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Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York

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PROTECTING BATTERED WOMEN: A PROPOSAL FOR COMPREHENSIVE DOMESTIC VIOLENCE LEGISLATION IN NEW YORK

I. Introduction

The problem of wife abuse[1] is so prevalent that it no longer remains hidden behind urban tenement doors and suburban picket fences.[2] It is estimated that, nationally, repeated violence between spouses[3] occurs in ten to twenty percent of all marriages.[4] Statistics

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1. The term "wife," for the purposes of this Note, includes married women, common law wives and female cohabitants.

This Note also uses the terms "wife abuse" and "domestic violence" interchangeably to refer to willful acts that cause pain and bodily injury, or force a person to do something against her will or prevent her from doing something she chooses to do. The terms do not extend here to verbal and other non-physical abuse.

2. Wife abuse spans all races and socio-economic classes. *See* U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 3 (1982) [hereinafter RULE OF THUMB]; *see also* R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS 43 (1977) ("persons taking part in [domestic] conflicts are of all ages, communities, income levels, races, religions, employment situations, and marital status").

One study showed that the number of wife abuse cases reported in West Harlem, New York City—a community of working-class blacks, some Latin-Americans and a few whites—was roughly equivalent to the number of incidents reported in Norwalk, Connecticut, a similar-sized community populated by upper-middle class whites. *See* D. MARTIN, BATTERED WIVES 19 (1981) (citing Bard, *The Study and Modification of Intra-family Violence*, in THE CONTROL OF AGGRESSION AND VIOLENCE: COGNITIVE AND PSYCHOLOGICAL 154 (1971)) [hereinafter MARTIN]. In its first two months of operation, the Women's Center of Greater Danbury in Fairfield, Connecticut, counseled 26 battered wives and found that "[a]ll but 2 of the abusive men were professionals, including lawyers and physicians." Fields, *Legal Remedies: Part of the Cure for Battered Women*, in IDENTIFICATION AND TREATMENT OF SPOUSE ABUSE: HEALTH AND MENTAL HEALTH AGENCY ROLES 49 (A. Lurie & E. Quitkin eds. 1980) [hereinafter Fields].

3. Although abuse may be perpetrated by either spouse, it is widely recognized that the victims of long-term physical abuse are nearly always women. *See* L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 1 n.3 (1981) [hereinafter LERMAN]; Hamlin, *The Nature and Extent of Spouse Assault*, in LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES 1 (1980) [hereinafter DEPARTMENT OF JUSTICE]; *see also* R. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES 14-15 (1979) ("the use of force between adults in the home is systematically and disproportionately directed at women") (footnote omitted) [hereinafter DOBASH & DOBASH]. For this reason, and because the use of gender-neutral terms here would obscure the true nature of domestic violence, this Note identifies and addresses the problem in terms of abused women. *See id.* at 11-12.

4. *See* NEW YORK STATE GOVERNOR'S COMM'N ON DOMESTIC VIOLENCE, FIRST REPORT 4 (1986) (citing R. GELLES, S. STEINMETZ & M. STRAUS, BEHIND CLOSED

reveal that wife abuse is equally wide-spread within New York State. In 1984, 145 people in New York were murdered by a family member.[5] In 1985, 28,375 calls to the police concerned incidents of wife abuse.[6]

DOORS: VIOLENCE IN THE AMERICAN FAMILY 18 (1980)) [hereinafter N.Y. GOVERNOR'S REPORT]. The severity of the domestic violence problem should be measured not only by its epidemic proportions but also by the brutal nature of the attacks. *See* Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1670 (1981) ("[a] comparison of assaults by spouses with other kinds of attacks demonstrates that domestic victims are much more likely to be seriously injured [and] to require medical attention and hospitalization") [hereinafter Marcus]. Experts on the subject of domestic violence report that wives have been "raped, choked, stabbed, shot, beaten, had their jaws and limbs broken, and have been struck with horse whips, pokers, bats, and bicycle chains." RULE OF THUMB, *supra* note 2, at 2-3.

Although wives are the direct victims of spouse abuse, they are not the only ones who suffer. Children, even if they escape the violence themselves, often witness the violence directed against their mothers. *See* MARTIN, *supra* note 2, at 22. Children were present in 43% of all domestic violence occurrences in New Jersey during 1984. *See* G. GOOLKASIAN, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES 10 (National Institute of Justice, May 1986) (citing CRIME IN NEW JERSEY: 1984 UNIFORM CRIME REPORT 181 (N.J. Division of State Police 1985)) [hereinafter GOOLKASIAN]. In the West Harlem study, children were present in 41% of the cases in which police intervened. *See* MARTIN, *supra* note 2, at 22 (citing Bard, *The Study and Modification of Intra-family Violence*, in THE CONTROL OF AGGRESSION AND VIOLENCE: COGNITIVE AND PSYCHOLOGICAL 161 (1971)). The children who witness domestic violence may suffer emotional trauma. *See id.* Furthermore, a child exposed to a pattern of intra-family violence is more likely to grow up to be an abusive spouse. *See* RULE OF THUMB, *supra* note 2, at 3. " '[O]ne out of ten of the husbands [of the 2,143 families studied] who grew up in violent families are wife beaters in the sense of serious assault. This is over three times the rate for husbands who did not grow up in such violent homes.' " *Id.* (footnote omitted) (quoting R. GELLES, S. STEINMETZ & M. STRAUS, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 122 (1980)). One commentator observed that "isolated instances of domestic violence [carry] the potential for ever-increasing patterns of violence." MARTIN, *supra* note 2, at 23.

5. *See* N.Y. GOVERNOR'S REPORT, *supra* note 4, at 4 (citing N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., DOMESTIC VIOLENCE VICTIM DATA (1984)).

6. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 1984 CRIME & JUSTICE ANNUAL REPORT 112 (1985). The victims included legal and common law wives. *See id.* Reported abuses included aggravated assault, simple assault, sex offenses and violations of protective orders. *See id.* The 1985 statistics comport with a steady increase in reported incidents of domestic violence since data collection began in 1980: in 1980, 4,942 incidents of wife assault were reported. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 1980 CRIME & JUSTICE ANNUAL REPORT 273 (1980). In 1981, 13,709 cases of wife victimization were reported. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 1981 CRIME & JUSTICE ANNUAL REPORT (1981). In 1982, 17,033 incidents were reported. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 1982 CRIME & JUSTICE ANNUAL REPORT (1982). In 1983, 22,216 incidents of wife abuse were reported. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 1983 CRIME & JUSTICE ANNUAL REPORT 119 (1983). In 1984, there were 24,970

Acts of domestic violence are often undeniably criminal in nature.[7] The criminal justice system, however, has often treated domestic violence as a private family matter:[8] when violence is directed at wives, police often fail to arrest the batterer;[9] prosecutors frequently do not prosecute;[10] and the few cases that do reach the courts[11] may be subject to judicial leniency.[12] The frequent failure of the criminal

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reported incidents of wife abuse. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 1984 CRIME & JUSTICE ANNUAL REPORT 122 (1984).

7. *See supra* note 4.

8. An expert in the area of domestic violence has observed: "The sanctity of the family home pervades the world of law enforcement. A man's home is his castle, and police, district attorneys, and judges hesitate to interfere with what goes on behind that tightly closed door." MARTIN, *supra* note 2, at 87.

Although states provide criminal penalties for assault and battery, they rarely impose these penalties upon spouses who abuse their mates. *See* Lerman, Landis & Goldzweig, *State Legislation on Domestic Violence*, in ABUSE OF WOMEN: LEGISLATION, REPORTING AND PREVENTION 39, 43 (1983) ("mate abuse has not traditionally been treated as a criminal matter").

9. Police officers exercising discretion "are *very unlikely* to make an arrest when [an] offender has used violence against his wife." DOBASH & DOBASH, *supra* note 3, at 207 (emphasis in original). Police make fewer arrests for violent acts directed by husbands against their wives than for similar acts directed by strangers against strangers. The results of a 1967 study of police response and court disposition in Washington, D.C., showed that 75% of assault cases involving strangers or unrelated people ended in arrest and court adjudication, "whereas only 16% of all cases involving assaults in the family ended in arrest and trial." *Id.*

10. Heavy caseloads, a perception that most domestic violence crimes are trivial, and a belief in the sacrosanctity of the family unit cause prosecutors to give domestic violence cases low priority in their casesloads. *See* LERMAN, *supra* note 3, at 13, 33.

11. *See* GOOLKASIAN, *supra* note 4, at 81. Goolkasian states that "[f]ew domestic violence cases actually reach trial, and those that do often involve particularly serious or repeated violent crimes." *Id.*

12. Judges sometimes fail to impose upon a husband who assaults his wife punishment commensurate with that imposed for a similiar violent crime between strangers. *See id.* at 83.

Historically, American courts not only refused to protect battered wives but actually condoned wife-beating. *See* RULE OF THUMB, *supra* note 2, at 12 ("early law of many American States expressly endorsed the right of a husband to punish his wife physically"). In 1824, the Supreme Court of Mississippi became the first court to proclaim that a husband had a right to chastise his wife. *See* Bradley v. State, 2 Miss. (1 Walker) 156 (1824). The court held that a husband should be "permitted to exercise the right of moderate chastisement . . . without being subjected to vexatious prosecution, resulting in the mutual discredit and shame of all parties concerned." *Id.* at 158.

The courts were slow to disavow the right of chastisement. In 1868, the North Carolina Supreme Court affirmed the acquittal of a man indicted for assault and battery upon his wife. *See* State v. Rhodes, 61 N.C. (Phil. Law) 453 (1868). The court observed that "the ground upon which we have put this decision is not that the husband has the *right* to whip his wife . . . but that we will not interfere with family government in trifling cases." *Id.* at 459.

justice system to punish a batterer signals to him, as well as to his victim and the public in general, that wife abuse is not criminal behavior and that it is an acceptable practice.[13]

Legislation can be vital to reshaping criminal justice system practices.[14] A number of state legislatures have recently demonstrated their dissatisfaction with police, prosecutors and courts whose failure to enforce existing law has led to the de facto decriminalization of spouse abuse.[15] These states have enacted comprehensive domestic

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Even those courts that no longer expressly condoned wife-beating continued to adhere to a policy of nonintervention in the absence of great injury. *See, e.g.*, State v. Pettie, 80 N.C. 367, 368 (1879) (no invasion of "domestic forum . . . unless some permanent injury be inflicted, or there be an excess of violence"); State v. Oliver, 70 N.C. 60, 61-62 (1874) (husband has no right to chastise wife but absent permanent injury or dangerous violence "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive").

It was not until the late 19th century that the courts expressly held wife-beating unlawful and acknowledged that a wife was "entitled, in person and in property, to the fullest protection of [a state's] laws." Fulgham v. State, 46 Ala. 143, 147 (1871) (husband not permitted by law to "correct" wife); *see also* Commonwealth v. McAfee, 108 Mass. 458, 461 (1871) (beating of wife unlawful); Harris v. State, 71 Miss. 462, 464, 14 So. 266, 266 (1894) (overruling *Bradley* as "revolting precedent").

Even today, however, evidence shows that some courts do not fully appreciate the serious nature of domestic violence. *See, e.g.*, Orloff v. Orloff, 49 A.D.2d 975, 975, 373 N.Y.2d 888, 890 (3d Dep't 1975) (isolated threat, by wife with handgun held insufficient ground for divorce); Rios v. Rios, 34 A.D.2d 325, 326, 311 N.Y.S.2d 664, 666 (1st Dep't 1970) (to obtain a separation, party "must either establish a pattern of actual physical violence or . . . conduct must be such as seriously affects the health of the spouse and threatens to impair it and renders it unsafe to cohabit"), *aff'd mem.*, 29 N.Y.2d 840, 277 N.E.2d 786, 327 N.Y.S.2d 853 (1971).

13. When police fail to arrest them:

> Men . . . [get] the message from police officers that woman battering is not a crime and that the sanctions of the criminal justice system—sanctions which presumably exist to deter and punish those who have the inclination to behave in antisocial ways—are routinely not invoked by police officers and that therefore they have nothing to fear if they beat the women with whom they are, or were, involved.

Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN 82-83 (D. Moore ed. 1979).

In a victim's own words: "My husband doesn't think he did anything wrong, and as long as he thinks like that, it's a problem." Interview with domestic violence victim, Urban Women's Shelter, Central Harlem, New York City (Feb. 13, 1987).

14. *See* GOOLKASIAN, *supra* note 4, at 20. Legislation can also affect societal attitudes and influence social change. *See* MARTIN, *supra* note 2, at 174.

15. *See infra* notes 127-47 and accompanying text. Significantly, "[t]he fact that [these] states have recently enacted laws specifically prohibiting wife-beating . . . demonstrates that the law has treated and regarded this form of violent behavior as quite different from the less common violence between strangers." J. FLEMING, STOPPING WIFE ABUSE: A GUIDE TO THE EMOTIONAL, PSYCHOLOGICAL, AND LEGAL

violence statutes that establish specific arrest practices,[16] and prosecutorial and judicial responsibilities.[17] Moreover, several states have made arrest of batterers mandatory in certain instances.[18]

New York State, however, lacks a specific statutory provision to guide law enforcement officials' response to domestic violence.[19] Existing domestic violence legislation in New York is limited primarily to providing improved court access for victims.[20] Ultimately, whether a batterer will be brought before the courts at all depends greatly on whether police exercise their arrest powers.[21] If unchecked by legislative intervention, New York's current policy of discretionary arrest will continue to allow the police to avoid making arrests in cases of domestic violence.[22] Without statutorily mandated arrest for

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IMPLICATIONS FOR THE ABUSED WOMAN AND THOSE HELPING HER 153 (1979) [hereinafter FLEMING].

16. For a discussion of state statutes establishing arrest practices for domestic violence, see *infra* notes 226-43 and accompanying text.

17. For a discussion of the prosecutorial and judicial responsibilities established by domestic violence legislation, see *infra* notes 305-27 and accompanying text.

18. For a discussion of mandatory arrest statutes, see *infra* notes 235-55 and accompanying text.

19. This proposition has two minor exceptions. New York has specifically granted police officers the authority to arrest violators of protection orders when the domestic violence victim presents an officer with a copy of the order. *See* N.Y. CRIM. PROC. LAW § 530.12(8) (McKinney 1984); N.Y. FAM. CT. ACT § 168(1) (McKinney 1983). New York also currently requires police officers to notify domestic violence victims of their legal rights and remedies. *See* N.Y. CRIM. PROC. LAW § 530.11(6) (McKinney Supp. 1987); N.Y. FAM. CT. ACT § 812(5) (McKinney Supp. 1987). Otherwise, the New York general warrantless arrest provisions apply when police respond in instances of domestic violence. *See infra* note 134 and accompanying text.

20. For a discussion of existing judicial remedies, see *infra* notes 51-98 and accompanying text.

21. The discretion accorded the police gives them the power to effectuate the entire penal process. *See* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543 (1960) [hereinafter Goldstein]; *see also* RULE OF THUMB, *supra* note 2, at 91 ("police stand at the entrance to the justice system, and their actions often prevent or discourage battered women from pursuing criminal remedies against their abusers").

22. Regarding the general use of discretion by police officers, Goldstein suggests:

> The ultimate answer is that the police should not be delegated discretion not to invoke the criminal law[;] . . . [they] should operate in an atmosphere which exhorts and commands them to invoke impartially all criminal laws. . . . Responsibility for the enactment, amendment, and repeal of the criminal laws will not, then, be abandoned to the whim of each police officer or department, but retained where it belongs in a democracy—with elected representatives.

Goldstein, *supra* note 21, at 586-87 (footnotes omitted). For a discussion of the ineffectiveness of discretionary arrest in instances of domestic violence, see *infra*

domestic violence, batterers will continue to view their actions as legally permissible and women will continue to be beaten.[23]

This Note proposes that New York implement a state-wide mandatory arrest policy for certain types of spouse abuse. Part II of this Note examines the approach of the New York Legislature to the problem of domestic violence, including previous attempts at decriminalization, current judicial remedies and the efficacy of protection orders.[24] Part III discusses the ineffectiveness of discretionary arrest in instances of spouse abuse and the advantages of mandatory arrest legislation.[25] Part IV discusses domestic violence statutes enacted by other states as potential models for New York.[26] Part V argues for the implementation of mandatory arrest legislation in New York and sets forth a proposal for comprehensive domestic violence legislation, including a provision for mandatory arrest.[27] Finally, this Note concludes that mandatory arrest legislation is necessary to curb domestic violence in New York State.

II. New York's Legislative Response to Domestic Violence

Currently, specific domestic violence legislation in New York State is limited primarily to providing improved court procedures and greater access for victims.[28] As originally enacted, the Family Court

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notes 135-38 and accompanying text. For an example of guidelines, adopted at the departmental level by the New York City police, which limit discretionary arrest in instances of domestic violence, see *infra* note 172.

23. *See supra* note 13.

24. *See infra* notes 28-98 and accompanying text.

25. *See infra* notes 99-221 and accompanying text.

26. *See infra* notes 222-55 and accompanying text.

27. *See infra* notes 256-327 and accompanying text.

28. *See infra* notes 51-98 and accompanying text. Recently, the legislature has focused on improving non-judicial relief, such as social services, for victims. In 1977, the legislature authorized the Board of Social Welfare to approve the establishment and operation of shelters for battered women accompanied by minor children. *See* 1977 N.Y. Laws ch. 450 (codified at N.Y. Soc. Serv. Law §§ 2(32) (McKinney Supp. 1987), 371(22) (McKinney 1983)). A subsequent amendment encouraged women to seek refuge in shelters by providing for reimbursement to them for the cost of their lodging. *See* 1985 N.Y. Laws ch. 688, § 1 (codified at N.Y. Exec. Law § 626 (McKinney Supp. 1987)). Moreover, the legislature also enacted a revenue-producing mechanism to support programs that respond to and prevent family violence. *See* Children and Family Trust Fund Act, 1984 N.Y. Laws ch. 960 (codified at N.Y. Soc. Serv. Law § 481-a to -f (McKinney Supp. 1986)).

The Governor's Task Force on Domestic Violence influenced the passage of some of these provisions. *See* Task Force on Domestic Violence, Domestic Violence: Second Report to the Governor and the Legislature 17 (1982) [hereinafter Task Force Second Report]. The Task Force, now called the Governor's Commission on Domestic Violence, was established within the Executive Department by Executive Order No. 90 in 1979. *See id.* at 37. Since then, the Commission has been a force

Act relegated incidents of domestic violence to civil adjudication.[29] Subsequent amendments, however, expanded the available judicial remedies to include access to criminal court.[30]

A. The Original Family Court Act

In 1962, the New York State Legislature enacted the "Family Offenses Proceedings" article (Article 8)[31] of the Family Court Act.[32] By establishing procedures for obtaining civil protection orders in family court, the legislature intended to provide a conciliatory alternative[33] to filing charges[34] against an abusive spouse.

The goal was "practical help" for the family rather than punishment for the offender.[35] Article 8 vested the family court with "exclusive original jurisdiction"[36] over proceedings concerning acts of disorderly conduct or assault[37] between spouses, parent and child,

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behind improved support services for battered wives in New York State. Past efforts included establishing a state-wide toll-free hotline, *see id.* at 16, and drafting, with the New York State Department of Health, a hospital memorandum and protocol setting forth the responsibilities of hospital staff towards victims of domestic violence. *See* N.Y. GOVERNOR'S REPORT, *supra* note 4, at 6.

29. *See infra* notes 31-51 and accompanying text.

30. *See infra* notes 51-98 and accompanying text.

31. 1962 N.Y. Laws ch. 686, §§ 811-846 (current version at N.Y. FAM. CT. ACT §§ 812-847 (McKinney 1983 & Supp. 1987)).

32. 1962 N.Y. Laws ch. 686, §§ 111-1019 (current version at N.Y. FAM. CT. ACT §§ 111-1211 (McKinney 1983 & Supp. 1987)). The New York Family Court was established by a 1961 amendment to the New York State Constitution. *See* N.Y. CONST. art. VI, § 13(a) ("Family court of the state of New York is hereby established").

33. *See* REPORT OF JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION No. 2—THE FAMILY COURT ACT, *reprinted in* 1962 N.Y. Laws 3428, 3444 [hereinafter COMMITTEE REPORT]. "The aim is not punishment, but practical help. Depending on the circumstances, this help may require an order of protection, support or conciliation." *Id.*; *see also* People v. Williams, 24 N.Y.2d 274, 278, 248 N.E.2d 8, 9, 300 N.Y.S.2d 89, 91 (1969) (purpose of Family Court Act is ameliorative); People *ex rel* Clifford v. Krueger, 59 Misc. 2d 87, 90, 297 N.Y.S.2d 990, 994 (Sup. Ct. Nassau County 1969) (legislative purpose underlying family court is to provide " 'practical help' " in family disputes).

34. *See* COMMITTEE REPORT, *supra* note 33, at 3444. The committee found that wives who brought criminal charges against their husbands generally sought one of three ends: (1) to conciliate; (2) to compel him to leave home; or (3) to make him stop beating her—and not conviction. *See id.* The committee thus concluded that "[g]iven the actual purposes that prompt wives to make 'criminal charges' of disorderly conduct or assault, . . . these concerns should be treated in the [f]amily [c]ourt by means of a civil proceeding." *Id.*

35. *See id.*

36. *See* 1962 N.Y. Laws ch. 686, § 812 (current version at N.Y. FAM. CT. ACT § 812 (McKinney 1983 & Supp. 1987)); *see also* People v. De Jesus, 21 A.D.2d 236, 238, 250 N.Y.S.2d 317, 321 (4th Dep't 1964) (family court is court of first resort).

37. *See* 1962 N.Y. Laws ch. 686, § 812 (current version at N.Y. FAM. CT. ACT § 812 (McKinney 1983 & Supp. 1987)).

or members of the same family or household.[38] Complaints filed in criminal court were transferred to the family court,[39] which had sole power to determine if these instances of spouse abuse should be treated as crimes and returned to the criminal court.[40]

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38. *See id.* "Spouses" and "household" were narrowly defined: a divorced spouse could not petition the court, *see* People v. Williams, 24 N.Y.2d 274, 283-84, 248 N.E.2d 8, 13, 300 N.Y.S.2d 89, 96 (1969) (no purpose in family court jurisdiction when goal of salvaging marriage is gone), nor could an unmarried cohabitant. *See* People v. Allen, 27 N.Y.2d 108, 112-13, 261 N.E.2d 637, 640, 313 N.Y.S.2d 719, 722-23 (1970) (cohabitants excluded from family court because public policy does not favor preserving these relationships); People v. Ostrander, 58 Misc. 2d 383, 385-86, 295 N.Y.S.2d 293, 295-96 (Dutchess County Ct. 1968) (same).

39. *See* 1962 N.Y. Laws ch. 686, § 813 (current version at N.Y. FAM. CT. ACT § 813 (McKinney 1983)); *see also* People v. Radison, 40 Misc. 2d 1063, 1065, 244 N.Y.S.2d 941, 943-44 (Sup. Ct. N.Y. County 1963) (criminal complaint must be transferred by criminal court to family court unless family court has transferred proceeding to criminal court); *cf.* People v. Hebmann, 54 Misc. 2d 666, 668, 283 N.Y.S.2d 179, 181-82 (Dist. Ct. Suffolk County 1967) (because criminal court lacked jurisdiction, escape charges brought against defendant arraigned in criminal court must be dismissed).

40. *See* 1962 N.Y. Laws ch. 686, § 814 (repealed 1977 N.Y. Laws ch. 449, § 2); *see also* People v. Berger, 40 A.D.2d 192, 193, 338 N.Y.S.2d 762, 764 (3d Dep't 1972) (family offense not a crime unless family court so determines); People *ex rel* Clifford v. Krueger, 59 Misc. 2d 87, 90-91, 297 N.Y.S.2d 990, 994 (Sup. Ct. Nassau County 1969) (same). This provision, in effect, decriminalized domestic violence. *See* Note, *Jurisdiction Over Family Offenses in New York: A Reconsideration of the Provisions for Choice of Forum*, 31 SYRACUSE L. REV. 601, 610 (1980) ("during any particular year for which statistics are available, only two to three percent of all family offense cases were transferred by the family court to a criminal court") [hereinafter *Choice of Forum*].

Nonetheless, although all assaults were statutorily within the jurisdiction of the family court, the courts still disagreed as to when, if ever, the criminal court could have initial jurisdiction over cases of serious assault. *Compare* People v. Johnson, 20 N.Y.2d 220, 224, 229 N.E.2d 180, 182-83, 282 N.Y.S.2d 481, 484-85 (1967) (family court has original jurisdiction over felonious assault) *and* People v. Battaglia, 39 A.D.2d 833, 833, 333 N.Y.S.2d 47, 47 (4th Dep't 1972) (family court has exclusive original jurisdiction over assault) *and* People v. De Jesus, 21 A.D.2d 236, 241-42, 250 N.Y.S.2d 317, 324 (4th Dep't 1964) (family court has jurisdiction over all assaults, not just misdemeanors) *and* Seymour v. Seymour, 56 Misc. 2d 546, 547, 289 N.Y.S.2d 515, 517 (Family Ct. Tioga County 1968) (all intra-family assaults are within jurisdiction of family court) *with* People v. Klaff, 35 Misc. 2d 859, 861, 231 N.Y.S.2d 875, 878 (Dist. Ct. Nassau County 1962) (felony assault has no place in family court).

The courts also disagreed as to whether family court jurisdiction over felony assault unconstitutionally deprived the grand jury of its power to indict. *Compare* People v. De Jesus, 21 A.D.2d 236, 240-41, 250 N.Y.S.2d 317, 323-24 (4th Dep't 1964) (delegation of jurisdiction over assault to family court does not conflict with constitutional power of grand jury) *with* Ricapito v. People, 38 Misc. 2d 710, 712, 238 N.Y.S.2d 864, 867 (Sup. Ct. Nassau County), *aff'd*, 20 A.D.2d 567, 245 N.Y.S.2d 846 (2d Dep't 1963) (family court jurisdiction conflicts with grand jury right to indict). Moreover, distinguishing between assault and attempted

A spouse, family member or an agent authorized by statute[41] initiated a proceeding in family court by filing a petition[42] alleging that the respondent spouse had committed a proscribed act.[43] The court, at the conclusion of a dispositional hearing[44] either: (1) dismissed the petition; (2) suspended judgment; (3) placed the respondent on probation; or (4) issued an order of protection.[45] The order of protection was limited in duration to one year, and its prohibitions, which emphasized protection of children rather than the abused

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murder, of which assault is an element, meant the difference between civil and criminal penalties. *See* People v. Bronson, 39 A.D.2d 464, 465, 337 N.Y.S.2d 215, 217 (4th Dep't 1972) (family court does not have jurisdiction over attempted murder); Whiting v. Shepard, 35 A.D.2d 11, 12-13, 312 N.Y.S.2d 414, 416 (3d Dep't 1970) (family court has jurisdiction only over enumerated acts, not over attempted murder); People v. Vaughn, 99 Misc. 2d 991, 992, 417 N.Y.S.2d 621, 623 (Dist. Ct. Suffolk County 1979) (family court lacks jurisdiction over attempted murder even though assault is an element). *But see* People *ex rel* Balk v. Warden, 46 A.D.2d 224, 225, 362 N.Y.S.2d 180, 181-82 (2d Dep't 1974) (family court has jurisdiction over defendant charged with both attempted murder and assault; distinguishing *Bronson*, in which defendant was charged only with attempted murder).

41. *See* 1962 N.Y. Laws ch. 686, § 822 (current version at N.Y. FAM. CT. ACT § 822 (McKinney 1983 & Supp. 1987)). This section allowed a petition to be filed by "[a]ny person in the relation to the respondent of spouse, parent, child, or member of the same family or household: . . . [a] duly authorized agency, association, society, or institution; . . . [a] peace officer; . . . [or a] person on the court's own motion." *Id.*

42. *See id.* § 821 (current version at N.Y. FAM. CT. ACT § 821 (McKinney 1983 & Supp. 1987)).

43. *See id.* § 821(a).

44. *See id.* § 833 (entitled "Definition of 'dispositional hearing' ") (current version at N.Y. FAM. CT. ACT § 833 (McKinney 1983)). Prior to the dispositional hearing, *see id.* § 835 (entitled "Sequence of hearings") (current version at N.Y. FAM. CT. ACT § 835 (McKinney 1983)), the court held an adjudicatory hearing to determine if the allegations of the petition were supported by a fair preponderance of the evidence. *See id.* § 832 (entitled "Definition of 'adjudicatory hearing' ") (current version at N.Y. FAM. CT. ACT § 832 (McKinney 1983) (entitled "Definition of 'fact-finding hearing' ")).

45. *See id.* § 841 (current version at N.Y. FAM. CT. ACT § 841 (McKinney 1983 & Supp. 1987)). The order of protection prescribed "reasonable conditions of behavior" to be observed by either petitioner or respondent or both. *Id.* § 842 (current version at N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1987)). The order might require that the party:

> [S]tay away from the home, the other spouse or the child; . . . permit a parent to visit the child at stated periods; . . . abstain from offensive conduct against the child or against the other parent or against any person to whom custody of the child is awarded; . . . give proper attention to the care of the home; . . . [or] refrain from acts of commission or omission that tend to make the home not a proper place for the child.

Id.

spouse, could also be imposed upon the petitioner.[46] Sanctions for willful violation of the order were limited to incarceration for a maximum of six months.[47] Furthermore, disposition of the petition by the family court barred any subsequent criminal proceedings on the same offense.[48]

B. Current Judicial Remedies

Today, New York's criminal courts have jurisdiction concurrent with that of the family court. Concurrent jurisdiction has not only made additional judicial remedies available to the victim of domestic violence,[49] but has also increased the availability of the traditional, and most frequently sought remedy—the order of protection.[50]

1. Concurrent Jurisdiction

In the late 1970's, the New York State Legislature began amending Article 8 of the Family Court Act to de-emphasize conciliation as the solitary goal of judicial intervention.[51] Amended language further indicated the reorientation of Article 8; the purpose of a family court proceeding now is "to stop the violence, end the family disruption and obtain protection."[52] The legislature recognized that in order to uphold its primary responsibility—protecting abused wives—penal alternatives might be necessary.[53]

The most significant amendment to Article 8 provided the criminal court with original jurisdiction that was concurrent with that of the

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46. *See id.*

47. *See id.* § 846 (current version at N.Y. FAM. CT. ACT § 846-a (McKinney 1983)).

48. *See id.* § 845 (current version at N.Y. FAM. CT. ACT § 845 (McKinney 1983)).

49. *See infra* notes 51-79 and accompanying text.

50. *See infra* notes 80-98 and accompanying text.

51. *See infra* notes 52-79 and accompanying text.

52. N.Y. FAM. CT. ACT § 812(2)(b) (McKinney 1983). The statutory language illustrates the evolving orientation of the statute from conciliation to protection. Prior to the adoption of the current version, the stated purpose of the Family Court Act was to "keep the family unit intact." 1977 N.Y. Laws ch. 449, *amended by* 1981 N.Y. Laws ch. 416. This was a goal much more consistent with the original intent of the Act—securing "practical help" and "conciliation." 1962 N.Y. Laws ch. 686, § 811, *repealed by* 1981 N.Y. Laws ch. 416.

53. *See* N.Y. FAM. CT. ACT intro. commentary 125, 128 (McKinney 1983) (among legislators, there was "a new consensus, namely: that the process of decriminalization had gone too far; that, by emphasizing the treatment of offenders . . . the authorities lost sight of their primary responsibility—to protect women from further injury").

family court.[54] Accordingly, the jurisdiction of the family court and criminal court are now largely identical,[55] except that criminal court has exclusive jurisdiction over first-degree assault.[56]

The legislature's recent expansion of the definition of "household member" to include former spouses and unmarried persons who have a child in common, provides greater court access than did the original version of Article 8.[57] The victimized household member has the choice of forum,[58] and arrest is not a prerequisite to

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54. *See* 1977 N.Y. Laws ch. 449, § 1 (codified at N.Y. FAM. CT. ACT § 812(1) (McKinney 1983 & Supp. 1987)) (concurrent jurisdiction). In approving the amended act, former New York Governor Carey observed that "[b]y giving criminal courts concurrent original jurisdiction over these family matters, this legislation now makes available the entire range of criminal sanctions which would have been applicable had the crime not occurred within a family or household." Governor's Memorandum on Approval of ch. 449, N.Y. Laws (July 19, 1977), *reprinted in* 1977 N.Y. Laws 2501 (McKinney); *see also* N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 1984) (effective June 24, 1980) (concurrent jurisdiction).

55. *See* N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 1984); *see also* N.Y. FAM. CT. ACT § 812(1) (McKinney Supp. 1987).

56. *See* N.Y. FAM. CT. ACT § 812(1) (McKinney Supp. 1982). The 1980 amendment divesting family court of jurisdiction over first degree assault, *see* 1980 N.Y. Laws ch. 530, § 5, signified the legislature's increasing recognition of the serious nature of domestic violence. *See* Governor's Memorandum on Approval of chs. 530, 531 and 532, N.Y. Laws (June 24, 1980), *reprinted in* 1980 N.Y. Laws 1877, 1877-78 (McKinney) [hereinafter Governor's Memorandum on Approval]. Former New York Governor Carey, quoting the Justice Subcommittee, stated:

> This exclusion, like the present exclusion of attempted murder, is a public policy statement that serious acts of violence between family members will not be tolerated. Violence in the home is as serious a breach of public order and safety as violence in the streets. Family violence is learned by children who take the violent response into the schools and streets, and later transmit it to their children.

Id. at 1878.

57. *See* N.Y. FAM. CT. ACT § 812(1) (McKinney Supp. 1987); *see also* N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 1984). The statute still does not provide access to family court for unmarried cohabitants, unless they have a "child in common." N.Y. FAM. CT. ACT § 812(1) (McKinney Supp. 1987).

58. *See* N.Y. FAM. CT. ACT § 812(2) (McKinney 1983); *see also* N.Y. CRIM. PROC. LAW § 530.11(2) (McKinney 1984). Court personnel must inform the victim of the distinction between the two proceedings:

> [A] family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end family disruption and obtain protection . . . [while] a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender.

Id.; N.Y. FAM. CT. ACT § 812(2) (McKinney 1983); *see also* N.Y. JUD. LAW § 216(1) (McKinney 1983) (imposing duty upon chief administrator of courts to designate appropriate persons to provide information to victims).

proceeding in either court.[59] Once the victim selects a forum, however, she is barred from proceeding in the alternate forum by either a finding on the merits of the petition or complaint, or a lapse of seventy-two hours following filing of the petition or criminal instrument.[60]

Both courts are also authorized to issue temporary[61] and permanent[62] orders of protection. Furthermore, under amended Article 8, if the victim presents a police officer with either a civil or criminal court issued protection order, the police officer has authority to arrest the violator.[63] Despite the overlap between the courts, however, their

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59. *See* N.Y. FAM. CT. ACT § 812(2)(f) (McKinney 1983); *see also* N.Y. CRIM. PROC. LAW § 530.11(2)(f) (McKinney 1984).

60. *See* N.Y. FAM. CT. ACT § 812(2)(e) (McKinney 1983); *see also* N.Y. CRIM. PROC. LAW § 100.07(2) (McKinney 1981); *id.* § 530.11(2)(e) (McKinney 1984). Family court jurisdiction is not barred if, when the family court is not in session, the defendant is initially brought before the criminal court in order for the victim to obtain a temporary restraining order against him. N.Y. FAM. CT. ACT § 821(4) (McKinney 1983). Criminal court jurisdiction will also not be barred if a family court judge, in his discretion, transfers a matter initiated in family court to criminal court. *See id.* § 813(1) (former § 813 mandating transfer from criminal court to family court was repealed by 1977 N.Y. LAWS ch. 449, § 2).

In addition, there is a loophole created by the interplay of these statutes: nothing expressly prohibits commencement of an action in criminal court *within* 72 hours of filing a family court petition. *See Choice of Forum, supra* note 40, at 616. Furthermore, there is no express requirement that a criminal action be terminated upon commencement of a family court action. *See* N.Y. FAM. CT. ACT § 821 practice commentary 165, 166-67 (McKinney 1983). New York Criminal Procedure Law section 530.11(4), however, which requires notice of the filing of a criminal complaint to the family court in which a proceeding is pending, represents an attempt to close this loophole. *See* N.Y. CRIM. PROC. LAW § 530.11(4) (McKinney 1984).

61. *See* N.Y. FAM. CT. ACT § 828 (McKinney 1983) (temporary order after petition filed); *id.* § 1029 (McKinney 1983) (temporary order before or after filing petition under "Child Protective Proceedings" article); *see also* N.Y. CRIM. PROC. LAW § 530.12(1), (3) (McKinney 1984 & Supp. 1987) (temporary orders obtainable when criminal action is pending, or *ex parte* after filing complaint and for good cause shown).

62. *See* N.Y. FAM. CT. ACT §§ 841(d) (McKinney 1983), 842 (McKinney 1983 & Supp. 1987) (order of protection for period not in excess of one year); *see also* N.Y. CRIM. PROC. LAW § 530.12(5) (McKinney Supp. 1987) (order of protection in addition to other disposition upon conviction).

63. *See* N.Y. FAM. CT. ACT § 168(1) (McKinney 1983) ("[t]he presentation of a copy of an order of protection or temporary order of protection . . . to any . . . police officer shall constitute authority for him to arrest a person charged with violating the terms of such order"); *see also* N.Y. CRIM. PROC. LAW § 530.12(8) (McKinney 1984) (same). These sections also reauire that the court clerk issue a copy of the order to the respondent or defendant, *see id.*, and file another copy with the local sheriff or police department. *See* N.Y. CRIM. PROC. LAW § 530.12(6) (McKinney 1984); N.Y. FAM. CT. ACT § 168(2) (McKinney 1983); *see*

purposes and dispositional alternatives remain, for the most part, distinct.[64]

The purpose of a family court proceeding—to obtain a civil remedy—has remained essentially unchanged, as have the available dispositional alternatives.[65] Concurrent jurisdiction, however, now provides the victim with an election of remedies when a family court protection order is violated.[66] When a spouse has violated a condition of an order of protection issued by the family court, the victim has three alternatives.[67] First, she may re-petition the family court, which can issue a new order of protection based on the recent offense.[68]

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also N.Y. FAM. CT. ACT §§ 155, 155-a (McKinney 1983) (post-arrest and admission to bail procedures for adults arrested for violating family court order of protection or for committing family offense or pursuant to court warrant).

64. *See infra* notes 65-79 and accompanying text.

65. The available dispositions include dismissal of the petition, suspension of judgment, imposition of probation or issuance of a protection order. *See* N.Y. FAM. CT. ACT § 841 (McKinney 1983 & Supp. 1987). As a result of a recent amendment, *see* 1980 N.Y. Laws ch. 531, § 1, the act now requires that a respondent placed on probation participate in an educational program. *See* N.Y. FAM. CT. ACT § 841(c) (McKinney 1983).

The conditions suggested by the legislature for inclusion in an order of protection have been amended since the 1962 enactment to include: (1) requiring a petitioner or respondent to participate in an educational program, *see id.* § 842(g); (2) requiring a person to pay for the injured party's medical expenses arising from the incident, *see id.* § 842(h); and (3) requiring the person to pay the other party's reasonable counsel fees or disbursements incurred in obtaining or enforcing the order. *See id.* § 842(f). The enumerated conditions are only suggestions—the court may impose conditions of its own devisal limited only by a requirement that they be reasonable. *Cf.* Jane Y. v. Joseph Y., 123 Misc. 2d 771, 773, 474 N.Y.S.2d 681, 683 (Family Ct. Richmond County 1984) ("stated purpose of family offense proceedings must be the measure by which the reasonableness of an order of protection is determined").

66. *See* N.Y. FAM. CT. ACT § 847 (McKinney 1983). Section 847 provides:

> An assault, attempted assault or other family offense as defined in section eight hundred twelve of this article which occurs subsequent to the issuance of an order of protection under this article shall be deemed a new offense for which the petitioner may elect to file a violation of order of protection petition, or a new petition or initiate a proceeding in a criminal court.

Id.

67. *See* People v. Mosley, 121 Misc. 2d 4, 6, 467 N.Y.S.2d 146, 148 (Syracuse City Ct. 1983) ("we read section 847 of the Family Court Act to provide to a complainant three alternative courses of action once an assault allegedly occurs subsequent to the issuance of an order of protection") (dictum). *But see* People v. Hayden, 129 Misc. 2d 444, 445, 493 N.Y.S.2d 272, 274 (Suffolk County Ct. 1985) (not party's own election when state decides to prosecute), *aff'd*, 128 A.D.2d 726, 513 N.Y.S.2d 220 (2d Dep't 1987).

68. *See* N.Y. FAM. CT. ACT § 847 (McKinney 1983) (entitled "Election by petitioner; certain cases"); *id.* § 821 (McKinney 1983 & Supp. 1987) (entitled "Originating proceedings").

Second, she may file a violation of protection order petition[69] with the family court, which can then issue a warrant for the violator's arrest.[70] If the court finds a willful violation, it may modify the existing order, impose a new order, or commit the offender to jail for a maximum of six months.[71] Third, the victim may file an accusatory instrument with the criminal court and commence criminal proceedings on the underlying offense.[72]

In contrast a criminal court proceeding—the purpose of which is to prosecute the offender—can result in conviction[73] and the imposition of penal sanctions.[74] The criminal court is also authorized to issue temporary orders of protection before disposition[75] and permanent orders in conjunction with final disposition.[76]

The extension of jurisdiction to the criminal court has made available additional sanctions for violations of protection orders. First, when a criminal court-issued protection order has been violated, the court can revoke the offender's bail, probation or conditional discharge.[77] Second, the court can punish the offender for contempt, independent of the sanctions it may impose for the underlying offense.[78] Third, at least one court has held that criminal courts adjudicating a case of intra-family assault have jurisdiction over a secondary charge of contempt for violation of an existing family court order of protection.[79]

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69. *See id.* §§ 847, 846 (McKinney 1983) (entitled "Petition; violation of court order").

70. *See id.* § 846(d) (entitled "Issuance of warrant").

71. *See id.* § 846-a (sanctions for willful violation). If the court finds that the violation was not willful it may still modify the petition for good cause shown. *See id.* § 844 (McKinney 1983) (entitled "Reconsideration and modification").

72. *See id* § 847 (McKinney 1983).

73. *See* N.Y. CRIM. PROC. LAW § 530.11(2)(c) (McKinney 1984); N.Y. FAM. CT. ACT § 812(2)(c) (McKinney 1983).

74. *Cf.* N.Y. CRIM. PROC. LAW § 530.12(10) (McKinney 1984) (sentence upon conviction of original crime not reduced or diminished by punishment for contempt based on violation of an order of protection).

75. *See id.* § 530.12(1) (McKinney 1984 & Supp. 1987).

76. *See id.* § 530.12(5) (McKinney Supp. 1987).

77. *See id.* § 530.12(11) (McKinney 1984).

78. *See supra* note 74; *see also* N.Y. JUD. LAW §§ 750, 751 (McKinney 1975 & Supp. 1987) (power of courts to punish for criminal contempt).

79. *See* People v. Feist, 129 Misc. 2d 761, 762, 494 N.Y.S.2d 628, 629 (Dist. Ct. Suffolk County 1985) (criminal court has jurisdiction over New York Penal Law § 215.50(3) prosecution for contempt for violation of family court order of protection); *see also* People v. Hayden, 129 Misc. 2d 444, 445-46, 493 N.Y.S.2d 272, 274 (Suffolk County Ct. 1985) (pursuant to New York Penal Law § 215.54 and New York Judiciary Law § 776, exclusive jurisdiction of court against which contumacious behavior was directed, does not preclude criminal court jurisdiction

2. *Protection Orders*

Recent legislative efforts have focused primarily on expanding the powers of the criminal court to issue protection orders[80] and on clarifying existing procedures for obtaining civil protection orders.[81] The family court order of protection is the judicial remedy most commonly sought by domestic violence victims.[82] In 1983, victims filed 24,793 family offense petitions seeking protection orders in the family courts.[83]

A number of commentators, however, have questioned the actual

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over prosecution for like penal code violation). These courts, respectively, declined to follow People v. Mosley, 121 Misc. 2d 4, 467 N.Y.S.2d 146 (Syracuse City Ct. 1983) (no prosecution pursuant to New York Penal Law § 215.50 for violation of family court order of protection), and criticized its holding. *See Feist*, 129 Misc. 2d at 762, 494 N.Y.S.2d at 629; *Hayden*, 129 Misc. 2d at 445, 493 N.Y.S.2d at 273-74.

80. *See, e.g.*, 1986 N.Y. Laws ch. 620 (codified at N.Y. CRIM. PROC. LAW § 530.12(5) (McKinney Supp. 1987)) (upon conviction of felony, criminal court may enter order of protection effective up to five years beyond date of conviction or three years from date of expiration of maximum term of indefinite sentence of imprisonment actually imposed); 1981 N.Y. Laws ch. 575 (codified at N.Y. CRIM. PROC. LAWS § 530.13 (McKinney 1984 & Supp. 1987)) (whenever there is a criminal prosecution, criminal court is authorized to issue orders of protection as condition of pre-trial release or release on bail to all crime victims regardless of their relation to defendant); *see also* 1983 N.Y. Laws ch. 376 (codified at N.Y. FAM. CT. ACT § 155(1) (McKinney 1983)) (clarifying that arrest of respondent for violation of family court protection order does not preclude petitioner from filing criminal complaint instead of family court violation of protection order petition).

81. *See, e.g.*, 1986 N.Y. Laws ch. 391, § 1 (codified at N.Y. FAM. CT. ACT § 818 (McKinney Supp. 1987)) (clarifying that family offense proceedings may originate in family court venue where shelter in which victim has sought refuge from violence is located); 1986 N.Y. Laws ch. 847, §§ 1, 2 (codified, respectively, at N.Y. FAM. CT. ACT § 812(5) (McKinney Supp. 1987), and N.Y. CRIM. PROC. LAW § 530.11(6) (McKinney Supp. 1987)) (requiring police or law enforcement officers investigating family offense to give victim notice of appropriate community services, legal rights and available remedies); 1981 N.Y. Laws ch. 693 (codified at N.Y. FAM. CT. ACT § 262(a)(ii) (McKinney 1983)) (providing that indigent petitioners have right to court appointed counsel in family court order of protection proceedings).

82. *See Report of the New York Task Force on Women in the Courts, reprinted in* 15 FORDHAM URB. L.J. 11, 29-30 (1987) [hereinafter *Women in the Courts*]. "The victim of a family offense has two options when seeking court-ordered protection . . . . The most widely used mechanism is a family court order of protection . . . . Prosecutorial discretion to decline to prosecute [a] case limits the availability of [criminal court issued orders of protection]. . . ." *Id.* (footnotes omitted).

83. N.Y. GOVERNOR'S REPORT, *supra* note 4, at 3 (citing NEW YORK STATE OFFICE OF COURT ADMINISTRATION, FAMILY COURT FAMILY OFFENSE PROCEEDINGS (1983)).

availability and efficacy of orders of protection.[84] One commentator has observed that initial access to the courts is still problematic since victims may not know "where to turn for help."[85] The Report of the New York Task Force on Women in the Courts concluded that some court personnel actively discourage victims who seek access to either the family court or the criminal courts.[86] Victims may also be disheartened by the length of time it can take to obtain the order of protection.[87] In addition, in 1982, the Governor's Commission on Domestic Violence reported that prosecutors often found criminal court judges reluctant to grant orders of protection.[88]

The Report of the New York Task Force on Women in the Courts has criticized the family court's practice of frequently issuing mutual orders of protection.[89] The Report found that mutual orders of protection, especially in the absence of a cross-complaint, make the petitioner appear equally guilty of violence and can negatively influence future court proceedings.[90] Moreover, mutual orders often confuse police, who, because they do not know which party to arrest, sometimes arrest neither.[91]

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84. *See infra* notes 85-98 and accompanying text.

85. Note, *Restraining Order Legislation For Battered Women: A Reassessment,* 16 U.S.F. L. REV. 703, 727 (1982) [hereinafter *Restraining Order Legislation*].

86. *See Women in the Courts, supra* note 82, at 34-36. The report, which was commissioned by the New York Task Force on Women in the Courts, was designed to collect data in order to assist the Task Force in assessing the extent to which gender bias may exist in the New York courts. *See id.* at 15, 23-25 & n.23. One thousand seven hundred and fifty-nine attorneys responded to the survey which included questions concerning such issues as equitable distribution, custody, rape and domestic violence. *See id.* at 23 n.23. The Task Force reports that "[f]orty-eight percent of women and thirty percent of men responding to the Attorneys' Survey reported that women are 'sometimes' or 'often' discouraged from seeking orders of protection in criminal court." *Id.* at 34 (footnote omitted). Furthermore, 35% of women and 24% of men who responded to the survey said that "domestic violence victims are 'often' or 'sometimes' discouraged by court or probation personnel from petitioning for orders of protection in family court." *Id.* at 35 (footnote omitted); *cf.* M. FIELDS & E. LEHMAN, HANDBOOK FOR BEATEN WOMEN 10 (1985) ("person at the appointment desk and the judge will both ask if this was the first time your husband attacked you. If it was . . . they will try to get you to forgive him").

87. *See* Fields, *supra* note 2, at 53 ("[j]udges in all courts also refuse to give family violence cases the expedited hearings warranted in these emergency situations . . . . Getting temporary orders of protection . . . can take months").

88. *See* TASK FORCE SECOND REPORT, *supra* note 28, at 25.

89. *Women in the Courts, supra* note 82, at 38. "[M]any family court judges routinely enter mutual orders of protection in family-offense proceedings upon the mere oral request of respondents or *sua sponte* without prior notice to petitioners and without an opportunity for rebuttal testimony by petitioners." *Id.*

90. *See id.* at 38-39.

91. *See id.* at 39.

Commentators have cited inadequate enforcement as a factor that diminishes the efficacy of protection orders.[92] It has been observed that when a victim presents a copy of a protection order to a police officer, thus authorizing him to arrest the violator,[93] the officer is often reluctant to make the arrest.[94] When a victim files a violation of protection order petition with the family court, she " 'will probably wait at least six weeks to come before the judge.' "[95] Even then, sanctions for violations are at the discretion of the family court judge.[96] Violators brought before either the family court or even the criminal court are " 'likely to receive a light punishment, if any at all.' "[97] Finally, a study has suggested that orders of protection do not significantly prevent future incidents of domestic violence.[98]

III. The Need for Mandatory Arrest Legislation

Three studies have similarly concluded that arrest of a batterer reduces recidivism.[99] General police policy, however, which affords officers discretion in making arrests, results in infrequent arrests of persons committing acts of domestic violence.[100] Conversely, man-

92. *See id.* at 44-45.

93. *See* N.Y. FAM. CT. ACT § 168(1) (McKinney 1983); *see also* N.Y. CRIM. PROC. LAW § 530.12(8) (McKinney 1984).

94. *See* N.Y. FAM. CT. ACT § 168 practice commentary 130, 131 (McKinney 1983) ("experience in many areas of the state seems to indicate [this provision's] limited success in encouraging police responsiveness . . . the police still view many family disputes as having minor importance and are reluctant to become involved").

95. *Women in the Courts*, *supra* note 82, at 44-45 (quoting testimony of Mary Lee Sulkowski, former Director of Haven House, a battered women's shelter in Buffalo, New York).

96. *See* N.Y. FAM. CT. ACT § 846-a (McKinney 1983) (entitled "Powers on failure to obey order"); *see also Women in the Courts*, *supra* note 82, at 45 (" 'Family Court Act gives judges discretion regarding enforcement' ") (quoting testimony of Wynn Gerhard, Esq., Acting Director of Neighborhood Legal Services in Buffalo).

97. *Women in the Courts, supra* note 82, at 45 (quoting testimony of Elizabeth Holtzman, District Attorney, Kings County); *see also* Fields, *supra* note 2, at 53 ("New York Family Court judges rarely impose jail sentences for contempt for violating orders of protection").

98. *See Restraining Order Legislation*, *supra* note 85, at 732 (citing J. FAGAN, E. FRIEDMAN, D. STEWART & V. LEWIS, THE NATIONAL FAMILY VIOLENCE EVALUATION: FINAL REPORT (1982) (available at *University of San Francisco Law Review* office). Approximately 60% of the 89 former clients of Law Enforcement Assistance Administration-funded family violence demonstration programs who had obtained restraining orders suffered further abuse. One out of four was subjected to further violence. *See id.* at 732 nn.160, 164.

99. *See infra* notes 102-24 and accompanying text.

100. *See infra* notes 127-75 and accompanying text.

datory arrest legislation includes, among its advantages, the assurance that batterers *will* be arrested.[101]

A. Arrest Deters Future Incidents of Domestic Violence

Several recent studies conclude that arrest of a batterer is effective in reducing recidivism.[102] In 1982, the Minneapolis Police Department, in cooperation with the Police Foundation, conducted a "classic" experiment.[103] The experiment was designed to test which police response—advice, separation or arrest[104]—most effectively deterred abusers from repeating violence.[105] The experiment was conducted over a one year period[106] in two Minneapolis precincts with the highest density of reported domestic violence.[107] Based on follow-up data supplied by the police and victims,[108] the researchers concluded that of the three possible responses, arrest was the most effective in preventing future acts of domestic violence.[109] The find-

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101. *See infra* notes 176-220 and accompanying text.

102. *See infra* notes 103-24 and accompanying text.

103. A "classic experiment" is a research design in which the effect of one factor on another is determined by holding constant all other possible causes of that effect. *See* Sherman & Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REP. 3 (Apr. 1984) [hereinafter *Minneapolis Experiment*]. For details of the methodology, see Sherman & Berk, *The Specific Deterrent Effects of Arrest For Domestic Assault*, 49 AM. SOC. REV. 261, 263-65 (1984) [hereinafter Sherman & Berk].

104. Police response was directed by lottery: each officer carried report-form pads that were color-coded for each of the three possible responses. *See Minneapolis Experiment*, *supra* note 103, at 3; *see also* Sherman & Berk, *supra* note 103, at 263. Whenever they received an appropriate domestic violence call they were to respond in the manner directed by the form on the top of the pad. *See id.*

105. For ethical reasons, the experiment was confined to misdemeanor or simple assault cases. *See id.* Pursuant to Minnesota statute the officer was not required to witness the assault to make an arrest, but he was required to have probable cause to believe that a cohabitant or spouse had assaulted the victim within the past four hours. *See id.*

106. The experiment ran from March 17, 1981, to August 1, 1982, and produced 314 case reports. *See* Sherman & Berk, *supra* note 103, at 264; *Minneapolis Experiment*, *supra* note 103, at 3-4.

107. *See Minneapolis Experiment*, *supra* note 103, at 3.

108. Two measures were used to determine rates of recidivism over a follow-up period of six months: police records of repeat offenses; and interviews with 205 of the victims in which they were asked if there had been further violent incidents. *See id.* at 5-6.

109. Results from police reports of subsequent violence show that out of the 314 initial reports, 24% of the offenders who were "separated" and 19% of those who received "advice" committed another violent act against a spouse within the six-month period. Only 10% of the arrested offenders repeated their violence within that period. *See id.* at 1 (figure 1).

Statistics computed from interviews with the 161 victims who completed all 12

ings also indicated that concerns, voiced by both police and victims, that arrest might lead to greater retributive violence against the victim, were largely unjustified.[110] In addition, the study suggested that the deterrent effect of arrest does not seem to depend on subsequent incarceration of the assailant; most of the batterers who were arrested spent little, if any, time in jail.[111]

A second study, conducted in Santa Barbara County, California, successfully replicated the findings of the Minneapolis experiment.[112] Researchers here also found that arrest reduced recidivism in domestic violence incidents.[113] They concluded that there was no evidence that

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follow-up interviews showed that of the suspects "separated" or "advised," 33% and 37%, respectively, committed new acts of violence against their spouses, while only 19% of those who had been arrested committed such acts. *See id.* at 6 (figure 2). Furthermore, interviews with victims indicate that according to them, the manner of arrest may affect its deterrent effect. *See id.* at 6. When the police arrested the suspect but did not take time to listen to the victim, 26% of the suspects repeated their violent acts. When the police similarly arrested the suspect but also talked with the victim, however, only nine percent of the suspects repeated an offense. *See id.* (figure 3). One possible explanation for this finding is that when the police acknowledged the victim, it showed the suspect that the victim had the power to influence police actions and that he had not been arrested for arbitrary reasons. *See id.* at 6.

110. *See* Sherman & Berk, *supra* note 103, at 270. Sherman and Berk concluded that "arrest intervention certainly did not make things worse and may well have made things better." *Id.* at 269.

111. *See id.* at 270. Of batterers who were arrested, 43% were released within one day, 86% within one week and 14% after a week. *See id.* at 268. These data dispel the hypothesis that the violence-reducing effect of arrest was due only to incapacitation. Moreover, the fact that the deterrent effect was not ostensibly impaired by the absence of long jail terms undermines the rationale often given by police for not arresting the offender—that without subsequent punishment arrest is a "waste of time." *See id.* at 270. Arrest, by itself, seems to provide a deterrent effect.

112. *See* Berk & Newton, *Does Arrest Really Deter Wife Battery? An Effort to Replicate the Findings of the Minneapolis Spouse Abuse Experiment*, 50 AM. SOC. REV. 253 (1985) [hereinafter Berk & Newton]. The data used was based on 783 wife battery incidents coming to police attention from June, 1981, to October, 1983, in Santa Barbara County, California. *See id.* at 256.

113. *See id.* at 261. Berk and Newton found that the deterrent effect of arrest was strongest with those suspects who, the authors determined, were more likely to be arrested anyway. *See id.* A number of factors or variables contributed to the "arrest propensity" of a suspect, including, but not limited to: whether the suspect was difficult when police arrived; whether either party had been drinking; the number of prior convictions; and the presence of a weapon. *See id.* at 257-58. The authors propose three rival hypotheses to explain the greater deterrent effect of arrest on "high propensity" batterers: (1) that for these batterers there is also an increased probability of serious post-arrest sanctions; (2) that the manner in which police arrest these offenders is more whole-hearted than in most domestic violence cases, thus conveying the seriousness of the offense; or (3) that arrest

"arrest *increased* the likelihood of new violence;"[114] that "on the average, arrests deter wife batterers from committing new offenses;"[115] and that these findings may thus support an argument for "at least presumptory arrest."[116]

The Minneapolis and Santa Barbara studies determined that once police had intervened in a domestic dispute, arrest was the most effective response in deterring future violence.[117] A third study, conducted by the Bureau of Justice Statistics of the United States Department of Justice, in reliance on National Crime Survey data, examined whether it is advisable for victims to call the police in the first place.[118] Although data collected by the National Crime Survey from 1978 to 1982 showed that the problem of repeat violence is far greater for victims of domestic-related attacks than for victims of an attack by a stranger,[119] only sixteen percent of the women who initially called[120] the police were victimized again within a six-month period.[121] Approximately twenty-three percent of women who did not call, however, were subject to renewed violence.[122] In addition, no evidence showed that any attacks that did occur after police were called were more serious than the initial incidents or than subsequent attacks experienced by victims who failed to call the

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does not as strongly deter lower propensity batterers because the violent incidents are rare for these individuals and are not recognized by them as battery. *See id.* at 260-61.

114. *Id.* at 261 (emphasis in original).

115. *Id.*

116. *Id.* Because the research to date has not revealed the mechanisms underlying the deterrent effect of arrest, Berk and Newton are reluctant to advocate adoption of an arrest policy in the absence of further study. *See id.* at 261-62.

117. *See supra* notes 103-16 and accompanying text.

118. *See* BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP'T OF JUSTICE, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 2 (Aug. 1986) [hereinafter PREVENTING DOMESTIC VIOLENCE].

119. The National Crime Survey found that from 1978 to 1982 an estimated 2.1 million married, divorced and separated women were victims of domestic violence at least once during an average twelve-month period. *See id.* at 3. Moreover, in the six months following an initial victimization, 32% of the women were victimized an average of three more times, whereas in stranger-to-stranger crimes for the same period, only 13% of the victims were victimized again by a stranger. *See id.*

120. The authors classified about 1.8 million of the approximately 2.1 million victims surveyed as "callers"—meaning that someone (most often the victim) called the police during the first, and perhaps only, incident of domestic violence in the twelve-month period—or "non-callers"—meaning that the police were not informed of the incident. *See id.*

121. *See id.* at 4. Moreover, when the assailant and the victim were married—not divorced or separated—the victim was 62% less likely to be assaulted again if she had called the police. *See id.*

122. *See id.*

police.[123] The Bureau of Justice statisticians concluded that the deterrent effect of calling the police may be attributable to the actual arrests made.[124]

Thus, the empirical evidence to date strongly supports the argument that law enforcement officers should intervene in incidents of domestic violence.[125] Moreover, once police intervene, arrest of the batterer is the most effective way of preventing repeated violence.[126]

B. Discretionary Arrest Results in Non-Arrest in Domestic Violence Cases

In practice, police generally use one of three approaches when responding to domestic violence calls. They may: mediate;[127] rec-

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123. *See id.*

124. *Id.* at 5. The authors observe:

> The critical element may be what police actually do once they are called. The arrests that undoubtedly occurred in some fraction of the incidents recorded in the [National Crime Survey] may largely or even entirely explain the lower risk of subsequent violence against women who call the police.

Id. The authors also present two other hypotheses to account for the deterrent effect: (1) that the mere threat of punishment presented by police intervention may have a deterrent effect, *see id.*, or (2) that calling the police is effective because abused wives are "good judges of character" and thus know which abusers they can safely report to the police. *Id.* at 4.

125. *See supra* notes 118-24 and accompanying text.

126. *See supra* notes 103-16 and accompanying text.

127. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 22-23 (September 1984) [hereinafter ATTORNEY GENERAL'S TASK FORCE]. The emphasis on a conflict-resolution approach in the 1960's led various police departments, including the New York City Police Department, to employ mediation intervention in response to domestic violence incidents. *See* Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform,* 14 SETON HALL L. REV. 74, 85 (1983) [hereinafter Finesmith]. Until recently, mediation was the preferred response in New York City, *see id.* (citing 10 CITY OF NEW YORK POLICE DEP'T, LEGAL BUREAU BULL. (No. 5, July 11, 1980) (not currently in effect)), but no longer. *See infra* note 172 for a discussion of the New York City Police Department's current policy on domestic violence.

Police departments in a number of jurisdictions, however, still prefer mediation over other responses. *See* Finesmith, *supra*, at 88-92.

The goal of mediation is often just "[q]uieting the people for the night and preserving the peace." D. REED, S. FISCHER, G. CANTOR & K. KARALES, ALL THEY CAN DO . . . POLICE RESPONSE TO BATTERED WOMEN'S COMPLAINTS 51 (1983) [hereinafter ALL THEY CAN DO]. Mediation typically requires the officer to "calm the dispute, listen carefully to both parties . . . and suggest ways to resolve the problem without involvement of the criminal justice system." RULE OF THUMB, *supra* note 2, at 18.

Although traditionally preferred, mediation is often an inappropriate response to the problem of domestic violence because: (1) it assumes equal culpability when

ommend that the victim exercise her civil remedies;[128] or, as a last resort, arrest the batterer.[129] Although the current trend disfavors mediation,[130] and some law enforcement organizations consider arrest to be the "preferred response,"[131] arrest is still discretionary in New York State[132] and in most jurisdictions.[133] Although New York law implicitly authorizes police to make warrantless arrests in cases of wife abuse,[134] police response to wife abuse still differs from police response to other crimes.[135] Police make fewer arrests in spouse abuse incidents than in incidents of similar violence between strangers.[136] Police may informally be implementing a higher standard of probable cause in cases of wife abuse.[137]

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that may not be the case; (2) it may be ineffective because of the disproportionate allocation of power in the battering relationship; and (3) it may presume that the underlying cause of violence can be resolved without arrest. *See* ATTORNEY GENERAL'S TASK FORCE, *supra* at 22-23. Mediation is an inappropriate technique that should not be used in lieu of arrest. *See* RULE OF THUMB, *supra* note 2, at 18.

128. *See id.* at 20 (police try to steer victims to civil remedy in belief that domestic violence does not belong in criminal justice system).

129. In its study of police attitudes towards domestic violence, the Civil Rights Commission concluded that "police departments apply formal or tacit arrest-avoidance policies to domestic violence cases." RULE OF THUMB, *supra* note 2, at 21. Moreover, police officers who testified at the commission hearings confirmed that "arrests in domestic abuse cases are rare." *Id.* at 14.

130. *See* LERMAN, *supra* note 3, at 6.

131. *See, e.g.,* ATTORNEY GENERAL'S TASK FORCE, *supra* note 127, at 17, 24 (recommending that chief executive of every law enforcement agency establish arrest as "preferred" response to domestic violence).

132. *See infra* note 134.

133. *See infra* notes 223-34 and accompanying text. For a discussion of state laws making arrest of the batterer mandatory in certain circumstances, see *infra* notes 236-43 and accompanying text.

134. *See* N.Y. CRIM. PROC. LAW § 140.10(1) (McKinney 1981). This section provides, inter alia, that "a police officer *may* arrest a person for . . . [a] crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise." *Id.* (emphasis added). The term "crime" includes both felonies and misdemeanors. *See* N.Y. PENAL LAW § 10.00(6) (McKinney 1975).

Statutes authorizing arrest implicitly apply to cases of wife abuse. *See* Woods, *Litigation on Behalf of Battered Women*, 5 Women's Rts. L. Rep. 7, 22 (Rutgers Univ. 1978) [hereinafter Woods]. Moreover, in cases when the police may be reluctant to arrest, a battered woman has the right to make a citizen's arrest. *See id.; see, e.g.,* N.Y. CRIM. PROC. LAW § 140.30 (McKinney 1981). This law provides: "[A]ny person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence." *Id.*

135. *See supra* note 9.

136. *See id.*

137. *See* LERMAN, *supra* note 3, at 25 ("[p]olice often impose a higher standard of probable cause to arrest in spouse abuse cases than [in] stranger cases"). In

When the decision to arrest is discretionary, police rely on various rationales to justify a tacit arrest-avoidance policy in spouse abuse cases.[138] Police, influenced by their own attitudes about wife beating[139] or the family, often conclude that arrest would violate marital privacy,[140] and would be economically detrimental to the family.[141] Some police officers view arrest as futile, given complainant attrition[142] and prosecutorial inaction.[143] They may believe that arresting the

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instances of minor injuries, fewer arrests are made when there is a prior relationship between the parties than when the parties are strangers. *See id.* at 25-26. Moreover, police may minimize the severity of a battering incident. For example, one officer observed: "This is mostly not very serious—maybe one of them gave the other a few pops. If it's a legitimate battered woman where there's bleeding and all, it's different." ALL THEY CAN DO, *supra* note 127, at 38. In the words of a victim: "You have to be dead or almost dead for them [police] to take action. I've seen this in almost all [New York City] boroughs—I've been in almost all boroughs with him [the batterer] except Staten Island." Interview with domestic violence victim, Urban Women's Shelter, Central Harlem, New York City (Feb. 13, 1987); *cf.* ME. REV. STAT. ANN. tit. 19, § 770(4) (1981) ("[a] law enforcement officer at the scene of an alleged incident of abuse shall use the same standard of enforcing relevant Maine Criminal Code sections when the incident involves family or household members as when it involves strangers").

138. *See infra* notes 139-47 and accompanying text.

139. Some officers themselves may believe that the offender has a right to beat his wife. *See* L. WALKER, THE BATTERED WOMAN 207 (1979) ("[p]olice officers are frequently men who have been socialized to believe that a man has the right to discipline his woman") [hereinafter WALKER]. One officer's anecdote about his partner is illustrative:

> I had a call and this guy was beating his wife up. My partner took me outside and said, "[l]ook, son. I'm going to tell you something. I've been married probably longer than how old you are." He said, "[m]y wife feels as though I don't love her anymore, so at least once a month, I start an argument, I slap her around a little bit, and we have a perfect marriage. I've been married thirty-five years."

FLEMING, *supra* note 15, at 151. Walker reports that there is "[a]n unusually high incidence of wife beating . . . among police officers." WALKER, *supra*, at 207.

140. *See supra* note 8 and accompanying text. In a victim's words: "Each time they [the police] came they said 'okay, be a good wife, you can fix it, why are you trying to break up the family. . . . He'll just go find himself another wife.' " Interview with domestic violence victim, Urban Women's Shelter, Central Harlem, New York City (Feb. 13, 1987).

141. *See* Marcus, *supra* note 4, at 1670; Note, *The Inadequate Police Protection of Battered Wives: Can a City and Its Police Be Held Liable Under the Equal Protection Clause?*, 14 FORDHAM URB. L.J. 417, 435 (1986) [hereinafter *Inadequate Police Protection*].

142. *See* RULE OF THUMB, *supra* note 2, at 15. Witnesses testifying before the Commisson on Civil Rights agreed: "[O]fficers do not always make arrests, even when the victim specifically requests it, since many officers expect that the victim will later change her mind." *Id.*

143. *See* LERMAN, *supra* note 3, at 14-15; *see also* RULE OF THUMB, *supra* note 2, at 93 ("[p]olice officers . . . may be less interested in arresting an assailant if they know the prosecutor probably will not pursue the case").

batterer would result in even greater danger to the victim—possibly encouraging retaliation by the batterer.[144] Practical constraints on police resources,[145] and the low priority generally attached to domestic violence calls,[146] may further discourage arrest. Finally, because of the common perception that domestic violence calls are among the most dangerous for police, many officers may be reluctant to confront an already irate batterer with arrest.[147]

None of these rationales, however, justifies a failure to arrest.[148] First, a decision to forgo arrest based on a perception that state intervention would violate marital privacy and destroy the possibility of harmony, is logically and legally indefensible: "The courts have unequivocally ruled that the right of privacy shields acts between two individuals only when both consent and when such acts do not impair any person's safety and health."[149] Second, the rationale that arrest of the batterer would deprive the family of income does not

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144. *See* Finesmith, *supra* note 127, at 85; *Inadequate Police Protection, supra* note 141, at 435.

145. Factors such as the volume of violations at any given time can influence the decision to arrest. *See* Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited,* 3 Women's Rts. L. Rep. 138, 156 (Rutgers Univ. 1977) [hereinafter Eisenberg & Micklow].

146. Because batterers are not considered "serious criminals," as are "bank robbers [and] murderers," police do not view arrest of a batterer as a "good pinch." Blair, *Making the Legal System Work for Battered Women*, in BATTERED WOMEN 101, 107 (D. Moore ed. 1979). Arrest of a batterer is also not considered a "glamorous job." Therefore, because domestic violence cases do not provide the usual police rewards, they are a low priority for officers. *See id.*

147. Police officers commonly perceive intervention in domestic disturbances as highly dangerous to themselves. *See* RULE OF THUMB, *supra* note 2, at 13. This may lead them to "avoid domestic calls, to delay responding, or to avoid any type of confrontational action when they do respond." GOOLKASIAN, *supra* note 4, at 6.

148. *See infra* notes 149-70 and accompanying text.

149. Marcus, *supra* note 4, at 1661 (footnotes omitted); *see also* People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207, *cert. denied*, 471 U.S. 1020 (1985). In holding unconstitutional the marital rape exemption provision of New York Penal Law § 130, the New York Court of Appeals in *Liberta* rejected the defendant's argument that the exemption protected marital privacy and promoted reconciliation by preventing state intervention in marriage. The court found, instead, that the exemption did not further privacy, because the right of privacy protects consensual acts and not violent assaults. *See id.* at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214; *cf.* Trammel v. United States, 445 U.S. 40 (1980). The Court in *Trammel* abolished spousal immunity, finding that "the modern justification for this privilege"—its "perceived role in fostering the harmony and sanctity of the marriage relationship"—was insufficient to sustain it. *Id* at 44. "When one spouse is willing to testify against the other in a criminal proceeding . . . their relationship is . . . in disrepair [and] there is probably little in the way of marital harmony . . . to preserve." *Id.* at 52.

justify the failure to arrest.[150] Police demonstrate no concern over the effect of lost wages on the families of other criminals they arrest.[151] Furthermore, alternative dispositions available to the courts may enable batterers who have been arrested to continue working.[152]

Third, the possibility of complainant attrition is an invalid reason for failure to arrest.[153] No evidence demonstrates that complainant attrition is higher when the abuser and victim are married or cohabitate, than when they are merely acquaintances.[154] Existing complainant attrition may be attributable to the systematic discouragement that victims of domestic violence receive from the police, prosecutors and the courts,[155] and thus may be remedied.[156] Moreover, complainant attrition should not impair the deterrent effect of arrest, since it has been shown that arrest alone, without further sanctions, deters repeated violence.[157]

Police rationalize their failure to arrest by pointing to the reluctance of prosecutors to pursue domestic violence cases.[158] The officers may thus view arrest as a waste of time or they may fear that if the offender is free to immediately return home, arrest could trigger retaliation against the victim.[159] While increased prosecutorial efforts are badly needed,[160] failure to arrest based on potential failure to prosecute, only perpetuates an unfortunate cycle of inaction.[161] In fact, more arrests may lead to more frequent prosecutions.[162] Furthermore, the empirical evidence shows that police fears that an

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150. *See Inadequate Police Protection, supra* note 141, at 435.

151. *See id.* at 436; *see also* Marcus, *supra* note 4, at 1671 ("[b]urglars and batterers may not use diminution of their family's income as a basis for immunity if their victims are strangers; it would be a curious paradox if economic protection of the wife were invoked only where her own loss of physical security is at stake") (footnote omitted).

152. *See infra* notes 321-25 and accompanying text.

153. *See* Woods, *supra* note 134, at 19-20.

154. *See Inadequate Police Protection, supra* note 141, at 436.

155. *See supra* note 86 and accompanying text.

156. In states where prosecutors have vigorously pursued domestic violence cases, the incidences of cooperation by complaining witnesses, and the rates of conviction, have been high. *See* Marcus, *supra* note 4, at 1680, 1690 n.140. For a discussion of enhanced prosecution programs and victim advocacy projects, see *infra* notes 305-15 and accompanying text.

157. *See supra* notes 103-24 and accompanying text.

158. *See supra* note 143 and accompanying text.

159. *See supra* note 144 and accompanying text.

160. *See supra* note 10; *infra* note 200.

161. If police make fewer arrests because of perceived prosecutorial inaction, fewer batterers will be subject to prosecution—thus cyclically reinforcing police perceptions.

162. *See* LERMAN, *supra* note 3, at 119-20 ("[a]n increase in the number of

arrested batterer will retaliate against the victim are, for the most part, unfounded.[163]

Police policy, which generally gives low priority to domestic violence, is generated by a perception of domestic violence as essentially non-criminal.[164] This perception is false: acts of domestic violence are often undeniably criminal;[165] they are often accompanied by serious injury to the victim[166] and are characterized by high rates of recidivism.[167]

Finally, police concerns that domestic violence incidents disproportionately threaten their own safety are largely unfounded.[168] A recent study has shown that in New York City, domestic violence calls accounted for only two percent of all assaults on officers.[169] Moreover, compared with four other types of incidents to which police respond—robbery, burglary, traffic and other disturbances—domestic violence presented one of the lowest risks of injury.[170]

Even though much of the rationale for non-arrest is without merit, it still influences the perceptions of officers who make the ultimate decision of whether to arrest.[171] In New York, the absence of any statutory control over police discretion[172] in responding to the unique

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persons arrested for violence against their mates . . . will lead to more frequent prosecution of family violence cases").

163. *See supra* notes 103-24 and accompanying text.

164. *See supra* note 146.

165. *See supra* note 4.

166. *See id.*

167. *See supra* note 119 and accompanying text.

168. *See* GOOLKASIAN, *supra* note 4, at 6. Misinterpretation of official statistics on police deaths has contributed to the perception that domestic violence calls are highly dangerous. The danger of responding to domestic violence calls has been exaggerated because statistics regarding domestic violence calls were included with other categories:

> Until 1982, all felonious deaths of police officers which occurred when they responded to bar fights, "man with a gun" situations, general disturbances, and "family quarrels" were reported by the FBI under the category of "disturbances," and for a number of years this category was the single most frequent category of officer deaths.

Id. According to the National Association of Chiefs of Police, confrontations with "criminals" are now considered more dangerous than responding to domestic violence calls: "Robbery and burglary calls have displaced domestic disputes as the most dangerous calls for law enforcement officials." USA Today, Jan. 6, 1987, at 8A, col. 1.

169. *See* GOOLKASIAN, *supra* note 4, at 6 (citing J. GARNER & E. CLEMER, DANGER TO THE POLICE FROM DOMESTIC DISTURBANCE CALLS: A NEW LOOK AT THE EVIDENCE (National Institute of Justice 1985)).

170. *See id.*

171. *See supra* notes 135-47 and accompanying text.

172. Any limiting of police discretion has come from the courts and the threat of civil liability. In Sorichetti v. City of New York, 65 N.Y.2d 461, 482 N.E.2d

problem of wife abuse has resulted in a lack of uniformity on two levels—in the actions of individual officers and in police policy

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70, 492 N.Y.S.2d 591 (1985), the court held New York City liable for its failure to provide reasonable police protection to six-year old Dina Sorichetti, to whom a special duty was owed. *See id.* at 470-71, 482 N.E.2d at 76-77, 492 N.Y.S.2d at 597-98. The facts of *Sorichetti* are tragic. Mrs. Sorichetti, Dina's mother, had repeatedly obtained orders of protection against her violent husband. During the exercise of his weekly visitation privileges with Dina, however, Mr. Sorichetti viciously attacked the girl with a knife, a fork, and a screwdriver, and tried to saw off her leg, leaving her permanently injured. *See id.* at 464-67, 482 N.E.2d at 72-74, 492 N.Y.S.2d at 593-95. The court held that the police owed Dina a special duty arising from: (1) the existence of a protection order obtained by Dina's mother, against her husband; (2) police awareness of Mr. Sorichetti's potential for violence; (3) Mrs. Sorichetti's reasonable expectation of police protection; and (4) police reponse to Mrs. Sorichetti's requests for assistance on the day of the assault. *See id.* at 469, 482 N.E.2d at 75, 492 N.Y.S.2d at 596; *see also* Bloom v. City of New York, 78 Misc. 2d 1077, 357 N.Y.S.2d 979 (Sup. Ct. N.Y. County 1974) (municipality liable for negligent failure to protect when its officers have given specific assurance of protection). Liability for failure to protect, however, may be limited in New York to cases in which the court finds that the police owed a special duty to the victim. *Cf.* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (no liability when police had not undertaken to protect).

Prior to *Sorichetti*, 12 battered wives had used the New York courts to challenge the New York City Police Department, among other parties, for its policy of non-arrest and its resulting failure to protect the wives from their abusive husbands. *See* Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. N.Y. County 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dep't 1978) (non-justiciable cause of action), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979). The trial court, refusing to grant the defendant's motion for summary judgment, had held that the police owed a duty of protection to women who had obtained orders of protection. *See Bruno*, 90 Misc. 2d at 1050, 396 N.Y.S.2d at 977.

Before the appeal, the police entered into a court-enforceable consent judgment with the plaintiffs, *see* Woods, *supra* note 134, at 27, which resulted in amendments to the New York City Police Department's regulations concerning response to domestic violence incidents. *See id.* Current New York City Police Department guidelines expand the definition of "family/household" beyond the Family Court Act definition, to include " 'common-law' marriages, and same sex couples." CITY OF NEW YORK POLICE DEP'T INTERIM ORDER No. 56, 2 (Aug. 1, 1985) (available at *Fordham Urban Law Journal* office). The current regulations also limit police discretion: arrest is required, even against the wishes of the victim, if the officer has probable cause to believe a felony has been committed. *See id.* at 3. If the police officer has probable cause to believe that the offender committed a misdemeanor, the officer must make an arrest if the victim requests, and he may do so at his discretion, even if she objects. *See id.* The guidelines stress that the standard of probable cause applied in domestic violence situations does not differ from the standard applied in situations involving other offenses. *See id.* at 2.

In addition, the New York City Police Department now prohibits an officer from issuing a Desk Appearance Ticket when the victim and the offender are members of the same "family/household" and, the "[o]ffender has violated an [o]rder of [p]rotection [or when the] [o]ffense charged is disorderly conduct, harassment, menacing, reckless endangerment 2 [degree]; assault 3 [degree] or attempted assault, [or

across the state.[173] Moreover, the policy of discretionary arrest in New York, where "[a] major systemic problem has been inadequate police responses to domestic violence calls,"[174] leads, more often than not, to no arrest.[175]

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the] . . . victim requests [the] opportunity to obtain a [t]emporary [o]rder of [p]rotection, [or the] facts of the case indicate the immediate need of a [t]emporary [o]rder of [p]rotection." *Id.* at 6.

Recently, the police department has intensified its efforts to combat domestic violence in New York City. In October, 1984, the New York City Police Department, in conjunction with the Victim Services Agency (VSA), established the Domestic Violence Prevention Program (DVPP). *See* CITY OF NEW YORK POLICE DEP'T OPERATIONS ORDER No. 47, 1 (May 9, 1986) (available at *Fordham Urban Law Journal* office) [hereinafter OPERATIONS ORDER No. 47]. The DVPP, which currently operates in three New York City precincts, employs a team consisting of a police officer and a VSA counselor "to track and target violent households and to administer outreach intervention strategies." DOMESTIC VIOLENCE PREVENTION PROGRAM, POLICE DEP'T, CITY OF NEW YORK 1 (undated and unpublished) (available at *Fordham Urban Law Journal* office) [hereinafter DOMESTIC VIOLENCE PREVENTION PROGRAM].

Accordingly, a fulltime "Domestic Violence Prevention Officer" (DVPO), assigned to each of the three precincts, reviews records of past and present domestic violence calls to the precinct. *See* OPERATIONS ORDER No. 47, *supra*, at 1. The DVPO then compiles a list of addresses at which serious or numerous domestic disputes have occurred, including information on arrest activity and the presence of weapons, for dissemination to officers of the command. *See id.* The DVPO also telephones targeted households to explain to either the batterer or the victim that domestic violence is a crime and that the situation in his/her household will be monitored by the police. *See* DOMESTIC VIOLENCE PREVENTION PROGRAM, *supra*, at 2. Victims are offered the assistance of a VSA counselor, and are informed of their options, including orders of protection and/or arrest and prosecution of the batterer. *See id.* Batterers are informed of the availability of counseling. *See id.* In certain cases, the DVPO is authorized to make personal visits to affected households, arrest batterers, or assist complainants in serving summonses and protection orders. *See* OPERATIONS ORDER No. 47, *supra*, at 1.

The DVPP is not limited to the participation of a VSA counselor and a DVPO, but also extends to the prosecutorial level. The District Attorney's office has agreed to prosecute misdemeanor domestic violence cases in the absence of a complainant "if the police can provide an independently supportable case." DOMESTIC VIOLENCE PREVENTION PROGRAM, *supra*, at 3.

Victims in other states have also used the courts' coercive powers to effect police reform. For example, in Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984), the court upheld an equal protection challenge to malperformance of official police duties with regard to assaults on the plaintiff by her husband. *See id.* at 1527. Moreover, the *Thurman* case inspired the Connecticut State Legislature to enact comprehensive state-wide domestic violence legislation, which includes a mandatory arrest provision. *See infra* note 241 and accompanying text.

173. For example, the police department in one town in Rockland County, New York, has a "preferred arrest" policy, while the police departments in 12 other Rockland County towns do not. Telephone interview with Phyllis B. Frank, President of the New York State Coalition Against Domestic Violence (Feb. 2, 1987) [hereinafter Frank Interview].

174. N.Y. GOVERNOR'S REPORT, *supra* note 4, at 6.

175. A commentator familiar with the problem of domestic violence in New

C. Benefits of Mandatory Arrest

If the basic goals of criminal law are "standard-setting, deterrence, incapacitation, rehabilitation, and punishment,"[176] then mandatory arrest for acts of domestic violence serves these goals well.[177] Statutorily mandated arrest makes explicit the legislative intent to increase arrests in instances of domestic violence.[178] It makes clear the oft-forgotten fact that spouse abuse is a crime,[179] and it communicates that fact to the community,[180] to the police,[181] to the batterer[182] and to the victim.[183] Mandatory arrest will help ensure that police decisions are not predicated on erroneous and archaic rationales.[184] Changing the current policy of discretionary arrest to a policy of mandatory arrest will compel police to do their jobs and more arrests will be made.[185]

Systematic arrest of batterers may have a manifold impact. Certainty of punishment is a critical element of deterrence.[186] Logically,

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York observed that in Otsego County: "County police, sheriffs, and state troopers all [handle] domestic violence calls, and arrest is a last resort—definitely not a first choice." Telephone interview with Regina Haran-Buckner, Assistant Director of Aid to Battered Women, Oneonta, New York (Feb. 2, 1987). Moreover, Phyllis B. Frank, President of the New York State Coalition Against Domestic Violence, observed that "according to feedback [she] received in traveling across the state, arrest is [not the usual] response, [and] even in cases where [arrest] guidelines exist—arrest is not the typical response." Frank Interview, *supra* note 173.

176. Finesmith, *supra* note 127, at 104.

177. *See infra* notes 178-204 and accompanying text.

178. *See* LERMAN, *supra* note 3, at 130.

179. *See supra* notes 8, 127-37 and accompanying text.

180. *See* MARTIN, *supra* note 2, at 174 ("legislation very often effects changes in public attitudes over time").

181. *See infra* notes 252-55 and accompanying text.

182. Sanctions demonstrate social disapproval of various behaviors, and withholding sanctions demonstrates to batterers that their behavior is not illegal. *See* DOBASH & DOBASH, *supra* note 3, at 217.

183. An arrest of the perpetrator of violence can demonstate to the victim that she has a right not to be beaten. *See* LERMAN, *supra* note 3, at 120-21. A victim's comment supports this proposition:

> When I was battered my ex-husband told me it was my fault. The police acted as if it was my fault. No one ever said it was his fault; no one ever said he was breaking the law. No one ever acted as if it was him and not me who should have been punished.

An Act Concerning Family Violence Prevention and Response: Public Hearings Before Connecticut General Assembly, Joint Standing Comm. on the Judiciary, Part 2, 522 (1986) (testimony of Tracy Thurman) [hereinafter *Hearings*]. For a discussion of the *Thurman* case, which was, in part, the impetus for legislative reform in Connecticut, see *supra* note 172.

184. *See supra* notes 138-70 and accompanying text.

185. *See infra* notes 250-53 and accompanying text.

186. Marcus, *supra* note 4, at 1686. "Certainty of punishment is critical to its impact." *Id.* Moreover, "[t]he prime penological goal of deterrence is premised on such certainty." *Id.* at 1686 n.124.

therefore, limiting police discretion will make the threat and reality of punishment more immediate to the batterer. Mandatory arrest may thus provide a deterrent effect,[187] both general[188] and specific.[189] It has a general deterrent effect because many batterers do not view their behavior as criminal,[190] and therefore an awareness that their acts will result in arrest can be a powerful deterrent.[191] Furthermore, studies[192] indicate that arrest in instances of wife abuse has a specific deterrent effect: batterers who were arrested showed reduced rates of recidivism upon their return home.[193] The deterrent effects of sanctions against an abuser may potentially be greater than they are for other crimes.[194] Generally, an offender's belief that he will elude identification and not be apprehended, diminishes the deterrent effect of sanctions.[195] Domestic violence, however, is one of the few crimes in which the offender knows the victim can always identify him.[196]

While arrest itself—without further sanctions—deters,[197] increased arrests may also lead to more frequent prosecution of offenders.[198]

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187. *See id.* at 1685. "Assaults have been punishable as crimes throughout our history . . . because persuasion and supervision are insufficient without the ultimate sanction of incarceration." *Id.*

188. A "general deterrent" dissuades potential offenders in the general community from committing criminal acts. *See* S. KADISH, S. SCHULHOFER & M. PAULSON, CRIMINAL LAW AND ITS PROCESSES 195 (1983).

189. A "specific deterrent" entails inflicting a sanction upon a particular individual so he is less likely to engage in a certain act again. *See id.*

190. Typically, batterers "are likely to see themselves as law-abiding citizens for whom arrest is unusual and frightening." Finesmith, *supra* note 127, at 104.

191. The realistic consequences of arrest—"publicity, embarrassment, and loss of time from work," *id.*, as well as the "symbolic impact [accompanying] the stigma attached to criminal misconduct," LERMAN, *supra* note 3, at 14, may have a strong deterrent effect. *See* Finesmith, *supra* note 127, at 104. In the words of a former batterer: " 'It was such an extreme experience having actually been arrested and dealt with rather harshly . . . that I sought help.' " ATTORNEY GENERAL'S TASK FORCE, *supra* note 127, at 22 (quoting former abuser).

192. *See supra* notes 103-24 and accompanying text. The authors of the Minneapolis experiment, which was confined to a study of misdemeanor assault cases, "favor a *presumption* of arrest . . . [and] do not . . . favor *requiring* arrests in all misdemeanor domestic assault cases." Sherman & Berk, *supra* note 103, at 270 (emphasis in original). The authors of the Santa Barbara study note that the deterrent effects of arrest found under existing conditions may be altered if those conditions are changed, for example, by the adoption of an arrest policy. *See* Berk & Newton, *supra* note 112, at 261.

193. *See supra* notes 103-16 and accompanying text.

194. *See* ATTORNEY GENERAL'S TASK FORCE, *supra* note 127, at 4-5.

195. *See id.*

196. *See id.*

197. *See supra* note 111 and accompanying text.

198. *See* LERMAN, *supra* note 3, at 119-20. Prosecution need not always result in incarceration of the batterer. Prosecution, or the threat of prosecution, also can

Indeed, increased prosecutions may be encouraged simply by the sheer volume of arrests.[199] A legislative scheme that provides for enhanced prosecutorial efforts[200] can also lead to more frequent and successful prosecutions.[201]

The implications of statutorily mandated arrest will vary depending upon the circumstances of the individual victim.[202] For all victims, however, arrest of the batterer can prevent further immediate injury.[203] For those women who, in the past, had called the police in an unsuccessful attempt to have the batterer arrested, mandatory arrest will be a welcome validation of the seriousness of their plight.[204]

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provide the leverage necessary to order a batterer into a rehabilitative counseling program. *See id.* at 91. For a discussion of pretrial and posttrial diversion, see *infra* notes 323-25 and accompanying text.

199. *See* LERMAN, *supra* note 3, at 119-20.

200. *See, e.g.*, CAL. PENAL CODE §§ 273.82, 273.83 (West Supp. 1987) (limiting discretion not to charge and implementing vertical prosecution program to increase likelihood of convicting batterers).

In general, prosecutors have broad discretion to charge. *See* Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *see also* Eisenberg & Micklow, *supra* note 145, at 158 ("common knowledge that a prosecuting attorney exercises considerable discretion in deciding whether or not to invoke the criminal process in any given case"). *But see* Nader v. Saxbe, 497 F.2d 676, 680 n.19 (D.C. Cir. 1974) (" 'prosecutorial discretion' " not a "magical incantation").

Prosecutors, however, sometimes hesitate to prosecute wife battering cases. The goal of securing convictions can make prosecution of spouse abuse a "poor risk" for prosecutors, RULE OF THUMB, *supra* note 2, at 23-24, because of the possibility that victims will be hesitant to file complaints or to testify. *See* LERMAN, *supra* note 3, at 18-19. Nevertheless, prosecutors who sometimes discourage victims or delay trials contribute to the problem of complainant attrition. *See id.* at 20. This self-perpetuating cycle can be reversed by impressing upon prosecutors their responsibility to expedite serious cases through the criminal justice system, and to provide for victim support programs. *See* Fromson, Report of the NDAA/CWPS Memphis, Tennessee, Meeting, Sept. 25-28, 1978, in LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES 11-12 (1980).

Prosecutors can increase victim cooperation by treating spouse abuse as a crime against the state. By acknowledging that it is their duty—not the victim's—to enforce the law, prosecutors can reduce the pressure on the victim and thus encourage cooperation. *See* LERMAN, *supra* note 3, at 34.

201. *See* LERMAN, *supra* note 3, at 35 ("[d]omestic violence prosecution units have not only reduced case attrition, but have also obtained a high rate of convictions"). For a discussion of programs for enhanced prosecution of spouse abuse, see *infra* notes 301-11 and accompanying text.

202. *See infra* notes 203-20 and accompanying text.

203. Police are called most often during the "acute battering phase," which can last from two to 24 hours. LERMAN, *supra* note 3, at 120. Thus, police who arrive and then immediately depart may leave the victim in grave danger, even if both parties appear calm. *See id.*

204. *See supra* note 183.

The effect of a mandatory arrest statute on the victim who does not call the police,[205] will depend on the reasons for her failure to call. If she avoided calling because, through past experience, she thought it would be ineffective,[206] then an awareness that arrest is mandatory may encourage her to call. If she has never called, her failure to do so may be attributable to the confluence of factors that keeps her in an abusive relationship.[207] For this victim a mandatory arrest policy may have little impact, other than to convey to her social and legislative disapproval of the batterer's actions.[208]

Arguments can be made against requiring arrest when the victim has called the police but does not want the batterer arrested.[209] Nevertheless, several considerations override the argument that mandatory arrest is undesirable because it supersedes a victim's choice.[210] First, assuming, arguendo, that a victim's desire not to have the

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205. A study of 201 female victims of spouse abuse attempted to identify the factors that influence a victim's decision to call the police. *See* Berk, Berk, Newton & Loseke, *Cops on Call: Summoning the Police to the Scene of Spousal Violence*, 18 LAW & SOC'Y REV. 479 (1984) [hereinafter Berk, Berk, Newton & Loseke]. The authors concluded that "victims will be very likely to call the police if they have called the police in the past, if witnesses are present, if they are not married to the offender, if the offender is poorly educated, and if he has a violent history." *Id.* at 493. Moreover, neither the race or employment status of a batterer, nor the severity of the victim's injury, seemed to discernably affect a decision to call for police help. *See id.* at 492-93.

206. Victims participating in a Cook County, Chicago, study gave as a reason for not calling the police the fact that they thought "it would do no good," that the police " 'were very cordial and courteous, but they did nothing.' " ALL THEY CAN DO, *supra* note 127, at 29-30.

207. Experts have associated certain personality traits and psychological characteristics with battered women, including: low self-esteem, guilt, emotional dependence, isolation, fear, ambivalence and shame. *See* FLEMING, *supra* note 15, at 81-93. Battered women may have traditional views about home, family and prescribed female roles. *See* WALKER, *supra* note 139, at 31, 36.

The psychological profile of a battered woman, however, is beyond the scope of this Note. Moreover, discussion of generic characteristics of "the battered woman" has been omitted deliberately, as it can lead to "blaming the victim." Victim blaming obscures the fact that, regardless of the reasons for a woman's victimization, the acts perpetrated against her are crimes. *See generally* DULUTH, MINNESOTA DOMESTIC ABUSE INTERVENTION PROJECT, THE JUSTICE SYSTEM'S RESPONSE TO DOMESTIC ASSAULT CASES 2-7 (undated and unpublished) (available from Minnesota Program Development, Inc., Domestic Abuse Intervention Project, 206 West Fourth Street, Duluth, Minn. 55806) [hereinafter DULUTH ABUSE INTERVENTION PROJECT].

208. *See supra* notes 178-83 and accompanying text.

209. *See infra* notes 210, 217 and accompanying text.

210. *See* Note, *Immediate Arrest in Domestic Violence Situations: Mandate or Alternative*, 14 CAP. U.L. REV. 243, 260 (1985) (a "problem with an arrest policy is that the decision making may be taken from the victim") [hereinafter *Immediate Arrest*].

batterer arrested is a form of acquiesence to the assault, it is still an indisputable proposition that "there is no legally valid permission to inflict serious physical injury on a consenting victim."[211] Permitting the victim of domestic assault to prevent the arrest of the batterer would, in essence, be giving legal effect to a victim's consent to a crime committed against her. Second, domestic assault is a crime against the state,[212] as well as against the individual. Therefore, because "a private individual generally has no authority to settle or condone such a public wrong, even if [she] is the victim of it,"[213] it is reasonable to preclude a battered wife's preference for non-arrest.[214]

Finally, the argument that arrest should be the victim's choice fails to take into account the possibility that she may not have made a free choice in the first place. She may not request arrest in the presence of the batterer out of fear that if she initiates the criminal action, he will retaliate against her.[215] Mandatory arrest, however, not only relieves the victim of the burden of being the one to request arrest in front of her abusive husband, but may also, as a result, reduce his animosity towards her.[216]

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211. Marcus, *supra* note 4, at 1678.

212. *See id.* at 1678-79 n.86 ("[a]lthough the crime of assault is conveniently classified as an offense 'against the person,' this is merely a convenient shorthand for 'an offense against the State in the form of injury to the person' "); ATTORNEY GENERAL'S TASK FORCE, *supra* note 127, at 12. "Assaults against family members are not only crimes against the individual but also crimes against the state and the community." *Id.*

213. Marcus, *supra* note 4, at 1678-79 n.86 (citing R. PERKINS, CRIMINAL LAW 975 (2d ed. 1969)).

214. *Cf.* GOOLKASIAN, *supra* note 4, at 62 (need to protect innocent bystanders and community from future domestic violence supports argument for eliminating victim influence on prosecution decisions); *see also* People v. Harris, 113 Misc. 2d 46, 54, 448 N.Y.S.2d 961, 966 (Suffolk County Ct. 1982) (unlawful possession of loaded revolver not within family court jurisdiction—"[i]t is inconceivable that the [l]egislature intended to vest in the complaining spouse the power of determining . . . whether or not to prosecute criminally those criminal acts which are of danger, not only to the complaining spouse, but to the other members of the public").

215. *See* GOOLKASIAN, *supra* note 4, at 35 ("[u]nderstandably, battered women often fear that being an active party in an arrest will bring increased retaliation and violence when the offender is released").

216. *See An Act Concerning Family Violence Prevention and Response: Connecticut General Assembly House of Representatives Proceedings*, Vol. 29, Part 14, 5267 (1986) (testimony of Representative Migliaro). Mandatory arrest allows "the arresting officer [to make] a decision without any written complaint from the individual who has been hurt; therefore, taking the burden of arrest away from that individual and the person that is arrested can no more go back and blame that person, particularly the spouse." *Id.* Moreover, it may be appropriate to make a decision for the victim, because a battered woman who has called the police in

Critics of mandatory arrest also argue that if victims who do not want the abuser arrested are aware of the policy, they will be reluctant to call the police.[217] It is possible that fewer calls will be made.[218] Nonetheless, effective police assistance to victims who do call is arguably more desirable than providing ineffective assistance to a greater number of victims.[219] Moreover, even if a mandatory arrest statute discourages some victims from calling the police, it would be unlikely to deter bystanders, whose calls to police have been shown to be equal in number to calls by victims.[220]

Ultimately, the benefits of mandatory arrest—deterrence, increased prosecution, setting a standard of acceptable behavior, and prevention of immediate injury—strongly outweigh the cost of limiting the victim's choice.[221]

IV. Models of Reform for New York

A number of states have responded to the problem of domestic violence by enacting statutes which provide precise guidelines for law enforcement response to domestic violence, including permissive or mandatory arrest provisions.[222]

A. Permissive Arrest Provisions

Subject only to the fourth amendment of the United States Con-

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the middle of a violent episode is unlikely to be capable of making a major decision such as requesting an arrest. *See* ALL THEY CAN DO, *supra* note 127, at 63.

217. *See Immediate Arrest, supra* note 210, at 259.

218. One study shows a decrease in domestic violence related runs by police in Michigan following implementation of legislation expanding police authority to arrest for domestic assault. *See* Buzawa, *Police Officer Response to Domestic Violence Legislation in Michigan*, 10 J. POLICE SCI. & ADMIN. 415, 423 (1982). The author, after dismissing two rival hypotheses—a decrease in domestic violence or greater initial screening by police of calls—posited that police made fewer runs because they received fewer calls. *See id.* Buzawa's tentative hypothesis was that as victims became aware of increased police arrest powers, they were reluctant to call for fear of adverse consequences. *See id.* The author concluded, however, by noting the dilemma presented by these findings—whether to opt for a policy that results in "a large number of relatively ineffective police-citizen interactions" or to adhere to an expanded arrest policy that apparently results in "a smaller number of contacts with a higher possibility of success." *Id.*

219. *See id.*

220. *See* Berk, Berk, Newton & Loseke, *supra* note 205, at 485. In their study of 201 victims of domestic violence, the authors discovered that approximately one-half of the 110 calls to the police were made by bystanders, including neighbors, children, relatives, friends and landlords. *See id.*

221. *See supra* notes 178-201 and accompanying text.

222. *See infra* notes 223-55 and accompanying text.

stitution's requirement of probable cause,[223] states may freely grant the authority to arrest.[224] A number of states recently have enacted legislation specifically expanding the power of police to make warrantless arrests in instances of spouse abuse.[225] Some states have amended the language of their existing warrantless arrest provisions to include explicit authorization to arrest in instances of domestic violence.[226]

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223. The fourth amendment requires that for an arrest to be constitutionally valid:

> [Police] officers [must have] probable cause to make it—[there must be] at that moment [of arrest] . . . facts and circumstances within their knowledge and of which they had reasonably trustworthy information [that are] sufficient to warrant a prudent man in believing that the [suspect] ha[s] committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964).

224. Lerman, *Expansion of Police Arrest Power: A Key to Effective Intervention*, 3 RESPONSE TO VIOLENCE IN THE FAMILY 1, 2 (June, 1980) [hereinafter *Police Arrest Power*].

225. *See infra* notes 226-43 and accompanying text. The Supreme Court's decision in Payton v. New York, 445 U.S. 573 (1980), should not render these provisions unconstitutional. *See Police Arrest Power, supra* note 224, at 2. Although the Court in *Payton* circumscribed police power to make warrantless arrests in the homes of suspects, this does not appear to apply to instances of domestic violence. First, the two warrantless arrests invalidated by *Payton* involved "entries into homes made without the consent of any occupant." *Id.* at 583. In domestic violence cases, however, the victim usually consents to the entry of the police. Warrantless arrests in these cases therefore are not within the ambit of *Payton's* prohibition. *Cf.* United States v. Purham, 725 F.2d 450, 455 (8th Cir. 1984) (warrantless arrest upheld because mother and sister of suspect voluntarily admitted police into home and entry into home with " 'consent of one who possesses common authority over the premises . . . is valid as against the absent, nonconsenting person with whom the authority is shared' ") (quoting United States v. Matlock, 415 U.S. 164, 170 (1974)).

Second, Justice Stevens' caveat in *Payton* further indicates the inapplicability of the holding to instances of domestic violence: "[W]e have no occasion to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583. The factors used to determine the presence of exigent circumstances include:

> "(1) [T]he gravity or violent nature of the offense with which the suspect is to be charged; . . . [2] 'a clear showing of probable cause . . . to believe that the suspect committed the crime'; [and (3)] 'strong reason to believe that the suspect is in the premises being entered' . . ."

United States v. Martinez-Gonzalez, 686 F.2d 93, 100 (2d Cir. 1982) (quoting United States v. Reed, 572 F.2d 412, 424 (2d. Cir.) (quoting Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970)), *cert. denied*, 439 U.S. 913 (1978)). Thus, undoubtedly, most instances of domestic violence fall under the rubric of "exigent circumstances" to which the *Payton* decision does not apply.

226. *See, e.g.*, ALASKA STAT. § 12.25.030(b) (Supp. 1986) (warrantless arrest permitted when victim is spouse); FLA. STAT. ANN. § 901.15(6), (7)(a) (West 1985 & Supp. 1986) (warrantless arrest upon probable cause for violation of domestic violence protective injunction; battery upon person's spouse with evidence of bodily

Other states have enacted separate domestic violence prevention statutes that specify the way in which law enforcement officials must respond to domestic violence.[227] A greater responsiveness to the victim's needs is implicit in many of these provisions, which may require, or permit, police to: (1) notify the victim of her legal rights and of available social services;[228] (2) assist her in obtaining medical treatment;[229] (3) remain on the scene until the immediate danger has

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harm or potential for further violence); IDAHO CODE § 19-603(6) (Supp. 1987) (warrantless arrest if reasonable cause to believe, based upon physical evidence or statements made in officer's presence, that person has assaulted spouse); MONT. CODE. ANN. § 46-6-401(2) (1985) (warrantless arrest upon probable cause for domestic abuse or aggravated assault against family or household member); OHIO REV. CODE ANN. § 2935.03(B) (Anderson 1987) (in pursuit outside jurisdiction, police officer may arrest and detain person who officer has reasonable cause to believe has committed offense of domestic violence, until warrant obtained).

227. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13.3601 to -.3602 (Supp. 1986) (entitled "Ch. 36 Family Offenses"); CAL. PENAL CODE §§ 13700-13731 (West Supp. 1987) (entitled "Law Enforcement Response to Domestic Violence"); COLO. REV. STAT. §§ 14-4-101 to -105 (Supp. 1984) (entitled "Domestic Abuse"); HAW. REV. STAT. § 709-906 (1985) (entitled "Abuse of family and household members; penalty"); ILL. ANN. STAT. ch. 40, paras. 2311-1 to 2313-5 (Smith-Hurd Supp. 1987) (entitled "Illinois Domestic Violence Act of 1986"); MASS. ANN. LAWS ch. 209A, §§ 1-9 (Law. Co-op. 1981 & Supp. 1987) (entitled "Abuse Prevention"); N.J. STAT. ANN. § 2C:25-1 to -:25-16 (West 1982) (entitled "Prevention of Domestic Violence Act"); OKLA. STAT. ANN. tit. 22, §§ 40-40.6 (West Supp. 1987) (entitled "Victim of . . . Domestic Abuse"); R.I. GEN. LAWS §§ 15-15-1 to -7 (Supp. 1986) (entitled "Domestic Abuse Prevention"); VT. STAT. ANN. tit. 15, §§ 1101-1109 (Supp. 1986) (entitled "Abuse Prevention").

228. *See, e.g.*, ALASKA STAT. § 18.65.520 (1986) (must provide to victims information regarding shelters and obtaining court orders); ARIZ. REV. STAT. ANN. § 13.3601(d) (Supp. 1986) (police must inform victims of availability of protection orders and emergency social services); CAL. PENAL CODE § 13701 (West Supp. 1987) (police departments shall develop guidelines for responding to domestic violence, including provisions for informing victim of available criminal procedures and social services); FLA. STAT. ANN. §§ 741.29, 415.606 (West 1986) (police must notify victim of location of nearest domestic violence center and of right to file criminal complaint); ILL. ANN. STAT. ch. 40, para. 2313-4(b)(2) (Smith-Hurd Supp. 1987) (when no arrest made, police must inform victim of right to request criminal proceedings); MASS. ANN. LAWS ch. 209A, § 6 (Law. Co-op. Supp. 1987) (police must inform victim of legal options); N.J. STAT. ANN. § 2C:25-7 (West 1982) (police must notify victim of legal rights and available social services); OKLA. STAT. ANN. tit. 22, § 40.2 (West Supp. 1987) (peace officer must give victim notice of available social services and of right to prosecute assailant); R.I. GEN. LAWS § 15-15-5 (Supp. 1986) (police must notify victim of legal remedies).

229. *See, e.g.*, ILL. ANN. STAT. ch. 40, para. 2313-4(a)(1) (Smith-Hurd Supp. 1987) (police may provide victim with transportation to hospital or shelter); MASS. ANN. LAWS ch. 209A, § 6 (Law. Co-op. Supp. 1986) (police may assist victim in obtaining medical treatment); R.I. GEN. LAWS § 15-15-5 (Supp. 1986) (police may assist victim in obtaining medical services).

passed;[230] or (4) protect the victim as she prepares to leave the home.[231] Moreover, legislators have recognized the criminal nature of many acts of domestic violence by including express statutory guidelines for permissive arrest when the police have probable cause to believe a person has violated an order of protection or committed a crime against his spouse when no such order exists.[232] By enacting legislation that specifically addresses law enforcement response to spouse abuse, these states have acknowledged past deficiencies in police response.[233] Moreover, recent enactments demonstrate an awareness on the part of legislators, that to compensate for past

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230. *See, e.g.,* MASS. ANN. LAWS ch. 209A, § 6 (Law. Co-op. Supp. 1987) (police must remain until immediate danger passes); R.I. GEN. LAWS § 15-15-5 (Supp. 1986) (police may be required to remain with victim until no immediate danger).

Alternatively, some statutes authorize the police to order the abuser to leave the premises for a "cooling-off" period. *See, e.g.,* HAW. REV. STAT. § 709-906(3) (1985) (12 hour cooling-off period).

231. *See* ILL. ANN. STAT. ch. 40, para. 2313-4(a)(2) (Smith-Hurd Supp. 1987) (police may accompany victim removing possessions from home).

232. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 13-3601(B), -3602(I) (Supp. 1986) (warrantless arrest upon probable cause for violation of protection order or commission of misdemeanor or felony domestic violence); HAW. REV. STAT. §§ 709-906(2), -906(3) (1985) (warrantless arrest upon reasonable grounds to believe person has physically abused household member, and that arrested person is, in fact, guilty); ILL. ANN. STAT. ch. 40, para. 2313-1(a) (Smith-Hurd Supp. 1987) (warrantless arrest upon probable cause for crime, including but not limited to, protection order violation); MASS. ANN. LAWS ch. 209A, § 6 (Law. Co-op. Supp. 1987) (warrantless arrest upon probable cause for felony, or for misdemeanor committed in officer's presence); N.J. STAT. ANN. § 2C:25-5 (West 1982) (warrantless arrest upon probable cause for protection order violation, act of "domestic violence," or apparent injury to victim); OKLA. STAT. ANN. tit. 22, § 40.3B (West Supp. 1987) (warrantless arrest upon probable cause for act of "domestic abuse" committed within preceding four hours causing visible injury to victim); R.I. GEN. LAWS § 15-15-5 (Supp. 1986) (warrantless arrest upon probable cause for felony domestic violence, or misdemeanor when failure to arrest could result in nonapprehension or further injury).

233. *See, e.g.,* N.J. STAT. ANN. § 2C:25-2 (West 1982) (entitled "Legislative Findings and Declarations").

> The Legislature . . . finds . . . that even though many of the existing criminal statutes are applicable to acts of domestic violence, previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context . . . . [B]attered adults presently experience substantial difficulty in gaining access to protection from the judicial system . . . . [Thus] . . . the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim.

Id.

inadequacies, all levels of the legal system—the legislature, the courts and the police—must address the problem of domestic violence.[234]

B. Mandatory Arrest Laws

Several states have done more than merely codify existing discretionary arrest practices to eradicate the traditional misuse of discretion in domestic violence cases.[235] These states have enacted domestic violence prevention statutes that make arrest of an offender mandatory in certain circumstances.[236] Domestic abuse statutes in Connecticut, Iowa, Maine, Minnesota, North Carolina, Oregon and Washington provide that police "shall" arrest an abuser:[237] the use of "shall" instead of "may" makes arrest mandatory.[238]

The circumstances in which arrest is mandatory differ to some extent in each state. In Maine, Iowa, Oregon and Washington, police responding to domestic violence calls are directed to arrest when they have probable cause to believe that a crime[239] has been committed or a protection order violated.[240] Connecticut mandates arrest when

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234. *See id.*

235. *See infra* notes 236-47 and accompanying text.

236. *See infra* notes 237-43 and accompanying text.

237. *See* CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 1987) ("shall arrest"); IOWA CODE ANN. § 236.12(2)(b) to -.12(2)(d) (West Supp. 1987) (as amended by 1987 Iowa Acts, House File 591) ("shall arrest"); ME. REV. STAT. ANN. tit. 19, § 770(5) (Supp. 1987) ("shall arrest"); MINN. STAT. ANN. § 518B.01(14) (West Supp. 1987) ("shall arrest"); N.C. GEN. STAT. § 50B-4(b) (1984 & Supp. 1985) ("shall arrest"); OR. REV. STAT. ANN. § 133.055(2) (1984) ("shall arrest"); WASH. REV. CODE ANN. § 10.99.030(3)(a) (Supp. 1987) ("shall exercise arrest powers").

238. *See, e.g.*, State v. Marshall, 105 N.E.2d 891, 894 (Piqua Municipal Ct., Ohio 1952); Clark v. Carney, 71 Ohio App. 14, 16, 42 N.E.2d 938, 939 (1942).

239. The seriousness of the offense for which arrest is mandatory varies by state. *See, e.g.*, IOWA CODE ANN. § 236.12 (2)(b) to -.12(2)(d) (West Supp. 1987) (as amended by 1987 Iowa Acts, House File 591) (mandatory arrest for acts of both serious and aggravated misdemeanor assault); ME. REV. STAT. ANN. tit. 19, § 770(5) (Supp. 1987) (mandatory arrest for act of aggravated assault); OR. REV. STAT. ANN. § 133.055(2) (1984) (mandatory arrest for assault or for act placing family member "in fear of imminent serious physical injury"); WASH. REV. CODE ANN. § 10.99.030(3)(a) (Supp. 1987) (mandatory arrest with reference to criteria of § 10.31.100—felony assault, assault resulting in bodily injury whether observable or not, within preceding four hours).

240. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 770(5) (Supp. 1987) (mandatory arrest for criminal violation of consent agreement or protection order); OR. REV. STAT. ANN. § 133.310(3) (1984) (mandatory arrest for violation of restraining order); WASH. REV. CODE ANN. § 10.31.100(2) (mandatory arrest for knowing violation of protection order). Iowa does not require arrest here, but rather, that the offender be taken into custody and brought before a magistrate. *See* IOWA CODE ANN. § 236.11 (West Supp. 1987) (as amended by 1987 Iowa Acts, House File 591) (peace officer "shall take [a] person into custody" upon probable cause to believe

a family violence crime has been committed,[241] without express reference to arrest for violations of a protection order. Minnesota and North Carolina require arrest only for violations of protection orders,[242] and arrest remains permissive when no such order has been obtained.[243]

Legislative goals behind mandatory arrest enactments include: stronger and more unified police procedures;[244] greater protection for the victim;[245] speedier access to the courts;[246] and identification of "domestic violence as punishable behavior, thereby reducing the frequency with which it occurs."[247]

The impact of these mandatory arrest statutes is encouraging.[248] Following implementation of mandatory arrest in Oregon, one study showed that from 1977 to 1981 domestic homicides *decreased* by ten percent, while at the same time non-domestic homicides *increased* by ten percent.[249] In Duluth, Minnesota, an experiment testing various

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that the person has "violated an order or approved consent agreement entered under this chapter, a temporary or permanent protective order . . . or any order establishing conditions of release or a protective or sentencing order in a criminal prosecution arising from a domestic abuse assault").

241. *See* CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 1987) (mandatory arrest for commission of "family violence crime").

242. *See* MINN. STAT. ANN. § 518B.01(14) (West Supp. 1987) (mandatory arrest for violation of verifiable order of protection); N.C. GEN. STAT. § 50B-4 (1984 & Supp. 1985) (same).

243. *See* MINN. STAT. ANN. § 629.341(1) (West Supp. 1987) (may arrest when probable cause to believe that within past four hours person has assaulted or put spouse in fear of imminent bodily injury); N.C. GEN. STAT. § 15A-401(b)(2) (Supp. 1985) (may arrest for act committed outside presence when probable cause to believe felony committed, or misdemeanor when failure to arrest would result in non-apprehension or danger to victim).

244. *See, e.g., Hearings*, *supra* note 183, at 510-11 (testimony of Astrida Olds, Chairman of the Connecticut Governor's Task Force on Family Violence). Olds stated:

> The proposed Bill has three major goals. One[,] it stiffens and unifies police procedures . . . [and] treats the crime of family violence as a crime. [Two,] the Bill offers both intervention and protection for the victim. Three, . . . the Bill would institute a speedy process to bring cases before a judge to offer real protection to victims and treatment and alternatives to batterers.

Id.

245. *See id.*

246. *See id.*

247. Jolin, *Domestic Violence Legislation: An Impact Assessment*, 11 J. POLICE SCI. & ADMIN. 451, 452 (1983) [hereinafter Jolin].

248. *See infra* notes 249-55 and accompanying text.

249. Jolin, *supra* note 247, at 454. Furthermore, the decrease in the homicide rate occurred at a time when one-third of Oregon's law enforcement agencies had not yet implemented the provisions of the statute. *See id.*

administrative policies showed that a policy of mandatory arrest resulted in 175 arrests over a twelve-month period—a substantial increase over the 107 arrests made when police were merely encouraged to arrest, and a marked increase over the twenty-two arrests made under a policy of total officer discretion.[250]

It is also encouraging that many police officers seem willing to comply with the new laws.[251] While some police officers initially may have resisted curtailment of their discretion,[252] they generally comply, possibly for the reason given by one Oregon officer: "rather than having to go back [to the same household] three or four times in one evening, [the officers] can nip [a domestic dispute] in the bud."[253] Other officers may welcome mandatory arrest legislation because it simplifies and clarifies[254] their duties, for without a mandatory arrest statute:

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250. DULUTH ABUSE INTERVENTION PROJECT, *supra* note 207, at 20. In addition, under a policy of mandatory arrest, the percentage of minority men arrested declined to a level closer to their actual percentage of population in Duluth. *See id.*

251. *See infra* notes 253-55 and accompanying text. *But see* GOVERNOR'S COMM'N FOR WOMEN, STATE OF OREGON EXECUTIVE DEP'T, DOMESTIC VIOLENCE IN OREGON: PRELIMINARY FINDINGS (Feb. 1979) (unpublished) (available at *Fordham Urban Law Journal* office) [hereinafter GOVERNOR'S COMMISSION, PRELIMINARY FINDINGS]. The report found that "[d]espite the Abuse Prevention Act, most law enforcement agencies continue to follow traditional non-arrest policies." *Id.* at 10. The report noted that many officers avoided making arrests by inciting the victim to object—which, under then-existing Oregon law, nullified the mandatory arrest requirement. *See id.* Oregon has since amended the statute so that mandatory arrest is no longer contingent upon the victim's consent. *See infra* note 285. Moreover, the report concludes that "[d]espite the fact that some police agencies are openly hostile about the Abuse Prevention Act, the Act is not only essential; it is workable." *See* GOVERNOR'S COMMISSION, PRELIMINARY FINDINGS, *supra*, at 19.

252. Telephone interview with Officer Steven Morrow, Planning and Research Division, Portland Oregon Police Bureau (Jan. 26, 1987) [hereinafter Morrow Interview]. Similarly, in Minneapolis, Minnesota, there "was some resistance . . . from older cops who were adamant that a 'man's home is his castle' . . . [but] we [the police department] just made it loud and clear that [mandatory arrest orders must be followed] or you are in violation of the law yourself." Telephone interview with Lieutenant Ed Scott, Family Violence Unit, Criminal Investigations Division, Minneapolis, Minnesota Police Department (Feb. 26, 1987).

253. Morrow Interview, *supra* note 252. A police officer in Augusta, Maine, expressed similar sentiment: mandatory arrest "makes it better—instead of going back [to the same house] three or four times, you go back only once." Telephone interview with Patrolman Levi Jackson, Department of Public Safety, Police Division, Augusta, Maine (Feb. 26, 1987). Oregon's Officer Morrow also observed that since the state's adoption of a mandatory arrest law for domestic violence, many officers have been compelled to comply by the knowledge that "if you don't arrest and follow the law [you might] jeopardize your career," Morrow Interview, *supra* note 252, whereas under the discretionary arrest provision that preceded the mandatory arrest statute, "a lot of police officers didn't get involved . . . it was lawful to arrest but they bypassed it." *Id.*

254. *See* Morrow Interview, supra note 252.

> [I]f they make an arrest too quickly, the officer is subject to suit. On the other hand, if they make no arrest whatsoever, they're subject to a suit on the other end and [the officers are] saying please give us some clarification. Please give us some legislation to help us do the right type of job . . . .[255]

V. Recommendation: A Mandatory Arrest Statute for New York

Domestic violence legislation generally fits into one of three categories: provisions for non-legal remedies, such as shelters; improved court procedures; and expanded authority for police.[256] In New York State, existing domestic violence legislation is limited to the first two categories.[257] Moreover, the existing provisions were enacted in a piecemeal fashion.[258] Police response, because it is guided only by general arrest laws,[259] results in inconsistent enforcement on the individual level. There is, furthermore, a state-wide lack of uniformity: specific domestic violence arrest policies have been formulated by, and are confined to, several individual police departments.[260] Given the widespread problem of domestic violence in New York, the current approach is clearly insufficient.[261] To combat the problem of domestic violence effectively, New York State should enact comprehensive domestic violence legislation, similar to that of its sister states,[262] directing law enforcement response,[263] requiring greater prosecutorial and judicial responsibility and affording more protection to victims.[264]

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255. *See Hearings, supra* note 183, at 492 (testimony of John Kelly, Connecticut Chief State's Attorney).

256. *See* FLEMING, *supra* note 15, at 255.

257. *See supra* notes 31-98 and accompanying text.

258. *See supra* notes 52-83 and accompanying text.

259. *See supra* note 134 and accompanying text.

260. *See supra* notes 172-73 and accompanying text.

261. *See supra* notes 5-13 and accompanying text.

262. *See supra* notes 225-42 and accompanying text. New York's domestic violence statute should be modeled after state statutes that make arrest mandatory. The statute, however, also should incorporate some of the unique provisions found in statutes that do not require arrest.

263. *See supra* notes 225-42 and accompanying text. In a 1986 Legislative Priorities Survey, members of the New York State Coalition Against Domestic Violence and other domestic violence programs rated as the highest priority for legislative action "[a] uniform statewide police response to domestic violence—which stresses that domestic violence is to be treated no differently from any other call, and which stresses the use of arrest." New York State Coalition Against Domestic Violence Newsletter (available from Katey Joyce, Director, Haven House, Buffalo, New York).

264. *See infra* notes 304-19 and accompanying text.

The following is an outline of the provisions suggested for inclusion in a comprehensive domestic violence statute for New York State.[265]

A. Offenses and Persons Chargeable

A domestic violence statute should provide as much protection as possible to all potential victims.[266] Thus, the statute must require arrest for a number of offenses and must apply to a variety of potential abusers.[267]

First, the terms "family" or "household" as currently defined in Article 8 of the Family Court Act[268] are underinclusive. For the purposes of comprehensive domestic violence legislation the definition must be expanded to include unmarried cohabitants and former cohabitants.[269] Second, the offenses for which a household member may be arrested should be set forth as designated acts, or crimes, of "domestic violence."[270] These offenses should be limited to acts which cause physical injury or place the victim in fear of imminent

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265. *See infra* notes 266-327 and accompanying text.

266. *See infra* notes 268-76 and accompanying text.

267. *See id.*

268. *See supra* notes 38, 57 and accompanying text.

269. In a number of states, domestic violence statutes protect cohabitants and former cohabitants. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-38a(a)(2) (West Supp. 1987) ("persons presently residing together or who have resided together in the recent past") (footnote omitted); ME. REV. STAT. ANN. tit. 19, § 762(4) (Supp. 1987) ("individuals presently or formerly living as spouses . . . . Holding oneself out to be a spouse shall not be necessary to constitute 'living as spouses' "); MINN. STAT. ANN. § 518B.01(2)(b) (West Supp. 1987) ("persons who are presently residing together or who have resided together in the past"); WASH. REV. CODE ANN. §§ 10.99.020(1) (Supp. 1987), 26.50.010(2) (1986) ("persons who are presently residing together or who have resided together in the past"); *see also* CAL. PENAL CODE § 13700(b) (West Supp. 1987) ("cohabitant, former cohabitant, or a person with whom the suspect . . . has or has had a dating or engagement relationship").

270. State provisions can include an entirely new category designated "family violence offenses," for the purposes of obtaining protection orders. Nevertheless, for a statute directing law enforcement response, designated acts of domestic violence should be keyed into existing penal law provisions. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-38a(a)(3) (West Supp. 1987) (" 'Family Violence Crime' means a crime as defined in section 53a-24 which also constitutes family violence and shall include, but not be limited to: . . . [a]ssault . . . kidnapping and unlawful restraint . . . sexual assault . . . criminal mischief"); ME. REV. STAT. ANN. tit. 19, § 770(5) (Supp. 1987) ("Arrest . . . [for] a violation of Title 17-A, section 208 [aggravated assault]"); WASH. REV. CODE ANN. § 10.99.020(2) (Supp. 1987) (" 'Domestic Violence' includes but is not limited to any of the following crimes when committed by one family or household member against another: . . . [a]ssault . . . [r]eckless endangerment . . . [c]oercion . . . [c]riminal trespass . . . [m]alicious mischief . . . [k]idnapping . . . [r]ape").

physical injury, such as assault,[271] attempted assault,[272] menacing,[273] reckless endangerment,[274] rape,[275] and kidnapping.[276] The legislation would neither extend to physical contact which is too minor to be included within the definition of assault,[277] nor to harassment.[278]

B. Mandatory Arrest

In delegating to the police the authority to arrest for acts of domestic violence, the statute should stipulate that police "shall"[279] arrest a spouse whom they have probable cause to believe has committed a crime[280] against a household member. An explicit sta-

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271. *See* N.Y. PENAL LAW §§ 120.00 to -.10 (McKinney 1975 & Supp. 1987).

272. *See id.* § 110.00 (McKinney 1975).

273. *See id.* § 120.15.

274. *See id.* §§ 120.20 to -.25.

275. *See id.* §§ 130.25 to -.35. For a discussion of the New York Court of Appeals' decision invalidating the marital rape exemption provision, see *supra* note 149. The penal law has not been amended to conform with the case law.

276. *See* N.Y. PENAL LAW §§ 135.00 to -.25 (McKinney 1975). It should be noted that the affirmative defense to kidnapping, *see id.* § 135.30 ("that . . . defendant was a relative of the person abducted, and . . . his sole purpose was to assume control of such person"), applies only to cases involving abduction of a child by a parent. *See id.* practice commentary at 506.

277. The New York Penal Code designates three levels of assault: assault in the first degree, *see* N.Y. PENAL LAW § 120.10 (McKinney 1975); assault in the second degree, *see id.* § 120.05 (McKinney 1975 & Supp. 1987); and assault in the third degree, *see id.* § 120.00 (McKinney 1975). Third degree assault includes those acts considered by the legislature to be least serious, yet still definable as assault:

> A person is guilty of assault in the third degree when:
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> 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
>
> 2. He recklessly causes physical injury to another person; or
>
> 3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or dangerous instrument . . . .

Id.

278. *See* N.Y. PENAL LAW §§ 240.25 to -.30 (McKinney 1980 & Supp. 1986).

279. For a discussion of the usage and significance of this language, see *supra* notes 237-38 and acompanying text.

280. New York Penal Law defines "crime" as "a misdemeanor or a felony." N.Y. PENAL LAW § 10.00(6) (McKinney 1975). A police officer can therefore make a warrantless arrest for a misdemeanor even if it was not committed in his presence. *See* N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1981) ("a police officer may arrest a person [without a warrant] for . . . [a] crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise"). Because the New York Penal Law does not distinguish between felonies and misdemeanors in authorizing warrantless arrests, a domestic violence statute requiring arrest for misdemeanors in addition to felonies would not entail radical restructuring of the underlying law. *See* N.Y. PENAL LAW § 10.00(6) (McKinney 1975). This is significant because an arrest standard "based on a misdemeanor/

tutory reminder that the standard of probable cause is the same as that used when the crime is between strangers[281] may prevent the tendency of police to implement a higher standard in domestic violence cases.[282]

Under current New York law, when a spouse violates a protection order, presentation of a copy of the order to a police officer constitutes probable cause to arrest the violator.[283] The statute should require arrest in these instances.[284] New York now requires police to notify victims of available legal remedies and services.[285] Legislation should also encourage the police to provide immediate assistance, including transportation to a hospital or shelter, upon the victim's request, regardless of whether the situation requires them to arrest the batterer.[286]

The experiences of states that have enacted mandatory arrest legislation suggest that the statute should include two additional qualifications. First, arrest should not be conditioned upon the victim's consent,[287] as she may be too intimidated by the batterer to assent.[288] Second, when an officer has probable cause to believe that mutual assault has occurred, he should not be required to arrest both spouses, but instead to arrest the spouse he believes was the "primary physical aggressor."[289] Without this qualification, man-

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felony distinction discourages arrest in most domestic abuse cases." *Police Arrest Power, supra* note 224, at 2.

281. *See supra* note 137 and accompanying text.

282. *See id.*

283. *See supra* note 63.

284. *See supra* notes 240, 242 and accompanying text.

285. *See* N.Y. FAM. CT. ACT § 812(5) (McKinney Supp. 1987); *see also* N.Y. CRIM. PROC. LAW § 530.11(6) (McKinney Supp. 1987).

286. *See supra* notes 229-31 and accompanying text.

287. "Conditioning the duty [to arrest] on the consent of the victim may render the duty ineffective." *Police Arrest Power, supra* note 224, at 2; *see* CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 1987) ("decision to arrest and charge shall not . . . be dependent on the specific consent of the victim"); *see also* 1979 Or. Laws ch. 522, § 2 (clause providing "unless the victim objects" deleted from statute mandating arrest).

288. A victim who is asked, in the presence of the abuser, if she objects to arrest may be too afraid not to object. *See Police Arrest Power, supra* note 224, at 2.

289. *See, e.g.,* WASH. REV. CODE ANN. § 10.31.100(2)(b) (Supp. 1987). This section provides:

> When the officer has probable cause to believe that spouses, former spouses, or other persons who reside together or formerly resided together have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the *primary physical aggressor.* In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to

datory arrest of batterers may also result in the arrest of victims.[290] Finally, the statute should include a provision formally requiring increased police training[291] and can, as many states have done, include a provision immunizing police from civil liability for carrying out their duties.[292]

C. Post-Arrest Detention

The statute should require police to take an arrested offender into custody.[293] Current New York law permits an officer who has made a warrantless misdemeanor arrest to issue an appearance ticket in

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> protect victims of domestic violence under [Washington Revised Code section] 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved.

Id. (emphasis added).

290. For example, in one incident occurring in Washington prior to the enactment of that state's "primary physical aggressor" provision, *see supra* note 289, a woman who had spat chicken soup at her husband, and consequently was beaten severely by him, was arrested along with her husband. Telephone interview with Susan Wilder Crane, Coordinator, Abused Woman Project, Evergreen Legal Services, Seattle, Washington (Jan. 26, 1987).

291. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-38b(g) (West Supp. 1987) (providing for establishment of education and training program for police and state's attorneys stressing "enforcement of criminal law in family violence cases"); CAL. PENAL CODE § 13519 (West Supp. 1987) (providing for training of officers and guidelines for response); ILL. ANN. STAT. ch. 85, para. 507(7) (Smith-Hurd 1987) (implementing police training program, including techniques for response to domestic violence).

The New York State Municipal Police Training Council has already increased the number of domestic violence training hours required of recruits, from two-and-one-half hours to 14 and one-half hours. *See* TASK FORCE SECOND REPORT, *supra* note 28, at 10.

292. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-38b(c) (West Supp. 1987) (peace officer not civilly liable for personal injury or property damage resulting from domestic violence arrest based upon probable cause); OR. REV. STAT. ANN. § 133.315 (1984) (peace officer not civilly or criminally liable for making good faith arrest under domestic violence statute); UTAH CODE ANN. § 77-36-8 (Supp. 1987) (peace officer may not be held civilly liable for good faith, probable cause arrest of domestic abuser).

The purpose of these provisions is to exempt officers from personal liability for false arrest, thus decreasing the disincentive to arrest. These provisions do not preclude suits against municipalities for failure to protect. *See Police Arrest Power, supra* note 224, at 2.

293. *See, e.g.*, OR. REV. STAT. ANN. § 133.310(3) (1984) ("peace officer shall arrest and take into custody"); *see also* Nearing v. Weaver, 295 Or. 702, 709, 670 P.2d 137, 142 (1983) (construing Oregon Revised Statute § 133.310(3): "Even though . . . arrested person is entitled to be released pending an eventual adjudication of a criminal charge or contempt . . . temporary removal was deemed essential to emphasize the seriousness of the court's order and to permit the victims of violence to escape further immediate danger").

lieu of detaining the offender.[294] In cases of domestic violence, however, this practice could prove dangerous for a victim who may thus be subjected to the batterer's immediate and intensified rage.[295] Therefore, legislation should specifically prohibit the issuance of citations for domestic violence misdemeanors.[296]

Other statutory pretrial protection for the victim generally takes one of two forms: emergency orders of protection and specific domestic violence bail provisions.[297] New York criminal courts are currently authorized to issue a temporary order of protection as a condition of pretrial release,[298] or as a condition to release on bail.[299] A bail provision[300] setting forth specific criteria[301] upon which the court must rely in setting bail for domestic violence crimes, is necessary, however, to prevent the immediate release of an offender who is arrested and subsequently determined to be dangerous to the

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294. *See* N.Y. CRIM. PROC. LAW §§ 140.27, 140.40 (McKinney 1981). Moreover, New York Criminal Procedure Law § 150.20(1) permits police officers, who would otherwise be authorized to make a warrantless misdemeanor arrest, to issue an appearance ticket instead. *See* N.Y. CRIM. PROC. LAW § 150.20(1) (McKinney 1981).

295. *See supra* note 203 and accompanying text.

296. *See, e.g.*, MINN. STAT. ANN. § 629.72 (West Supp. 1987). This law provides that an arresting officer may not issue a citation in lieu of arrest and detention to a person charged with assaulting a spouse. *See id.* Only an officer in charge of the police station, or the county sheriff in charge of the jail, may issue a citation after the person has been brought in and it is determined that detention is not necessary to prevent injury to a spouse or other person. *See id.*

297. *See infra* notes 298-304 and accompanying text. Minnesota has enacted a unique provision, which makes trespass on the grounds of a facility providing shelter services or transitional housing for battered women a gross misdemeanor. *See* MINN. STAT. ANN. § 609.605(2) (West Supp. 1987).

298. N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1984).

299. *See id.*

300. New York's Criminal Procedure Law includes a cursory bail provision. *See* N.Y. CRIM. PROC. LAW § 530.12(9) (McKinney 1984). Following the arrest of a batterer and upon the filing of a petition or criminal complaint by the victim, the court is authorized either to hold the defendant or to set bail. *See id.* When an arrest is made for a violation of an order of protection, the court can impose sanctions such as revoking a conditional discharge, bail or probation. *See id.* § 530.12(11); *see also* N.Y. FAM. CT. ACT § 155-a (McKinney 1983) (cash bail provision for family court appearance).

301. *See, e.g.* MONT. CODE ANN. § 46-9-302 (1985) ("justice of the peace or city judge may, in his discretion, establish and post a schedule of cash bail . . . except for offenses amounting to felonies and the offense of domestic abuse"); N.C. GEN. STAT. § 15A-534.1 (1984) (suspect accused of crime of domestic violence may be held in custody for reasonable period upon judicial determination that appearance bond would not suffice to protect victim); OHIO REV. CODE ANN. § 2919.251 (Anderson 1987) (considerations in setting bail in domestic violence cases include: whether the person has a history of domestic violence acts, or court order violations; the person's mental health; whether release poses a threat to someone; whether high bail will interfere with current treatment or counseling).

victim.[302] A provision that requires keeping a potentially dangerous offender in custody for a "reasonable period of time,"[303] would not only protect the victim from further harm but would prevent her from being intimidated against testifying.[304]

D. Prosecutorial Program

Comprehensive domestic violence legislation should require enhanced prosecutorial efforts.[305] Adoption in New York of a spouse abuse prosecutor's program, similar to that recently enacted in California, would undoubtedly reduce complainant attrition and increase conviction rates.[306] California's statute establishes a funding and guidance mechanism for the state's district attorney's offices.[307] The statute sets forth criteria, including the severity of the offense charged and the number of prior offenses charged, to guide the exercise of prosecutorial discretion in domestic violence cases.[308] The statute further provides for "vertical prosecution" by "highly qualified . . . prosecutors,"[309] and vertical counselor representation.[310] Victim advocacy programs, similar to California's provision for counselor representation, have been implemented in Seattle, Washington[311] and Duluth, Minnesota[312] and by statute in Connecticut.[313] The support

302. Because the wife batterer knows where to find the victim, short-term detention is more important in domestic violence cases than in incidents of stranger-to-stranger violence. *See* LERMAN, *supra* note 3, at 139, 141.

303. N.C. GEN. STAT. § 15A-534.1 (1984).

304. *See* LERMAN, *supra* note 3, at 135 ("[i]mmediate post-arrest release enables the abuser to return to the victim, and through either actual or threatened violence, dissuade her from participating in prosecution").

305. Increased prosecution concomitant with increased arrests will have a mutually reinforcing effect. Police may arrest wife batterers more often when they believe that such offenders will actually be charged and prosecuted, *see* LERMAN, *supra* note 3, at 15, and increased arrests may lead to more frequent prosecution. *See Police Arrest Power, supra* note 224, at 1.

306. The Chief Prosecuting Attorney of Duluth, Minnesota, cites the adoption of guidelines for prosecutors as contributing to a 67% increase in conviction rates for domestic violence in Duluth over a three year period, from 1980 to 1983. *See* DULUTH ABUSE INTERVENTION PROJECT, *supra* note 207, at 21.

307. CAL. PENAL CODE § 273.81 (West Supp. 1987).

308. *See id.* § 273.83.

309. *Id.* § 273.82. Vertical prosecution ensures that the prosecutor initially assigned to a case stays with it throughout the criminal justice process.

310. *See id.*

311. *See generally* Roise & Tulonen, CITY OF SEATTLE FAMILY VIOLENCE PROJECT (undated and unpublished) (available from City of Seattle Law Department-Criminal Division, Dexter Horton Building, Room 1055, 710-2nd Avenue, Seattle, Washington 98104) [hereinafter SEATTLE FAMILY VIOLENCE PROJECT].

312. *See generally* DULUTH ABUSE INTERVENTION PROJECT, *supra* note 207.

313. *See* CONN. GEN. STAT. ANN. § 46b-38c (West Supp. 1987) (establishing family violence response and intervention units in the Connecticut judicial system

of a trained domestic violence counselor, assigned to work with a reluctant victim,[314] can greatly reduce complainant attrition[315] and thus should be implemented uniformly by statute.

E. Judicial Duties and Dispositional Alternatives

Some comprehensive domestic violence prevention statutes include judicial guidelines.[316] These may be implemented to emphasize to the criminal courts "the serious nature of domestic violence."[317] The provisions suggest that the court identify, from docket sheets, which pending actions involve domestic violence.[318] Possible judicial leniency

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to prepare case reports for court; arrange services for victims and treatment for offenders; and implement pre-trial family violence education program for offenders).

314. *See* SEATTLE FAMILY VIOLENCE PROJECT, *supra* note 311, at 14-17. Family violence victim advocates work with reluctant victims to determine the source of their reluctance, and help them to overcome it. *See id.* They explain the judicial process to victims, emphasizing the positive aspects of prosecuting the offender while stressing the defendant's need for treatment and the victim's need for protection. *See id.* Advocates respond to a hostile victim by informing her that domestic violence is a crime. They tell her that the city will charge the batterer even if she refuses to testify, but that by involving herself in the process she can have an impact. *See id.* An advocate works with the prosecutor to develop the case, accompanies the victim to court, and refers her to counseling. *See id.* at 24.

The Duluth Abuse Intervention Project has similar goals and guidelines:

> Advocates teach women how to use the courts, how to gather much of the evidence needed for the trial, how to work with the prosecutor in a case. Women have begun in unprecedented numbers to use the court both because they now understand how to use it and because the court is willing to take measures to protect them.

DULUTH ABUSE INTERVENTION PROJECT, *supra* note 207, at 38.

315. Duluth's Chief Prosecutor estimated that in 1980, 20% of the cases filed in his office by arresting officers or victims resulted in conviction. *See* DULUTH ABUSE INTERVENTION PROJECT, *supra* note 207, at 21. By 1983, however, the conviction rate reached 87%. *See id.* Several factors contributed to the increase in convictions:

> [T]he use of advocates to work with women throughout the court process; . . . the use of probable cause arrests which result in a high degree of guilty pleas in contrast to victim-initiated charges; . . . the adoption of prosecution guidelines which discourage city attorneys from dismissing charges unless the victim refuses to testify and there is not sufficient evidence to pursue a conviction without the victim's testimony; and . . . the availability of educational groups for women during the court process.

Id. at 21-22.

316. *See, e.g.*, N.J. STAT. ANN. § 2C:25-9 (West 1982) (entitled "Duties of Court"); UTAH CODE ANN. § 77-36-3 (Supp. 1987) (entitled, in relevant part, "Court's powers and duties in domestic violence actions"); WASH. REV. CODE ANN. § 10.99.040 (Supp. 1987) (entitled "Restrictions upon and duties of court").

317. UTAH CODE ANN. § 77-36-3 (Supp. 1987); WASH. REV. CODE ANN. § 10.99.040 (Supp. 1987).

318. *See, e.g.*, UTAH CODE ANN. § 77-36-3 (Supp. 1987); WASH. REV. CODE ANN. § 10.99.040 (Supp. 1987).

may be reduced by including within a statutory scheme a requirement that the court "not dismiss a charge involving domestic violence at the request of the victim unless it has reasonable cause to assume that such a dismissal would benefit the victim."[319]

Because, in some cases, extended incarceration may not be an essential factor in the deterrent effect of arrest,[320] the statute can make available to the court prescribed dispositional alternatives. These may include: mandatory counseling concomitant with other penalties;[321] intermittent sentencing for less serious offenses;[322] and pretrial[323] or posttrial[324] diversion.[325] Diversion, however, should be available only for lesser offenses and when there is no lengthy history of domestic violence.[326] It should never substitute for incarceration in cases of serious domestic abuse.[327]

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319. UTAH CODE ANN. § 77-36-3(1)(e) (Supp. 1987).

320. *See supra* note 111 and accompanying text.

321. *See* UTAH CODE ANN. § 77-36-5(2) (Supp. 1987) ("the court, in addition to penalties otherwise provided for by law, may require the defendant to participate in treatment or therapy under the direction of an organization or individual experienced in domestic violence counseling").

The New York Penal Law currently allows the courts to impose a sentence of conditional discharge when the court finds that "neither the public interest nor the ends of justice would be served by a sentence of imprisonment." N.Y. PENAL LAW § 65.05 (McKinney 1975 & Supp. 1987). Section 65.10 sets forth the conditions of probation and of conditional discharge, which can include psychiatric treatment, participation in an intervention program, and the requirements that the offender "avoid injurious or vicious habits" and "meet . . . family responsibilities." N.Y. PENAL LAW § 65.10 (McKinney 1975 & Supp. 1987).

322. New York has an intermittent sentencing provision under its general sentencing laws. *See* N.Y. PENAL LAW § 85.00 (McKinney 1975) (revocable sentence of imprisonment to be served on days or during certain periods of days, or both, specified by court as part of sentence; limited to misdemeanor or D and E felony convictions).

323. Pretrial diversion means that a prosecutor agrees to defer prosecution if the defendant will seek counseling. *See* RULE OF THUMB, *supra* note 2, at 64. If the defendant successfully completes a course of treatment, the prosecutor drops the charges. *See id.*

324. In posttrial diversion, counseling is made a condition of probation. *See id.* The court then has the power to revoke probation and jail the defendant if he fails to complete the program. *See id.*

325. The advantages of diversion include reduction of: (1) problems that are concomitant with the long delay between the filing of a complaint and court disposition; and (2) complainant attrition. *See* LERMAN, *supra* note 3, at 92, 111.

326. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3601(G) (Supp. 1986) (no deferred prosecution or probation if offender was previously found guilty, or had charges dismissed, under this section); CAL. PENAL CODE § 1000.6 (West 1985) (defendant eligible for diversion upon judicial determination, provided that defendant has not been convicted of violent offense within past seven years, has not had parole or probation revoked, and has not participated in diversion program within past five years).

327. *See* ATTORNEY GENERAL'S TASK FORCE, *supra* note 127, at 34 ("[i]n all

VI. Conclusion

Assault and battery, even if committed in the privacy of the home, are crimes. Traditionally, however, enforcement of existing laws against these crimes has stopped short at the front door of the family home. The New York Legislature has given victims of domestic violence access to the criminal courts. Yet, access alone is insufficient to compensate for the inadequate response of the criminal justice system to domestic violence. New York needs comprehensive domestic violence legislation to bring more batterers before the courts and ensure that they are adequately sanctioned once there. " 'Strengthening of legal sanctions against violence in the home is a step toward stopping it in individual cases, and toward educating the public that violence in the homes is as much a criminal act as violence in a public place.' "[328]

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cases when the victim has suffered serious injury, the convicted abuser should be sentenced to a term of incarceration"). Because diversion channels domestic violence out of the criminal process, overuse of such programs could perpetuate the societal attitude that domestic violence is not criminal behavior. *See* RULE OF THUMB, *supra* note 2, at 62, 65 (domestic violence is " 'a legal problem that should have legal action and legal remedies such as prosecution' ") (citation omitted). Moreover, failure to prosecute, as with pretrial diversion, can reaffirm the offender's belief that he has not done anything wrong, and denies the victim the support of the criminal justice system. *See id.* at 62.

328. Governor's Memorandum on Approval, *supra* note 56, at 1878.