

# MAKING PRIVATE VIOLENCE PUBLIC

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## 1. INTRODUCTION

Ever since the early 1970s, when Erin Pizzey first published her seminal book on the subject,<sup>1</sup> awareness of the prevalence and horror of domestic violence has steadily grown. Yet increased awareness has done little by itself to eradicate or even, seemingly, to curb the problem. Indeed, despite the enactment over many years of a range of statutes providing “tailor-made” civil law remedies for victims of such violence,<sup>2</sup> the number of reported incidents has remained alarmingly high,<sup>3</sup> with, according to the British Crime Survey of 1993, a national annual total of around 530,000 such occurrences.<sup>4</sup> And even this figure fails to represent the full extent of the problem. Partly, this is due to the fact that the police have traditionally been far from sedulous when it comes to recording such occurrences. As Edwards notes, “key policing deficiencies have been, *inter alia*, ineffective handling of cases at the scene, the predilection to decline charges, and a habituation of the practice of “no-criming”.”<sup>5</sup> The statistics are also under-representative because, for reasons of fear or embarrassment, some victims are dissuaded from reporting domestic assaults.<sup>6</sup> Against this background then, it is clear that the current law and

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<sup>1</sup> *Scream Quietly or the Neighbours Will Hear* (Harmondsworth: Penguin, 1974).

<sup>2</sup> Prior to October 1997 the law was contained in the Domestic Violence and Matrimonial Proceedings Act 1976; the Domestic Proceedings and Magistrates Courts Act 1978, ss 16-18 and the Matrimonial Homes Act 1983, s 1. Since then, however, the law has been exclusively contained in Part IV of the Family Law Act 1996.

<sup>3</sup> According to one study, there are about 60,000 cases of domestic violence reported annually to the Metropolitan Police alone: A Cretney and G Davis, “Prosecuting “Domestic” Assault” [1996] *Criminal Law Review* 162.

<sup>4</sup> Figure quoted in S Grace, *Policing Domestic Violence in the 1990s*, Home Office Research Study 139 (London: HMSO, 1995) 1.

<sup>5</sup> S Edwards, *Sex and Gender in the Legal Process* (London: Blackstone Press Ltd, 1996) 193. The same phenomenon exists in Australia: see S Hatty, “Policing and Male Violence in Australia” in Hanmer et al (eds), *Women, Policing and Male Violence: International Perspectives* (London: Routledge & Kegan Paul, 1989) 70.

<sup>6</sup> See M Hough and P Mayhew, *Taking Account of Crime: Key Findings from the 1984 British Crime Survey*, Home Office Research Study 85 (London: HMSO, 1985) 19; House of Commons Home Affairs Committee, Third Report, *Domestic Violence* HC 245, para 9; J Pahl, “Introduction” in J Pahl (ed), *Private Violence and Public Policy* (London: Routledge & Kegan Paul, 1985) 4; A Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld & Nicholson,

institutional responses to domestic violence are both unsatisfactory and insufficient.

This article seeks to identify what it is about the existing law, remedies and practice<sup>7</sup> that cause them to be so inefficacious and secondly to consider a range of strategies - some of which have never been tried in this country - that might be employed to better effect upon this long-standing<sup>8</sup> but seriously under-regulated<sup>9</sup> problem.

## 2. DEFICIENCIES IN CURRENT LAW AND PRACTICE

To appreciate the need for a new approach, it is necessary to provide a brief sketch of the limits of the statutory<sup>10</sup> and institutional<sup>11</sup> responses to domestic violence. To begin with, as regards the civil law, there are serious lacunae in the "designer" legislation which provides injunctive relief for victims of domestic violence. In relation to those orders which can be obtained to oust the violent individual from the domestic dwelling, for example, the criteria according to which such orders may be awarded tend to be restrictive in terms of those entitled to apply for them.<sup>12</sup> Similarly, the terms on which (hopefully deterrent) powers of arrest may be appended to protective orders typically require the complainant to show the prior use or threat of violence.<sup>13</sup> Moreover, even where an order is

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1992) 17; H Kennedy, *Eve Was Framed: Women and British Justice* (London: Vintage, 1993) 82-8.

<sup>7</sup> For a general criticism of the current law contained in Part IV of the Family Law Act 1996 see J Murphy, "Domestic Violence: the New Law" (1996) 59 *Modern Law Review* 845.

<sup>8</sup> See M Doggett, *Marriage, Wife-beating and the Law in Victorian England* (London: Weidenfeld & Nicholson, 1992) and M Freeman, "Violence Against Women: Does the Legal System Provide the Solutions or Itself Constitute the Problem?" (1980) 7 *British Journal of Law and Society* 169.

<sup>9</sup> S Edwards, *op cit* n 5, pp 192-200.

<sup>10</sup> For a fuller account of the statutory deficiencies than is provided here see (in relation to the former position) K McCann, "Battered Women and the Law: the Limits of the Legislation" in J Brophy and C Smart (eds), *Women in Law* (London: Routledge & Kegan Paul, 1985); and (in relation to Part IV of the Family Law Act 1996) J Murphy, *op cit* n 7.

<sup>11</sup> See further S Grace, *op cit* n 4, ch 4; A Cretney and G Davis, *op cit* n 3; A Sanders, "Personal Violence and Public Order: the Prosecution of "Domestic" Violence in England and Wales" (1988) 16 *International Journal of the Sociology of Law* 359. For a useful comparative summary of the limits of the Australian legislation see Working Group of Commonwealth, State and Territory Officials, *Model Domestic Violence Laws* (Australian Capital Territory: Attorney General's Department, 1997).

<sup>12</sup> Under the Family Law Act 1996, the right to apply for an occupation order is made dependant both upon the nature of the applicant's right (if any) to occupy the dwelling house and the nature of her relationship with the abuser. Where the abused woman has no occupational entitlement she may only obtain an order where she is the cohabitant, former cohabitant or former spouse of the abuser. This, at a stroke, rules out applications by women in same sex relationships, those who merely share premises with fellow tenants as well as others: see further J Murphy, *op cit* n 7.

<sup>13</sup> Family Law Act 1996, s 47(2)(b).

granted - whether or not with a power of arrest appended - it provides no guarantee against recidivism.<sup>14</sup>

Perhaps the single greatest criticism of the civil law, however, is that it is reactive; it seeks to provide a remedy to a problem that has already arisen. By contrast, the criminal law is premised upon deterrence achieved by the threat of punishment. Yet the potential ideological impact of properly treating domestic assaults as criminal offences has, to some extent, been muted by the judiciary.<sup>15</sup> Indeed, their fondness for the use of the bindovers betrays further an attitude that fails to place domestic assaults on a par with those that occur in other settings.<sup>16</sup> Furthermore, this attitude spills over into the private law context where the courts always seem willing to accept undertakings (rather than investigate a case fully and award proper injunctive relief).<sup>17</sup>

Thirdly, the present system does not work adequately because of the prevailing ideology and received beliefs concerning domestic violence. This problem is not confined to the attitude displayed by judicial pronouncements about it being a "Draconian Step" to grant applicants ouster orders on something akin to the belief that an Englishman's home is his castle;<sup>18</sup> it is shared by the police. As two eminent scholars have explained: "[i]t has been a part of police culture to regard victims of domestic violence as vacillating women who, in the end, deserve what they get."<sup>19</sup> Thus, a not uncommon police view of female victims of

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<sup>14</sup> See the accounts of the several interviewees in K McCann, *op cit* n 10, p 91. See also J Barron, *Not Worth the Paper? ... The Effectiveness of Legal Protection for Women and Children Experiencing Domestic Violence* (London: Women's Aid Federation, 1990). More thoroughgoing empirical studies which exhibit similar findings in the Australian context may be found in J Stubbs and D Powell, *The Effectiveness of Civil Protection Orders* (Sydney: New South Wales Bureau of Crime Statistics, 1984) and *Domestic Violence: The Impact of Legal Reform in New South Wales* (Sydney: Australian Bureau of Crime Statistics and Research, 1989).

<sup>15</sup> Most notably, not until 1992, in the milestone decision in *R v R* [1992] 1 AC 599, did the English courts recognise the possibility that a man could be guilty of raping his wife.

<sup>16</sup> See A Cretney and G Davis, *op cit* n 3, at 170-1.

<sup>17</sup> See A Kewley, "Pragmatism Before Principle: the Limitations of Civil Law Remedies for the Victims of Domestic Violence" [1996] *Journal of Social Welfare and Family Law* 1. Note also *Davis v Johnson* [1979] AC 264 where the Law Lords appeared to place a higher premium on property rights than on protecting a victim of domestic violence.

<sup>18</sup> See, eg, *Richards v Richards* [1984] AC 174; *Wiseman v Simpson* [1988] 1 All ER 245; *Summers v Summers* [1986] 1 FLR 343. Note also, the "victim unfriendly" decision in *C v C (Non-Molestation Order: Jurisdiction)* [1998] Fam Jo where a restrictive interpretation of "molestation" was applied to deny the victim a remedy under the 1996 Act. Cf *Spencer v Camacho* (1983) 127 Sol Jo 155, under the old law, where rooting through a handbag was held to amount to molestation.

<sup>19</sup> A Cretney and G Davis, *op cit* n 3, at 173-4. Dobash and Dobash have identified further that "[p]olice officers continue to see victims as fundamentally "unreliable and capricious", "inadequate people" who are worthy only of a police response [but not an arrest]." R Dobash and R Dobash, *Women, Violence and Social Change* (London: Routledge, 1992). And this comment was echoed in a more recent study by Tony Farragher who observed that "the police abrogate their protective role, for their judgment is heavily

domestic assault is succinctly captured in one Australian case documented by Hatty:

“[A] Woman begged the police to arrest her husband. She lowered her jeans and lifted her top to show the officers her bruises... The officer declined to arrest, claiming the woman was exaggerating. However, he commented “Not bad legs though”. ”<sup>20</sup>

Furthermore, though not quite so extremely in this country, it is clear that despite government initiatives to improve police attitudes and responses to reports of domestic violence,<sup>21</sup> such non-interventionist stances remain commonplace. For example, it has been documented that it is common for an officer to fail to make an arrest or to record a domestic assault as a crime.<sup>22</sup> The prevailing ideology permeates the victims themselves, for a significantly higher proportion of domestic (as opposed to other) assault victims are minded, on reflection, to withdraw an initial complaint to the police.<sup>23</sup> This then means that prosecution rates are lower than they would otherwise be which, in turn, plays a part in perpetuating the myth that a battery behind closed doors is somehow a lesser species of that offence. In addition, the police, knowing that a prosecution is less likely in a domestic setting, themselves begin to trivialise or ignore domestic assaults. As McCann notes:

“In spite of their role the police appear to be extremely reluctant to involve themselves. Although the police have always had the power to exercise their discretion to intervene in family disputes under the criminal law, the evidence is that they have consistently shown a reluctance to become involved, and fail to define wife assault as a crime.”<sup>24</sup>

Perhaps because of a deep-seated faith in the rule of law, trust is generally placed in the law, legal personnel and the operation of the criminal justice system. Accordingly, when the courts and the legislature conspire, wittingly or otherwise, to create and nurture the image of domestic violence as a sub-species of offence - one that is less reprehensible than other forms of violence - the fiction that battering one's partner is

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influenced by prognoses of the woman's reliability as a witness". T Farragher, "The Police Response to Violence against Women in the Home" in J Pahl (ed), *op cit* n 6, p 117. In similarly critical vein, see S Edwards, *op cit* n 5, ch 5 and A Cretney and G Davis, *Punishing Violence* (London: Routledge & Kegan Paul, 1985).

<sup>20</sup> S Hatty, *op cit* n 5, p 70.

<sup>21</sup> Home Office Circular (60/1990), *Domestic Violence* (London: Home Office, 1990)

<sup>22</sup> S Edwards, *op cit* n 5, pp 196-7; Victim Support, *Domestic Violence: Report of a National Inter-Agency Working Party* (London: Victim Support, 1992) paras 2.3-2.19; House of Commons Home Affairs Committee, Third Report, *Domestic Violence* (London: HMSO, 1993)

<sup>23</sup> As to discontinuance rates, see A Cretney and G Davis, *op cit* n 3, at 166-7.

<sup>24</sup> K McCann, *op cit* n 10, p 89 (emphasis added). See also R Dobash and R Dobash, *Violence Against Wives: A Case against the Patriarchy* (London: Open Books, 1980).

permissible (or at least forgivable) is inevitably produced.<sup>25</sup> This image is then widely disseminated by police insouciance and inaction.<sup>26</sup>

Against this backdrop, any reform that concentrates merely upon civil law remedies must be seen in terms of a “double effect”.<sup>27</sup> On the one hand, tinkering with the statutory framework might lead to a marginal improvement in the plight of a small number of hitherto unprotected individuals.<sup>28</sup> Yet, on the other hand, it will also re-affirm the notion that domestic violence is essentially a civil law (and hence, private) matter of less importance than other forms of assault in that it does not warrant state intervention. Viewed from this perspective, the case for a more “public” response seems irresistible. It is my concern, therefore, for much of the remainder of this article to consider several possible forms of “public” response. I shall do so in three stages. First, I shall consider the value of a “no-drop” policy (whereby the victim is forced or, at least “strongly encouraged”, to participate in her abuser’s prosecution). Secondly, I shall explore the possibility of the implementation of a pro-arrest policy (whereby the police are required presumptively to arrest anyone alleged to have perpetrated domestic violence). And finally, I shall consider a miscellany of other measures that may assist in curtailing the prevalence of domestic assaults. Before I set out what these strategies might entail and consider their suitability for adoption in this country, it is important to clarify the different ways in which domestic violence might be seen to have a “public” dimension. For, as I will seek to show, finding a suitable “public” response to domestic violence demands an understanding of the several levels on which it may be seen to possess a “public” dimension.

### 3. PRIVATE VIOLENCE AS A PUBLIC PHENOMENON

There are four inter-connected, but distinct, levels on which domestic violence may be perceived to be a public issue. First, and most obviously, the fact that a physical domestic attack constitutes a criminal assault<sup>29</sup> enables it to be viewed as an offence which the state has a legitimate interest to deter and punish. This is the crudest sense in which domestic violence has a public dimension. Secondly, the prosecution of such offences will often require the victim to make a court appearance in order to secure a conviction: the fact that the assault took place behind closed doors, and out of sight and earshot of any third party, often renders it crucial that the victim should provide evidence in court.<sup>30</sup> And court

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<sup>25</sup> See M Freeman, *op cit* n 8, at 225-7.

<sup>26</sup> See T Farragher, “The Police Response to Violence against Women in the Home” in J Pahl (ed), *op cit* n 6. See also K McCann, *op cit* n 10 and S Grace, *op cit* n 4, ch 6.

<sup>27</sup> I have borrowed this term from applied philosophy. It is generally used in the contexts of euthanasia and abortion to describe a course of action that, unavoidably, has both positive and negative features. See, eg, J Harris, *The Value of Life* (London: Routledge & Kegan Paul, 1992) 43-4.

<sup>28</sup> The Family Law Act 1996, in making non-molestation orders available to a wider class of applicants than formerly, does this: see J Murphy, *op cit* n 7, at 850-4.

<sup>29</sup> There are several forms of assault, with varying degrees of gravity, contained in the Offences Against the Person Act 1861, ss 18, 20 and 47. There is also the offence of common assault and battery contained in the Criminal Justice Act 1988, s 39.

<sup>30</sup> This factor was recognised by the Criminal Law Revision Committee and led to its proposal that spouse X should become a compellable witness against spouse

appearances of this kind require victims *publicly* to air their domestic grievances. Thirdly, the fact that only a small proportion of domestic assaults ever get prosecuted<sup>31</sup> means that, given the rate of recidivism in this context,<sup>32</sup> there are significant public costs to be borne. These include the costs associated with re-arrest, a subsequent (not necessarily successful) prosecution, NHS treatment supplied to battered women and the time lost from work. Fourthly, the fact that domestic violence continues to flourish, largely unchecked, entails the final public aspect: the re-affirmation of the ideological notion that domestic violence is a lesser form of offence. Low prosecution and conviction rates, together with traditional police attitudes to the problem, continue to re-assert this familiar image not just to the offenders who escape and the victims who lay themselves open to further abuse, but also to the community as a whole.

All of the above public aspects of domestic violence must be borne in mind when attempting to devise appropriate law reform. To conceive of domestic violence as a public issue in only the first (and crudest) sense, can lure one into the trap of suggesting aggressive pro-arrest or no-drop policies<sup>33</sup> in order to maximise the conviction rate. But there is an important price for so doing which reverberates in the other senses in which domestic violence might also be considered to be a public issue. Thus, for example, the cost of forcing a potentially valuable witness<sup>34</sup> to give evidence in court against her abuser (which sometimes, and for very good reasons, she would prefer not to do) is her, and women's, re-victimisation:

“for wherever the law seeks to strengthen its response in order to punish offenders and protect women from violent men, it lays itself open to the criticism that in so doing it is punishing the woman rather than her assailant.”<sup>35</sup>

From this, it follows that the only point from which any acceptable programme of law reform may proceed is the assumption that the victim should be afforded the choice of whether to instigate or participate in the conviction of the abuser. The utilitarian argument that maximising conviction rates reduces recidivism (and is therefore a social good that outweighs the harm of denying the victim her autonomy) must accordingly be rejected.<sup>36</sup> With this in mind, then, I turn to consider whether no-drop and

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Y in cases involving violence done by the latter to the former. For an account of this see A Keane, *The Modern Law of Evidence* (London: Butterworths, 1995) 90-1. See also A Cretney and G Davis, “The Significance of Compellability in the Prosecution of Domestic Assault” (1997) 37 *British Journal of Criminology* 75.

<sup>31</sup> A Cretney and G Davis, *Punishing Violence*, *op cit* n 19, chs 6 and 7.

<sup>32</sup> See R Morley and A Mullender, “Hype or Hope? The Importation of Pro-arrest Policies and Batterers’ Programmes from North America to Britain as Key Measures for Preventing Violence Against Women in the Home” (1992) 6 *International Journal of Law and the Family* 265, 270.

<sup>33</sup> See, *eg*, C Hanna, “No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions” (1996) 109 *Harvard Law Review* 1850.

<sup>34</sup> See A Cretney and G Davis, *op cit* n 30, esp at 79-81.

<sup>35</sup> *id*, at 76.

<sup>36</sup> There are two reasons for this. First, the deterrent effect of higher conviction rates *per se* is unproven (see n 60, *infra*), for which reason they ought not to be pursued as a “self-evident good”. More importantly, however, as Rawls comments in *Political Liberalism*: “liberties cannot be denied to certain social

pro-arrest policies (in one form or another) together with other, related strategies are in fact suitable for implementation in this country. More particularly, my aim is not so much to consider ways in which the law, *per se*, can be improved in *practical* terms, but rather to analyse various means by which an *ideological* change can be effected so that, in turn, deterrence from the commission of domestic violence may be augmented.

#### 4. NO-DROP POLICIES IN BRITAIN?

In this section of the article I consider whether Britain ought to implement laws making it mandatory for victims of domestic violence to participate in the prosecution of their abusers. Before evaluating the various potential benefits and disadvantages of so doing, it is important to make clear the fact that there is no unitary concept of a no-drop policy.<sup>37</sup> Broadly, they are of two kinds: the “hard” and “soft” models. According to the former, the victim, on pain of prosecution for contempt of court,<sup>38</sup> is forced to testify against her abuser. In Duluth, Minnesota, where such a policy has been adopted:

“Prosecutors can force people to “cooperate” by using their police powers, including the issuance of subpoenas and the filing of contempt charges. When victims participate under these circumstances, their “cooperation” may not be truly voluntary.”<sup>39</sup>

Such a strategy, if deployed in the face of victim reluctance, plainly lays open the state to the claim that it is “re-victimising” the battered woman.<sup>40</sup> She may perceive herself merely to have been drawn from one sphere in which her conduct and compliance are obtained by compulsion, only to be placed in another. At all events, such aggressive endeavours to secure convictions appear wholly inconsistent with the protection of privacy and family life offered by Article 8 of the European Convention on Human Rights and Fundamental Freedoms which has all but been incorporated into national law by the Human Rights Act 1998.<sup>41</sup>

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groups on the grounds that their having these liberties may enable them to block policies”: J Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) 294-5. In our context this means the state’s aggressive attempts to prosecute domestic violence should not take precedence over the victim’s basic liberties such as the right to privacy, family life etc conferred by Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

<sup>37</sup> The most modern and thoroughgoing account of the various forms of the no-drop model is to be found in C Hanna, *op cit* n 33.

<sup>38</sup> See I Brownlee, “Compellability and Contempt in Domestic Violence Cases” [1990] *Journal of Social Welfare Law* 107.

<sup>39</sup> C Hanna, *op cit* n 33, at 1863. A slightly different variant exists in San Diego where the policy is “to pursue every provable felony case, regardless of the victim’s wishes,” and in the event of non-appearance “the prosecutor can request a bench warrant and a continuance when a victim fails to appear”: *id.*

<sup>40</sup> This term derives from M Asmus, T Ritmeester and E Pence, “Prosecuting Domestic Abuse Cases in Duluth: Developing Strategies from Understanding the Dynamics of Abusive Relationships” [1991] *Hamline Law Review* 115, 149-54.

<sup>41</sup> Technically the Convention has not been incorporated into domestic law. Instead, the 1998 Act merely, so far as we are concerned, makes it unlawful for any public authority to act in a way which is incompatible with a “Convention right”: see ss 6-8. Such public authorities expressly include courts of law: s

By contrast, soft no-drop policies entail a more moderate approach whereby “prosecutors do not force victims to participate in the criminal process; rather victims are provided with support services and encouraged to continue the process”.<sup>42</sup> The model adopted in Brooklyn, New York, for example, involves compulsion of the victim only to the extent that she is required to undergo educative counselling before she may drop charges. The hope is that, “with enough understanding and encouragement, the battered woman will assess her situation realistically, start to unlearn her helplessness” and thus “help to assist the legal system as a witness against her [batterer]”.<sup>43</sup>

Soft no-drop policies are clearly more flexible and victim-sensitive than are their hard alternatives. Indeed, so accommodating are they that it might even be argued that they are no-drop policies in name alone, the reality being that they are merely a procedural variant of the *status quo*. For this reason, it is tempting to reject them out of hand on the basis that they fail, ultimately, to secure mandatory victim participation in the prosecution process. A soft no-drop policy, it could be argued, is one which, paradoxically, allows the victim - whose plight it is designed to improve - to undermine its very *raison d'être*. It is largely for this reason that Cheryl Hanna, ultimately, declines to identify any value in the adoption of such a policy.<sup>44</sup> She claims that, instead, hard no-drop policies can *guarantee* more convictions<sup>45</sup> and convey the message to abusers, victims and the general public alike that domestic violence is a serious offence that the state will punish at all costs.<sup>46</sup> She justifies her position on the basis that “because domestic violence is a public crime, the state has a responsibility to intervene aggressively”.<sup>47</sup> She also asserts that the adoption of a hard no-drop policy reduces the risk of future threats or acts of violence:

“If participation is mandated, the state takes away the batterer’s ability to influence the victim’s actions. Basing prosecutorial decision-making on witness cooperation in domestic violence cases ultimately places the victim in more danger... Fear, intimidation, and imposition of guilt on the victim “work” if the case is dismissed.”<sup>48</sup>

Both of these points are, of course, true. But they do not, as we noted earlier, tell the whole story. They are premised on only two of the four “public” conceptions of domestic violence. They overlook the fact that there is an equal, and countervailing, public concern that women should not be re-victimised by being forced against their wishes to supply evidence against their abusers. They also ride rough-shod over the woman’s right to privacy and family life<sup>49</sup> and deny her freedom of choice. To overlook these aspects of the issue is to ignore the fact that there may be very good reasons why a woman may wish to avoid participation in the prosecution process. She may, for example, be concerned about the fact that her partner is the sole money earner in the home and may consider state benefits insufficient to maintain

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6(3)(a). On the Act generally, see K Ewing, “The Human Rights Act and Parliamentary Democracy” (1999) 62 *Modern Law Review* 79.

<sup>42</sup> C Hanna, *op cit* n 33, at 1863.

<sup>43</sup> K Waits, “The Criminal Justice System’s Response to Battering: Understanding the Problem, Forging the Solutions” (1985) 60 *Washington Law Review* 267, 307.

<sup>44</sup> C Hanna, *op cit* n 33.

<sup>45</sup> *id*, at 1863.

<sup>46</sup> *id*, at 1864.

<sup>47</sup> *id*, at 1865.

<sup>48</sup> *id*, at 1891-2.

<sup>49</sup> See n 36, *supra*.



her (and any children) adequately if her partner were to be incarcerated for his offence. She may simply consider it the lesser of two evils to allow her abuser to escape unpunished if it means she can avoid the perceived ordeal,<sup>50</sup> or sheer shame and humiliation<sup>51</sup> of giving evidence in court. Alternatively, she may simply be unwilling to testify because of a continuing affective bond, because of the threat of further violence from her partner, because of reasons associated with her racial heritage,<sup>52</sup> or because the incident was a one-off, never to be repeated. In addition, there are at least two further, pragmatic counter-arguments that may be mounted against the adoption of a hard no-drop policy in this country. First, the knowledge that participation in the prosecution process would be mandated may be enough to dissuade some women from telephoning the police in the first place. Without the compulsion to participate, a non-deterred phone call can be a useful way of averting or ending an imminent or current episode of domestic assault. Secondly, in some of Britain's inner cities, particularly among certain minority groups, victims who participate in the criminal process may be perceived by members of their local community to be guilty of collusion with the police, widely seen therein as the universal enemy.<sup>53</sup>

For all of these reasons, I cannot, unlike Hanna, conceive of the advantages of implementing a hard no-drop policy as adequate justification for its adoption. The counter-arguments are both too numerous and too weighty to be ignored or overridden. Thus, given my central thesis - that some form of public response is needed in view of the essentially private tack that has hitherto ineffectually been pursued - we are forced to consider more closely the merits of a softer version of "compulsory" victim participation.

Although soft no-drop policies do not carry any guarantee of higher prosecution rates, they cannot be dismissed as totally futile for, as we shall see, they can operate on other, less crude levels, to effect a valuable public response to domestic violence. Yet before considering these aspects of softer policies, it is important first to meet the powerful feminist argument that soft no-drop policies do nothing to unsettle the ideological *status quo* and in fact, on the contrary, do much to stabilise and reinforce it.<sup>54</sup> The reason we can reject such a stance is that there is an equally powerful and opposite feminist argument that the adoption of a hard no-drop policy deprives the victim of her autonomy.<sup>55</sup> Ultimately, then, recourse to

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<sup>50</sup> On which, see A Cretney and G Davis, *op cit* n 3, at 171.

<sup>51</sup> Hanna in fact recognises this problem (*op cit* n 33, at 1871) but argues that its significance is diminished by the fact that in around 90% of cases plea-bargaining removes the need for the victim to testify.

<sup>52</sup> See, *eg*, C Cuneen and J Stubbs, *Violence Against Filipino Women*, (Sydney: Sydney University Institute of Criminology, 1996) and C Cuneen (ed), *Aboriginal Perspectives on Criminal Justice* (Sydney: Sydney University Institute of Criminology, 1992).

<sup>53</sup> See S Holdaway, "Recruitment, Race and the Police Subculture" and R Oakley, "The Police and Black People: The Training Response" in M Stevens and S Becker (eds), *Police Force, Police Service* (Basingstoke: Macmillan Press Ltd, 1994). *Cf* the attitude of some aboriginal and other NESB women to the uninvited involvement of the police documented in M Kaye, "Third-party Applications for Protection Orders: Opportunities, Ambiguities and Traps" [1997] *Journal of Social Welfare and Family Law* 403, 412-415.

<sup>54</sup> See J Zorza, "Must We Stop Arresting Batters?: Analysis and Policy Implications of New Police Domestic Violence Studies" (1994) 28 *New England Law Review* 929, 978-9 and M Freeman, *op cit* n 8.

<sup>55</sup> The tension between the public goal of punishing crime and the private concern of preserving the victim's autonomy is recognised by Hanna. Nonetheless, she

feminist arguments alone cannot supply an unequivocal solution to the problem of how best to co-ordinate a public response to the prevalence of domestic violence: any feminist rejection of a soft no-drop model can itself legitimately be dismissed on feminist grounds.

What, then, is the value of a soft no-drop policy on the lines of the Brooklyn model we saw earlier?<sup>56</sup> First and foremost, the Brooklyn policy stresses the importance of “educative counselling and support”. Indeed, it is only the education and support for the victim that is truly mandatory under this soft policy. It enables a prosecution to be dropped in those cases, discussed earlier, where the victim genuinely has a greater interest in the aggressor’s acquittal than in his conviction. Yet it also minimises the chance of her withdrawing on the basis of a false perception of a continuing affective bond or because she is suffering from battered woman syndrome.<sup>57</sup> Pursuing cases regardless of the victim’s *informed* wishes lays open the criminal justice system to criticisms on two counts. Either it re-victimises the woman who refuses to testify by convicting her for contempt of court or it fails to convict large numbers of assailants where the victims decide to commit perjury in order to ensure their release. Neither outcome would foster a favourable public impression of the Crown Prosecution Service (CPS) or the criminal justice system generally. Indeed, the CPS is specifically charged with the task of being selective about those cases which it decides to prosecute in order to avoid such an image (as well as to save costs).<sup>58</sup> To this extent, we already enjoy a form of soft no-drop policy. Yet it is the commitment to education and support of the victim that specifically enhances the possibility of achieving the ideological change for which this article argues; and it is for this reason that current practice needs to be modified.

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claims that “[i]n the domestic violence context the goal is to punish the batterer in order to protect potential victims. Although removing a woman’s right to choose whether to prosecute may undermine her autonomy, such an infringement on her liberty is necessary to protect women overall.” *op cit* n 33, at 1870. But this is both a paternalistic and patriarchal stance to adopt manifesting, as McGillivray puts it, a “consensus between [mainly male] reformers and the state that social interests are to take precedence over the immediate interests of the victim”: A McGillivray, “Battered Women: Definition, Models and Prosecutorial Policy” (1987) 6 *Canadian Journal of Family Law* 15, 31. On notions of autonomy generally, see I Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969) 118-172; J Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) ch 10 and, more particularly, J Hardwig, “Should Women Think in Terms of Rights?” in C Sunstein (ed), *Feminism and Political Theory* (Chicago: University of Chicago Press, 1982).

<sup>56</sup> See n 43, *supra*, and associated text.

<sup>57</sup> For an interesting account of this phenomenon see M Fox, “Legal Responses to Battered Women who Kill” in J Bridgeman and S Millns (eds), *Law and Body Politics* (Aldershot: Dartmouth, 1996) 181-5. See also J Stubbs and J Tolmie, “Race, Gender and the Battered Woman Syndrome: an Australian Case Study” (1995) 8 *Canadian Journal of Women and the Law* 122. For a much fuller, though not wholly compelling, account see D Downs, *More Than Victims - Battered Women, The Syndrome Society and the Law* (Chicago: University of Chicago Press, 1996).

<sup>58</sup> See A Cretney and G Davis, *Punishing Violence*, *op cit* n 19, pp 101-105. See also S Edwards, *op cit* n 5, pp 198-200.

Secondly, the sensitivity and flexibility of soft no-drop policies are advantages not lightly to be dismissed.<sup>59</sup> In some circumstances, they empower the victim to make the difficult choice between the risk of recidivism and almost certain family break-up (which latter she might elect to avoid for the sake of any children there may be); they avoid aggressive paternalistic interventionism in genuine one-off cases; they accommodate the genuine fear some women possess of giving evidence in court;<sup>60</sup> and they avoid the arguable breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms that we explored earlier.<sup>61</sup> Finally, some increase in the rate of prosecution and convictions leading to incarceration could, I think, still legitimately be expected. This, in turn, might prevent some assailants from battering the same woman, or a new partner, in the future. It would also, assuming the likelihood of recidivism,<sup>62</sup> save the public purse in terms of the costs of re-arrest, future health care, shelter and re-housing victims (in cases where the degree of violence escalates) and the loss to employers of members of their workforce for days at a time.

On balance, then, there seems a strong case for bringing current British practice more into line with the form of soft no-drop policy that exists in Brooklyn. The level of victim coercion would be confined to compulsory counselling prior to discontinuing her participation in a prosecution. Nonetheless, we could not expect such a policy to be a panacea. We need also to consider additional forms of public response for which I argue in this article. Let us, therefore, turn our focus to another strategy that has undergone widespread implementation in North America: the adoption of a presumptive-arrest policy.

## 5. PRESUMPTIVE ARREST IN BRITAIN?

Just as there is no single species of no-drop policy, so there are, equally, varying forms of pro-arrest policy.<sup>63</sup> Essentially, there are again broadly two options. First, that of making arrest mandatory, regardless of the victim's wishes (but dependent upon there being sufficient evidence to suggest that the initial complaint was genuine),<sup>64</sup> and secondly, a more sensitive model of presumptive arrest which, to an increasing extent, is already beginning to be adopted in this country.<sup>65</sup> Here, the emphasis is upon the creation of specialist police units that take "a more interventionist approach to policing

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<sup>59</sup> Under Utah Code Ann. § 77-36-3(1)(e), for example, a domestic violence case can be dismissed if there is "reasonable cause" to believe that the victim would "benefit" from so doing. The fact that Code is concerned with the victim's welfare more than with securing a prosecution is, in my view, to be applauded.

<sup>60</sup> See C Hanna, *op cit* n 33, at 1878.

<sup>61</sup> See n 36, *supra*.

<sup>62</sup> Morley and Mullender supply disturbing evidence from North America which suggests that deterrence from recidivism tends only to be short-lived: R Morley and A Mullender, *op cit* n 32, at 270.

<sup>63</sup> The best, modern account of these variants is to be found in R Morley and A Mullender, *loc cit*.

<sup>64</sup> See *id*, at 267.

<sup>65</sup> The most comprehensive and up-to-date data available to me at the time of writing is available in S Grace, *op cit* n 4. But for useful academic critique of such measures see S Edwards and A Halpern, "Protection for the Victim of Domestic Violence: Time for Radical Revision" [1991] *Journal of Social Welfare and Family Law* 91. Cf the scepticism of R Morley and A Mullender, *op cit* n 33, at 276.

domestic violence,”<sup>66</sup> yet which also possess and deploy “a combination of counselling skills - compassion, being a good listener - and knowledge about legislation and procedures in domestic violence.”<sup>67</sup> In this section of the article, I assess the relative merits of each form of pro-arrest policy and consider the appropriateness (or otherwise) of their *formal* introduction in this country.

The main supposed advantage of introducing a pro-arrest policy is the deterrent effect that it is likely to have. In North America, the wide-spread introduction of such policies followed closely on the heels of the experiment conducted in Minneapolis from March 1981 to September 1982 which disclosed such an effect. In their now famous account of that experiment - which compared first, the deterrent effects of a pro-arrest policy, secondly, ordering the abuser from the premises and thirdly, requiring the abuser to undergo counselling or engage in mediation with the victim - Sherman and Berk concluded that presumptive arrest was the most efficacious in terms of curbing recidivism.<sup>68</sup> Since that study, however, it has become widely known - particularly in the light of three subsequent studies conducted in North Carolina, Nebraska and Wisconsin - that the deterrent effect of adopting either mandatory or presumptive arrest policies tends only to be short-lived.<sup>69</sup> In addition, it has been pointed out that:

“arrest may in fact endanger the victim’s safety due to reprisals from an angry partner. Indeed, fear of reprisal appears to be a major reason why many women wish to withdraw charges against their assailants. And this fear may not be misplaced: in 1987 and 1988 more than 90 per cent of women killed by their partners in Minnesota were actively trying to separate from them or seeking help from an outside agency.”<sup>70</sup>

The danger of reprisals is equally significant in the British context, for the overwhelming majority of abusers are never prosecuted.<sup>71</sup> In addition, the more offenders that go unprosecuted, the more the impression is created that the police are guilty of too heavy-handed an approach to law enforcement which, in ethnic minority circles at least, may appear as wanton police oppression.<sup>72</sup>

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<sup>66</sup> S Grace, *id.*, at 1 (describing the recommendations contained in Home Office Circular 60/1990, *op cit* n 21).

<sup>67</sup> *id.*, at 18.

<sup>68</sup> L Sherman and R Berk, “The Specific Deterrent Effects of Arrest for Domestic Assault” [1984] *American Sociological Review* 261. They concluded that while advice and separation interventions were of little to no value, there was clear evidence that “arrest and initial incarceration alone may produce a deterrent effect, regardless of how the courts treat such cases:” *id.*, at 270.

<sup>69</sup> According to one study, the deterrent effect lasts, in general, only for about six months: see E Stanko, “Policing Domestic Violence: Dilemmas and Contradictions” (1995) 28 *Australian and New Zealand Journal of Criminology* 31. For details of the findings in the three studies mentioned in the text see R Morley and A Mullender, *op cit* n 33, at 170.

<sup>70</sup> *id.*, at 171.

<sup>71</sup> See A Cretney and G Davis, *op cit* n 3, at 165-7. The same is also true in Australia: see S Parker *et al.*, *Australian Family Law in Context* (Sydney: Law Book Company, 1994) 367-368.

<sup>72</sup> See J Stubbs, *Domestic Violence, Cultural Diversity and the Legal System* (Occasional Paper No 7) (Darwin: Office of Women’s Policy, 1998).

Though arguments such as these clearly provide a solid foundation to Morley and Mullender's scepticism about the adoption of aggressive arrest policies,<sup>73</sup> this, of itself, ought not to dissuade us in absolute terms from adopting more interventionist policing of domestic violence. Recall that there are essentially two versions of such policies: the mandatory and presumptive arrest models. Though the counter-arguments just explored are indubitably pertinent in the context of the former, they do not necessarily ground an objection to the latter or to more interventionist policing more generally. A mandatory arrest policy is an extreme example of a public response to domestic violence. But, as I argued earlier, there are other public dimensions to domestic violence than simply the state's interest in prosecuting offenders; and, with these in mind, a more moderate form of pro-arrest policy might be viewed as a useful public response to domestic assault.

Morley and Mullender have gone as far as to argue that, at an ideological level, a policy predicated on the *presumption* of arrest<sup>74</sup> conveys "a clear message to the abuser and society" the substance of which is that "woman battering is crime unacceptable to the community which will therefore be fully prosecuted, a woman's right to equal protection is established and her sense of human dignity enhanced."<sup>75</sup> Though I have reservations about whether such an immediate impact could be expected, I nonetheless consider that, over time, such an effect (at least upon the police) could reasonably be expected; especially if an insistence upon interventionist policing were to be introduced into police training.

Equally, the fact that under a presumptive arrest policy the police exercise their discretion as to whether they should make an arrest partly by reference to the victim's views means that, in a sense, the victim is empowered by the adoption of such a policy because the batterer's immediate future is significantly determined by the victim's wishes.<sup>76</sup> Thus, there is much to commend a presumptive arrest policy. It should therefore be applauded that many of Britain's police forces have already informally introduced such a policy,<sup>77</sup> following the recommendation contained in a Home Office Circular of 1990 that "[t]he arrest and detention of an alleged assailant should, therefore, always be considered, even though the final judgement may be that this is inappropriate in the particular case."<sup>78</sup> Even if the deterrent effect of presumptive arrest policies remains in question, the fact that victims are empowered, in the manner suggested above, and dealt with in a sympathetic and understanding way is valuable in itself.

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<sup>73</sup> R Morley and A Mullender, *op cit* n 33.

<sup>74</sup> Sherman and Berk, in fact, argued for just such a pro-arrest policy. They claimed that "an arrest should be made unless there are good, clear reasons why an arrest would be counterproductive," and added "it is widely recognised that discretion is inherent in police work. Simply to impose a requirement of arrest, irrespective of the features of the immediate situation, is to invite circumvention [of the objective]." *op cit* n 68, at 270.

<sup>75</sup> R Morley and A Mullender, *op cit* n 33, at 271.

<sup>76</sup> See E Pence, *The Justice System's Response to Domestic Assault Cases: a Guide for Policy Development* (Duluth: Minnesota Programme Development Inc, 1989).

<sup>77</sup> Not only has there been widespread, informal implementation of this recommendation, at least five of Britain's 43 police forces have now established specialist domestic violence units which deal exclusively with incidents of domestic abuse with sensitivity and understanding: see S Grace, *op cit* n 4, p 5.

<sup>78</sup> *Op cit* n 21, at 6.

## 6. OTHER STRATEGIES?

In this penultimate section, I consider whether, in addition to the adoption of a soft no-drop policy, in tandem with a formalised version<sup>79</sup> of the presumptive arrest policy (which has been adopted on an informal basis by only some of Britain's police forces) there might not be other measures which ought to be introduced in this country in order to respond effectively to the unacceptable prevalence of domestic violence. Almost self-evidently, a web of strategies is a better way to address the problem than simply placing total reliance on the adoption of only scheme.<sup>80</sup>

I think that by three broad means, a much more effective public response to domestic violence might be achieved. First, a range of further improvements could be made to the standard police response to complaints about domestic violence.<sup>81</sup> Secondly, a rather different approach could be adopted by the Crown Prosecution Service, which all too frequently has been accused of 'down criming' domestic assaults,<sup>82</sup> when deciding whether or not to prosecute an assailant. Finally, a re-appraisal of the use of plea-bargaining in the specific context of domestic violence appears warranted; for, though plea-bargaining in both its guises is generally widespread,<sup>83</sup> it has the capacity to mask the seriousness of domestic violence (the profile of which this article argues needs raising).<sup>84</sup>

As regards changing the policing of domestic violence, I would suggest that in addition to introducing specialist domestic violence units nationally,<sup>85</sup>

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<sup>79</sup> The Home Office Circular that prompted the implementation of presumptive arrest policies (60/1990) does not carry the force of law. To achieve mandatory and universal application of such strategies, legislation would be required: see S Edwards, *op cit* n 5, pp 194-5.

<sup>80</sup> Regrettably, there is a suggestion of such an "all the eggs in one basket" approach in the Home Office Circular of 1990 (*op cit* n 21) which focuses (at 6) narrowly upon: "[e]xperience in other countries [which] suggests that the arrest of an alleged assailant may act as a powerful deterrent against his re-offending."

<sup>81</sup> Yet as Grace noted in 1995, despite it having been around for half a decade, "a third of operational officers had not heard of Circular 60/1990 at all and over half said that they had not received any new guidelines on domestic violence:" S Grace, *op cit* n 4, pp 53-54.

<sup>82</sup> See S Edwards, *op cit* n 5, pp 200-201; N Lowe and G Douglas, *Bromley's Family Law* (London: Butterworths, 1998) pp 188-189.

<sup>83</sup> Wasik *et al* identify two kinds of plea-bargain. The first, charge bargaining, involves certain charges being reduced or dropped in return for defendant's guilty plea. The second - sentence discounting - entails the defendant receiving a more lenient sentence in exchange for a guilty plea: See M Wasik, T Gibbons and M Redmayne: *Criminal Justice: Text and Materials* (London: Longman Press, 1998) pp 374-388.

<sup>84</sup> In the case of charge bargaining, where D is convicted of a lesser offence, there is a danger of conveying the message that domestic assaults are less serious than in fact they are. A similar problem arises in the case of sentence bargaining; for there, D may receive a lighter sentence than is warranted (if the profile of domestic violence is to be raised).

<sup>85</sup> The case for sensitive, specialist policing of domestic violence is beyond doubt when empirical studies consistently supply evidence of harsh policing such as the officer in Cretny and Davis' study who said to one woman who was being pressurised in to complaining formally: "Well don't expect us to help you if you

officers ought routinely to be more thorough in their response to domestic violence allegations by making full and complete notes at the premises to which the victim has called them,<sup>86</sup> and by questioning mature children, neighbours and perhaps even family doctors about past events. It might even be useful to note the physical state of the premises themselves, for the knowledge that a charge might also be brought for criminal damage could lend additional deterrent weight for the future. In addition, officers could record the victim's statement at the time of the initial response with a view to making more use of section 23 of the Criminal Justice Act 1988 which, in certain circumstances,<sup>87</sup> permits a person's recorded statement to be used as evidence of a fact if their oral statement of that fact would have been admissible.<sup>88</sup> The use of this provision could help to circumvent the problem of witnesses who are afraid generally to give evidence in court, or who are "warned" in the interim, by their abuser, not to do so.<sup>89</sup> At the very least, it is clear that the thoroughness of the police response should not continue to be dominated by the likelihood of obtaining a conviction. Aside from the pro-arrest strategies that have so far been introduced, police action has hitherto been determined, according to Cretney and Davis' research, by "[t]he distinction between reporting a crime and 'making a complaint' (and thereby signifying commitment to the prosecution process)" for, they inform us, "this distinction is of central importance. They will seldom arrest and prepare a case file for the CPS unless they are confident that they have a victim who is prepared to 'complain.'"<sup>90</sup> In short, in the context of domestic violence, the police must cease to "measure their success in terms of convictions secured - as of course they are encouraged to do within the prevailing political climate."<sup>91</sup>

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get murdered and don't expect us to come running to your assistance if this is your attitude." A Cretney and G Davis, *op cit* n 31, at 81. See also the many cases documented by McCann (*op cit* n 10) and Hatty (*op cit* n 5).

<sup>86</sup> Empirical research has revealed that "[t]he painstaking, well-ordered response to reported assault is the exception rather than the rule." A Cretney and G Davis, *Punishing Violence*, *op cit* n 20, p 96. To take the attitude, upon arrival at the scene of a domestic assault - as one policeman interviewed by Hatty did - that "she's quite big enough to look after herself" self-evidently must be deplored and made unacceptable: see S Hatty *op cit* n 5, p 77. In addition, the knowledge that a charge might be brought in relation to criminal damage might add further deterrent weight.

<sup>87</sup> See n 89, *infra*.

<sup>88</sup> Section 23 must be read subject to section 25 under which provision, such a statement may be excluded if there are good reasons for such exclusion. It would seem that those responsible have interpreted "good reasons" to mean "virtually any reasons," for in a study of ninety cases in Bristol undertaken by Cretney and Davis, use of section 23 was made in only one instance: A Cretney and G Davis, *op cit* n 31. On the other hand, under s 26 of the Act, a trial judge is afforded an *inclusive* discretion to permit *any* statement which was prepared for the purposes of a criminal investigation or pending criminal proceedings.

<sup>89</sup> It is an important restriction on the use of this provision that it may only be used where the complainant is absent because of fear or because of being kept out of the way. It is of no use, for example, where the complainant declines to co-operate in the prosecution of her partner for reasons of wishing to be reconciled with him or for the (mis)perceived sake of their children. For more detailed analysis of s 23, see Keane, *op cit* n 31, pp 270-84.

<sup>90</sup> A Cretney and G Davis, *Punishing Violence*, *op cit* n 20, p 75.

<sup>91</sup> *id.*, at 82.

As regards CPS practice, two suggestions seem apposite. First, given my earlier rejection of the adoption of a hard no-drop policy in this country, it follows that section 80(3)(a) of the Police and Criminal Evidence Act - which makes a spouse a compellable witness against her husband where he has been charged with assaulting, injuring or threatening to injure her - should, contrary to the tenor of the Home Office Circular of 1990, continue to be used very sparingly, if at all.<sup>92</sup> It is one thing to be supportive of a victim, it is quite another to overlook two ineradicable problems associated with compelling the victim to give evidence against her spouse. Quite apart from the fact that common use of this provision may deter a battered wife from complaining in the first place, the subsection provides no guarantee against her committing perjury in order to secure her husband's acquittal in cases in which she would prefer charges to be dropped. In addition, the public interest in prosecuting violent crimes committed by one spouse upon the other runs counter to the ascendant social policy of preserving the integrity of marriage.<sup>93</sup>

Secondly, I would suggest that, while considerable emphasis should still be given to the general principle that the more serious the offence, the more it is in the public interest to secure a conviction, the CPS should be chary of seeking to convict if it is likely to result in breaking up the family. This is especially so where there are non-abused children and the incident complained of was an isolated event. Such an approach can easily be accommodated within the general discretion conferred upon the CPS when deciding whether or not to proceed with a prosecution.<sup>94</sup> Yet recent empirical evidence suggests that the CPS is becoming increasingly likely to attempt to convict in domestic assault cases.<sup>95</sup> My argument is not that the CPS should not attempt to convict where the victim is a willing witness, merely that she should not be put under undue pressure to become such a witness.

The final matter that I think needs to be addressed is the prevalence of plea-bargaining - especially in relation to offences against the person.<sup>96</sup> While Hanna, as we saw, sees the wide-spread use of plea-bargaining as a means of justifying the use of a hard no-drop policy, I take the contrary view that, in the context of domestic violence, the use of plea-bargaining has two significant negative effects which provide a basis on which to reject its use. If a plea of guilty is accepted in exchange for reducing a charge from, say, grievous bodily harm to actual bodily harm, there is a danger of trivialising in the minds of the victim, the abuser and society generally the severity of domestic assaults. Equally, the problem of assailant identification does not obtain in the context of domestic assaults though, of course, this is a major

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<sup>92</sup> The Circular in question (*op cit* n 21), noted, in connection with s 80(3)(a) that "[t]he power is used infrequently" because of the prospect of the victim not wishing to give evidence. Yet it went on to suggest that "[t]his underlines the need to give close support to the victim during the pre-trial period, so that she will feel sufficiently self-confident to give evidence:" para 24.

<sup>93</sup> See Family Law Act 1996, s 1.

<sup>94</sup> Prosecution of Offences Act 1985, s 23. This discretion is exercised by reference to two factors, evidential sufficiency and the public interest. For a useful account of what the public interest includes in this context, see S Edwards, *op cit* n 5, pp 199-200.

<sup>95</sup> See A Cretney and G Davis *op cit* n 3, who revealed that in the first 10 months of 1993 in the Bristol area, 46% of assaults prosecuted in courts were "domestics" causing them to conclude of domestic violence that "this is a hidden crime no longer."

<sup>96</sup> For a good overview of the various forms plea-bargaining takes, see M Wasik *et al*, *op cit* n 83, pp 370 ff.



obstacle to securing convictions for assaults committed elsewhere.<sup>97</sup> In those cases there is much greater need to make use of plea-bargaining yet so far as the virtues of plea-bargaining have been afforded statutory recognition, no such distinction along the lines argued for here has been made.<sup>98</sup>

## 7. CONCLUSION

It is clear that the annual number of incidents of domestic violence remain at an unacceptably high level. It is equally clear that the civil law remedies - awarded on the basis largely of cure rather than prevention - are inadequate to the tasks both of reducing these figures significantly and operating effectively.<sup>99</sup> And while there have been some developments in recent years with respect to the recognition of the seriousness of, and public dimension to, domestic violence, much remains to be done both in terms of broadening the bases of approach and formally institutionalising them.

There is, ultimately, and almost inevitably, no simple practical solution to the problem. Indeed, much of the battle against domestic violence must take place on an ideological level. To achieve this, the problem needs to be attacked on a number of fronts none of which, needs be, may be crude in nature. The simple adoption of a hard no-drop policy with a view to obtaining more convictions is insufficient. Equally, the implementation of an aggressive pro-arrest policy in the hope that it will operate as an important deterrent is similarly inadequate in the absence of any other co-existing strategy. Only once the message is widely conveyed, and then re-conveyed, that domestic violence *is* a serious, punishable offence against not just individual women, but also on an ideological level, against women generally, will we be likely to achieve a significant reduction in its incidence. It is sometimes argued that, instead of attempting to prosecute offenders, greater emphasis should be placed on educating *both* partners together - for example by counselling. Yet there is a danger with this approach: it tends to detract from the seriousness of the offence. Still worse, endeavours to counsel the aggressor alone might convey the message that being subjected to such "gentle advice" is the sum total of his punishment.

In this article I have considered a number of alternative ways in which the profile of domestic violence might be raised and the institutional responses to it might be modified and supplemented. At bottom my concern has not been simply to increase incarceration rates nor anything else so crude. Instead, I have argued for a series of means by which, in time, domestic violence might come more widely to be regarded as the dreadful crime that it is. If this paper has gone some way to achieving that goal, then it has served its purpose.

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<sup>97</sup> See A Cretney and G Davis, *Punishing Violence*, *op cit* n 20, p 83.

<sup>98</sup> See Criminal Justice and Public Order Act 1994, s 48 (statutory endorsement of sentence bargaining).

<sup>99</sup> See, *eg*, Michael Freeman's comment that domestic violence injunctions are "often of little more value than sticking plaster is to a broken leg:" *op cit* n 8, at 241.