

# DOMESTIC VIOLENCE

HEARINGS  
BEFORE THE  
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OF THE  
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H.R. 7927 and H.R. 8948

TO AUTHORIZE THE SECRETARY OF HEALTH, EDUCATION,  
AND WELFARE TO ESTABLISH A GRANT PROGRAM TO DE-  
VELOP METHODS OF PREVENTION AND TREATMENT RELAT-  
ING TO DOMESTIC VIOLENCE, AND FOR OTHER PURPOSES

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Use of the Committee on Education and Labor  
CARL D. PERKINS, *Chairman*



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THE CRIMINAL JUSTICE SYSTEM AS FAMILY:  
TRYING THE IMPOSSIBLE FOR BATTERED WOMEN

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In recent years, advocates for battered women have demanded that the criminal justice system "do its job." They demand aggressive enforcement of assault and battery laws, and implore the criminal justice system to assist the victims of family violence. However, when responding to these demands, the criminal justice system is not performing its traditional role, but rather, is "doing the job" traditionally done by family. Unfortunately, the criminal justice system does not function well as a surrogate family to assist battered women. In fact, the very structure of the system holds an inherent "hostility" to battered women, exclusive of any conscious or personal resistance to their cause by individuals within the system. Advocates for battered women must understand that structural hostility in order that they be able to change the criminal justice system fundamentally so that it can be part of the effort to help battered women.

Bard/Connolly (page 9) note that the extended family once was the source of solutions to family violence. Laszlo/McKean (page 22) illustrate that the deterioration of family and its extended religious unit pushed violence out of the home and into the courts. The common presupposition is that once,

in American society, families somehow contained violence in their midst. It is important to consider that, perhaps, such containment did not necessarily solve problems or end violence in the family. In some cases, "handling" the problem of the battered woman in the family might have been an accommodation of that violence, aimed only at preventing its spillage to other family members and its communication beyond the home.

Still, a common presupposition is that, in the past, families were so structured that they could minimize or eliminate violence by their members against each other. The breakdown of the extended family, the theory continues, has changed that structure and ability. What was it then, in that structure, that allowed the family to deal with violence? What is it then, that the criminal justice system can not replace?

The family's ability to prevent violence derived from at least three factors: (1) immediacy. The violence was witnessed, in the same dwelling, by persons who would judge the incident and end it. (2) interest. The violence affected other members of the family who had an interest in making sure the violence did not continue, did not extend to others in the family, and did not become known to persons outside the family. (3) authority. The violence confronted a family willing and able to proscribe, prevent, or punish conduct (drinking, gambling, etc.), or address emotional problems that might

have been the catalyst to violence. The criminal justice system does not have comparable immediacy, interest, or authority.

Immediacy. The first contact between the criminal justice system and a battered woman is the arrival of the police. The delay between the battery and arrival, whether minutes or hours, denies the criminal justice system the opportunity for immediate judgment and control. The relative impotence of the police, in comparison to the family under these circumstances, can be viewed at almost any critical position in the criminal justice system. For example, because the police officer was not present, s/he can neither judge the incident nor stop it. Because the police officer did not witness the battery, s/he may not be able to testify in court.

Interest. Unlike the family that is directly affected by violence in its midst, the criminal justice system has little or no inherent need to prevent or punish battery to women. If one assumes that the system is designed to eliminate crime, or at least to apprehend and prosecute the most serious crime, family violence ranks low on its list of priorities. After all, family violence has little obvious criminal impact beyond the family unit. It is difficult to see that family violence in this generation can contribute to crime in the next, although it is clear that the armed robber tonight can also be the armed robber tomorrow.

Ironically, even if one assumes the opposite, radical perspective on the criminal justice system, the status of battered women remains the same. That is, if, as some suggest, the criminal justice system is not dedicated to the elimination of crime, but rather, to its perpetuation in ways that nurture the health of the criminal justice system in society (see, for example, the works of criminologist Richard Quinney), family violence still would be ignored for either one of two compelling reasons: (1) Family violence, because it passes from one generation to the next, is fundamental to the continuation of violence in society. Thus to prevent it would be to undermine a primary source of crime, and without crime the criminal justice system can not survive. (2) Even if "inherited" family violence is nonexistent, or not fundamental to crime, methods to eliminate it would not materially contribute to the strength of the criminal justice system. Apprehension of family violence does not require the sophisticated technology that attracts grant proposals from police forces modernizing their crime-fighting capacity. District attorneys do not advance their careers by counseling battered women or prosecuting misdemeanor battery cases. Prisons are not strengthened by prosecution of crime that rarely leads to imprisonment. In fact, additional attention by the criminal justice system to family violence could add strength to other professions, such as social work, at the expense of resource allocations to police, prosecutors, and prisons.

In short, while families had a vested interest in the elimination of violence in order to preserve their health, the criminal justice system has no comparable interest. Women can continue to be battered, isolated in each home or apartment, while at the same time, the criminal justice system pursues car thieves and armed robbers. To survive, the family had to eliminate or minimize violence. To thrive, the criminal justice system can be better off by completely ignoring family violence.

Authority. It is presumed that the family had little difficulty enforcing its proscriptions against violence. The family could act as counselor or punisher and, under extreme circumstances, could banish the member who repeated violence. Significantly, the victim child or spouse could remain with the family.

No comparable authority exists in the criminal justice system. Countless men batter their wives, and find that the system will not prosecute them. Others find that when prosecuted for battery, a misdemeanor carrying a light maximum penalty, they receive probation or a fine. Even the most conscientious prosecutors and judges face a tragic dilemma when forced to consider that, if jailed, the man will lose his job and be unable to support the family he has victimized. Most often, the family is sent home, ready to repeat violence.

Thus, where the criminal justice system carries its authority to its ultimate power, the outcome almost always

leaves the basic situation unchanged. In fact, the resulting situation may be worse because the woman no longer has threat of prosecution as a weapon against the man, and because the tensions that led to the battery and prosecution may be exacerbated by the fact that prosecution has taken place.

Only the "first offender" seems susceptible to family-like authority controls of the criminal justice system. A dramatic, persuasive, threatening effort by the district attorney has a chance to convince a man that battery not only violates a woman and the family, but threatens his self interest in terms of reputation and employment. Here, the criminal justice system can be effective when the threat of prosecution in the event of another battery, coupled with enforced counseling, not only ends the physical violence but helps the family find those who can help to solve the underlying problems.

To compensate for its lack of immediacy and interest, the criminal justice system has been urged to seek specialization and expansion. The theory is that even though the system can never experience family violence with the immediacy and interest of the family, it can achieve specialized sensitivity to battered women through education of police, attorneys, and judges, and expansion of resources to include counselors and social workers.

The resulting attempt by the criminal justice system to achieve specialization and expansion is a plethora of new

police units, social agencies, and programs, illustrated by Laszlo/McKean as well as by the Milwaukee County District Attorney's Battered Women Project. The development of such specialization has raised a question noted by Bard/Connolly (page 24), and implicit in the Laszlo/McKean studies: Where, in the criminal justice system, should the specialization occur?

Viewing specialization as a substitute for immediacy and interest brings into focus the debate over police discretion. Those who would limit police discretion and require arrest in virtually every case of battery to a woman do not say that each offender should be treated in exactly the same way. Rather, they say that the police officer should bring the offender to others who have specialized understanding of family violence, and who can determine the appropriate course for each case.

Others, however, argue for substantial police discretion because, in the criminal justice system, police officers are in the best position to approximate the immediacy of family. Moreover, they argue that with specialized training, police can attain counseling and referral skills. Thus, a denial of police discretion would result in a loss of immediacy without an offsetting gain in interest through specialization.

That second view of police discretion, however, does not account for present police practices, particularly in large cities. If police officers still walked the beat, and still

maintained family-like relationships in the neighborhoods they patrol, they very well might be in a position to handle family violence with considerable skill and discretion. If the police officer's salary did not have such a direct relationship to overtime pay, the police might very well be encouraged to spend time with families in an effort to solve problems. But today's police officer works a strictly scheduled shift, rides in a squad car, transfers from one neighborhood to another, and is cautioned that overtime should only be used for court appearances. No arrangement could result in less immediacy and interest in the neighborhood and family.

Still, if police officers merely make arrests, they bring offenders further into the criminal justice system where district attorneys, judges, and agencies, with less immediacy than the police, have little inclination and ability to assist battered women. Located many blocks or miles from the family, they do not even have the police officer's interest in keeping the neighborhood quiet. Moreover, where the family's ability to deal with violence related to the continuing contact between the offender and the other family members, no such continuing contact can come in the criminal justice system. The most dedicated prosecutors, exhausted emotionally after a year of specializing in family violence cases, seek survival and professional advancement in other areas. Similarly, social workers, overwhelmed by their case-

loads, have difficulty maintaining family-like contact, and often move to another job after a year or two.

The realities of the criminal justice system negate another aspect of the theory that limits on police discretion will help battered women. Such limits, it has been said, would result in a flood of battered women cases in the criminal justice system, forcing the system to adjust. But the denial of police discretion merely moves the discretionary function down the line. Nothing in the structure and function of the criminal justice system gives the slightest hint that it would respond to the flood by increasing judicial, prosecutorial, and counseling resources available to battered women. At best, short term projects will be funded. However, such projects, like Milwaukee's, succeed not only in helping many individuals, but also in raising counter-productive false hopes that fundamental and lasting change has occurred.

Thus, accepting the presupposition implied by Bard/Connolly and Laszlo/McKean--that, in handling battered women cases, the criminal justice system is acting as a surrogate family--one is left with a pessimistic view. The criminal justice system can never approximate the immediacy of family. It can never have the vested interest in the family and, in fact, even might have within its own structure, forces that militate against an interest in the elimination of violence. Finally, the supposed authority of the system most often proves illusory for the battered woman.

This is not to say that efforts to help battered women, both within and without the criminal justice system, should cease. On the contrary, it is to say that many, both inside and outside the criminal justice system, have been naive in their attempts to help battered women. To make fundamental improvements, it must be understood that the criminal justice system is being urged by battered women, their advocates, and those within the criminal justice system who support their cause, to do something that can not be done: replace family by enforcing criminal law against battery.

Advocates for battered women will have to understand that the criminal justice system has nothing inherent in its structure and function that would lead it to make battered women cases a priority. Furthermore, advocates will have to understand that even if police officers, prosecutors, and judges come to understand the relationship between family violence and "more serious" crime, limited resources still will vitiate the efforts of the sensitive and skilled persons in the criminal justice system. Advocates will have to understand the dynamics of social action and political pressure that lead the criminal justice system to allocate resources to certain areas not because such allocation is good or wise, but because, somehow, it becomes expeditious and necessary.

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