wife beating. The salient point is that when battered women's shelters were started, domestic violence was largely shielded from the eyes of the law.

Now, however, all states and the federal government have laws against domestic violence and stalking. Public officials at all levels, from local prosecutors to governors to former Attorney General Janet Reno, have decried the amount of violence against women in society, paying particular attention to domestic violence. Now that the government has asserted its political will to

stop violence against women, a critical reassessment of the institutional arrangements surrounding the response to domestic violence is warranted.

In this vein, it is instructive to examine how battered women's shelters have been integrated into the state's response to domestic violence under this new legal regime that treats wife beating as criminal. While the state neither fully supports nor runs battered women's shelters, it explicitly relies upon them in its response to domestic violence. In progressive law enforcement departments, police supply information on battered women's shelters when they answer domestic violence calls.¹³ At the same time, the police will usually advise the woman to seek a protective order. Underlying this seemingly redundant behavior is a realistic expectation that an order of protection will not actually provide adequate security. By referring a battered woman to a shelter, the state demonstrates that it believes both that the violence will escalate if her partner is allowed contact with her and that it is her responsibility to provide for her own safety. The same expectation that the order of protection will not adequately restrain the batterer from reassaulting his victim is reflected in stalking laws. Yet instead of seriously reforming its response, the criminal justice system routinely issues protective orders, fully aware of the likelihood that the orders will not work.

In the same way that the existence of battered women's shelters reifies the notion that the victim must seek shelter, the creation of detention facilities would instead give meaning to male responsibility for violent and abusive behavior. The current regime in which women's complaints of abuse are not treated as lethal threats forces abused women to seek other methods of assistance rather than to rely on the state for protection.

By contrast, increasing state protection from abuse would change the distribution of rights and responsibilities of people involved in domestic violence, and would make battered women more likely to call upon the state for protection.¹⁴ It could increase the real cost and consequences to the abuser. By giving abused women an expanded range of options to deal with their situations, batterer detention facilities would represent a government response more commensurate with its promise of protection.

Whether through direct action or failure to act, the state is implicated in almost all aspects of domestic violence. Through legislation, law enforcement, judicial decision-making, and the performance of a multitude of other roles and functions, the state acts. In so doing, it takes a side—and privileges the interests of one party over the other. In a situation of domestic violence, when a woman is not safely separated from her assailant, the state's actions place her in danger of attack. The present delivery of state services in response

to domestic violence is rife with state action that exacerbates and intensifies the problem, rather than addressing it effectively.

Locating Batterer Detention Facilities Within the Larger Context of Domestic Violence

CONTINUED SUPPORT FOR BATTERED WOMEN'S SERVICES

My proposal to create batterer intervention facilities and the critique of battered women's shelters as part of the facilitation of domestic violence is not to be read as an indictment of the battered women's movement or the life-saving work that battered women's advocates have done throughout the years. It is rather a critique aimed at a criminal justice system that can do a much better job of protecting its citizens from domestic abuse. Imagine for a moment the expanded range of services that battered women's advocates could provide if the batterer, rather than the battered woman, were the one detained. If the pressure to provide shelter were decreased, advocates could turn their attention to providing more long-term assistance to battered women, such as helping them find permanent new housing, new jobs, or job training so that they could advance in their careers. A battered woman would be able to evaluate her options in relative safety, while the batterer would be in detention, rather than having to run for her life and hide.

BATTERED WOMEN AND NORMATIVE PREFERENCES: WHY SHE DOESN'T LEAVE

Many of the normative assumptions made about the parties involved in domestic violence fail to address adequately the complexity of the relationship between the perpetrator and the victim. Unlike most other victim to offender relationships, in domestic violence the parties are connected emotionally and economically and often have children together. When hearing stories about domestic violence, people often ask, "Why doesn't she leave?" This question, which assumes that the woman *wants* to leave the relationship, disregards the context of intimate violence. Instead, the battered woman usually wants the violence to stop.¹⁵ This precept should be the operating normative assumption for the creation of batterer detention facilities, as it increases the possibility that the violence *will* stop.

Focusing on the question of why she does not leave also reflects the commonly held attitude that it is the battered woman's responsibility to control (or avoid) the temper of her violent intimate partner. It reflects the deeply misogynist idea that a woman must act in a way so as not to displease her husband—a notion that underlies laws explicitly permitting a husband to beat his wife.¹⁶

It also assumes that there is someplace to go, and that she can go there. These presumptions have many flaws.¹⁷ First, while battered women's shelters do exist, such shelters are only a temporary solution, and have limited space. A shelter may be unavailable when a battered woman most needs it. Even if one is available, going to it is inevitably difficult and painful. Consider how it feels for a woman who has been beaten by an intimate partner to have to then seek shelter in a strange and hidden place. She must uproot herself and her children and go into hiding. She will be cut off from familiar surroundings and her support system. She may lose contact with friends and family at the very moment when she most needs emotional support.¹⁸ Her job may be placed in jeopardy. If she works out of her home, she may be unable to continue. Alternatively, she may justifiably fear going to work, where her abuser might find her.¹⁹ If she has children, their school attendance will likely be disrupted. Schools are often the site of parental abduction, and battered women recognize and may simply not be willing to take this risk.

Most important, however, leaving is the most dangerous time for a woman. Battered women who are killed by their abusers have left or attempted to leave an average of at least five times.²⁰ It is critical to understand that because battering is about power and control, a woman leaving her abuser signifies to him a loss of control and he will predictably reassault her in an attempt to reassert control.²¹ While it might seem counterintuitive, men who batter do not do it because they want the woman to leave; rather, they want her to stay, but in a subordinate position. Abused women often leave to both escape further abuse and also because they interpret the battering as a message that their batterers must hate them and want them to leave. However, it is much more complicated than that.²² So well does the criminal justice system understand this problem that stalking laws anticipate that she will leave and that he will stalk her in exactly this manner.

Fear is often the biggest reason that women don't leave. Many abused women have been warned by their batterers that the punishment for leaving will be severe. Fear paralyzes many battered women—fear that the abuse will escalate once the abuser finds them, fear of the unknown once they leave, fear of losing custody of the children (a very common threat of batterers) and fear of abject poverty.²³ In this current environment, it is quite understandable why women don't leave if one takes a moment to consider the realities facing women in this situation.

Although frustrating to battered women's advocates, we should not be surprised that several years into the movement, people are still asking the question, "Why doesn't she leave?" The entire criminal justice system is set up to perpetuate the victim-blaming inherent in the question. Battered women's

shelters reify the notion that the violence is her responsibility; invisible is the counter notion of male responsibility. In a culture that has never truly rejected the idea that a woman is responsible for her partner's violence, where the laws have codified the notion that female sexuality is an open invitation to male violence, perhaps the only surprise is that we have seen so much surface-level change in the formal response to domestic violence.

INTERRUPTING THE KNOWN CYCLES OF INTIMATE VIOLENCE

It is widely recognized that domestic violence occurs in cycles. In the tension-building phase, the man is irritable and cranky, and nothing the woman does can please him. He gradually becomes more abusive and may slap and verbally abuse his intimate partner. The next stage is the violent outbreak with acute battering. The man will "fly into a rage and become violent for no apparent reason, or state a reason that seems petty or irrational, such as his wife's cooking."²⁴ Reports of the violent outbreak often describe men as acting completely out of control, wild-eyed, red in the face, and foaming at the mouth. After the beating, the man is remorseful and apologetic. This is known as the "honeymoon phase." This "intermittent reinforcement" is a powerful tool to keep the woman in the relationship.²⁵ Many women will stay in the relationship believing in the "man they love" and hoping that his promises to change will be fulfilled.

The predictability with which domestic abuse occurs gives law enforcement a unique opportunity to intervene effectively to prevent further criminal activity. The batterer detention proposal is designed specifically to interrupt the known cycle of violence.

Integrally related to the cycles of violence in domestic abuse is what can be described as "the stalking cycle." It is predictable that when an abused woman tries to leave her abuser, he will prevent her, or attempt to prevent her from leaving through increasingly violent means. Stalking laws, which exist in every state, reflect the knowledge that the order of protection obtained by the battered woman may not be strong enough to stop the man from following her to get her back. The irony of this method of control is intriguing; the man typically beats and/or rapes the woman in an attempt to get her to stay with him. One might think from his actions that he wants her to leave, but that is not, he case, as evidenced by the stalking that almost inevitably takes place after she tries to do so. Instead, stalking grows out of the abuser's feeling that "if I can't have you no one will."

The cycle of domestic violence together with the stalking cycle combine to produce an elaborate game of hide and seek in which battered women's shelters play an important role. Put simply, the abused woman hides in a battered

woman's shelter,²⁶ and the batterer seeks her through stalking. This is far from a game, however. It is nothing less than a terroristic attempt by the batterer to regain control over the victim to resume the cycle of violence she has broken by leaving. Stalking must be treated as the lethal act that it is. Violation of a restraining order demonstrates the perpetrator's disregard for legal authority—a strong indication of his belief that his criminal behavior will not have consequences. This behavior should be read as a sign of immediate and grave danger to the battered woman, and reacted to appropriately by law enforcement. If it is not, the woman will end up like other hunted prey.²⁷

Batterer Detention Facilities

In the typical cycle of domestic violence, separation is the most dangerous time for a battered woman. My proposal is aimed at safely separating the parties and defusing the volatility of the situation to prevent escalation of the violence. We are at a moment in history where our collective understanding of intimate partner violence is evolving simultaneously with an increased focus on offender management and accountability.²⁸

My proposal is intended not to detract from the provision of services for battered women but to increase the range of available options in response to domestic violence.

The most current thinking on batterer intervention indicates that a constellation of services is necessary for a successful program. This includes participation from judges, prosecutors, probation officers, victim advocates, and batterer program personnel. Although a batterer detention facility does not yet exist, the information available through the various programs in place across the country is directly applicable to a program that includes a housing component. The addition of a housing component to a batterer intervention program would be fully consistent with program objectives and would augment the effectiveness of intervention by decreasing significantly the opportunity for reassault.²⁹

The following subsections describe the main components of a batterer detention facility. First, the facility should be created by a local coordinated community council. It should include active judicial oversight and participation, a well-planned intake evaluation process, a work release program using electronic monitoring, state-of-the-art batterer intervention therapy, coordination with victim services, enumeration of specific responsibilities for program participants, consideration of possible funding mechanisms, and cost-benefit analysis.³⁰ This is only a starting point for discussion in planning a successful pilot program.

CONSTELLATION OF SERVICES:
COORDINATED COMMUNITY RESPONSE

Coordination of community services and the criminal justice system has been demonstrated to be the most effective way of addressing batterer behavior. A recent report on batterer intervention by the National Institute for Justice suggests that an integrated criminal justice response to battering should include law enforcement officers, prosecutors, judges, victim advocates, and probation officers and should promote cross-fertilization of ideas.³¹ Additionally, members of the defense bar should be included in the design of batterer detention facilities, as their cooperation and involvement can troubleshoot problems that can be addressed in the planning process and facilitate their clients' participation in the program.³² The coordinated structure will strengthen the overall delivery of services and help to ensure that the victim's safety is not neglected through miscommunication regarding the batterer's treatment.

VICTIM LIAISON

The safety of the victim is the cornerstone of the batterer detention facility proposal. Indeed, it is structured to increase the victim's range of options, as well as to redistribute the rights and responsibilities for the domestic assault. Detaining the perpetrator allows the battered woman to confront her options in relative safety. Moreover, she will be able to make these choices while staying at home, rather than being restricted by the "choice" of hiding from her abuser or going back to him.

That ultimate objective suggests that batterer detention facilities should incorporate comprehensive victim services. Victim advocates must be included in the design of the program to ensure the full consideration of victim safety concerns and the realization of victim preferences. Batterer detention facilities should also appoint a special victim liaison to communicate with victims on an ongoing basis. Victim notification is very important at certain times in the program. Currently, victims are notified when a batterer begins a program, when he is terminated for noncompliance, when he completes the program, and when there is an imminent threat to the victim's safety.³³ Notification procedures should be developed to accommodate the specific needs of victims whose abusers are in the detention program. While the victim would be informed of threats to her security, the detention program increases the extent to which the batterer's behavior is controlled and monitored. In this system, threats to her safety could and should be more immediately and effectively addressed, because he is already in a custodial setting.

The victim liaison also could perform the role of explaining safety planning

and the basic features of the program. Many battered women whose abusers are in batterer intervention programs are not aware of services available to them. Victim liaisons can provide crucial information to help battered women build the support system they need, evaluate their options, improve their lives and ensure their safety. They can help the victim understand that enrollment in the batterer detention facility does not guarantee that the batterer will change. Importantly, the liaison can serve as a person for the battered woman to call when she needs support.³⁴

LETHALITY ASSESSMENT PERFORMED AT INTAKE

Domestic violence cases should all be treated as potentially lethal crimes. All domestic homicides and murder-suicides have involved previous incidents of physical assaults accompanied by threats of murder. Working backward from the domestic homicide, the consistent message is that if the criminal justice system had treated the domestic assault as potentially lethal, the murder might have been prevented.

Lethality assessments should be absolutely mandatory in all domestic violence cases. Following the lethality assessment, the defendant can be held under a pretrial detention statute until he can have a hearing before a judge. Pretrial detention is constitutional under many circumstances, and most states have statutes that specifically authorize it in cases of domestic assault.³⁵

The legal apparatus necessary to sustain a batterer intervention program would include a structure of incentives to make the program attractive to the batterer. The most logical of these incentives would be a resolution of the criminal complaint that does not include a finding of guilty if the batterer agrees to enter the program, completes it successfully, and fails to reassault for a given period of time.

At intake, which should take place within twenty-four hours of arrest, a specially trained batterer counselor or probation officer would explain the option of going to a batterer intervention facility and conduct the appropriate evaluation to determine eligibility.

The primary determinant of fitness for a batterer intervention facility is the performance of a lethality assessment. Conducting a lethality assessment of batterers at the intake phase can make the difference between life and death for the victim. For this reason, the evaluator should be instructed to "assume there exists a potentially lethal situation."³⁶ In doing so, the evaluator could and should make use of the substantial literature on assessing whether batterers are likely to kill.³⁷ Moreover, the lethality assessment should be conducted on an ongoing basis to monitor threatening behavior. It is critical that the lethality assessment be coordinated with victim notification services.

Evaluation criteria would include, but not be limited to, the alleged

batterer's family history, his criminal record, his attitude toward control within an intimate relationship, his attitude toward and previous use of violence in intimate relationships, his history of substance and alcohol abuse, his propensity for violence outside the home, his level of contrition for the attack, his level of denial of the seriousness of the assault, whether children are involved as witnesses or as victims, and other information relevant to the batterer's propensity to commit violence against his intimate partner. The information gathered in the assessment would provide useful guidance in constructing the detention program and for coordinating safety measures with the victim's liaison.

ACTIVE JUDICIAL OVERSIGHT

Active judicial management and oversight of domestic violence cases have been shown to decrease reassault rates and to increase batterer compliance with orders of protection and attendance at court-mandated batterer intervention programs. Thus, participation by the judiciary in the operation of batterer detention facilities would be essential to their success. Ongoing judicial oversight sends the signal to both batterers and victims that their cases will be taken seriously by a criminal justice system that understands the nature of the crime and is committed to protecting victim safety.

Batterer intervention facilities should have intuitive appeal to the judiciary. They add a meaningful alternative to the current choice of jail or no-jail. Courts have too few alternatives in dealing effectively with domestic violence.³⁸ Judges are often uncomfortable issuing only orders of protection, knowing the probability that the order will not protect the victim. Yet, they impose jail only for the most egregious intimate partner assaults, because many judges simply feel that a prison sentence is incommensurate with the crime of domestic violence.

The creation of batterer intervention facilities as a criminal justice option is not intended to suggest that battering is not criminal. Rather, it recognizes that the common criminal sanction has not proven to be the most effective way to address domestic violence.³⁹ Short jail sentences without specific batterer intervention tend to have the effect of incubating violent behavior. Placing the batterer in confinement with other violent offenders offers the opportunity for male bonding over violent behavior—a problem so pronounced that batterer intervention programs take measures to confront the issue before it arises—and will likely produce an angrier batterer with stronger desire to seek revenge on his victim upon release.⁴⁰

Moreover, jail sentences often correlate with the "honeymoon" period of the violence cycle, during which time the offender will apologize profusely

from jail and claim he learned his lesson.⁴¹ Because the dynamics and power structure of the relationship change when he is in jail—he becomes dependent on her for outside contacts and access to resources—she might be more willing to accept his apologies, as well as to pity him for being in jail. Yet, if his violent behavior in intimate situations is not addressed, he will likely repeat it when he is released.

A judiciary committed to effectively addressing domestic violence can integrate a batterer detention facility into an overall structure of sanctions for intimate partner violence. A system of graduated sanctions is the most effective way of dealing with domestic violence. Judges must be willing to issue meaningful and appropriate sentences and to respond forcefully to any violations of orders of protection.⁴² Adding the option of detaining batterers in specially created facilities in no way negates the appropriateness of jail sentences in many domestic assault cases. Rather, batterer detention is intended to address effectively the criminal behavior of an entire group of batterers whose behavior is not so addressed under the current system.

WORK RELEASE

Work release would be a key component of the batterer detention facility. According to David Adams, a founder of EMERGE in Cambridge, Massachusetts, one of the country's leading batterer intervention programs, the most successful batterer programs are the ones that seek to preserve relationships, stability, jobs, and connection to community. In addition to preserving some sense of stability, the work-release option of the batterer detention facility would have several economic advantages. First, it would remove the threat of economic deprivation for the battered woman if she or her children are dependent on the batterer's income. Economic pressures are one of the most often cited reasons that battered women resist prosecution of perpetrators, especially if it means that their children may go hungry. The batterer's wages could be remitted directly to the facility, which would ensure that support payments are made. Second, judges are reluctant to incarcerate batterers when the likely result is forfeiture of employment.⁴³ The work-release option removes this impediment. Third, the batterer could finance participation in the program if he is allowed to keep his job.⁴⁴ This would defray some of the operating costs, as well as potentially increase the batterer's commitment to the program.

THE CORRELATIVE SAFETY PLAN: ELECTRONIC MONITORING

Batterer detention facility programs would include a "correlative safety plan," in which both the abuser and the victim are equipped with electronic monitoring devices that automatically activate whenever they are within a

certain distance of each other. Rather than relying solely on the batterer's internal control mechanisms, an electronic bracelet would provide external control as well. The extra measure of security will provide the woman with an increased sense of safety knowing that he is being monitored. Such a system would dramatically increase the effectiveness of a "stay-away" order. Electronic monitoring is a method that can be used to achieve the judicial objectives embodied in a protection order.

Other available tracking devices should also be considered in planning for the victim's safety. A combination of state-of-the-art devices would likely provide the most protection.

THERAPEUTIC COMPONENT

Batterers who participate in the program would receive intense counseling and intervention therapy. Treatment modalities would be modeled after programs like EMERGE, which combines cognitive-behavioral techniques with "accountability-focused group therapy," or the Duluth curriculum, developed by the Domestic Abuse Intervention Project in the early 1980s, which situates battering within the larger context of male privilege and challenges batterers to reconceptualize gender relations in order to eliminate their violent tactics.⁴⁵ The Duluth program seeks to replace the "power and control" wheel with the "equality and nonviolence" wheel.⁴⁶

Batterers report that the one thing that matters to them is consequences.⁴⁷ A batterer detention facility creates the possibility for consequences where none previously existed. More specifically, it would capture abusers who are in a mid-range of abusive behavior, and who previously would have only been subject to a (ineffective) restraining order. There is a large universe of batterers who could be helped by such a program.

These state-of-the-art treatment intervention models would be incorporated into and adapted specifically for the batterer detention program. Because the program is in-house, the treatment would be intensified to correlate with the batterer's physical detention. Thus, batterers could have daily sessions rather than weekly or biweekly ones. Further, batterers would receive both group and individual therapy sessions to maximize the effectiveness of the therapeutic intervention. Because the batterers would not be allowed access to their victims, different methods would be employed to measure the progress of attitudinal adjustments. The length of the detention would correlate to current treatment regimes, but may be shorter because of the increased intensity. Facilities could experiment with the program length, incorporating graduated controls for when the batterer is released. The existing literature on

batterer intervention programs suggests that two months would probably be the appropriate amount of time for the in-house detention.

CAN IT WORK IN REAL LIFE?

In one sense the creation of batterer intervention facilities represents an institutional reflection of a paradigmatic shift in focus from the battered woman to the batterer. Yet in another way, it might simply be an idea whose time has come. Since I presented the ideas in this essay at the Sexual Harassment Conference at Yale Law School in 1998, I have spoken to hundreds of people about the idea. I am pleased to say that the concept has met with overwhelming support from victim's advocates, judges, law enforcement officers, academics, and other various members of the community. I have discussed the idea with representatives from different municipalities in various geographic areas.

I have encountered two concerns with the proposal, both of which can and would be addressed in designing a pilot program. The first and most serious concern was raised by a prosecutor who has worked extensively with victims. She asserted that jail is the proper place for batterers, and that any time a program is created to help batterers, it takes away from the available resources for battered women.

My response to this is twofold. First, I agree that many batterers should be in jail for their crimes against their intimate partners. However, most judges are reluctant to send them there, but would be more inclined to admit them to a program that would both detain them and offer the most effective intervention available today. The existence of the program and the added requirements of conducting a lethality assessment in itself would require judges to take much more seriously the victim's safety and the potential dangerousness of the offender. Second, resource allocation is a matter of political will and prioritizing. There is no reason that money would be taken from battered women's services to fund a batterer intervention facility. Rather, the money should be taken from prison budgets. As discussed above, allowing the batterer to participate in work-release alleviates some of the cost concerns, as he can be required to pay rent. In my opinion, lack of funding is an excuse that people use to preserve the status quo, especially in the face of a truly progressive initiative that could give women more rights. I know, based on my many years of experience in government, that budgetary measures are highly discretionary, and quite simply, where there's a political will, there's a way to get things done.⁴⁸

The other major concern was about the right of the defendant to a fair trial. Some people thought that the program would essentially convict a defendant

and sentence him without conducting a trial. As I discussed in the section on the importance of a coordinated community council, defense attorneys would be part of the planning for a pilot of the program. Many jurisdictions, including at the federal level, already have pretrial detention statutes under which a lethal defendant can be held until trial. While this program involves something less than pretrial detention, it is important to note that there is precedent for such detention. Moreover, the jurisdiction designing its batterer intervention facility can construct the program as an alternative or a deferred sentence.

Conclusion

The hope of this project is to reverse the institutionalized structure of society's response to men beating their intimate partners to produce a correlative change in the current distribution of entitlements. Quite simply, a woman should not be forced to leave her home after she has been the victim of a violent assault committed against her by her intimate partner. For the criminal justice system to consistently support this result—expecting her to leave while failing to hold the batterer accountable for his violence—perpetuates an intolerable denial of equal protection for women under the law. Moreover, to leave her in hiding and at risk of predictable future reassault denies her liberty to participate in society as a citizen.

Catharine MacKinnon is right when she points out that the Supreme Court in *Morrison* sent women back home to their abusers, where they have no rights.⁴⁹ But the Supreme Court is not our only hope. We have other viable means of fighting this battle, and it is time to work on identifying and challenging those institutional structures that keep women in their place, whether by design or effect. We must demand a public explanation from those who would defend the status quo, in which a woman can't go home again.

Notes

I wish to thank many people who have helped nurture and develop this idea, including Bernard Auchter, Mary Becker, Harvey Berkman, Bonnie Campbell, Pamela Coukos, Terry Fisher, Charles Fried, Jerry Frug, Christine Jolls, Susan Keller, Duncan Kennedy, Catharine MacKinnon, Burke Marshall, Martha Minow, Wendy Murphy, Jane DiRenzo Pigott, Laurie Robinson, William Rodriguez, Shawn Ryan, Dena Sacco, Alexa Smith, Christopher Stone, and my family. Valuable research assistance was provided by Stacey Dershewitz, Julie Mantooth, Karen Paik, Claire Prestel, Anne Robinson, Shelley Senterfitt, Shauna Shames, and Diane Welsh. This essay is dedicated to the memory of my friend Ronald V. Greer.

1. An order of protection, sometimes referred to as a stay-away order or protection from abuse order, is a common civil or criminal remedy sought by battered women to protect them against their abusers. Like other injunctions, such orders are available

immediately as emergency orders of protection. These can be issued *ex parte*, as in a temporary restraining order. Then the defendant is given notice and a full hearing is set for trial, usually within ten to fourteen days, depending on the jurisdiction.

2. I describe the operational aspects of batterer intervention facilities in another article entitled "Why Doesn't He Leave? The Creation of Batterer Intervention Facilities," *Domestic Violence Report*, Aug.–Sept. 1999 at 93. My thanks to Joan Zorza for suggesting the title and for her guidance in thinking about these facilities in the larger context of battered women's rights.

3. "The constituent acts of domestic battery are obvious criminal violations; they are regularly grounds for arrest and if proven, for conviction in contexts other than husband and wife. Women's attempts to gain legal redress and protection from domestic victimization are infamously ineffectual. This suggests that intimate assaults on women by men are ignored even when they are reported—even when there is an unambiguous doctrinal receptacle for the complaint." Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 160 (1979) (citations omitted).

4. Duncan Kennedy, *Sexy Dressing Etc.* 126, 137 (1993). Kennedy articulates the benefits to all men in a system in which some men abuse women without consequence. He recognizes "what we might lose through more protection for women" while offering solid justifications for reduction of these illegitimate gains. Most important, he describes how the background rules on the tolerated level of abuse between partners affect them, even in situations that seem not to involve it at all. The tolerated residuum is "plausibly attributed to contestable social decisions about what abuse is and how important it is to prevent it." *Id.*

5. This particular analogy was suggested by my colleague Pamela Coukos, former public policy director of the National Coalition Against Domestic Violence, at an informal presentation of this essay on February 25, 1998. She is currently an associate at Mehri & Skalet in Washington, D.C.

6. Andrew Klein, *Re-abuse in a Population of Court-Restrained Male Batterers After Two Years: Development of a Predictive Model* 112 (1993). Klein concluded that restraining orders do not protect women from continued abuse and that almost half the men re-abused their victims within two years of the 1990 court intervention (at 63).

7. I thank Stacey Dershewitz for helping me articulate and develop these insights.

8. Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," 49 *Stanford L. Rev.* 1111 at 1116. (May 1997).

9. *U.S. v. Morrison*, 120 S. Ct. 1740 (2000). In this case, the U.S. Supreme Court invalidated the civil right to be free from gender-motivated violence found in Title III of the Violence Against Women Act of 1994, Public Law No. 103-322, 108 Stat. 1941 (codified as amended at 42 U.S.C. § 13981 (1994)).

10. Catharine MacKinnon, "Disputing Male Sovereignty: On *United States v. Morrison*," 114 *Harv. L. Rev.* 135, 174–175 (Nov. 2000).

11. The movement can be traced to the eighteenth century, when women began visibly agitating for legal reforms that would protect them from physically abusive husbands. By the late eighteenth century, wife beating was illegal in most states, but very few husbands were prosecuted or incarcerated. Elizabeth Pleck, *Domestic Tyranny*, ch. 10 (1987).

12. Erin Pizzey devised the idea of temporary residences for battered women. She

established a neighborhood center in England offering housing and childcare for homeless women that attracted many battered wives. Several American women visited the English shelters. The first shelter in the United States was for abused wives of alcoholic husbands in St. Paul, Minnesota, in 1974. In August 1976, there were about twenty shelters in the United States; by 1982, there were about three hundred, as well as coalitions to provide battered women with services. *Id.*

13. See www.vaw.umn.edu/Promise/pplaw.htm for a description of Promising Practices pertaining to law enforcement response published by the Department of Justice, Office of Justice Programs.

14. Interview with Dr. David Adams, founder of EMERGE (Batterer Intervention Program) Cambridge, Mass. (Apr. 20, 1998).

15. Barbara Hart, "Battered Women in the Criminal Justice System," in *Do Arrests and Restraining Orders Work?* 100, 101 (Buzawa and Buzawa eds., 1996).

16. The first known law of marriage was formalized by Romulus (who was credited with the founding of Rome in 753 b.c.) and required married women "as having no other refuge, to conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions." The attitudes contained in this directive, ancient though the formulation may be, sound hauntingly like the sentiments expressed by men in (current) violent relationships." Angela Browne, *When Battered Women Kill*, 164-65 (1987).

17. For an unabashed examination of this question, see Andrea Dworkin, "In Memory of Nicole Brown Simpson," in *Life and Death* (1997).

18. Studies show that victims facing post-traumatic stress syndrome are more likely to heal and avoid revictimization when they can stay close to their support systems. See Susan E. Bernstein, "Living Under Siege: Do Stalking Laws Adequately Protect Domestic Violence Victims?" 15 *Cardozo L. Rev.* 525 (1993)

19. It is common for batterers to stalk their victims at work. This has led to several companies and governmental agencies to institute workplace violence policies to protect employees in abusive situations. For example, the federal Office of Personnel Management has established a workplace violence policy.

20. N. Isaacs, L. Langford and S. Kabat, "Intimate Partner Homicides, Massachusetts 1990-1995, Peace at Home" (1997).

21. This phenomenon was termed "separation assault" by Martha Mahoney. See Martha Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," 90 *Michigan L. Rev.* 1 (1991).

22. Indeed, this complication lies at the heart of gender-motivated violence. Such violence differs from other hate-based crimes because other hate crimes involve attempts to exclude those you hate, while gender-based violence is intended to put and keep women in their place. Unlike other race-based hate crimes, for example, it is impractical for men to exclude women from their lives in general. I am grateful to my former student Pam Armour for making this point.

23. See Bernstein, *supra* note 18 at 556.

24. Dawn Bradley Berry, *The Domestic Violence Sourcebook* 31-33 (1995).

25. "A batterer who intersperses abuse with loving acts, courtship, and gifts is unwittingly using one of the most powerful techniques for convincing the woman to stay with him." *Id.*

26. In fact, great pains are taken to ensure the confidentiality of the shelter location. This is often reflected in statutes and by tacit agreement because of the expectation that the abuser will try to find her and that she will not be safe if he does. Not all shelters are hidden, however. In Sweden, for example, battered women's shelters are found in public view. It is culturally understood that a man would be too ashamed to show his face at one of these facilities.

27. Spousal homicide studies suggest that some men may perceive "separation as an affront and actually heighten their pursuit and abuse of their partner." Edward W. Gondolf, "Patterns of Reassault in Batterer Programs," in *Violence and Victims* (1997). A recent stalking report issued by the National Institute of Justice confirms that there is a strong link between stalking and other forms of intimate partner violence: 81 percent of women who were stalked by a current or former husband or cohabiting partner were also physically assaulted by that partner and 31 percent were also sexually assaulted by that partner. See Patricia Tjaden and Nancy Thoennes, National Institute of Justice, *Stalking in America: Findings from the National Violence Against Women Survey* (1998).

28. Historically, we have moved beyond triage. In the late 1970s, one activist was opposed to the idea that a victim should go into hiding while her assailant was free, but she was dissuaded from questioning the need for shelter because "she received too many calls from women huddled in phone booths with their children, asking where they should go." Today, victim services for battered women are more readily available, and there is a National Domestic Violence Hotline available twenty-four hours a day with a toll-free number, 1-800-799-SAFE. It provides counseling and resource referrals for any area of the country. Although the provision of services is far from perfect, we can begin to focus on the controlling batterer behavior while continuing to take other steps to ensure victim safety.

29. Reassault rates in domestic violence hover around 32 percent, according to the most recent batterer intervention statistics. Yet, half of batterers who are in treatment programs still live with their abused partner. Living together has been found to significantly increase the risk of reassault. See Edward Gondolf, "Patterns of Reassault in Batterer Programs," *Violence and Victims* (December 1997). Detention facilities would correct this problem by providing a housing solution after a domestic assault. Moreover, the recidivism rate is substantial enough to warrant at least trying a new approach to stopping this predictable violence.

30. Appropriate funding will be critical to the success of a batterer detention project. I recommend a full exploration of funding possibilities, including, but not limited to, possible grants under the Violence Against Women Act, public-private partnerships, private donations, and the establishment of trust funds created through criminal penalties. A cost-benefit analysis should include preventive costs such as prosecutorial expenses saved through avoiding repeat prosecutions for severe violations and possible homicides. Moreover, it should include factors such as costs saved on hospitalization, lost wages, and increased dependency on government programs. For an extensive analysis of the costs of violence against women in this country, see generally the legislative history of the Violence Against Women Act of 1994, Public Law No. 103-322, 108 Stat. 1902 (VAWA), in which Congress concluded after four years of hearings and testimony, that violence against women has a substantial effect on interstate commerce. Based on this

finding, Congress passed the VAWA pursuant to its powers under the Commerce Clause (as well as under section 5 of the Fourteenth Amendment).

31. Kerry Healy et al., United States Department of Justice, National Institute of Justice, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) (hereinafter *NIJ Report*).

32. Including defense attorneys from the inception of the project would increase the effectiveness of the program for several reasons. First, defense attorneys may be able to provide insights into any objections raised by such a program. These objections could then be addressed in the pilot planning process. Second, defense attorneys would be in a good position to advise their clients to enter the program by explaining the legal and social value of reforming the batterer's behavior. Finally, the defense bar could help discourage batterers' misuse of the criminal justice system to avoid responsibility for their criminal conduct and to harass their victims.

33. See *NIJ Report*, at 38.

34. *Id.* at 36-42.

35. See, e.g., *U.S. v. Salerno*, 481 U.S. 739 (1987); accord *Mendonza v. Commonwealth*, 673 N.E.2d 22 (Mass. 1996) in which defendant was held on evidence including threats to kill his wife, standing over her with a knife, drug addiction, a history of psychiatric hospitalizations, and assault and battery on a police officer.

36. *NIJ Report*, at 157. The Report contains an intake form from the AMEND program in Denver, Colorado. See also www.nashville.net/police for former Lieutenant Mark Wynn's form on lethality assessment.

37. Criteria include threats made, weapons used or threatened to be used, and when the batterer begins to act without regard to legal or social consequences. See Barbara Hart, Pennsylvania Coalition Against Domestic Violence, *Assessing Whether Batterers Will Kill* (1990).

38. Interview with the Honorable Shirley S. Abrahamson, Chief Justice, Wisconsin Supreme Court, May 21, 1999.

39. "Incarceration is the one sentence clearly conveying the seriousness of wife battering as a criminal offense. But, for a variety of reasons, including jail and prison overcrowding, the relative ineffectiveness of incarceration for preventing further violence, and victim reluctance to have their batterers incarcerated, judges will impose alternative sanctions." Ford, Regoli, Reichard, and Goldsmith, "Future Directions for Criminal Justice Policy on Domestic Violence" in *Do Arrests and Restraining Orders Work?* 258 (Buzawa and Buzawa eds., 1996).

40. Interview with Dr. David Adams, EMERGE (Apr. 20, 1998).

41. This is the period after the violent assault when the batterer is remorseful and promises to change. The cycles of domestic violence are explained more fully *infra*, "Interrupting the Known Cycles of Domestic Violence."

42. See *NIJ Report*, at 83. The report also makes the important point that judges should be aware of the co-occurrence of domestic violence and child abuse as well as the harm and danger to children who witness domestic violence.

43. This is not to imply that unemployed batterers would be ineligible for the program. Rather, for these men, community service arrangements could be worked out.

44. Most batterer treatment programs require the abuser to pay for the therapy. Prices

are on a sliding scale, so that poverty can be taken into consideration yet not used as an excuse to avoid therapy.

45. Central to this model is the "power and control wheel," which portrays eight abusive practices as "spokes" of male control: economic abuse; intimidation; emotional abuse; isolation; children; male privilege; coercion and threats; and minimizing, denying, and blaming. These behaviors, combined with a pattern of violence, enable batterers to control their partners.

46. The Duluth model utilizes group classes led by a trained instructor who encourages participants to confront their violent behavior and hold one another accountable. The program seeks to teach men skills to foster more egalitarian relationships and is organized accordingly around eight themes: nonviolence, nonthreatening behavior, respect, support and trust, honesty and accountability, sexual respect, partnership, and negotiation and fairness. By concentrating on the use of power and control as the nucleus of abuse, rather than the specific details of any one participant's relationship, the curriculum explores "with each abusive man the intent and source of his violence and the possibilities for change through seeking a different kind of relationship with women." Michael Paymar, *Violent No More* (1993).

47. See *id.* The book contains many anecdotal stories based on the writer's experience as a training coordinator with the Duluth Domestic Abuse Intervention Project. Batterers interviewed constantly refer to the fact that they could engage in their abusive behavior without consequences.

48. For example, former Illinois Attorney General Roland Burris created the Women's Advocacy Division during his tenure in the early 1990s. It was simply a high priority for his administration to do something about domestic and sexual violence, and he did it with no extra funding.

49. MacKinnon, *supra* note 10.