

# **Safety for Battered Women in a Textually Mediated Legal System**

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**Chapter 5-10**

## **CHAPTER FIVE**

### **A TEXTUALLY MEDIATED SYSTEM**

When I was a child I lived with my mother, three sisters, and brother on Winnetka Road in New Hope, Minnesota. Winnetka was a dirt road. It separated the houses built for returning soldiers and their families after World War II from the fields of corn, soybeans, and hay that spread beyond that point for as far as I could see. We had one phone (rotary dial) in our house. Taped to the wall above it was a red card identical to those taped to the walls in the houses of all my friends. At the top, in big letters, it read EMERGENCY NUMBERS. Below were three numbers—for FIRE, POLICE, and AMBULANCE.

I remember using an emergency number only once. I called the fire department because my brother had accidentally started our dog house on fire. The fireman who answered asked to talk to my mother. She was at work, so he called Mrs. Nelson, who lived next door, to see if a fire truck was necessary. Apparently it wasn't, because Mrs. Nelson came over and put out the fire with the garden hose.

I still live on a dirt road. But there is no red card in my home, because like almost all other citizens in my community, I know that in case of an emergency requiring the police, an ambulance, or the fire department, I need simply dial 911. This number—911—is a universal text in the U.S., actively organizing the way in which the public enters into processes of management and ruling by community institutions.

Today if I call the designated emergency number, I won't reach a fireman, as I did when I lived on Winnetka Road. I'll reach a county employee. The management of public agencies which organize our social relations has become increasingly complex and bureaucratized. The county employee I will reach by calling 911 is an intake dispatcher, who will determine if I need an emergency service, which emergency service or services I need, the exact location of the problem, and the identities of those involved. This dispatcher will then electronically transfer my call to a second dispatcher, who will appropriate emergency service to dispatch “help.”

When a woman who has been beaten by her intimate partner dials 911 for help, she activates a complex system of agencies and legal proceedings which constitute the state's legal apparatus of ruling. It is in turn linked to other systems of ruling, particularly the mental health and social service systems. These agencies of social control are themselves coordinated and controlled through administrative processes and regulating texts increasingly present in the mundane but vital processes that manage our daily lives. Few activities that occur in the processing of a case are not textually mediated. Texts are the primary instruments of implementation and action in this system and as such are a focal point of my investigation.

The number 911 is the first in a series of texts that will coordinate, guide, and instruct a number of practitioners who will participate in processing as a criminal assault case a woman's experience of being beaten. The dispatcher who receives the call does not use her own discretion in accomplishing each of the tasks in this highly specialized system. She instead follows a written script in the form of computer screens which mediate the discussion first between the caller and the 911 intake worker and then between the dispatcher and the police officer who will respond to the call (Wahlen & Smith, 1994). These screens constitute the second text in the management of a domestic assault case by a community's police and court system. They are not, as D. E. Smith (1990b) notes, "without impetus or power" (p. 122). These texts and the hundreds that will follow are active. They screen, define, prioritize, schedule, highlight, route, mask, and shape.

The "case," as a woman's actual experiences become when the dispatcher begins the process of inscription, is institutionally resolved through a series of processes or organizational occasions. Cases move from one occasion to the next through a series of practitioners who do something—take action—and then textually record those things needed to move the case to the next occasion for action. Much of what the practitioner does is guided by texts such as administrative forms, rules and regulations, screening devices, intake forms, and report-writing formats. The text the practitioner produces is designed to hook up and assist the practitioner at the next occasion for institutional action. As such the text, like the practitioner, is doing something. Between what happened to the woman the night she was beaten and the final organizational occasion lies a "social organization of ruling."

Much of the ideological work of the system is buried in the text. Therefore to incorporate a principle such as prioritizing victim safety into the infrastructure of the system, changes must occur at the level of the text. While I have contended that the battered women's movement has not had a very sophisticated understanding of the court system as a textually mediated process, I am not claiming that the movement has paid no attention to the text. It was battered women's activists who insisted on state laws requiring police to write investigation reports on all domestic assaults they investigate. It was also these activists who argued for a dispatching system that coded assaults on women separately from the general category of domestic calls, which includes any disturbance at a private residence—loud parties, cats stuck in trees, teenagers who don't come home at night. They have worked on committees to review state forms, court regulations, and welfare intake forms. I am, however, contending that we have placed far too great an emphasis on the personal attitudes and beliefs of individual practitioners, missing the processes that organize their responses, and arguably their consciousness, about these cases. Each entry into a case file represents a version of a lived experience. Each version has its own production story (Green, 1983). Activists have paid far too little attention to the way practitioners' daily activities are organized to produce the texts which both become the cases and determine case outcomes.

### Court File And Agency Case Files

Institutions which manage citizens' private lives, such as the legal system, do so through paperwork. For a case to be handled by people in diverse settings, each with specialized tasks, a written record is kept. Each practitioner leaves an imprint on the case. The record moves from one component of the case processing to the next. Sometimes the people involved in the case are present to add their voices; sometimes the written record becomes the total representation of their experiences. But as D. E. Smith (1990b) contends, inscriptions do not just refer to events that occurred, they are in themselves doing something. They are working with the reader at different organizational occasions to accomplish different institutional tasks.

In particular the formality, the designed, planned, and *organized* character of formal organization, depends heavily on textual practices, which coordinate, order, provide continuity, monitor, and *organize* relations between different segments and phases of organizational courses of action, etc.

Organizational texts order and coordinate the practices of dispersed organizational settings. Hence they will be read and interpreted differently on different organizational occasions. (pp. 217-218)

The legal system, like most institutions of social control, uses bureaucratic forms of management to accomplish its work. Relationships between individual citizens who are linked to a crime and workers in the legal system are organized through the creation of a case. A case record or file becomes a key organizational element in taking action; it is the institution's representation of the "incident" (here the incident is an assault on a woman) which precipitated the opening of the case. As an institutional representation, it reflects the concerns of the institution. It is like a medical chart telling the reader who did what, when, and for what purpose. Although some organizational occasions are recorded, case files rarely contain verbatim transcripts of what occurred. Instead they contain documents that are organized to record what "of institutional significance" occurred at each processing occasion.

Members of the institution are trained to read and write in institutionally recognizable ways. The reader is linked to the writer of a document in such a system not only through the text but through the legal discourse which organizes their professional training. Professionals are trained to translate what they see and hear and gather from the everyday world into professional discourses about that world. The professional discourse in reports and documents appears to be the objective work of an individual responding to a specific set of circumstances, yet this is far from what actually happens: battered women's lives are twisted into preformulated categories created not in the lived experience, but in the professional discourse.

This is not a process to which advocates are immune. As Gillian Walker (1990) shows, we have adopted many of these ideological representations of women who are battered and of their abusers. But more important, we have engaged in producing our own ideologies by adopting the conceptual practices of the professional discourse which individualiz violence theory of feminist therapist Lenore Walker (1984) is perhaps the best example of movement activists embracing and promoting an ideological representation of women's lives. L. E. Walker's theory makes the dubious claim that almost all of the millions of men who batter their partners are experiencing a psychological response to stress and anger which reoccurs cyclically over an extended period and typically escalates in severity and frequency. Her theory proposes that this psychological

response occurs in three phases: a tension-building phase, an explosion phase, and a respite phase. Even though thousands of women report the absence of tension-building or respite phases, and thousands of others experience low levels of violence for decades with no escalation in frequency or severity, her theory is widely embraced as descriptive of most domestic violence.

The law deals with cases. Cases don't exist in the lived reality on the night a man's fist smashes into a woman's face; cases exist in case files. Case files create a means for the many practitioners involved to act on a case in a prescribed way. A case file is oriented to a particular subject. The gathering of the data for the file is generally not seen as problematic. Entries are made by invisible, interchangeable people. The entries made by those who make the observations typically interpret the actions of the report's subjects, the man who beat his wife and the woman who was beaten, in terms of the legal process for which an entry is being made. A police officer records information related to the existence of the elements of a crime, the probation officer produces an account of a case in relation to sentencing objectives, and the rehabilitation worker documents indicators of amenability to change. Administrative forms, established ways of seeing things, and criteria established in policies regarding what is relevant information guide the recorder through the literally dozens of choices to be made. These guiding forces are invisible to the casual observer and make it appear as if practitioners are making individual choices based on the specifics of a case. Martha McMahon and Ellen Pence (1995) quote the following observation from a worker at a newly organized visitation center. It offers a rare glimpse of a situation in which the textual process is visible and not yet embedded in the setting. The production of a file (the visitation center log) is still seen as embedded in the choices and activities of individual people.

[After the visit] we make a note in the log if anything went on worth noting. It's that term "worth noting" that causes the problems. We've had so many discussions about what to record. These records have been subpoenaed by attorneys on both sides of really brutal custody fights. So we all feel uncomfortable about what to record.

We thought we solved the problem by agreeing to only record exactly what we saw. Still, just selecting which two or three things of the thirty things we've observed should be logged was a problem. Should we only comment on things the visiting parents do that are negative? If we put in the log ". . . he was always on time and respectful to us and his former partner and seemed to be attentive to the children's needs and feeling," what would be the purposes and use of this comment later in a courtroom when lawyers make

their cases? (pp. 190-191)

Here the worker is part of a process which in just a few years will be invisible. She and her colleagues are trying to create a rule or frame for selecting the particulars of a situation. Later these recordings will appear as objective observations of what of relevance was there to be seen.

In order to investigate the documentary practices associated with processing a criminal domestic assault case I collected every available court and police document on six cases.<sup>30</sup> I chose cases based on discussions held at the bimonthly interagency meetings involving probation officers, shelter advocates, and facilitators of men's groups. If a particular man's name came up at the meeting I noted it and began to collect files related to his case.<sup>31</sup> I had planned to write a summary of each case and then analyze how the issue of victim safety was either incorporated into a case file or dropped from it. My plan was to then link the safety concerns in the file to the actions practitioners took as a result of these safety considerations. A co-worker helped me gather files. It took 20 to 30 hours over 2 weeks for two of us to gather all of the documents on just six cases. Even at that we were missing many documents. The court file was centrally located, but there were literally hundreds of related documents dispersed throughout the system in the agency files of individual practitioners.

When I had finally succeeded on getting one fairly complete file together I spent an entire day indexing each piece chronologically. It was confusing because the file documented four separate incidents of violence. There were in fact four separate cases covering more than 6 years, all in one court file. Having completed this unexpectedly time-consuming task, I sat down to read the file in its entirety. I wanted to figure out just what had happened to Debra Barber and the man who was beating her, Robert Barber. My indexing sheets on the Barber file follow.

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<sup>30</sup>I selected specific cases only to have an entry point into what I am trying to understand as discursively organized relationships. I am not trying to establish a random sample or a look at a representative type of case.

<sup>31</sup>During the course of a week I attended two or three meetings with advocates or court personnel or DAIP staff in which the names of problem cases came up. I selected cases in which the problem seemed to be with how someone in the system responded rather than those that were problematic strictly because of the offender's behavior.

## **ROBERT JOHN BARBER COURT FILE**

### **88-81543 OFP**

8/5/88 Order for domestic abuse hearing and ex parte order for protection (along with Affidavit of Debra Barber)  
8/5/88 Sheriff's information sheer  
8/13/88 OFP  
8/13/88 Court minutes—notes persons present at 8/13/88 hearing  
8/14/88 Letter to Judge Hersh from the court alcohol counselor  
8/31/88 Petition for review/hearing and order by Debra Barber asking court to allow “us to go to counseling together” and believing he has changed and wants to be together as a family. (Set hearing for 9/15/88)  
9/15/88 Order allowing Barber to reside in home and continued counseling of both parties by Reverend Sikes and reinstating remainder of provisions of 8/13/88 order  
12/14/88 Letter to Pierce (DAIP) from Lutheran Social Services re status of Barber  
12/21/88 Petition for review/hearing and order by Pierce—hearing set for 1/12/89 (says Barber not cooperating)  
1/12/89 Order ordering Barber to meet with Smith and Kent re counseling plan  
1/12/89 Court minutes—notes those present at hearing

### **CRIMINAL CASE #75843 ASSAULT IN THE 5th DEGREE OBSTRUCTING LEGAL PROCESS WITH FORCE OR VIOLENCE**

9/18/88 Arrest report of 9/17/88 assault on Debra and cops  
9/19/88 Criminal complaint  
9/19/88 Public defender's eligibility form  
9/19/88 Supervised release agreement  
9/30/88 Prosecutor's notice of evidence and demand for disclosure per rule 9.02  
10/8/88 Letter to court by prosecutor confirming omnibus hearing has been reset for 10/16/88  
10/16/88 Petition to enter plea of guilty in felony or gross misdemeanor case  
11/12/88 Dismissal of count II of the complaint  
11/12/88 Guilty plea to assault in the 5th degree; fined \$100.00  
12/28/88 Summons to appear on 1/26/89 to answer complaint alleging Barber violated terms of probation by failing to cooperate with DAIP (includes the Conditions of Probation form)  
1/26/89 Notice of alleged violations to Barber by Arrowhead Corrections  
1/26/89 Transcription report  
9/30/88 to 1/26/89 Transcribed summaries of all Barber's court appearances

### **K3-74-589241 OFP**

7/25/92 Order for domestic abuse hearing and ex parte order for protection (along with Affidavit of Debra Barber)  
8/1/92 Order for protection and court minutes noting persons present  
10/20/92 Notice of motion and motion by Barber requesting dismissal of OFP and



- restoration of custody of children. The affidavit asks for the modification of the OFP because “Religious beliefs specifically forbid separation of husband and wife”
- 10/23/92 Order to show cause (based on DAIP staff’s affidavit) why court should not hold Barber in contempt of court for failing to make arrangements with DAIP and because DAIP staff saw them together on several occasions
- 10/23/92 to 10/28/92 Sheriff’s log with attempts at serving Barber with order. Also a photo of him and a note stating “ARMED”
- 11/7/92 Order holding Barber in contempt of court and sentencing him to 10 days in jail unless he complies with OFP dated 8/1/92 and denying Barber’s motion to terminate OFP and court minutes
- 1/15/93 Notice of motion and motion by Debra to modify OFP so they can attend church together and go to marriage counseling
- 1/23/93 Order allowing the parties to attend church together and can attend marriage counseling upon Barber’s completion of his remaining nine anger control sessions
- 3/7/93 Notice of motion and motion by Barber to modify OFP to permit contact and lift exclusion from the home “to renew our marriage”
- 3/17/93 Order allowing Barber in home with the 8/1/92 OFP as amended remaining in effect
- 5/8/93 Notice of motion and motion by Debra to exclude Barber from home
- 5/18/93 Motion by Debra to prohibit phone contact and allow visitation through Visitation Center. He came to house while they were gone, changed locks, put some things in garage, carries gun
- 5/21/93 Order forbidding Barber from being at or near the home and contact only in public in presence of third persons and parties are to arrange visitation through Visitation Center
- 5/28/93 Letter to Barber from DAIP Visitation Center confirming that Barber will no longer be using the visitation center
- 2/3/94 Memo and enclosures to Initial Intervention Unit form, court administrator’s office re OFP
- 2/3/94 Order for hearing and ex parte order for protection (along with Affidavit of Debra)
- 2/3/94 Sheriff’s information sheet
- 2/12/94 Order for protection and court minutes
- 3/15/94 Affidavit and motion to modify OFP by Debra asking for no phone contact and supervised visitation and mandated anger groups
- 3/15/94 Affidavit and motion to modify order for protection by Barber requesting custody of children and possession of house until Debra has undergone counseling for anger, then family counseling
- 3/23/94 Order continuing modification hearing until 4/94/94; prohibiting phone contact; arrange visitation through Visitation Center and reinstating rest of 1/12/95 Order and court minutes
- 4/9/94 Order granting Barber supervised visitation through VC and reinstating all other provisions of the 2/12/94 order and court minutes (copy of order to Barber returned by post office)
- 7/21/94 Affidavit and motion to modify order for protection by Barber requesting

unrestricted visitation  
8/6/94 Order denying visitation because Barber is in jail and minors cannot visit inmates  
8/7/94 Letter by Barber to Judge Adams stating that new policy of jail does allow minors to visit  
8/21/94 Letter by Barber to Judge as above

**SB-94-420680-CRIMINAL CASE SB-94-420680 BURGLARY AND VIOLATION OF OFP**

5/4/94 Criminal complaint with copies of OFPs and criminal record  
5/7/94 Felony—gross misdemeanor first appearance statements of rights  
5/7/94 Prosecutor’s request of bail in the amount of \$12,000  
5/7/94 Court minutes setting Omnibus hearing, appointing PD, etc.  
5/9/94 Judicial determination of probable cause to detain  
5/11/94 Order detaining Barber and setting bail at \$12,000  
5/12/94 Notice by prosecutor of evidence and demand for disclosure per rule 9.02  
5/25/94 Notice of motion and motion by Barber to dismiss the complaint and suppress illegally obtained evidence  
5/26/94 Contested Omnibus hearing set for 6/5/94  
6/2/94 Criminal stalking complaint (felony) with prior OFPs; criminal record  
6/4/94 Notice by prosecutor of evidence and demand for disclosure per Rule 9.02 with:  
2/29/94 police report and arrest report of 5/2/94  
Written statements of witnesses  
Prior OFPs  
6/5/94 Findings of fact and order finding probable cause and lawful entry by police into Barber’s hotel room  
6/18/94 Motion for joinder consolidating court files R7-94-842267 and SB420680, i.e., and violation of OFP case with the stalking case  
6/25/94 Order consolidating the above files/cases  
7/28/94 Seven-page letter from Barber to Debra  
8/25/94 Notice of jury trial set for 8/25/94  
8/25/94 Subpoenas  
8/25/94 Petition to enter plea of guilty in a felony case and court minutes ordering PSI  
9/1/94 Sentencing minutes (2) for both cases

**S9-94-420-849**

5/28/94 Bail request for \$30,000  
6/4/94 Criminal complaint alleging stalking and violation of OFP with copies of OFPs; criminal record  
6/4/94 Felony—gross misdemeanor first appearance statement of rights  
6/4/94 Court minutes—set Omnibus hearing; bail; appointment of PD  
6/5/94 Order to detain Barber; bail is \$30,000  
6/18/94 Motion to consolidate criminal the two cases by prosecutor  
6/24/94 Court minutes—motion to consolidate under advisement; NG plea  
6/25/94 Order consolidating cases  
7/15/94 Seven-page letter by Barber to Debra as evidence  
8/25/94 Petition to enter plea of guilty

8/25/94 Court minutes—guilty plea accepted—PSI ordered re stalking  
9/1/94 Court minutes—looks like 1 year at NERCC is stayed; probation for 2 years; anger counseling; urinalysis for drugs; continued medication; no firearms; comply with OFP  
9/4/94 Order appointing a PD

**Information from individual practitioners' files**

7/16/82 Discharge summary for Barber re chem dependency indicates he was preoccupied with wife and confronted about this  
10/17/82 Volunteer jail visitor report of talk with Barber  
1/26/89 to 4/29/90 DAIP participant service record  
9/17/88 Summary of Police report  
9/18/88 Order for domestic abuse hearing and ex parte order for protection with Affidavit  
9/25/88 DAIP contract for participation  
9/25/88 Victim's file—includes: victim's report & release of info  
9/25/88 DAIP initial interview and referral form along with history of abuse, etc.  
9/26/88 Order finding domestic abuse; restraining order; custody to Debra, etc.  
9/27/88 Letter to Judge Hersh from court alcohol counselor  
10/5/88 Petition by Debra to allow visitation and joint counseling  
10/29/88 Order modifying OFP to allow Barber to move back in with Debra  
11/12/88 Conditions of probation  
12/15/88 Letter to Barber from Terri Sill of Lutheran Social Services  
12/21/88 Letter to Pierce from Lutheran Social Services  
12/28/88 Petition by Pierce to review OFP due to non-cooperation by Barber  
1/26/89 Copy of 1/26/89 order modifying OFP  
3/15/89 Letter to Barber from DAIP re missed men's group  
7/12/92 Order for domestic abuse hearing and ex parte OFP and affidavit  
8/1/92 OFP  
8/1/92 DAIP contract for participation  
8/19/92 DAIP domestic abuse intervention project intake and referral form  
8/20/92 to 4/21/93 DAIP participant service record  
9/13/92 Notice to DAIP for Lutheran Social Services that Barber is in counseling  
10/22/92 Letter to Barber from DAIP suspending him due to violation of OFP  
10/23/92 Affidavit of DAIP staff of DAIP re suspension of Barber from DAIP program  
10/23/92 Order to show cause to Barber to appear based on DAIP staff's affidavit  
11/7/92 Order holding Barber in contempt of court  
1/23/93 Order allowing Barber and Debra to go to church together  
3/17/92 Order pursuant to Barber's request to lift exclusion and no-contact provisions of OFP. The order allows him lift exclusion from home  
4/10/93 DAIP contract for participation  
4/21/93 Letter to Barber from DAIP informing him that he completed DAIP program  
2/1/94 Arrest report re shoving incident on 2/1/94  
2/12/94 OFP pursuant to hearing  
2/29/94 Incident report re violation of OFP  
3/4/94 Incident report re another OFP violation

3/16/94 Incident report re violation of OFP by driving by house  
3/23/94 Order on OFP continuing matter to 4/9/94 & prohibiting phone contact  
4/30/94 to Dispatcher's watch report  
5/2/94  
5/2/94 Arrest report & witness statements. Barber had loaded gun under bed in hotel room; he was taken to hospital for evaluation

My initial reaction to the whole exercise was one of enormous disappointment. There were hundreds of pages of documents, the recordings of literally dozens of people who in some way had handled the case, and yet there were enormous gaps in information. I had expected to complete the task with most of my questions about what had happened answered. But I had scores of unanswered questions. For example, on 7/16/82, when Robert was released from his chemical dependency program, the staff noted that he had been obsessed about his wife throughout the treatment process, which "interfered with his recovery." I can't tell from the record if he was obsessed in a way that posed a danger to her or simply that he wanted to talk about their relationship rather than his own addiction to drugs and alcohol. I can't tell if Debra knew about this obsession. I couldn't tell what his release and his obsession meant to Debra. Did she want him released? Did she have to go to the shelter?

In the second file I put together there were also multiple cases involving an offender who had assaulted two different women over an extended period of time. In one of those cases the prosecutor made a motion to dismiss the charges because the victim, Leslie, had written a letter saying she had lied to the police to get him in trouble. But as I read further I found an almost identical letter written by another woman with whom the offender, Conrad Freisen, had been living 2 years earlier, similarly asking the court to drop the charges because she had lied. I was struck by the finality of missing information. What was missing was permanently missing and if it wasn't in the file, it seemed to have no relevance. For example, in both the Barber and Freisen files, none of the calls to 911 were transcribed or preserved on tape. The motion to dismiss based on Leslie's letter saying she had lied was made 3 months after her call to 911. I did find the dispatcher's initial complaint report in the pwas a comment, "Woman crying . . . says boyfriend tried to choke her unconscious." But by the time the letter came to the prosecutor the tape had been erased and the dispatcher record is available to the prosecutor only upon request. I wonder how helpful Leslie's letter to the court saying she had lied would have been to the defense if the

jury had heard the 911 tape and then read the letter from the “lying” victim.<sup>32</sup>

I was amazed at how little was ever said about Robert Barber’s use of violence in the dozen or more hearings involving his case. I could figure out more about his drinking habits than his hitting habits. I thought I would be able to see what people did as they “worked” on the case but the work of individual practitioners was missing from the record. As I reviewed the file I was critical of all the missed opportunities to get the conviction, but maybe a conviction would not have added to Debra’s safety at all. There is no place in the file to look up that kind of information. Apparently she was never asked, “What implications will a trial or a conviction have on your safety?” If she was asked, there was no place in the file to record her answer. I could see what had happened: the violence was erased, and Debra’s experiences were not recoverable in this file. But I couldn’t see how this erasure had happened.

I realized that text analysis was going to be inadequate because it treated texts as inert objects. I needed to explicate them as actively organizing, interpreting, and screening particulars. I wasn’t going to understand from simply analyzing a file how institutional processes are organized to resolve cases in ways which so frequently fail to protect women. I wasn’t as interested in analyzing the text as an entity in itself or reading a particular transcript and completing a textual analysis as I was in following D. E. Smith’s instructions to explicate how institutional relations determine the everyday world. These institutional relations are constituted in the local organization of work routines which at the juncture of a woman’s experience act to generalize the particular. This makes her accountable to the institutional way of knowing, rather than it accountable to the particulars of her life. It was the relationships of the production of the text, the women’s experience, and the safety measures put into place by the court that I needed to

I abandoned the project of analyzing a file and regretted all the time I had spent indexing the six cases. But when I began my observations of case processing, I had a better understanding of what to look for and ask about in my interviews. I began to observe the production of every type of text created in this process. It was during a police ride-along shortly after gathering my files

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<sup>32</sup>According to a Domestic Abuse Information Network (DAIN) statistics summary for 1995, 21% of men arrested in Duluth last year for assaulting a partner had been in court at least once before for battering.

that I began to see very distinct types of texts and distinct roles of texts in the process. I was finally connecting D. E. Smith's work to my own. I could see how settings were socially organized courses of action and that no individual practitioner completes such an action. I could start to see how texts on many levels were guiding practitioners as they translated the messy realities of peoples' lived experiences into institutionally recognizable forms which then mandated prescribed courses of action. For the sake of discussing the role of the key texts in a criminal assault case I am delineating them into four categories: administrative texts; regulatory texts; reports, recommendations, and statements; and arguments.<sup>33</sup>

### Types of Legal Texts

*Administrative texts* include such documents as intake forms, report-writing instructions, court minutes, applications for protection orders, warrant request forms, and applications for a public defender. These texts (a) record and document things that have happened; (b) initiate new proceedings or actions; (c) communicate and link organizational occasions and workers together; and (d) select relevant information by defining the categories of information practitioners are to use when producing a text.

*Regulatory texts* include documents such as state statutes, instructions to the jury, rules of evidence, case law, department policies, insurance regulations, and city ordinances. These texts set the boundaries of institutionally authorized action and authority. They frame the construction of all of the other texts. They are never attached to the particulars of a case. They pre-date the event that has created a case and require that the case be attached to them rather than allow the particulars of a case to be fully accounted for in the outcome.

*Reports, recommendations, and statements* include documents such as police initial investigation reports, psychological evaluations, chemical dependency evaluations, presentence investigations, pretrial release recommendations, affidavits, witness statements, and medical exam records. Most of these texts, with the exception of statements,<sup>34</sup> are presumed to be objective findings

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<sup>33</sup>These delineations are helpful to me in organizing my investigation of work interchanges and my writing; they are not recognized categories in the legal system.

<sup>34</sup>A statement is assumed to be a product of the truthfulness and objectivity of the person making it, not the result of its process of production. When a woman recounts her story to the police her recantation is therefore seen as a

which have been prepared to inform the court on some aspect of the case. They are sometimes evaluative in that they constitute a practitioner's recommendation to the court. While these reports are prepared by individual practitioners, they bear the marks of institutionally authorized ways of thinking about and acting on the case. Here is where we see how practitioners are linked into a larger organization of ruling. Their professional training acts as a framing device as they select particulars from their many observations or pieces of reportable data and link them together in the form of an observation to the court: "Mrs. Peterson is reluctant to move forward with the case, Your Honor," or "Mr. Maki has been under some unusual stresses lately, Your Honor, his mother has just . . . ." Here the legal system links to the professional discourse and extended relations of ruling. It also links into other institutional ideologies and practices, creating the hegemonic control of the ruling apparatus.

*Legal arguments* include motions to dismiss, motions to include or exclude something as evidence, objections, jury summations, arguments for sentencing, and defendants' statements for the court record. These texts are both written and oral and are meant to persuade the court to accept a particular version of an account or interpretation of the law. Legal arguments are recognized as efforts to persuade toward a particular bias or viewpoint. They gain currency by linking into established discourses, and like evaluations and reports, they too tap into extended relations of ruling. As I will show, legal arguments frequently hook up with the psychiatric/psychological discourse providing individualized causal explanations of men's violence toward their partners.

## Conclusion

Advocates observe the use of these texts every day but do not observe or necessarily account for the role they play in making people's lived experiences actionable. It is this active work of texts that gives them their distinctive character and makes them the subject of analysis for advocates. In the next two chapters I discuss texts within their contexts, as part of a sequence of institutionally organized activity.

## **CHAPTER SIX**

### **THE ADMINISTRATIVE AND REGULATORY TEXTS AT WORK**

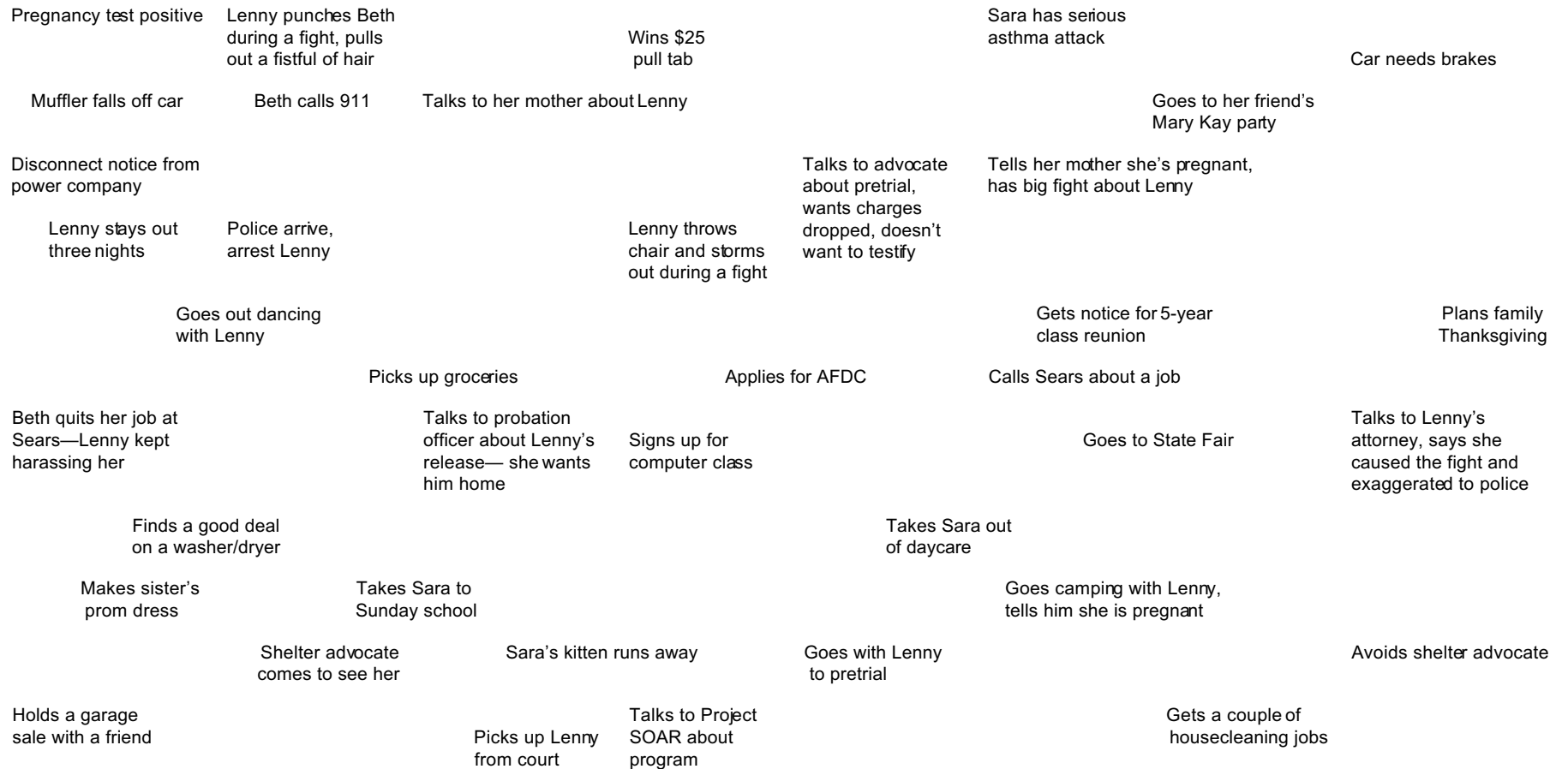
The active text, by contrast, might be thought of as more like a crystal which bends the light as it passes through. The text itself is to be seen as organizing a course of concerted social action. As an operative part of a social relation it is activated, of course, by the reader but its structuring effect is its own.

That it is activated by the reader means that the activity or operation of the text is dependent upon the reader's interpretive practices. These too are constituents of social relations rather than merely the idiosyncrasies of individuals. They are social in origin and built into social relations. Analysis, therefore, depends upon the analyst-as-member's knowledge of the interpretive practices and schemata relevant to the reading of a particular text. (D. E. Smith, 1990b, p. 121)

The texts I've described in chapter 5 function to move a battered woman's experience into an institutionally recognizable and actionable case. The following chart shows the events that occur in the life of a fictitious woman named Beth. These events share a timeline with the events which constitute the processing of a case. I asked a group of six women whose partners had been arrested for assault to help in its design. They agreed that what Beth is going through during the turbulent months following the arrest of a batterer, would not be atypical.



## FIGURE 6: BETH'S REALITY



## INSTITUTIONAL VERSION

	Squad dispatched, suspect arrested, booked, jailed	Arraigned, released		Pretrial		Trial
May 20-27	May 28	May 30	June	July 7	August, September, October	November

Beth's chart depicts the everyday experiences of a woman that is not as neat and orderly as a criminal court processing chart. The fact that Lenny is being processed as a defendant in a criminal case keeps "popping up" in their lives. It is a process that adds to the stress and tenuous position of their relationship. As the case is processed all of this is absent from the court's treatment of the case. She will be brought into the process as a witness to a crime, a crime against her. As the chart shows, she is far more than a witness.

### The Administrative Text at Work

In this chapter I examine the first hour of a case being processed and focus attention on the active work of administrative and regulatory texts in transporting a woman such as Beth from her lived experience into an institutional existence. This case begins with a woman's call to 911. As noted earlier, 911 is the first text utilized in the process. It is a text that connects the reality of the everyday world and the institutional reality, which through its processes and function as a ruling apparatus subsumes the everyday into the institutional. This text is made possible only because of extended relations of ruling that go far beyond citizens' connection to their local police station.<sup>35</sup> The following is an excerpt from the transcript of the call which activates this text.

Caller: Yeah, I'm calling from 214 East Third Street and I need a squad out here right away.

Dispatcher: What's the problem, ma'am?

Caller: It's my husband, he beat me up.

Dispatcher: Is he there with you right now?

Caller: He's . . . getting some of his stuff, he's not suppose to be living here.

Dispatcher: Are you injured?

Caller: No, he punched me in the back but—shit, here he comes.

Dispatcher: I'm dispatching a squad now, ma'am, it's on its way. Can you answer a few questions for me?

Caller [talking to husband]: It's the police, Don, there's a cop on his way right now so don't try anything.

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<sup>35</sup>Establishing a countywide 911 system is a major undertaking involving all levels of government. Our county implementation of its 911 system involved issuing new addresses to every household in the county outside the city limits of the seven cities in the county.

Dispatcher: Ma'am, do you need medical help?  
Caller: No, the police are enough.  
Dispatcher: Does he have a weapon with him now?  
Caller: No . . . Get out of here, Don, if you take that stuff it's stealing, the cops are coming and you'll get caught for stealing, you bastard.  
Dispatcher: Ma'am, can I get your name?  
Caller: What?  
Dispatcher: Your name.  
Caller: Randi, Randi Ward.  
Dispatcher: And his name?  
Caller: Don, Donald.  
Dispatcher: Donald Ward?  
Caller: Yeah, yeah.  
Dispatcher: Is he leaving?  
Caller: I think so, he went out the front door.  
Dispatcher: What kind of a car is he driving?  
Caller: He doesn't have a car, he's with his friend Tony, who has a blue pickup.  
Dispatcher: Which way is he headed?  
Caller: I don't know, I can't see them. I'm not so sure they've even left.  
Dispatcher: Do you have a protection order?  
Caller: Yes, and he's not suppose to be anywhere near here. Oh fuck, now he's coming in the back . . . I gotta go, get the cops here! [She hangs up.]

This conversation between the woman calling and the dispatcher is directed by an *administrative text*, the dispatcher's computer screen. It is guided by the questions the dispatcher asks: the questions appear on the computer screen pulled up by the dispatcher when the caller identifies the situation as a domestic assault. One can imagine how many different situations are organized by this screen and treated as similar cases. Appendix C is a copy of the screen that guided this conversation.

The screen is one of three domestic-related screens. It is coded "DOMESP", meaning there is a claim of a physical assault. The other screens are coded in the top right "DOMES," defined as "A verbal domestic quarrel not necessarily blood or married relations . . ." or "DOMESW," defined as "A domestic involving weapons or the threat of weapons. This includes guns, knives, clubs . . ." These screens direct dispatchers to gather certain information and present the order in which to gather it. The intake dispatcher must assume that the caller will not be free to speak or have time to answer a long list of questions. A dispatcher discusses the priorities:

We get a lot of hangups on these. You see the address come up on where the call is coming from so we don't ask that. We try to first find out what kind of danger the police will be walking into and if we need to get medical there. It goes from there. How to get in, is it an apartment. . . . I don't use the screen anymore but you do when you're new, or you use it on a call you're not familiar with." (Interview, October 3, 1995)

The 911 screen provides an excellent example of the active role of administrative texts in mediating the relationship between the practitioner and the woman who calls for help. This text is doing several things. First, it is standardizing the response of the system regardless of the idiosyncratic work habits of the dispatcher on duty. Any competent dispatcher would have handled the call in a very similar, although not identical, fashion. It screens out institutionally irrelevant information by putting into place a very specific set of instructions for the practitioner on the intake process. It begins by warning the dispatcher of the dangerous nature of these calls. While the dispatcher does not read the warning every time she activates the screen, it is also built into her awareness during trainings and in the questions she is directed to ask. The form requires the dispatcher to assign a level-one priority to the call regardless of the dispatcher's opinion of the level of danger.<sup>36</sup> It instructs the dispatcher to be cognizant of the key *regulatory text* this call operationalizes, Minnesota Statute 629.341, authorizing and defining conditions under which officers can make warrantless arrests in domestic-related assaults. The screen is designed to link this organizational occasion to others in the processing of a case; it is an administrative form which assigns a number to the case. As stated earlier, this number is referred to in all future law enforcement entries into the case file. The information recorded by the dispatcher serves as a report to the responding officer and provides information the officer will use in preparing an investigation or arrest report.

The 911 dispatch screen is perhaps the text which most centralizes safety—the safety of the victim, the responding officers, and others. But it focuses only on the moment. In this case the

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<sup>36</sup>The assignment of a priority-one call to domestics is the result of advocacy efforts made in the 1970s and 1980s.

caller hangs up before the dispatcher can complete his questions, but had she stayed on the line his questions would have stopped short of asking about danger beyond the immediate situation. Dispatchers are not directed to ask about past violence or the woman's perception of the offender's dangerousness. The form is not only incident focused, but focused solely on one small part of the intervention process, a problem I also address in chapter 4. The screen is well designed to link the responding squad to the caller, but it is not well designed to link the needs of the women to those who will take up the case in other organizational settings, such as the advocate, the prosecutor, or the judge who will make a determination on the conditions of releasing the offender.

The woman quickly becomes a data point in the process. The dispatcher directs the conversation, collecting information from her but not engaging in a dialogue. The screen defines the relationship between the two. It is like an interpreter for two people who speak different languages. An administrative text can participate in accounting for the level of danger these cases pose and the safety requirements of the victim. I talked with John, one of the dispatchers, about this.

Ellen: Who put this screen together?

John: I think Nancy and Sherry did that—see it says here 10/08/90, that's when they put together the new system up here.

Ellen: This is the kind of thing we're [DAIP and the shelter] trying to do all the way through the process, put safety in the center of everybody's work. It's not as simple as you would think.

John: Well that's because here we're dealing with the guy before he's been subdued by the system. You know what I mean?

Ellen: I'm not sure.

John: The whole situation is still very emotional when we get it. Everybody is scared of what he might do, or her, too, for that matter. Later when he shows up for court, well, all the screaming and yelling is over and he's just trying to be on his best

behavior so as to stay out of trouble. You know, the old suit-and-tie routine.

Ellen: Some pretty bad looking ties, too.

John: I believe you.

Ellen: So do you think that when the man shows up for arraignment that people aren't afraid of him?

John: Not the way we are here. You know people are drinking, it's usually late at night, nobody knows for sure who the guy is we're looking for or who else might be at the scene. You're walking into their territory, guns, knives, it's so unpredictable. The guy has the upper hand if he decides to get crazy on the officers, there could be some people hurt. In the courtroom he's under wraps, you know how I mean. It's a whole different arena. (Interview, September 19, 1995)

John mentions several important features of the legal system's response to these cases. He clearly identifies with the police, even though he works for a different agency. When he talks about danger to the police, he talks about "we." On the other hand, the woman who is most likely to be the person hurt is seen as part of the dangerous "other." She is clearly, like the abuser, an outsider. Later John talks about judges and probation officers as "others" also. He is immediately linked in the intervention process to the police officers responding to the call. John, like most of the practitioners I interviewed, identified as part of a very specific aspect of the overall system. He was connected to the responding police, the jailer, and his co-workers.

John is quite insightful in assessing the context in which practitioners feel the dangerousness of a batterer. When the abuser is removed from the environment in which he is entitled to use violence, the home, his identity changes. He is transformed from an unpredictable and volatile crazy man to the defendant in a domestic assault case. In most organizational settings, the reality of a batterer's violence and the fear and danger it creates for those it is directed toward is detached from the workings of the system. This is a key feature of the institutional setting. It strips the parties from their everyday identities. The police call is the exception: they, like the woman who has called for them, feel the fear.

The dispatcher produces an initial complaint report, known as an ICR. It is linked directly to the police investigation or arrest report; in cases which do not merit a written police report, the ICR stands as the only official document of the call.<sup>37</sup>

Following are two ICRs. The first complaint (Figure 7) resulted in an arrest and therefore a police report was filed. ICRs come through a computer at the police department much like a wire service in a newsroom. Every morning the deputy in charge of the patrol division and the police chief scan the printout, known as the watch report, to get a general idea of the previous day's activities. Detectives investigating felony or gross misdemeanor assaults review it to determine if they should order a transcript of the 911 call. It is not, however, forwarded to the court as the police report is, and it is therefore not accessible to those who are making decisions about the offender's release or later, his sentence. The watch report became available to advocates in Duluth only recently; it is not currently available to advocates in most other cities.

#### FIGURE 7: INITIAL COMPLAINT REPORT #1

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<sup>37</sup>Minnesota law requires that officers file a written report if a person claims to have been assaulted by a partner. However, many Minnesota law enforcement agencies have a low compliance rate with this regulation, and reports are written only if the officer establishes probable cause that an assault occurred or if the assault results in injury.



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INCI: 3880 POLICE **HISTORY** TYPE: DOMESTIC      DISP: JAIL
ANI:   09/15/96 00:12:20BEAT: 27F                POSITION: 4
ORG: 09/15/96 00:12:38 3REC: DU- 27              MAP:
REC:                                     SOC: T      COUNTY:
DSP: 09/15/96 00:12:53 3RPT: DU- 27              CENSUS: 900
ATS: 09/15/96 00:12:54  PRI: 2                    USER-1:
TRN:                                     POST:        #PERS:WRECKER:
CLS: 09/15/96 01:19:46 3MINI:                     USER-2:
ZTR:                                     ZTR STATUS:      MAP INDEX:
VOTER PRECINT:      QUAD:
CRIME WATCH 1:     CRIME WATCH 2:
ASSIGNEE: 349 SYMENS
UNITS: #S26 #S36 #S97 #S19

AD: 899 MESABA AV./9ST. E., DUPREM:
RP:                                     RA:

255MLA [00:12:38-37]
CASE: #96029982      P-DU DU [00:12:38-37]
MALE ATTACKING FEMALE [00:12:47-37]

From: S36 -ONE IN CUSTODY - ENROUTE TO CJ [00:25:46-37]
From: S19 (BECKER)-VICTIM IS JUDITH ANN DOCKENDORF 051255 [00:42:17-28]
From: S19 (BECKER)-OF 837 CHARLES AV 624-3416 WORKS AT [00:42:17-28]
From: S19 (BECKER)-DEFELD SUPER VALUE 624-4871 [00:42:18-28]
From: S19 (BECKER)-SUSPECT (FIANCEE RONNIE JAMES CLARK [00:42:18-28]
From: S19 (BECKER)-040265 OF SAME ADDRESS) PULLED HER HAIR [00:42:19-28]
From: S19 (BECKER)-WHILE SHE WAS DRIVING & STRUCK HER IN TH [00:42:19-28]
From: S19 (BECKER)-E HEAD. ALMOST CAUSED TK TO CRASH.. [00:42:20-28]
From: S19 (BECKER)-IS FAMIL W/OFP ETC AS SHE HAS WORKED AT [00:42:20-28]
From: S19 (BECKER)-THE COALITION MALE TO COUNTY JAIL [00:42:21-28]
From: S36 (LAFONTAIN)-RONNIE CLARK JAIL FOR DOMESTIC. [01:19:08-28]
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The second ICR (Figure 8) is the only documentation of a call to a home that evening. This report was not forwarded to anyone in the system.

FIGURE 8: INITIAL COMPLAINT REPORT #2

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INCI: 3955 POLICE **HISTORY** TYPE: DOMESTIC DISP: ADV
ANI: 09/15/96 03:55:07 BEAT: 28B POSITION: 4
ORG: 09/15/96 04:01:45 3REC: DU- 6 MAP:
REC: 09/15/96 04:02:30 4SOC: A COUNTY:
DSP: 09/15/96 04:02:34 4RPT: DU- 6 CENSUS: 100
ATS: 09/15/96 04:15:03 PRI: 2 USER-1:
TRN: POST: #PERS:WRECKER:
CLS: 09/15/96 04:31:20 4MINI: USER-2:
ZTR: ZTR STATUS: MAP INDEX:
VOTER PRECINT: QUAD:
CRIME WATCH 1: CRIME WATCH 2:
ASSIGNEE: 320 MACMILLAN
UNITS: #S28

AD: 505 REDWING ST. W./BIRCHWOOD, DUPREM:
RP: AMBER BERQUISTRA: 5898 PIKE LAKE RD. NPH: 728-5353

HANG UP 911 CALL NO CONVERSATION ON CALL BACK SPOKE WITH FEMALE STATING HER HB RYA
BERQUIST IS STALKING HER AND DRIVING HER CRAZY COMPL WILL BE FILING FOR DIVORCE ON MON
IS GONE NOW BUT COMPL WANTS TO SEE OFFICER
CASE: #96040015 P-DU DU [04:01:46-34]
HE ARRIVED IN A GRY AND BLU FORD TRUCK BUT LEFT NOW [04:02:13-34]
From: S28 (MACMILLAN)-RP ADVISED TO CONTACT THE WOMENS COALITI [04:29:51-28]
From: S28 (MACMILLAN)-ON AND TO OBTAIN AN OFP ALSO ADVISED TO [04:29:52-28]
From: S28 (MACMILLAN)-CALL BACK IF HER HUSBAND RETURNS [04:29:52-28]
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In this case, Amber Berquist is linking into the legal system to say that she is being stalked by her husband. Because Ryan Berquist is not actionable by the police at this point, this call is recorded but goes nowhere. It may in fact be a situation that is quite dangerous, but ICRs are not routinely linked into the advocacy system.

The next document in the process is the responding officer's report (Appendix D). The top half of the police report is laid out to record all of the identifying features of the case, names, addresses, dates, and so forth. The officer identifies the report by assigning it the same number as the dispatcher's initial complaint report. This allows prosecutors and others using these reports later to be sure they have matched the ICR with the right police report. There are frequently several calls to the same residence involving the same people over a 2- or 3-day period. Sometimes there are repeat calls during the same police shift. But as is described in

chapter 3, the legal system deals with incidents separately unless they are considered to be linked to a “continuous course of action,”<sup>38</sup> so the ICR number is an important identifier in police work. The form asks for the date of birth of all parties, which ensures that a person is not misidentified because he or she shares a name with another person known to the police. All of these identifiers are used to process the criminal case but not to link the parties to other mechanisms of support or help, including the women’s shelter. Despite the fact that there is an emerging discourse in policing that sanctions the linkages of police to community-based groups, battered women’s activists have had to implore police chiefs for the most basic levels of information sharing. There is no little box for the officer to fill in that links this call to shelter or advocacy for battered women. Yet it is at this level of administration that linkages are normalized.<sup>39</sup>

The top half of the police report form, like the dispatcher’s screen, links people and texts. It is followed by the narrative. Administrative texts are present at every organizational occasion. They are a primary mechanism by which institutional objectives are inserted into the management of a case. They are created extralocally; individual experience is fitted into them. At each organizational occasion there is an opportunity to incorporate safety measures for women into the administrative text. I will repeatedly make the point that the objective of safety is not structured into the system, as is the objective of determining guilt or innocence. To alter the system we need not replace the objective of processing the case as a crime but add a parallel, equal objective: to ensure victim safety, so that even when the criminal case drops out, the objective of securing victim safety remains institutionally actionable.

### The Regulatory Text at Work

As police begin to gather information for their report we are about 3 minutes into a case that will

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<sup>38</sup>For example, in the process of robbing a store a person might violate four or five statutes by committing a gun violation, assault, robbery, and reckless endangerment but be charged with only one crime.

<sup>39</sup>Duluth Police Department gives advocacy groups access to ICRs and arrest and investigation reports, but it is in a small minority of departments which exercise this option.

likely take 3 months to resolve. While the officers are approaching the scene, the dispatcher contacts the county jail, where copies of all active locally issued protection orders are on file. The dispatcher checks on past calls to the home. These two administrative routines provide officers with a partial institutional history of the parties involved. Institutions coordinate the activities of a diverse group of agencies and individuals which make up the state's apparatus of ruling. In the span of 4 or 5 minutes, a county agency, the dispatch center, has linked with the city police and the county sheriff's department to coordinate the beginnings of an institutional response to a citizen's call for intervention. Much of that coordinating work is being done by the text.

The jailer confirms that Randi does have an order for protection against Donald and reads the specifics of the court order to the dispatcher, who electronically enters. Violation of an order that excludes a party from a residence or restricts his access or contact with the victim is a misdemeanor in Minnesota, and state law requires an officer to arrest such an offender. Here the *regulatory text* of the state law and department policy come into play as officers encounter the parties. It is the invisible text in the case. In all phases of case processing the regulatory text is represented in how practitioners frame their reports, what observables they select for recording, and how they make sense of those observables, but the regulation itself is not present in any case file or record.

Randi Ward's protection order excludes Donald Ward from "being at or near the residence of the petitioner," and prohibits him "from establishing any contact in person, by phone or by third party with the petitioner." This court order is a representation of Minnesota Statute 518.B.01, authorizing the court to restrain persons who have been found to commit acts of domestic abuse from being at or near the residence of the petitioner (in this case, restricting Donald Ward from being at or near the house of Randi Ward). This statute requires that a person must know of the order to be in violation of its terms. The police report on the call states,

Randi Ward provided me with her copy of the OFP, and it indeed stated that it prohibited Donald Ward, DOB 5/6/68, from being at or near her residence and from not having contact with her through a third party. I asked Donald Ward if he was served with the OFP. He stated that he had been. I then asked him how long he had been at this address today. He stated that he had been here for approximately 45 minutes. I asked him if he knew this was the residence of Randi Ward. He stated yes, that this was his house too, and that he had some things . . . that she was suppose to give him but she didn't so he was just trying to get some of his personal belongings. I asked him if he knew it was a violation for the OFP that he had been served. He at first stated that he did not, but then stated yes he did. Having this information I concluded that Ward had knowingly violated the OFP, and I had probable cause to make an arrest.

I then informed Ward that he was under arrest. I applied, gapped, and double-locked my handcuffs on his wrists and completed a custodial search. A short while later, I transported Ward to the St. Louis County Jail where he was lodged on a misdemeanor charge of a violation of a protection order.

The officer's report is organized by state statute and the elements of proof needed to establish guilt later at a trial. Every statement ("I asked Donald Ward if he was served with the OFP") provides for a coherent account of an investigation that leads to a certain institutionally authorized course of action, in this case arrest. Elements of proof are established by the state legislature, and rules of court defining what can be admitted into a trial as evidence are established by the state supreme court.<sup>40</sup> The law in Minnesota evidentiary rules translate into questions for the officer: "Did Donald Ward knowingly and willingly violate the court order?" Regulatory texts are created through the political process and are always extralocal. They are created separately from the particulars of the situations they are authorized to govern. The local is fitted into the abstracted system of institutional modes of ruling. In this case, officers arrested Donald Ward for violating a protection order. He was charged with a misdemeanor and eventually sentenced to 30 days in jail, but the time was suspended on the condition that he would complete a 27-week men's nonviolence class. Had Donald committed this crime several

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<sup>40</sup>Minnesota Rules of Court are published annually and provide updates on trial and appellate rules, professional rules, and federal rules of court.

years earlier or in another state,<sup>41</sup> he might have been given the option of leaving the residence rather than facing arrest.<sup>42</sup> Donald lives in a city in which the police department has enacted a policy requiring officers to arrest in domestic violence cases if certain conditions exist (see Figure 9).

#### FIGURE 9: DULUTH POLICE POLICY ON DOMESTIC VIOLENCE

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<sup>41</sup>Half of the states have passed legislation making violation of a protection order a mandated arrest situation (National Council of Juvenile and Family Court Judges, 1996), although I would guess that fewer than 20% of police departments require officers to make such an arrest.

<sup>42</sup>Mandatory arrest is opposed by many activists because it increases the number of poor, working class, and immigrant men coming into a classist and racist system. Women are reluctant to subject their abusers to the adversarial court process, and the racism and classism increase their fears of using the system.

DULUTH POLICE DEPARTMENT POLICY  
SUBJECT: DOMESTIC VIOLENCE

III. PROCEDURE

A. Assault With Injury

A person SHALL be arrested and taken into custody when an officer has probably cause to believe that a person:

- has assaulted another person and there is visible signs of injury or physical impairment; or
- the victim was threatened with a dangerous weapon.

For an arrest to occur. . .

B. Assault Without Visible Injury or Physical Impairment

A person MAY be arrested and taken into custody when an officer has probable cause to believe that person:

- has assaulted another person without injury; OR
- has placed the victim in fear of immediate bodily harm.

For an arrest to occur. . .

C. Mutual Combat/Self-Defense

When evidence of mutual combat is present, the situation does not necessarily dictate the arrest of both parties. Officers must determine. . .

Donald also lives in a state in which officers are required by statute to arrest if a person knowingly violates a protection order that restrains a person from having contact with the petitioner (see Figure 10).

## FIGURE 10: DULUTH POLICE PROTECTION ORDER POLICY

### DULUTH POLICE DEPARTMENT POLICY

#### SUBJECT: ORDERS FOR PROTECTION

#### III. PROCEDURE

##### A. Mandatory Arrest

Minnesota Statute 518B.01, Subd. 14(b) REQUIRES an officer to arrest and take into custody a person the officer has probable cause to believe has violated the sections of an Order for Protection by:

- restraining the person (from committing further acts of domestic abuse, as defined in G.O. 230.01); or
- excluding the person from the residence or the petitioner's place of employment.

An arrest is required even if the violation did not take place in the officer's presence. There is no time constraint on arrests.

State statute requires an arrest regardless of whether or not the person was admitted into the residence. Minnesota Statute 518B.01, subd. 14(g) states that it is not a violation for the petitioner to admit the other person into the residence; per Minnesota Statute 518B.01, Subd. 6(d), such action does not void the Order.

##### B. OFP Verification

PRIOR TO MAKING THE ARREST THE OFFICER MUST VERIFY:

- the existence of the Order for Protection; and
- that the offender knew the Order for Protection existed. (This does not apply in "Temporary Orders")

##### C. Investigations

Violations of an OFP which do not involve a mandatory arrest are documented in a report. Officers should weigh . . .

This policy was the result of local activists, including many women who had been battered, working with police administrators to strengthen the civil protection order by ensuring its full enforcement through criminal procedures. It was made possible by the work of activists who worked at the state level to expand police powers of arrests in these cases. Prior to the work of the movement, police officers could not arrest on a misdemeanor assault unless they witnessed the offense. A women could make a citizen's arrest by requesting the officer in the presence of the abuser to arrest him. This rarely occurred. Officers almost never arrested for violation of a



civil protection order unless there was another assault. In 1983 activists successfully lobbied for an amendment to the Domestic Abuse Act mandating officers to arrest for violations of civil protection orders (see Figure 11).

FIGURE 11: DOMESTIC ABUSE ACT—VIOLATION OF AN ORDER FOR PROTECTION

DOMESTIC ABUSE ACT  
Minnesota Statute 518.B.01

Subd. 14. Violation of an order for protection.

(b) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order granted pursuant to this section restraining the person or excluding the person from the residence or the petitioner's place of employment, even if the violation of the order did not take place in the presence of the peace officer, if the existence of the order can be verified by the officer. The person shall be held in custody for at least 36 hours, excluding the day of arrest, Sundays, and holidays, unless the person is released earlier by a judge or judicial officer. A peace officer acting in good faith and exercising due care in making an arrest pursuant to this paragraph is immune from civil liability that might result from the officer's actions.

The battered women's movement has been most effective in changing regulatory texts and has in many states, including Minnesota, become quite adept at using the legislative political process. But legislation which mandates certain courses of action and agency policies which prohibit practitioner discretion are always problematic, because they lump together disparate events, decreeing dissimilar situations to be similar. This has been the dilemma for activists advocating for policy and legislative reforms. In one sense activists have tried to factor into the law language which accounts for the special nature of these types of assaults and acts of violence, but we have not been able to fully escape the problems inherent in the generalizing character of regulatory texts and processes. Any process which requires that the particulars are fitted into the general compromises attention to the lived experience. A police officer explains the dilemma from his perspective:

I have no problem arresting a man who violates a protection order by going back over to the house and harassing a lady. If he's driving around, watching her and keeping her in

that fear I'll gladly throw him jail. But the law also makes me throw guys, and some women, in jail that seems unfair. I had a guy who was coming home every Saturday and mowing the lawn, working around the house because they were trying to sell the place. Well, one of these days his new girlfriend shows up to bring him some keys or something and his ex finds out he's been shacking up with this gal, and boom, she calls 911 and reports him for violating his protection order. Was she in so much danger that I had to lock that guy up? No, but the law takes away my discretion to make that decision. (Interview, July 17, 1995)

Of course many advocates would argue that police have so misused their discretion that mandating certain courses of action has been a necessary step. Others would argue that the man this officer arrested should never have been at the house in the first place and would dismiss the officer's sympathy for him. Neither of these arguments is the point here. The officer is correct in observing that laws cannot account for the particulars of local events. Local events are forced into policy or abstracted systems of governing, and safety is often compromised in that process. For example, assault laws in all 50 states categorize assaults into two or more levels of seriousness and thereby activate different levels of punishment for those convicted of it. Minnesota law defines 11 levels of assault, ranging from first-degree felony to fifth-degree misdemeanor.

#### 609C.211 FIRST DEGREE FELONY ASSAULT

Whoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than 20 years as or to payment of a fine of not more than \$30,000, or both.

#### 609.224 FIFTH DEGREE MISDEMEANOR ASSAULT

Whoever does any of the following commits an assault and is guilty of a misdemeanor:

- (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or
- (2) intentionally inflicts or attempts to inflict bodily harm upon another.

In Minnesota as in most states, the level of seriousness correlates to the bodily harm done in the assault or the potential harm based on the use of a weapon. Bodily harm is categorized accordingly to broken bones or permanent physical injury, so that a single slap to the side of the

head that results in damage to the eardrum is a felony, whereas multiple blows to the body that result in deep bruising, cuts, and scrapes constitute a misdemeanor. Following is an excerpt from a police report documenting the arrest of a woman who had been physically and sexually abused by her partner for years.

I asked Diane Winterstein to tell me what occurred, she said her husband Phillip had come home after drinking at the Y&R bar and was becoming very belligerent. She said he told her that people were “reporting on her.” I asked what he might have meant by that and she said that he acts like everybody is his personal watch guard over her and that he makes up affairs she was supposed to have and then says his reporters saw her with someone. She went on to say that Phillip started pushing furniture around. I noted that a chair was pushed over in the dining room. She then went into the kitchen and got out a steak knife and threatened to “poke his eyes out” if he didn’t leave the house immediately. I asked her if she was in fear of grave bodily harm at this point and she said no, she thought he was going to leave. Then according to Diane he started to call her names like “whore” and “bitch” and “cunt,” at which point she lunged at him and “poked him in the right hand with the knife.” She said when he saw the blood he started to cry and she called him a “big baby,” at which point she says, “he grabbed me by my hair began pulling me toward the bathroom and kicking me.” She stated that he kicked her three or four times in the legs and right hip area. I asked her if there were any bruises. She showed me the area of her right hip which was red and swollen and beginning to bruise. I asked her if he did anything else to assault her and she stated that he threw her up against the wall and told her that this time she had gone too far. I asked her if she had been violent to him in the past and she said that she often threatens him to get him to leave her alone . . . . She said that he slapped her across the face twice and then spit in her face. . . .I conferred briefly with Officer Dickie and a decision was made to arrest both parties. I informed Diane that I was placing her under arrest for 2nd degree assault and took her into custody without incident degree assault (see Officer Dickie’s report for more details). . . . Officer O’Keefe took pictures of both parties’ injuries. Both refused medical treatment. I placed a kitchen knife shown to me by Diane Winterstein as the one she used to stab her husband into evidence.

In this case Diane Winterstein faced a prison sentence of 10 years. She was charged with second-degree assault for “stabbing her husband with a deadly weapon.” Because it was her first offense, she spent only 11 days in jail and was ordered to classes for offenders. Phillip Winterstein pled guilty to a misdemeanor assault and was sentenced to 1 year probation. He served 2 days in jail, and was ordered to attend 27 weeks of DAIP men’s educational groups. It

is the generalizing character of the law that impedes practitioners from intervening in this case in a way that will protect Diane from future assaults. In fact it is quite possible that she has actually been made more vulnerable to her abuser by this state intervention than had the police never arrived at her door. Yet each practitioner in this case did their job.

In most cases the battered women's movement has used the legislative process to structure safety into the ways that police and the courts handle domestic assault cases. We have promoted laws which shift the onus of placing controls on abusers from the victim to the community. For example, in every state advocacy groups have successfully lobbied to expand police authority to arrest, eliminating the need to ask the victim if she will make the charge. We have in many districts secured agreements with prosecutors to discontinue the almost universal practice of dropping charges at the request of the victim.<sup>43</sup> We have expanded the kinds of testimony and evidence that can be used by the state in these cases to prove assault, making the victim testimony less crucial for obtaining a conviction. We have also lobbied to expand the power of police and courts to take protective action through using civil protection orders, notifying victims when offenders are released from incarceration, establishing longer periods of probation for domestic assault-related offenders, recognizing protection orders across state lines, and making stalking behavior a felony offense.

While the legislative agenda of the battered women's movement has definitely been safety oriented, we have not been able to fully escape the problems with generalizing texts as Diane Winterstein's arrest shows.

## Conclusion

The battered women's movement has argued for consistent enforcement of the law in domestic

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<sup>43</sup> This position is controversial in the movement. We know on one hand that if a women's request to drop charges automatically results in a dismissal, then most batterers can and will exact such a request from their victims. We also know that prosecution of an individual batterer is frequently not helpful to the individual woman he has beaten. The battered women's movement has argued that women should be allowed to retain choices in the processing of a case.

abuse cases and has lobbied for a broad range of changes in legislation and policy in every aspect of criminal law as it relates to these cases. Yet, it continues to struggle with the inherent problems that generalizing texts pose when applied to the wide range of circumstances they are designed to encompass. Policies and laws must be designed with an eye toward allowing for the particulars of a case, especially as they might influence a woman's safety.

## CHAPTER SEVEN

### LEGAL ARGUMENTS AND EXTENDED RELATIONS OF RULING

A small percentage of domestic violence–related cases go to trial. The majority of these are settled in pretrial or omnibus hearings with a negotiated arrangement between the prosecutor and the defense attorney. Most legal arguments do not occur in the elaborate courtroom scenes witnessed in the O.J. Simpson trial but in settings in which dozens of cases are disposed of in a matter of hours. Legal arguments are made at several points in a case. In this chapter I use arguments presented at sentencing hearings in order to show one way in which the legal institution is linked through discursive practices to extended relations of ruling, particularly the “psy” professions. The adversarial legal system culminates in a storytelling contest (legal arguments) in which one story wins and the other story loses.

Legal arguments always involve attempts to put a certain “spin” on a set of “facts.” The “facts” of the case may come into question as much as the interpretation or the version that one side or other in the adversarial system wants the court to accept. I talked with several judges about the impact of the adversarial system on women’s safety. Their comments attest to the rather brutal character of the system.

The adversarial system mocks the role of ethics in the process. A lawyer is taught to zealously represent his client even if his client is an axe murderer. It’s the lawyer’s job to cast aspersions on any piece of evidence that indicates his client did it, whatever it is. The judge or the jury is the fact finder and as such they are not allowed to ask questions. The facts are presented by the two adversaries who seek to disparage their opponent. The defense attorney enshrines his client. It is actually the job of a lawyer to construct a lie and then convince people of its truth.<sup>44</sup> (Interview, October 11, 1996)



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<sup>44</sup>At the time of the interview this judge was reading the book *Guilty: The Collapse of Criminal Justice* by Judge Harold J. Rothway (Random House, 1996) and I believe was paraphrasing the author.

Most battered women want to do something so that they don't get hurt again. If she goes the criminal route she may risk the relationship, which may not be what she wants. . . . Even if she does want to get out of the relationship . . . she doesn't want to do it in a hostile way. The civil route is much more what she is looking for but it's tainted with the adversarial notion of truth finding. Its advantage is that there is no punishment attached to winning, but then again, it's not as strong an intervention as a conviction. (Interview, October 12, 1995)



The criminal justice process is a glorification of the dispute, it's not a search for the truth. (Interview, September 11, 1996)

The adversarial system calls for a representation of the parties to the case that reflects pre-formulated categories of abuser and victim. It does not call for a representation of the complexities of a specific woman's life. These pre-figured subjects are created in a professional discourse which links into the legal system through extended relations of ruling, leaves women's experiences unaccounted for, and greatly compromises the likelihood of practitioners engaging in practices protective of women.

The activities that constitute the production of a story (or "spin") are often invisible, as manufactured accounts enter the courtroom represented as factual or as the authentic voice of one of the parties involved.

To illustrate how accounts are manufactured in an adversarial system, I want to use the transcript of a taped discussion I had with a woman in 1991 about a charge against her for filing a false police report. Karen had come to my office one day with a stack of papers, asking for assistance to get the charges against her dismissed. We talked for a while. I read the police report regarding the night she was assaulted, I read her statement to the court saying she had lied to the officers, I read the memo by the county attorney asking to have her charged, and finally I read the subpoena to appear in court on the charge of filing a false police report. She also gave me two protection order petitions she had made to the court against her boyfriend, which I glanced

over quickly.<sup>45</sup> I asked her if I could interview her on tape and said that I might use the transcript when talking with the city attorney. During part of this conversation she read directly from her police statement.

Karen: Keith called me from this bar he was at and said he was coming home. He was in a bad frame of mind. Then a little while later, he called me back. He had gotten in a fight with a Black guy, and Keith is very prejudiced against Blacks. He said this guy had jumped him. Anyway, he got hit. We've had lots of fights over his attitude, because he wants me to stop seeing my Black friends, which I won't do. So, he was yelling on the phone about niggers, and how I loved niggers. He was with his ex-girlfriend and said they were both coming over. I told him not to bring her over, but he hung up on me. I didn't want him to come over like that 'cause he is not too predictable. So I jammed the door with a bunch of knives to keep him from being able to get in.

I called this neighbor in my building and told him that I might need help. He suggested I call the police, but I didn't really want to get them involved. I called the dispatcher and asked if a car could just drive around and check on things, but they said if they sent a car out, they'd have to come to the door and check on things, so I said OK.

Keith showed up almost right after I called, and he started on me about how I want niggers and a bunch of stuff. I argued with him, and he started shoving me around. I was getting tired of being shoved, so I threw my glass of water in his face. Then I threw the glass at him, and it hit him in the chest. I turned and ran out of the door, but he caught me and dragged me back in. He was looking for the glass. He found it and picked up a piece of the glass from the floor and told me to apologize for throwing it. I didn't, so he started choking me and asking how I thought it felt to be hit with the glass. I said it would probably hurt. Then he held the piece of glass up to my throat, so I apologized by telling him that I was sorry for stooping to his level. That's when the police showed up.

Ellen: Is this the story you told the police?

Karen: Yeah, except I told them that Keith broke the glass, and I didn't tell them that I threw the glass at him. But I called the desk sergeant up right away and told him that I left it out. [The police records indicate that she called 27 minutes after the

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<sup>45</sup> A protection order petition contains an affidavit by the petitioner, in this case Karen, describing incidents of abuse that cause her to need court protection.



arrest occurred.]

Ellen: So, is that why you were charged with filing a false report?

Karen: No, Keith took me and his ex-girlfriend down to his attorney and told us we had to change our stories or he'd go to prison. He was already on probation, and this was a gross misdemeanor or maybe a felony. It was on the day he was supposed to go to court.

Ellen: Was Keith in the room when you talked to his attorney?

Karen: No, he was standing outside the door, but he was going to read it [her statement] when I was done, so he could have just as well been standing there.

Ellen: Did his attorney ask you if Keith was coercing you or making you do this?

Karen: No, he just asked me what happened and I started to tell him, and then he would say things like, "If that's what you say, he'll be convicted," but I can't say he actually told me what words to use.

Ellen: Did you tell the attorney you weren't afraid when Keith held the glass up to your throat?

Karen: That's what I was there for. That was what he was going to go to jail for. So that's what I had to change.

Ellen: Were you afraid?

Karen: Have you ever met Keith?

Ellen: No, but I know quite a bit about him.

Karen: Well, if you know a lot about him, then you know I was afraid . . . he's a very dangerous person.<sup>46</sup>

Here we see the intersection of a man's willingness to use violence, his attorney's willingness to stretch the boundaries of ethical behavior, the adversarial nature of U.S. criminal law, and an overly specialized work force producing an account that endangers a woman who would likely have been safer had the criminal court not intervened in any way in her life. In this case, the

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<sup>46</sup>This transcript appeared in slightly different form in a previously published article (Pence & Ritmeester, 1992).

activities that produced the account are not visible to the courtroom observer. Even when the work of creating the “spin” is observed directly, the hegemony of certain of certain ways of thinking makes the ideological practices within the legal system difficult to discern. I want to use several sentencing hearings to illustrate this point.

The first is typical of dozens of sentences in domestic violence cases. It illustrates how the case involving the assault of a woman culminates in a disposition by the court. Ordinarily in these hearings there is the introduction of the case by either the prosecutor or the defense attorney; a word or two about the offender by the defense attorney; a report by the probation officer on the presentence investigation; a discussion about the numbers of days that the defendant has already spent in jail; a summary of the agreement between the prosecutor and the defense attorney regarding jail time yet to be served; some mention of conditions of probation; a reference to alcohol or alcohol treatment; and a short statement by the defendant or a comment regarding victim input. The judge says a few words, then imposes a sentence. Following are excerpts from a typical sentencing hearing. The full hearing transcript is found in Appendix E.

**The Court:** Mr. Barns? . . . We’ll go on record in the matter of State of Minnesota versus Benjamin George Barns. . . . The Court in this matter has received a Pre-Sentence Report from Mr. Pegg dated February 1, 1995.

The presentence investigation in this case is presented in written form to the court. This is a felony assault; a misdemeanor assault presentence investigation is given orally. The presentence investigation report in this case had no description of the history of violence or the statements from the victim about the violence. It did lift language from the police report describing the assault in the incident.

Next, both the prosecutor, Mr. Torez, and the defense attorney, Mr. Holmes, are given an opportunity to dispute the recommendation of the probation officer. In this case neither does.

(Excerpts from Appendix E)

**[Prosecutor]:** Your Honor, we also accept the report as factually consistent with our information and the Guidelines Worksheet as accurate. With

regard to the recommendation, we concur with the recommendation of Mr. Pegg in the report. . . .

**[Defense Attorney]:** Well, I have to agree that the recommendations I think are fair. They are consistent with the plea agreement in the case. I'm going to ask the Court to follow those recommendations. That's all that I have.

The probation officer's report goes uncontested. It follows a routine that everyone can agree to. The presentence investigation looks at past convictions, past compliance with court orders and instructions, the general citizenship qualities of the offender (e.g., does he work, does he have debts, the length of time he has lived in Duluth). There is no attempt here to understand Mr. Barns as a batterer, only as a candidate for probation or as a potential flight risk.

It is Mr. Barns himself who offers the explanation for his crime.

(Excerpts from Appendix E)

**The Court:** Mr. Barns, anything that you wish to say?

**The Defendant:** Yes, I haven't drank [sic]. I've been—since the incident, since I've been out of jail I've been going to AA, and—and spirituality, I—he's kind of the man I see. It's a Native American, Ojibwa ways, spirituality, I've been seeing him at least once a week and trying to get that back together. I've been doing pretty good. Carrie, the victim, would be here today, but her grandfather just passed away. That's about it, I guess.

**The Court:** The Court then at this time will formally accept Defendant's plea of Guilty as well as his written Petition to plead such that the Defendant now stands before the Court adjudged and adjudicated Guilty of Assault in the Fifth Degree, a felony. As for a sentence, it is the judgment of the law and the sentence of this Court that the Defendant be committed . . .

The court sentences Mr. Barns to a stayed (he won't actually be incarcerated) 1-year jail term (this was his third domestic abuse-related conviction). The prosecutor then brings up another matter. Mr. Barns had attempted to coerce the victim into refusing to testify against him and was charged with obstructing legal process. He had pled guilty to this charge as well and the prosecutor wants a conviction entered into the record.

(Excerpt from Appendix E)

**[Prosecutor]:** Your Honor, just that I'd ask for, also the Court to impose the sentence on the Count II Obstructing Legal Process as recommended

there, that being a 90-day sentence stayed for one year of probation concurrent with the other sentence.

**The Court:** Mr. Holmes, you have any comment on that matter?

**[Defense Attorney]:** I think that was part of the plea agreement, Your Honor.

**The Court:** On the charge of Obstructing Legal Process, the Court will impose a sentence of 90 days in the County Jail; execution of that sentence stayed in favor of one year of probation, that year to be served concurrent with the first year of Defendant's probation on the felony and on the same terms and conditions.

**[Defense Attorney]:** Thank you, Your Honor.

**[Prosecutor]:** Thank you, Your Honor

**The Court:** Thank you, gentlemen.

(Proceedings concluded at 9:12 a.m.)

The court essentially throws another conviction in with the felony assault and sentences Mr. Barns to the same non-jail time he has received for beating the victim. The record show two convictions, two sentences, two dispositions, the excuse that “the drinking made me do it,” and no mention of the violence or the injuries and threats to the victim, whose name is mentioned only in passing.

In this felony case there is no discussion about the violence or the safety needs of this victim. The presentence investigation report to the court is based on the offender’s criminal record, not how this incident fits into an overall pattern of coercion or intimidation. The written record contains no documentation of the offender’s use of violence or intimidation of this victim over several years, only a very general summary of the assault. During the hearing neither the defendant nor the court mention the violence, just the alcohol. As in over 70 percent of the cases I observed, alcohol is involved and is either discussed as the cause of the assault or becomes the focus of sentencing. During this hearing reference is made to two regulating texts, the sentencing guidelines and the fine schedule. The probation officer has complied with the procedures and guidelines set forth in these texts.

The next sentencing hearing involves the murder of a woman whose husband had “caught” her in bed with another man. The case occurred in Baltimore in 1994, at the same time that I was beginning my observations of sentencing hearings. I read about the case on the Internet and

ordered the transcript. When I read it, I could immediately see that all of the talk in this case provided the subtext for the cases I had been observing. The full transcript is found in Appendix F.

In this case the “facts” are not in dispute. The man with whom Sandra Peacock was having a sexual relationship provided detail testimony at the trial about the events that led up to Kenneth Peacock’s discovery of Sandra and him in bed. Kenneth then described what happened during the approximately 2 hours he was alone with Sandra. He talking, that they had had several drinks, and that he had then shot her. Neither the state nor the defense challenged his version of the night’s events.

We hear the voices of four people at this hearing: the prosecutor, who represents the State of Maryland; the judge, who represents the court; the defense attorney and the defendant, who constitute the defense; and the victim’s mother, who represents the victim. Because the victim has been killed, her mother is asked to provide information to the court through a victim impact statement. The other voice, one not represented by a particular person in this hearing, is the voice of the state legislative body. The state legislature enacts the criminal code (a regulating text) and sets sentencing guidelines (a second regulating text) which the judge must follow. Any judge who deviates from them must write a memorandum explaining the reason for doing so.

In this case the defendant was charged with first-degree murder for shooting and killing his wife. A plea agreement was made, and he pled guilty to manslaughter, which under Maryland law means that there was not the requisite intent to kill. (Thus accidental deaths caused by the negligence of the accused are considered manslaughter.) The third regulating text involved here is the “defendant’s score” which is a scale used by the State of Maryland to rate the offender before the court. This score is determined during a presentence investigation by asking background questions about the defendant and looking at information on past convictions. In this case the defendant has no previous convictions. His score is therefore quite low, considering

the offense.

The defense attorney had agreed to a negotiated plea of manslaughter, which under the sentencing guidelines means a sentence involving 3 years of incarceration.

(Appendix F, Lines 29-44)

**[Defense Attorney]:** We have agreed they're three to eight years. I don't know if they've been submitted.

**The Court:** That's what my notes indicated, it was three to eight.

**[Prosecutor]:** I would submit them. Actually I'll finish them up.

**The Court:** Go ahead, finish those. I had a note to that affect.

And my notes also indicate, of course, that the State's position in return for the plea to the charge of manslaughter was that the Court impose a sentence within the guidelines. And all of that is reflected in the memorandum of the plea negotiations, signed by the defendant and counsel. And it appears for the record that as a result of those plea negotiations this was simply a one-count information; is that right?

**[Prosecutor]:** Yes, your Honor. The information charged first degree murder.

**The Court:** Charging first degree murder, but this is the plea to the lesser included offense with that, correct?

**[Defense Attorney]:** That's correct.

**[Prosecutor]:** That's correct, your Honor. I'm submitting the guidelines at this point, which do reflect that.

The remaining part of the hearing is taken up by the defense counsel arguing that the court could in fact decide that incarceration would not be appropriate; the prosecutor, speaking on behalf of the state and the victim, arguing that incarceration is appropriate; the defendant asking that no jail time be imposed; and the judge explaining his decision to place the defendant in a residential work-release program (in which the defendant will be restricted only at night) for 18 months, followed by 1 year probation. Each of these legal arguments centers on the presentation of a version of Sandra's death.

### Versions of Sandra's Death

Each of the parties, the state, the court, the defense, and victim, as represented by her mother, offers a version of Sandra's death. The sentencing hearing becomes an avenue for all interested

parties to create a version of the facts of the case. The first version is presented by the defense.

### The Defense Attorney's Version of Sandra's Death

This version has three primary components. First the defense attorney says that the victim, who is now dead, was not a good woman, but the defendant, who shot and killed her, is a good, tax-paying citizen. Then he says that the offender shot and killed her, not as a criminal, but as a good citizen who committed an accident which was the result of the convergence of alcohol, his emotional response to his wife's infidelities, and the presence of a firearm. The third component is that the offender has an illness and it is this illness, alcoholism, that caused the victim's death.

(Appendix F, Lines 73-77)

**[Defense Attorney]:** But at any rate, it goes without saying this is a time where nobody wants to sit in your [the judge's] chair up there. This is obviously the hardest job a judge ever has.

You have got on the one hand a beautiful family, a kid who has worked his whole life. . . .

(Lines 79-86)

He has a fatal flaw. He is an alcoholic. I've had him evaluated. He has met a couple times with Nick Gianpietro, a certified alcohol evaluator. And based upon what happens today, it is obvious he has to be in some kind of program, whenever he is not incarcerated, if he is not incarcerated from the outset, or later on, he is going to need treatment for that. It is a disease that runs in the family.

And when you mix alcohol, emotion, the incredible emotion of the situation he found himself in, and firearms, a tragedy happens. And Sandra Peacock, for all her fragilities, it is a tragedy that she is deceased.

No evidence of the existence of the victim is before us except what is continuously referred to as her frailties, these frailties being that she is a gambler, that she drinks, that she is a poor mother, and that she has had, on more than one occasion, an affair with another man.

(Appendix F, Lines 102-106)

**[Defense Attorney:]** You know all the facts of this case. You know everything. The one thing you don't know is that he keeps working hard to do his obligations. One of the things, Sandra, because of her drinking, and she had a gambling addiction to playing Keno at these bars. Everybody says Keno is a great thing, but she spent hundreds of dollars a day playing Keno, of his money, her money. . . .

(Lines 130-135)

I would just say that I have talked to Mary Lemon, and Mr. DeHaven was nice enough to share with me a little about what she said. She is a very religious lady. She prays for her daughter. If she were her, she would tell you about her daughter's frailties and how nice Ken was to her son from a prior marriage. That son wasn't living with here because she wasn't considered to be a mother that could handle a son, and the grandmother, Mary Lemon, is raising that boy down in Texas. . . .

(Lines 78-79)

He marries a lady he is in love with, he has been married five years, and for the second time he finds her in this tragic situation [having sex with another man].

This picture of her is juxtaposed with that of the person who shot and killed her. We are told that he comes from a beautiful family, he is a kid, he has worked his whole life, he was in love with this woman, he has a flaw, he is an alcoholic with a disease. Next we hear about those who support her,

(Appendix F, Lines 90-95)

**[Defense Attorney:]** It is certainly appropriate in our situation with this beautiful family—the problem, he has got two brothers that are police officers, and I would worry about his safety down there. Bruce is a twenty-year veteran, Brian is an eight-year veteran. Brian served in Desert Storm. Kenny didn't become a police officer mainly because he started working and getting a real paycheck ever since junior high school. He has worked every day that he could his entire life, as you know. . . .

(Lines 97-99)

Mr. Manifold [his employer] took the trouble to come down from Pennsylvania, he is in the back, the gentleman in the tie and coat, he took the trouble to come down here. He needs him to work. You have seen letters from his customers, he is nice and polite. . . .

(Lines 112-113)

He has paid his lawyer bills slowly and on time. I'm fully paid. The landlord is being paid. He is just a tax-paying great member of society.

It is this draping Kenneth in the flag and adorning him with core American values such as being a hard worker, coming from a good family, and being a tax-paying citizen that creates the subtext that he is not a real criminal. Criminals do not come from beautiful families, they are not kids, they do not work (and if they work they don't work steadily and they don't work hard), they are not in love with their partners, they are not linked to the police in a positive way, they do not



have brothers who participated in Desert Storm, and they do not have letters from customers who say they are nice and polite. Even though middle-class, white American businessmen are responsible for a significant amount of the criminal activity that occurs in the United States and commit most major financial crimes, the cultural image of a criminal is usually a person who is not white, not middle-class, and not hard working. Criminals are typified as poor white trash or people of color who have grown up on welfare, live off the state, and engage in violent behavior because they come from families with no true values. In this way the defense is putting forth the version that the offender is not a criminal but is in fact a good citizen.

The version of Sandra's death is simultaneously hooking into a larger discourse which has dominated U.S. media and politics since the rise of the right wing in the 1980s. It is counting on the listener/reader, in this case the judge, to make a conversion here. The defense attorney is speaking to the judge as a member of a professional community who knows how to organize the particulars that the defense is presenting. Sandra is to be blamed for the situation (Jones, 1980; Pagelow, 1981); Kenneth is to be understood yet not totally exonerated, and alcohol is to be blamed for how he reacted to the situation (Coleman & Straus, 1983; Frieze & Knoble, 1980; Eberle, 1982), as is his understandable rage (Gondolf & Russell, 1986). The way men and women are organized into marriage, the role of economics, and the role of male entitlements in U.S. family structures are made invisible in these arguments. The effort by the defense attorney to link the violence to the alcohol, the rage, and the victim's behavior is available to be hooked into because there isn't a more powerful professional discourse in the field challenging these concepts.

#### The State's Version of Sandra's Death

The prosecutor, representing the state, claims that he will incorporate the state's argument into Sandra's mother's desires. He thus links the impersonal state to the personal, a mother's rational call for some punishment for the death of her daughter. Both the defense and the prosecutor, for their own respective purposes, present the mother as a good woman, not vindictive. Both

selectively use her words to bolster their own versions. She is not physically present, nor does she present her own version. Instead four or five lines of conversation are extracted from interviews that were designed to elicit only certain kinds of responses from her and only limited information about Sandra, her relationship with her husband, and the history of their marriage.

The prosecutor is entering into a very tricky argument. On one level he, on behalf of the state, has agreed to allow a person who has admitted to killing his wife because she slept with another man to plead to manslaughter, a charge which implies the death is accidental. On the other hand, he needs to argue that this person must be punished for the accident. He does not question the premise of the defense's argument. He does not mention that infidelity to one's spouse is not uncommon in the U.S. (Michael, Gagnon, Laumann, & Kolata, 1994). He does not ask who in his courtroom has also been unfaithful and then suggest that they are lucky to still be alive.

(Appendix F, Lines 154-172)

**[Prosecutor:]** She indicated to me on one side, and I'm going to incorporate the State's argument of course along with this, but basically her feeling is the State's feeling as well, you[r] Honor. She indicated to me that on one hand she can see her daughter provoking the anger that it did, and causing the anger that later led to this incident. And as we talked all along about this case, I said, well that was the reason basically the State agreed to proceed on the manslaughter charge. The State believed that provocation was sufficient to proceed just on the manslaughter as opposed to the murder in this case.

And she talked about the other aspect of her feelings, and that is what the State is going to argue to you today, that the defendant should be punished for his actions. The defendant had an opportunity to walk away that night. It is clear that the defendant decided to take matters into his own hands, to pick up that gun, to pull the trigger, and eventually took the life of another person. Mrs. Lemon indicated to me she believes this Court should punish the defendant appropriately.

The State believes that appropriately in this case means a sentence of incarceration within the guidelines. They are three to eight years, your Honor. As the Court notes from the guideline sheet, nothing has to do with the offender score. The defendant up until this point, his life, he has been an exemplary citizen. In fact, remains so even while out on bail awaiting sentencing today. The State does not believe that really he is going to be a threat to society when he gets out. I do believe this is an isolated incident.

Alternative discourses which the prosecutor could call upon have very little currency in the legal setting. For example, he does not refer to the notion that a batterer is not out of control but uses violence to establish control. The prosecutor apparently accepts the premise of the defense that murderous rage is understandable, that alcohol is a disease which turns nice guys into killers, and that Sandra provoked the assault. He doesn't challenge the assumption that Sandra needed to be punished, only that Kenneth was acting outside of accepted social bounds of punishing by taking the role of the punisher into his own hands. He never has to explain how Kenneth can be an exemplary citizen and will in all likelihood continue to be an exemplary citizen once he pays for this isolated incident. No one seems concerned for the woman in the courtroom who was earlier introduced as his new fiancée.

(Appendix F, Lines 58-65)

**[Defense Attorney:]** He has got a wonderful family, many of whom are here. Eugene Manifold, his employer, is here, whose letter you have read, Bruce Peacock and his wife, Michelle. Bruce is the twenty-year veteran, whose letter you've read, Mike Hertzog, his friend, whose letter you have read, Barbara Bauer, his fiancée, Bruce Peacock, Sr., the thirty-eight year employee of the Baltimore Gas and Electric company, who is Kenny's father, who is here today with his stepmother, who loves him dearly. You have read her letter, and Mr. Peacock, Sr.'s letter. His mom, Jane, is here today, and Lisa Stinson, a friend of the family. They're all here.

She is introduced as part of the entourage of people here to stand up for Kenneth as a good kid. It's hard to imagine a man recovering from killing a woman he truly loved and to whom he was a devoted husband, working as many hours as he could to help his mental state, and finding someone to propose to in such a short period of time. But those particulars are inconsequential here, and this woman's future safety is presumably not in question because she will not have the same frailties as Sandra had and he will most likely stop drinking.

#### The Defendant's Version of Sandra's Death

Kenneth talks about what has happened (lines 182-185).

"I'm very sorry about what has happened."

"I would like to continue working."

“Working . . . helps me out mentally.”

“I’m just willing to accept whatsoever you will do for my actions.”

He follows the defense attorney’s argument that he was not so much an actor here as a victim of a series of forces beyond his personal control. The holy trinity of batterer’s defense attorneys appears here: alcohol, rage, and bad women. He then portrays himself as a hard-working, good man with simple needs. He shows deference to the judge’s hierarchical authority in a display of humility and piety one wonders if Sandra ever saw. As thousands before him have done, he throws himself upon the mercy of the court. In his case he finds a more than merciful court, he finds another man who under the same circumstances would himself mete out some degree of corporal punishment. As the judge said in his sentencing,

(Appendix F, Lines 295-298)

[**The Court:**] I seriously wonder how many married men, married five years or four years would have the strength to walk away, but without inflicting some corporal punishment, whatever that punishment might be. I shudder to think what I would do. I’m not known for having the quietest disposition.

### The Judge’s Version of Sandra’s Death

The judge takes up the defense attorney’s version but puts a frame around it that will authorize him morally, ethically, and legally to take an institutional course of action which simultaneously preserves male prerogatives and social status and allows him to claim that he has been objective, fair, and unfortunately harsh on the tax-paying kid before him. He is able to do all of this by framing the case as analogous with the manslaughter by automobile cases. Most of us who drink have feared getting caught with a slightly high blood alcohol count while driving. We have perhaps driven while drunk, later realized that we could have hurt someone, and thanked God for letting us escape such an accident. We have been educated by all of the public service TV ads and by Mothers Against Drunk Driving: we understand that hitting someone in the car while drunk is an accident but that getting into the car while drunk is a choice, and that therefore, what happens to someone who drinks and drives must be the responsibility of the driver. The judge equates Kenneth to such an individual. He sympathetically agonizes over the plight of a woman who killed her best friend in a drunk driving accident, the man who killed his brother, and the

forlorn husband who killed a 10-year-old child.

(Appendix F, Lines 191-207)

[**The Court:**] The old saw is that it is decide custody, but that truly is not the most difficult thing that a judge is called upon to do. The most difficult thing that I have found is sentencing noncriminals as criminals.

This case is very similar and equally tragic to the very difficult manslaughter by automobile cases that I've handled in the past year. The consequences are as tragic. I was called upon to sentence a young man who while driving under the influence killed his brother.

I recently had to sentence a noncriminal citizen, a lady who had attended Christmas parties last December or a Christmas party, overindulged and got on the ramp going the wrong way and killed her best friend, leaving two children that that lady was supporting.

And previously I was called upon to sentence an individual, an employee of Xerox who had never had a brush with the law in fifteen years and had had a prior ticket of some nature up in Pennsylvania, but while driving home after his wife had left him sometime before and having had too much to drink one night, he struck and killed a ten-year-old child on a bike.

Those are brutally difficult choices. This [trial of Kenneth Peacock] is nonetheless, it is equally as difficult.

This likening the shooting of Sandra to a drunk driving death creates a sort of template, or frame, for the judge's ensuing remarks. He prefaces those remarks by expressing a bit of relief that he can sentence in anonymity because unlike drunk driving cases, no organization like Mothers Against Drunk Driving is present (line 208). He muses that perhaps because of the attention on spousal abuse, someone might hear of this case, but most likely he will be acting outside of the public eye (line 208).

The judge's accidental-death version of Sandra's murder was not one that he simply pulled out of a hat. It is probably safe to assume over his years on the bench he has heard cases similar to those that I've observed in Duluth's misdemeanor and felony criminal courts. A probation officer and victim advocate comment on the alcohol link in these cases.

At least three out of four cases I work involve drinking by the guy or both of them. So of course alcohol has a role in all of this. And I'm sure he won't quit [battering] until he stops his drinking. So I focus a lot of my attention on getting him into a treatment program that will work for him. —Probation officer (interview, September 29, 1995)



I'm so sick of these guys standing up in front of the judge with a false humility saying, "The booze did it, Your Honor, I'm sorry, I have it under control now." It's almost as if it's like a required script at sentencing for the defense attorneys or the batterers to say this.—Victim advocate (interview, June 15, 1995)

Below are excerpts from several sentencing hearings typical of the "script" to which the advocate above refers. Whether spoken by the client or by the defense attorney on behalf of the client, it is the most common explanation offered by offenders for their violence.

The first case involves two sentencing hearings of the same abuser, Lawrence Schul. One occurred in 1991 and a second in 1994. Mr. Schul had been arrested for several other assaults and had had several protection orders issued against him. He had been convicted of disorderly conduct previously for an incident in which he assaulted his partner and entered into a plea agreement for a reduced offense. Following are excerpts from the 1991 plea and sentencing hearings.

**The Court:** All right. Mr. Thornton.

**[Defense Attorney]:** Your Honor, I believe the recommendations are reasonable under the circumstances. If you do sentence him consistently with the recommendations, it's good to see that he has earned the benefit of the Court's faith in him by allowing him into the treatment program [for alcoholism] early, and the benefit of the Probation Department's expertise in this matter.

Most importantly, I think from his point of view, if he drinks at all from now on, the life as he's known it is over. He's going to lose his job, his girlfriend, he has everything to lose. This Court is giving him an opportunity to gain a lot, so I would ask that you sentence him consistently with the recommendations.

I ask that he keep in mind the benefit that he's getting, not only from this Court and the Probation Office but from the Prosecutor's Office, as well.

The defense attorney sets the stage for the defendant to make the claim that drinking is his problem. It is a claim that neither the court or the prosecutor challenges. Mr. Schul will leave the courtroom convinced that he is not a batterer but a man with both a drinking and a woman problem. He articulates this to the court.

**The Court:** Mr. Schul, is there anything you wish to say?

**The Defendant:** Yes. I thank you for letting me to go treatment when you did. I realize I really did mess up. Before this incident happened, I did try to get in treatment. I realized I was out of control, and I wish I would have gotten there before anything happened. I just appreciate your letting me go when you did, into treatment.

**The Court:** Ms. Coker, is Mr. Schul in Miller-Dwan at the present time?

**[Probation Officer]:** Your Honor, he just completed the treatment at Miller-Dwan. I have got a confirmation that he did successfully complete the program there just last week. They also will be scheduling him for follow-up treatment and aftercare.

**The Court:** All right. Mr. Schul, for the crime of assault in the second degree, this Court is going to sentence you to the Commissioner of Corrections at Stillwater Penitentiary for the period of 21 months.

However, I don't think it's necessary that you serve that sentence at this time. I'll stay the execution of that sentence, and I'll place you on probation for a period of three years. . .

I will require, as you have already done, that you complete your chemical dependency treatment, and that you successfully continue with any follow-up that they recommend, and successfully complete that.

During this period of time, I'll require that you use no alcoholic beverage, which includes 3.2 beer, and that you use no drugs or medicines unless they are prescribed by a physician.

I will require that you get yourself involved in the domestic abuse program. Ms. Coker can get that set up for you.

I've got to warn you, Mr. Schul, there will be other terms and conditions of probation. . .

Now, before you leave here today, I want you to talk to Mr. Ritzell and Ms. Coker, and they'll get you set up on your probationary program.

You got yourself a real break, so take advantage of it.

**The Defendant:** I will, sir.

Two years after this case, Lawrence Schul was convicted of a felony assault (his third conviction) and served 18 months in a local correctional facility. Shortly after his release, he was again arrested. The same defendant is once again before the court, this time for violating a no-contact order. This is the fourth time the court is sentencing Mr. Schul for a domestic violence-related offense. The defendant is explaining that nothing really happened.

**The Defendant:** She was just upset and crying and . . . I don't know. I didn't harm her in any way. All I was tryin' to do is settle her down. All-you know, that's all. I got a new job. Like I said, a friend of mine came up from Ohio. I'm supposed to be leaving this weekend for-for a company called F & F Incorporated. They clear for power lines and gas lines and all stuff like that. And I just luckily got on. I've been locked up for

over—almost a year, Your Honor. I just got out here a month or so back, two months back. All I want to do is get back on my feet. I lost a good job 'cause of what happened over a year ago. I used to work for Burlington. I lost that, because of what I've done.

(Pause.)

**The Defendant:** I won't be going to her house again, Your Honor. I won't even be in town.

**The Court:** Just a minute. Let me read through the reports here. Just take it easy. . . .

Okay. Does the Probation Office have a recommendation in this matter?

**[Defense Attorney]:** Yes, we do, Your Honor. Just to recap for the Court. He—Mr. Schul just recently got out of NERCC [Northeast Regional Corrections Center] about a month ago. He was there for a Second Degree Assault involving the same victim and also for a violation of probation which resulted from a drinking incident.

He indicates that he is aware of the OFP, that Julia Adams knew he was planning on leaving town, he said, this weekend. He ran into Julia Adams yesterday. She invited him to the house. And she was intoxicated. He had a couple drinks himself, although he indicates he wasn't intoxicated. He indicates that she started to cry and got upset over something. He doesn't know what. And it just seemed to accelerate from there. . . .

The probation officer conveys Lawrence Schul's version of the offense to the court without questioning its validity. Here we see the problem with a system that sees the offender, not the victim, as the client. If, as an advocate suggested earlier (chapter 3), the victim was the client of the probation officer, this report would most likely be radically altered. That is not the case, however. The probation officer continues his recommendation.

**[Defense Attorney:]** At this point we would be making a recommendation that—possibly that Mr. Schul be given a—a sentence of seven—something like 60 days in the County Jail and—and stay all but about four of those days for purposes of him being allowed to find a job in Ohio. He indicated there is a friend of his in town now [who] he was planning to going back to Ohio with this weekend. He doesn't know exactly when. He doesn't know where to get ahold of this friend, and he can't verify what time his friend wants to leave. So I don't know how he can—he can handle that situation. But I think after spending a couple days in jail, I think that he needs to be given an opportunity to make that start in Ohio where he says he has a job lined up, especially since there doesn't appear . . .

**The Court:** The Court having accepted Defendant's plea of Guilty, is going to impose a sentence of three days in the County Jail. Defendant will be given credit for yesterday and today . . .

Let me suggest to you you really want to do that, because every time you stick around here—

**The Defendant:** I know.

**The Court:** —and you see her, you get in trouble. And you always wind up either in jail or NERCC, and she's sitting out there in her apartment



drinking beer or whatever she does. I don't know. It seems to me that at some point, you know, you got to, you know, have the lights go on and say, you know, this doesn't make sense.

**The Defendant:** No, it don't. That's one reason I'm leaving, Your Honor.

**The Court:** Okay.

**[Defense Attorney]:** Thank you, Your Honor.

**The Court:** 7:00 o'clock tomorrow we're going to give you a chance to do that.

**The Defendant:** Thank you.

There seems to be a consensus by two judges, one probation officer, and two prosecutors that the problem here is not men's entitlements in these private relations with women or how men use intimidation and violence to maintain or enforce those entitlements, but it is alcohol or the mixture of alcohol, anger, and problematic women.

The second case involves a man who has pled guilty to fifth-degree misdemeanor assault against his partner, who has since left him. It begins as the judge questions him about the incident. I've selected excerpts related to the defendant's rationale for avoiding jail time despite his previous assaults against this woman and another woman. Again we see the introduction of the claim, "I'm a problem drinker, not a woman abuser."

**The Court:** She reported on that occasion that you had choked her and pushed her into a wall; is that what happened?

**The Defendant:** I don't believe I choked her—and I hurled her against the wall; I didn't push her. Those walls was—just leaning sometimes; you can crack them—or it's kind of foggy because I was under the influence of alcohol. Since then I haven't had a drink or any drugs or anything like that. I've taken an alcohol assessment, and I'm working with the counselor and I have been in anger control class, and stuff. I am currently [at] work with social services to try to get the children placed back in the home. I'm doing community service hours. I've been keeping regular contact with my probation officer . . .

**[Prosecutor]:** I think you should add more time than just ten days.

**The Defendant:** I don't plan on having anything to do with her whatsoever. My main problem has been alcohol. I'm getting help with that. I've been off of it for nineteen or twenty days. My priorities are reversed . . .

But I just want to get my stuff together with my kids and run the home. As long as I stay away from alcohol, I don't seem to have problems with anything.

**The Court:** Ever been through treatment?

**The Defendant:** No, I haven't. That's been recommended. I was trying to get the child custody, and stuff, out of the way. I had a Rule 25 assessment and they determined there wasn't a dependency, but there was signs of abuse. I agree with that . . .

**The Court:** Have you had a previous assault conviction?

**The Defendant:** No.

**[Prosecutor]:** I was told there was another assault charge by somebody else.

**The Defendant:** There had been one made but it was dropped by the court. This was no evidence. But I meant her no harm. I don't know why she's crawling on me so bad. I want to get my life back in order and raise my children like I should have been doing the whole time . . .

**The Court:** 90 days county jail. Stay the time in favor of a year of supervised probation. Conditions being that you abstain from the use of alcohol; follow though with any recommendations from your Rule 25 . . .

Throughout these examples, alcohol is coupled with the notion of men having buttons, or breaking points, which unleashes an uncontrollable anger and rage. It is the combination of these factors which explains the violence and directs the response of the state to those who use it. This framework for understanding men's violence against women is one that has been formulated in the discursive practices of the human science and social service apparatus. In the case of Sandra Peacock, the Judge, the defense attorney, and the prosecutor all link into this discourse. Before returning to the case of Sandra's murder I want to talk about how these extended relations of ruling enter into this courtroom setting.

### Linking to Extended Social Relations

The battered women's movement has spent much of its energy trying to offer alternative discourses to the much more powerfully entrenched discourses of the ruling apparatus. As discussed in chapter 2, for a brief period of time we dominated much of that discourse, but as research dollars became available and domestic violence became a popular field of study, the grassroots voice which used the media, newsletters, and training manuals as a form of discourse was subsumed under the discursive practices of academia and the U.S. human service and legal professions. Researchers in this field are entrenched in the ideological practices of sociology, psychology, and criminology. Russell and Rebecca Dobash, in their 1992 book *Women, Violence and Social Change*, describe the impact of the psychological discourse on the work of

the battered women's movement:

The psychological and psychiatric professions are now extremely important in the United States and there has been a rapid rise in the number of professionals engaged in delivering therapeutic services. There were only 12,000 clinical psychologists in the United States in 1968, by 1982 there were over 40,000. Today, about one-half of the world's clinical psychologists are working in the United States. . . .

The rapid expansion during the nineteenth century of institutions of confinement in Europe and the USA provided a significant impetus to the behavioral sciences and the therapeutic professionals associated with them. This was the age of the great confinement and the rise of the carceral or discipline society. . . .

If the nineteenth century was the period for the rapid expansion of institutions and the growth of institutional psychiatry, the twentieth century has been a time when the professionals who created and operated these institutions have found their way into the general community. . . .

Around the turn of the century social welfare workers in Britain and the United States began to seek professional legitimation by shifting their emphasis from merely helping and aiding the poor within communities, to various forms of casework counseling linked to 'scientific' interventions associated with psychiatry and psychology. Alignment with medical psychiatry gave professional status and legitimacy to the otherwise pragmatic work of social welfare agencies. Psychiatric perspectives played an important role in shifting the focus away from the social and economic conditions which produced the slums and depriving conditions of social work clients, to a focus on the personalities of the poor. Emerging individual perspectives grounded in the embryonic professions of psychiatry and psychology conceived of poverty and crime as primarily linked to individual pathology and inadequacy. This shift had a profound influence on the course of social work in the United States, making it difficult to consider the common bases for most social and economic problems. (pp. 215-219)

Practitioners are organized to think and act by the discursive practices extralocal to their everyday work setting. The social relations that organize individual practitioners' work are visible neither to the observer of the daily work practices in a local courthouse nor to the worker, but they are discoverable as the textual character of ruling and managing is explicated. As I have discussed, workers in the legal system are assigned duties that are highly specialized and routinized. Generally speaking, frontline workers prepare cases for resolution at a higher level of

decision making. These workers process cases in standardized ways. To orchestrate the processing of a case involving many people with many different viewpoints, procedures are put into place which create institutionally acceptable actions on the part of practitioners. Limitations of the ability of individuals to act independently from institutional norms are constructed through the use of procedures, rules, regulations, promotional practices, and professional training. While court practices are carried out in local settings, the obstacles battered women face in getting what they might think of as justice or protection are encountered in courthouses across the nation. As D. E. Smith (1990b) argues, “Social consciousness exists now as a complex of externalized social relations organizing and coordinating contemporary society. It exists as co-ordered practices and can be investigated as such” (p. 8).

Officers and all of the succeeding practitioners who enter a case operationalize certain methods of thinking about and interpreting what they are seeing and hearing. It is these methods of thinking that determine how practitioners will select, order, interpret, and record an account of the situation. Each practitioner who enters into the case will be institutionally organized to order, select, and interpret information to both read and produce texts. The ability to subsume individuals’ commonsense knowledge and perhaps intuitive reactions to a case under an institutional interpretation of the situation characterizes the way institutional relations are ideologically accomplished. Workers are organized into a method of thinking about the people they work with that is rooted in theoretical models that borrow observations from the actual lives of women but are never accountable back to those experiences for their validity.

This method of thinking causes practitioners to replace a women’s primary narrative with an account that gives her what we might think of an institutional legal existence. The psychiatric system uses a similar method but gives her a psychiatric existence; social workers bring her into existence as a welfare recipient or troubled mother; medical personnel know her as a patient. Though each discovers her and makes her actionable in very different ways, the method of thinking that facilitates this way of ruling is common to them all. It transports the woman from

her existence as a subject in her everyday world to the object of institutional action in their everyday world. These methods are so entrenched in the workings of the system that they seem natural. They are viewed as objective, while advocates, who articulate a political commitment to women's autonomy, are seen as ideological.

D. E. Smith (1990a) draws on Marx, especially his work in *The German Ideology*, to explicate these methods of thinking:

Ideas and concepts as such are not ideological. They are ideological by virtue of being distinctive methods of reasoning and interpreting society. . . .

To treat assumptions about human nature (among other concepts) as active forces in social and historical processes is an ideological practice. . . . Concepts, ideology, and ideological practices are integral parts of sociohistorical processes. Through them people grasp in abstraction the real relations of their own lives. Yet while they express and reflect actual social relations, ideological practices render invisible the actualities of people's activities in which those relations arise and by which they are ordered. (pp. 36-37)

When the actualities of people's activities are made invisible in these cases, women's lives are literally endangered. There is no way to fully see the violence or the meaning of that violence in the woman's or the man's life. In her description of D. E. Smith's use of Marx, Sylvia Hale (1990) points out the power of this method and capsulizes Marx's description of ideological practices in *The German Ideology*:

The creation of an ideology involves three distortions or tricks. First, real data, real experiences are noted. Secondly they are embedded in abstract conceptual schemes. Finally, these abstract models are treated as causal forces, and imposed as explanations for behavior. The original relations between people are covered up. This is a powerful way of controlling people because the logical models do indeed seem to fit the original data. People believe them and become obedient to them. (p. 246)

Practitioners in the legal system are directed through a system of professionalism and bureaucratic management to think in these prescribed ways. Class, gender, and race privilege are

sustained not by the overt imposition of a specific bias but by ideological practices that produce methods of thinking about people's actual lives. The Canadian psychologist Donald Dutton became a media darling after his testimony in the preliminary hearings of the O.J. Simpson trial. In his book (1995) *The Batterer: A Psychological Profile*, Dutton claims to have uncovered a profile of the serial batterer. While his book sold well, it was his media fame following the Simpson trial that helped promote his theory that early childhood trauma causes men to become serial batterers. Dutton was interviewed about his theory in relation to O.J. Simpson in a popular Canadian women's magazine.<sup>47</sup>

Three traumatizing factors in early childhood development seem to produce an adolescent "ticking bomb": a shaming or disparaging father who regularly humiliates the boy, often in public; an insecure attachment to the mother figure, which produces a "Madonna or whore" perception of all women; and experiencing or witnessing an abusive home environment. As far as [Dutton is] concerned, Simpson fits the profile to a T: "His father left home when O.J. was a kid, and the scuttlebutt around the neighborhood was that the father was gay. His mother went out and worked 16 hours a day to keep a roof over their heads and meals on the table, so she wasn't available to him much of the time. On top of that, he had rickets. The neighborhood kids would call him Pencil Pins, and because there wasn't much money, his mother made homemade braces for him. So he experienced extreme shame, I would think—from the deformity, to the homosexual father who leaves home, which is the ultimate rejection, to the mother who tries but isn't available. With the shame comes rage, which doesn't go away just because he wins a football scholarship and goes on to become an American celebrity. The personality splits, and the rage goes underground. (Keyes, 1996, p. 57)

The practice of moving from actual observables to fabricated schemata that selectively utilize those observables to support causal explanations is an ideological practice in that "original relations between people are mystified, covered up" (Hale, 1990, p. 246).

The original relations between people in Simpson's childhood as well as within his marriage are

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<sup>47</sup>I am using this interview in a magazine rather than Dutton's published work because this is how his theory enters the jury pool and popular thinking. In his book he says, "I believe most intimate abusiveness committed by men stems from . . . deep-seated feelings of powerlessness that have their origins in the man's early development. With a shaming, emotionally rejecting or absent father, the boy is left in the arms of a mother who is intermittently available but whom he perceives as all-powerful. He never recovers from the trauma" (Dutton, 1995, p. 121).

being covered up in Dutton's method of thinking about and representing a version of Nicole Brown and Ronald Goldman's murders. Dutton's testimony is meant to affirm that Simpson fits the picture of a violent man, but in doing so he perpetuates a representation of men as out of control of their rage and women as bringing this rage on. Violence as a product of men's historic social and economic position of authority in the family is obscured in this analysis (Paymar, 1993; Gondolf, 1985). Dutton engages in several activities here that exemplify how battered women's actual lived experiences are denied expression in these discursive practices. First, his alleged theory on childhood trauma acts as a filter which will not allow into the picture most of what there is to see. The many particulars of Simpson's life and relationship with Nicole Brown, including those which contradicts his theory, are dropped from view. His theory acts to select the particulars readers will use as the original source of data. Dutton is not required to test it against the actual experiences of Brown or Goldman or Simpson because the theory itself has become the gatekeeper of information. Simpson will be squeezed into his theory, and not very neatly in this case.

Dutton's theory calls for a child to witness abuse or violence as a child. He claims that Simpson fits his theory to a T, but we know of no witnessing of violence. He shows absolutely no evidence of Simpson's having an insecure attachment to his mother, but uses the fact that she worked long hours as evidence of an insecure attachment. Finally, he apparently has no data to show that Simpson's father was actively engaged in humiliating or disparaging Simpson. He uses the possibility of his father being gay to assert that Simpson was regularly humiliated or shamed. He adds to this a guess that having rickets was humiliating but doesn't let us know how that might be tied to his father humiliating him. In short, the description that "fits to a T" fits more like an X, but it doesn't matter because these people are not present in the discursive practices to correct the misrepresentations. If Simpson is an excellent example of his theory, what man couldn't be manipulated into it?

The Simpson's interviewer fails to note the extent to which Simpson has to be crammed into the

Dutton theory but does authorize Dutton's account by listing for us his credentials. Dutton

is a Vancouver psychologist who testified for the prosecution at the Simpson trial's preliminary hearings . . . He recalls being cross-examined by F. Lee Bailey one of Simpson's "Dream Team" [lawyers] . . . An author and professor of forensic psychology at the University of British Columbia . . . he was asked by the Vancouver police force to help modernize its officer training . . . "For two years I spent every Friday night riding on patrol" . . . Based on his research and experience . . . (pp. 56-57)

Dutton's approach exemplifies here the ideological practices Marx explicates in *The German Ideology*. Trick one: Note real data and experience (batterers often have childhood experiences that could be represented as trauma). Trick two: Make up an abstract conceptual scheme into which real data can be embedded (humiliation by father, insecure attachment to mother, and witnessing violence produce a childhood shame that turns to rage by adolescence). Trick three: Treat this abstract model as causal to the observation (Simpson had a deep well of rage that turned him into a batterer and in this case perhaps a killer).

In the same interview Dutton claims that battering has a typical cycle and goes on to describe Lenore Walker's "cycle of violence" theory:

The typical cycle of domestic battery goes from a gradual build up of tension to an explosive release to a period of I'll-never-do-it-again remorse that [Dutton] says can sometimes seem like a seductive honeymoon. It's a pattern that can promote a strong form of bonding . . . (p. 58)

Walker's theory (1979), described in chapter 5, uses the same method of thinking as Dutton's. Interestingly, she was called upon by the Simpson defense to work on the trial preparations. After forty hours of interviews with Simpson, Walker, who has never been an expert on working with abusers, announced on several nightly talk shows that she was quite prepared to testify that Simpson did not fit the profile of a man likely to kill his wife.

Several legal theorists (Bersoff, 1986; Tremper, 1987; Faigman, 1986) have discussed the



increasing role of the “psy” professions in shaping legal discourse and influencing how practitioners and juries understand the cases before them. It is the interlocking nature of these conceptual practices that contributes to the hegemonic control of what becomes seen as masculinist interests in the legal system. Dutton and L. E. Walker are not apologists for the legal system. Both have been actively working to reform court processes to make them more protective of women. Social scientists and practitioners engage in these practices because they are fully entrenched in the common ideological practices of knowledge making.

### Was Sandra’s Killing an Accident?

I have used four sentencing hearings, including the sentencing of the man who killed Sandra Peacock, to explicate how the discursive practices of the social sciences, particularly the “psy” literature, intersects with the documentary practices of court practitioners to produce accounts of men’s abuse of their partners. In the hearings cited in this chapter, these discursively manufactured explanations of battering create a boundary around institutional inquiry that consistently discounts the danger that women experience in relationships with men who use violence. These frameworks individualize what is social and decontextualize “incidents.” Yet the use of violence must be contextualized if victims are to be afforded adequate protection. In Kenneth’s case we have a judge, perhaps-aged man, presiding over a hearing about a woman’s death. The prosecutor, a man with a law degree who must have seen hundreds of cases of women being battered, speaks for the state when he tells us that the man who shot this woman is not dangerous. Also in the room is a court reporter who has been silent throughout the whole proceeding and is married to the defense attorney. The courtroom is filled with Kenneth’s friends, family, employer, and fiancée, all of whom are there to say he is a good guy.

Most men who kill their wives do so because their wives are leaving them. Most women who kill their husbands do so because their husbands are beating or raping them (Jones, 1980; Browne, 1987). Gay men kill their partners, and lesbians kill theirs. However, this sentencing

hearing is conceivable only in the case of a man killing his wife. The historical legal right and obligation of a man to chastise his wife is rooted in heterosexual male privilege (Dobash & Dobash, 1979) and is the basis for the prosecutor's decision to reduce charges, the defense attorney's decision to argue that his client should serve no time, and the judge's decision to impose the lightest sentence possible for such an act of violence.

Let's look beyond this courtroom scene to a few years in the future. Three years from now Kenneth will be off probation, he will have served his sentence, and he will likely be married to Barbara Bauer, the woman introduced as his fiancée. If he hits her, she may seek help, perhaps a protection order. The clerk of court or the advocate who helps fill out that protection order will undoubtedly have private thoughts about the woman before her, a woman who is surprised that her husband, who killed his first wife, is being violent. As the clerk helps to fill out the forms she will be asking herself, What did she expect marrying a man who killed his first wife? Is she crazy? Did she think she could bring out something in him that Sandra couldn't? Did she have - esteem? Was her denial so high?

The judge has said that Kenneth is a non-criminal. The prosecutor has said that the level of provocation was such that we could not call this murder. The employer says he's a great customer pleaser. None of these men will be implicated in the indictment of the young woman who is seeking protection from a man who killed a previous wife. A new framework will be applied for her. This framework will also be borrowed from the "psy" profession. This time we will look at what self-defeating personality disorder led her to choose such a brute.

William Ryan, in his classic 1972 book *Blaming the Victim*, explains why victim blaming is so pervasive in these types of settings.

The victim blamers turn their attention to the victim in her post-victimized state. They want to bind up wounds, inject penicillin, administer morphine, and evacuate the wounded for rehabilitation. They explain what's wrong with the victim in terms of social

experiences in the past, experiences that have left wounds, defects, paralysis, and disability. And they take the cure of these wounds and the reduction of these disabilities as the first order of business. They want to make the victims less vulnerable, send them back into battle with better weapons, thicker armor, a higher level of morale.

In order to do so effectively, of course, they must analyze the victims carefully, dispassionately, objectively, scientifically, to see what made them so vulnerable in the first place.

What weapons, now, might they have lacked when they went into battle? Job skills? Education?

What armor was lacking that might have warded off their wounds? Better values? Habits of thrift and foresight?

And what might have ravaged their morale? Apathy? Ignorance? Deviant lower-class cultural patterns?

This is the solution of the dilemma, the solution of Blaming the Victim. And those who buy this solution with a sigh of relief are inevitably binding themselves to the basic causes of the problems being addressed. They are, most crucially, rejecting the possibility of blaming, not the victims, but themselves. They are all unconsciously passing judgments on themselves and bringing in a unanimous verdict of Not Guilty. (p. 28)

Kenneth Peacock's sentencing hearing shows how the legal system connects into extended relations of ruling. The actual lived experience is subsumed under the ideological practice of a ruling apparatus that shapes the lives of women and in this case declares that Kenneth Peacock—who sat for almost two hours talking with his wife after discovering her in bed with another man, finished his discussion with her, picked up a gun, pointed it to her head, and shot her, causing instant death—did so accidentally. Heterosexual men can't help shooting wives who are unfaithful.

## **CHAPTER EIGHT**

### **POLITICS OF CHANGE**

I am concerned that the story I have told here might imply that battered women and those who intervene to stop the violence against them are being totally controlled by documentary practices and that both are powerless to change this. This is not an accurate picture of what occurs. Individual women, intervening practitioners, and advocates all engage in concrete actions to control or interfere with these practices so that the process doesn't control them. In chapter 3 I provided an example of this with a transcript of a prosecutor's attempt to stretch the confines of the system: she prosecuted a man who had repeatedly assaulted and threatened his wife, although the incident for which he was arrested had been constructed as a mere argument over possessions. Another example of attempting to control documenting practices is that for years shelter advocates have kept only minimal records of women using their facilities in order to avoid being subpoenaed to appear at a court hearing in which information might be used against residents. At the same time, they have argued for increasing the documentation of men's violence. Ensuring that practitioners involved in these cases notice and document the violence is seen as a method of compelling them to take more protective action, if for no other reason than to avoid liability should someone "get hurt."

I am mostly interested here in ways advocates can promote changes in the system by resisting what seems to be the hegemonic control of ideological practices embedded in textual processes. Sociologists are recognizing that social change doesn't necessarily come in the form of class warfare, as Marx and others might have argued, but through undermining the countless expressions of power in micro processes of managing social institutions of ruling. Within the battered women's movement there have been many successful attempts to control these discursive practices. Like activists in the broader women's movement, advocates have recognized that for the benefit of battered women, we can avoid succumbing to methods that benefit the interests of the institution as an apparatus of ruling with no regard for a woman's safety.

In this chapter I will describe an effort to claim these documentary practices for the benefit of battered women by changing a single processing interchange and work setting.

It would be difficult to say I finished my research on a particular day or in a certain month. But there was a point in which I stopped being a researcher, looking for the how, and became an activist, advocating for changes. I talked with my co-workers about concrete ways we could make changes based on the many ways I had come to see documenting practices marginalizing women's safety. It would have been practically impossible to propose changes at every point of case processing, so we decided to begin where we had our best links to practitioners in the system, the probation department. I approached the agency director about working with the adult misdemeanor unit of the department. He and the unit supervisor agreed to work with me and my co-workers on a strategy to improve the department's attention to victim safety. We saw the presentence investigation (PSI) as a crucial point in addressing victim safety and a good place to start proposing some changes in documentary practices.

### The Presentence Investigation

The court assigns a case to a probation officer after a trial or a negotiated plea agreement. Most cases are resolved through a negotiated agreement between the prosecutor and the defense attorney. In its most basic terms, such an agreement entails an offer by the prosecutor to the defense attorney along the following lines: "You have your man plead guilty to fifth-degree assault, and I'll drop the other two charges against him: violation of a protection order and criminal damage to property. We'll have a presentence investigation conducted and we both agree to abide by the recommendations of the probation officer." Or, "I have a victim who wants to testify, pictures, a police report that is extremely thorough, and a 911 tape that the jury would love to hear. I'd suggest you have your man plead guilty." If there is only the assault charge and not such a great case the prosecutor might phrase the agreement, "You have your man plead guilty, and I'll lower the charge from assault to disorderly conduct. We'll have a presentence investigation and both agree to the recommendation of the probation officer." Judges can refuse

a plea agreement if they think it is not in the interest of justice. However, they cannot prohibit the prosecutor from dropping a case or require a prosecutor to charge a case. In Duluth, the prosecutor dismisses approximately 22% of domestic assault–related cases for lack of evidence. Of the remainder, 95% are resolved through such a negotiation process. Only a handful of misdemeanor cases go to trial (Duluth chief prosecutor, interview, May 8, 1996).

Minnesota state law requires judges to impose a fine for all crimes involving violence. Low-income defendants can work off their fines through a community work program. The Duluth DAIP conducts a 27-week course on nonviolence. Completion of that course has become a standard condition of probation for domestic assault offenders. While each probation officer has a distinctly idiosyncratic style of reporting the PSI process, the resulting recommendations to the judge were essentially the same.

I began working on a proposal for changing the PSI process by watching a probation officer conduct a PSI. The day I came to observe, the courtroom and the hallway were packed with defendants and their friends. One hundred thirty-nine cases were scheduled to be disposed of between 9:30 a.m. and 3:30 p.m. Ten defense attorneys were wandering around in the hallway calling out the names of clients, while watching for a private moment with the prosecutor. As defense attorneys huddled with clients, the prosecutor stood toward the front of the courtroom near his table. He had the 139 case files arranged before him according to some plan. Defense attorneys were constantly approaching him. As the prosecutor looked for the relevant file, he and the defense attorney would hold a brief conversation in hushed tones. This had gone on for about 40 minutes when the arrival of the judge was announced and everything came to an abrupt halt. We all rose as instructed by the bailiff and then sat down as instructed by the judge.

This, it occurred to me, was what John at the dispatch center was talking about when he said the system subdued the man. The building, the organized chaos, the rituals, and the suited lawyers representing mostly working-class and poor men all combined to create an ambiance of

authority.

As the first case was called, both the prosecutor and the defense attorney approached the bench. The defense attorney began to explain to the judge that he had made an arrangement with the prosecutor. In some cases there had been no arrangement, in which case a trial date was set. In more than half of the cases the defense attorney and the prosecutor had reached an agreement.

The first domestic-related case that day came up about 40 minutes into the proceedings. It was the case of Darrel Stanik and Michelle Lake. Darrel Stanik's attorney explained to the court that Mr. Stanik was going to be pleading guilty to a charge of disorderly conduct. Both the prosecutor and he would accept whatever recommendations the probation officer made for sentencing. The judge handed a file to the clerk. The clerk held the file out in front of her and the judge said, "Okay, Mr. Stanik, I'll have a probation officer conduct a presentence investigation with you and then this afternoon we'll have your sentencing. If you want to go then with Ms. Downer, she will conduct the PSI on this matter."

Here two attorneys presumably pitted against each other in an adversarial contest were submitting to the unknown recommendations of a third party. It seemed to me that individual probation officers have a great deal of power.

Sharon Downer was standing in the doorway. She came forward as the judge mentioned her name, took the file that the clerk was holding out, and motioned for Mr. Stanik to follow her. A shelter advocate followed them out the door, as did I. The shelter advocate motioned to Sharon that she wanted to have a word with her. Sharon turned to Mr. Stanik and said, "Can you just wait here a few seconds? I need to talk to someone." He nodded and Sharon walked a few feet away with the advocate. They exchanged a few words and parted. Sharon came back to Mr. Stanik and asked me if I would be joining them, and the three of us headed for the elevator.

Later, I found out that the advocate had told the probation officer that, after the incident, Michelle Lake, the victim, had obtained an OFP, which excluded Mr. Stanik from the home. She also informed Sharon that Ms. Lake did not want him back in the home or for him to have any contact with her. This information was eventually incorporated into the probation agreement under condition number seven: “Obey all court orders, includ of its future modifications.”

The probation officer sat at her desk, and Mr. Stanik sat next to the door at the side of her desk. I sat in a corner, off from both of them. I noticed that the defendant sat between the probation officer and the door. This arrangement did not conform to the safety protocols of larger probation offices, which advise probation officers to make sure they can leave the room first.

Sharon began her interview with a brief explanation, saying, “We’re here to get some information on your background so that the judge can sentence you appropriately. This is a presentence investigation and if the judge puts you on probation, I’ll be your probation officer. I need to ask you some questions so I can make a recommendation to the judge, is that O.K.?” Mr. Stanik nodded. She then began to ask questions directly from her PSI form: his name, his birth date, his race, his place of birth.

After these few questions, Sharon sat back in her chair and asked, “How long have you lived here, Mr. Stanik?”

“Three years,” Mr. Stanik replied. They chatted about different places he had lived, then she asked him to wait a bit while she checked on some information.

When she walked out of the room, she left his file on her desk. I wasn’t sure what was in the file, but I wanted to grab it. I thought there might have been something in there from the woman he had assaulted or from the shelter. I wanted to follow Sharon out of the office but decided to stay in the room with Mr. Stanik so he wouldn’t look in the file. Sharon, I later learned, ran a



record check for the three states he had mentioned in their conversation. It would take about 15 minutes for the report to come back.

She came back in the office and completed the interview. During that time, she asked several more questions from her form: his military background, family of origin, education, place of employment, income, length of employment. She looked up, leaned back, and began another chat with him. “So what happened here, Mr. Stanik?” She picked out the police report from the file and skimmed it while he began to talk. He started to relate the events of the evening the police had arrested him. She interrupted him several times, pointing out discrepancies between the police report and what he was saying. He explained each discrepancy but seemed to be trying to stop short of saying he cussed the incident for a few minutes and then Sharon asked him more questions: did he drink a lot, had he ever been to treatment, did he spend much time gambling, and had he ever been in counseling for any reason? He answered that he drank infrequently but occasionally did get drunk. He had had a DWI in the past but had never had any sort of counseling. Occasionally, he played poker with his friends; however, he did not gamble in any of the casinos. Then Sharon asked what kind of drinking there had been in his family. Had he ever been a victim of abuse as a child, or had he witnessed abuse in his family? His father had frequently pushed his mother around, but nothing that ever resulted in any kind of “police action or arrest or ambulances or anything like that.” Had this been the first time he had ever assaulted Michelle? They had both “gotten into it a few times before, but not to have the police called.” Sharon asked a few remaining questions from the form and then asked him to wait in the chair in the hall while she talked to Michelle. He told Sharon where to reach Michelle during that time of day and stepped out of the room. She called Michelle at the number he had given her but there was no answer. She found another number in the police report, but no one answered at that one either.

Sharon went to get the results of his record search, came back to her desk, wrote for about 5 minutes, and then asked the defendant to come back into the room. She asked him about the DWI

conviction in 1989 in St. Louis County. He said that they had taken it off his record, but she told him they had not. He asked her what that was going to mean as far as this conviction goes. It probably would not make a difference in terms of doing any time in jail, Sharon explained. However, because he was drinking the night of the incident and had a DWI, she was going to recommend to the judge that he have a chemical dependency evaluation and follow whatever recommendations the evaluator makes.

Sheen to counseling for abuse and described the men's educational program at the DAIP. She said she would also recommend that program as a condition for his probation. She would not recommend any days in jail beyond the 2 he had already spent there following his arrest. The judge would probably put him on probation for a full year. She then quickly ran through the conditions of the probation she would be recommending to the judge and asked if he understood each of those conditions.

He said that he understood each condition. She asked him again to wait in the hall while she finished her paperwork. After about 5 minutes filling out two forms Sharon said, "That's it. Let's go see the judge." We picked up Mr. Stanik and the three of us walked to the courtroom. When the case was called again, the judge turned to Sharon and asked if she had completed the PSI. "Yes, Your Honor, I have," she told him and she went on to make her report.

Appendix G is a copy of the presentence investigation form Sharon completed as she interviewed Mr. Stanik.

The judge sentenced Mr. Stanik to 60 days in the county jail, 2 of which he had already served. The judge stayed the remaining 58 days and placed him on probation for 1 year. He asked Mr. Stanik if he understood the conditions of probation that the probation officer had recommended. Mr. Stanik replied, "Yes, Your Honor, I do." The judge said he hoped that Mr. Stanik would take advantage of the programs. If he failed to follow through, he faced spending more time in

jail. That was the final disposition. Appendix H is the conditions of probation document that he signed. A year from now, when Mr. Stanik is “off paper,” as probation officers say, the case will be closed.

When the sentencing was over, Sharon and I returned to her office and discussed the process. She asked me what I thought about it. I told her I was surprised how little discussion there had been about the kind of violence the defendant had used against to talk to the victim occurred during a 10-minute period during the PSI. I asked why the department didn’t allow more time to conduct these investigations. She explained to me that having same-day sentencing has its advantages: it moves the cases along quicker and the defendants are always there for an interview. However, the lack of preparation time is a drawback. In more than half the cases she is unable to reach the victim. She explained that in gross misdemeanor and felony convictions, probation officers have several weeks to prepare the PSI and thus have more time to try to reach the victim. We agreed that the PSI might be primarily a record check and a quick assessment of the defendant’s attitude, but that other information that could inform the court—for example, the danger this person posed or all the harm done to the victim—was not available to the probation officer during this process.

I asked Sharon if she thought that this was an adequate process for the court to make informed decisions on sentencing misdemeanor offenders. She thought that it was “totally inadequate,” but that it was still better than what other communities do. Many of them do not conduct PSIs on misdemeanors and base sentences strictly on past criminal records. As the probation officer, she does have the option of asking for an extended period to complete a PSI if she has reasonable belief that there may be more to the case than a record check will uncover. She has done that twice that she could recall.

During this discussion, we invited the adult probation unit supervisor into the conversation about the adequacy of the PSIs. David had been at the agency a lot longer than Sharon and

remembered that they had developed the presentence investigation form in the early 1970s. They had not changed it since then, except for a few questions. We all agreed that a meeting with the entire probation staff would have to be the first step in thinking about revamping the PSI form. David agreed to set that meeting up and we all went home for the day.

The next morning I returned to my office at the DAIP and reported on the PSI, the sentencing, and the meeting afterwards. Our agency began to rethin-workers, Coral McDonnell, Nancy Helgeson, and Graham Barnes, worked with me in meeting with probation officers to make changes to the PSI form. They, too, started to go on police ride-alongs and observe dispatchers and probation officers. We also contacted the advocates at the shelter and asked them to work with us on this project. Thus the stage was set for the development of a “safety audit” of the Duluth court system.

This was not the first PSI I had ever observed, but in the past I had not paid attention to the role that texts—in this case the PSI form—play in directing the work, and the decisions, of the probation officer. However, this process of thinking about work settings, watching people do their work, and thinking about how texts influence that work led me to see a whole range of new possibilities for institutional advocacy and change.

#### The Story of Changing the Misdemeanor PSI Form: Stage I

We incorporated the objective of changing the PSI process into a project we were working on with the Centers for Disease Control.<sup>48</sup> We worked on three probation forms—the supervised release interview, the felony and gross misdemeanor PSI, and the misdemeanor PSI. All of us learned more about micromanagement issues and how they have defined and standardized the actions of probation officers.

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<sup>48</sup>In 1994, the DAIP received a five-year, \$1.5 million grant from the U.S. Centers for Disease Control and Injury Prevention to test an enhancement of the coordinated community response in Duluth.

The supervisor of the adult misdemeanor unit of probation and I structured a format for a meeting held in June of 1995 with all of the probation officers, three DAIP staff, and two shelter staff. During the first several meetings, probation officers discussed their cases from the perspective of their respective work settings. Together we talked about actions or behaviors of an offender that would make any of us consider him dangerous to his partner or to anyone else.

We also reviewed signs probation officers might notice during a PSI that would suggest that a particular offender was going to be difficult to manage on probation. Would this influence their recommendations to the judges? Collectively we were trying to identify criteria that could predict whether an individual victim would be safe from an individual offender. What measures would a probation officer then recommend to deter that offender from further use of violence or coercion?

Probation officers said that they placed a great deal of weight on the nature of the offense and the degree to which a defendant took responsibility for what had happened. For example, one probation officer offered this observation:

If a defendant engages in some kind of bizarre or sadistic behavior, like maybe the killing of an animal, or torturing some kind of pet, or forcing the woman to engage in some kind of humiliating act, or threatening to kill her family members, or something like that, then I start to have a heightened sense of fear that a victim is going to get seriously hurt.

A second probation officer said that she noticed if the victim was too dependent on the defendant, “like if she is a chronic alcoholic and needs him for her booze, or if she has small children and needs him to help, or if she is just desperate to get him out of jail or trying to get charges dropped.” She saw these individuals as women who might be less able to use the system for help. She didn’t see these things as signs that the woman was at fault but that she was more vulnerable to his violence.

A third probation officer said that in cases where he had a long history with an offender and knew the pattern of abuse he felt more able to offer the court some kind of useful information on

the likelihood of a new offense.

Advocates from the shelter and DAIP staff present at these meetings added many of their own observations about what alerts any of us to the possibility of escalating violence.

We all noted at the end of the second meeting that few of the issues that we had discussed were addressed on the PSI form that probation officers used in domestic assault cases. We generally agreed that the generic misdemeanor PSI form did not allow probation officers to account for the special nature of such cases, particularly regarding victim safety. After some discussion in which the DAIP staff argued for changing the form completely, we agreed that we would spend the next meeting designing a supplement to the existing form. Two of us from the DAIP volunteered to use the information that we had gathered during these two preliminary meetings to outline a supplement before the next session. We also volunteered to bring the new criteria before a group of formerly battered women who had used the court system.<sup>49</sup> We could obtain ideas from them as to the kinds of indicators that they thought would help a probation officer know whether an abuser would be likely to increase the severity or frequency of his violence.

During the same period, the DAIP was holding regular meetings with researchers at the University of Minnesota-Duluth to develop what we called a “high-risk checklist.” This list was supposed to help any practitioner, whether a probation officer, therapist, or police officer, look for indicators that would increase the risk for a victim.

Using Jacquelyn Campbell’s book *Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers* (1995), we developed a checklist of about seventeen items. Advocates and battered women from our advisory committee added another nine items, producing the following checklist.

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<sup>49</sup>Forming a special committee of women who have been battered to work on a policy or procedural change has been common practice for the DAIP.

### Assessing Dangerousness List

1. Has the abuser ever injured the victim so badly she needed medical attention?
2. Does the abuser seem preoccupied or obsessed with the victim (following, monitoring her whereabouts, stalking, very jealous, etc.)?
3. Does the abuser have ready access to a gun?
4. Have the abuser's assaults become more violent, brutal and/or dangerous?
5. Has the abuser ever choked the victim?
6. Has the abuser ever injured or killed a pet?
7. Does the victim believe the abuser may seriously injure or kill her?
8. Is the victim extremely protective of the abuser (trying to change or withdraw statement to police, reduce bail, charges, etc.)?
9. Has the victim separated or tried to separate from the abuser in the past 12 months?
10. Does the abuser drink excessively/have an alcohol problem?
11. Does the abuser use street drugs (speed, cocaine, steroids, crack, etc.)?
12. Has the abuser ever been to alcohol/drug treatment?
13. Has the victim sought outside help (OFP, police, shelter, counseling) during the past 12 months?
14. Has the abuser ever threatened to kill the victim?
15. Was the abuser abused as a child by a family member?
16. Did the abuser witness the physical abuse of his mother?
17. Does the victim seem isolated from sources of help (car, phone, family, friends, etc.)?
18. Has the victim ever been assaulted by this abuser while pregnant?
19. Has abuser ever threatened or attempted to commit suicide?
20. Has the abuse included pressured or forced sex?
21. Has the abuser used a weapon against the victim or threatened to use one?
22. Does the abuser lack remorse or sadness about the incident?
23. Does the abuser commit nonviolent crimes?
24. Does the abuser have a history of violence to others (non family members)?

25. Has the abuser experienced any unusual high stress in the past 12 months (loss of job, death, financial crisis, etc.)?
26. Is the abuser assaulting the victim more frequently?

As we started to look at the use of such a checklist in many different settings within the legal and human service systems, we became increasingly uncomfortable about the direction we were taking and, in fact, promoting. We began to recognize that practitioners would inevitably use such a list to assign points to cases to decide how dangerous a situation was. If, for example, one case had 6 risk factors and another 11, then the practitioner would have to assume that the case with eleven factors was more dangerous than the case with 6. University researchers suggested that we consider weighting some factors over others and use our research to test the checklist.

One woman on our advisory committee, Denise, presented the paradigmatic illustration of what was wrong with this kind of quantitative check list. If she had filled out a risk factor questionnaire before her husband's attempt to kill her, her case would have been considered a low-risk situation. He had been sexually abusive, intimidating, and cruel for ten years, but never physically violent to her or to their children. He had not been under any unusual stress, he had no weapons in the house, had never choked her, and had he never threatened to kill her.

Denise had decided to leave him. She also sensed that he knew about her plan. One day when she returned home from work, he demanded that she go out and clean the garage. She refused several times but he became extremely agitated. To keep him from getting any more upset, she went out to the garage. He had beaten her dog to death with a two-by-four and strung it up from the rafters. It was a warning.

He had never beaten her. He had never hit her or kicked her, or even restrained her from leaving. About a month after she left him, as she got off the bus coming home from work, he grabbed her, threw her to the sidewalk, choked her, and slashed her face with a razor blade, leaving her for



dead. Denise knew well before she left her husband that he was dangerous and that her leaving could result in violence—not because of risk factor points on some scale assigned to her “case,” but because of her daily life with him.

Denise’s story led the DAIP to backtrack on the development of any kind of “dangerousness scale” in meetings with the university research team. Unsure of our arguments and lacking the proper academic credentials to argue our case “scientifically,” we eventually organized a conference call among the DAIP staff, the university researchers, and several activist researchers.<sup>50</sup> We explained our dilemma and differences of opinion and asked for their ideas. The outside researchers all agreed that we were entering dangerous territory. The complex twists and turns associated with abusive behavior defy prediction based on a formula; a quantifiable profile of a batterer does not exist. In the end we realized that we were creating an instrument that would not be any different from the PSI form we were trying to revamp: both excluded from consideration the perceptions and lived experience of the woman.

The whole process illustrated for us how easily activists can be drawn into institutional ways of ruling.<sup>51</sup> It is a trap that makes many activists and feminist theorists leery of these types of reform efforts (Currie, 1990; Dobash & Dobash, 1992; Pateman, 1987; Schechter, 1982; Smart, 1989; G. A. Walker, 1990). It also points out the vulnerability of community-based advocacy groups to local institutions such as the university. Because of our own reputation in the area we

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<sup>50</sup>We called Jackie Campbell, author of *Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers* (1995); Susan Schechter, author of *Women and Male Violence: Visions and Struggles of the Battered Women’s Movement* (1982); Beth Richie, author of *Compelled to Crime* (1995); Ed Gondolf, author of *Man Against Women: What Every Woman Should Know About Violent Men* (1989); attorney Loretta Frederick; and victim advocate Eileen Hudon. All of them supported our decision to give up on the scale idea.

<sup>51</sup>Even though I had been working on my own research at this time, I was having problems fully articulating why I was so wary of the move towards developing scales on dangerousness. Community-based agencies like ours, which receive federal money to develop programs, are often obligated to work with local colleges or universities to evaluate these programs. The role of the university in these projects has been expanding over the past few years. In our case, locating the research in the School of Medicine proved to be a mistake because of the faculty’s uncritical acceptance of the research methods of the physical sciences. Eventually we were able to move this research into the School of Social Work, where we gained a more receptive audience for our questions about the use of scales and risk factors.

had access to many of the nationally recognized leaders in the field. We were able to call them and ask for a conference phone call. Many local programs would not have had access to these experts and would be left to argue with their local university staff as non-professionals, or at least as non-academics.

The DAIP and advocates eventually decided to put an end to the risk factor list as a possible scale to predict dangerousness. Most of the probation officers agreed. They already knew about the arbitrariness of scales and tests. By either law or policy, they are forced to use such measures in determining, for example, who is an alcoholic and who is not, whom to release from custody and whom to hold, which drunk drivers need prison sentences and which do not.

Sentencing is not simply about punishment; it is used to punish, to establish restitution, to put conditions on the defendant that will protect the victim from more harm, to offer opportunities for rehabilitation, and to enforce community norms. Presentence investigation interviews with offenders are used to create a profile of the offender. That profile is based on his relationship to the criminal justice system. We wanted to create a PSI form that would make the safety of the woman a central concern to the sentencing of the assailant. We were trying to build into the structure an authorized and institutionally sanctioned method of making women's experience of violence count.

We spent many hours discussing specific domestic assault-related cases, deterrence theories, Minnesota law, and the practical realities of sentences judges are willing or politically disposed to mete out.

We agreed on seven areas that probation officers should make relevant to the process:

- (1) violence and harm used by the offender in the incident for which he had been found guilty;
- (2) the pattern of abuse;

- (3) victim's perception of the violence;
- (4) the defendant's attitudes about his violence, his partner, his need to change his behavior, and his level of danger to his partner and others;
- (5) the defendant's social history;
- (6) the defendant's history of convictions, police contact, and orders for protection;
- (7) the involvement of children in the abuse.

The supplement we developed follows (Figure 12).

FIGURE 12: PROBATION REFERRAL SHEET

**DOMESTIC RELATED OFFENSE INFORMATION AND REFERRAL SHEET**

- Misdemeanor PSI     Gross Misdemeanor PSI     Felony PSI

Name: \_\_\_\_\_

**SOURCES OF INFORMATION** (Check all that you were able to use)

- Interview with victim or advocate     Interview with offender

**Collateral Information**

- Police report     Watch report     Past police contact     Criminal history  
 OFP history     DAIP history     Advocate report     Other

**SEVEN POINTS TO CONSIDER**

**1. Level of violence and/or intimidation of this incident**

- |   |  |
|---|--|
| <input type="checkbox"/> Single blow or minor injury                | <input type="checkbox"/> Required medical attention  |
| <input type="checkbox"/> Multiple blows, minor injury               | <input type="checkbox"/> Caused extreme fear         |
| <input type="checkbox"/> Multiple blows, significant bruising       | <input type="checkbox"/> Terroristic threats         |
| <input type="checkbox"/> Multiple blows and severe abrasions/injury | <input type="checkbox"/> Threatened w/ weapon        |
| <input type="checkbox"/> Significant pain                           | <input type="checkbox"/> Weapon used during incident |
| <input type="checkbox"/> Bodily impairment                          | <input type="checkbox"/> _____                       |
| <input type="checkbox"/> Fracture                                   | <input type="checkbox"/> _____                       |

Comments: \_\_\_\_\_

**Is there information to suggest that the following occurred? Check all that apply**

**2. Past violence/pattern of abuse—physical, sexual, intimidation**

**Information for 2 & 3 can be gathered from Women’s Coalition form, police report, and/or interview with victim.**

- \_\_\_ Offender has seriously injured the victim (needed medical attention).  
\_\_\_ Offender’s assaults become more violent, brutal and/or dangerous.  
\_\_\_ Offender choked the victim.  
\_\_\_ Offender has injured or killed a pet.  
\_\_\_ Offender has threatened to kill the victim.  
\_\_\_ Abuse has included sexual coercion or attacks.  
\_\_\_ Offender used a weapon against the victim or threatened to use one.  
\_\_\_ Offender is assaulting the victim more frequently.  
\_\_\_ Offender has attempted to intimidate the victim. How? \_\_\_\_\_

Describe the most severe violence victim has experienced from this partner.

Comments: \_\_\_\_\_

**3. Victim perception—Isolation, victim attempting to separate**

- \_\_\_ Victim believes the offender may seriously injure or kill her.  
\_\_\_ Victim appears extremely protective of the offender (trying to reduce bail, charges, etc.).  
\_\_\_ Victim has separated or tried to separate from the offender in the past 12 months.  
\_\_\_ Victim has sought outside help (OFP, police, shelter, counseling) during the past 12 months.  
\_\_\_ Victim seems isolated from sources of help (car, phone, family, friends, etc.).

Comments: \_\_\_\_\_  
\_\_\_\_\_

**4. Offender attitude**

- Offender lacks remorse about the incident.
- Offender denies responsibility for behavior.
- Offender seems preoccupied or obsessed with the victim (following, monitoring whereabouts, very jealous, etc.).
- There is information to suggest that offender is stalking the victim.
- Offender blames victim for the violence.

Comments: \_\_\_\_\_  
\_\_\_\_\_

**5. Offender social history** (If checked, comment below)

- Offender drinks excessively/has an alcohol problem.
- Offender uses street drugs (speed, cocaine, steroids, crack, etc.).
- Offender has been to alcohol/drug treatment.
- Offender has had psychiatric treatment in the past.
- Offender was abused as a child or witnessed the physical abuse of his mother.
- Offender seems seriously depressed or has threatened to commit suicide.
- Offender has had homicidal thoughts.
- Offender has committed non violent crimes.
- Offender has been exposed to institutional violence: \_\_\_\_\_
- Offender has a history of violence to others (non family members).
- Offender has experienced unusually high stress in the past 12 months (loss of job, loss of children, death, financial crisis, etc.).

Comments: \_\_\_\_\_  
\_\_\_\_\_

**6. Conviction/Arrest/OFP Record** - (violent acts and domestic related)

\_\_\_\_\_  
\_\_\_\_\_

**7. Impact on children - Safety needs of children during visitation, abuse of children**

- Were children present at this incident ?
- Were children involved in any way in the incident?
- Have children been abused by offender?
- Has offender ever attempted or threatened to abduct children?
- Are children afraid of the offender?

Comments: \_\_\_\_\_  
\_\_\_\_\_

psi/att.pr2 12/31/96

Form developed by Minnesota Program Development, Inc. & Arrowhead Regional Corrections

Judges and others in the criminal justice field hold widely divergent philosophies on sentencing. One judge who reviewed the new PSI form commented,

Sentencing should be a part of setting standards in the community, it should say that a particular behavior is not to be tolerated. Second, it should keep that particular defendant from committing the same or similar offenses. Third—and I don't mean here third in importance—sentencing should protect the public and that especially includes the person who was abused. We have the objective of treating similarly situated cases similarly. I don't think you'll find much argument with what I've just said but you will find much disagreement on what a judge can and should consider when sentencing. I want to fully understand the situation, not just what happened that night. We can only convict based on what happened in that incident. We can't convict someone of assaulting their partner because we believe he's a batterer. The state has to prove beyond a reasonable doubt that this incident did occur. But that's not the standard in sentencing. A judge has a wide latitude in sentencing zero to ninety days in jail, up to two years on probation, that is all there in order to allow the judge to take measures that will address the situation. (Interview, January 15, 1996)

The new PSI form, although fraught with its own problems of a generalizing text, is meant to shift the probation officer from presenting the court with what is essentially an offender's citizenship report to presenting a picture of his offense in the context of his use of violence in this or past relationships. It informs the court about the defendant as a batterer and, to a lesser extent, as a potential flight risk or supervision problem. The group could not reach a consensus about the final form, but we agreed that this form provided better and more thorough information to the court than the old one. We also agreed that during the sentencing process the new PSI form could alert the probation officer, the court, and in some cases, the victim, to safety issues. In essence, what we were doing was not eliminating documentary practices or eliminating the textually mediated characteristic of the legal system but claiming that feature for the benefit of battered women. We were doing so by incorporating into those documentary practices attention to the pattern of coercive, intimidating, and violent behaviors and therefore attention to the needs for taking protective measures on behalf of victims.

The old PSI ignored the fact that first-time domestic-related misdemeanors are not all the same.

A woman has usually been assaulted many times before her abuser is convicted of an offense. Some misdemeanants convicted for the first time have continuously engaged in a pattern of intimidation, violence, and coercion and are extremely dangerous. Others are not.

After completing the work on the PSI form, the group continued to meet to develop a sentencing matrix for domestic-related misdemeanor offenses. By reviewing two or three domestic-related cases that each probation officer had on her or his case load, we divided the sentencing options into four categories. The first category includes those cases in which the offender had no apparent sustained pattern of intimidation, violence, or coercion. Many battered women who illegally fight back fit into this category. Men or women who have assaulted their partners but have not engaged in a pattern of abuse fit here also. The most severe category involves cases where the probation officer found a pattern of severe abuse, stalking behavior, and little interest from the abuser in changing. For the first category, the probation officers recommend no jail time other than what the offender has already served following the arrest, and rehabilitation specific to the case. For the fourth category, they recommend between 60 and 90 days in jail, with 2 years of probation if they do not serve the entire jail time, and increased monitoring of the offender.<sup>52</sup> In all categories the offender is prohibited from having contact with the victim if that is the victim's request.

Figure 13 is the sentencing matrix the group developed. It is designed to account for the particulars of the case specifically as they relate to the pattern of abuse the woman is experiencing. It is an attempt to create a regulatory text that accounts for the women's experience of violence and focuses on the need to enact safety measures commensurate with the level of violence an abuser is willing to use.

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<sup>52</sup>A person cannot be put on probation if he has served the maximum jail sentence for a crime; probation is in lieu of more jail time.





FIGURE 13: DOMESTIC VIOLENCE-RELATED MISDEMEANOR SENTENCING RECOMMENDATION MATRIX

Category one	Category two	Category three	Category four
<p><b>The offender</b> commits an offense against the victim but there is no evidence to suggest the offender is battering the victim. The offender has no history of battering.</p> <p><b>This category may include</b> offenders who commit an act uncharacteristic of their typical behavior. It may also include victims of battering who use illegal violence or activities to control or stop violence used against them.</p> <p><b>Considerations:</b> If the offender in this case is experiencing ongoing battering by the person assaulted, the probation officer considers safety measures for both parties. Specialized programming is recommended, and the probation officer would not consider executed jail time unless the assault is severe.</p>	<p><b>The offender</b> engages in battering behavior with this victim, but there is no indication that the battering is escalating in severity or frequency, or that this offender has battered another person.</p> <p><b>This category may include</b> batterers who have a history of using low levels of violence and activities which threaten or intimidate the victim. The offender may not intend to place the victim in fear of serious bodily harm.</p> <p><b>Considerations:</b> The recommendation focuses on victim safety and rehabilitation programming rather than sanctions.</p>	<p><b>The offender</b> has established a clear pattern of battering with this or past victims. The PSI indicates the battering will likely continue and possibly escalate in severity and frequency.</p> <p><b>This category may include</b> batterers whose history includes: multiple domestic violence-related contacts with the police; demonstrated harassing behavior* toward the victim; violation of an OFP; repeated threats or assaults against this or other victims. The victim may be in fear of serious bodily harm.</p> <p><b>Considerations:</b> Victim safety recommendations are combined with more sanction-oriented sentencing, such as the maximum probationary period, some executed jail time, and programming.</p>	<p><b>The offender's PSI</b> demonstrates that the heightened, obsessive and/or unrelenting nature of the battering poses a high risk of serious harm to this or other victims.</p> <p><b>This category includes</b> offenders with backgrounds similar to category three offenders but may also include: stalking behavior,* threats to seriously harm or kill; threats or use of weapons; injuries that require medical attention.</p> <p><b>Considerations:</b> The most aggressive victim safety measures possible including working with child protection on children's safety. A substantial jail term and long-term probation may be combined with programming if amenable.*</p> <p><i>*terminology next page</i></p>
<p><b>Incarceration or other correctional programming*</b></p>			
30 days stayed jail	60 days stayed jail	60 days stayed jail 10-30 days executed jail	60-90 days stayed jail 20-30 days executed jail
			30 days stayed, 60 executed or 90 days straight time
<p><b>Gross misdemeanor incarceration or other correctional programming*</b></p>			
	91-120 days stayed jail 0-45 days executed jail	91-120 days stayed jail 45-120 days executed jail	120-180 stayed jail 120-180 executed jail
			180-365 days stayed jail 180-365 days executed jail
<p><b>Probation duration</b> (Gross misdemeanor convictions routinely receive 2 years probation)</p>			

one year

one year

two years

two years

Arrowhead Regional Corrections, Duluth, MN

Finally, we developed a form that probation would use when recording their recommendations in order to focus attention of both probation officers and judges on the three functions of sentencing: offender accountability (punishment), rehabilitation, and victim safety. It also serves as a referral form to the DAIP. That form appears as Appendix I.

### The Story of Changing the Misdemeanor PSI Form: Stage II

The work setting of the probation officer was not designed for the production of this new PSI form. The next stage of change would have to focus on making new information institutionally accessible to the probation officers. The revised PSI form requires a significant amount of information from the abused woman.

This was a twofold problem. First, the specialized labor practices discussed earlier involved three practitioners and an advocate talking to the woman before the PSI is conducted. The dispatcher, the responding police officer, and the on-call advocate all talk to the woman within a few hours of a call to 911. Usually, the supervised release agent talks to her a day or so after the arrest. No routine was set up through which to communicate the relevant information from these contacts to the probation officer. A small fraction of what a woman reports to any of those interveners is made available to the probation officer.

The second part of the problem centered on the type of information that practitioners were eliciting and recording. The dispatcher elicits and records information about the situation that the officers will be encountering. As shown earlier, additional information given to the dispatcher about the context of the violence is not routinely recorded. The officers are looking for the elements of a crime and the basis for making a probable cause arrest; most of what the woman has to say about the totality of her experience of the abuse is either not elicited or not recorded. Yet this is exactly what the probation officer needs to know to recommend a sentence that makes the victim a central concern. The on-call shelter advocate who makes a home or hospital visit immediately following an arrest focuses on the assistance that the shelter can offer. This advocate could also help the woman communicate her situation and need for safety measures to the court.

To incorporate the perceptions of battered women in a way that expands the practitioner's orientation from the task of accomplishing a narrow administrative case processing function to that of enhancing the protection of the victim required a new set of negotiations with department supervisors and practitioners in the system.

The director of the probation department could not just call up the police chief and say, "Scott, we've made some changes to the PSI, and I'm going to need you to retrain your officers on writing domestic assault reports so they include information my people need to do PSIs." Even to the extent that this informal network of power brokers exists, community-based advocacy groups are rarely able to tap into it when they organize for change. Coral McDonnell, Nancy Helgeson, and I began by meeting with the supervisor of the patrol division. We showed him the new PSI form and explained that it would require the development of a similar specialized police reporting form for domestic abuse calls. He immediately rejected a special report form. We then went up the chain of command to the police chief, who said, "You can write up a cheat sheet if you want. You can train officers on its use, but no specialized arrest forms."<sup>53</sup>

We had obviously struck a bureaucratic nerve. Police officers were inundated with specialized reporting requirements and often had as many as a dozen specialized report forms to carry on a shift. The Duluth Police Department had just spent the past year trying to reduce the number of these forms and was not ready to make an exception to its own rule. We gave up on a specialized form and instead took up the notion of writing an outline for officers to follow when dictating a report.

We enlisted the help of the city's chief prosecutor in designing a new reporting format and in training officers on its use. She was interested in working with us to develop the "cheat sheet" that the chief of police had suggested. She wanted the police reports to routinely include specific

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<sup>53</sup>Our relationship with the police has been quite cooperative, but we don't always get what we want. We've discovered that a narrative rather than a form actually provides much better information on the case and once trained on using the narrative format, officers provide a more complete picture of the safety issues of the victim.

information that would enhance her ability to get convictions. Several police officers, the city attorney, and two legal advocates worked on the design of the “cheat sheet,” which we then had made into small laminated cards that would fit into an officer’s shirt pocket. Figure 14 shows the two sides of the card.

FIGURE 14: REPORT WRITING CHECKLIST

<p><b>Domestic Abuse</b> <b>Arrest/Incident</b> <b>Report Writing Checklist</b> Duluth Police Department</p> <hr/> <p>Times (incident, arrival, statement)</p> <ol style="list-style-type: none"> <li>1. Parties present</li> <li>1. Emotional state (describe) Victim/ Suspect</li> <li>1. Injury to victim</li> <li>1. Injury to suspect</li> <li>1. Describe scene</li> <li>1. Relationship of victim/suspect</li> <li>1. State if children present, not present, witnessed, or involved Describe involvement</li> <li>1. Pictures taken</li> <li>1. Evidence collected</li> <li>11. Medical attention (where?)</li> <li>12. Note when any of the following are present: OFP, probation, victim/ suspect intoxicated</li> <li>13. List where suspect lived in past 7 years</li> <li>14. Witnesses' names, addresses, phones, workplaces</li> <li>15. How can Detective Bureau or others reach victim during next 24 hours? Name, address, phone of person who will always know how to reach victim</li> </ol>	<p><b>Risk Factors:</b> To be used by court for conditions of release, PSIs, advocacy needs for victims</p> <hr/> <p>Please note those observed or those which appear to exist.</p> <ol style="list-style-type: none"> <li>1. Guns or other weapons in home</li> <li>2. Suspect has access to or carries weapons</li> <li>3. Suspect abuses alcohol/drugs</li> <li>4. Suspect under high stress recently</li> <li>5. Suspect has threatened or attempted suicide</li> <li>6. Threats to kill or severely harm victim/others</li> <li>7. Victim believes suspect may seriously injure or kill her</li> <li>8. Suspect obsessed with victim, stalking</li> <li>9. Victim has called police before</li> <li>10. Recent separation, OFP, divorce in past 6 months</li> </ol> <p><b>MDT Temporary Report</b></p> <ol style="list-style-type: none"> <li>1. Name, phone, address of victim</li> <li>2. Alleged offenses summary</li> <li>3. Who to follow up: a) Detective Bureau; b) Victim advocate; c) Child protection worker; d) Prosecutor</li> <li>4. Officers' action taken</li> </ol>	<p>Sample of a two-sided laminated card for police officers use when dictating domestic violence related reports.</p> <p>Developed by Duluth City Attorney's Office, Duluth Police Department. and Minnesota Program Development, Inc. 9/95</p>
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16. Notes for narrative: victim statement, suspect statement, witness statement, probable cause for each arrested party. Who initiated? Self-defense?

***Remember to re-code if necessary***

*continued on other side*

We designed a new 3-hour police training focused on writing the arrest or investigation report using the card as an outline. Simultaneously, we worked with the police to get daily copies of the dispatch record. The chief prosecutor conducted a series of trainings for all patrol and supervisory officers over a 2-month period. The training focused on the importance of the police report in establishing the basis of the prosecutor's case and showed officers how the risk factors and questions about children would be used to alert victim advocates and child protection workers to cases where there appeared to be a high level of danger. It also provided supervised release agents and probation officers making sentencing recommendations with a better picture of the level of intervention necessary to deter a particular offender and protect a particular victim.

Following that training Nancy<sup>54</sup> and I attended shift changes<sup>55</sup> in the squad room for 4 days and passed out the new report guides. We explained that Nancy would be picking up reports on a daily basis to make sure that the information they contained would be immediately routed to other intervening parties: probation officers, shelter advocates, prosecutors, civil court judges. We told officers that to gain a high degree of consistency in the use of the new format, Nancy would read each report, send the supervisor of the patrol unit a checklist on reports produced in that unit, and point out the missing information. On the following page is a copy of the form

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<sup>54</sup> Nancy was employed as communications coordinator by the DAIP under the Centers for Disease Control grant.

<sup>55</sup> A shift change is a 15-minute briefing of officers beginning a new shift. Usually the unit's sergeant or lieutenant conducts the briefing.

Nancy used to report to a unit supervisor (Figure 15).



FIGURE 15: DOMESTIC ASSAULT REPORT FEEDBACK FORM

DOMESTIC ASSAULT REPORT FEEDBACK

ICR #	Incident Location:	Date:	Officers:
			Group A B C D (Circle)

Are following items covered in report?	Yes	No	Comment (see reverse)	Are following items covered in report?	Yes	No	Comment (see reverse)
1. Times				11. Medical Attention Facility noted			
2. Parties present				12. Background in fo			
3. Emotional state Victim - Suspect				13. -Witnesses -Person able to reach -Victim location 24hrs			
4. Injury to victim				14. Narrative notes			
5. Injury to suspect				Victim statement			
6. Scene				Suspect statement			
7. Relationship				Witness statement			
8. Children				Probable cause elements			
Children involvement				Where both parties lived during the last seven years.			
9. Pictures taken				15. Risk Factor notes			
10. Evidence collected							

These checklists became known as the “DAIP report cards” and were bitterly resented. Officers complained that non-police personnel were being put in the role of judging their work, yet no such reciprocal arrangement existed between police and the shelter or the DAIP. We decided to end the hated practice of issuing “report cards” and instead began to meet with unit supervisors to review the reports and ask them to notify officers about those which were incomplete.<sup>56</sup>

<sup>56</sup> We had anticipated that it would take 3 to 6 months to reach a 90 to 95% compliance rate with the format.

Officers followed the new format quite closely with the exception of the questions regarding the overall pattern of abuse. This was referred to on the laminated card as the risk factors. Fewer than half of the officers asked and recorded information about the risk factors. Below are excerpts from an investigative report in which the officer did respond to the items on the risk factor list. I have underlined the information acquired as a direct result of his questions. The excerpts show how adding the institutional objective of tending to victim safety contextualizes the violence. It provides the multiple readers with a very different version of what is going on and therefore elicits a very different sort of response.

Date/Time of Occurrence 03/18/95 0300 hrs

Date/Time Reported 03/18/95 1226 hrs

SYNOPSIS:

Officer was dispatched to a report of a domestic assault at the above location. Officer spoke with the complainant who said she had been assaulted approximately 10 hours earlier. No visible signs of assault were evident to officer. Written statement to be completed by victim. Victim advised to obtain order for protection and suggested that she stay at women's shelter. Victim said she would complete written statements and bring them into the Duluth Police Department. Victim declined to go to women's shelter and said she would seek an order for protection. A warrant request is to be made on suspect.

DETAILS:

On 03/18/95 at approximately 1227 hours . . .

Upon arrival . . .

Johnson said she . . .

Johnson said when she and Doe . . .

Johnson said Doe and her began to argue . . .

I observed Johnson's neck and chin area where she said she was experiencing some swelling and redness, but I could not find any signs of abuse. There was no swelling or redness at the time I viewed Johnson's face and neck. Doe said her neck muscles were very sore on the back of her neck and were sore to the touch. In looking around the room, I observed there was clothing scattered across the floor, and Johnson said that was from when Doe had "gone crazy." I asked Johnson what type of relationship she had with Doe, and she said they had been dating for approximately seven months and that they have been living together for the past three months. They do not have any children, and they have never been married to each other.

No pictures were taken of Johnson nor was there any evidence to be collected on the scene. Johnson did not say that she needed to obtain any medical help at the time I spoke with her.

Johnson mentioned that Doe was very intoxicated at the time the assault took place and that Doe had begun to drink a lot more than he ever had before. Johnson said Doe does not use any other dries not have any guns at the residence where they are currently living, but Doe is a very accomplished marksman as he was in the military in the Special Forces Unit during Vietnam. Johnson said Doe keeps track of her every movement, making phone calls,

following her around, and making sure he always knows where she is. Johnson said this is the first time Doe has become violent with her but said Doe's ex-wife has been assaulted by Doe at least two times in which the police were called.

Johnson said Doe has talked to Johnson about committing suicide and has told her that if she ever leaves him, he would jump off a pier into the bay. Johnson also said that the present time, it seems that they are in somewhat of a financial bind largely due to excessive drinking by Doe. Johnson does feel that Doe may seriously injure or kill her because of the threats he has made to her. Johnson has never called the police prior to this incident and has never had an order for protection against Doe.

Johnson was asked if there was a person who is always able to reach her, and she said her sister-in-law, Jane Black, who lives on Central Entrance in Duluth and who works at Penny's, can usually reach Johnson should she need to be contacted in case of an emergency. Johnson said she would stay at her residence this afternoon unless further problems start up. I asked Johnson where both her and Doe have lived for the past seven years. Johnson said Doe has lived in Placketon, South Dakota, for the past seven years, and Johnson has been a resident of the City of Duluth for the past ten years.

Johnson was given a voluntary written statement form . . .

Doe was unavailable for interview as he was not at the residence

at the time of this complaint nor was he at work at Boe's Repair on First Street. A warrant request for fifth degree domestic assault is requested based on the aforementioned complaint, pending return of written statements by complainant.

This report illustrates how such a process can assist in contextualizing the violence against a woman. This case is no longer a misdemeanor involving an offender who threw his partner down and rubbed her face into the carpet, leaving no signs of injury, but an account of a potentially very dangerous situation. This contextualized account will be made institutionally accessible to several key practitioners such as advocates, supervised release agents, probation officers, and sentencing judges when making decisions about safety measures. When I asked several patrol officers about the resistance to incorporating the risk factors into their reports I found their resistance to using the risk factors was not so much a lack of concern for victim safety as it was a function of how police are organized into the reader-writer relationship, in this case the police as writer and prosecutor as reader.

I'm investigating a crime, gathering evidence for a prosecution. I'm not doing an evaluation of the relationship between these two people. (Interview, July 21, 1995)



I can't say I'm resistant. I'm just not thinking about that when I'm interviewing somebody. It can be pretty chaotic and for me to all of a sudden start asking a bunch of questions not related to what's going on right then and there can put a lot of people off. I want to get what I can for the case and to throw in a bunch of irrelevant stuff just makes the whole situation more precarious. (Interview, July 21, 1995)

These officers have been trained and have operated for years as links to the prosecution of the case; to now change that relationship so that officers see themselves as coordinated with broader intervention goals, including centralizing victim safety as an institutional objective, is not a simple task.

While we were working through this change with the police, we were meeting with shelter advocates to review their process of making visits to women following arrests. The purpose of these visits was to help women do safety planning. On home visits advocates spent from 30 minutes to several hours talking with women about their options: Does she want to come to the shelter before his release? Does she want to file for a protection order now? He can be served while in jail. Does she know about the services available in the community? Does she need medical attention? Are her children in danger? Does she want photographs taken of her injuries for documentation? Does she understand the criminal court process that will follow this arrest?

We asked advocates to re-enact a few visits and talked about the connection between the visit and the decisions that would be made in court affecting her safety. Shelter legal advocates agreed that the court process should be better explained to the woman. They would also ask her about the dangerousness of the abuser and what court measures she would need to feel protected from recurrent abuse. The on-call advocates would fill out a specialized form and fax it to the courthouse before arraignment court each morning. The following form (Figure 16) shows the information added to the advocate's report of the visit.

FIGURE 16: ADDITION TO VICTIM ADVOCATE ARREST FOLLOW-UP FORM

The following questions are designed to help assess the dangerousness of the situation. Answering these questions can help both you and the court decide what safety measures should be put in place to help protect you and will be helpful in providing rehabilitation for the offender.

Can you describe past violence and/or injuries (worst incident, type of injuries, frequency):

During the course of your relationship, has your partner (referring to the person who has just been arrested):

yes no

1. \_\_\_ \_\_\_ become increasingly more violent, brutal, and/or dangerous to you?
2. \_\_\_ \_\_\_ caused injuries to you which required medical attention?
3. \_\_\_ \_\_\_ choked you?
4. \_\_\_ \_\_\_ injured or killed a pet?
5. \_\_\_ \_\_\_ threatened to kill you?
6. \_\_\_ \_\_\_ forced sex or used sexual coercion?
7. \_\_\_ \_\_\_ used a weapon against you or threatened to use one?
8. \_\_\_ \_\_\_ seemed preoccupied or obsessed with you (following, or stalking, very jealous, etc.)?
9. \_\_\_ \_\_\_ increased the frequency of assaults upon you?
10. \_\_\_ \_\_\_ Do you believe that s/he may critically injure or kill you?
11. \_\_\_ \_\_\_ Have you separated or tried to separate from your partner in the past 12 months?
12. \_\_\_ \_\_\_ Have you sought outside help (OFP, police, shelter, counseling) during the past 12 months?
13. \_\_\_ \_\_\_ Do you feel isolated from sources of help (car, phone, family, friends, etc.)?

Please elaborate on 'yes' answers:

Is there other information you would like the court to know about the danger you may be in (an event, a specific threat, a feeling you may have)?

yes no

- \_\_\_ \_\_\_ Would you like the court to order the assailant to have limited or no contact with you?
- \_\_\_ \_\_\_ Would you be interested in a protection order?
- \_\_\_ \_\_\_ Are you interested in attending education/support groups?
- \_\_\_ \_\_\_ Would you like to receive our monthly newsletter and group calendar?

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This information is used to assist us in providing services to you and to evaluate our services. We ask your permission to give this information and photos to other agencies who hold offenders accountable and provide protection for you. Can we share this information with:

\_\_\_ Supervised Release Agents/Probation Officers for setting conditions of release from jail and



However, probation officers and other practitioners in the legal system resisted giving women's advocates an authorized voice in the processing of the case. They regarded information that came from the shelter as "biased" and "less reliable than a police report." Probation officers were reluctant to use notes prepared by shelter staff or volunteers as the basis of their recommendation to the court. The shelter was, after all, an outsider to the system; their information could not be treated as insider information. Probation officers deemed the advocate intrinsically biased and believed that her information would not necessarily reflect what the woman had said but "what she had been encouraged to say." As one probation officer put it, ". . . perhaps they would inflate the information to bolster the lady's case." Shelter advocates are neither "objective" nor "professional." To be "professional" meant to put one's personal views aside and operate from within the boundaries of "the profession." We did not argue that the shelter report was objective, but we did argue that it was untrue that professionals in the system were objective and that having an advocacy function did not make advocate information unreliable.

The dilemma of trying to change this institutionally entrenched perception put the shelter in a double bind. On one hand, none of the shelter staff would want to draw advocates into an institutional case management role. They clearly want to remain outside the system, yet on the other hand, they are committed to creating a process in which the information they provide to the court is considered as credible as information coming from any practitioner within the system.

To resolve this conflict, we set up a training conducted by probation officers for the on-call advocates. We began the session by having probation officers describe their job in making recommendations to the court on conditions of pretrial release and later sentencing. Each advocate then described a home visit she had recently made.

The probation officers and the advocates asked many questions of each other and the training quickly became a dialogue. Advocates expressed a strong reluctance to become involved in

trying to get the woman to work with the system on a conviction. One advocate summarized the group's argument: "I don't mind filling out a report or form and faxing it to you if that will help protect the woman. Still, she has to agree to my sending this stuff. If she's not into having him go through the criminal process, I don't want it to be my job to talk her into it" (training session, October 19, 1995).

This session helped resolve two issues. For the probation officers it clarified the role of advocates and clearly showed that advocates did not consider a conviction a measure of success. We agreed that advocates would explain both the pretrial release procedures and sentencing procedures and ask women if they would be interested in having the advocate fax the information to the probation department.<sup>57</sup>

A repeat offender meant to the court, until now, that he or she had prior convictions. The new approach takes into account that an offender can repeatedly use violence, intimidation, and coercion against a partner, with or without prior convictions. It replaces the exclusively incident-focused approach with one which takes into account the context of the violence, discernable patterns of abuse, and the perceptions of the victim. It is a process that makes the court more accountable to victims of domestic violence.

The final link in the sentencing process proved more difficult to change. Judges were only marginally involved in the development of the new PSI and the sentencing matrix. The chief judge of the district and the assistant chief judge both reviewed and commented on the drafts of the documents. During a discussion between the DAIP and probation on how best to introduce the new procedure to the judges, one probation officer stated,

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<sup>57</sup> According to Madeline Tjaden, Women's Coalition legal advocate, more than 90% of the women with whom they work sign the release to fax the information (Interview July 17, 1996).

It'll ruffle some feathers and cause some grumbling, but it's really the professional responsibility of this department to put before the court the best recommendation possible to deal with this offender. We've been missing the boat on domestics and everybody knows it, but will this cause some flack? You bet it will, and our agents will just have to deal with that. They'll have to stand behind their recommendation and the process we used to come up with that recommendation. (Interview, November 8, 1996)

We decided to ask the chief judge to bring the new PSI form and the matrix to the attention of the other judges and have them deal with arguments internally. The chief judge simply sent out a memo with the new PSI form and the matrix attached, stating they would go into effect immediately. The bench did not embrace the changes with enthusiasm but neither did it discard them.

One probation officer describes her first experience using the new matrix:

Nobody liked what I was doing, not the judge, not the public defender, certainly not the offender. It was hard to go against what I was recommending because I had put it all in the record. This was radically different. . . . I was focusing on different things . . . the whole listing of violence and the victim's safety. In the end it's hard to justify not going along with a different kind of sentence because if a problem comes up later I put all that stuff in the transcript. It was very hostile the first few times, I felt like a lamb in the lion's den. (Interview, January 23, 1996)

The process had focused so far on regulatory and administrative texts, but the politics of resistance materialized at the point of execution. I had attributed to probation officers the power to influence sentencing: prosecutors and defense attorneys made deals and then agreed to abide by the recommendation of the probation officer following a PSI. It seems that this was conditional power. It was given because probation officers acted within certain institutionally approved boundaries. The new process which changed those boundaries brought us all into the realm of the legal argument.

Some judges and defense attorneys argued that use of the PSI and matrix produced a process through which they were sentencing an offender for actions that had not been proven in court. Others, however, argued that sentencing should be based on what the court believes will accomplish three goals: deter this offender from committing the same or similar offenses, deter others in the community from committing these offenses, and protect the victim and public. The state leaves the court wide latitude to accomplish these goals in misdemeanor cases, including the use of incarceration for up to 90 days and the use of probation instead of jail for up to 2 years. Indeed, the state legislature recognized the special problems associated with sentencing batterers when it extended the length of time an offender could be placed on probation for a domestic-related misdemeanor from 1 to 2 years.

A shelter advocate summarized the reaction to the matrix:

The problem is that the judges just assume that a man gets one free beating. That is, one free conviction for beating his wife. I can't think of a man who's been convicted in the past year where this was the first time he ever beat her up or assaulted her. So why do we all start out presuming the sentence should be "go to classes" and "no jail"? Some men don't need to go to jail—arrest and one or two nights in jail is quite powerful—but others do. They are making this woman's life hell and flaunting the fact to her that they can get off. The sentence should be based on how he is using violence against her, not what kind of a guy he seems to be to the judge. (Interview, November 21, 1995)

Judges do not as individuals make the assumption to which this advocate alludes. It is structured with sentencing practices and normalized in daily work routines which once uncovered can be held out for inspection.

### Conclusion

The process I have described, changing a single work setting so that it is designed to account for women's safety, provides an insight into a legal advocacy strategy. By engaging workers in an

examination of their own work processes we simultaneously work toward progressive change at the level of practice and attitudes. In this work we are looking for how safety is accounted for in the institutional objectives of processing domestic assault cases. Chapter 9 explains this strategy by laying out the principles of conducting an institutional audit.

## **CHAPTER NINE**

### **SAFETY AUDIT**

The courthouse in Duluth is located in the center of the city's business district. The three imposing buildings of the government complex face a courtyard guarded by a twenty-foot statue of a sword-wielding Greek warrior towering over a terraced fountain. As one faces the complex, the federal building is to the left. It houses the FBI, the postal service, several federal courtrooms and magistrates' offices, and the IRS. Directly across from it is city hall, where the police, mayor, city attorney, and city council conduct their business. Between them is the St. Louis County courthouse.

The courthouse ground floor houses many of the county's administrative offices: purchasing, highway maintenance, building maintenance. The first floor is dominated by courtrooms and the offices of those who staff them. Arraignment court, conciliation court, and the court administrator's office are on this floor. It is always busy. One floor up are the county commissioners' offices and board room and the licensing bureau for boats and cars and hunting and fishing. The county's microfilm office and the county auditor's office are also located on this floor. The third floor has more courtrooms, probation, family, and juvenile court judges, and more court administration staff. The cases handled on this floor pertain mostly to family matters, divorce, juveniles, and protection orders. The fourth floor has more courtrooms and judges, and bigger cases get handled here, such as murders and robberies. The only time I've ever been searched was on this floor. The fifth floor offices are occupied by the county attorney's office. The county attorney is considered by many Duluth political observers to be the most powerful political figure in the county.

A man who physically abuses his partner does not usually do so in the courthouse. He does it in his home or in his car or at his neighborhood bar or in his back alley. He uses violence in "his" territory. The courthouse is clearly not his territory. He is not the powerful figure here that he is

in his home, yet in many ways the power he holds in his home is akin to the modes of governing, regulating, and managing that constitute the dais beaten his wife enters the courthouse, he breaks the shield between the private and public sphere that has dominated legal debate and discourse for two centuries (Olsen, 1983). He enters at a particular historical moment in this debate. The fact that he is entering the building at all is the result of women barging into the debate and altering its terms. The fact that he comes into the building under the escort of a county sheriff is the result of the police department's mandatory arrest policy, which exists because of recent gains in the centuries-old struggle of women to evoke the power of the state in criminalizing violence against women (Dobash & Dobash, 1992).

Carved into the facade over the main entryway of the courthouse are the words, "The people's laws define usages, ordain rights and duties, secure public safety, defend liberty, teach reverence and obedience, and establish justice." And yet advocates and battered women who pass under these words know from their everyday experiences that the situation is otherwise. George Smith (1990) contends, "The ideology of a politico-administrative regime is ruptured when people know a situation to be otherwise on the basis of their everyday experiences" (p. 632). I have conducted my investigation with an eye towards discovery of how it is that public safety, in other words, the safety of battered women, becomes so marginalized in the criminal court setting. I have used D. E. Smith's notion of an institutional ethnography, which begins at the same place advocacy begins, in the everyday world of battered women. I found in my investigation that what I had previously seen as victim blaming and as sexist attitudes among individual practitioners in a male-dominated institution is not so much a phenomenon of people's attitudes or thought processes. It is more an expression of ideological practices, embedded in textual realities, which extend extralocal relations of ruling into local settings, defining and regulating the everyday life of women who are brought into the legal system as victims of a domestic-related crime.

The totality of the processes that I have discussed in the previous chapters serves to transport the

particulars of women's lives into abstracted and generalized forms of case management which are not required to accurately reflect a woman's experience or account for her safety. In the previous chapter I described a rather haphazard process of change that was triggered by the results of research conducted by a single activist graduate student. Conducting a similar but more systematic investigation with a team of practitioners and advocates can become a critical method for local communities to deepen the level of the progressive changes that have been engendered by the legal advocacy work of the battered women's movement. The description of change in a single work setting, the presentence investigation, illustrates the complexity of institutional advocacy and the susceptibility of the legal system to certain levels of reform. It also depicts the unevenness of change (Brown, 1992). In this chapter I am summarizing my research by suggesting that legal advocates persuade their local police, probation, and prosecutor's offices to jointly conduct a safety audit (an institutional ethnography) as a method for initiating a systematic investigation of problematic legal processes. This investigation will lead to a blueprint for making changes which centralize victim safety as an institutional objective in the processing of these cases.

A safety audit can be both an investigative and an organizing tool. As an investigative process it will dispel the myth of the objective investigation of crimes and explicate how the ideological processes of ruling are at work in these cases. As an organizing process it can be designed to involve an interdisciplinary team which includes community-based advocates in an effort to facilitate the process of proposing and implementing changes in the legal system. The first objective is to discover how safety is compromised in the legal system. The second objective is to overcome resistance to change. I'll talk about the latter first.

### The Audit as an Organizing Tool

I work in a medium-sized nonprofit organization which is audited yearly. Our organization is a collective so we all share some administrative functions. I am not on the finance committee but like any of us in the organization, I can tell when an audit is coming. About 3 weeks beforehand



we start getting notes in our message boxes such as, “You didn’t sign your February 1-15 time sheet, please stop by and do so,” or, “There is no receipt for your airline ticket to Atlanta in June, where is it?” These messages tell us that the accountant is getting ready to have someone pour over her books, asking a million questions and seeking documentation for the thousands of financial transactions we conduct in a year. Audits may not keep people from embezzling but they do tend to draw everyone’s attention to proper financial documentation at least once a year. I am using the concept of an audit in order to evoke that same image and that sense of examining practices. However, I am proposing that unlike a financial audit conducted by an outsider, an institutional audit be conducted by a team both of advocates and of practitioners within the legal system.

Organizing an interagency audit team has several important advantages over hiring a consultant to conduct an audit for a community. First, it provides an institutionally authorized voice for the concerns of victim advocates by involving them as co-investigators on a team. Much of the resistance to advocacy concerns is linked to activists’ status as outsiders. Having an outsider role is important to advocacy efforts, as is evidenced by those groups which have located themselves within the bureaucracy and have then been so reshaped by institutional objectives that they have lost their advocacy voice. As one legal advocate for the Domestic Abuse Project in Minneapolis reported at a statewide advocacy meeting, “I used to explain what the woman needed and wanted to people in the court system. Now, I seem to be mostly explaining what people in the court system need to battered women” (interview, September 11, 1995).

Participating in an audit provides a temporary position for advocates which does not appropriate them into a case-processing role, where co-optation is most likely to occur. As members of the audit team they will not be asked to “bring a victim around” so that she sees the value of helping in a prosecution or filing for a protection order or participating in her assailant’s counseling. Much of the work of advocates is finger pointing and confrontation. Their way of doing things is seen as hostile, unprofessional, and negative. An audit approach draws practitioners into an

examination of a system that they complain about endlessly with their co-workers yet vigorously defend against attacks from outsiders, such as legal advocates for battered women. It provides a place for advocates and practitioners to work together which can legitimize the advocacy group's voice without making that voice vulnerable to appropriation (G. A. Walker, 1990).

A safety audit creates a victim-focused (woman-focused) frame of reference for court practitioners examining practices regarding these cases. The fragmented work processes and incident-focused features of the criminal justice system create a frame of reference for workers which has little to do with victim safety. The audit will serve to embed within the system safety features which will parallel the generic objectives of criminal case processing. Such an audit will produce concrete changes in routines that will reduce the disjointed approach to case management while orienting each processing stage to an expanded institutional objective of safety.

If an audit is based on the premise that retaining the woman's experience of violence increases the likelihood of practitioners acting in ways attentive to safety, it will explicate the power and gender aspects of these cases which are now expunged in the generic processing of an assault case. Feminists have long held that if women's lives were talked about and accounted for in how we manage our society, then everything would change. An audit can explicate how women's lived experiences are screened out of the information-gathering process and suggest ways of making such information central to case processing. Depending on how the audit team defines safety measures, there is the opportunity to incorporate changes at the level of daily practice which will raise the consciousness of practitioners to the power dynamics inherent in gendered relations and particularly in gendered social relations marked by violence.

An audit is designed to look at routines, forms, policies, regulating text, and protocols, not individuals. It does not focus on the beliefs or attitudes of individual practitioners and will therefore bypass much of the resistance of individuals to examination. I found most Duluth

practitioners to be extremely open to discussing such practices and often quite critical of existing procedures. With few exceptions, almost every practitioner I spoke to could provide an insight as to how a particular procedure, protocol, or form could be changed to better enhance women's safety. Even though the relationship of the woman who is battered to the practitioner who processes her case is organized by processes extralocal to the woman or to the practitioner's everyday experience, changing that relationship can occur on the local level. An audit conducted by an interdisciplinary team produces an agenda for change to which policy makers are in many ways compelled to respond. The audit shows how things really work and it engages practitioners in the system in revealing this story. It would be difficult, although not impossible, for policy makers to shelve a report like this.

#### The Audit as an Investigative Tool

Certified public accountants conduct audits using generally accepted accounting principles, often referred to as GAAP. I am suggesting that the findings of my investigation in the Duluth court system can provide a similar framework for persons interested in reforming the criminal justice system's approach to responding to domestic assault cases. I am not trying at this point to provide all of the details of an audit but to lay out its general principles in three areas: the definition of safety, or what the team is looking for; the audit process, or how the team looks for it; and audit objectives, or how the audit will lead to change.

#### The Definition of Safety

A safety audit must start from some premise about what constitutes safety for battered women. Throughout my investigation I asked practitioners and advocates what compromises victim safety. There was almost universal agreement that outsiders, whether that be police officers, therapists, judges, or clergy, must intervene in these cases in ways that account for the context in which the violence is being used and experienced. Contextualizing the violence meant different things to practitioners and their definitions often related to their positions within the system. I have summarized below the most significant ways that these practitioners and advocates

translated the notion of contextualizing the violence in the criminal court processes. In order for victim safety to be fully incorporated into case management routines, each interchange in the process must account for:

(1) The pattern of abuse

A domestic assault–related crime, such as trespass, criminal damage to property, violation of a protection order, or kidnapping, is rarely an isolated incident of violence or abuse. In order to take measures which maximize the chance of providing the victim ongoing protection from further abuse, attempts should be made to understand the context in which violence was used by eliciting and recording information which documents the pattern of coercion, intimidation, or violence associated with the case. An informed intervention must account for who is being harmed by the violence and the extent of the harm being done.

(2) Power differentials

A battered woman and her abuser are never in equal positions of power. Social relations of power in society, coupled with the power that comes from a sustained pattern of coercion, intimidation, and violence, place the perpetrator in a position of power over the victim and make the victim vulnerable to pressure, intimidation, and retaliation by the offender. The adversarial nature of the criminal court process frequently places the victim in opposition to thigations and case processing need to acknowledge that domestic assaults do not involve two autonomous parties. An ongoing economic and social connection between the victim and offender mediates every statement, affidavit, and action.

(3) The particulars of the case

The criminal justice system processes discrete incidents of abuse and may work with serious and dangerous offenders as misdemeanants. Practitioners should enact safety and intervention measures based on the particulars of the case rather than on predetermined legal or institutional

categories. Some misdemeanors are in fact more volatile and more likely to result in serious harm than some felony cases. Precautions should be based on the local and particular experiences of the victim rather than on generalized categories based on laws or other criteria (see sentencing matrix in chapter 8).

(4) Potential dangers to a victim of a fragmented response

There are literally dozens of actions taken on a case by various practitioners. Practitioners' work routines, including communication routines, should strengthen the connections of various practitioners in responding to a case so that victim safety is not compromised by a fragmented and poorly coordinated response. Examples might include establishing a system of preserving key 911 tapes to enhance the prosecutor's ability to place controls on a defendant; creating access for child protection workers and victim advocates to police investigation and arrest reports; ensuring that supervised release agents and probation officers have access to past police reports and OFP affidavits when preparing recommendations to the court on victim safety measures; and ensuring that case-related reports, such as police reports or presentence investigations, address victim safety.

(4) Victim perception of danger

No scale can accurately predict which offender will kill or seriously injure his partner. However, ample evidence exists to suggest that victims of homicide or attempted homicide often make several attempts to tell others about the danger but are ignored. How is the victim's perception of danger accounted for in the processing of a case? At what point is her knowledge screened out of the information gathering and at what point is it given an authorized place in the construction of the case?

(5) The differences in women's lives

There is no universal battered woman. Race and class positions result in differing impacts of the

same treatment. For example, Lawrence Sherman's Milwaukee study of recidivism following the impact of police making arrests compared to that of police issuing warnings showed that married and employed men were less likely to reoffend when arrested rather than warned. Unmarried unemployed men of all ethnic backgrounds in the study were more likely to reoffend when arrested rather than warned (Sherman, 1992). Only a handful of men in either group were prosecuted making the impact of legal intervention unclear. We might speculate that an approach which brings the legal system into the relationship but does not follow through with using the power of the state to control the offender can make some women more vulnerable to abuse.

#### (6) The presence of imminent danger

Assuming that no community could nor should necessarily try to respond to every assault of a woman as if she were about to be killed, we are faced with the problem of determining at what level to respond to physical violence against intimate partners. Insisting on a legal response that treats all acts of physical force, every shove, every push, every slap, as if these actions will escalate to homicide would be basing our work on a false premise and would so overload the system that all cases would suffer. But so far, overreacting to assaults has not been a significant problem. Instead, cases which are in fact quite dangerous are being conceptualized and processed as would be an isolated slap or a bar room fight between two people with no ongoing relationship. In addition, the legal process is not designed for quick action in situations that pose imminent danger.

### Methods

The methods of the audit would parallel my own: observation of work settings and processing interchanges, texts analysis, and interviews with practitioners. The activities would begin with mapping the community's system with charts similar to those in Appendix B. Each work setting and its corresponding interchanges need to be detailed in these maps in order to determine all of the possible points at which victim safety can be implicated in the case management procedures.

The team would conduct an analysis of each interchange, which therefore becomes the unit of analysis for the audit. The key elements for analysis at each interchange are technology, resources, procedures, and texts.

Prior to conducting interviews and observations, auditors would design worksheets to be used at each observation covering these four areas of inquiry. Each interchange may require several observations and team discussions about the auditors' observations and findings.

The auditors' worksheets should not be seen as an instrument to establish pre-formulated categories of items to look for in an audit. Their purpose would be to guide the auditor, not limit the scope of inquiry or restrict the auditors' use of their own knowledge and experience. It is important in structuring an investigation such as this to avoid putting boundaries around it. After all, the whole purpose here is to make visible what has become invisible. The Duluth study can act as a beginning point to frame auditors' worksheets.

The worksheet on technology is generally trying to help the auditors and the practitioners at a given work setting uncover all of the ways in which the technology of that setting impacts the potential for safety measures being built into the system's infrastructure. For example, I had several rather long conversations at the dispatch center, police department, and probation department about the lack of coordination in the city, county, and state computer systems and what this means for victim safety. The inability of dispatchers to make information that is contained in these data bases immediately available to police officers responding to a call has definite safety implications for both the police and battered women. The solution requires some long-range planning but not necessarily an expensive overhaul of the computer systems.

Similarly, the worksheet on resources is designed to uncover all of the resources readily available to practitioners as they do their work. It may be, for example, that there is a shelter in town but

that it is usually full when police try to house a woman and her children there. The lack of shelter facilities changes what actions police can and should take. Perhaps the resource that will be found most lacking is adequate time to spend on the case. I found when interviewing social workers for a related but separate piece of research that child protection workers were strongly discouraged from using the criminal court process to keep violent fathers from having contact with their children. It was a resource that was not available to them as practitioners and its unavailability explained why they were prone to recommending placement in foster care for children who were being repeatedly exposed to violence against their mothers.<sup>58</sup> Many activists in the battered women's movement, including myself, had speculated that child protection workers' initiatives to place these children in foster care was a manifestation of their victim-blaming attitudes rather than seeing them as the result of concrete work processes.

The worksheet on processes is designed to help the auditor explore with the practitioner how procedures and processes used at an interchange can compromise or centralize women's safety. The auditor is asking questions related to the definition of safety. Are the practitioner's activities and the procedures being applied at this point in the case organized in a way that accounts for the pattern of abuse, the power differentials, and the victim's sense of danger? The auditors are trying to explicate how this specific process or procedure is consequential to a woman's safety and how it might be altered to account for safety.

The most complex aspect of the audit will be the analysis of the active role of texts in the provision of victim safety. The team needs to gather every text related to an interchange and

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<sup>58</sup>I am referring here to a series of meetings we held to discuss the emerging notion of charging women who are battered and cannot (or will not) keep their abuser out of the home with "failure to protect" and placing their children in foster care. Child protection workers frequently give a woman the choice of getting a protection order which excludes her abuser from the home or losing her children to foster care. The woman files for the protection order but the abuser violates the order and moves back home. If she doesn't call the police to have him arrested, the social service department is forced to place the children in foster care. We have been proposing that the social worker go over to the home, witness him there, file charges against him for violation of a protection order, and have the court incarcerate him rather than implement a de facto incarceration of the children. This resource has never been institutionally available to workers.



discover how the text—regulatory, administrative, narrative, or argument—frames and organizes the practitioner to act in institutionally authorized ways. Over the course of the year that I observed interchanges I began to develop a series of questions that helped focus my observation and interviews. I was looking for the text in action, not as an inert object to analyze in and of itself. Below are some of the questions that emerged from my readings of D. E. Smith’s work as I began finding patterns in my own observations.

At each interchange:

- ▶ How does the production or use of texts at this interchange occur?
- ▶ What texts (policies, laws, rules, ordinances) regulate what occurs at this interchange?
- ▶ What administrative texts are used in this interchange?
- ▶ What reports, recommendations, or statements are used or produced at this interchange?
- ▶ What frames were used in the production or reading of texts at this interchange?
- ▶ Who is the intended reader of the text being produced or altered at this interchange?
- ▶ How does the woman become actionable in this interchange, and how does the man become actionable?

For each text:

- ▶ How does this text influence what information about the case is filtered out of the process?
- ▶ What information related to contextualizing the incident (safety) drops out because of the work of this text?
- ▶ How does this text act to create priorities?
- ▶ How does anticipating an intended reader shape the production of this text?
- ▶ How does this text organize the work of the practitioner?
- ▶ How does this text organize the writing and reading done here?

- ▶ How does the method of production of this text influence the practitioner to make certain observables or pieces of information visible and others invisible?
- ▶ How does this text allow for the retention of information on the pattern of abuse? On power differentials? On the woman's and man's social position? On the immediate danger? On the woman's perception of danger?

This is not meant to be a complete list of considerations on the text but an example of the kinds of questions auditors need to have in their heads as they begin their observations. Most likely several members of a team will observe a particular interchange. Much of what is to be discovered will come out of team meetings to discuss these interviews and observations.

### The Audit Objectives

Finally, the team would work with policy makers in the various agencies that participate in the processing of these cases to recommend a comprehensive plan to reorganize work settings and processing procedures at each point of interchange to incorporate victim safety.

The final report should explicate how victim safety was marginalized at each interchange in the sequence of interchanges that constitute case processing and make recommendations for specific changes to centralize victim safety. Many of these suggested changes will have come directly from practitioners in the field. In many cases they will be the best people to present these recommendations to policy makers. The audit team should see practitioners as co-investigators in the process and subsequently as colleagues in designing the changes. Using a participatory approach in designing the changes will simultaneously reduce resistance to change and develop on-site trainers on the new methods of case processing.

Conclusion

These kinds of regimes usually have two inter-related pieces of organization: a political apparatus and a bureaucracy. . . . The notion of a politico-administrative regime operates as a heuristic device for investigating empirically how ruling works, how the lives of people are regulated and governed by institutions and individuals vested with authority (G. W. Smith, 1990, pp. 629-632).

Using the strategy of conducting a safety audit will lead to an explication of how that regime works. As a co-worker recently said at one of our staff meetings discussing how as a group we could expand my research to a systematic audit of the Sixth Judicial District's criminal and civil court system, "This is really big, it's as big as when we first proposed that everybody sign policies fifteen years ago."

I have focused my analysis on the processing of a criminal court case and safety for battered women. However, the concept of using D. E. Smith's work to conduct an audit of institutions with a specific social change objective in mind can be applied in a variety of feminist and progressive projects. Using a similar audit format, an investigator could look for the concrete practices that produce racialized policing or limit cancer patients' control over their medical care or compromise the safety and integrity of high school students who report sexual harassment. I use these examples because they are all projects I have begun to work on with activists in other fields. This project has answered for me the question I posed in my introduction: What should I do next?

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