THE CASE FOR LEGAL REMEDIES FOR ABUSED WOMEN

I
INTRODUCTION

The serious physical abuse inflicted on women by men who supposedly care for them is finally becoming a matter of public concern. Women have long suffered beatings and assaults from husbands and male friends which, if committed by strangers, would be punishable under our criminal laws. Woman abuse,[1] however, has long been treated as different from any other assault and has never been considered a crime. Society has, in fact, always accepted such treatment of women. Until the early twentieth century, the law explicitly permitted men to beat their wives.[2] Today, the nonenforcement of laws whose application could give women some protection against abuse allows men to continue to beat them without fear of punishment and denies women much needed protection.

Woman abuse has continued because it has been approved of, condoned, or ignored by the general public as well as concealed by its victims. This has led society to neglect woman abuse as a social and political problem. The public policy of family privacy,[3] the myth of the happy harmonious family, and the

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1. The phenomenon of woman abuse has been identified as wife assault, wife battery, wife beating, spouse beating, and domestic violence. As suggested by Eileen P. Sweeney of Garfield-Austin Neighborhood Legal Services, Legal Assistance Foundation of Chicago, the best descriptive term is woman abuse, for the following reasons: (1) It includes women who are abused by men with whom they are living in an informal rather than legal relationship; (2) It is not limited by the legal definitions associated with the words "battery" and "assault"; and (3) It emphasizes the fact that this is a crime directed primarily against women.

2. For example, a medieval theological law gives a man permission to castigate and beat his wife. E. DAVIS, THE FIRST SEX 255 (1971). A sixteenth century Russian Household Ordinance describes the most effective way to beat one's wife. W. MANDEL, SOVIET WOMEN 12 (1975). In 1765 a London magistrate ruled that a man could beat his wife if he used a stick no thicker than a man's thumb. Calvert, *Criminal and Civil Liability in Husband-Wife Assaults*, in VIOLENCE IN THE FAMILY 89 (S. Steinmetz & M. Straus eds. 1975). Following the English rule, an 1867 North Carolina court affirmed the acquittal of a man who had whipped his wife with a switch about the size of one of his fingers, but smaller than his thumb. State v. Rhodes, 61 N.C. (Phil. Law) 445 (Super. Ct. Wilkes Cty. 1868). *See* D. MARTIN, BATTERED WIVES 29-32 (1976); Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241, 244-45 (1917).

3. The public policy of family privacy has been recognized by the courts for a long time. As early as 1868, a North Carolina court ruled that it would not interfere with or attempt to control family government except in extreme circumstances, because the evil which would result from doing so would be greater than the "lesser evil of trifling violence." State v. Rhodes, 61 N.C. (Phil. Law) 445, 450 (1868). The Supreme Court fully recognizes the right to family privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 488 (1965).

"cultural norms which implicitly make the marriage license a hitting license"[4] have supported and sustained this neglect. The victims, who are ashamed, weakened physically and psychologically, and fearful of retaliatory beatings from which they have no protection, are forced to acquiesce in silence. By failing to speak out and seek help, they have failed to educate and sensitize society to the problem.

The current activity in the areas of women's rights, crime prevention, child abuse, and rape has helped to prepare society to confront the real injustice of woman abuse. The growing recognition of woman abuse as a serious problem is stirring efforts to eliminate the violence which is destroying the lives of so many women. Social service agencies, legal services, and women's groups are actively striving to awaken people to the problem of woman abuse. Such groups are also developing emergency housing and counseling services and helping to draft and promote legislation which will provide women with the legal protection they presently lack. Concurrently, litigation designed to enforce the rights of abused women is also being presented to the courts.

The capacity of the legal system to contribute to the prevention of woman abuse and the protection of its victims is the subject of this Note. The first section describes the characteristics of woman abuse which make legal remedies necessary. The following section examines the inadequacy of the present responses to abused women by police, prosecutors, and courts. The succeeding sections analyze current and potential strategies to reform the law so that it better serves the interests of battered women. Although the legal system alone cannot end woman abuse, it can and must do more to protect the victims, deter the perpetrators, and reduce the incidence of this problem.

II
THE NECESSITY FOR EFFECTIVE LEGAL REMEDIES

A. The Magnitude of the Problem

The attitudes which have shaped a society in which abused women are denied protection and made to feel too ashamed to seek outside aid have caused both women and the police to allow many incidents of abuse to go unreported. Woman abuse is now believed to be one of the most underreported crimes.[5] Although inadequate reporting has made it impossible to accurately document the magnitude of the problem, data which has been collected from police agencies, court rosters, and hospital reports indicates that woman abuse is a widespread problem. The number of battered women nationwide is conser-

4. M. Straus, Sexual Inequality, Cultural Norms and Wife-Beating (Abstract from International Institute on Victimology, Bellagio, Italy, July 1-12, 1975). The norms which maintain a high level of violence in the male-dominant western world have been described by University of New Hampshire sociologist Murray Straus as (1) the defense of male authority; (2) a compulsive need to prove one's masculinity; (3) economic constraints and discrimination; (4) the burdens of child care; (5) the myth of the inadequacy of the single parent household; (6) the pre-eminence of the wife role; (7) the negative self-image of women; (8) the image of women as children; and (9) the male orientation of the criminal justice system. *Id.* at 1-12.

5. Guthrie, *The Battered Wife: A Victim of Most Under-reported Crime*, Cleveland Press, Nov. 3, 1976, § C, at 4, col. 3 [hereinafter cited as Guthrie].

vatively estimated to be well over a million,[6] although recent research indicates that twenty-eight million is a more accurate figure.[7]

Courts receive a large number of complaints from abused women. In Detroit, Michigan, 4900 wife assault complaints were filed in 1972.[8] In New York State, about 14,000 wife assault complaints were handled by the Family Court during the judicial year 1972-73.[9] The Matrimonial Unit of the South Brooklyn Legal Services Corporation found that 41.5 percent of 700 women represented in divorce actions between July 1, 1974 and November, 1975, complained of physical assaults by their husbands. Thirty-six percent of these clients received divorces based on the grounds of cruel and inhuman treatment and 5.1 percent on grounds of abandonment.[10] The 1228 complaints of marital violence which were processed by the San Francisco District Attorney's Office in 1973 is thought to represent only a small percentage of the total number of offenses which actually occur in San Francisco.[11]

Police departments also receive a significant number of abuse complaints. In Atlanta, 60 percent of police calls on the night shift are reported as "domestic disturbances," a term which often means woman assault.[12] An instructor at the New York City Police Academy has estimated that about 40 percent of all calls for police assistance involve husband-wife disputes.[13] The Boston Police Department receives 45 wife abuse reports each day, which totals over 16,000 a year.[14]

Homicide and assault statistics further reveal the gravity of the problem of woman abuse. A 1977 study of the occurrence of violence in intimate settings recently reported new evidence of the high incidence of violence involving friends or relatives. Researchers found that over half of the homicides in De-

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6. Durbin, *Wife-beating*, LADIES HOME JOURNAL, June, 1974, at 64, *cited in* D. MARTIN, *supra* note 2, at 12. A study by the Connecticut Commission on the Status of Women found that the number of physically abused and battered women is much greater than they had estimated. Of the 270 women in the Hartford, Connecticut, area who had voluntarily responded to a telephone survey, 97.4% answered yes to the question "were you actually physically abused?" Of this group, 45.1% said that they were kicked, beaten, or abused; 28.8% said that they were hurt or threatened with weapons, suffered broken bones, or required stitches. These are abuses which, depending on exactly what happened, would be considered Class B or D felonies and punishable by imprisonment. L. Frost, B. Karl, G.J. Stillson MacDonnell, D. Minasian, Report of the Connecticut Task Force on Abused Women, Household Violence Study, North Central and Capital Regions 8-9 (March, 1977) [hereinafter cited as Conn. Task Force on Abused Women].

7. R. LANGLEY & R. C. LEVY, WIFE-BEATING: THE SILENT CRISIS 12 (1977).

8. Bannon, Law Enforcement Problems With Intra-Family Violence 5 (August 12, 1975) (Address by James Bannon, Ph.D., Commander Detroit Police Department, to the American Bar Association Convention) [hereinafter cited as Bannon].

9. Barden, *Wife-beaters: Few of Them Ever Appear Before a Court of Law*, N.Y. Times, Oct. 21, 1974, at 39, col. 1, *cited in* D. MARTIN, *supra* note 2, at 11. The wife was plaintiff in 82% of the 17,277 cases of family violence reported.

10. Fields, *Wife-Beating: The Hidden Offense*, N.Y.L.J., April 29, 1976, at 1, col. 1 [hereinafter cited as Fields].

11. *Hearing on Marital and Family Violence Before the Cal. Sen. Subcomm. on Nutrition and Human Needs of the Sen. Health and Welfare Comm.*, 5 (July 21, 1975) (statement of M.S. Ashley) [hereinafter cited as *Cal. Sen. Hearings*].

12. Guthrie, *supra* note 5.

13. Interview with Detective John Sullivan of the New York City Police Dep't, *cited in* Fields, *supra* note 10, at 1.

14. Guthrie, *supra* note 5.

troit in 1972 and in Kansas City in 1970 and 1971 were committed in the course of a conflict between persons who knew each other. The incidence of aggravated assaults committed by friends or relatives of the victims was found to be similarly high. In Detroit between 1971 and 1973, 14 percent of the aggravated assaults studied involved family members and an additional 31.1 percent involved friends, lovers, or acquaintances.[15] The FBI Uniform Crime Reports indicates that about 19 percent of the murders in the United States in 1974 were between marital partners or lovers. Of the 12.5 percent which involved husband and wife in those years, the wife was the victim in 52 percent, and the husband the victim in 48 percent.[16] Although these numbers show that murder victims are male almost as often as female, studies show that the male victims are usually the first to use violence or a deadly weapon and thus provoke the violent female response which results in their deaths.[17] The victim in this situation thus comes to resemble an offender. Law enforcement officials also often become victims of woman abuse. In 1975, woman abuse calls accounted for 28 percent of assaults on police officers[18] and for over 21 percent of all police deaths.[19]

B. The Nature of the Wrong

Abused women suffer serious physical, psychological, and emotional injury. They describe injuries typical of those reported by victims of assault and battery and aggravated assault: lacerations, swellings and soreness, fractured jaws, concussions, and miscarriages.[20] These injuries frequently require hospital care.[21] The harm inflicted on an abused woman, however, is more destructive than the harm experienced by the victim of an isolated assault. Abused women are atypical assault victims, because they are compelled to live with and be dependent on their assailants. The abuse they suffer is inflicted repeatedly and increases in frequency and brutality with each recurrence.[22] New

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15. Police Foundation, Domestic Violence and the Police, Studies in Detroit and Kansas City 10-11 (1977) [hereinafter cited as Domestic Violence and the Police].

16. FBI, UNIFORM CRIME REPORTS 19 (1974).

17. Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 1, 8 (1957); Domestic Violence and the Police, *supra* note 15, at 17-18.

18. FBI, *supra* note 16, at 246.

19. *Id.* at 224.

20. Gingold, *The Truth About Battered Wives*, Ms., Aug., 1976, at 52.

21. A Boston City Hospital nurse reports that 70% of all assault victims given emergency treatment are women who have been attacked in their homes. Guthrie, *supra* note 5. In response to an August, 1977, article reporting a survey finding that 50% of Cleveland hospitals saw wife abuse cases every month and 25% of the hospitals saw abused women once a week or more often, two area doctors wrote the following:

> Both my husband and I find your estimates very low. For the past month, I have been the first-year surgical resident at Cleveland Metropolitan General Hospital and have personally seen at least one case of wife abuse a day (certainly not one per week!). For the past month my husband has been the first-year surgical resident at University Hospital and has personally seen at least two such cases per day. Perhaps our experience is a biased sample, or perhaps one month is not long enough from which to secure an overall estimate, but for the month of July, wife abuse was a very popular pastime.

Our Fastest Growing Indoor Sport, CLEVELAND MAGAZINE, Sept., 1977, at 7.

22. Gingold, *supra* note 20. The definition of woman abuse proposed by a committee of the

evidence that domestic related homicides are often preceded by a history of disturbance and conflict calls to police indicates that repetitive incidents of woman abuse may ultimately end in murder.[23]

Brutality becomes a way of life for abused women, because a combination of external obstacles and personal handicaps prevent women from removing themselves from abusive situations. Limited finances, employment opportunities, and earning power often make it impossible for women to support themselves and their children. They are forced to be financially dependent on their assailants. A 1976 study by the Women's Bureau of the United States Department of Labor documents a wide disparity in the earning potential of men and women.[24] Based on 1974 figures, the study found that women who worked at year round full time jobs earned only 57 cents for every dollar earned by men, that men's median weekly earnings exceeded women's by about $97, and that women had to work nearly nine days to gross the same earnings which men grossed in five days.[25] These discrepancies are partially explained by historical stereotypes which cause women to be placed in lower paying occupations and lower status jobs. Statistics show that women are paid less than men in the same high skill job. For instance, the median salaries of women scientists in 1970 were from $1700 to $5100 less than those of men in the same fields.[26] Women are also paid less than men with the same educational background. In 1974, women with four years of college earned only 59 percent of the income of men with four years of college, and had lower incomes than men who had only completed the eighth grade.[27] The earning potential of women is further affected by lack of work experience and discontinuous patterns of employment due to absences for childbearing and family responsibilities or difficulty in finding a job.[28] The depressing economic picture drawn by these statistics is supported by the findings of a research project on working mothers done at the Columbia University School of Social Work.[29] The researchers in this project found that the median income of female headed families in 1975 was $7,972 less than the median income of male headed families, that over 13 percent of all families were headed by females in that year and that female headed families represented 40 percent of all poor families

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Royal College of Psychiatrists and selected by the House of Commons Select Committee on Violence in Marriage reflects the repetitive nature of woman abuse: "[A] battered wife is a woman who has suffered serious or repeated physical injury from the man with whom she lives." SELECT COMM. ON VIOLENCE IN MARRIAGE, REPORT, H.C. CMND. NO. 553 at vi (London 1975) [hereinafter cited as 1975 SELECT COMM.].

23. A study of domestic violence in Kansas City found a distinct relationship between domestic related homicides and aggravated assaults, and prior police interventions for disputes and disturbances. The study found that in the two years preceding the domestic assault or homicide, the police had been at the address of the incident for disturbance calls at least once in about 85% of the cases and at least five times in about 50% of the cases. Domestic Violence and the Police, *supra* note 15, at 9.

24. Women's Bureau, Employment Standards Administration of the United States Department of Labor, The Earnings Gap Between Women and Men (1976).

25. *Id.* at 1.

26. *Id.* at 2.

27. *Id.* at 2-3.

28. *Id.* at 3.

29. This study is reported in Kamerman, *Needy American Women Waiting for Equity*, N.Y. Times, Feb. 19, 1977, at 23, col. 3.

and contained over half of the children living in poverty.[30] Burdened with inequitable and inadequate earning power, women who live in financially secure, although abusive, situations are justifiably afraid to break away.

The psychological effects of repeated abuse from a husband or male friend further weaken a woman's ability to escape from or stop the abuse. Continual abuse eventually convinces a woman that she is indeed inferior and somehow deserves or has caused the assaults.[31] Loss of self esteem inhibits all independent action.[32]

Emotional and social pressures add to the crippling effect of abuse on women. Fear of future violent assaults which ultimately end in death prevents a woman from taking such radical action as leaving the home or seeking a temporary separation or divorce.[33] Emotional ties to the man who abuses her, reinforced by illusory hopes, promises of reform, and temporary ebbs in the frequency or severity of the beatings, keep a woman with an abusive man.[34] Children, who may have been conceived against her will when the batterer destroyed, or obstructed the use of, contraceptives,[35] may compel a woman to stay home to provide the appearance of peaceful family life which society demands of her.[36]

Prohibited by external constraints from using their own resources to free themselves from abusive men, abused women look for outside help but find none available. Friends and relatives, who often do not realize or refuse to recognize the extent and nature of the abuse, usually blame the women and send them back home.[37] Sympathetic friends may lack the means to support another family[38] or fear the danger which they may face if they help a woman who is being pursued by an abusive man.[39] Social services, which have the resources to help abused women, similarly fail to recognize the problem and refuse to provide either the immediate shelter, protection and support, or the long term housing, financial, and emotional aid which abused women need in order to build new independent lives.[40] Finally, the police and the courts, usu-

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30. *Id.* A comparison of 1975 total dollar amounts further illustrates the earning disparity between men and women. The median income in that year was $8,853 for men, compared to $3,385 for women. At the same time, the median income of male-headed families was $14,816, compared to $6,844 for female-headed families. Median wages were $12,760 for men and $7,500 for women. *Id.*

31. Guthrie, *supra* note 5.

32. 1975 SELECT COMM., *supra* note 22, at viii.

33. Gelles, *Abused Wives: Why Do They Stay?* 38 J. MARR. & FAM. 659, 662 (Nov., 1976) [hereinafter cited as Gelles].

34. D. MARTIN, *supra* note 2, at 73; Gelles, *supra* note 33, at 661, 662, 666.

35. Interview with Marjory D. Fields, attorney at South Brooklyn Legal Services, Inc., in New York City (Jan. 26, 1977).

36. D. MARTIN, *supra* note 2, at 73, 79-81; Gelles, *supra* note 33, at 666.

37. D. MARTIN, *supra* note 2, at 2-3.

38. D. MARTIN, *supra* note 2, at 119; Testimony of L. Williams Before the Illinois Commission on the Status of Women 4 (1976) (unpublished transcript on file at N.Y.U. Review of Law and Social Change) [hereinafter cited as Williams].

39. D. MARTIN, *supra* note 2, at 119.

40. Social services have failed battered women in the following ways: (1) there is a lack of emergency housing for women and children; (2) there are difficulties in obtaining AFDC funds or welfare, since the husband's income makes the family ineligible; (3) mental health services have failed to respond adequately; and (4) there has been a lack of coordination between social and legal

ally the first resort of abused women, often provide no help at all.[41] Thus denied the protection of the law as well as all other sources of help, these women are forced to live with constant abuse and suffer its physical, psychological, and emotional consequences.

C. The Causes

Why men inflict brutal injuries on their wives and female friends is not clear. Because woman abuse has only recently become a public issue, research into its causes and the appropriate preventive treatment has only begun. Information gathered thus far has given rise to some tentative conclusions as to the factors which contribute to woman abuse.

There is no evidence that domestic violence is peculiar to any socio-economic, racial, age, or educational group. Lawyers, social workers, and others working with abused women have found that their clients come from all levels of society.[42] Woman abuse occurs in the homes of the educated and the wealthy as well as in the homes of the illiterate and the poor.

The part played by psychological factors in woman abuse is uncertain, although several theories have been proposed. One theory suggests that women are masochistic and therefore somehow invite, provoke, or consent to abuse.[43] This theory has been criticized and is being disproved by findings that show

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services. *See generally* D. MARTIN, *supra* note 2, at 119-47; *see also*, Testimony of S. Millhollen *in Cal. Sen. Hearings*, *supra* note 11, at 30-33; Gelles, *supra* note 33, at 664.

41. Section III of this Note is devoted to the inadequate response of the law enforcement officials and agencies to the needs of abused women. For other views on the legal response to abused women, *see* R. LANGLEY & R.C. LEVY, *supra* note 7, at 153-85; D. MARTIN, *supra* note 2, at 87-118; E. PIZZEY, SCREAM QUIETLY OR THE NEIGHBOURS WILL HEAR, 112-29 (1974) [hereinafter cited as PIZZEY, SCREAM QUIETLY]; Spectator, Nov. 23, 1974, *quoted in* D. MARTIN, *supra* note 2, at 48; Owens, *Battered Wives: Some Social and Legal Problems*, 2 BRIT. J. L. & SOC'Y 201 (Winter 1975); Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 584 (1970) [hereinafter cited as Parnas, *Judicial Response*]; Parnas, *Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914 (1967) [hereinafter cited as Parnas, *Police Response*]; Truninger, *Marital Violence: The Legal Solutions*, 23 HAST. L. REV. 259 (1971); Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RIGHTS L. REP. 138 (1977) [hereinafter cited as Eisenberg & Micklow].

42. International Association of Chiefs of Police, Inc., Training Key 245, Wife Beating 1 (1976) [hereinafter cited as Training Key 245]; Testimony of M. S. Ashley in *Cal. Sen. Hearings*, *supra* note 11, at 5, 6, 62; Conn. Task Force on Abused Women, *supra* note 6, at 13; Eisenberg & Micklow, *supra* note 40, at 159; Fletcher, *Wife Abuse: The Hidden Epidemic*, CLEVELAND MAGAZINE, Aug., 1977 at 60 [hereinafter cited as Fletcher]; Northrup, *Battered Women: Wife-beating Persists but British Establish Refuges to Aid Victims*, Wall Street Journal, Aug. 20, 1976, at 1, col. 1. *But see* Bard & Zacker, *How Police Handle Explosive Squabbles*, PSYCHOLOGY TODAY, Nov., 1976, at 74 [hereinafter cited as Bard & Zacker], for the argument that economic class and education are variables in determining who will be a woman abuser or abused woman. Such a finding reflects variations in reporting rather than the social origins of woman abuse. Wealthier women have greater access to private counselling and medical services than their poorer sisters who must go to public agencies and hospitals. *1975 Select Comm.*, *supra* note 22, at vii.

43. On the physiological necessity of feminine masochism *see* H. DEUTSCH, THE PHYCHOLOGY OF WOMEN 245-85 (1944); S. Freud, Analysis Terminable and Interminable, in 23 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 209 (J. Strachey ed. 1964). On how that innate masochism results in unconscious provocation of assault, *see* Schultz, *The Victim-Offender Relationship*, 14 CRIME AND DELINQUENCY 135, 138 (1968). *But see* K. HORNEY, FEMININE PSYCHOLOGY 214-33 (1967), for the view of feminine masochism as a cultural and sociological phenomenon.

that most assaults are unwarranted and totally unexpected.[44] Other theories suggest that men who beat women are psychopaths[45] or have personality disorders or needs for security, power, and attention which cause them to be aggressive and violent.[46] The effects of alcohol have also been said to contribute to woman abuse,[47] but, while alcohol is often associated with woman abuse, experts disagree as to whether it causes violence or releases already present tendencies.[48] Although each of these elements may have some relationship with woman abuse, the present lack of empirical proof establishing a causal connection minimizes the contribution which these theories make to our understanding of woman abuse. These theories also reflect a general bias against, and lack of sympathy for, the victims of the crime, as well as a superficial understanding of the motivations of the abusing men.

Sexism and stereotypical views of women offer more certain and demonstrable explanations for woman abuse. Several sociologists have identified sexism as the prime contributor to woman abuse.[49] Pressures on men to prove their manliness and to maintain a superior power position in the family may cause men to assert themselves through violence. Antagonism arising out of the different and unequal sex roles of men and women, societal demands that a woman keep the family unit together, and domination of the legal system by males reared in sexist attitudes further contribute to and perpetuate woman abuse.[50] There is also evidence that sex role socialization within abusive environments is a direct cause of future woman abuse. Researchers have found that daughters of abused women are more likely to be abused and sons of abusing men are more likely to become abusive than are their counterparts in nonviolent families.[51] Children apparently learn to expect abuse and to give abuse from the role models set by parents and from the abuse which they themselves most likely receive from such parents.

Investigation into the causes of woman abuse points to the elimination of sexist attitudes as the primary means to end woman abuse. Changing attitudes, however, is a long and difficult process. Until that change is otherwise effected, emergency measures responsive to the needs of battered women are desperately needed to protect these women.

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44. Often there is either no triggering event, or the actual triggering event does not warrant the resulting violent response. D. MARTIN, *supra* note 2, at 49. Most of 20 victims studied in Michigan characterized the beatings which they received as unwarranted and undeserved and described the men as having explosive tempers triggered by the slightest frustration. Eisenberg & Micklow, *supra* note 41, at 144.

45. Pizzey, *Violence Begins At Home*, London Spectator, Nov. 23, 1974, *quoted in* D. MARTIN, *supra* note 2, at 48.

46. Fletcher, *supra* note 42, at 60; Katz, *Battered Wives Seek Refuge*, Toronto Star, Aug. 23, 1975, at B6 (from interview with Clive Chamberlain of the Provincial Family Court Psychiatric Clinic in Toronto).

47. 1975 SELECT COMM., *supra* note 22, at ix; D. MARTIN, *supra* note 2, at 55-57; Fletcher, *supra* note 42, at 60.

48. Fletcher, *supra* note 42, at 60.

49. O'Brien, *Violence in Divorce-Prone Families*, in VIOLENCE IN THE FAMILY 66 (S. Steinmetz & M. Straus, eds. 1975); Straus, *supra* note 4, at 1.

50. Straus, *supra* note 4, at 1.

51. D. MARTIN, *supra* note 2, at 22-24; PIZZEY, SCREAM QUIETLY, *supra* note 41, at 74; Gelles, *supra* note 33, at 662-63; Gayford, *Wife Battering: A Preliminary Survey of 100 Cases*, BRITISH MED. J., Jan. 25, 1975, at 195-96.

III
THE INADEQUATE RESPONSE OF THE LEGAL SYSTEM

The overwhelming powerlessness of abused women coupled with the frequency and intensity of woman abuse makes it imperative that the legal system provide immediate and effective remedies for victimized women. The law, however, has not responded to the urgent needs of battered women. Measures which could provide some protection to the victims and deter the offenders either do not exist, are not enforced, or are so complicated by definitions and conditions that their application is inhibited. The police, prosecutors, legislators, and judges responsible for the lack of legal protection and enforcement in this area contend that the familial nature of the crime and the sanctity of marriage compel a policy of nonintervention.[52] The absurdity of this viewpoint is revealed by the actual destructive effect which woman abuse has on families and relationships. Nevertheless, these officials refuse to acknowledge this contradiction and continue practices and policies of nonintervention which only aggravate a woman's helplessness and reinforce a man's belief that he may legally abuse a woman.[53]

A. Application of the Criminal Law

Woman abuse consists of acts and injuries which fall within state statutory and case law definitions of the traditional crimes of assault and battery, aggravated assault, intent to assault or to commit murder, and rape, as well as the very untraditional crime of wife abuse.[54] Except for wife abuse, which is not generally recognized as a crime,[55] these crimes are misdemeanors and felonies punishable by incarceration in every jurisdiction in the United States.[56] Yet, these criminal laws are only theoretically available to abused women. American law does not recognize the crime of rape between married persons.[57] Pro-

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52. D. MARTIN, *supra* note 2, at 101. In the view of Cleveland Police Prosecutor Almeda Johnson, "wife abuse cases are treated fairly lightly by the judicial system not because it is a woman's problem, but because it occurs in the sacrosanct area of marriage where the court hesitates to intervene." Fletcher, *supra* note 42, at 61.

53. Gingold, *supra* note 20, at 94.

54. D. MARTIN, *supra* note 2, at 87-89.

55. One of the few states which has a spouse abuse statute is California. Enacted in 1945, CAL. PENAL CODE § 273d (West 1970 & Supp. 1977) provides:

> Any husband who willfully inflicts upon his wife corporal injury resulting in a traumatic condition, . . . is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for not more than 10 years or in the county jail for not more than one year.

Because the statute describes a felony and requires proof of "corporal injury resulting in a traumatic condition," it is rarely invoked. Police and courts are reluctant to convict under such conditions for reasons herein discussed. Truninger, *supra* note 41, at 263-64.

56. D. MARTIN, *supra* note 2, at 88-89. *E.g.*, In New York, the physical assault or rape of a woman would be considered a felony or a misdemeanor under N.Y. PENAL LAW §§ 120.00, .05, .10, .15, .20, .25, 130.20, .35 (McKinney 1975). A felony is punishable by a sentence of imprisonment of not less than one year. N.Y. PENAL LAW § 70(3) (McKinney 1975). A misdemeanor is punishable by a sentence of imprisonment of up to one year. N.Y. PENAL LAW § 70.15 (McKinney 1975).

57. Today 27 states statutorily provide for the immunity of the husband. Nineteen of these states define rape as being committed upon a person other than the spouse of the rapist, *e.g.*, CAL. PENAL CODE § 261 (West 1970 & Supp. 1977); N.Y. PENAL LAW § 130.00(4), 130.25-.35 (McKinney

cedural and discretionary obstacles prevent the application of the other criminal laws to cases of woman abuse.

1. The Refusal of the Police to Respond, Arrest, or File Charges

Policemen, whose decisions to respond to victims of crime and to invoke the criminal process largely determine the extent of law enforcement,[58] pose the first and most critical barrier to access to the aid of the criminal law. The breadth of discretion which the legal system invests in the police[59] permits them to make decisions which reflect and perpetuate misconceptions of sexual roles and family privacy which are held by those involved in the judicial process.[60] Police officers seem to view family violence as a "quasi-permissible social and non-criminal problem rather than a crime or potential crime of violence."[61] This attitude, the risk of liability for false arrest, the physical danger posed by intervention,[62] and general ignorance of how to cope with domestic violence have discouraged police involvement in cases of woman abuse.[63]

The police response is minimal regardless of the possible severity of the injuries that may be sustained by abused women. Woman abuse calls are uniformly assigned a low priority status.[64] Some calls are entirely "screened out" by police department personnel and never officially recorded or responded to at all.[65] The result of such procedures is that repeated calls, denoting the pattern of increasingly more frequent and brutal assaults characteristic of woman abuse, as well as the single serious assault call are missed.[66] The police may not respond until a death occurs.[67] When calls are assigned for response, police

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1975); 8 provide separate statutory exemptions, *e.g.*, MD. CRIM. LAW CODE ANN. § 27-464D (Supp. 1976). The other states generally apply the common law exemption to marital rape cases. In a recent case in New Jersey, a man was indicted for raping his wife, but the judge, although critical of the common law exemption for husbands to rape charges, held that it was codified in the New Jersey rape statute and that he did not have the authority to change it. That decision is currently being appealed. State v. Smith, No. 1600-75 (Cty. Ct. Essex, Jan. 21, 1977). A bill submitted to the New York State legislature which would have allowed a woman who was legally separated from her husband to file rape charges if he returned and forced her to have sexual relations against her will was killed in committee. Meislin, *Women Lobby State Legislators for Bills to Aid Battered Wives*, N.Y. Times, Apr. 23, 1977, at 48, col. 4.

58. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543 (1960).

59. *See* LaFave, *The Police and Non-enforcement of the Law* (pt. 2), 1962 WIS. L. REV. 179, 180-88, 238 (1962); Williams, *supra* note 38, at 7; Letter from Attorneys Sweeney and Williams of Garfield-Austin Neighborhood Legal Services, Legal Assistance Foundation of Chicago, to Supt. Rochford of the Chicago Police Dept. (Sept. 27, 1976) at 2 [hereinafter cited as Letter to Supt. Rochford].

60. Goldstein, *supra* note 58, at 557-80; LaFave, *supra* note 59, at 106, 121, 197-99, 214-15, 227; Parnas, *Police Response*, *supra* note 41, at 930-31.

61. Letter to Supt. Rochford, *supra* note 59, at 2.

62. Testimony of D. Martin *in Cal. Sen. Hearings*, *supra* note 11, at 17; Parnas, *Police Response*, *supra* note 41, at 920.

63. Bannon, *supra* note 8, at 3.

64. Testimony of M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 81; Letter to Supt. Rochford, *supra* note 59, at 2.

65. Bannon, *supra* note 8, at 6-7.

66. *Id.*

67. M. & H. Field, *Marital Violence and the Criminal Process: Neither Justice Nor Peace*, 47 SOC. SERVICE REV. 221, 224 (1973); Interview with Marjory D. Fields on CBS "With Jeanne Parr"

act slowly and often arrive too late to be of any help.[68] To circumvent the police decision not to respond to "domestic disturbances," abused women may lie about the reason for their call and identify the problem as an attack by a stranger[69] or an attack by someone with a weapon.[70] Such misidentification of the problem, however, quickly loses its effectiveness. As soon as the police discover that the woman is married to or living with her assailant, they leave without providing any aid and refuse to come the next time the same woman calls with a similar story.[71]

Even if the police do answer the abused woman's call, they rarely make an arrest, take any action to protect the woman from further danger, or obtain medical help.[72] Social attitudes, police training, and department regulations are responsible for this approach. For example, the Michigan Police Training Academy procedure recommends the following course of action for domestic dispute calls:

a) Avoid arrest if possible. Appeal to their vanity.
b) Explain the procedure of obtaining a warrant.
   (1) Complainant must sign complaint.
   (2) Must appear in court.
   (3) Consider the loss of time.
   (4) Cost of court.
c) State that your only interest is to prevent a breach of the peace.
d) Explain that attitudes usually change by court time.
e) Recommend a postponement.
   (1) Court not in session.
   (2) No judge available.
f) *Don't* be too harsh or critical.[73]

When the police do arrest, they are usually motivated by factors which they consider more compelling than simply concern that a crime has been

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(Nov. 16, 1976). *See, e.g.*, Hartzler v. City of San Jose, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (1975). In this case, the woman called the police to report that her estranged husband had contacted her and told her that he was coming to kill her. The police came only after the husband had stabbed and killed the woman. There had been 20 complaints to the police for violent acts by the husband in the year prior to the fatal stabbing.

68. D. MARTIN, *supra* note 2, at 92; Letter to Supt. Rochford, *supra* note 59, at 2.

69. Testimony of D. Martin *in Cal. Sen. Hearings*, *supra* note 11, at 20.

70. Bannon, *supra* note 8, at 6.

71. *Id.* at 6-7.

72. *See generally* D. MARTIN, *supra* note 2, at 92, PIZZEY, SCREAM QUIETLY, *supra* note 41, at 98-99.

73. Michigan Police Training Academy procedure for domestic calls is set forth in D. MARTIN, *supra* note 2, at 93. The approach of the New York City Police Dept. is summarized in Fields, *supra* note 10, at 1, col. 1, as remaining neutral, assuming all parties are at fault and calming both parties to stop the particular beating and reduce police injuries. Until recently, the training bulletin of the International Association of Chiefs of Police, Inc., similarly stated that most family disputes are "personal matters requiring no direct action. Once inside the home, the officer's sole purpose is to preserve the peace . . . the power of arrest should be exercised as a last resort." Gingold, *supra* note 20, at 54. Fortunately, this position has been reversed and police are now required to treat battered wives as victims of crime and husbands as violent lawbreakers. *See* Training Key 245, *supra* note 42 and International Association of Chiefs of Police, Inc., Training Key 246, Investigation of Wife Beating (1976) [hereinafter cited as Training Key 246].

committed or that a victim has been harmed. Most arrests occur when the peace of the neighborhood is disrupted or a deadly weapon is used.[74] There are, of course, those cases in which the assault is so serious that police have no alternative but to arrest.[75] The actual charges filed in those cases, however, do not always accurately correspond to the severity of the crime committed. The crimes charged tend instead to be those which involve lighter penalties, more casual treatment by the courts, and less involvement by the state attorney, such as disorderly conduct, malicious mischief, and trespass.[76]

The reluctance of the police to arrest and press charges is accounted for in part by the legal prerequisites for misdemeanor and felony arrests. In a number of jurisdictions, to arrest for a misdemeanor, an officer must have seen the criminal act committed in his presence or have a previously issued warrant for arrest.[77] In the typical woman abuse case the officer is called after the fact and cannot witness the crime. Officers usually do not have warrants because they are obtained only after the victim has filed a complaint with the district attorney, overcome the prosecutor's resistance to authorize the complaint, and convinced the judge to issue the warrant.[78] Even when authorized to arrest without a warrant or actual witnessing of the act, police still avoid making an arrest. For example, few arrests for woman abuse are made in Seattle, Washington, where the police are permitted to arrest on "reasonable belief" that a misdemeanor or gross misdemeanor involving physical harm to someone has been committed, even if the officer was not a witness.[79] In Washington, D.C. police may arrest without a warrant on probable cause, but choose instead to refer victims to a Citizen's Complaint Center which cannot provide immediate help at all hours.[80] The authority to arrest for a felony on "probable cause" or "reasonable belief" that a felony has been perpetrated by the person identified by the victim or witness is similarly rarely exercised.[81] The vague standards for arrest, the low percentage of arrests which result in convictions, and the fact that battered women may not pursue their cases once charges have been filed

74. Eisenberg & Micklow, *supra* note 41, at 156-57; Bannon, *supra* note 8, at 2.

75. D. MARTIN, *supra* note 2, at 94; Gingold, *supra* note 20, at 54.

76. Testimony of Officer Rackley *in Cal. Sen. Hearings*, *supra* note 11, at 42; Williams, *supra* note 38, at 8. A woman, beaten by her husband twice, called the police both times, but succeeded in having her husband arrested only after the second call when the husband was carrying a steak knife. The only charges were harrassment, possession of illegal drugs, and possession of a stolen credit card. An assault charge was not made. *See* Bard & Zacker, *supra* note 42, at 81. The 1967 study by Seattle reporters, Schwartz and Mills, also supports these conclusions. Of 70 cases of woman abuse reported in one week in Seattle, only 20 resulted in arrest. Only 9 of these went to trial, at which time 7 of the defendants pleaded guilty, 2 to police assault. Two were acquitted. The sentences imposed ranged from suspended sentences of one month in jail to fines of $25 to $30 to reduced charges of disturbing the peace. None of the defendants actually were imprisoned. Schwartz & Mills, *Wifebeating: Crime and No Punishment* 3, *in* FEMICIDE (C. Orlock, ed. 1967).

77. *See, e.g.*, N.Y.C., N.Y. Police Rules, Ch. 9 § 59.2 (Jan. 1, 1972); ILL. REV. STAT. Ch. 38 § 107-2 (a)(b) (1973).

78. These procedures and problems are discussed in text accompanying notes 95-102, *infra*.

79. WASH. REV. CODE ANN. § 10.31.100 (1969); Schwartz & Mills, *supra* note 76, at 6.

80. Yankowski, *Battered Women: A Study of the Situation in the District of Columbia*, 9-11, 13 (unpublished 1975), *cited in* D. MARTIN, *supra* note 2, at 98.

81. *See generally* D. MARTIN, *supra* note 2, at 90. *See, e.g.*, N.Y.C., N.Y. Patrol Guide §§ 110-1, 110-38 (Oct. 1, 1972).

are the reasons which the police often cite for their refusal to arrest.[82]

The policy of discouraging arrest limits the woman's ability to file charges by means of the citizen's arrest, an alternative available in most jurisdictions.[83] The police often fail to inform women of their right to make such an arrest and thus effectively deny it to the woman who is not aware of this alternative.[84] If she is aware of it, the police may still discourage her from using it and may refuse to aid if their help is necessary to take the man into custody and complete the arrest.[85] Procedures for civilian arrest may themselves incorporate the nonarrest policy by unreasonable requirements such as requiring the victim to take physical custody of her attacker and to deliver him to the police.[86] Since the woman has most likely called the police for help because she is unable to handle the man alone, she cannot meet such requirements and is effectively denied her right to make a civilian arrest.

2. The Refusal of the Police to Take Other Appropriate Action

Nonarrest, either directly or by virtue of the withholding of necessary assistance in effecting a civilian arrest, is not the only way in which the police fail to assist battered women. The police have also been known to refuse to provide the immediate aid necessary for the woman's physical well-being. There are reports of police officers refusing to assist a woman in obtaining medical treatment or in getting to a place of safety, refusing to remove the man or at least his weapon, and even refusing to report the incident officially.[87] Instead, police officers may offer women legal and other advice which exceeds the officer's authority and often misrepresents the law or the proper procedure to be followed. Such advice commonly consists of referral to attorneys, family court, and small claims court because "the police can do nothing."[88] Police also make statements which blame the woman and condone and even encourage the man's violence.[89] Sometimes police will try to intervene, to calm, and

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82. Testimony of Officer Rackley *in Cal. Sen. Hearings*, *supra* note 11, at 40; Training Key 245, *supra* note 42, at 4.

83. *See, e.g.*, CAL. PENAL CODE § 837 (West 1970); ILL. REV. STAT., Ch. 38 § 107-3 (1973).

84. For specific instances of police failure to inform women of their right to make a citizen's arrest, *see* the complaint filed in Bruno v. Codd, U.S.L.W. 2042 (Aug. 2, 1977), N.Y.L.J., July 6, 1977, at 7, col. 1 (Sup. Ct. N.Y., July 6, 1977), at paras. 71, 72, 104, 105, 151, 152, 274, 275, 345, 346, 516, 517, 541, 542, 566, 567.

85. Rockwood, *How To Tell It To The Judge*, Ms., Aug., 1976, at 96; Testimony of D. Martin *in Cal. Sen. Hearings*, *supra* note 11, at 17. For specific allegations of police refusal to help and of police action to discourage civilian arrest, *see* the complaint filed in Scott v. Hart, No. C-76-2395 WWS (N.D. Cal., filed Nov. 24, 1976), at paras. 12, 15.

86. D. MARTIN, *supra* note 2, at 90.

87. Eisenberg & Micklow, *supra* note 41, at 157. *See, e.g.*, complaints filed in Scott v. Hart at paras. 10, 12, 13, 15; and in Bruno v. Codd, at paras. 127, 153.

88. Interview with Marjory D. Fields on CBS "With Jeanne Parr" (Nov. 16, 1976). For specific allegations of police misconduct, including informing women that there was nothing that they could do, referring women to Family Court, attorneys, and the Society for the Prevention of Cruelty to Children, *see* the complaint filed in Bruno v. Codd, at paras. 65, 80, 139, 148-50, 273, 341-44, 512, 543, 565; and the complaint filed in Scott v. Hart, at para. 11.

89. For examples of police giving support to abusive men and failing to treat abused women as victims of crime, see the affidavits filed in Bruno v. Codd and cited in the denial of defendants' motion for summary judgment, N.Y.L.J., July 6, 1977, at 7, col. 1 (Sup. Ct. N.Y., July 6, 1977):

to arbitrate either on their own or as part of one of the crisis intervention programs which have arisen in the past ten years to train police to resolve family disputes without arrest.[90] Police will simply walk the assailant around the block once, return him to his home, and then leave.[91]

Whatever the police do or fail to do while responding to a victim's call, they usually depart having taken no action of a legal or referral nature to deal with the present assault or to deter future assaults.[92] Such inaction only aggravates the battered woman's situation; it supports the attacker's belief that his actions are condoned and will not be punished and thus may provoke an immediate retaliatory attack by him.[93] The battered woman, preferring no police response to one that makes her plight worse, eventually stops calling the police for help. The police may then wrongly believe that their action has been successful in preventing further abuse. They may think that they have satisfactorily protected the woman as well as furthered certain goals desired by the police: protecting police officers from deaths and injuries, preventing loss of time and effort on a legal process which the parties, the judge, or the prosecutor are likely to halt, and removing domestic violence from the legal system

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Even more disturbing are incidents alleged in the affidavits in which the responding officers are quoted as giving support to the assaulting husbands. Thus, one woman, whose arm had just been sprained by her husband's attack, requested his arrest, and says she was informed by a police officer that "there is nothing wrong with a husband hitting his wife if he does not use a weapon." (Affidavits, at 158-97). Another wife, who was slapped and struck with a knife by her husband, says she heard the officer who refused to arrest her husband, say to her husband, "Maybe if I beat my wife, she'd act right too." (Lalande Affidavit, p.4 annexed to reply brief).

90. Family Crisis Intervention Programs, which have now been tried in several cities including Oakland, Richmond, and Hayward, California, New York City, and Norwalk, Connecticut, train officers in basic psychology, mediation techniques, the uses of social services, and safety measures. For descriptions of some of these programs, *see* Parnas, *Police Response*, *supra* note 41, at 949-59; Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW & CONTEMP. PROB. 539, 549-58 (1971); Bard, *Family Intervention Police Teams as a Community Health Resource*, 60 J. CRIM. L.C. & P.S. 247 (1969); Bard & Zacker, *supra* note 42, at 73-75; D. MARTIN, *supra* note 2, at 135; *Cal. Sen. Hearings*, *supra* note 11, at 47-50, 58-66, 110-12, 141-210, 211-17. Although shortages of funds have led to the curtailment of most of these programs, *Cal. Sen. Hearings*, *supra* note 11, at 47, and the dismissal of officers trained under them, promoters of crisis intervention techniques report that these programs are still successful in reducing repeat calls, total calls, police injuries, arrests, and homicides. M. BARD, FAMILY CRISIS INTERVENTION: FROM CONCEPT TO IMPLEMENTATION 5 (1973) *cited in* Domestic Violence and the Police, *supra* note 15, at 2-3. Such reports may be true, but they may also simply reflect the ineffectiveness of programs which rely exclusively on mediation. Women who receive ineffective help from police eventually stop calling the police for help. Mediation is not the correct remedy for all incidents of abuse. It incorrectly treats all abuse cases as family squabbles and often leaves a woman defenseless against a man who has learned that he will not be arrested for beating this woman. Fields, *supra* note 10, at 4, col. 1; Eisenberg & Micklow, *supra* note 41, at 160-61. Calming techniques can be useful in solving family problems, but when an attack has occurred, police must be ready to conduct an assault investigation and arrest where appropriate. Training Key 245, *supra* note 42, at 3-4; Training Key 246, *supra* note 73, at 1.

91. Gingold, *supra* note 20, at 54; Letter to Supt. Rochford, *supra* note 59, at 2.

92. Bernstein, *She Shelters the Abused*, Daily News, March 28, 1977, at 37, col. 1; Letter to Supt. Rochford, *supra* note 59, at 1.

93. Fields, *supra* note 9, at 4, cols. 1-2; Letter to Supt. Rochford, *supra* note 59, at 1.

altogether.[94] This faulty interpretation adds yet another obstacle to the battered woman's fight for legal protection.

3. The District Attorney's Refusal to Act

As an alternative to police arrest, the abused woman may file a criminal complaint directly with the District Attorney's office. Filing criminal charges in this manner, however, is a lengthy and difficult process which does not provide the immediate aid which the battered woman needs and is not even likely to culminate in prosecution. Prosecutors, like police officers and judges, are reluctant to pursue a criminal charge against a man who has abused his wife or woman friend, even when there has been an arrest. Prosecutors tend to view woman abuse complaints as extralegal family matters which the overburdened judicial system not only cannot, but should not, handle, especially because prosecuting the man may take away the woman's support and force her on welfare.[95] They also argue that the heavy penalty and high bail for such crimes and the relationship of the parties increases the likelihood that either the man will contest the charges or the woman will drop the charges, so that prosecution is not likely to result in conviction.[96] To avoid prosecuting woman abuse cases, prosecutors have developed various diversion techniques. Secretaries and district attorneys are known to have flatly refused cases of battered women without any consideration of the facts of the particular case.[97] Even after taking the case for evaluation, the prosecutors misuse their discretion and refuse to prosecute for spurious reasons[98] or apply unreasonable standards for authorizing a complaint.[99] Preliminary referrals to inside bureaus[100] for hearings

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94. Parnas, *Police Response*, *supra* note 41, at 930-34; Bard & Zacker, *supra* note 42, at 74; Testimony of S. Gershenson *in Cal. Sen. Hearings*, *supra* note 11, at 61.

95. This belief is common among judges also. *See* text accompanying note 109 *infra*.

96. D. MARTIN, *supra* note 2, at 100, 109; Eisenberg & Micklow, *supra* note 41, at 158. Carol Murray, former director of the San Francisco Neighborhood Legal Assistance Foundation's Domestic Relations Unit, says, however, that she has never seen any statistics to support the claim that women prosecuting their husbands for assault fail to proceed any more frequently than any other prosecuting witness. Letter from Carol Murray, on the criminal prosecution of violent spouses, to Stanley Weiss, director of San Francisco's District Attorney's Bureau of Family Relations (1974), *quoted in* D. MARTIN, *supra* note 2, at 94.

97. *See, e.g.*, Memorandum of Law in Support of Motion for Class Certification and Preliminary Injunction at 2 and Complaint for Declaratory and Injunctive Relief at 2 in Raguz v. Chandler, No. C74-1064 (N.D. Ohio, filed Feb. 4, 1975).

98. *Id.* For example, prosecutors tell battered women that they cannot prosecute because they are not permitted to get involved in domestic matters. *Id.*

99. Truninger, *supra* note 41, at 259. The San Francisco District Attorney's Office, for example, requires that the following elements exist before the District Attorney will authorize a complaint and seek an arrest warrant before a judge: a crime defined in the penal code, identification of a specific defendant, witnesses (usually 3), and documentary proof such as medical records and affidavits of witnesses, severe injuries, as well as willingness of the victim to testify and a history of previous attacks. From material of the San Francisco District Attorney's Office provided by the Women's Litigation Unit of the San Francisco Neighborhood Legal Assistance Foundation, reported in D. MARTIN, *supra* note 2, at 109-10. These requirements are particularly difficult to meet in woman abuse cases, because the peculiar nature of the crime makes it extremely difficult to obtain witnesses or proof of injury. D. MARTIN, *supra* note 2, at 111; Eisenberg & Micklow, *supra* note 41, at 158. First, "the experienced wife-beater . . . goes for places that don't show, like the scalp, the stomach, especially during pregnancy, and the lower spine." *Cal. Sen. Hearings*, *supra*

and to outside agencies for counseling[101] are also made for the stated purpose of answering the needs and desires of beaten women. The actual effect of such action is the channeling of all woman abuse cases to hearings and counseling and the denial of an arrest warrant. It is these diversion techniques rather than the woman's emotional and family ties which cause a woman to drop charges and otherwise fail to follow through on prosecution.[102]

4. The Courtroom

Filing criminal charges and having the assailant arrested is only the beginning of the long ordeal which the battered woman must endure to obtain relief through the criminal justice system. While the case is pending the woman receives no protection but remains subject to danger from the man who is usually released and allowed to come home and live with her. The danger to the woman is further increased by features of the criminal law system which delay and often totally obstruct the granting of relief.

The defenses of intoxication, self-defense, or insanity which may be asserted against an assault and battery charge[103] are difficult to overcome in cases of woman abuse, because alcohol, mutual combat, and, arguably, abnormal mental states are often involved in such incidents.[104] The proof of injury necessary to sustain a charge of assault and battery is hard to produce, because there are usually no witnesses and the wounds often are not visible or have healed by court time. Medical proof is usually unavailable,[105] because the

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note 11, at 18. Second, medical proof is not available since medical assistance is often not sought by embarrassed women. Truninger, *supra* note 41, at 264. Third, the abuse consists of repeated assaults and not just an individual one, so that external injuries do not really reflect the true extent of the injury. D. MARTIN, *supra* note 2, at 111-12.

100. *E.g.*, The Bureau of Family Relations of the San Francisco District Attorney's Office, discussed by S. Weiss in *Cal. Sen. Hearings*, *supra* note 11, at 71-79, 218, and the Night Prosecutor Program in Columbus, Ohio, discussed in D. MARTIN, *supra* note 2, at 112-13.

101. The agencies mentioned in note 100, *supra*, often refer complainants to outside social agencies.

102. A recent study of felony cases in New York City by Vera Institute of Justice, finding that (1) criminal charges are often dismissed or reduced in severity, and (2) that defendant and victim often know each other, led researchers to conclude that the victims dropped charges and refused to cooperate, because "last night's fight was over" and they had reconciled with defendant. Goldstein, *Large Number of Crime Suspects Knew Their Victims Study Shows*, N.Y. Times, Dec. 4, 1976, at 30, col. 1; Brill, *Plea-Bargaining Bargain*, NEW YORK, Jan. 17, 1977, at 9, col. 2. This conclusion reflects the sexist misconceptions held by many law enforcement personnel and ignores the practices of police, prosecutors, and judges which obstruct and delay a woman's ability to prosecute a man she is living with and whom she fears. If she "makes up with him," it may only be in self-defense.

103. Intoxication may be a limited defense as in California, where it is not an excuse for a crime but is to be taken into consideration in determining intent when intent is a necessary element of the crime. CAL. PENAL CODE § 22 (West 1970). New York provides no defense of intoxication but does permit the defenses of self-defense, N.Y. PENAL LAW § 35.15 (McKinney 1975), and mental disease or defect, N.Y. PENAL LAW § 30.05 (McKinney 1975).

104. D. MARTIN, *supra* note 2, at 88; testimony of D. Martin *in Cal. Sen. Hearings*, *supra* note 11, at 18.

105. Testimony of D. Martin *in Cal. Sen. Hearings*, *supra* note 11, at 18; Gingold, *supra* note 20, at 94. Women who are beaten by their husbands and male friends and want legal protection should collect evidence of the beatings: photographs, medical records, witnesses who saw their physical and emotional condition at the time and will testify. Marjory D. Fields, attorney at South

woman's shame and the lack of police assistance often prevent the woman from obtaining medical assistance. If such assistance is obtained, medical personnel often either do not record or do not discover the cause of the injury which they are treating. Furthermore, the judges who hear woman abuse cases and decide these issues of proof tend to believe that domestic violence is a private matter which does not belong in a court of law.[106] The judges try to discourage women from going through with the proceeding[107] and, if counseling fails to reconcile the parties, may refer the complainant to divorce court.[108] Belief in reconciliation, skepticism of the woman's story, and reluctance to imprison a wage earner often move judges to dispose of woman abuse cases by releasing men on bail or on their own recognizance.[109] Sometimes overly light penalties such as unsupervised probation or fines are imposed.[110] Some jurisdictions have a quasi-criminal remedy called a peace bond which requires that the accused put up a certain sum of money as a surety to keep the peace.[111] In California[112] and in Illinois,[113] failure to pay is punishable by incarceration. Possible constitutional problems in the process of issuing and enforcing peace bonds, however, often inhibit the issuance of such bonds.[114] When issued, the peace bond is still of dubious value, because it generally is not enforced.[115]

Regardless of which remedy the judge chooses, if there is no serious threat of imprisonment, the man is left free to return to the woman he has already assaulted and to repeat his assault, perhaps more severely. Thus, the criminal

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Brooklyn Legal Services, speaking at N.Y.U. School of Law Symposium on Wifebeating (Jan. 26, 1977).

106. *See, e.g.*, State v. Rhodes, 61 N.C. (Phillips) 445 (Super. Ct., Wilkes Cty. 1867); Bailey v. People, 54 Colo. 337, 130 P. 832 (1913). *See* cases cited for the general rule in 41 C.J.S. Husband and Wife §§ 64, 396; 41 AM. JUR. 2d § 522; 6 AM. JUR. 2d § 44.

107. Comments of Eileen P. Sweeney, attorney at Legal Assistance Foundation of Chicago, The Legal Rights of Battered Women in Illinois 4 (presented at Woman Abuse Conference in Chicago, Oct. 9, 1976) [hereinafter cited as Sweeney]; Williams, *supra* note 38, at 8.

108. D. MARTIN, *supra* note 2, at 116.

109. PIZZEY, SCREAM QUIETLY, *supra* note 40, at 116. Testimony of D. Martin *in Cal. Sen. Hearings*, *supra* note 11, at 17; "A judge isn't going to put a guy who makes a living in jail and his wife on welfare . . . . In terms of the respective values of our society, his earning money outweighs her possible physical injury." Gingold, *supra* note 20, at 94, *quoting* Carol Murray, Washington, D.C. attorney.

110. A Cleveland, Ohio, attorney who represents many abused women reports that, if the man pleads guilty or no contest or if he is found guilty in court, "in 90 percent of the cases the guy is placed on probation and in 80 percent of the cases, the probation is inactive . . . . The criminal justice system doesn't think he's dangerous, so what good does any of that do?" Fletcher, *supra* note 42, at 62.

111. Truninger, *supra* note 41, at 265-66; Parnas, *Judicial Response*, *supra* note 41, at 600-05; Sweeney, *supra* note 107, at 5; Williams, *supra* note 38, at 8. *E.g.*, ILL. REV. STAT. ch. 38, § 200-1 (1965).

112. *See* CAL. PENAL CODE §§ 706, 707 (West 1970).

113. ILL. REV. STAT. ch. 38, § 200-7 (Smith-Hurd 1973).

114. *E.g.*, The California Peace Bond has not been used since 1943, because, as Truninger explains, the statute violates several Constitutional rights. A poor man who cannot pay the surety is discriminatorily imprisoned; an accused person is subjected to double jeopardy, because a prior conviction is conclusive evidence of a violation; a man may be imprisoned for failing to pay without having committed a "crime"; and the rights to trial by jury and appointed counsel are contravened. Truninger, *supra* note 41, at 265-66.

115. In Illinois, the document has been described as a "non-document," Bannon, *supra* note 8, at 5, as well as "utterly improper." Parnas, *Police Discretion*, *supra* note 90, at 563.

justice system not only thwarts the woman's attempts to protect herself, but also harms her. The result is that the system contradicts its own ostensible purposes of protecting citizens from bodily harm and deprivation of freedom.

B. Civil Remedies

Denied access to criminal remedies solely because of the "family nature" of the assault, abused women may turn to the civil system for protection. The forms of civil relief open to them are various types of injunctive orders, money damages, and actions related to the marital relationship such as divorce, separation, and support. Whether or not and to what extent these forms of relief are really available depends on the applicable state law, on the existence of a special family court, and on enforcement policies. Civil remedies, however, like criminal remedies, are either not suited to the immediate needs of the woman or are not enforced when the parties involved are either married or living together.

1. Protective Orders: "Immediate Protection"

The injunctive relief available to battered women consists of protective orders which may command the assailant to "cease and desist" from offensive conduct, or to stay away from or vacate the home. They may also determine the custody of children. Most injunctions issue upon application and a hearing at which the petitioning woman must make a showing of threatened or actual harm. Preliminary ex parte injunctions (temporary orders which issue without a hearing) are sometimes available. Enforcement may be achieved through the police and courts, and violation may result in citation for contempt of court and confinement in prison or a fine.[116] These orders and enforcement mechanisms, if made available to every battered woman, could afford some immediate protection to her and could deter the offender. The availability of these orders, however, is often limited by statute.

Injunctive relief is often conditioned on divorce or separation.[117] Such a requirement denies relief to those women who do not or cannot obtain a divorce or separation but whose need for protection is just as great. The women who cannot obtain a protective order include: (1) women not legally married; (2) women who are married but for whom divorce or separation is either unacceptable,[118] inappropriate,[119] not yet commenced, too expensive,[120] or

116. *E.g.*, In New York, The New York Family Court Act § 846 (McKinney 1975) provides for a sentence of up to six months in jail for willful violation of the order.

117. *E.g.*, CAL. DIV. CODE §§ 4359, 5102 (West Supp. 1976); ILL. REV. STAT. ch. 40, § 21.4 (1967); MASS. GEN. LAWS ANN. ch. 208, § 34B (West Supp. 1976). *See* D. MARTIN, *supra* note 2, at 115-16.

118. A divorce or separation may be unacceptable for religious or social reasons.

119. In some cases, the reasons for ending the marriage may be legal grounds for annulment rather than divorce. These may include insanity, the existence of a prior valid marriage, fraudulent inducement, duress, or drunkenness or narcotics addiction of which the woman was not aware at the time of the marriage.

120. An abused woman may not be able to pay a private attorney's fee and there may be no legal aid attorney to process her divorce. Many areas have no civil legal aid or legal service lawyers. Furthermore, divorce, separation, and annulment are low priority in legal aid and legal service offices. Interview with Marjory D. Fields, attorney at South Brooklyn Legal Services, Inc., in New York City (Jan. 26, 1977).

simply undesirable; (3) women who have been divorced or separated, but who still need protection from ex-husbands; and (4) women who cannot afford to wait the period of time it takes to process a divorce. Massachusetts has extended its injunction to actions for annulment, support, and separate maintenance, but such an extension is an exception and remains inadequate.[121] New York has dropped the divorce or separation requirement as a prerequisite to relief but still limits the issuance of injunctions to women who are related to and living with the men who assault them or to women who are awaiting the conclusion of a pending divorce, separation, or annulment proceeding.[122] Consequently, women who have already been divorced or separated or who are not legally married to their assailants cannot get orders of protection in New York at the present time. Only within the last year and only in Pennsylvania has relief been extended to all women regardless of marital status.[123] Those states which confine the issuance of injunctions to marital dissolution proceedings also often confine the types of orders issued to eviction of one party from the home and (its) temporary possession by the other,[124] temporary alimony, and temporary custody of children. These states, however, lack other optional or concurrent orders specifically enjoining abusive conduct.[125] Thus, by concentrating on questions relating to marital dissolution, these states have ignored the primary needs of battered women for forceful, specific, and immediate protection.

New York is one of the few states with a comparatively long history of providing a comprehensive program of injunctive relief. The legislation which created the family court in 1962 also included a section governing family offenses. The Family Court Act provides for the issuance of both ex parte preliminary temporary orders of protection[126] and orders of protection which issue after a full hearing and are enforceable for up to one year.[127] The Act provides specific orders which, in woman abuse cases, would require the husband to abstain from abusive conduct, would award possession of the marital home to

121. MASS. GEN. LAWS ANN. ch. 208, § 34B (West Supp. 1976).

122. The jurisdiction of the New York Family Court, as defined in N.Y. FAM. CT. ACT § 812 (McKinney 1969) amending N.Y. FAM. CT. ACT § 812 (McKinney 1962), was narrowly interpreted by case law to exclude family members who did not reside together and unmarried persons living together as a family unit. *See* People v. Williams, 24 N.Y.2d 274, 248 N.E.2d 8, 300 N.Y.S.2d 89 (1969); People v. Allen, 27 N.Y.2d 108, 261 N.E.2d 637, 313 N.Y.S.2d 719 (1970). The new law, effective since September 1, 1977, limits the Court's jurisdiction to members of the same family or household, defined as: a) persons related by consanguinity or affinity to the second degree, and b) persons legally married to each other. 1977 N.Y. Laws ch. 449 § 1 (McKinney) (to be codified as N.Y. FAM. CT. ACT § 812), and to persons who have divorce, separation, or annulment proceedings pending. 1977 N.Y. Laws ch. 449 § 9 (McKinney) (to be codified as N.Y. DOM. REL. LAW § 252).

123. 35 PA. CONS. STAT. §§ 10181-90 (Purdon 1977) was enacted Oct. 7, 1976. Section 10182 defines Family or Household Members as "spouses, persons living as spouses, parents and children, or other persons related by consanguinity or affinity."

124. *E.g.*, ILL. REV. STAT. ch. 40, § 21.4 (1973); MASS. GEN. LAWS ANN. ch. 208, § 34B (West Supp. 1976).

125. *E.g.*, Both Massachusetts and Illinois provide temporary alimony, ILL. REV. STAT. ch. 40, § 16 (1973); MASS. GEN. LAWS ANN. ch. 208, § 34, (West Supp. 1975) and temporary custody of children, ILL. REV. STAT. ch. 40, § 14 (1973). MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1975), but lack orders to enjoin abusive conduct in general.

126. N.Y. FAM. CT. ACT § 828 (McKinney 1975).

127. *Id.* § 842.

the woman, and would determine child custody and visitation. Article Eight also authorizes the court to place the husband on probation for a one year period.[128] The orders are enforced by way of certificates issued to the woman and to the police. This certificate authorizes a police officer to take an alleged violator into custody and to take any measures "within his power" to secure the protection which the order is intended to provide.[129] Upon proof of willful failure to obey the order, a judge may cite the violator for civil contempt and sentence him for up to six months in jail.[130] Prior to September, 1977, the New York Family Court Act also provided for transfer of the abuse case to Criminal Court if the Family Court judge concluded that the protective and probationary orders of Family Court were inappropriate.[131] This provision existed because Family Court had exclusive jurisdiction over family offenses.[132] The transfer provisions have since been repealed,[133] and jurisdiction over family offenses has been expanded to lie in both family court and criminal court.[134]

Theoretically, a broad scheme of protective orders with immediate enforcement mechanisms and stringent sanctions should meet an abused woman's need for protection. Yet, it does not because of the same judicial biases and police policies toward the "family nature" of the crime which make criminal remedies ineffectual. To have an order issued, a woman must appear in court and thus incur substantial expenses in the form of attorney's fees and filing expenses and experience extensive delays due to probation appointments and calendar backlog.[135] Even in New York, where aid is supposed to be available immediately and where a woman does not have filing fees or need an attorney, a woman is often denied access to that aid by intake clerks and probation personnel. In violation of the Family Court Act,[136] they may refuse to permit

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128. *Id.* § 841(c).

129. *Id.* § 168; N.Y.C. Police Reg. § 110-8 (March 1, 1972). The provision for issuance of the order to the police agency became effective September 1, 1977. 1977 N.Y. Laws, ch. 449 § 8 (McKinney) (to be codified as N.Y. FAM. CT. ACT § 842-a).

130. N.Y. FAM. CT. ACT § 846 (McKinney 1975).

131. *Id.* § 816(a) (repealed 1977). The processes of Family Court were held to be appropriate so long as there was a reasonable opportunity for reconciliation between the parties and a reasonable likelihood of the preservation of the family unit. In making this determination, the interests of the community as well as the family were to be considered. Hawley v. Hawley, 78 Misc. 2d 55, 355 N.Y.S.2d 962 (Fam. Ct. Sullivan County 1974). The helpfulness of Family Court processes to the family's problems, the desires of the petitioner, the danger to the petitioner, and the criminal nature of the conduct are the factors which were to be considered in making the transfer decision. Montalvo v. Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605 (Fam. Ct. City of N.Y. 1968).

132. N.Y. FAM. CT. ACT § 812 (McKinney 1975) (amended 1977).

133. 1977 N.Y. Laws, ch. 449 § 2 (McKinney).

134. 1977 N.Y. Laws, ch. 449 § 1 (McKinney) (to be codified as N.Y. FAM. CT. ACT § 812). This revision properly leaves the choice of forum up to the petitioner. It also properly requires that the petitioner be informed that there is a choice, what the consequences of that choice are, and that a choice bars any subsequent suit in another court for the same offense. 1977 N.Y. Laws, ch. 449, § 1 (McKinney) (to be codified as N.Y. FAM. CT. ACT § 812 (2)).

135. D. MARTIN, *supra* note 2, at 105; Truninger, *supra* note 41, at 267-68.

136. N.Y. FAM. CT. ACT § 823(b) (McKinney 1975), provides: "The probation service may not prevent any person who wishes to file a petition under this article from having access to the court for that purpose." Section 823(d) further provides: "The probation service may not be authorized under this section to compel any person to appear at any conference, produce any papers, or visit any place." The new act similarly prohibits the official appointed under new § 812(2) (appointed to

filing, leave allegations out of the complaint, require return appointments, compel support petitions, and refer a woman to probation without informing her of her rights to bypass probation, to file a petition at any time, and to file for an immediate temporary order of protection.[137]

The woman who is not deterred by the complex procedures of family court and who manages to file a petition goes to court without the right to appointed counsel which the man is granted.[138] She faces a judge who may be predisposed against the use of the courts in family disputes.[139] This judicial attitude has been codified in the New York Family Court Act,[140] which emphasizes preserving the family. This results in overuse of the ineffective statutorily provided remedies. Thus, in the past, in New York, judges rarely transferred to criminal court cases which were really criminal matters. Rather, they retained jurisdiction and thereby precluded a criminal hearing on the charge.[141] The small number of family court judges who recognized the seriousness of woman abuse and the obstacles to obtaining relief in criminal court preferred to keep the case in family court in order to issue a strong order of protection. They knew that if the case were transferred, the woman would have no protection while the case was pending and that the assignment of counsel to the defendant, the representation of the woman by a prosecutor likely to have negative feelings about the seriousness and appropriateness of such cases,[142] and the prosecution of the case before a judge likely to be soft on woman abusers[143] would probably result in a judgment for the man and no relief for the woman. Most family court judges, however, only reluctantly issue temporary orders of

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advise the petitioner of the procedures available for instituting family offense proceedings) from discouraging or preventing the filing of a petition under the Act. 1977 N.Y. Laws, ch. 449 § 1(3) (McKinney) (to be codified as N.Y. FAM. CT. ACT § 812(3)).

137. *For the Battered Bride*, N.Y. Times, April 28, 1977, at A22, col. 1. *See* complaint filed in Bruno v. Codd at paras. 113-15, 221-24, 297-307, 311-24, 350-82, 424-27, 430-35, 439-54, 464-71, 483-93, 546-50.

138. N.Y. FAM. CT. ACT § 262(a)(ii) (McKinney 1975).

139. *See* text accompanying notes 106-10, *supra*. Many judges feel that women abuse court processes as an unfair weapon in a family quarrel. The fallacy of this argument is evident when one realizes how difficult it is to obtain court help. Going to court is not only not "fun" for a battered woman, but also puts her in more danger. A battered woman does not go to court "on a lark." Marjory Fields, attorney at South Brooklyn Legal Services, speaking at N.Y.U. School of Law Symposium on Wifebeating (Jan. 26, 1977).

140. The policy of Article 8 of the New York Family Court Act against criminal conviction and punishment and for practical help is set out in § 811:

> In the past, wives and other members of the family who suffered from disorderly conduct, harassment, menacing reckless endangerment, assaults, or attempted assaults by other members of the family or household were compelled to bring a "criminal charge" to invoke the jurisdiction of a court. Their purpose, with few exceptions, was not to secure a criminal conviction and punishment, but practical help.

N.Y. FAM. CT. ACT § 811 (McKinney 1975).

141. Note, *Jurisdiction Over Intra-Family Offenses: A Plea for Legislative Action*, 45 N.Y.U.L. REV. 344, 351 (1970). Only 2% of all family offense cases are transferred by family court to criminal court. Report of the Admin. Bd. of the Judicial Conf. for July 1, 1973, through June 30, 1974, Leg. Doc. No. 90 73 (1974); Report of the Admin. Bd. of the Judicial Conf. for July 1, 1972 through June 30, 1973, Leg. Doc. No. 90 349 (1973). A final disposition by family court precludes a criminal proceeding on the charge. N.Y. FAM. CT. ACT § 845 (McKinney 1975).

142. *See* text accompanying notes 95-96 *supra*.

143. *See* text accompanying notes 106-09 *supra*.

protection since they ostensibly regard the man's due process right to a hearing as superior to the woman's need for immediate protection.[144] This argument is made even though the man is accorded a due process hearing upon the subsequent issuance of a permanent order. Moreover, the temporary order only forbids the doing of an act which is already illegal.[145] An order requiring the man to vacate and stay away from the home is also difficult to obtain, even after a hearing. Judges are reluctant to evict a man from a home which they almost irrebuttably presume he owns and has bought. The presumption persists when the home is a rental unit with no equity, or when the lease is solely in the woman's name, or even when the man makes no financial contribution and the woman and children are on welfare.[146] Orders of probation are also an uncommon disposition.[147] If a judge issues any order at all, it is most likely one which only requires the man to cease assaulting the woman. The three to six months which the woman has waited to receive that order significantly decreases the aid which it renders.[148] Refusal to issue an order and dismissal of the petition,[149] based on the fact that there has been no new assault since the one described in the petition, is quite common.

The value of a protective order is further reduced by enforcement procedures which are neither effective nor exercised. The police do not have copies of the restraining orders filed with them[150] and are not always specifically authorized to arrest upon violation of the order.[151] Even when authorized to arrest, police still refuse to do so, reasoning that such action would only be nullified by the subsequent release of the man either on low bail or on his own recognizance.[152] When an abused woman seeks enforcement of an order, police

144. Gingold, *supra* note 20, at 94; Judge Margaret Taylor of the N.Y.C. Family Court, speaking at N.Y.U. School of Law Symposium on Wifebeating (Jan. 26, 1977).

145. "Corporations can get temporary orders of protection, why not abused women?" Marjory D. Fields, attorney at South Brooklyn Legal Services, speaking at N.Y.U. School of Law Symposium on Wifebeating (Jan. 26, 1977).

146. *Id.*

147. For a discussion of probation orders in Detroit, Milwaukee, and New York, *see* Parnas, *Judicial Response*, *supra* note 41, at 611-20, 638. In New York, however, only a small number of all family offense petitions are disposed of by the issuance of orders of probation. This is probably due to the pre-hearing counseling and the lack of probation staff. REPORT OF THE FAMILY COURT 375, 376 (1967), *noted in* Parnas, *Judicial Response*, *supra* note 41, at 638.

148. Marjory D. Fields, attorney at South Brooklyn Legal Services, speaking at N.Y.U. School of Law Symposium on Wifebeating (Jan. 26, 1977).

149. In 1966-1967, 38% of the petitions disposed of in New York City were either withdrawn or dismissed, while 54% were withdrawn or dismissed in other counties. REPORT OF THE FAMILY COURT at 377 (1967). In the Schwartz and Mills study in Seattle, 50 of the 70 cases looked at were withdrawn or dismissed. Schwartz & Mills, *supra* note 76.

150. In New York, the new law specifically provides for filing the order with the police department. 1977 N.Y. Laws ch. 449 § 8 (to be codified as N.Y. FAM. CT. ACT § 842-a). The Pennsylvania statute, 35 PA. CONS. STAT. §§ 10181-90 (1976), lacks such a provision.

151. New York City police are directed to arrest upon violation of any order of protection as well as upon the authority of a warrant from family court. N.Y. FAM. CT. ACT § 168 (McKinney 1975); N.Y.C., N.Y. Police Rule 52.3; N.Y.C. Police Reg. § 110-8 (Oct. 1, 1972). In California, however, police are not specifically authorized to arrest for violation of an order of protection and police argue that civil contempt and not police arrest is the proper enforcement mechanism for such orders. D. MARTIN, *supra* note 2, at 106; Testimony of Officer Rackley and M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 42, 83.

152. Testimony of Officer Rackley *in Cal. Sen. Hearings*, *supra* note 11, at 42.

often refuse, telling the woman that they do not understand the meaning of the order,[153] that they cannot enforce the order because the woman does not have a copy to show them,[154] that they can do nothing until an actual injury occurs,[155] or that the matter is civil and outside of their jurisdiction.[156] Instead of enforcing the order, the police may advise the woman to see her attorney in order to file another petition for violation of the order.[157] Instituting another civil proceeding is slow and requires fighting the bureaucratic machinery all over again only to have the judge release the man with a warning in exchange for his unenforceable promise not to touch the woman.[158] Judges rarely imprison in such situations.[159]

A woman in need of protection, who has put up with the "time consuming, expensive and humiliating"[160] processes of civil court, receives only a meaningless piece of paper which is not enforced by police and courts. The order may make a woman feel more secure, but it does so falsely and only temporarily, because the man will be free to assault her again and will do so.[161] Her futile effort has taught her not to seek help from a court system which not only does not protect her but which puts her in even more danger[162] by supporting the man's belief that it is not wrong to assault one's wife or female friend.

2. *Other Civil Remedies*

Two other remedies which are relevant and possibly helpful to the beaten woman are the civil actions for tort damages and divorce. Neither offer her any protection, and both are limited in availability. Where they exist, however, these remedies may offer a woman some freedom which, in conjunction with immediate protection, may be of some help to her.

A woman who is not married to her male assailant may sue in tort for monetary damages for the physical and emotional injuries which she has suffered. A woman married to or separated from her assailant does not have the same right in all states. The common law doctrine of interspousal immunity which recognizes husband and wife as a single legal entity acts as a bar to a wife's suit in tort in twenty-three states today.[163] Through court decisions and

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153. D. MARTIN, *supra* note 2, at 107; Testimony of M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 83.

154. Testimony of M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 83.

155. D. MARTIN, *supra* note 2, at 105.

156. Eisenberg & Micklow, *supra* note 41, at 154.

157. D. MARTIN, *supra* note 2, at 105; Testimony of R. Chamberlain *in Cal. Sen. Hearings*, *supra* note 11, at 68.

158. D. MARTIN, *supra* note 2, at 105.

159. 45 N.Y.U.L. REV., *supra* note 142, at 351; Gingold, *supra* note 20, at 94.

160. Gingold, *supra* note 20, at 94.

161. D. MARTIN, *supra* note 2, at 108.

162. For plaintiffs' allegations that they had learned from experience not to go to the police and courts again, *see* complaint filed in Bruno v. Codd, at paras. 177, 178, 408, 415; complaint filed in Scott v. Hart, at para. 12. "Mrs. Doe thought about going back to court or calling the police, but she was so depressed by her earlier experiences that she thought it would be more effective to just get an ice-pack to reduce the swelling." Complaint filed in Bruno v. Codd, at para. 415.

163. Williams, *supra* note 38, at 5. *E.g.*, ILL. REV. STAT. ch. 68, § 1 (1965).

legislation, the doctrine of interspousal immunity is no longer the prevalent rule.[164] The usual public policies put forth to justify this rule: domestic tranquility, the fear of collusive or frivolous suits, and the availability of other remedies such as divorce and criminal prosecution,[165] are clearly inapplicable to a suit by a woman who has been intentionally assaulted by her husband.[166] The woman abuse situation presupposes the absence of any tranquility which could be disrupted and the hostility engendered negates the possibility of collusion.[167] Adequate alternative remedies are not available in either criminal court[168] or divorce court.[169] On the other hand, if the tort remedy is permitted and the money is available to satisfy the judgment, a damage suit could provide a woman with resources which would enable her to leave her husband and start a new life.[170]

The divorce remedy, as discussed in reference to protective orders[171] and judicial excuses for refusing to apply civil and criminal remedies,[172] is a limited remedy. Aside from the previously mentioned personal, religious, financial, and other factors which limit use of the divorce remedy, the legal elements of the divorce action itself often make it unavailable to the battered wife. The wife may not have a cause of action against her husband if the state in which she resides will not grant a divorce on the ground of cruel and inhuman treatment.[173] Where such a ground exists, a woman who has fled her home may be prevented from getting a divorce by the defense of abandonment available to her husband.[174] The woman must also satisfy a heavy burden to prove cruelty.[175] Most states require proof of repeated acts, continuing course of conduct, or, where only a single act occurs, aggravated circumstances such that life and health are endangered, the marriage is destroyed, or cohabitation

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164. *See generally* Annot., 43 A.L.R.2d 632 (1955). Interspousal immunity was abandoned in California in 1962 in Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Reptr. 97 (1962). New York common law interspousal immunity was abrogated by the enactment of G.O.L. § 3-313 (McKinney 1975) in 1937.

165. Annot., 43 A.L.R.2d 632, 635, 663 (1955).

166. Williams, *supra* note 38, at 5-6.

167. D. MARTIN, *supra* note 2, at 103; Williams, *supra* note 38, at 5-6. For application of this reasoning by the courts, *see* Brandt v. Keller, 413 Ill. 503, 511, 109 N.E.2d 729, 732, 733 (1953).

168. *See* text accompanying notes 54-111 *supra*.

169. *See* text accompanying notes 171-81 *supra*.

170. D. MARTIN, *supra* note 2, at 103.

171. *See* text accompanying notes 116-62 *supra*.

172. *See* text accompanying notes 95-96, 107 *supra*.

173. *E.g.*, Until 1972, Michigan statutes listed exclusive grounds for divorce which did not include the ground of cruel and inhuman treatment. MICH. COMP. LAWS ANN. § 552.6 (1967). In 1972, the statute was amended to allow divorce when there has been a breakdown of the marriage. MICH. COMP. LAWS ANN. § 552.6 (1972).

174. *E.g.*, N.Y. DOM. REL. LAW § 171(2) (McKinney 1975) provides for the defense of abandonment. *See* Mante v. Mante, 34 App. Div. 2d 134, 309 N.Y.S.2d 944 (2d Dept. 1970) for the case law rejection of all affirmative defenses to an action for divorce based on abandonment. Thus, a woman is compelled to remain in the marital residence to avoid the appearance of abandonment which would jeopardize property, custody, and support rights.

175. For a discussion of the "Single Act as a Basis of Divorce or Separation on Grounds of Cruelty," *see* Annot., 7 A.L.R.3d 761, 765 (1966).

is impossible.[176] A New York Court of Appeals decision recently departed from this standard and held that one beating was sufficient to prove cruel and inhuman treatment.[177] If constructive abandonment is the only ground for divorce open to a woman, she may be able to obtain a divorce by alleging that her husband's conduct put her in fear for her safety and justified her barring him from the home or her leaving the home. Divorces based on the ground of abandonment, however, require that a certain period of time pass before a divorce can be finalized.[178] Divorce in general is not an immediate remedy. In many places a woman may have to wait over a year before her case reaches trial.[179] While her divorce is pending, a woman is still in danger. Protection may not be available at the time it is needed. The jurisdiction may lack appropriate protective orders[180] or the specific court awarding the divorce may not have the authority to issue them.[181] The woman who obtains a divorce may still be in danger of assault from her ex-husband, but the dissolution of her marriage makes orders of protection unavailable to her in most jurisdictions. She is forced to rely on the largely ineffective remedies of criminal court.

Although not a total or immediate remedy, divorce is a very practical remedy. Divorce and the accompanying support and custody decrees give a woman economic and psychological freedom. A divorce judgment is also the best way to get the man out of the house, because judges are less reluctant to grant women exclusive use of the home in a divorce judgment than in a judgment which concerns parties who remain married. Divorce also allows the woman to leave without fear of an abandonment charge. Like the relief afforded by tort damages, divorce should be considered concurrently with other remedies which give immediate protection, but not as an absolute remedy by itself.

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176. Echevarria v. Echevarria, 40 N.Y.2d 262, 353 N.E.2d 565, 386 N.Y.S.2d 653 (1976).

177. *Id.* In dismissing the complaint for divorce, the trial judge noted that the plaintiff might have grounds for divorce based upon constructive abandonment but would have to wait until a year of separation had passed. The Court of Appeals, in overturning that decision, noted that "[I]t would serve no purpose to require plaintiff to delay her action for divorce until the statutory period for 'constructive abandonment' had elapsed . . . . It would be pointless to allow this obviously defunct marriage to be needlessly prolonged in light of the evidence of physical abuse and its effect on the physical and mental well being of the plaintiff." *Id.* at 263, 353 N.E.2d at 566, 386 N.Y.S.2d at 654.

178. *E.g.*, New York law requires a person to wait at least a year before obtaining a divorce on the ground of abandonment. N.Y. DOM. REL. LAW § 170(2) (McKinney 1975).

179. Marjory D. Fields, attorney at South Brooklyn Legal Services, Inc., speaking at N.Y.U. School of Law Symposium on Wifebeating (Jan. 26, 1977).

180. *E.g.*, Missouri provides temporary orders for custody and support of children, MO. STAT. ANN. § 452.390 (Vernon Supp. 1976), and alimony, MO. STAT. ANN. § 452.315 (Vernon Supp. 1976), but does not provide orders to protect a woman's physical safety pending divorce.

181. Until September 1, 1977, the New York Supreme Court had exclusive jurisdiction over divorce, separation, and annulment proceedings but refused to issue protective orders. The judges of the supreme court argued that such orders were to be issued only by the family court, even though existing case law supported the conclusion that the supreme court had concurrent jurisdiction with the family court for actions under the Family Court Act. *See* Kagen v. Kagen, 28 App. Div. 2d 734, 282 N.Y.S.2d 30 (1967). The new law effective September 1, 1977, in New York, remedies this problem by specifically empowering the supreme court to issue protective orders pending divorce, separation, or annulment actions. 1977 N.Y. Laws ch. 449 § 9 (McKinney) (to be codified as N.Y. DOM. REL. LAW § 252).

IV
THE NEED FOR REFORM

The present civil and criminal remedies for woman abuse are inadequate, ineffective, or unenforced. Measures are necessary to provide abused women with immediate protection from assault and to provide assurances that assaults will not recur in the future. Law enforcement personnel must be educated to recognize and to respond flexibly to the needs of battered women. At the same time, they must be authorized to intervene in abuse situations in the most effectual and appropriate manner. Only through rigorous application of legal sanctions will men learn that they cannot abuse and beat their female companions.

A. Towards Better Law Enforcement

1. Documentation and Reportage

Documentation and reportage of incidents of woman abuse is necessary to effectuate any change in the response of the law to abused women.[182] Police departments, courts, and other public services that deal with assaulted women should be required to keep statistics on the number and nature of woman abuse calls, the type of action taken in response thereto, and the consequences of that action. This information would provide a more accurate picture of woman abuse and could be used to educate the public and public officials. Such information would lead to better understanding of the problems peculiar to abused women, and thus to better remedies. Records of individual incidents, calls, and protective orders would also help law enforcement personnel to assess previous police or judicial action in the same household. They could then respond more effectively to women who may call repeatedly for help or who may have orders of protection which must be enforced.

2. The Police

Police action is a critical factor in the initiation of the criminal process and in the enforcement of the civil protective order. Therefore, to insure a proper police response, police discretion should be reduced by directing police officers to answer woman abuse calls and to arrest and file criminal charges whenever appropriate. Police training must include instruction in the handling of domestic violence in a manner that both emphasizes the serious and unique nature of the abuse received by women and accommodates the officers' concerns for personal safety.[183] The police should be taught to ignore personal biases and to

182. *Cal. Sen. Hearings*, *supra* note 11, at 84, 92; Fields, National Women's Agenda, Objective No. 13, Creation of Legal Protection and Support for Abused Wives 3 (1976) [hereinafter cited as NWA Obj. 13]; Sweeney, *supra* note 107, at 11.

183. Sweeney, *supra* note 107, at 11; Williams, *supra* note 38, at 10. A recent study of the handling of domestic violence by police presents evidence that the way in which a police officer handles a disturbance has some effect on whether the officer is injured. Touching and threatening the suspect caused the suspect to attack the officer, H. TOCH, VIOLENT MEN 39 (1969), while conflict management techniques resulted in the absence of injuries to officers. M. BARD, FAMILY CRISIS INTERVENTION FROM CONCEPT TO IMPLEMENTATION 5 (1973), *cited in* Domestic Violence and the Police, *supra* note 15, at 2-3.

respond according to the desires and needs of battered women. Police regulations can be written more clearly to aid police officers in identifying the circumstances which constitute "reasonable" or "due cause" for arrest, taking into consideration signs of physical injury, the presence of weapons, violent conduct in their presence, the desires of the victim, and outstanding orders of protection.[184] Police officers should be compelled to inform all persons of their rights, to refer victims to legal and social services, and to assist in making citizen's arrests and in obtaining medical aid.[185] Woman abuse ought to be treated as any other assault or attempted murder and upgraded to the top priority status of those crimes.[186] Finally, police should be put on notice of the need for full law enforcement by subjecting them to liability for injuries which result from an abuse of discretion in the performance of their obligations to protect citizens and prevent crime.[187]

3. The Courts

Judges, court personnel, and district attorneys must also be educated as to the criminal nature of woman abuse and the need to protect battered women. In place of their present emphasis on the preservation of the family and in place of their reliance on counseling as a method of resolution, these officials must enforce criminal penalties and provide protection tailored to the circumstances of each case. They must also inform women of their legal rights, of the remedies available, and of the procedures to be followed. Counsel should be provided to assist the women in preparing their case.[188] Women should also be trained to take photographs of their injuries and to obtain other proof of abuse.[189] Proof requirements should also be relaxed to conform to those used for crimes between strangers, while compensating for the peculiar proof of problems of woman abuse.[190]

Furthermore, prosecutors and judges should be held liable for abuse of discretion when action which should be taken is not.[191] Discretionary decisions should also be subject to some type of appeals process. Political pressure from women's groups and publicity would also increase the accountability and con-

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184. Testimony of M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 82.

185. Sweeney, *supra* note 107, at 12, 13.

186. Testimony of M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 80-82; NWA Obj. 13, *supra* note 182, at 5.

187. D. MARTIN, *supra* note 2, at 178; for examples of statutes providing blanket immunity for police officers, *see* ILL. REV. STAT. ch. 85, § 2-205 (1965); CAL. GOV'T CODE § 820.2 (West 1975).

188. D. MARTIN, *supra* note 2, at 174.

189. Interview with Marjory D. Fields, attorney at South Brooklyn Legal Services, Inc., in New York City (Jan. 26, 1977).

190. *See* note 99 *supra*, for the proof problems faced by battered women.

191. Raguz v. Chandler, No. C74-1064 (N.D. Ohio, filed Feb. 4, 1975), a suit filed against the Prosecutor for failure to prosecute and requesting the injunctive and declaratory relief, represents an attempt to impose such liability on prosecutors. The doctrine of official immunity, however, which provides officials with immunity from suit when they act within the scope of their authority and exercise the appropriate discretion, may frustrate such suits. *See* Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (absolute immunity for judges); Imbler v. Pachtman, 424 U.S. 409, 420-24 (1976) (absolute immunity for prosecutors); Florida First National Bank of Jacksonville v. City of Jacksonville, 310 So.2d 19, 21 (1975); and Schuster v. City of New York, 46 A.L.R.3d 1084 (1972) (police officers can be held liable for undertaking responsibilities which create a special relationship and duty of care).

scientiousness of officials in the performance of their duties.[192] Greater and speedier access to the courts can be achieved by increasing the number and quality of court and probation personnel[193] and by simplifying and shortening procedures which cause undue delay. Alternative penalties such as jail sentences to be served on weekends or after work would make it easier for reluctant judges to impose sanctions for woman abuse without decreasing the deterrent value of the sanction.[194]

B. Towards Better Laws

New laws will provide better remedies for abused women. New legislation can also be an educational tool leading to changes in attitudes and better law enforcement.

1. Increasing the Value of Protective Orders

Injunctive relief must be immediately available to all women who need such relief. This can be achieved on the state level through legislation which would allow courts to issue temporary preliminary orders upon a showing of actual or threatened harm. To be effective these injunctions should authorize immediate termination of abusive conduct, eviction of the man from the home, and determination of the custody of the children. Relief should be available to all women regardless of their marital status or their wishes to change that status. Penalties for noncompliance with these orders must be explicitly defined and made known to the public. Above all, police and judges must enforce these orders by imposing penalties for noncompliance.

2. Tort Liability and Dissolution Proceedings

To increase a woman's ability to free herself from an abusive situation, the civil remedies of tort liability and divorce must be broadened. Common law and statutory interspousal immunity can be modified to allow married women to bring damage suits for intentional torts.[195] The option of divorce must also be made more easily available to those who desire it. This can be accomplished by legislation providing battered women with a defense to the charge of abandonment,[196] establishing no fault divorce, or a making of physical abuse a ground for divorce. Finally, when divorce is an appropriate remedy, it should be available easily and quickly.

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192. Such tactics have made a difference in Brooklyn, New York, according to an attorney working with battered women in Brooklyn. Interview with Marjory D. Fields, attorney at South Brooklyn Legal Services, Inc., in New York City (Jan. 26, 1977).

193. On the problems with the quality of performance by family court personnel in New York, Rhode Island, and Hawaii, *see* Dyson & Dyson, *Family Courts in the United States* (pts. 1 & 2) 8 J. FAM. L. 505, 540-78 (1968), 9 J. FAM. L. 1, 8-11 (1969).

194. Note, *Orders of Protection in Family Court Disputes*, 2 COLUM. J.L. & SOC. PROB. 164, 173 (1966); Van Gelder, *Giving Battered Wives a Little Legal Clout*, N.Y. Times, Nov. 13, 1976, at 10.

195. Testimony of A. Biren *in Cal. Sen. Hearings*, *supra* note 11, at 91; Sweeney, *supra* note 107, at 9; Williams, *supra* note 38, at 5.

196. NWA Obj. 13, *supra* note 182, at 7.

C. *Coordination of Legal and Social Services*

Along with specific changes in the law and in police and court enforcement of the law, there remains the necessity for a coordinated system of social services. Social agencies could work with the legal system to fill those needs which the legal system cannot satisfy alone. Specially designed shelters to which police officers could remove battered women from the physical threat of danger could provide a supportive atmosphere[197] as well as a resource center for counseling, housing, welfare, medical, and legal services. Such shelters would also offer relatively long-term safety as men are more reluctant to bother women in a public shelter, and police officers are more willing to protect a public house.[198] It is suggested that shelters will also serve a preventive function, as men will be more reluctant to beat their wives when they know that their wives can leave them and seek refuge in these facilities.[199] Furthermore, the temporary separation could be therapeutic and improve the relationship.[200] Such shelters exist in many other countries and are beginning to appear in the United States,[201] but public or private financial support is needed to increase the number of shelters and the services they provide.

Although these shelters seem to be "the only direct, immediate, and satisfactory solution to the problem,"[202] it must be remembered that they are not a permanent solution. Shelters exist only because the economic, legislative, and social structure has failed to provide women with equal job and welfare opportunities, political status, and legal protection. Shelters are not the best remedy for abused women, however, as they are an inefficient use of energy and resources and are inequitable because the burden is placed on the woman, not the man, to leave the home.[203]

V
TRENDS TOWARD REFORM BY LEGISLATION

The need for legal reform to bring the protective and preventive forces of the law to the aid of battered women is just beginning to be recognized in our country. Reform legislation is being drafted and proposed in several states.[204] The efforts thus far have already increased the public's awareness of and concern for the problems of battered women and should translate into more effective laws as well as more effective application of those laws.

The greatest effort and major success in legislative reform has been in the

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197. D. MARTIN, *supra* note 2, at 196.

198. Williams, *supra* note 38, at 14.

199. 1975 SELECT COMM., *supra* note 22, at xiii.

200. *Id.*

201. D. MARTIN, *supra* note 2, at 196.

202. *Id.* at 196-225.

203. Kathleen Fojtik, coordinator of the National Organization for Women's Domestic Violence Project in Ann Arbor, Michigan, has described shelters as "a wasteful, disruptive, energy-consuming and costly way to protect women. If the police were doing their job, we wouldn't have to go through this. Why should the woman have to leave her home when it's the man who is the assailant? He's the one who has broken the law. Let him leave." Guthrie, *The battered wife: What's wrong with the husband?* [*sic*] Cleveland Press, Nov. 4, 1976, at § D, p. 1, col. 3.

204. *E.g.*, California, Florida, Illinois, Maryland, New Hampshire, New York, and Pennsylvania are some of the states active in creating new legislation.

area of extending the availability and enforcement of civil remedies. The Protection From Abuse Act[205] enacted in Pennsylvania in 1976, and statutes drafted in California[206] and Illinois[207] provide injunctive relief to all women, whether they are married to, getting a divorce from, or living with (but not married to) their assailants. The English Parliament is considering extending injunctive relief to common law wives and cohabitees.[208] These proposed statutes also provide for broader, more flexible, and faster relief. The orders of protection allowed by the Pennsylvania, California, and Illinois bills include the variety of orders provided under the New York Family Court Act: temporary and permanent restraint of abuse, temporary possession of the home, and temporary custody of the children.[209] The Pennsylvania statute further provides for the approval and enforcement of consent agreements to end abusive conduct[210] and also allows district judges to issue short-term emergency orders[211] when court is closed for the weekend.

In New York, revisions of the New York Family Court Act have created additional forms of relief by authorizing: (1) the enforcement of probation conference agreements, whereby the man agrees to stop his offensive conduct in return for the woman's promise not to file a petition;[212] (2) the issuance of protective orders while a case is pending in criminal court;[213] and (3) the issuance of protective orders by the family court or the supreme court while a matrimonial action is pending in the supreme court.[214] Other changes in the Act are designed to encourage courts to issue appropriate injunctive relief. Language which allowed a court to dismiss petitions if it concluded that "the court's aid is not required" even though it found that the respondent had committed a family offense is deleted.[215] Judges are assured that temporary orders will not prejudice a respondent's rights by the statutory provision stating that a temporary order is not tantamount to a finding of wrongdoing.[216]

Protective orders can be enforced by police arrest and a court sentence for contempt.[217] In an effort to encourage police enforcement, the new Pennsyl-

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205. 35 PA. CONS. STAT. §§ 10181-10190 (Purdon 1977).

206. CAL. CIV. PROC. CODE § 536 (West 1975).

207. An Act to add § 25 to "An Act to revise the law in relation to injunction," ILL. REV. STAT. ch. 69 (1965), soon to be introduced to the Illinois legislature.

208. 1975 SELECT COMM., *supra* note 22, at xvii, xviii, xx.

209. 35 PA. CONS. STAT. § 10186 (Purdon 1977); CAL. CIV. PROC. CODE § 536 (West 1975); an Act to add § 25 to "An Act to revise the law in relation to injunction," ILL. REV. STAT. ch. 69 (1965), soon to be introduced to the Illinois legislature.

210. 35 PA. CONS. STAT. § 10186 (Purdon 1977).

211. *Id.* § 10188.

212. 1977 N.Y. Laws, ch. 449, § 4 (McKinney) (to be codified as N.Y. FAM. CT. ACT § 823(c)).

213. 1977 N.Y. Laws, ch. 449, § 11 (McKinney) (to be codified as N.Y. CRIM. PROC. LAW § 530.11). Although criminal court judges always had the power to condition the release of a defendant on his staying away from the complaining witness, they often refused to do so. The new law gives statutory authority for such protective orders and adds custody and visitation provisions which are very important for protecting the woman and her children while a prosecution is pending in criminal court.

214. 1977 N.Y. Laws, ch. 449, § 9 (McKinney) (to be codified as N.Y. DOM. REL. LAW § 252).

215. 1977 N.Y. Laws, ch. 449, § 7 (McKinney) (amending N.Y. FAM. CT. ACT § 841 (1975)).

216. *Id.* § 5 (amending N.Y. FAM. CT. ACT § 828 (1975)).

217. *E.g.*, N.Y. FAM. CT. ACT § 846 (McKinney 1975).

vania Act specifically provides that copies of the order be issued to the woman, the man, and the police department.[218] The more recent notice provision in the New York Act[219] provides for filing of the order with the proper police agency and adds that the petitioner may file the order with the appropriate police agency if the court fails to do so. Under the proposed English statute, an order is served upon the superintendent of the local police department when it is issued. If an order is violated and an arrest made, the police are then required to notify a solicitor, who must find a judge within a specified period of time.[220] The California statute, on the other hand, makes no special provision for enforcement of injunctions but seems to rely on the existing statutory authorization to arrest for civil contempt.[221] This reliance may be misplaced in view of the present reluctance to arrest under that statute.[222] Such a procedure also lacks the potential incentive to arrest which specific authority in the hands of the police might provide.

The terms of the California, Illinois, and New York legislation go far toward eliminating obstacles to arrest and encouraging police enforcement. These statutes recommend special police training aimed at providing guidance to police in the flexible handling of domestic complaints.[223] They also call for data collection and reportage,[224] police liability for substantial injury due to the abuse of discretion,[225] the creation of a distinct crime of spouse beating,[226] and the enactment of citizen's arrest statutes which are easy to understand and to apply.[227] Legislation mandating other concurrent forms of relief is also being considered. Some states are looking at proposals to eliminate interspousal immunity in order to give women an action for damages for an intentional tort.[228]

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218. 35 PA. CONS. STAT. § 10187 (Purdon 1977).

219. 1977 N.Y. Laws, ch. 449, § 8 (McKinney) (to be codified as N.Y. FAM. CT. ACT § 842(a)).

220. 1975 SELECT COMM., *supra* note 22, at xviii.

221. CAL. CIV. PROC. CODE § 1219 (West 1972).

222. In one case, a woman who had an order of protection called the police to enforce the order when her husband beat her again. The police never came to her home even though the assault was serious enough that the woman had to be hospitalized for treatment of her injuries. Complaint filed in Scott v. Hart, at para. 9. *See also* Testimony of Officer Rackley and M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 42, 83; text accompanying notes 150-57 *supra*.

223. A recommended amendment to ILL. REV. STAT. ch. 85, § 501 (1965) adds to the Police Training Act a provision for training police as to action to be taken in family abuse situations.

224. A recommended act relating to domestic violence which requires law enforcement officers to file written reports concerning investigations of domestic violence will soon be introduced to the Illinois legislature. 1977 N.Y. Laws, ch. 449, § 12 (McKinney) (to be codified as N.Y. JUD. LAW § 211(3)); Fla. H. 3473, 1976 sess. (1976). 1975 SELECT COMM., *supra* note 22, at xvii.

225. Recommended amendment to CAL. GOV'T CODE § 820.3 (West 1975), soon to be introduced to the California legislature; recommended amendment to ILL. REV. STAT. ch. 85, § 2-205 (1965), soon to be introduced to the Illinois legislature.

226. CAL. PENAL CODE § 273(d) (West 1970); recommended act to add § 12-9 to ILL. REV. STAT. ch. 38, div. 1 (1965), soon to be introduced to the Illinois legislature. While a separate statutory provision for spouse beating may emphasize the seriousness of the crime, it would also provide support for those who look upon spouse beating as something different from a crime. Spouse abuse should be treated like all other criminal assaults.

227. Recommended act to amend CAL. PENAL CODE § 837.5 (West 1975), soon to be introduced to the California legislature.

228. *E.g.*, Recommended amendment to ILL. REV. STAT. ch. 68, § 1 (1965), soon to be introduced to the Illinois legislature.

Public and private shelters are being proposed and supported,[229] but funding is limited. Divorce laws are being liberalized.[230] Suggestions to broaden injunctive relief pending divorce, support, separate maintenance, and annulment proceedings are also being made.[231] A law passed recently in New York makes one or more beatings an affirmative defense to a charge of abandonment in a divorce action.[232]

Many of these changes are still only proposals. The fact that woman abuse has only recently become a matter for public concern makes it difficult to predict whether or not these statutory suggestions will be implemented. The enactment of the Pennsylvania[233] and New York[234] legislation providing civil injunctive relief and the failure of a Maryland proposal[235] making spouse abuse a misdemeanor punishable by fines and incarceration indicate that civil remedies may be more readily accepted by legislatures than other types of remedies. Legislatures will act in response to a "law and order" argument on woman abuse, but their actions seem to be tempered by the entrenched biases against interfering in family disputes. People are becoming more aware of woman abuse, but they are still reluctant to regard assaults by husbands and male friends as criminal acts, because such assaults do involve delicate personal matters. Yet, this reluctance is the factor which compounds the harm suffered by the victims of these assaults, because it forces women and children to live with abusive men. Assaults by husbands and male friends are at least as serious as any other assaults and should receive equal treatment under the law.

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229. *E.g.*, Cal. S. 91 (1977); Fla. H. 3725, 1976 sess. (1976) (died in appropriations committee); 1977 N.Y. Laws, ch. 450 (McKinney) (amending the N.Y. Soc. Serv. Law, Exec. Law, and Not-For-Profit Corp. Law). Two shelters in New York, one in Buffalo, and one in New York City, receive state funds. A shelter in Cleveland, Ohio, is funded by private donations and private foundations. Fletcher, *supra* note 42, at 62. The Law Enforcement Assistance Administration, recognizing the serious need for resources for abused women, reported on September 2, 1977, that it was nearly tripling funds to pay for shelters, hot lines, and counseling for abused women. The agency gave $1.3 million over the past three years to programs for battered women and is planning to put aside $1 million for fiscal year 1977. Legislation in Congress would provide $60 million over the next three years for emergency shelters and counseling for domestic violence. Detroit News, Sept. 3, 1977, at 1, col. 6.

230. No fault divorce statutes are increasing in number. The trend to no fault divorce began when New Mexico adopted "incompatibility" as a ground for divorce in 1933. By 1963, 21 states allowed divorce after a specified period of separation. In 1970, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Marriage and Divorce Act which included the ground of no fault divorce: the granting of a divorce if the court finds the marriage irretrievably broken, either because there is serious marital discord or the parties have lived separately for more than 180 days, even if one of the parties believes the breakdown is not permanent. By 1975, no fault divorce was the only ground for divorce in 10 states and was added to the traditional grounds in 9 others. By that time most other states had made separation for a specified period of time a ground for divorce. Women in Transition, Inc., Women in Transition: A Feminist Handbook on Separation and Divorce 192-93 (1975).

231. Recommended amendment to Ill. Rev. Stat. ch. 40, § 23 (1965), provides an order for temporary exclusive possession of the home while support, separate maintenance, or annulment proceedings are pending; Md. 1085, 1976 sess. (1976); Mass. Gen. Laws Ann. ch. 449, § 9 (McKinney) (to be codified as N.Y. Dom. Rel. Law § 252).

232. N.Y.S. 3154-A 1977-78 sess. (1977).

233. 35 Pa. Cons. Stat. §§ 10181-10190 (Purdon 1977).

234. 1977 N.Y. Laws, ch. 449, ch. 450 (McKinney).

235. Md. H. 1775, 1976 sess. (1976).

VI
TRENDS TOWARDS REFORM THROUGH LITIGATION

New legislation is not enacted easily or quickly. Passing a law, however, is still easier than enforcing it. The attitudes of police officers, prosecutors, and judges which account for their past failure to perform their duties in protecting abused women may persist and affect the enforcement of the new laws. The process of changing attitudes and thus ensuring enforcement can be helped along in a more direct and forceful manner by bringing a class action suit on behalf of women abused by husbands and male friends, requesting injunctive and declaratory relief from the law enforcement officials responsible for denying them legal protection. By making public the horror stories of women abused by men and denied the protection of the law, this lawsuit can be a potent tool for change. It can establish a declaration of the rights of abused women, change the rules and conduct of forums which declare and enforce those rights, alert decision makers and the public at large to the problem of woman abuse, and improve the abused woman's self-image.[236]

Three class actions lawsuits have already been instituted. A suit filed in Cleveland, Ohio in 1975 ended in a consent decree in which the prosecutor agreed to provide most of the relief requested: to give full consideration of each case on its merits; to schedule a prosecutor's hearing or request an investigation by the Detective Bureau if an arrest warrant or summons is not issued and the complaint is not frivolous; to provide and notify a woman of her right to a review of a decision not to prosecute an alleged assailant; and to notify police that men who assault women will be prosecuted by the prosecutor's office.[237] A suit filed in California against the Oakland Police Department and City Council awaits trial.[238] Another suit against the New York City Family Court clerks, Probation Department, and Police Department has thus far resulted in a denial of defendants' motions for summary judgment and denial of plaintiffs' motion to certify the complaint as a class action.[239] In spite of the failure to get certification as a class action, the case already marks a victory for the cause of battered women. It states for the first time that battered wives may have a cause of action against the police officers and the probation and court personnel who deny them access to the protection of the law. An examination of the strategies used in these first cases suggests prospects for future litigation by battered women.

A. Suing Under State Statutes

The suit currently pending in New York City bases its cause of action on the unauthorized discriminatory application of state law.[240] Plaintiffs rely on provisions of the New York City Charter,[241] the New York City police

236. Gilhool, *The Uses of Courts and of Lawyers*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 155 (R. Kugel, M.D. & A. Shearer, eds. 1975).

237. *See* motion for class certification and preliminary injunction filed in Raguz v. Chandler, No. C74-1064 (N.D. Ohio, filed Feb. 4, 1975), at 1.

238. Scott v. Hart, No. C762395 WWS (N.D. Cal., filed Nov. 24, 1976).

239. Bruno v. Codd, 46 U.S.L.W. 2042 (Aug. 2, 1977). N.Y.L.J., July 6, 1977, at 7, col. 1 (Sup. Ct. N.Y., July 6, 1977).

240. *Id.*

241. N.Y.C. Charter § 435 (1976).

regulations,[242] and the New York Criminal Procedure Law[243] as well as New York case law[244] to establish the propositions that the police have a duty to protect assault victims and a duty to protect battered wives in the same manner as any other assault victim. Plaintiffs further cite support for a "special duty" owed by the police to protect women armed with orders of protection.[245] Plaintiffs refer to the relevant portions of the New York Family Court Act[246] as the source of the right of women to immediate protection from assaults by their husbands and the responsibilities of the family court and the Probation Department personnel in assuring this right. Reference to specific existing statutory and regulatory duties familiar to the state judiciary gives the court concrete and easily identifiable bases for liability. By developing evidence of the defendants' failures to perform the duties imposed upon them by law, petitioners build a tight and compelling argument. The denial of defendants' motion for summary judgment and the judicial recognition of a cause of action for battered wives in New York prove how convincing this technique can be. A similar suit brought in the courts of other states should be just as successful. When suing on state claims, however, federal constitutional claims should be reserved so that the possibility of a federal remedy is not foreclosed by a negative state court decision which would be binding on the federal courts.[247]

B. Suing Under the Constitution

The lawsuits in California and Ohio pursued a different tactic based on the theory that the denial of legal protection to battered women constitutes a denial of certain constitutionally secured rights. The California complaint focuses on equal protection while the Cleveland motion for an injunction against the city prosecutor sets out claims under the fourteenth amendment equal protection and due process clauses as well as under the first amendment right to petition the government for redress of grievances. Convincing arguments for battered women can be made under each of these constitutional theories, but the prospects for success are complicated by the development of constitutional doctrine which has limited the rights protected by the Constitution and has made it more difficult to show a denial of those rights which are protected.

1. The Equal Protection Argument[248]

The equal protection clause of the fourteenth amendment requires that all persons similarly situated must receive equal treatment under the law.[249]

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242. N.Y.C., N.Y., Patrol Guide §§ 106-1, 110-1, -3, -38 (Oct. 1, 1972).

243. N.Y. CRIM. PROC. LAW §§ 140.10, .30, .40 (McKinney 1971).

244. People v. Brady, 54 Misc. 2d 638, 283 N.Y.S.2d 175 (Sup. Ct., Suffolk County 1967); People v. Hermann, 54 Misc. 2d 666, 283 N.Y.S.2d 179 (Sup. Ct., Suffolk County 1967).

245. Baker v. City of New York, 25 App. Div. 2d 770, 771, 269 N.Y.S.2d 515, 516 (1966).

246. N.Y. FAM. CT. ACT §§ 168, 255, 811, 812, 821-823, 828, 846 (McKinney 1975).

247. If federal claims are not reserved, the decision of the state court may be held binding by the federal court in accordance with the principle of comity, by which courts of one jurisdiction give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. BLACK'S LAW DICTIONARY 334 (4th ed. 1968).

248. *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments—Equal Protection*]; Graham & Kravitt, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. C.R.-C.L. REV. 103 (1972); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

249. Reed v. Reed, 404 U.S. 71, 77 (1971).

Analysis of statutes under the equal protection clause has come to be governed by the following traditional principles:

> [T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways . . . . The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike . . . .'[250]

Application of these principles to the treatment of abused women by police, prosecutors, and judicial personnel makes out a clear case of discrimination in violation of the fourteenth amendment. These officials fail to respond to abused women solely because these women are assaulted by husbands or male friends instead of by strangers. The purposes given to justify the differential treatment are unreasonable, arbitrary, and not rationally related to the discriminatory action taken by law enforcement personnel. The state's interests in preserving the family and marriage, in saving the woman from retaliatory beatings, and in preventing government interference in private matters and social problems are valid state goals,[251] but they are simply not accomplished by the discriminatory actions of these officials. When a woman abused by her husband or male friend seeks the protection of the law, she is not interested in preserving her family, her relationship with the man, or her privacy. She is both admitting that there is no relationship and family to preserve and requesting government intervention. The decision of the government not to intervene will not prevent the commission of more beatings by a man who knows that the woman has sought protection and can find none. The other interests asserted by the state, the prevention of harm to police officers and the efficient administration of its law enforcement agencies, are also valid interests, but are impermissible in light of the availability of alternative means of accomplishing these goals and in comparison to the state's more compelling interest in protecting the life, safety, and liberty of its female citizens.[252] By training police officers to handle violent situations which involve people who know or are married to each other, harm to police officers would be reduced without penalizing this class of female assault victims.[253] The economic interests of the state could also be accommodated by recognizing that woman abuse belongs in the police category of assaults which receive high priority treatment and from which resources are not diverted in the interests of economy.[254] Available resources could be reallo-

250. Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1971), *quoting* Reed v. Reed, 404 U.S. 71, 75-76 (1971) (citations omitted).

251. For a discussion of the right to marital privacy secured against state intrusion, *see* Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

252. The state's interest in protecting life was asserted in Roe v. Wade, 410 U.S. at 148. In that case, the state's important interests in the health of the mother and the potential life of the fetus were labeled compelling so as to justify state regulation of abortion. This interest can also be viewed as compelling the state to render legal protection to battered women.

253. *See* note 183 *supra*.

254. In striking down a residence requirement which denied welfare payments to persons who

cated from victimless nonviolent crimes to the more serious violent crimes.[255] In the final analysis, the state's interest in the life, liberty, and safety of abused women is far more substantial than the competing interests which the state asserts to justify its failure to protect battered women.[256]

The failure of law enforcement personnel to adequately protect battered women may be subjected to stricter scrutiny by characterizing the rights being denied as "fundamental" or the class being discriminated against as "suspect."[257] The Supreme Court has recognized as fundamental rights which abused women are effectively denied when police officers, prosecutors, and court personnel refuse to respond to their requests for protection. The right to liberty guaranteed under the first section of the fourteenth amendment[258] is infringed upon when a woman who has been assaulted requests the protection accorded to other assault victims and is denied such protection. When that protection is denied, the victim is left unprotected from further assaults and possible death. The right to personal privacy in marital and associational matters[259] is also denied battered women. Although this right is traditionally asserted to prevent state intrusion into one's marital affairs,[260] it can be argued that it also stands for a woman's right to the state's protective mechanism when she decides that her marriage or relationship requires it. The state should not uniformly refuse to intervene because it is decided that the woman's relationship should be preserved and that nonintervention is the proper means to that end. The rights of abused women to equal administration of the law,[261] to equal access to state municipal benefits,[262] and to petition the government for

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did not meet it, the Court in Shapiro v. Thompson, 394 U.S. 618, 633 (1969), recognized that a state had a valid interest in preserving the fiscal integrity of its programs but stated that saving welfare costs could not justify an otherwise invidious discrimination. In Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), the Court found that state fiscal objectives did not provide a rational basis for a statute which required transcript cost reimbursement from unsuccessful appellants confined in state institutions but not from unsuccessful appellants whose punishment consisted of suspended sentences, probation, or fines. Differential treatment that is based on economic motives is thus discriminatory.

255. Mary Vail, an attorney in the Women's Litigation Unit of San Francisco Neighborhood Legal Assistance Foundation complains that the large amount of money spent by police departments on the apprehension of persons who commit nonviolent crimes is inequitable, since there are no complaining victims of nonviolent crimes and there are many complaining victims of violent crimes who get no action from the police. Testimony of M. Vail *in Cal. Sen. Hearings*, *supra* note 11, at 85-88.

256. In determining the appropriate amount of state regulation of a woman's decision to have an abortion, the Court in Roe v. Wade balanced the valid competing interests in the mother's health and in the potential life of the fetus by according greater weight to each when each involved a greater risk to life and health. The risk to the abused woman's life and family is certainly greater without protection than with protection. It is also greater than the risk to the police officer who can be trained to avoid that risk.

257. *Developments—Equal Protection*, *supra* note 248, at 1077.

258. U.S. CONST. amend. XIV, § 1, guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

259. Roe v. Wade, 410 U.S. 113, 152 (1973); Boddie v. Connecticut, 401 U.S. 371, 376 (1971); Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

260. 410 U.S. at 153; 405 U.S. at 453-54; 381 U.S. at 485-86; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

261. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

262. *Cf.* Hawkins v. Shaw, 437 F.2d 1286, 1292 (5th Cir. 1971).

redress of grievances under the first amendment[263] are also discriminatorily denied to women assaulted by husbands and male friends. The class of battered women denied legal redress in this manner may also be characterized as "suspect." They are identified by a prior relationship with their assailant, are helplessly unable to protect themselves alone, and have historically been ignored by the law because of stereotypes and biases held by law enforcement personnel. Such a class lies within the "traditional indicia of suspectness"[264] set out in *San Antonio Independent School District v. Rodriguez*:[265] the class is saddled with disabilities, is subjected to a history of purposeful unequal treatment, and is relegated to a position of political powerlessness so as to command extraordinary protection from the majoritarian process.[266]

However appropriate the application of the equal protection clause to the case of battered women may seem, recent judicial trends have severely reduced the probability of success under such an approach. The federal courts have limited the extension of equal protection in several areas which are relevant to discrimination against abused women. Sexual classifications have been given special treatment by the courts[267] but have not been declared suspect. Shelter[268] and welfare[269] have not been included in the list of fundamental rights. The Supreme Court has also required proof of discriminatory motive or purpose in order to show a violation of the equal protection clause. A demonstration that women assaulted by husbands and male friends statistically do not receive the same legal and police protection that women and men assaulted by strangers receive is not enough to prove discrimination. Disproportionate impact alone, except in very rare cases in which a pattern of discrimination is clear and no other explanation is possible, is not enough to hold official action unconstitutional.[270] Furthermore, state interests in administering traditional state functions such as internal government affairs or social and economic welfare, as well as the inevitable limits on state resources, are gaining recognition by the courts as acceptable justifications for a certain amount of discrimination.[271]

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263. *See* text accompanying notes 290-94 *infra*.

264. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

265. 411 U.S. 1 (1973).

266. *Id.* at 28; *see* the similar justification for special scrutiny in United States v. Carolene Products Co., 304 U.S. 144 (1938):

> Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 153 n.4. *See also* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 (1973), for the suggestion that classifications which are most likely based upon stereotypes should be looked upon with special suspicion.

267. Craig v. Boren, 429 U.S. 190, 197-99 (1976); 404 U.S. at 75.

268. Lindsey v. Normet, 405 U.S. 56, 74 (1972); James v. Valtierra, 402 U.S. 137, 141-43 (1971).

269. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

270. Washington v. Davis, 426 U.S. 229, 239 (1976); Rizzo v. Goode, 423 U.S. 362, 371 (1976); Arlington Heights v. Met. Housing Dev. Corp., 429 U.S. 252, 264-68 (1976). On equal protection and administrative action, *see also* Snowden v. Hughes, 321 U.S. 1 (1943); Oyler v. Boles, 368 U.S. 448 (1962).

271. In National League of Cities v. Usery, 426 U.S. 833, 852 (1976), the Court recognized the

Whether or not a suit brought on behalf of battered women under the equal protection clause would be successful is still open to question. The difficult requirement of proving discriminatory motive or intent may be satisfied by showing police regulations and prosecutorial standards that are blatantly discriminatory. There is a possibility that the presentation of overwhelming data and facts making out a clear case of discrimination might move a court to infer that intent also. The judicial objection to classifications based on sex or derived from stereotypes and the recognition of race as a suspect class might be the basis of a lawsuit which links equal protection claims to claims of sexual and racial discrimination.[272] It is also possible that lower federal courts might be more receptive to claims of discrimination than the highest court in the United States. State courts might be more sympathetic forums if suits are based on state equal protection clauses as well as the federal equal protection clause.

2. The Due Process Argument

The due process clause of the fourteenth amendment prohibits government action which results in the arbitrary infringement on some benefit or right without a meaningful opportunity to be heard and fair consideration of the individual claim.[273] The discriminatory treatment of battered women by police, prosecutors, and courts in effect denies life,[274] liberty,[275] and property[276] in violation of the due process clause.[277] The irrebuttable presumptions governing the actions of law enforcement personnel that assaults on wives and women friends are only "disputes," that battered women are not seriously harmed, that women will not follow through on a prosecution of their husbands and male friends, and that the relationship with the husband or male friend should be preserved, are not "necessarily or universally true, in fact."[278] Further, the alternative of individual consideration of each case applied in other law enforcement matters should be available in cases of woman abuse as well and should not be denied in the name of judicial speed and efficiency.[279] The result

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state's interest in its own integral government functions. Dandridge v. Williams, 397 U.S. at 478 gave recognition to legitimate domination by the state in the social and economic field. *But see* National League of Cities v. Usery, 426 U.S. at 852 n.17 for an argument for intrusion into traditional state concerns under the fourteenth amendment: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising its authority granted it under other sections of the Constitution such as the spending power." Art. I, § 8, cl. 1, or § 5 of the fourteenth amendment, 426 U.S. at 852 n.17.

272. Graham & Kravitt, *supra* note 248, at 199. *See, e.g.*, complaint filed in Scott v. Hart, at para. 1.

273. Boddie v. Connecticut, 401 U.S. at 378 (1971); Goldberg v. Kelley, 397 U.S. 254, 268-69 (1970); *see* Weiman v. Updegraff, 344 U.S. 183 (1952).

274. *E.g.*, Lack of protection often results in death. *See* text accompanying note 23 *supra*.

275. *E.g.*, With no alternative means of protection, women are compelled to either remain in abusive situations or retreat to a public refuge. *See* text accompanying notes 24-41, 197-203 *supra*.

276. *E.g.*, With no source of protection, women may be compelled to leave their homes for safety.

277. *Cf.* Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974) in which the court held that juveniles who were uniformly and indiscriminately arrested, taken into custody, and confined without consideration of the individual facts of each case were deprived of liberty without due process of law.

278. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644; *cf.* U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 513-14 (1973); *cf.* Vlandis v. Kline, 412 U.S. 441, 452 (1973).

279. 414 U.S. at 646; 412 U.S. at 451; Stanley v. Illinois, 405 U.S. 645, 656 (1971).

of foregoing individual consideration is to penalize unduly a woman's freedom of choice in matters of marriage and family life, a right long recognized as one of the liberties protected by the due process clause.[280] Women who requested government protection from assaults by husbands and men friends cannot find that protection, because the government has chosen to ignore the woman's desires in favor of its own ideal of preserving the family by nonintervention. The penalty suffered by abused women who have nowhere else to turn for help is equivalent in magnitude to the penalty suffered by plaintiffs who are excluded from the only forum competent to settle their disputes.[281] They are forced to remain confined in an abusive, possibly fatal, situation with nowhere to go for protection.

The due process argument, like the equal protection argument, is also limited by current judicial decisions which raise standards of proof and limit constitutional protection. Courts rely on the right of personal privacy in marital and associational matters to justify their policy of nonintervention in family life.[282] This is the same justification used by police, prosecutors, and judges for their own refusal to respond to woman abuse. Further, the definition of "liberty" protected under the due process clause is being limited to rights specifically found in the Constitution[283] and to the right to privacy recognized in *Roe v. Wade*.[284] State concern with fiscal and administrative burdens is being accorded more deference by the courts,[285] and the standard for whether or not harm has been suffered has been raised to absolute deprivation of a right.[286] The result is that impermissible "irrebuttable presumptions" and arbitrary classifications are not being readily found and denial of due process is harder to prove.

3. The First Amendment Argument

The first amendment right to petition the government for redress of grievances, mentioned in reference to the due process and equal protection arguments, also may constitute a separate cause of action for battered women.[287] The right to access to the courts is derived from this first amendment right to petition the government,[288] but it is effectively denied to battered women. This right has been recognized in several cases involving a prisoner's right to petition the courts for a hearing on all charges brought against him and all grievances alleged by him.[289] A situation closer to the case of battered women is

280. 414 U.S. at 639; 410 U.S. at 152; 401 U.S. at 376; 381 U.S. at 485-86.

281. 401 U.S. at 377; Griffin v. Illinois, 351 U.S. 12, 17, 18 (1956).

282. *See* note 260 *supra*.

283. Doe v. Commonwealth's Attorney for City of Richmond, 425 U.S. 901 (1976); 403 F. Supp. 1199 (E.D. Va. 1975); Paul v. Davis, 424 U.S. 693, 710-12 (1976). *See* Bishop v. Wood, 426 U.S. 341, 350 (1976).

284. 410 U.S. 113 (1973).

285. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Weinberger v. Salfie, 422 U.S. 749, 784 (1975).

286. 424 U.S. at 340-42; *see* Sosna v. Iowa, 419 U.S. 393, 406 (1975).

287. *See generally* Note, *A First Amendment Right to Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

288. *See* California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 512 (1972).

289. Younger v. Gilmore, 404 U.S. 15 (1972) (per curiam); 319 F. Supp. 105 (N.D. Cal. 1970).

presented by *Boddie v. Connecticut*,[290] a case in which a filing fee barred appellants' access to the only forum which could dissolve their marriage. In limiting the right of access to the court to situations in which the state is the sole agency empowered to adjust a dispute involving a fundamental human relationship, the court in *Boddie* stated that: "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the fourteenth amendment."[291] Therefore, the success of a first amendment argument for battered women depends on the courts' willingness to view the state's protective legal agencies as the only effective means of assuring women their fundamental right to protection or to extend the right of access to the courts beyond the limits established in *Boddie*.

VII
CONCLUSION

Educating the public and law enforcement personnel, creating social services to aid abused women, and changing the substance and enforcement of legal protection for abused women are necessary to meet the immediate needs of abused women. Although many argue that such "domestic matters" should be totally removed from the legal system,[292] that cannot be contemplated as long as woman abuse continues to be as widespread and as serious a problem as it is at present. Only when vigorous legal action, increased social services to battered women, and a change in the social status of battered women has reduced the magnitude of the offense will nonlegal alternatives be acceptable. Until then, public disapproval of abuse, immediate aid, and enforceable legal sanctions are needed to protect abused women from the husbands and male companions who assault and batter them.

TERRY L. FROMSON

290. 401 U.S. 371 (1971).
291. 401 U.S. at 282.
292. Parnas, *Judicial Response*, *supra* note 41, at 641-44.