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THE CRIMINAL JUSTICE SYSTEM'S RESPONSE TO BATTERING: UNDERSTANDING THE PROBLEM, FORGING THE SOLUTIONS

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I. INTRODUCTION

Women have been battered for centuries,¹ but only recently has America

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1. For a history of the problem of abuse in western civilization, see generally Davidson, *Wife Beating: A Recurring Phenomenon Through History*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2 (M. Roy ed. 1977).

This article will consider the problem of abuse only as it relates to female victims. There are several reasons for this limitation. First, only one study suggests that men are battered more frequently than women, see M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 40 (1980) [hereinafter cited as *BEHIND CLOSED DOORS*], and that portion of the study has been widely discredited. All other studies show a much higher incidence of female than male victimization. See works cited in S. SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 214 (1982). Additionally, the study by Straus, Gelles and Steinmetz does not itself support the proposition that men and women are equally likely to be abused. As Gelles himself pointed out, the researchers did not inquire either into the motive for spousal violence or about the damage inflicted. Gelles, *The Truth About Husband Abuse*, in R. GELLES, *FAMILY VIOLENCE* 137, 138-39 (1979) [hereinafter cited as R. GELLES]. As women are much more likely than men to act in self-defense in domestic violence cases, this failure is significant. Pleck, Pleck, Grossman, & Bart, *The Battered Data Syndrome: A Comment on Steinmetz's Article*, 2 *VICTIMOLOGY: AN INT'L J.* 680, 682 (1977). Similarly, the study did not distinguish between a punch thrown by "the 280-pound, 6 foot 5 inch husband" and a similar act by his "5 foot 4 inch, 120-pound wife." R. GELLES, *supra* at 139. In criticizing this element of the *BEHIND CLOSED DOORS* study, I do not intend to undermine the validity of its other findings, which are well-supported and consistent with those of other researchers. See, e.g., *infra* notes 16-17.

Another reason to focus on the abused woman is that the criminal justice system encounters wife beating far more often than husband beating. INTERNATIONAL ASSOC. OF CHIEFS OF POLICE TRAINING KEY # 245, reprinted in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 144, 145 (M. Roy ed. 1977) [hereinafter cited as *POLICE KEY # 245*]. Additionally, the social forces that encourage the victimization of women, see *infra* note 9, are absent in husband beating cases. Finally, wife abuse conforms, albeit pathologically, to our society's ideas about the proper male and female roles, see *infra* note 9, whereas husband abuse deviates from these ideas. Thus, we cannot be certain that solutions appropriate for battered women apply equally to battered men.

This discussion does not, of course, argue that domestic violence laws should ignore abused men. Sex-neutral abuse laws are indeed proper. However, as women bear the brunt of domestic violence, the legal system must focus on them.

An important issue is how to define "battering." See Lerman, *A Model State Act: Remedies for*

been willing to acknowledge and address the plight of abuse victims. During the past fifteen years² there have been significant changes in public perceptions of the battered woman and her abusive mate.³ The legal system's response to wife abuse⁴ has also significantly advanced. These changes in the legal system have come from two sources. First, the written law is different: the batterer's actions, once condoned by the law,⁵ are now largely condemned.⁶ Second, both old and new laws are being implemented

Domestic Abuse, 21 HARV. J. LEGIS. 61, 71-73 (1984). This article adopts the definition of Dr. Lenore Walker, who is probably the leading authority in the field:

A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice.

L. WALKER, *THE BATTERED WOMAN* xv (1979). For further discussion of the battering cycle and its importance in the dynamics of the violent couple's relationship, see *infra* text accompanying notes 134-164.

2. British author and activist Erin Pizzey is credited with first bringing the problem to public attention in 1971 when she organized the United Kingdom's first women's center. Her book was the first systematic feminist treatment of battering. See E. PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1974). In the United States, the campaign to end domestic violence dates from 1975, when the National Organization for Women established a Task Force on Battered Women and Household Violence. Note, *Wife Abuse Legislation in California, Pennsylvania, and Texas*, 7 THURGOOD MARSHALL L. REV. 282, 282 n.1 (1982). The first widely read American book on the subject was probably D. MARTIN, *BATTERED WIVES* (1976). For an in-depth examination of the history of the battered women's movement in this country, see S. SCHECHTER, *supra* note 1.

3. Compare, e.g., the sympathetic and knowledgeable treatment of wife battering in *Wife Beating: The Silent Crime*, Time, Sept. 5, 1983, at 23 (cover story) [hereinafter cited as *The Silent Crime*] with the same magazine's earlier acceptance of the then-prevalent view that battered women engaged in "controlling, castrating behavior" and received "apparent masochistic gratification" from the beatings. *The Wife Beater and His Wife*, Time, Sept. 25, 1964, at 81-82, (quoting Snell, Rosenwalk & Robey, *The Wifebeater's Wife: A Study of Family Interaction*, 11 ARCHIVES OF GENERAL PSYCHIATRY 107 (1964)). See *infra* notes 56-78 and accompanying text for refutation of the masochistic theory of abuse.

4. This article uses the terms "wife abuse," "wife beating" and "battering" interchangeably although many abused women are not married to their assailants. See *infra* note 17. As used here, all these terms refer to violence by someone who is either currently in an intimate relationship with the victim or has had such a relationship with her in the past.

5. For a discussion of Roman, common law, and early American judge-made approaches to the right of a husband to abuse and punish his wife, see Stedman, *Rights of Husband to Chastise Wife*, 3 VA. L. REV. 241 (1917); see also Eisenberg & Micklow, *The Assaulted Wife: "Catch-22 Revisited,"* 3 WOMEN'S RTS. L. REP. 138 (1977) (collecting cases); Taub, *Adult Domestic Violence: The Law's Response*, 8 VICTIMOLOGY: AN INT'L J. 152, 152-57 (1983); Note, *supra* note 2, at 288-90; Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MAR. J. OF PRAC. & PROC. 549, 550-52 (1978). The "rule of thumb" was that a husband could beat his wife with a stick no larger than his thumb. Certain early American cases, such as *Bradley v. State*, 2 Miss. (1 Walker) 156 (1824), and *State v. Rhodes*, 61 N.C. 445 (1868), permitted "moderate" chastisement of a wife by her husband.

6. See UNITED STATES COMMISSION ON CIVIL RIGHTS, *UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE* 5-11 (1982) [hereinafter cited as *RULE OF THUMB*]; Lerman & Livingston, *State Legislation on Domestic Violence*, 6 RESPONSE TO VIOLENCE IN THE FAMILY & SEXUAL ASSAULT 1 (Sept./Oct. 1983) (comprehensive, although somewhat dated, compilation of spouse abuse laws); Lerman, *supra* note 1; Note, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1983 U. ILL. L. REV. 261 (extensive references to recent legislative

more effectively, as police officers, prosecutors, and judges have altered their attitudes and responses toward domestic violence.⁷

Despite a decade of progress, much work remains to be done to eradicate this personal and social tragedy. Misconceptions about the nature of the battering relationship are still prevalent in society and among law enforcement officials.⁸ The law's dedication to the elimination of the problem is still often half-hearted, and its reaction often misguided.

Powerful social forces permit and even encourage abuse.⁹ These forces

reforms).

However, blatant legal condonation of abuse remains in those states that continue to apply the doctrine of interspousal immunity to intentional torts. Note, *supra* note 2, at 290. See generally Annot., 92 A.L.R.3d 901 (1979). Cf. *Moran v. Beyer*, 734 F.2d 1245 (7th Cir. 1984) (Illinois spousal immunity statute declared unconstitutional in suit by battered wife against her ex-husband for injuries inflicted during marriage; immunity not rationally related to alleged purpose of maintenance of family harmony).

7. See RULE OF THUMB, *supra* note 6, at 1-4; see also *infra* note 275 and accompanying text. This change of attitude has often been thrust upon legal officials through the legislative and litigation efforts of battered women's advocates. Concerning legislative strategy, see generally J. HAMOS, *STATE DOMESTIC VIOLENCE LAWS AND HOW TO PASS THEM* (1980); concerning litigation, see the groundbreaking case of *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dept. 1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979). See generally Woods, *Litigation on Behalf of Battered Woman*, 5 WOMEN'S RTS. L. REP. 7 (1978); Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. LAW & SOC. CHANGE 135, 167-74 (1977). For a comparison of the two techniques, and the advantages and disadvantages of each, see Note, *Domestic Violence: Legislative and Judicial Remedies*, 2 HARV. WOMEN'S L.J. 167 (1979).

8. See, e.g., *The Silent Crime*, *supra* note 3, at 24 (New York City police sergeant quoted as saying that domestic violence cases may involve extenuating circumstances that make arrest inappropriate, for instance that "[m]aybe she wasn't giving him what he needed sexually"). Judicial ignorance came to national attention in the case of Clarence Burns, a Denver butcher who pled guilty to the murder of his estranged wife. Burns received a very light sentence (two years in a work release program) even though he had shot his wife five times in the face and the prosecution had presented evidence of Burns' history of abusing his wife during their 15-year marriage. Judge Alvin Lichtenstein stated that leniency was appropriate because Mrs. Burns had engaged in certain "highly provoking acts" before her death. These included deceiving her husband by acting very loving to him immediately before fleeing the marriage and failing to leave him a note explaining her departure. It is a measure of progress that the case drew an outraged response from the members of the public, including Colorado Governor Richard Lamm. Parmalee, "We're Outraged," *St. Petersburg Times*, Jun. 25, 1983, at 1A, col. 5. One week later, Judge Lichtenstein reversed himself and imposed a much stiffer sentence (four years in prison), stating that he had based the previous sentence on the incorrect assumption that Mr. Burn's imprisonment would have left the couple's 15-year old son without means of support. Parmalee, *Wife-Killer Going to Prison After All*, *St. Petersburg Times*, Jun. 30, 1983, at 1A, col. 1. For further examples of misguided official attitudes toward abuse, see *infra* notes 248-74, 307, and 343-45.

9. For a good discussion of these social forces, see Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 194, 208-17 (M. Roy ed. 1977). Straus lists nine sociological factors that encourage abuse of women: (1) defense of male authority; (2) economic constraints and discrimination against women; (3) the fact that child-care burdens fall largely on women; (4) the myth that single-parent households cannot possibly be good for children (thus encouraging battered women to stay with the abuser for the sake of the children, see *infra* note 69 and accompanying text); (5) the pre-eminence of the wife role in society's measurement of a woman's success, see *infra* notes 59-66 and accompanying text; (6) the view that women are essentially children without maturity or independence; (7) compulsive

continue to influence legal institutions and personnel, and undermine the legal system's desire and ability to combat the problem.¹⁰ Even if these forces were purged from the legal system, they would probably continue to operate in society at large. As long as social forces and attitudes condone battering, the legal system alone can never provide a complete solution to battering. Nevertheless, the law, especially the criminal law,¹¹ can play a critical role in reducing domestic violence.

This article will focus on the appropriate criminal justice response to battering.¹² Part II describes the nature of the problem of wife beating. It

masculinity (the need for males, once they realize that society does not value women, to divorce themselves aggressively from "feminine" nurturing traits); (8) women's negative self-image; and (9) the male orientation of the criminal justice system. Judge William Sweeney of Minnesota has stated that battering is directly associated with sexism. His response to the question, "Why do we have so many victims of battering?" was as follows: "This society, historically, presumes male superiority. If you grant this presumption, that superiority has to be validated if challenged. How does one validate it? Ultimately by physical force." Address to Minnesota Conference on Criminal Justice Policies in Domestic Violence Cases, *quoted in* Pence, *The Duluth Domestic Abuse Intervention Project*, 6 *HAMLIN L. REV.* 247, 251-52 (1983).

Many other factors could be added to Straus' list, but probably the most important is the common belief that social and legal institutions should not invade family privacy even in the case of domestic violence. See *infra* text accompanying notes 184-88 for a refutation of this contention. An important consequence of these social forces is our society's failure to condemn family violence as vigorously as it condemns violence between strangers. See *infra* notes 193 & 254-55 and accompanying text. See generally SCHECHTER, *supra* note 1, at 250-74; R.E. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 1-96 (1979) (broad theories of battering, based upon the needs of a patriarchal society).

10. For examples of how these social factors have infected the legal system's response to wife abuse, see *supra* note 8 and *infra* notes 248-75, 307 & 344-45 and accompanying text.

11. Civil remedies, such as civil protective orders, can help reduce abuse, especially when criminal law officials refuse to provide adequate protection to battered women. See generally, Comment, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 *U.S.F.L. REV.* 703 (1982). For extensive citations to the civil protective order statutes of various states see Note, *supra* note 6, at 271-76. See also *infra* note 277 for a discussion of recent state statutes that provide for mandatory arrest of batterers who violate protective orders. In these states, protective orders may become an important weapon against abuse, at least for those victims who are assertive and knowledgeable enough to obtain a protective order.

However, the criminal law must be the primary legal tool for deterring wife abuse as for other violent behavior. No other legal device can match the criminal law in its ability to label behavior as socially unacceptable. See *infra* note 209 and accompanying text. Further, only the criminal law can punish through the ultimate sanction of incarceration. Thus, if society truly condemns battering—as it is just starting to do, see *supra* notes 2, 3, 6 & 7—the criminal justice system must do all it can to address the problem. Accord, *RULE OF THUMB*, *supra* note 6, at 92 (excessive reliance on civil remedies forces the victim, rather than legal officials, to be "responsible for enforcing the law").

12. For a discussion of the law in various states, see Buzawa & Buzawa, *Legislative Responses to the Problem of Domestic Violence in Michigan*, 25 *WAYNE L. REV.* 859 (1979); Gottlieb & Johnson, *Reform in Kansas Domestic Violence Legislation*, 31 *U. KAN. L. REV.* 527 (1983); Reamey, *Legal Remedial Alternatives for Spouse Abuse in Texas*, 20 *HOUS. L. REV.* 1279 (1983); Note, *supra* note 6 (Illinois law); Comment, *Spouse Abuse: Proposal for a New Rule of Thumb*, 17 *U. RICH. L. REV.* 633 (1983) (Virginia law).

Domestic violence has also been receiving attention on the federal level. See UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT (1984)

first discusses the extent of abuse in America to demonstrate the seriousness of the problem and the urgent need for solutions. The remainder of Part II looks at the issue on a more individual basis. It examines the battered woman, the batterer, the battering relationship, and the effects of abuse on the couple's children. An understanding of the participants and their relationship, unencumbered by the many myths that surround battering, is essential to creating effective legal remedies.

Part III argues that the law must take a stand against wife abuse. The arguments for legal intervention against abuse may seem obvious, since spousal assault has been a crime for over a century. Nevertheless, the legal system remains reluctant to use its powers against batterers. Rationalizations offered for this reluctance range from alleged interests in protecting family privacy to the asserted ineffectiveness of the law in dealing with the problem. This article rejects these rationalizations because their effect is to condone wife beating. The law is not a panacea for domestic violence, but that does not mean it can or should do nothing.

Part IV enumerates the appropriate goals of a legal program to reduce battering. This enumeration is necessary for two reasons. First, one cannot determine whether any law is desirable without considering its purported objectives.¹³ Second, the flaws in the legal system's traditional answers to abuse are largely attributable to the pursuit of incorrect goals, such as the reconciliation of the partners.

With proper goals in mind, including protecting the victim and deterring the batterer, we can proceed to evaluate the legal system's response to battering. Part V examines the present state of the law and the changes necessary for an effective criminal justice response.

The first section of Part V sets out an overall approach to the problem and distinguishes between situations in which battering should and should not be treated the same as violent crimes between strangers. The remaining sections of Part V describe appropriate responses from police, prosecutors; and judges. Particular attention is devoted to the police, because as initiators of the criminal process, they play a crucial role in reducing spouse abuse. Moreover, their actions have historically been deficient and those deficiencies exemplify defects found elsewhere in the criminal justice system.

This article suggests various legislative changes. Although many states have recently enacted a number of enlightened statutes directed against battering, most jurisdictions need additional legislation. Proposed statutory

[hereinafter cited as TASK FORCE REPORT]. In September 1984 Congress passed a bill, P.L. 98-457, which authorizes \$62 million over a three-year period to fund domestic violence shelters. President Reagan has signed the authorization, but Congress has not yet appropriated the money.

13. See Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707, 735-52 (1978).

modifications include mandatory arrest of batterers by police, guidelines for the use of pretrial diversion of abusers to counseling, and increased sentencing of convicted abusers. Most of these proposals would be unnecessary if legal officials understood wife beating and used their discretion wisely to stop it. Unfortunately, ignorance about the nature of battering is so widespread among police, prosecutors, and judges that the legal system's response has generally been ineffective. The legislature must therefore take the lead, establish standards for these officials, and compel them to wield their power properly. If adopted, the suggested reforms would reduce domestic violence and would prevent another generation of American children from growing up believing that the marriage license is a "hitting license."¹⁴

II. THE NATURE OF THE PROBLEM

A. *The Scope of Wife Abuse*

It is impossible to know the extent of wife abuse in our society. For many years, the problem was largely ignored, and the available information was so incomplete and disorganized that it was functionally useless.¹⁵ More

14. Part II of BEHIND CLOSED DOORS, *supra* note 1, at 31–50 is entitled "The Marriage License as Hitting License." See *infra* notes 177–80 and accompanying text (discussing tendency for family violence to be passed down from generation to generation).

This article will focus on reform through legislation rather than litigation. The former has been a more fruitful arena for battered women's advocates in recent years. As long as police officers, prosecutors and judges have broad discretion in how they respond to battering, abused women have limited legal right to demand greater protection from recalcitrant legal personnel. *But see infra* text accompanying notes 283–84 (mandatory arrest laws should provide legally enforceable rights to battered women; even discretionary laws may do so). Legislatures generally have been sympathetic and responsive to the needs of family violence victims. See Lerman, *supra* note 1, and Note, *supra* note 6 (discussing legislative reforms).

This article will not deal with two topics that recently have stirred much public and scholarly interest. The first concerns how the criminal law should deal with a battered woman who injures or kills her abuser, see generally, WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE (E. Bochnak ed. 1981); Note, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 HARV. WOMEN'S L. J. 161 (1981) [hereinafter cited as *Defense Strategies*]. The second is the propriety, in such cases of violence by the battered woman, of introducing expert testimony concerning her psychological makeup, see generally Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U.L. REV. 348 (1982).

15. It is apparently common for police to file no written report in domestic disturbance cases. See Lerman, *supra* note 1, at 123 n.169 (13% of officers interviewed said they never wrote family disturbance reports, 70% said they completed written reports in fewer than 20% of the cases). Further, statistics are often compiled in ways that make it impossible to distinguish between domestic assaults and other crimes. See POLICE KEY # 245, *supra* note 1, at 145 (domestic abuse may be characterized as assault, battery or other crimes on police files, without being distinguished from crimes between strangers; similar problems exist with respect to emergency room records and court dockets). See also TASK FORCE REPORT, *supra* note 12, at 83–85 (current reporting practices make assessment of extent of family

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recently, there have been some serious efforts to compile data,¹⁶ and the results are shocking. The battering of women is both widespread and dangerous. In any given year, at least one-tenth to one-fifth of American women are beaten by a man with whom they are intimately involved.¹⁷ This translates into some six million battered women in America each year.¹⁸ One woman in four will suffer abuse during the entire course of a given relationship.¹⁹

violence very difficult; F.B.I. Uniform Crime Report should be changed to include data on relationship of victim and offender, and should include reports of incidents not leading to arrest; efforts to improve accuracy of National Crime Survey in reflecting family violence should be continued and supported); *accord*, RULE OF THUMB, *supra* note 6, at 92-93.

16. Two broad-based studies of domestic violence have been conducted in the past six years. Their results are reported in BEHIND CLOSED DOORS, *supra* note 1, and M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY (1981) [hereinafter cited as KENTUCKY SURVEY]. The findings of the two studies are similar. See KENTUCKY SURVEY, *supra*, at 59 (comparison table). See also UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE VICTIMS: A STUDY OF VIOLENCE AMONG FRIENDS AND RELATIVES (1980) [hereinafter cited as INTIMATE VICTIMS]. For a discussion of the methodologies employed in each study, see BEHIND CLOSED DOORS, *supra*, note 1, at 24-28; KENTUCKY SURVEY, *supra*, at 1, 10-11; INTIMATE VICTIMS, *supra*, at 47-48.

17. See BEHIND CLOSED DOORS, *supra* note 1, at 32-33 (16% of married couples reported at least one violent incident during the past year); KENTUCKY SURVEY, *supra* note 16, at 1 (of representative telephone sample of Kentucky women, 10% had experienced violence from a male partner during the previous twelve months); INTIMATE VICTIMS, *supra* note 16, at 3 (3.8 million crimes between intimates between 1973 and 1976).

These terrible statistics underestimate the extent of wife abuse, not only because of the victims' shame and denial, see *infra* notes 65-66 and accompanying text, but also because of the surveys' methodologies. The Kentucky research poll obviously excluded women who were so poor that they did not have a telephone, while the INTIMATE VICTIMS report did not count separately "series crimes," i.e., three or more separate but similar incidents in which the victim was unable to identify separately the details of each event. As the report acknowledges, INTIMATE VICTIMS, *supra*, at 4, many crimes among intimates recur and would therefore be excluded under this methodology. The figures in BEHIND CLOSED DOORS do not include either cohabitants or divorced or separated couples, although there is good reason to believe that there are significant levels of abuse in these groups. See *The Silent Crime*, *supra* note 3, at 23 n.* (estimates that nearly half of abuse victims were never married to perpetrator); KENTUCKY SURVEY at 18 (64% of women surveyed who had been divorced or separated during the previous year reported violence in their marriages). See also Bernard & Bernard, *Violent Intimacy: The Family as a Model for Love Relationships*, 32 FAM. REL. 283, 283 (1983) (survey of 461 college students found the incidence of violence in their intimate relationships to be 30%).

18. *The Silent Crime*, *supra* note 3, at 23. Given the tremendous underreporting of family violence, see *infra* note 27, the figure could be many times higher. Whatever the actual statistics, it is conceded that battering causes more injuries to women than any other cause, including automobile accidents, rapes, and muggings. *The Silent Crime*, *supra*, at 23. See also KENTUCKY SURVEY, *supra* note 16, at 1-2 (while 10% of the sample reported having experienced violence at home, fewer than 3% had experienced similar violence outside the home during the same year-long period); BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1981 at 71 (1983) [hereinafter cited as CRIMINAL VICTIMIZATION 1981] (violent crimes against women are perpetrated by "non-strangers" 50.9% of the time, as opposed to 38.4% for men).

19. KENTUCKY SURVEY, *supra* note 16, at 1 (21% of the women surveyed reported having experienced violence at some time from their partners); BEHIND CLOSED DOORS, *supra* note 1, at 32-33 (28% of couples still married to each other admitted to some violence during the course of their marriage).

Violence between partners is often serious and even fatal. Five to ten percent of women report severe beatings or use of a weapon such as a gun or knife.²⁰ Fatalities from abuse are all too common: the batterer may finally kill his victim,²¹ she may kill him,²² or one or the other of them may commit suicide in order to escape an unbearable situation.²³ The grim picture does not end with the damage to the couple. Domestic disputes are also time-consuming²⁴ and hazardous for the police.²⁵

The personal and social costs of wife abuse are staggering.²⁶ Further, they

20. KENTUCKY SURVEY, *supra* note 16, at 1 (4.1% of the respondents had experienced severe violence during the previous year; 8.7% had experienced it at some time); BEHIND CLOSED DOORS, *supra* note 1, at 34 (in one marriage out of 20 one spouse had "beaten up" the other; one out of 27 spouses admitted to having used a knife or gun against the other spouse); INTIMATE VICTIMS, *supra* note 16, at 1 (in 30% of crimes between intimates, the offender displayed or used a weapon; 10% of the time the weapon was a firearm).

21. *The Silent Crime*, *supra* note 3, at 23, estimates that 2000-4000 women are killed each year as a result of family violence. See also Stephens, *Domestic Assault: The Police Response*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 164, 168-69 (M. Roy ed. 1977) (study showed that 33.6% of homicides in Kansas City occurred in domestic disturbance situations); FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1979 10-11 (1980) (40% of female homicide victims are killed by family members or boyfriends).

22. See *Defense Strategies*, *supra* note 14, at 161 (according to an estimate from Cook County, Illinois, 40% of all women held there on homicide charges were accused of killing a man who had battered them). See also authorities cited in note 14, *supra* (discussing battered women's self-defense cases).

23. A major metropolitan hospital estimated that one quarter of all female suicide attempts it encountered were women who had experienced battering. *The Silent Crime*, *supra* note 3, at 24. See also NATIONAL CLEARINGHOUSE ON DOMESTIC VIOLENCE, WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL 20 (1981) [hereinafter cited as MEDICAL SETTING] (women using medical facilities at an urban hospital who risked continued battering by spouses or intimates were 12 times more likely to attempt suicide than non-battered women; 40% of these women who attempted suicide reported it was related to battering). Batterers may threaten suicide in order to coerce their wives to remain in or to return to the abusive relationship. L. WALKER, *supra* note 1, at 68. Because batterers have such low self-esteem and are socially isolated from everyone except their victims, see *infra* notes 100-03 and accompanying text, this is frequently not an idle threat. See L. WALKER, *supra* note 1, at 68 (in Walker's limited sample, 10% of batterers killed themselves after their wives left them).

24. Police spend about one-third of their time on domestic disturbance calls. *The Silent Crime*, *supra* note 3, at 23.

25. In 1980, 33% of all assaults on police officers and 11.5% of all police deaths occurred during responses to "disturbance" calls. FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1980, at 333, 339 (1981). Unfortunately, this statistic is not limited to spouse and cohabitant abuse. Unquestionably, however, police fear for their own safety when called to the scene of a domestic quarrel. See RULE OF THUMB, *supra* note 6, at 13.

26. INTIMATE VICTIMS, *supra* note 16, at 14, reports that roughly 10% of all victims of violence from intimates lose time at work. However, in situations where the perpetrator was a family member, victims were even more likely to lose time and were absent from work for longer periods of time. The drain on social services is also great. See MEDICAL SETTING, *supra* note 23, at 7-9 (survey of 2676 women using emergency surgical service at an urban hospital found that 21% had a history of being abused by spouses and of these, 83% were still involved in violent relationships); *id.* at 9 (battered women used emergency surgical services far more than previously suspected); *id.* at 16 (figures for simple emergency care point

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are perpetuated because family violence is transmitted from generation to generation.²⁷ As if this were not enough, the depressing portrait presented above is, if anything, too optimistic. All experts agree that the available statistics underestimate the extent of abuse.²⁸ There are myriad reasons why all forms of violence between intimates, including wife beating, are systematically underreported.²⁹ First is the belief that what happens within the family is a private matter that should not be discussed with outsiders.³⁰ Second is the taboo nature of the subject: people are often ashamed to admit that they have violated what is considered the norm of a happy, non-violent homelife.³¹ Finally, before people can admit the existence of battering to a researcher, they must first admit it to themselves. Such an admission is

to the same conclusions: a sample of 1155 women showed that 78% were "at-risk" for ongoing battering by spouses, and that these "at-risk" patients used the services an average of 1.95 times per year as opposed to an average of only 1 time per year by nonbattered women); *id.* at 17 (77% of all visits to the hospital's Women's Clinic were by women "at-risk"); *id.* at 10 (abused women were more likely to suffer purely accidental injuries than nonabused women).

27. See *infra* text accompanying notes 178–81.

28. See, e.g., Steinmetz, *Wifebeating, Husbandbeating—A Comparison of the Use of Physical Violence Between Spouses to Resolve Marital Fights*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 63, 65 (M. Roy ed. 1977) (only one in 270 incidents of spouse abuse are reported); *CRIMINAL VICTIMIZATION* 1981, *supra* note 18, at 10 (1983) (National Crime survey and victimization surveys tend to underreport violence between family members and close friends); *INTIMATE VICTIMS*, *supra* note 16, at 1 (55% of crimes between intimates go unreported to legal authorities); *BEHIND CLOSED DOORS*, *supra* note 1, at 35. See *Private Violence*, *Time*, Sept. 5, 1983, at 18 [hereinafter cited as *Private Violence*] (concludes that statistics on family violence are little more than wild guesses). Accord, Prescott & Letko, *Battered Women: A Social Psychosociological Perspective*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 72, 78 (M. Roy ed. 1977).

29. *INTIMATE VICTIMS*, *supra* note 16, at 3, 14–15, notes that underreporting occurs whenever assailant and victim know each other well, but also concedes that underreporting may be even greater when family members are involved. Crimes between non-intimates also go unreported; however, in the latter situation, victims are angry and may desire retribution. These emotions are more likely to lead to reporting than the shame that intimate victims feel. *Private Violence*, *supra* note 28, at 18. In addition, the victim who knows the offender has more reason to fear retaliation. See *infra* text accompanying notes 78–81.

30. This is the primary reason that intimate victims give for not reporting crimes. *INTIMATE VICTIMS*, *supra* note 16, at 15.

31. See Prescott & Letko, *supra* note 28, at 78. The myth of family non-violence is very powerful in America. Every society needs strong cultural norms to keep families together, and in our country this myth is one of them. Hotaling & Straus, *Culture, Social Organization and Irony in the Study of Family Violence*, in *THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 3, 11–15 (M. Straus & G. Hotaling eds. 1980). The existence of the myth is evident in the relative absence of family violence from children's stories, even though non-family violence is common in children's literature. Huggins & Straus, *Violence and the Social Structure as Reflected in Children's Books from 1950 to 1970*, in *THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 51, 63 (M. Straus & G. Hotaling eds. 1980).

For a discussion of the difficulties that researchers encounter in trying to get valid results in areas where interactions are private and intimate, see generally Gelles, *Methods for Studying Sensitive Family Topics*, 48 *AM. J. ORTHOPSYCHIATRY* 408 (1978), reprinted in R. GELLES, *supra* note 1, at 147–68. These difficulties are compounded when the behavior being examined is not only private and intimate, but also taboo.

difficult for both partners in an abusive relationship, who typically lie to themselves about the existence and degree of the violence.³²

It is important to emphasize that wife abuse is prevalent throughout our society. Recently collected data merely confirm what people working with victims have long known: battering occurs in all social and economic groups.³³ It is a myth that abuse is a problem only among poor people and minorities. It is true that battered women who are also poor are more likely to come to the attention of governmental officials than are their middle- and upper-class counterparts.³⁴ However, this phenomenon is caused more by the lack of alternative resources³⁵ and the intrusiveness of the welfare state³⁶

32. See *infra* text accompanying notes 67 & 117 (batterers and battered women are deniers).

33. KENTUCKY SURVEY, *supra* note 16, at 17; BEHIND CLOSED DOORS, *supra*, note 1, at 126–52. The authors of KENTUCKY SURVEY, *supra* note 16, at 2, found an 11% rate of violence for women in families earning less than \$15,000, 10% for those whose family income ranged from \$15,000 to \$24,999, and 8% for women whose families earned \$25,000 or more.

For anecdotal information concerning middle- and upper-class batterers, see D. MARTIN, *supra* note 2; L. WALKER, *supra* note 1. See also, *The Silent Crime*, *supra* note 3, at 23 (story of battered wife of executive in Fortune 500 company). For a good journalistic treatment of this problem, see Saline, *Bleeding in the Suburbs*, Philadelphia Mag., March 1984, at 81 (cover story).

Battering is also an international phenomenon. The wife of former Japanese Prime Minister Eisaku Sato stated that he was a good husband because he beat her only once a week. Subsequent to this revelation, Sato won the Nobel Peace Prize, D. MARTIN, *supra*, note 2, at 45. A former mistress of Greek shipping magnate Aristotle Onassis told of being beaten until Onassis became exhausted. BEHIND CLOSED DOORS, *supra* note 1, at 31. For information on the situation in Great Britain, see generally E. PIZZEY, *supra* note 2. For a brief discussion of French and Swedish law, see Taub, *supra* note 5, at 158–59.

34. The Kentucky survey, *supra* note 16, at 48, found that higher income and better educated women were much less likely to turn to social workers for help than were lower income, less well educated women.

35. For example, middle-class women may go to private physicians rather than to a hospital emergency room. S. SCHECHTER, *supra* note 1, at 235. Cf. KENTUCKY SURVEY, *supra* note 16, at 3 (nonwhite battered women were more than twice as likely as whites—18% vs. 8%—to turn to the police for assistance). The residents of battered women's shelters are also a non-representative sample. Middle- and upper-class women are more likely to have shelter alternatives, such as hotels or family with whom they can stay. Additionally, many shelters encourage abused women to examine other housing options, since shelters are often filled to capacity with women who have no place else to go. Interview with Kathleen Van Dere, Executive Director, Sexual and Physical Abuse Resource Center (SPARC), of Gainesville, Florida (state-funded domestic violence shelter serving North Central Florida) (October 2, 1984).

Abused women of higher socio-economic status may have an even greater fear of social embarrassment and hurting their husbands' careers than do lower-class victims. They may also assume that their husbands' high status will cause them not to be believed when they reveal their husbands' violent behavior. L. WALKER, *supra* note 1, at 22. Saline, *supra* note 33, contains many tragic examples of cases in which wealthy women hid their victimization for years and where friends and legal personnel failed to believe their horror stories. See also BEHIND CLOSED DOORS, *supra* note 1, at 31 (story of wife of the President of a Midwestern state university who asked researchers how she could deal with her husband's violence without jeopardizing his career).

36. See Dreas, Ignatov & Brennan, *The Male Batterer: A Model Treatment Program for the Courts*, 46 FED. PROBATION 50, 50 (Dec. 1982). Because violent families who are also poor are more likely to be subjected to governmental intervention than their wealthier counterparts, it is dangerous to generalize

than by any significantly higher incidence of violence among lower-class families.³⁷

B. Overview of the Battering Relationship

The preceding section provides ample evidence of the seriousness of the problem of wife beating. In addition, more and more citizens are asserting³⁸ that the legal system must take some responsibility for punishing and preventing abuse.³⁹ However, in this area, as elsewhere, the law will be effective only if it is tailored to fit the situation. In other words, before we

on the basis of social service, police, judicial, or other official records. Gelles, *Etiology of Violence: Overcoming Fallacious Reasoning in Understanding Family Violence and Child Abuse*, in R. GELLES, *supra* note 1, at 169, 174.

37. This is not to say that domestic violence is necessarily equally distributed among all groups in society. Both KENTUCKY SURVEY, *supra* note 16, at 17 and BEHIND CLOSED DOORS, *supra* note 1, at 123–52, note some variations. In both studies, blacks were found to have a higher incidence of family violence than whites, and urban dwellers had higher rates than their suburban counterparts. However, the BEHIND CLOSED DOORS survey, *supra* note 1, at 131, found that women living in rural areas were as likely to be abused as inner-city women. Some of the variations are contrary to what the public might expect. For instance, men with no more than an eighth grade education are less violent than those who have attended high school. BEHIND CLOSED DOORS, *supra* note 1, at 129; KENTUCKY SURVEY, *supra* note 16, at 17. In KENTUCKY SURVEY, *id.*, this group was found to be less violent than men who had had some college education. The high level of violence among well-educated people is documented in the findings of Bernard & Bernard, *supra* note 17.

There is, of course, no way of telling whether these findings represent genuine differences in abuse rates or differences in the victims' willingness to admit abuse either to themselves or to outsiders. More importantly, even assuming that abuse is more common in some groups than in others, this should not blunt the key finding of all research done: *family violence is prevalent throughout the economic and social spectrum.*

An example of upper-class battering is found in the recent revelation that John M. Fedders, 43-year-old chief of enforcement at the Securities and Exchange Commission, has beaten his wife at least seven times over the course of their 18-year marriage. Fedders was consequently forced to resign his \$72,000-a-year government position. However, his resignation was forced not in 1984, when the White House first learned of the problem, but in March of 1985, after the *Wall Street Journal* published a vivid 4000-word exposé. See *A Troubled Double Life*, *Time*, March 11, 1985, at 32. Details of the situation, revealed during a divorce trial, indicate that the battering began only two years into their marriage, and included an episode where Fedders beat his wife in the abdomen during pregnancy. See *infra* note 102.

The forced resignation of this affluent and influential government attorney reflects an improved public attitude on the subject. Certain facts, however, demonstrate continued condonation: (1) high officials knew about these allegations for a full year before acting; (2) the President was reluctant to act as long as there was a chance of reconciliation (the "family unity" excuse); and (3) there is at least some feeling that the "private" acts were not a legitimate basis for Fedders' dismissal from an office of public trust. See Jackson, *John Fedders of SEC Is Pummeled by Legal and Personal Problems*, *Wall Street Journal*, Feb. 25, 1985, at 1, col. 1.

38. Given the often ineffective response to battering, see *infra* text accompanying notes 248–76, one sometimes wonders how willing our society is to translate talk about curbing abuse into action. This is not to denigrate the significant strides that have been made in the past decade; it is merely to realize how much further we have to go.

39. RULE OF THUMB, *supra* note 6, at 102–09. See *supra* note 6 and *infra* notes 272 & 275 (discussing new laws and legal policies directed at deterring wife abuse).

can fashion sensible laws to deal with abuse, we must understand the people involved and the nature of their relationship.

The most important facts about battering are: (1) the abused woman cannot control the batterer;⁴⁰ (2) the violence will only cease through intervention; and (3) the sooner intervention comes after the couple's first violent incident, the better the prognosis for ending the abuse permanently and keeping the family together.⁴¹ The first fact is a specific instance of the more general observation that external forces—the victim's behavior, job pressures, alcohol—only trigger abuse; they do not cause it.⁴² The necessity of intervention arises from the batterer's refusal to accept responsibility for his actions. Not only do abusers minimize the extent of their violence or even deny it altogether, they also blame circumstances or other people for their violent behavior.⁴³ Wife beaters will change, if at all, only if they are forced to face the consequences of what they have done.⁴⁴ The legal system can play an important role in confronting and motivating batterers.

The importance of prompt intervention is perhaps the least surprising, since it arises from the power of inertia in human relations. Once two people have established a certain behavior pattern, changing that pattern is very difficult. The longer the pattern persists, the more difficult change becomes.⁴⁵ For this reason, couples with a long history of battering usually cannot stay together and become violence-free.⁴⁶ As will be described below, both the batterer's aggression and the woman's victimization are learned responses.⁴⁷ The longer these responses persist, the harder they are to unlearn.

40. See *infra* text accompanying notes 149–52.

41. See RULE OF THUMB, *supra* note 6, at 91 (left unchecked, spouse abuse generally increases in severity over time); accord N. Y. Times, Sept. 10, 1984, at B10, col. 2 (quoting Richard Berk, Professor of Sociology, University of California at Santa Barbara).

42. See *infra* text accompanying notes 121–28.

43. See *infra* text accompanying notes 118–20.

44. See *infra* text accompanying notes 132–33.

45. The observation is purposely stated broadly to apply to all relationships, not just the one between batterer and victim. Throughout this article, similar comparisons will be made between "normal" experiences and relationships and those encountered by the violent family. The point of these comparisons is not that the abusive couple is "normal." Their relationship is properly regarded as troubled and even pathological. But we can understand their behavior better if we are honest about the ways in which their actions resemble actions with which all of us are familiar.

46. L. WALKER, *supra* note 1, at 28–29. This is different from saying that some long-term batterers cannot learn to become non-violent in subsequent relationships. That is, starting fresh with a new partner, they might be able to make changes that would be impossible in a relationship of which violence has become an integral part. This phenomenon is recognizable to anyone who has seen people make significant behavioral changes from their first to their second marriage (for example, a wife whose first husband felt that she was overly dependent may become less dependent with her second husband).

47. See *infra* text accompanying notes 74–77 & 111–15.

Despite the horrors of the battering relationship, powerful psychological and social forces bind the abusive couple together.⁴⁸ These forces include the cyclical nature of battering⁴⁹ and the fact that both parties blame the victim and not the perpetrator for the violence.⁵⁰ As a result of these forces, abused women have great difficulty taking any action, either legal or personal, against their partners. Further, batterers, using both fear and manipulation, know how to deter their victims from leaving them and are especially adept at persuading or coercing their partners, if they have left, to return and give the relationship another try.⁵¹

The picture is not entirely bleak, however. With the support, encouragement, and understanding of others, many battered women have escaped their abusive situations and have rebuilt their own lives and those of their children.⁵² Some batterers have also gotten help and have ended their abuse.⁵³ With increased efforts by legal personnel and others, more victims could be saved and more assailants stopped.

C. *The Battered Woman—Why Does She Stay?*

So many myths⁵⁴ surround the issue of wife beating that only detailed information can dispel the ignorance of policymakers and the public. A good place to start is with a portrait of the battered woman.

The most important question about the abused woman is also the most obvious: why does she stay? Why would anyone subject herself to repeated, severe beatings? Why would anyone remain in a relationship that carries an ever-present threat of injury and even death? And why, as so often happens,

48. See *infra* text accompanying notes 99–104 & 164 (psychological forces that bind battering couples); *supra* note 9 (social forces that encourage battering).

49. See *infra* text accompanying notes 134–64.

50. See *infra* text accompanying notes 58–65 & 116–19.

51. See *infra* notes 78–81 & 156–58 and accompanying text.

52. See, e.g., L. WALKER, *supra* note 1, at 28. Battered women's shelters, which provide support, safety, and understanding to victims, have helped to lessen the isolation of battered women and to convince them that alternatives to continued violence are available.

53. Ann Ganley of the Veterans Administration Hospital in Tacoma, Washington, has had great success with a program that stresses a batterer's responsibility for his actions. Telephone interview with Dr. Ganley (March 12, 1984). See also *infra* text accompanying notes 322–35.

54. For an excellent discussion of myths concerning battering see L. WALKER, *supra* note 1, at 18–31. Walker's book, a brilliant and readable piece of original scholarship, is the best single source for one seeking to understand the psychological dynamic of wife abuse. Drawing from nothing more than her own experiences working with battered women, she developed a portrait of the abusive couple that subsequent research has consistently affirmed.

The opinion of Chief Justice Wilentz of the New Jersey Supreme Court in *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984), which draws extensively on the work by Walker and others, is the most detailed and sympathetic judicial treatment of the "battered woman's syndrome."

would a battered woman repeatedly leave her husband, only to return again and again to face inevitable beatings?⁵⁵

The traditional psychiatric answer to these questions has been that the battered woman is a masochist who stays because she enjoys being beaten.⁵⁶ In modern times, people who have actually dealt with battered women emphatically reject this answer.⁵⁷ In fact, the explanation for the abused woman's behavior is far more complex, and arises from a tragic combination of social and personal forces.⁵⁸

Certain of the victim's traits may predate the battering. For instance, the battered woman usually subscribes to traditional opinions about proper male and female roles.⁵⁹ Even if she works outside the home, she believes that what really counts for a woman is success as a wife and mother.⁶⁰ She

55. Even battered women who eventually escape permanently have nearly always returned to the abuser several times before they are able to terminate the relationship. L. WALKER, *supra* note 1, at 183. This phenomenon of repeated departure and reconciliations is explained by both the victim's "learned helplessness," *see infra* notes 74-77 and accompanying text, and by the dependence and hope created by the battering cycle, *see infra* text accompanying notes 134-64.

56. *See, e.g.,* Snell, Rosenwald & Robey, *The Wifebeater's Wife: A Study of Family Interaction*, 11 ARCHIVES GEN. PSYCHIATRY 107 (1964) (victims blamed for violence; authors condemn battered women's hostility toward their husbands). Such theories can be traced back at least as far as Sigmund Freud, who believed that masochism was inherent in women. *See* D. MARTIN, *supra* note 2, at 67-71. The myth of the battered woman as masochist, as with many other battering myths, diverts attention away from the batterer and on to his victim. *See* L. WALKER, *supra* note 1, at 20. ACCORD, J. FLEMING, STOPPING WIFE ABUSE 80 (1979). It also improperly relieves society of responsibility to deter battering, as it portrays family violence as consensual activity.

This myth is only an example of society's tendency to blame the victim. *See generally* W. RYAN, BLAMING THE VICTIM (1971). Not only does society tend to ascribe fault to victims, the victims invariably do this themselves, *see infra* notes 59-75 and accompanying text. *See also* S. SCHECHTER, *supra* note 1, at 18 (victims blame themselves in order to retain belief that they can control their lives, finding it easier to blame themselves than to accept the randomness of violent trauma); L. WALKER, *supra* note 1, at 31 (battered women subscribe to every battering myth).

57. L. WALKER, *supra* note 1, at 20. *See also* Dutton & Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY: AN INT'L J. 139 (1981) (analogizing battered women's behavior to that of prisoners of war).

58. The complexity of the "battered woman's syndrome" helps explain why expert testimony is often needed in cases in which a battered woman has assaulted or killed her mate. Expert testimony can help the jury both to understand the woman's actions and to overcome their uncritical acceptance of battering myths. *See* State v. Kelly, 478 A.2d 364, 369-73, 377-78 (N.J. 1984). *See also* Comment, *supra* note 14.

59. L. WALKER, *supra* note 1, at 33. Battered women typically come from homes in which traditional sex roles have been emphasized. While some battered women are from violent families, *see* authorities cited *infra* note 177, more frequently they had non-violent fathers who favored traditional sex roles and who pampered them, encouraging them to be dependent on men. L. WALKER, *supra* note 1, at 35.

60. L. WALKER, *supra* note 1, at 23. Batterers frequently demand that they be given total control over their wives' earnings. Battered women, even those with high earnings and successful professional careers, usually accede to this demand. *See* POLICE KEY # 245, *supra* note 1, at 146. They may do this not only to "keep the peace" at home, *see infra* text accompanying notes 137-39, but also because they

takes upon herself all responsibility for the happiness of her husband and family,⁶¹ and believes that if she just performs her wifely duties properly all family conflict will disappear.⁶² She thinks it her duty to accommodate all her husband's demands, no matter how irrational or inconsistent,⁶³ and may even believe that he has the right to "discipline" her through violence if she fails to satisfy him.⁶⁴ She is unrealistic about her relationship with the batterer because she clings to the myth that she can control his violence and prevent the battering.⁶⁵ Thus, when he abuses her, she blames herself rather than her mate.⁶⁶

The battered woman's traditionalist views on sex roles also help explain her response once the pattern of violence has begun. Because she feels that the beatings are her own fault, she may deny their existence or severity, even to herself.⁶⁷ She is also likely to be too ashamed to tell others about the abuse, including those who might help her to assess the situation objectively.⁶⁸ Further, because she is a traditionalist, she may place a premium on

themselves believe that complete command over family finances is a husband's right. An abused woman typically relinquishes her money to her partner even when she is the family's sole support, although she may try to hide some money from him in the hope of making an eventual escape. L. WALKER, *supra* note 1, at 34.

A batterer is often threatened by the independence that he fears his victim's job may give her and he may coerce her into giving up her job, thus increasing her isolation. *See infra* note 206 and accompanying text.

61. L. WALKER, *supra* note 1, at 34. At the same time that she holds herself accountable for the family's happiness, the battered woman believes that her husband, as the "man of the house," has the right to make all decisions on important family matters. Wetzel & Ross, *Psychological and Social Ramifications of Battering: Observations Leading to a Counseling Methodology for Victims of Domestic Violence*, 1983 PERSONNEL & GUIDANCE J. 423. Her willingness to turn over all her money to him, *supra* note 60, is just one example of this trait.

62. This attitude is both guilt-inducing and unrealistic. The family is an inherently conflict-prone unit; every family, even the happiest, has disagreements. Unfortunately, our society is reluctant to acknowledge the inevitability of family conflict. Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 194, 205-08 (M. Roy ed. 1977). This myth of perfect family harmony hurts the battered woman. It keeps her from realizing that the problem is not the existence of family conflict but rather her mate's inability to resolve that conflict through non-violent means.

63. *See infra* notes 125-26 and accompanying text (examples of the batterer's irrational demands).

64. *Cf.* L. WALKER, *supra* note 1, at 12 (batterer may believe he has a right to beat his wife).

65. *See id.* at 31; *infra* text accompanying notes 149-52 (discussing why the batterer's violence is outside his wife's control).

66. *Id.* at 33. Even women who have successfully extricated themselves from a violent relationship still feel this sense of guilt. When interviewed, "[m]ost . . . eventually got around to saying that they were still not completely sure that there was not something they could have done differently that might have made the batterer cease his abusive behavior." *Id.*

67. *Id.* at 74-76. She is even more likely to deny or minimize the violence to outsiders, often out of fear of how the abuser will react. An abuser often threatens violence against anyone who lends support to the victim and she believes him fully capable of carrying out his threats. *Id.* at 105.

68. Of the battered women in KENTUCKY SURVEY, *see supra* note 16, at 3, nearly half (43%) had not

keeping the family intact. She may feel that the stigma of divorce and depriving her children of their father are worse than the continuation of the abuse against her.⁶⁹ Her fear of separation and divorce may, of course, be even greater if she is economically dependent on her husband.⁷⁰ Even if she is not economically dependent, she will be emotionally dependent, feeling that she cannot live without "her man," or that he cannot continue without her.⁷¹

By the time the battered woman has been through the battering cycle⁷² a number of times, she suffers from low self-esteem.⁷³ To make matters worse, the repeated traumas of the beatings have left her in a state of "learned helplessness."⁷⁴ While she continues to take responsibility for the

told *anyone* about the abuse. The victim's reluctance to talk about the abuse is further reinforced by the abuser's need to isolate her from other people, *see infra* notes 101-05 and accompanying text, and by society's tendency to either ignore abuse or condemn her for it. *See infra* notes 85-89 and accompanying text.

69. Ferraro & Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROBS. 325, 330 (1983); D. MARTIN, *supra* note 2, at 81-82, 86; POLICE KEY # 245, *supra* note 1, at 145. In a survey of victims calling an abuse hot line in New York City, the stigma of divorce and the welfare of their children were among the reasons battered women gave when asked why they stayed with their abusers. Roy, *A Current Survey of 150 Cases*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 25, 31-32 (M. Roy ed. 1977). However, her concern for her children can at times spur a battered woman to try to escape, if she sees that they are becoming embroiled in the violence. Gelles, *Abused Wives: Why Do They Stay?* in R. GELLES, *supra* note 1, at 95, 105 [hereinafter cited as *Why Do They Stay?*].

70. D. MARTIN, *supra* note 2, at 84; POLICE KEY # 245, *supra* note 1, at 146; Roy, *supra* note 69, at 31. A battered woman who is employed outside the home is somewhat more likely to seek intervention than one who is not. A job may give her greater financial independence, *but see supra* note 60, and her co-workers may enhance the victim's self-image enough to allow her to see her options more clearly. However, emotional as well as economic factors are obviously present, since only half of the victims who seek help hold jobs. *Why Do They Stay?*, *supra* note 69, at 104.

71. *See* Roy, *supra* note 69 at 31; L. Walker, *supra* note 1, at 68. Battered women fear being alone, but once they actually choose to live alone, they feel tremendous relief at being free from fear and trauma. L. WALKER, *supra* note 1, at 183.

72. *See infra* text accompanying notes 134-64.

73. L. WALKER, *supra* note 1, at 32.

74. *Id.* at 45-54. The theory of learned helplessness was first developed in experiments on animals. When given electric shocks at random, animals will at first try to control their environment and stop the negative reinforcement. Once they realize that they cannot control the punishment, they become passive and compliant. Over time, their perception of their own helplessness becomes so strong that eventually they will not try to escape from the "torture chamber" even if there is a readily available means of escape and they are guided along the escape route. Only after they are repeatedly shown the way out do they start to respond voluntarily again. M. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* 21-44 (1975).

In humans, the theory has been shown to help explain the passive behavior of liberated concentration camp victims and others who have been subjected to random uncontrollable and repeated violence. *Id.*: *cf.* Dutton & Painter, *supra* note 57, at 146-47 (battered women are psychologically similar to prisoners of war and hostages). *See generally* Peterson & Seligman, *Learned Helplessness and Victimization*, 39 J. SOC. ISSUES 103 (1983).

If anything, the battered woman suffers from even greater trauma and confusion than victims in prisoner-of-war or hostage situations. In her case, the random violence is inflicted not by a stranger or a

batterer's behavior—which she cannot control—she is unable to take responsibility for that which she *could* control, her ability to flee the relationship. She is oblivious to means of escape because her problem-solving abilities have been literally beaten out of her.⁷⁵ She may even appear to accept her victimization passively.⁷⁶ Inside, however, she is filled with rage, not only against her abuser, but also against herself. Subconsciously, she has probably come to recognize the need for flight and is likely to blame herself for being unable to leave.⁷⁷ Thus, a destructive psychological spiral is established: the beatings lead to lowered self-esteem and learned helplessness, which in turn make her unable to escape; her inability to escape makes her feel even more inadequate and helpless and also leaves her in a relationship which will lead to further beatings, which will further decrease her self-esteem.

In many cases, the victim sees little point in attempting to escape. She may feel that the batterer will eventually kill her regardless of whether she leaves or stays.⁷⁸ Her fears are well-founded: a batterer usually becomes even more abusive if his partner makes any attempt to assert control over her life.⁷⁹ She may have tried to leave him before, only to have him threaten violence against her or others if she did not return.⁸⁰ A battered woman has every reason to believe that he is capable of carrying out that threat. Under such conditions, she may decide to stay, either hoping he will change or giving up hope altogether, especially if outsiders are offering her no assistance or protection.⁸¹

It cannot be emphasized enough that the battered woman's learned helplessness or her other psychological problems are the results of battering and not its cause. In other words, battered women have problems because

hostile outsider, but by someone with whom she is supposed to (and at times does) have a loving relationship. See S. SCHECHTER, *supra* note 1, at 19. It is thus even more understandable that she maintains her attachment to her abuser and tries desperately to placate him, behavior which all victims of learned helplessness exhibit. Dutton & Painter, *supra*, at 151; A. FREUD, THE EGO AND THE MECHANISMS OF DEFENCE 117–31 (1942). See also, State v. Kelly, 97 N.J. 178, 478 A.2d 364, 380–81 (1984) (battered woman's syndrome has a sufficient scientific basis to meet standard for admissibility of expert testimony); but see MEDICAL SETTING, *supra* note 23, at 3 (unclear that learned helplessness is a reliable theory as applied to battered women).

75. L. WALKER, *supra* note 1, at 48. It is also important to recognize that the battered woman faces real danger if she does try to leave, see *infra* notes 78–81 and accompanying text.

76. L. WALKER, *supra* note 1, at 31.

77. *Id.* at 174.

78. *Id.* at 75, 105. See also D. MARTIN, *supra* note 2, at 76–79 (battered women are trapped by fear).

79. See L. WALKER, *supra* note 1, at 180.

80. See *id.* at 75.

81. See *id.* at 49–51.

they have been battered. They are not battered because they have problems.⁸²

The characteristics of the batterer and the battering relationship reinforce the battered woman's helplessness and inability to view her situation realistically.⁸³ However, the pressures to remain in the abusive relationship extend beyond the couple's own relationship. The social forces that condone battering⁸⁴ keep victims trapped in abusive relationships. In addition, friends, family, and other outsiders⁸⁵ may exacerbate the situation by refusing to acknowledge the symptoms of abuse⁸⁶ or by disbelieving her when she finally summons up the courage to reveal the horrible truth.⁸⁷ These reactions may push her further into isolation and denial. Even if outsiders admit that she is being battered, they may foster her self-blame by focusing on what she has done to "provoke" her husband. They may advise

82. *Id.* at 229. After all, many American women believe in traditional sex roles. If they are not battered, however, they do not develop learned helplessness, depression, etc. This view is further reinforced by the fact that battered women who receive beneficial intervention rarely form a second battering relationship. *Id.* at 28.

Tragically, doctors have treated battered women's psychological symptoms without recognizing that they are rooted in abuse. *Id.* at 21 ("One woman who told of hearing voices which told her to kill her husband had received numerous electroshock therapy treatments. But just listening to her describe her husband's brutal treatment made her hallucination very understandable.").

83. *See infra* text accompanying notes 109 & 123-49.

84. *See supra* note 9.

85. Unhelpful outsiders may include not only law enforcement personnel, *see infra* Part V, but also neighbors, social workers, and even those involved in battered women's shelters.

The medical profession has been a particular source of problems for battered women. *See* MEDICAL SETTING, *supra* note 23, at vii-viii (in a period of 40 years, one woman saw 394 physicians and 17 psychiatrists for a total of 424 medical visits without anyone noting the importance of an early entry in her records that her husband beat her regularly; she was later committed to a state mental hospital for "punitive" reasons); *id.* at 1-5 (overview of the medical community's response in recent years).

86. P. McGRATH, P. SCHULTZ & D. FRANKLIN, THE DEVELOPMENT AND IMPLEMENTATION OF A HOSPITAL PROTOCOL FOR THE IDENTIFICATION AND TREATMENT OF BATTERED WOMEN 6 (Domestic Violence Monograph No. 5, 1980) [hereinafter cited as HOSPITAL PROTOCOL]. There are many reasons why third parties ignore family violence. Many people believe that "family privacy" should not be invaded. S. SCHECHTER, *supra* note 1, at 19. Some may fear what action the batterer might take against them if they were to become involved. Gelles, *No Place to Go: The Social Dynamics of Marital Violence*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 46, 56 (M. Roy ed. 1977). Others may shun the battered woman because dealing with her reminds them of times in their own lives when they felt unhappy or helpless. S. SCHECHTER, *supra* note 1, at 20.

87. *See, e.g.*, L. WALKER, *supra* note 1, at 175-77 (victim told her story to a male colleague of her husband; he didn't believe her; when she asked him what he thought she should do if what she was saying was true, the colleague said that she should commit suicide; the colleague then repeated the story to the batterer, who came home in a rage to his wife; when she told her husband that she had taken pills to kill herself, he lay down beside her, intending to do nothing until she was dead; fortunately, their daughter arrived at home in time to telephone the police and save her mother's life).

Outsiders may respond with disbelief both because some of the damage inflicted by abusers is truly incredible (for example, battering frequently occurs during pregnancy, *see infra* note 102) and because the batterer usually seems such "a nice guy" to the outside world. *See infra* notes 107-09 and accompanying text.

her to accede to his every demand,⁸⁸ thereby encouraging her delusion that he will stop beating her if only she does enough to please him. Other people may impair her ability to escape (already diminished because of learned helplessness) by emphasizing possible economic hardship and stigmatization rather than stressing the advantages of increased personal safety and self-respect.⁸⁹

At the other end of the spectrum, friends and family can hurt the battered woman by being judgmental and by insisting that she leave the abusive relationship.⁹⁰ Condemning her for failing to extricate herself is harmful rather than helpful because it increases the victim's self-hatred and her fears that she is crazy.⁹¹ It may also drive her into greater secrecy and shame. Excess judgmentalism also runs counter to the battered woman's long-term interests. The decision of whether and when to change her life must be hers, for both moral and practical reasons. Morally, she has an adult's right of self-determination. Practically, like other human beings, she is unlikely to adhere to a decision forced on her.⁹²

The proper role of outsiders in assisting abused women thus involves a delicate middle ground. Outsiders cannot force the victim to assume responsibility for her own safety, but they can show her the way out.⁹³ They can encourage her to stop blaming herself for her partner's behavior and to start taking control of her own life. They can help her to look at her situation realistically and assess her alternatives. By being understanding and non-judgmental, outsiders can raise her self-esteem and thereby move her toward self-reliance and away from learned helplessness.⁹⁴ Even with sympathetic and knowledgeable support and guidance, the battered woman will find leaving her husband and home difficult. Without such support, escape may be impossible.

88. See D. MARTIN, *supra* note 2, at 155–56 (traditional psychotherapy tells battered women that they should avoid doing anything that might upset the batterer).

89. See, e.g., S. SCHECHTER, *supra* note 1, at 26 (judges may discourage victim from pursuing legal remedies). Batterers often enlist the aid of family and friends to encourage victims to stay in the abusive relationship. See L. WALKER, *supra* note 1, at 92.

90. People in this category often fail to understand the victim's ambivalence about the batterer, or the forces that may cause her to return to him several times before making a permanent departure.

91. See L. WALKER, *supra* note 1, at 20, 31 (condemnation often causes battering victims to believe that they are weak and/or crazy).

92. It is critical to distinguish between the victim's right to self-determination and the law's independent duty to deter violence. See *infra* text accompanying notes 221–24.

93. HOSPITAL PROTOCOL, *supra* note 86, at 1. In the first chapter of J. FLEMING, *supra* note 56, at 15–68, the author speaks directly to battered women. She encourages them to examine their situation realistically and to stop blaming themselves for the beatings. She also tries to help victims overcome learned helplessness by discussing possible escape routes that they may have overlooked.

94. Workers at shelters for battered women must be very sensitive to the danger that battered women will substitute one dependence (on their husbands) for another (on the shelter workers). B. WARRIOR, *BATTERED WOMEN'S DIRECTORY* 157–58 (1982). For this reason, professionals in the field must daily tread a difficult line between sympathetic understanding and encouragement of helplessness.

D. *Characteristics of the Batterer—Why Does He Beat the Woman He Loves?*

Because many battered women have survived and have had the courage to tell their stories, we have a solid understanding of their characteristics and motivations. We have also become aware of the best ways to help the victims of abuse. Our knowledge about batterers is less extensive, but has grown considerably in the last several years.⁹⁵ We now know a great deal about why certain men beat their wives, although we are less confident that we know how to make them permanently non-violent.⁹⁶

At first blush, the batterer's actions seem as inexplicable as the victim's. Like hers, his behavior springs from a complex web of personal and social factors. Indeed, the batterer is in many ways a tragic mirror image of his wife. He, too, is a strong traditionalist when it comes to sex roles. He believes that a man should be "the master" of the house, and that it is the woman's job to satisfy all his needs and wants.⁹⁷ Additionally, he often believes that he has the right to use violence against her in order to enforce his will.⁹⁸

While the abuser has a tremendous need to dominate and control his wife, and may project a macho exterior, inside he is filled with doubt and insecurity.⁹⁹ He may resort to battering because physical intimidation is the only way he is confident of getting his way with her.¹⁰⁰ His low self-esteem

95. Battered women have been receiving attention for a dozen years. *See supra* note 2. Programs for abusers are much newer. While there are hundreds of shelters for victims, *see B. WARRIOR, supra* note 99 (reasonably up-to-date listing), programs for batterers are less common. *See The Silent Crime, supra* note 3, at 26 (50 programs for batterers nationwide; figure may have increased in the last year due to growing recognition of the need to focus on deterring abusers).

Initially, most information about batterers came from their wives. One reason that early researchers had such a difficult time learning about abusers is that these men are very reluctant to talk about their feelings and motivations. L. WALKER, *supra* note 1, at 36. Further, their tendencies to deny and minimize their violence and to externalize its causes make them unreliable sources of information. *See infra* notes 116–20 and accompanying text. However, recent portraits of abusers, developed by professionals who have worked directly with batterers and have successfully broken through their emotional barriers have confirmed the accuracy of the descriptions derived from conversations with victims. *See, e.g., A. GANLEY, PARTICIPANT'S MANUAL, COURT MANDATED COUNSELING FOR MEN WHO BATTER: A THREE-DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS* (1981); L. WALKER, *supra* note 1, at 36–41.

96. Not only are programs for batterers too new to be a basis for confident predictions, but they often lack extensive follow-up to determine whether abusers have remained non-violent. We have learned a great deal, however, about approaches (for example, we now know that merely lecturing batterers or sending the couple to mediation are *not* effective in combatting abuse). *See infra* notes 245 & 322–24 and accompanying text.

97. L. WALKER, *supra* note 1, at 36; Prescott & Letko, *supra* note 27, at 76.

98. L. WALKER, *supra* note 1, at 12; Prescott & Letko, *supra* note 27, at 76.

99. *See J. Fleming, supra* note 56, at 287: "Common sense tells you that people don't bully other people if they feel good about themselves. Abusers tend to feel weak and powerless, and must resort to violence to assure themselves that they are, in fact, strong and in control."

100. Violence is much more common in households where the husband is dominant than in

manifests itself in other ways as well. He is usually emotionally isolated from everyone except his wife, and he is therefore extremely dependent on her.¹⁰¹ His dependence and fears of inadequacy typically translate into pathological jealousy. He must have sole possession of her, and not only to the exclusion of other men. He also tries to drive away her relatives and friends, and is even jealous of their own children.¹⁰² Unfortunately, the battered woman usually yields to his demands and isolates herself from all outsiders,¹⁰³ because she perceives his possessiveness as a sign of love rather than insecurity¹⁰⁴ or just because she wants to keep the peace.

The batterer's jealousy is but one symptom of his infantile personality. Like a child, he is both impulsive and easily frustrated.¹⁰⁵ This combination of traits makes him dangerous: when he feels frustrated, he impulsively responds by lashing out at his wife. In dealing with her, he has not learned to separate his emotions from his actions.¹⁰⁶

Although the abuser may give some signs of his impulsiveness and low frustration threshold in other aspects of his life,¹⁰⁷ he is rarely violent in other relationships.¹⁰⁸ In fact, with people outside the family, he is generally

relationships where the partners share decisionmaking. Violence is even more common when the husband is not only dominant, but also lacks such assets as education, income and prestige, which might legitimate his position of power. BEHIND CLOSED DOORS, *supra* note 1, at 192-94.

101. A. GANLEY, *supra* note 95, at 31. The psychological phenomenon of his dependency helps explain the incredible lengths he may go to pursue and harass his victim. *See supra* text accompanying notes 78-80. His abusiveness only increases this dependency, since victimizing her gives him a sense of power he otherwise lacks. Dutton & Painter, *supra* note 57, at 159-62.

The threats of suicide that some batterers use to keep their wives from leaving them cannot be dismissed as mere manipulateness because often batterers are extremely dependent on their victims. However, counselors must still help the woman to decide whether she really wants to sacrifice the safety of her children and herself in an effort to protect the abuser from himself. A. GANLEY, *supra* note 95, at 33.

102. The batterer's pathological jealousy is a constant theme in all literature on the subject and is just one example of his insatiable need to control his wife. *See, e.g.*, L. WALKER, *supra* note 1, at 37-38.

His jealousy of their children helps explain why battering frequently occurs during pregnancy. *See generally* Gelles, *Violence and Pregnancy: A Note on the Extent of the Problem and Needed Services*, in R. GELLES, *supra* note 1, at 111-13. *Accord* MEDICAL SETTING, *supra* note 23, at 16 (survey at an urban hospital revealed that the frequency of miscarriages for battered women was twice that of nonbattered women); Roy, *supra* note 69, at 42 (women calling New York City hotline reported that pregnancy often precipitated violence).

103. J. FLEMING, *supra* note 56, at 289. As Fleming points out, however, "excessive jealousy is usually a sign that the woman is not really being seen for herself at all, but for the degree to which she can make a man feel important. Someone with a damaged ego often needs another person to make him feel whole, and jealousy is an expression of this tremendous dependency need." *Id.*

104. *See* L. WALKER, *supra* note 1, at 169-70.

105. A. GANLEY, *supra* note 95, at 29-30; J. Fleming, *supra* note 56 at 288.

106. *See* A. GANLEY, *supra* note 95, at 78. One of the primary purposes of therapy for batterers is to help them learn non-violent means of dealing with stress and anger. *Id.* at 22, 80-83. *See also infra* notes 322-25 and accompanying text.

107. Some batterers change jobs frequently, quitting whenever they encounter difficulties at work. A. GANLEY, *supra* note 95, at 30.

108. *See* L. WALKER, *supra* note 1, at 24 (no more than 20% of batterers are violent toward others).

charming.¹⁰⁹ He is violent at home because he has a bully's "sure winner" mentality. He beats his wife because he can win a physical battle with her, and because he can get away with it, as long as society does not intervene. In contrast, he doesn't beat his boss or his male acquaintances not because he is never angry at them, but because the price of such behavior is too great.¹¹⁰

Even with this information about the batterer's psyche, his conduct may still mystify us. If he loves his wife—and he will loudly proclaim that he does—how can he justify his brutality toward her? Even if he believes that "slapping her around" is all right, how can he possibly rationalize beating her senseless or threatening her with a weapon? The answer consists of two related elements. First, battering is learned behavior¹¹¹ which, for all his remorse, does "work" for the batterer. Second, the batterer is able to delude himself about his abuse and thereby avoid taking responsibility for it.

One piece of evidence pointing to battering as a learned response is that most batterers were themselves beaten as children or saw their fathers beat their mothers, or both.¹¹² Batterers learn from their violent homes that hurting loved ones is normal, and that strong family members, be they parents or husbands, have the right to use force against weak ones.¹¹³ Once they become adults and start beating their wives, batterers learn (although usually not consciously) that battering "helps" them deal with their problems. Their childhood experiences leave abusers with a bottomless rage, and battering temporarily dissipates their anger.¹¹⁴ By using physical

109. See *id.* at 26 (batterers use charm as a manipulative technique).

110. *The Silent Crime*, *supra* note 3, at 26. This also explains why batterers are usually respectful toward authority. See Lerman, *Expansion of Arrest Power: A Key to Effective Intervention*, 7 VT. L. REV. 59, 60 (1982) [hereinafter cited as *Expansion of Arrest Power*] (batterers are often polite and deferential in the presence of the police); cf. L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 64–65 (1981) [hereinafter cited as PROSECUTION OF SPOUSE ABUSE] (some prosecutors have found warning letters to batterers effective even when no prosecution is planned because of the authority of the state's attorney's office and batterers' fears of prosecution).

111. A. GANLEY, *supra* note 95, at 20–22: "The man who batters has learned a complex set of behaviors, attitudes and beliefs which facilitate his violence." He has learned, first of all, to use violence (as opposed to empathy, problem solving, and verbal expression of feelings) as a means of reducing stress. Second, he has learned that the safest place to release his tensions is in the home. Third, he has learned to suppress virtually all emotions other than anger. *Id.* at 22–23.

112. See *infra* notes 178–81 and accompanying text.

113. See Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 194, 202–04 (M. Roy ed. 1977); Dutton & Painter, *supra* note 57, at 142–43 (children who witness violence not only learn specific aggressive behaviors but also that violence is legitimate). See also statement of Donna Medley, Director, National Coalition Against Domestic Violence, quoted in N.Y. Times, Sept. 10, 1984, at B10, col. 3: "[batterers often come from violent homes because t]he message that little boys have been getting is that violence works, it gives them control." *Contra*, statement by Hubert Williams, Director of Police, Newark, New Jersey, *id.* at B10, col. 4 (men are not socialized to be violent; domestic violence is caused by "high levels of stress in society"; people must find other ways of relieving their tension and aggression).

114. See *supra* note 111. His anger is dissipated at least temporarily during the severe battering

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violence rather than other methods, the abuser may also succeed in getting what he wants from his wife, whether it is having her stay with him and cutting herself off from other people, or handing over her earnings to him, or preparing dinner the way he likes it.¹¹⁵

For all the “rewards” that their violence brings, batterers could not live with themselves and maintain their patterns without a variety of self-deceptive psychological tricks. Denial and minimization are crucial defense mechanisms for the batterer, because they allow him to evade accountability for his actions. By refusing to believe that any problem exists, he thus feels no need to change.¹¹⁶ Even when confronted with undeniable evidence of his violence, he will minimize its severity.¹¹⁷ Batterers are also quite remarkable in their ability to externalize and rationalize their acts.¹¹⁸ The most obvious and frequent target of blame is, of course, his victim. Naturally, his blame feeds right into her guilt. Consequently, they *both* blame *her* for the battering.¹¹⁹ Even when the batterer does not blame his wife, he attributes his behavior to other forces. He will say that he cannot control his temper, even though his actions belie this excuse.¹²⁰

incident. See *infra* notes 143–52 and accompanying text (describing severe battering incident).

115. S. SCHECHTER, *supra* note 1, at 222–23.

116. A. GANLEY, *supra* note 95, at 28. At some level, batterers realize that they have a problem. Therefore, they become enraged if their mate reveals the abuse to outsiders. L. WALKER, *supra* note 1, at 36.

Of course, most of us deny or minimize our faults, or may blame outside forces rather than accepting responsibility for our own actions. However, the batterer is unusually adept at deluding himself, particularly in light of the destruction for which he is responsible. See A. GANLEY, *supra* note 95, at 28 (denial and minimization are key traits of batterers).

117. J. FLEMING, *supra* note 56, at 290 (after watching a television program on abuse with his wife, a very brutal husband expressed shock that any man would do such things; when confronted with the fact that he had done the exact same things, he responded, “Oh no, I may slap you a little once in a while when you need it, but I never hit you like that!”).

118. See *id.* at 287:

His stated reasons for his use of violence vary: he may say it's because of stress at work, because he was worried about money, because she taunted him, because she didn't have dinner ready on time, because he was drunk, because she was pregnant, because she bought the wrong kind of mustard. The one thing these excuses have in common is self-justification—it was not his fault.

Cf. A. GANLEY, *supra* note 95, at 29 (batterers tend to view everything in their lives as being out of their control).

119. It is for this reason that traditional couples counseling is ineffective in dealing with battering. See L. WALKER, *supra* note 1, at 245–46. Unless such counseling is focused on getting him to take responsibility for the battering, both parties (and also the counselor, if he or she is unfamiliar with the dynamics of battering or subscribes to battering myths) will focus on what *she* should do to get him to stop the beatings.

120. The following all illustrate that batterers really do “know what they're doing.” (1) They often limit their beatings to places that will not show, like the stomach. POLICE KEY # 245, *supra* note 1, at 156. D. MARTIN, *supra* note 2, at 49. (2) Violent episodes occur almost exclusively in the home and only in front of nuclear family members. Gelles, *supra* note 86, at 48 & 55–56. (3) Although abusers differ in the amount of damage they inflict, most have “limits” beyond which they do not go. The last point is best

Perhaps the most common excuse, and one worthy of special mention, is alcohol. Many batterers have serious problems with alcohol and/or drug abuse.¹²¹ Both the couple and outsiders often think that the husband's alcoholism creates the violence.¹²² This explanation is unconvincing: beatings typically occur not only when the alcoholic batterer is drunk but also when he is sober.¹²³ His drinking may well facilitate his battering, but it is *not* its cause.¹²⁴

The false link between alcoholism and battering is only one example of the tendency to confuse the triggers for battering with its underlying causes.¹²⁵ In the violent household, the events that arouse the abuser's anger and "lead to" a beating are almost always trivial.¹²⁶ A batterer has learned how to set himself off.¹²⁷ Once he has reached the point in the battering cycle when he is ready to abuse the woman severely, the victim's behavior becomes largely irrelevant. He attributes negative motives to her behavior¹²⁸ and reacts violently to whatever she does.

demonstrated by the following example: A researcher was interviewing a wifebeater. When asked why he had repeatedly injured his wife, the man said, "I can't control myself. I just lose control." But the batterer had no answer when the researcher asked, "Well, why didn't you shoot her or stab her?" Obviously, the man knew what he was doing, and he did not want to hurt his wife that seriously. See Gelles, *supra* note 36, at 173.

121. Roy, *supra* note 69, at 39 (approximately 85% of battered women calling a New York City hotline reported that their abusers had alcohol or other drug problems). There is reason to believe that alcoholic batterers are likely to inflict the most serious types of injury, but the drinking itself does not seem to play a direct role in causing the episodes. Berk, Berk, Loseke & Rauma, *Mutual Combat and Other Family Violence Myths*, in *THE DARK SIDE OF FAMILIES* 197, 206 (1983). Accord L. WALKER, *supra* note 1, at 25. The frequency of drug and alcohol problems among batterers is hardly surprising, since substance abuse is common among all violent criminals. POLICE KEY # 245, *supra* note 1, at 148.

122. See D. MARTIN, *supra* note 1, at 55-58; L. WALKER, *supra* note 1, at 25. For the man, alcohol is just another "external" force that excuses his behavior. For the woman, it may be easier to focus on his drinking than on a realistic assessment of their relationship.

123. Roy, *supra* note 69, at 40; L. WALKER, *supra* note 1, at 25. Accord telephone interview with Dr. Richard Berk, sociologist at the University of California-Santa Barbara (March 8, 1984) (there is no evidence to show that alcoholism and battering follow or are influenced by each other, only that they often occur together).

124. Alcohol facilitates battering by making it easier for the batterer to deny his responsibility for his violent acts. UNITED STATES DEPARTMENT OF JUSTICE, *THE REPORT FROM THE CONFERENCE ON INTERVENTION PROGRAMS FOR MEN WHO BATTER* 11-12 (1981) [hereinafter cited as *INTERVENTION PROGRAMS*]. Batterers use alcohol to numb their bottomless anger, but alcohol's depressant effect only increases their rage. Alcohol also decreases the abuser's willingness to control his anger and lowers any inhibitions he might have about his conduct. Roy, *supra* note 69, at 42.

125. J. FLEMING, *supra* note 56, at 292.

126. See D. MARTIN, *supra* note 2, at 49-50. Martin cites cases in which women were severely beaten "because" they had broken an egg yolk at breakfast or "because" they had worn a pony tail instead of another hair style; in some cases the batterer does not even have a pretext. *Id.* at 49.

127. *Id.*

128. *Id.* Mistaken attribution of "bad" motivations is a source of conflict in all families, see generally Hotaling, *Attribution Processes in Husband-Wife Violence* in *THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 136 (M. Straus & G. Hotaling eds. 1980), but the violent family is different in two ways. First, because the batterer is so overwhelmed with anger, see *supra* note 114 and accompanying

So far, we have painted a monstrous picture of the abusive man. Does this mean that batterers are all hopelessly ill individuals who can never change? The experts say no; they believe that many batterers can be helped. Most batterers are not antisocial personalities who feel no remorse for their violence.¹²⁹ Ironically, it is the very depth of their guilt that causes them to search so vigorously for external explanations for their behavior.¹³⁰ In his own way, an abuser usually does love his wife and children, and it may ultimately be possible to use this love to effectuate changes in his actions.¹³¹

Such changes will not occur, however, until the wife beater takes responsibility for the battering *and* is punished for his behavior.¹³² Unhappily, third parties often encourage his continued denial of responsibility. Every time someone takes the attitude that "she brought it on herself," or "I know it's the alcohol which made you do it," or "I'll let you off this time if you promise never to do it again," that person only succeeds in making it easier for the batterer to persist in his behavior.¹³³

E. The Battering Cycle

We have focused primarily on the traits of the batterer and his victim as individuals. As with all couples, however, the dynamic between the partners is as important as the pre-existing characteristics they bring to the

text, he is more likely than most people to assume the worst about his mate's intentions. Second, the batterer has learned to use violence as a means of resolving family conflict. *See supra* note 111 and accompanying text. Thus, the abuser's incorrect interpretation of his wife's behavior results in violence rather than in less destructive forms of intrafamily conflict resolution exhibited by non-violent family members. *Cf. Foss, The Paradoxical Nature of Family Relationships and Family Conflict in THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 115, 123 & 131 (M. Straus & G. Hotaling eds. 1980) (families use a variety of techniques to resolve conflict; instrumental conflict—conflict that is "task-oriented"—is better for resolving intrafamily conflict than avoidance methods or methods (such as violence) that are oriented toward expression or release of hostility).

129. *See* L. WALKER, *supra* note 1, at 26. They do, however, share with psychopathic personalities an "extraordinary ability to use charm as a manipulative technique." *Id.* at 26. *See infra* note 327 and accompanying text (batterers can often manipulate legal personnel). *See also* BEHIND CLOSED DOORS, *supra* note 1, at 125 (most abusers are not mentally ill; working with them or meeting them at a party, one would not notice them as different); Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* (M. Roy ed. 1977) 194, 194–95 (percentage of abusers who are mentally ill probably no greater than in population generally).

130. A. GANLEY, *supra* note 95, at 28.

131. *See The Silent Crime, supra* note 3, at 26 (batterers often agree to counseling only after their wives have left them or are threatening to do so); A. GANLEY, *supra* note 95, at 45 (batterers are sometimes motivated to change once they examine honestly the negative effects that their violence is having on their lives).

132. Ganley, *Counseling Programs for Men Who Batter: Elements of Effective Programs*, 4 *RESPONSE TO VIOLENCE IN THE FAMILY* 3, 3–4 (Nov./Dec. 1981).

133. *See infra* text accompanying notes 249–69 & 342–45 for examples of how frequently legal officials respond in ways that condone the batterer's action.

relationship. The battering relationship reinforces many of the most negative personality traits of both the abused wife and her husband. Additionally, over time the battering itself comes to dominate their relationship and exacts a toll from the victim, making her escape increasingly difficult.

Even for the most violent batterer, severe beatings are not an everyday occurrence. There is an identifiable battering cycle,¹³⁴ consisting of three definable phases: (1) the tension building phase; (2) the acute battering incident; and (3) the contrite, loving phase.¹³⁵

During the tension-building phase there are battering incidents, but the victim views them as minor.¹³⁶ During this phase, the battered woman works very hard to keep her mate calm and under control. She gives in to his demands, no matter how unreasonable. She also tries to control and manipulate other possible sources of friction (in-laws, children), hoping to prevent the battering from escalating.¹³⁷ Indeed, during the tension-building phase, the victim may have occasional, limited control over the situation; the batterer may appear to respond to her appeasing attitude.¹³⁸ All the while, though, with each minor battering incident, tension on both sides builds.¹³⁹ The beatings occur more frequently and are more serious. He becomes ever more possessive of her, and the level of his verbal and psychological abuse¹⁴⁰ of her rises. He often abuses her sexually as well.¹⁴¹

134. The battering cycle is so important that Walker includes it as part of the definition of a battered woman. See *supra* note 1. Her reasoning is unassailable: "Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman." L. WALKER, *supra* note 1, at xv.

135. *Id.* at 55-70. See also *State v. Kelly*, 97 N.J. 178, 478 A.2d 364, 371-72 (1984) (battering cycle discussed as part of "battered woman's syndrome"); Walker, *Victimology and the Psychological Perspectives of Battered Women* 8 VICTIMOLOGY: AN INT'L J. 82, 102 (1983) (research conducted subsequent to publication of *THE BATTERED WOMAN*, *supra* note 1, confirms importance of battering cycle).

136. L. WALKER, *supra* note 1, at 56-57. From an outsider's viewpoint, the injury inflicted during phase one may seem major. However, it is always much less severe than what later occurs during the severe battering incident. The degree of violence in each phase cannot be described in absolute terms, since that element will be different for different couples. See *infra* note 165 and accompanying text. In other words, a beating that would be serious enough to constitute a phase two incident for some couples might be part of phase one in a more violent relationship. The important thing is that only the particulars vary from couple to couple; the basic dynamic of the battering cycle remains the same.

137. L. WALKER, *supra* note 1, at 34.

138. *Id.* at 57.

139. *Id.*

140. *Id.* at 59. During this period, batterers will often destroy a piece of property (a family heirloom or her favorite china) that the victim cherishes, and/or may threaten, abuse, or even kill family pets. A. GANLEY, *supra* note 95, at 14-15.

Many victims report that the psychological abuse is harder to bear than the physical abuse. L. WALKER, *supra* note 1, at xiv-xv. This should not surprise us if we recall the concentration camp, hostage, and prisoner of war analogies, see *supra* note 74. Like these other victims of long-term psychological and physical torture, the battered woman may well find the terror of the threat of violence worse than the physical pain when the violence finally comes.

141. L. WALKER, *supra* note 1, at 108; Roy, *supra* note 69, at 41. Battered women would be helped if

For her part, the abused woman continues in her efforts to satisfy his increasingly irrational and inconsistent demands. Naturally, she feels tremendous anger at his actions and her growing inability to control them. She denies this anger, however, or works to keep him from seeing it. She is likely to withdraw, hoping thereby to avoid an explosion, but this only causes him to bear down on her even harder. He scrutinizes her every action, and whatever she does is interpreted negatively.¹⁴² When the strain becomes unbearable, the severe battering incident (phase two) will occur.

Usually, an outside event or the boiling rage within the abuser triggers the severe beating, although with some couples the victim's behavior may set off this phase.¹⁴³ The severe battering incident typically lasts for two to twenty-four hours.¹⁴⁴ When it begins, no one except the couple and possibly their children are present.¹⁴⁵ The major destructiveness which occurs during this phase is regarded as serious even by the battering couple.¹⁴⁶ It is difficult for such severe violence to go unheeded, so most police intervention into the battering relationship occurs during the acute battering phase.¹⁴⁷

During the severe battering incident, the batterer is enraged by whatever his victim does. If she is passive, he beats her harder; if she tries to defend herself, he retaliates until she submits.¹⁴⁸ Both of them believe that he is out of control during this period,¹⁴⁹ although they later display vastly different powers of recall concerning events during the acute phase. She remembers his behavior vividly, although she may be less specific about her own actions. He remembers little of what happened, although he tries to justify his brutality by blaming either his wife or external forces such as alcohol.¹⁵⁰ One thing is clear: the victim has absolutely no control over the aggressor during the second phase of the battering cycle. The violence stops only if he exhausts himself or the two of them are separated for a substantial period.¹⁵¹

Once the severe battering incident is over, both partners react with shock, disbelief, and denial of the seriousness of the violence.¹⁵² The relationship

marital sexual assault were universally recognized as a crime. See generally Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 31 (1982); Annot., 24 A.L.R. 4th 105 (1983).

142. See L. WALKER, *supra* note 1, at 59.

143. *Id.* at 60; Gelles, *supra* note 86, at 57-58. See *infra* notes 170-71 and accompanying text for a further explanation of victim "provocation."

144. L. WALKER, *supra* note 1, at 60.

145. *Id.* at 61.

146. *Id.* at 59.

147. *Id.* at 64.

148. *Id.* at 61-62.

149. *Id.* at 60.

150. *Id.* at 62; INTERVENTION PROGRAMS, *supra* note 124, at 11-12.

151. L. WALKER, *supra* note 1, at 61.

152. *Id.* at 62-63.

then enters the third phase, characterized by the batterer's contrite, loving behavior. During this phase, the batterer is a generous and loving husband. He feels remorse for what he has done, and promises never to hurt her again.¹⁵³ Without some break in the battering cycle, however, the batterer lacks both the motivation and psychological tools to change his deeply seated violent pattern.¹⁵⁴ Without rapid action to force him to confront his behavior and get help, his need to evade responsibility for his actions quickly asserts itself and he will regress to denial and externalization.¹⁵⁵

Because her mate is no longer threatening her physically, the period immediately following an acute battering incident is when the battered woman is most likely to seek outside help or even flee the abusive relationship.¹⁵⁶ If she does, he will often succeed in manipulating her to come back, appealing to her guilt and her sense of responsibility to him and their children.¹⁵⁷ His considerate, normal behavior during this period helps both of them to delude themselves that the change is permanent, but it is not.¹⁵⁸ If she returns to him without his receiving therapy, the loving phase inevitably ends and the battering cycle will begin again.

The battering cycle explains much of the couple's behavior, and thus provides many clues to the appropriate legal response to battering. The victim's belief that she can control her abuser's violence is randomly reinforced during the tension-building phase. That is, at times it appears she can stop him or limit the violence and at other times she cannot. Such reinforcement creates great dependency and hope, because it leads her to believe that she could control him¹⁵⁹ this time, if only she could learn to "push the right buttons" on the batterer.¹⁶⁰ Her acquiescence to his

153. *Id.* at 65. Even during the contrite phase, the batterer's immature "overkill" tendencies are sometimes evident. He may shower the victim with extravagant gifts that the couple cannot afford. *Id.* at 37.

154. He lacks the motivation to change because an abstract desire to reform is inadequate in light of the duration and deep-seated nature of his violent pattern. *See supra* notes 112-20 and accompanying text. He lacks the tools to change because he has no insight into his behavior and has not developed alternatives to his violent responses. *See A. GANLEY, supra* note 95, at 73-86 (batterers learn new behavioral responses in therapy).

155. *See A. GANLEY, supra* note 95, at 28 (batterers may at times recognize their problem, but their guilt will drive them back into denial).

156. L. WALKER, *supra* note 1, at 66.

157. *Id.* at 66-67. Given the battered woman's traditional values, these appeals are particularly effective. *Id.* at 67.

158. *Id. See also Roy, supra* note 69, at 31 fig. 7 & 32 (the most common reason battered women cited for remaining in abusive relationships was a hope that their abusers would change).

159. Random reinforcement has been shown to create the greatest dependence in all animals, including humans. *See Dutton & Painter, supra* note 57, at 149 ("[w]hen the physical punishment is administered at intermittent intervals, and when it is interspersed with permissive and friendly contact, the phenomenon of 'traumatic bonding' [such as battered women and prisoners of war experience] seems most powerful").

160. *See also infra* text accompanying notes 171-72 for a discussion of why the battering cycle

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demands is also understandable, once we perceive it as her attempt to avoid an acute battering incident and to keep the violence at "tolerable," phase one levels.

The batterer's rage and seeming lack of control during the explosive battering episode explain why a brief "cooling off" of the parties will not alleviate the crisis. Even if the abuser appears calm and rational to law enforcement officials,¹⁶¹ if he is left in the house with the victim, he continues to beat her once the authorities leave. She knows this too, and so may not cooperate with the police, hoping that her display of loyalty will persuade the batterer to stop.¹⁶²

The contrite, loving phase acts as a powerful cement between the batterer and the victim. She may be best able to leave him during this period, and yet this is precisely the time when she gets the most benefit from their relationship.¹⁶³ This is why a battered woman nearly always leaves and returns to her husband several times before taking permanent steps to end the abuse. She recognizes and internalizes the intractability of his behavior only after she has repeatedly experienced the resumption of the battering cycle following the loving phase.¹⁶⁴

F. Variations in Battering Relationships

Knowing the general pattern of battering relationships is a necessary foundation for the creation of general legal rules. At the same time, the law and legal officials must be flexible enough to respond to individual cases. It

helps explain why some victims appear to provoke the acute battering incident.

161. This may often be the case, due to his respect for authority and his ability to manipulate people.

162. L. WALKER, *supra* note 1, at 65.

163. *Id.* at 69. After she has been through the battering cycle several times, the victim knows, consciously or otherwise, that she is kidding herself in believing that the "temporary dream state" of phase three will last. This realization only accentuates her self-condemnation for her inability to make a permanent break from her batterer. *Id.*

164. Those who are so condemnatory of the battered woman's ambivalence forget that leaving a relationship, even a bad one, is always difficult. S. SCHECHTER, *supra* note 1, at 20. Even the pattern of tension build-up, followed by a big blow-up, followed by reconciliation, is one that most non-violent couples experience on occasion. Cf. FOSS, *The Paradoxical Nature of Family Relationships and Family Conflict*, in *THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 115 (1980) (the family is a group that tends to suppress conflict through avoidance; however, avoidance leads to the accumulation of conflict and an increase of hostility; as hostility increases, so does the likelihood that conflict will erupt). This in no way excuses the batterer, but it helps to explain the couple's dynamic.

The evidence suggests that women who come from homes where their fathers battered their mothers are more likely to end their own violent relationships than women from non-violent family backgrounds. *Why Do They Stay?*, *supra* note 69, at 103. This makes sense when we realize that women from violent homes realize sooner that their husbands will not "magically" stop beating them, any more than their fathers stopped beating their mothers. In contrast, a woman with a non-violent father is more likely to think that it is her fault that her husband doesn't treat her the way her father did.

is therefore important to distinguish between elements that are common to all abusive relationships and those that may vary from couple to couple.

Common sense tells us that not all battering couples are identical, and experts in the field agree. For example, the extent of violence may vary from slapping with an open hand to murder with a firearm. The length of the three battering phases may vary from couple to couple. Some couples can sustain the tension-building period for a long time before it explodes into a severe battering incident.¹⁶⁵ With other couples, the contrite, loving phase is very brief, although still a critical bond between the partners. In addition, the triggers for abuse are different for different men; they are also more predictable in some men than in others.¹⁶⁶ Another critical variation is whether the batterer exhibits destructive behavior only toward family members or is more generally violent.¹⁶⁷

Victims' responses also lack uniformity. Some battered women consciously feel their anger, while others suppress it completely.¹⁶⁸ Some will fight back when attacked, although most will react passively.¹⁶⁹ A few victims may even seem to "provoke" the severe battering incident during the latter stages of the tension build-up phase.¹⁷⁰ Women who behave this way are not masochists seeking punishment. Instead, their behavior makes sense, when we remember that the contrite, loving phase inevitably follows the acute battering incident. The battered woman may want to get the bad part over with, so she can then have a period of enjoyment with her spouse.¹⁷¹

Both love and fear bind battered women to their batterers, but the mixture of these two emotions may vary. Some victims retain strong positive feelings toward their mates, while others no longer feel any love for the abuser and stay in the relationship out of family loyalty, fear, hopelessness, or lack of alternatives.¹⁷² Similarly, abusers employ different measures of force and manipulation to keep the violent relationship intact.¹⁷³

Other factors may affect the likelihood that the woman will seek refuge or that the man will be motivated to change. The more isolated the woman is

165. L. WALKER, *supra* note 1, at 58.

166. Telephone interview with Kris A. Billhardt, Coordinator of Counseling Services, Sexual and Physical Abuse Resource Center (SPARC), of Gainesville, Florida (state-funded domestic violence shelter serving North Central Florida) (October 2, 1984).

167. Walker estimates that only about 20% of batterers are violent outside the home. L. WALKER, *supra* note 1, at 24.

168. *See id.* at 56-57.

169. *Id.* at 62.

170. *Id.* at 60; MODEL TREATMENT PROGRAM, *supra* note 36, at 51.

171. L. WALKER, *supra* note 1, at 60.

172. Interview with Kathleen Van Dere, *supra* note 35.

173. Telephone interview with Kris A. Billhardt, *supra* note 166.

from potential sources of financial and emotional support, the less likely she is to perceive escape routes and to flee.¹⁷⁴ Abusers run the gamut from those who vigorously deny all culpability or feel no remorse to those who voluntarily seek assistance.¹⁷⁵ In general, the longer the abuse has gone on, the more difficult it is for the abuser to alter his violent habits.¹⁷⁶

These variations and gradations should not obscure the basic similarities among battering couples. Again and again, observers report the low self-esteem, isolation, and denial of both aggressor and victim, the learned helplessness of the battered woman, and the Jekyll-and-Hyde personality of the batterer. The legal system should not seize upon the differences among abusive couples as an excuse for inaction. Battering myths should not be resurrected merely because an occasional batterer seeks help on his own, or because a particular victim seems determined to refuse every offer of support. The law must devise a workable general approach to family violence, and deal with individual cases within the context of that approach.

G. The Most Innocent Victims—The Effects of Abuse on Children

The abusive relationship not only affects its direct participants; it can also destroy the couple's children, who are innocent bystanders. Even when the children are not physically abused themselves, they are emotionally scarred by witnessing their fathers beat their mothers. Such children, especially

174. See Gelles, *supra* note 86, at 60.

It is difficult to generalize about the extent to which economic factors deter battered women from leaving their mates. For many victims, economic dependence on their husbands is an important reason why they remain in abusive relationships. See Roy, *supra* note 69, at 43 (financial problems were listed as fifth most common reason for why victims stayed with batterer). On the other hand, there are also numerous cases where women with independent financial resources stay with the batterer, sometimes because he coerces her into giving him control over her money. See, e.g., L. WALKER, *supra* note 1, at 132–33; see also *supra* note 60.

These observations are hardly surprising. For most of us, financial issues are important but not always determinative in our decisions about interpersonal relationships. Further, some people weigh economic factors more heavily than do others. Perhaps the most accurate generalization about the relationship between economics and abuse would be that improving the economic status of women in our society would not be a complete solution to the problem, but would certainly constitute an important step in the right direction. See Straus, *Sexual Inequality and Wife Beating*, in *THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 86, 90–91 (M. Straus & G. Hotaling eds. 1980) (elimination of various forms of sexual inequality, including but not limited to economic inequality, is crucial to goal of reducing marital violence).

175. See J. FLEMING, *supra* note 56, at 289 (some men do not express any regret after acute battering incident). In recent years, as societal knowledge and condemnation of battering has increased, a few men have come forth to acknowledge that they have a problem and to ask for help in becoming non-violent. Telephone interview with Kris A. Billhardt, *supra* note 166.

176. See *supra* notes 45–47 and accompanying text.

boys, are far more likely to become involved in abusive relationships as adults than are children from non-violent families.¹⁷⁷

In many families where wife abuse occurs, the children are also beaten by one of their parents.¹⁷⁸ Children in this category are the most damaged of all. Child abuse is highly correlated with all forms of violent crimes and mental illness.¹⁷⁹ Children who are abused and who observe violence between their parents are particularly likely to participate in family violence later in life, whether as perpetrators or victims of battering, or as abusers of their own children.¹⁸⁰

The proven tendency of family violence to be transferred from generation to generation makes the search for solutions all the more pressing. Further, the harm inflicted upon children of battering couples should dissuade anyone from approving a laissez-faire approach toward wife abuse. Even if our society is willing to stand by and let the battered woman "take her lumps," the same cavalier attitude toward children is unthinkable.

III. THE NEED FOR LEGAL INTERVENTION

Having described the seriousness of the abuse and some of its causes and consequences, I will now address the issue of whether the law is an appropriate device to combat the problem. That it is even necessary to consider this question shows how tolerant American society is of family

177. BEHIND CLOSED DOORS, *supra* note 1, at 99–101 (for both men and women, those brought up with violence between their parents were more likely to be involved in violent marriages; the degree of violence in the parents' marriage was also important: sons of the most violent parents were 11 times more likely to beat their wives than were sons from non-violent parents). Roy, *supra* note 69, at 25, 30 fig. 6. 31 & 44 n.1 (of women calling New York City hotline, 33.3% reported that they were from violent homes, but 81.1% said that their abusive husbands were from such homes). See also Post, Willett, Franks, House & Back, *Childhood Exposure to Violence Among Victims and Perpetrators of Spouse Battering*, 6 VICTIMOLOGY: AN INT'L J. 156 (1981) (batterers most frequently learn aggressive behavior from childhood role models); Fitch & Papatonio, *Men Who Batter: Some Pertinent Characteristics*, 171 J. NERVOUS & MENTAL DISEASE 190, 190–92 (1983) (five major correlates of batterers include violence between parents and childhood abuse); Wetzel & Ross, *Psychological and Social Ramifications of Battering: Observations Leading to a Counseling Methodology for Victims of Domestic Violence*, 61 PERSONNEL & GUIDANCE J. 423, 423–28 (1983) (men who batter often have history of family violence). But see MEDICAL SETTING, *supra* note 22, at 3 (there is no lifetime study of Americans to prove beyond question that violence is transmitted intergenerationally).

178. Estimates vary. *The Silent Crime*, *supra* note 3, at 24, says that child abuse is present in 13% of wife abuse cases. The figure in L. WALKER, *supra* note 1, at 27, is much higher: her studies indicate that about two-thirds of the time the children are abused as well as the woman. In families where both child abuse and wife abuse are present, often it is the man who is guilty of both offenses. In other cases, the family operates on a gruesome variation of the "big fish-little fish" chain reaction: he beats her and she beats the kids (and sometimes the older children beat the younger ones). See BEHIND CLOSED DOORS, *supra* note 1, at 193.

179. See BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 37 (1983) (violent behavior and physical and psychological abnormalities associated with child abuse and family violence).

180. BEHIND CLOSED DOORS, *supra* note 1, at 100

violence. In any other context, irrefutable evidence of such severe physical and psychological damage would cause an outraged demand for legal action. Ignorance, a refusal to accept unpleasant facts,¹⁸¹ and flat-out condonation¹⁸² all contribute to the public's apathy about battering. Ignorance and denial can be diminished through education, but condonation is less tractable. Many people who take a "law and order" approach to violence outside the family take a "hands off" approach to violence within it.

Most legal officials condemn abuse in theory, but their actions usually belie their words. Full-scale, vigorous legal response to battering remains the exception and not the rule.¹⁸³ When asked to defend this pattern, legal personnel proffer a variety of sophisticated and superficially plausible reasons to explain their inaction. These reasons, because they are so widely accepted among police officers, prosecutors and judges, are major obstacles to effective legal remedies for wife beating. Therefore, before correct legal solutions can be devised, these "reasons" must be exposed for what they are: justifications for unjustifiable neglect. The need to refute these rationalizations should not be interpreted in any way as conceding their validity. Given the harm caused by battering, *the burden of proof clearly rests on those who oppose strong legal action.*

Deference to family privacy has been asserted as a basis for non-intervention.¹⁸⁴ However, legal doctrines that limit governmental interference with the family are grounded on reasons that do not apply to battering.¹⁸⁵ First, the law respects decisions on intrafamily arrangements

181. For example, most people find it unpleasant to face the fact that the world is unfair; they may therefore blame the victim rather than relinquish their faith in a just world. Dutton & Painter, *supra* note 57, at 140-41. Similarly, many citizens cling to the myth that battering occurs only in poor families so that they will not have to think about the possibility that their friends and neighbors (or they themselves) might be involved in a violent relationship.

182. A significant number of Americans accept and even approve of family violence, with men more likely than women to condone domestic abuse. See BEHIND CLOSED DOORS, *supra* note 1, at 47 (couples were asked what they thought about partners slapping each other around; over eight percent of the men and slightly over four percent of the women thought it was "necessary"; over fifteen percent of the men and almost nine percent of the women related it as "good"; it was considered "normal" by twenty-eight percent of the men and over twenty-three percent of the women); Yllo & Straus, *Interpersonal Violence Among Married and Cohabiting Couples*, 30 FAM. REL. 339, 339 (1981) (public perceives marital violence as less serious than violence between strangers).

183. See authorities cited in Pence, *supra* note 9, at 248 n.1 (police reluctant to interfere in domestic violence cases); see also *infra* text accompanying note 276.

184. RULE OF THUMB, *supra* note 6, at 21 (police traditionally have viewed spouse abuse as a private matter best resolved within the family itself); *id.* at 33 (the rate of prosecution and conviction in criminal complaints drops sharply when there is a prior or present relationship between the alleged assailant and the victim).

185. Lerman, *supra* note 1, at 69-70, observes that family privacy doctrines rest on the importance we attach to the home as a safe haven. Because the home is not a safe place for domestic violence victims, the policies behind these doctrines argue in favor of governmental intervention into family

because we assume that family members will reach mutually beneficial and satisfactory answers based on their love for each other.¹⁸⁶ Since abuse is so obviously harmful, the assumption is inaccurate and the rationale fallacious in the battering context. Second, many areas of family life entail controversial value judgments, where the superiority of one set of values over another is unprovable. We therefore permit pluralistic choices.¹⁸⁷ By contrast, society should not hesitate to condemn family violence. Finally, policies favoring family autonomy may reflect a lack of confidence in governmental wisdom: we may allow families to make poor decisions for fear that governmental decisions would often be even worse.¹⁸⁸ This reason makes no sense when family behavior—such as battering—is catastrophic and not merely questionable.

Another excuse for the law's indifference may be a perception of wife beating as a victimless crime. When children are present in the violent home, this perception is clearly absurd.¹⁸⁹ Even when they are not, the perception is fallacious, based upon inaccurate assumptions about the victim's motivations.¹⁹⁰

Those who cannot defend non-intervention on a purely theoretical level may argue that legal involvement is ineffective and therefore impractical.¹⁹¹ This assertion is, at best, unproven: How can we tell whether batterers can be stopped until we try? If anything, the evidence shows that batterers can be stopped.¹⁹²

This "shrug of the shoulders" attitude evinces an eagerness to distinguish between battering and other dangerous conduct.¹⁹³ The law may not eliminate battering, any more than it has eliminated murder, but that does not mean it should do nothing. Legal officers are constantly frustrated

violence, not against it.

186. For instance, the law traditionally would not interfere with support arrangements in the ongoing family. *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953).

187. This is particularly true with respect to such child-rearing decisions as discipline, religion, and education. See generally *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1215-16; 1351-57 (1980).

188. See *id.* at 1214.

189. See *supra* notes 177-80 and accompanying text. See also POLICE KEY # 245, *supra* note 1, at 148-49 (police answering a domestic disturbance call should be concerned with the well-being of any children present and should help parents understand the effect abuse is having on the children). Not surprisingly, children express great relief when the violence between their parents stops, even if the cessation is achieved through a permanent separation. L. WALKER, *supra* note 1, at 30.

190. See *supra* notes 56-66 and accompanying text (battering is not consensual; victim is not a masochist).

191. See Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW & CONTEMP. PROBS. 539, 539 (1971) (interest in diverting family violence cases away from the criminal justice system arose partly from belief that criminal process does not handle these cases well).

192. See *infra* notes 209 & 246 and accompanying text.

193. See TASK FORCE REPORT, *supra* note 12, at 11. See also *infra* text accompanying notes 253-55 & 264.

by the law's inability to create a utopia, but they do not usually offer that as a reason to surrender to lawlessness. Simply because the law will never stop all abusers does not mean it cannot stop some. With respect to other crimes, we assume that vigilant enforcement will usually result in both general and specific deterrence and incapacitation; since very few abusers are indeterrable antisocial personalities, the same assumption seems reasonable here. Finally, do nothing arguments ignore the symbolic value of the law—that the law can lead as well as follow. By taking unequivocal action against battering, the legal system can eventually make inroads against the social forces that condone abuse.¹⁹⁴

Three variations on the ineffectiveness theme deserve mention. The first, and most outrageous, is that the cost of stopping wife abuse outweighs the benefits.¹⁹⁵ This idea suffers from the same fallacies as its parent theme of the law's powerlessness. In addition, it depends on a tacit assumption that the welfare of battered women and their children is unimportant compared to the time and safety of legal officials. The cost-benefit excuse may also be a tacit acknowledgement of the pervasiveness of abuse. The fear is that if the law started to take battering seriously, it would be overwhelmed by abuse cases.¹⁹⁶ Society must reject this reasoning on both practical and moral levels. Practically, ignoring the problem will only compound it for future generations; any *laissez-faire* policy is therefore shortsighted. Morally, we should not accept the sacrifice of victim's lives as a fair price for the legal system's convenience.

A more sophisticated excuse is that legal institutions are ill-equipped to deal with complex social and psychological problems like battering and should thus avoid them.¹⁹⁷ This rationalization is really a *post hoc* justification for inaction rather than a sound reason for restraint. When the

194. See D. MARTIN, *supra* note 2, at 174–75 for a stirring retort to the argument that “You can’t legislate attitudes”:

I disagree; I think that legislation very often effects changes in public attitudes over time. The activity preceding the passage of a bill contributes to the process [After a bill is law] the die-hards have to learn to accept its existence When a law is enforced, it eventually becomes a part of the social fabric, a given in the daily lives of citizens. Only then does the collective change in attitudes have a lasting effect.

195. See RULE OF THUMB, *supra* note 6, at 13 (police often view domestic quarrels as high-danger, no-win situations in which the victim is uncooperative).

196. Cf. Parnas, *supra* note 191, at 539–40 (courts and police wish to divert domestic violence cases away from the criminal justice system because the system cannot keep up with the demands imposed by these cases). See also *infra* text accompanying notes 286–87 (fear of jail overcrowding is not a legitimate reason to avoid arresting batterers).

197. See N. LOVING, *RESPONDING TO SPOUSE ABUSE AND WIFE BEATING: A GUIDE FOR POLICE* xiii (1980) [hereinafter cited as *RESPONDING TO SPOUSE ABUSE*] (police express feelings of inadequacy in dealing with domestic violence calls); *BEHIND CLOSED DOORS*, *supra* note 1, at 17 (quoting New York City police officer concerning family disturbances: “You can’t solve their problems. You just try to calm them down. If you don’t get another complaint that night, you figure you did your job.”).

stakes are high enough, and when the alternatives to legal intervention are inadequate, the legal system does not hesitate to intercede in the resolution of complex issues.¹⁹⁸ Of course, battering involves difficult and sensitive issues, and legal personnel need training on how best to cope with the violent home.¹⁹⁹ It is equally clear, however, that someone must move against abuse, and that no other social institution has the legal system's clout to protect victims and to force batterers to face the consequences of their transgressions.²⁰⁰ The best approach is for the legal system to emphasize the similarities rather than the differences between abusers and other violent criminals.²⁰¹

The final reason for non-intervention, ironically, sometimes comes from people who feel sympathetic towards the battered woman. Such people may argue that intervention will often anger the batterer further, and that as a result he may well retaliate against the victim. Therefore, the argument continues, the law should not exacerbate a bad situation.²⁰² The premise of this argument is sound: batterers often react violently to any outside interference.²⁰³ But the conclusion, given what we know about battering, is absurd. Abuse continues and probably increases if intervention does not occur. It will not disappear if treated with "benign neglect."²⁰⁴ While legal officials must be sensitive to the problem of retaliation, they must not use it as an excuse for inaction. The correct responses are to protect and support the victim and to deter the assailant. These are not perfect answers, but they are preferable to leaving the victim at her husband's mercy.

The rationalizations for legal inaction will endure as long as the myths of battering endure. But the need to defend against the naysayers should never blunt the positive message: The law can curtail wife abuse, and it must.

198. Examples in the criminal law would include the insanity defense; in family law, child custody; and in public law, race and sex discrimination.

199. See *infra* notes 294-96 and accompanying text.

200. See *supra* note 11.

201. See *infra* note 245 and accompanying text.

202. See St. Petersburg Times, May 21, 1984, at 1B, col. 1 (officers quoted as opposing arrests because arrest will just give the batterer another reason for beating his wife).

203. See *supra* note 25 (police officers often injured during domestic violence calls).

204. A recent empirical study of the effects of arrest on subsequent domestic violence strongly rejects the idea that strong action against batterers makes them more violent. See Sherman & Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 268-70 (1984). See *infra* note 246 for further discussion of the study's methodology and conclusions. Thus, battering is distinguishable from certain other types of negative conduct which may get worse if labelled as criminal. See E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 186 (8th ed. 1970) (juvenile delinquency may be made worse if offenders are publicly defined as delinquents).

IV. GOALS OF A PROGRAM TO COMBAT BATTERING

Having established the appropriateness of legal action, we should now delineate the goals of a program to stop battering.²⁰⁵ Only then can we propose and evaluate the specific components of such a program.

The most important goals should be to assure both the short- and long-term safety of the battered woman. In the short term, the law must take forceful measures to protect the victim, especially during severe battering incidents. A long-range solution demands much more, for the victim will not be safe until the battering cycle is broken. The legal system must do everything it can to encourage the victim to say "no" to further abuse. This means that it should support her in every act that reduces her isolation²⁰⁶ and promotes her safety and self-esteem.²⁰⁷ At the same time, the legal system must understand why she finds it so hard to assess her situation realistically and to take control of her life. It must never shift blame from the abuser to the victim, nor should it misinterpret her struggles as masochistic enjoyment of the beatings.

The victim represents only half of the battering equation, of course, and the law must be equally sure of its goals in dealing with the batterer. The

205. It is critical for legislation to cover abuse regardless of the partners' marital status, *see, e.g.*, D.C. CODE ANN. § 16-1001(5) (Supp. 1984). Battering is common between unmarried cohabitants, and between divorced and separated couples. *See The Silent Crime, supra* note 3, at 23 (estimates that nearly half of abuse victims were never married to perpetrator); KENTUCKY SURVEY, *supra* note 16, at 18 (64% of women surveyed who had been divorced or separated during the previous year reported violence in their marriages). It may even be too restrictive for the law to require that the parties have ever cohabited. *See Lerman, supra* note 1, at 74 n.52.

206. Notice how many forces conspire to isolate the battered woman: she isolates herself out of shame, *see supra* note 68 and accompanying text; the batterer isolates her out of jealousy and his need to control her, *see supra* notes 102-04 and accompanying text; and outsiders isolate her out of embarrassment, ignorance, or condonation, *see supra* notes 79-92 and accompanying text. Anyone who wants to help the abused woman must first break through her isolation and denial. *See HOSPITAL PROTOCOL, supra* note 86, at 6 (one purpose of emergency room procedures is to overcome her withdrawal).

As a result of her isolation, the battered woman believes that no one else has the same problem she does, that no outsider will help her resolve her situation, L. WALKER, *supra* note 1, at 31, and that she has no alternative but to stay with her mate, Roy, *supra* note 69, at 31 (one of the two most common reasons battered women cited for remaining in abusive relationships was a belief that they had no place else to go). Obviously, one of the major purposes of battered women's shelters is to provide victims with an alternative to continued violence.

207. Programs at battered women's shelters are directed toward this goal. *See generally* B. WARRIOR, *supra* note 94, for practical information about shelter services and procedures; S. SCHECHTER, *supra* note 1, at 287 (describing political issues facing the shelter movement). Whether conducted as part of a shelter program or not, group therapy with other victims of wife abuse is the most effective technique for assisting battered women. B. WARRIOR, *supra* at 164.

Hospital emergency rooms can be another important resource for battered women. *See* KENTUCKY SURVEY, *supra* note 16, at 31 (59% of battered women who sought medical attention used emergency rooms). *See* HOSPITAL PROTOCOL, *supra* note 86, for a detailed description of a systematic program to identify and assist abuse victims.

primary goal of legal action should be to force him to stop his abuse permanently.²⁰⁸ In order to have any chance of accomplishing this, the law must present the abusive man with the unambiguous message that his conduct is criminal²⁰⁹ and will not be tolerated. Legal personnel must confront his denial and externalization, emphasizing that he will be held accountable for his behavior. The law should facilitate his efforts to change, if he can show that his motivations are genuine, but legal personnel must not be taken in by his charm and manipulateness. If he does not respond satisfactorily to lesser means, the full coercive powers of the law must be used against him, including a jail sentence, if necessary. Finally, the law *itself* must take responsibility for deterring the abuser and must relieve the victim of this burden. This does not mean that legal officials should ignore her wishes or fail to consider her interests. Naturally, these elements should be considered as important factors in legal decisionmaking. However, the government has an independent duty to protect its citizens, especially when they have difficulty in protecting themselves.²¹⁰ Violence against any person is a violation of society's rules; control and reduction of such violence is society's responsibility, and not the victim's.

The law must also recognize the needs of the children of the battering couple. Physical or sexual abuse of the children must be prevented. Even when direct abuse is not present, the law must strive to protect children against the emotional and psychological damage of observing parental violence.²¹¹

Saving the battering couple's relationship at the expense of the victim's safety is *not* an appropriate legal goal. Protecting the battered woman must be the top priority, a priority that cannot be achieved if the law focuses primarily on keeping the family together. Establishing the victim's protection as the law's number one goal inevitably implies a value judgment that it is better for her to be safe and on her own than to remain in a dangerous

208. While some batterers are successfully motivated to change by their partner's leaving them, most eventually continue in their violent pattern by forming a relationship with a new victim. See A. GANLEY, *supra* note 95, at 58 (75% of the batterers counseled reported abuse in previous relationships; of the remaining 25%, most had never had another significant relationship with a woman); Pence, *supra* note 9, at 253-54 (batterer obeyed court order requiring him to avoid contact with his wife, but entered into an abusive relationship with another woman).

209. Denominating the batterer as a criminal is an important deterrent because most batterers wish to avoid the stigma associated with crime. See E. SUTHERLAND & D. CRESSEY, *supra* note 204, at 351 (fear of loss of status in society is often an effective deterrent to crime).

210. See *infra* text accompanying notes 222-24 for a discussion of the extent to which, in handling domestic abuse cases, government officials should defer to the victim's expressed wishes.

211. See, e.g., 1984 FLA. LAWS CH. 84-152 (court must consider evidence of spouse abuse in divorce proceeding as evidence of detriment to the parties' children when determining whether parental responsibility for the child should be shared; if court finds that spouse abuse has occurred, court may award sole custody to abused spouse and may make visitation arrangements that will best protect children and abused spouse).

relationship. Furthermore, the goal of deterring the batterer may be undermined by an emphasis on family unity. For most abusers, their wife's departure is one of the few events that may motivate them to get help.²¹² Second, it is impossible for most long-term battering relationships to ever become violence-free.²¹³ Lastly, because of the abuser's denial and the victim's guilt, efforts aimed at the couple, rather than at the batterer, will nearly always miss the mark by concentrating on her actions rather than his.²¹⁴

With the nature of the problem, the need for legal action, and the correct goals in mind, we are now prepared to outline an anti-battering program for the criminal law.

V. A CRIMINAL LAW PROGRAM TO STOP ABUSE

This Part will describe how the criminal justice system should respond to battering. First, an overall approach, devised in light of the characteristics of the battering relationship and proper legal goals, will be articulated. This overview will provide a framework for the remaining three subsections, which set forth specific proposals for police, prosecutorial, and judicial action. For each component of the criminal justice system, the discussion will (1) recommend steps to curtail abuse; (2) explain why these steps are appropriate, given what we currently know about the abuser and his victim; and (3) suggest ways to implement the proposals made.

Various recommendations will be argued with varying degrees of fervor. The reason for this is simple. In some areas—such as the need to arrest batterers²¹⁵—we are confident that we already know the most effective way to address the problem. In others—such as the extent to which batterers should be diverted to counseling rather than required to serve jail time²¹⁶—we know enough to make proposals, but not enough to be sure how well they will work. Obviously, the level of certainty affects the question of implementation: in areas of substantial doubt, inflexible legal standards would be unwise.

The question of how to effectuate the program also turns on whether criminal justice officials are sympathetic to the program's goals and are

212. L. WALKER, *supra* note 1, at 67; *The Silent Crime*, *supra* note 3, at 26 (few batterers seek help on their own; the most common reasons for an abuser to be in therapy are that his wife has left him or threatened to do so or because of a court order).

213. See *supra* notes 45–46 and accompanying text.

214. This is also the reason that traditional couples counseling is inappropriate for the battering relationship. See *infra* notes 322–23 (batterers awaiting trial should not be diverted to couples counseling).

215. See *infra* text accompanying notes 234–45.

216. See *infra* text accompanying notes 325–33.

willing to carry out its specific elements. The less sympathetic they are, the more forcefully the legislature²¹⁷ must act to ensure that its intentions are carried out. We must therefore examine the attitudes and actions of police, prosecutors, and judges toward battering. These attitudes and actions have traditionally been deficient and based on ignorant assumptions about wife beating.²¹⁸ Any recent improvements in performance are, at best, spotty.²¹⁹ We will conclude that legislation is the only hope for wide-reaching reform.

Organization and clarity demand that each of three parts of the criminal justice system be considered separately, but separate discussions should not obscure the critical connections among the components. Abuse is a complex, multi-dimensional problem which must be attacked on every front.

A. *General Approach*

Two overriding principles should guide the law's approach to wife beating. First, the legal system should constantly and consistently convey the message that abuse is unacceptable conduct. Second, legal officials must treat battering as a serious criminal offense for which the batterer is responsible and which the legal system has an obligation to deter. In responding to abuse, the law should emphasize the nature of the harm done, and not the relationship between the parties.²²⁰ While it is proper to stress the similarities between domestic violence and crimes between strangers when dealing with the batterer, the law must recognize the difference between the two when dealing with the victim. Because of her relationship with the perpetrator, the battered woman will find it difficult to pursue legal remedies against him, much more difficult than does the victim who has not been rendered helpless by the criminal.²²¹ Non-cooperation from the abused victim impedes the goals of ensuring her safety and deterring her assailant. The law must therefore devise special strategies to overcome her reluctance to become involved in the batterer's prosecution.²²²

The battering victim presents other problems for legal officials. One of the most important questions is the proper weight to give her expressed

217. This of course assumes that the legislature is sympathetic to battered women's concerns.

218. See RULE OF THUMB, *supra* note 6, at 91-98 (every branch of the legal system fails to respond adequately to spouse abuse).

219. See *infra* notes 275 & 312 and accompanying text.

220. See TASK FORCE REPORT, *supra* note 12, at 10; Lerman, *Elements and Standards for Criminal Justice Programs on Domestic Violence*, in RESPONSE TO VIOLENCE IN THE FAMILY 9, 9 (Nov./Dec. 1982) [hereinafter cited as *Elements and Standards*].

221. See *supra* note 29. This is not to minimize the difficulties of encouraging victim participation even in cases involving violence between strangers, see *infra* note 309.

222. See TASK FORCE REPORT, *supra* note 12, at 12; Pence, *supra* note 9, at 249-50. See also *infra* notes 311-14 and accompanying text.

wishes. Although the legal system should act independently from the battered woman, this does not mean it should freely disregard her desires on how the case should be handled. A good rule is that her views should be accorded great deference when she wants the law to take action against the batterer, but should be given less weight when she says she wants to protect him.²²³ Several reasons support the distinction. First, because the law has a duty to deter batterers and to protect their wives and children, it follows that it sometimes has an obligation to act even when the victim refuses to assist the legal process. Second, when the battered woman is taking legal steps against the batterer, her actions are consistent with the goals of the law and should be supported and encouraged. The opposite is true when she is protecting him. Third, because of learned helplessness and because she is not a masochist, any expressions of disinterest in deterring him are far less likely to represent the true state of her feelings than when she claims the converse. Fourth, a battered woman is far more likely to minimize her husband's brutality than exaggerate it;²²⁴ she therefore has more credibility when she is making charges against him than when she is refusing to complain. Finally, the law should defer to her when she seeks harsh penalties against the abuser because her personal safety probably rests on the outcome: if he is not stopped, she is the likely target of his renewed violence.

In dealing with the abused woman, the law's top priority should be support. Ideally, with enough understanding and encouragement, the battered woman will assess her situation realistically, start to unlearn her helplessness, and will agree to help the legal system as a witness²²⁵ against her husband. Even if legal officials were to offer the victim their unqualified assistance, however, her actions would often fall short of the ideal, due to the psychological glue which binds her to her mate. When, despite their best efforts, legal personnel find that the victim cannot yet take control of her life, they face difficult choices between solutions which undermine batterer deterrence and solutions which further victimize the victim or increase her jeopardy.²²⁶

The law's treatment of batterers must be aimed at deterrence, and its approach geared to strength. A tough approach is proper when dealing with abusers, because it is the only way to break down their psychological walls of denial and externalization. Still, different batterers will present different situations.²²⁷ Thus, an overall policy of toughness may express itself in

223. See *infra* notes 315–20 and accompanying text.

224. L. WALKER, *supra* note 1, at xiv.

225. See *infra* text accompanying notes 308–10 (concerning the importance of recognizing that the battered woman is the victim of a crime that the state has the duty to prosecute).

226. See *infra* text accompanying notes 315–20 (discussing no-drop policies).

227. See *supra* text accompanying notes 165–67.

different legal responses, depending on the circumstances.²²⁸ Regardless of the means used in particular cases, the focus should always be on the batterer's deeds and not his words. Legal personnel must maintain a skeptical attitude toward the batterer's promises of rehabilitation, lest they fall prey to his manipulation and self-delusion.

When a batterer does not respond to lesser measures, the law must react as it does with other undeterred criminals: escalate the punishment. Increased sanctions may convince the abuser to reform, and even if they do not, at least he cannot beat his wife from a jail cell.

With proper goals and approaches firmly in mind, we can now turn to specific proposals for criminal justice action. We start where the system starts, with a call to the police.

B. Law Enforcement Response

1. Arrest of the Batterer

Effective response by law enforcement officials is the cornerstone of any program designed to reduce wife beating. The goals of safety for victims and long-term change in batterers' behavior patterns are unattainable without appropriate police intervention.

The police are frequently called to the scene of domestic violence, usually during an acute battering incident.²²⁹ Although law enforcement officials never come into contact with many abusive couples,²³⁰ the more severe the abuse, the more likely it is that police assistance will be sought.²³¹ Thus, the police are in a crucial frontline position to confront battering.²³² The potential impact (for good *or* ill) of law enforcement

228. For instance, pre-trial diversion programs are a good idea in some abuse cases, while other cases call for more severe and formal criminal processes, including full-scale trials and even jail sentences. See *infra* text accompanying notes 329-33 for a discussion of appropriate criteria for selecting among alternative dispositions.

229. See L. WALKER, *supra* note 1, at 135.

230. See *id.*; see also KENTUCKY SURVEY, *supra* note 16, at 37 (only nine percent of women who had experienced abuse and five percent of those without children said they had called the police).

231. *Why Do They Stay?*, *supra* note 69, at 100. A Kansas City, Missouri, Police Department revealed that in instances of homicide or aggravated assault between family members, the police had usually (85.4% of the time) been called to the same address at least once in the preceding two years, and that in over half the cases (53.9%), law enforcement officers had been previously called *five or more times*. Kansas City, Missouri Police Department, Domestic Violence and the Police (1973) (unpublished report), cited in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 164, 168-69 (M. Roy ed. 1977).

232. See RULE OF THUMB, *supra* note 6, at 91 (police stand at the entrance to the criminal justice system, and their actions often prevent or discourage battered women from pursuing criminal remedies).

response is magnified further by the crisis setting in which police intervention typically occurs.²³³

Arrest of the batterer is the central element of an effective police response.²³⁴ Arrest advances the goal of victim safety (both short- and long-term) and abuser deterrence. The victim's short-term safety is enhanced because, at least if the batterer is held long enough following his arrest,²³⁵ the acute battering phase will be terminated. If the spouses are not separated and the husband's rage is not given time to dissipate, the beating may continue after the police have left. The violence may even be intensified by the abuser's anger of police "intrusion" into his "private life."²³⁶ The ongoing danger to the woman exists even if the batterer appears calm in the presence of the police or she herself requests that he not be taken away. The former is symptomatic merely of the batterer's manipulative respect for authority,²³⁷ while the latter arises from the victim's trauma-induced confusion and her feelings of helplessness, guilt, fear, and dependence.

Arrest also increases the chances that the victim will begin to take the steps essential to her long-term wellbeing. The time away from her abuser may give her the breathing room to do an objective assessment of her options,²³⁸ particularly if the police provide her with information on where she can receive counseling, shelter and other services.²³⁹ More importantly, arrest is a strong support signal to the victim. It communicates to her that the legal system does not blame her for the abuse and that she will not have to tolerate it.²⁴⁰ If followed up properly by prosecutor and judge,²⁴¹ arrest is the first of a series of messages saying that legal officials will help her resolve the problem, that the burden of curbing the abuser will not fall exclusively on her.²⁴²

Arrest conveys a similar message to the batterer. It signifies that society condemns his conduct, and will hold him accountable for it. Arrest thus thwarts denial and evasion of responsibility. When he is taken into custody,

233. See Bard, *Family Crisis Intervention: From Concept to Implementation*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 172, 177 (M. Roy ed. 1977) (anyone in authority, including the police, has great power over people in crisis, especially if the crisis is sudden and arbitrary; victims look to the police as source of assistance, stability, and direction).

234. See *TASK FORCE REPORT*, *supra* note 12, at 22-25; *POLICE KEY #245*, *supra* note 1, at 150.

235. See *infra* text accompanying notes 302-06.

236. S. SCHECHTER, *supra* note 1, at 25.

237. *Expansion of Arrest Power*, *supra* note 110, at 60.

238. *POLICE KEY # 245*, *supra* note 1, at 150.

239. See *infra* notes 299-302 and accompanying text.

240. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 *SETON HALL L. REV.* 74, 109 (1983) (arrest of batterer may ameliorate learned helplessness of the victim).

241. See *infra* Parts VC and VD.

242. See *supra* note 209 and accompanying text.

it may also be the first time the wife beater has suffered external negative consequences from his violence.²⁴³ When succeeded by similarly strict measures from other criminal justice personnel, arrest begins a process under which the batterer faces both the carrot and the stick: if he changes his actions, he will be rewarded; if he doesn't, he will be punished. Arrest during or soon after a severe beating incident also benefits from good timing: with an opportunity to cool off away from his wife, the batterer will probably move into the contrite, loving phase. The legal system will then have a grip on him at precisely the time when he is the least defensive and the most motivated to change.²⁴⁴

The advantages of arresting the batterer are not just theoretical and speculative: arrest has been shown to be an effective deterrent to further abuse.²⁴⁵ An assertive attitude toward batterers also reduces the dangers that police themselves face in responding to domestic disturbances.²⁴⁶ Unfortunately, police attitudes and actions toward abuse remain backward and wrongheaded.²⁴⁷ Consequently, society cannot rely on them to use their discretion wisely in battering cases. Because of this intransigence, statutory change is the only means likely to achieve our stated goals. The charge that police cannot be trusted to handle domestic disputes correctly has such serious policy implications that it calls for further elaboration.

243. See Finesmith, *supra* note 240, at 104–05 (abusers are likely to see themselves as law abiding citizens unless arrested). Accord telephone interview with Dr. Richard Berk, professor of sociology at the University of California-Santa Barbara (March 8, 1984) (arresting the abuser helps drive home the seriousness of his actions).

244. L. WALKER, *supra* note 1, at 231. See also *infra* note 324 and accompanying text.

245. Sherman & Berk, *supra* note 204, reports on the results of the only empirical study ever done concerning the effects on domestic violence of different police responses. Their study involved misdemeanor domestic assault cases in Minneapolis. When called to the scene of a violent domestic disturbance, officers were given instructions to choose at random one of three responses. The three responses were: (1) police mediation of the situation (i.e., the officers talked to the participants and calmed them down but did nothing further); (2) separation of the parties for the night without an arrest; and (3) arrest of the offender. The researchers then conducted follow-up checks of police records and interviews with victims to determine if subsequent violence had erupted within six months following police intervention. See *id.* at 263–65 for further details on the study's methodology. The study found that the arrest was significantly more effective in preventing further violence than were the other two methods. *Id.* at 266–68. As a result, the authors recommended that police follow up a policy of arrest in domestic violence cases. *Id.* at 270. The Minneapolis Police Department was so impressed with the study's results that it adopted a policy strongly favoring arrest. See *infra* note 275.

246. Cf. New York Times, July 24, 1984, § 1, at 10, col. 5 (some Minneapolis police officers expressed reservations about new policy favoring arrest, but generally thought it gave them more power and a greater ability to control dangerous situations). See INTERNATIONAL ASSOC. OF CHIEFS OF POLICE TRAINING KEY # 246 reprinted in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 153, 155–56 (M. Roy ed. 1977) for practical procedures that help police take control over a domestic disturbance scene.

247. See *infra* text accompanying notes 248–70.

The Criminal Justice System's Response to Battering

Historically, police department policies minimized the criminality of family assaults and discouraged arrests.²⁴⁸ Arrests would be made only in instances of severe and visible injuries, if at all.²⁴⁹ There have even been reported cases where law enforcement officials did not respond at all to a domestic violence call.²⁵⁰

Once they arrive at the victim's home, the police generally pursue inappropriate goals. They usually seek merely to calm the parties, defuse the immediate crisis and then get out, often leaving the batterer and the victim together in the house.²⁵¹ Police questioning of the couple typically reflects inaccurate suppositions about the abusive relationship. Officers may consider the victim's hysteria as evidence of her untrustworthiness, and so they may rebuff her attempts to tell her story or may not believe it

248. Innumerable sources document the traditional police response. *See, e.g.*, authorities cited in Pence, *supra* note 9, at 248 nn.2–8; KUREK, WAYNE COUNTY, MICHIGAN SHERIFF POLICE TRAINING ACADEMY: DOMESTIC COMPLAINTS OUTLINE [hereinafter cited as WAYNE COUNTY POLICY] cited in Note, *supra* note 6, at 268 n.52; OHIO ATTORNEY GENERAL, OHIO REPORT ON DOMESTIC VIOLENCE (1979) (during a 9-month period in Cleveland in 1979, 15,000 domestic disturbance calls were logged, of which only 460 resulted in arrests). For a detailed description of the practices of the New York City Police Department that led to the decision in *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 402 N.Y.S.2d 165 (1st Dept. 1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979), see Woods, *supra* note 7; Note, *Domestic Violence: Legislative and Judicial Remedies*, 2 HARV. WOMEN'S L.J. 167 (1979); Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135 (1977). *See also* Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914 (contemporaneous "time capsule" of law enforcement procedures and attitudes concerning wife abuse); Pastoor, *Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws*, 2 L. & INEQUALITY 557, 559–66 (1984) (indicates that battering is still rarely treated as a crime, even in Minnesota, which is considered fairly enlightened in its approach to the problem).

249. *See, e.g.*, Comment, *supra* note 5, at 562 n.76 (police should arrest husband when wife seriously injured or unable to sign a complaint; otherwise, Community Intervention Services should be used). *See also* PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 24 (police require greater level of injury before they will make an arrest in a domestic violence case than when incident is between strangers).

250. KENTUCKY SURVEY, *supra* note 16, at 40 (police failed to respond to 17% of all calls for help from battered women); Parnas, *supra* note 248, at 924 (practice of Chicago police dispatcher was to inquire whether assailant had left scene; if he had, woman was often instructed on how to obtain warrant and advised to leave premises or lock the door and to call again if he returned). At least one such incident led to a civil suit against police. *Hartzler v. City of San Jose*, 46 Cal. App.3d 6, 120 Cal. Rptr. 5 (1975) (woman called police because her estranged husband said he was coming to her house to kill her; police came only after stabbing had occurred and the woman was dead, even though they had responded to 20 previous complaints concerning the husband's violent acts).

The model statute in Lerman, *supra* note 1, at 120–21, requires police to respond to domestic abuse calls, prohibits them from assigning a lower priority to such calls than to similar non-domestic violence, and provides criteria for police dispatchers to use in assigning priority to individual complainants.

251. *See* N. LOVING, SPOUSE ABUSE: A CURRICULUM GUIDE FOR POLICE TRAINERS I (1981) [hereinafter cited as CURRICULUM GUIDE] (police traditionally emphasize reconciliation of the parties and avoidance of arrest). *See infra* note 274 and accompanying text for a discussion of traditional police use of mediation techniques in response to battering.

once told.²⁵² They may focus on her behavior rather than his, in a misguided attempt to determine how she might have “provoked” her husband or how she can control him in the future. They may also minimize the batterer’s responsibility by accepting his excuses (for example, drunkenness) for the violence.²⁵³ These reactions disclose how strongly police distinguish between family versus stranger violence. In the latter category, issues of intent²⁵⁴ and provocation²⁵⁵ are viewed at most as mitigating factors to be considered at later stages of prosecution and not as bases to avoid commencement of criminal action.

Lack of understanding of the victim’s motivations causes police misperceptions which in turn cause police misconduct. If she appears reluctant to have her husband arrested, they will interpret this simplistically as masochistic acceptance of the situation rather than as the product of complex psychological factors. Based on this erroneous assumption, police will regard her as a willing victim and will fail to arrest the batterer.²⁵⁶ They will thereby create a self-fulfilling prophecy, for, as we know, most battered

252. See *supra* note 87 and accompanying text. This practice is devastating to the battered woman, since it keeps her from releasing the trauma of the severe battering incident and reinforces her isolation and guilt. See POLICE KEY # 246, *supra* note 246, at 157–58.

253. RESPONDING TO SPOUSE ABUSE, *supra* note 197, at xii–xiii (intoxication of assailant is one of the factors police often list as militating against arrest of abusers).

254. For instance, although intoxication can rob a person of his or her ability to form a specific intent, and can therefore reduce murder to manslaughter, drunkenness does not excuse a homicide, nor can it be used as a defense for crimes, such as assault, which do not require specific intent. See R. PERKINS & R. BOYCE, CRIMINAL LAW 1010 (3d ed. 1982).

255. It is well-settled that “[n]o conduct or words, no matter how offensive or exasperating, are sufficient to justify a battery.” *People v. Martinez*, 3 Cal. App. 3d 886, 889, 83 Cal. Rptr. 913, 915 (1970). Thus, even if the victim has done something annoying (such as “nagging” the batterer), this in no way excuses his violent response. As with intoxication, *supra* note 254, “provocation” can serve to reduce a charge from one kind of homicide to a lesser kind. However, the provocation must be “adequate,” which means that victim’s action must be such as would cause a reasonable person to lose control. See generally R. PERKINS & R. BOYCE, *supra* note 254, at 86–103. Since the “provocative” acts by battered women are almost always trivial, it is hard to imagine a case where the batterer could rightfully claim legal provocation.

Similar issues arise with regard to self-defense. Battered women, after they have experienced violence for some time, will on occasion hit their husbands first. However, his response is invariably far in excess of what is needed to defend himself against her attack; e.g., she slaps him a few times with her hand, and he responds by beating her until she is unconscious. The doctrine of self-defense holds that the amount of force used must be proportional to the harm threatened, and in particular that deadly force (force likely to cause death or great bodily harm) cannot be used to repel non-deadly force. See generally *id.* at 113–27. Therefore, the batterer who brutally retaliates against a victim who struck first has no legitimate self-defense claim.

256. RESPONDING TO SPOUSE ABUSE, *supra* note 197, at xii–xiii (victim’s refusal to press charges is important factor in police decision not to arrest domestic violence suspect). Parnas, *supra* note 248, at 925, gives two examples of serious violence (one where boiling water was thrown at the victim, another where a woman was hit with a belt) where no arrest was made because the victim said she did not want to sign a complaint.

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women require support in order to free themselves from the abusive relationship.

At times, police response goes beyond nonfeasance. Even when the victim asks that her abuser be arrested, law enforcement officers may pressure her to withdraw the request or may refuse to honor it.²⁵⁷ When asked to justify this dereliction of duty, police claim that domestic violence victims never follow through with criminal action and therefore arrest is futile.²⁵⁸ This rationale is unconvincing for two reasons. First, with proper support from criminal justice personnel, many battered woman will cooperate with efforts to prosecute their abusers.²⁵⁹ Second, arrest serves worthwhile purposes even if no further legal action is taken.²⁶⁰

Education alone cannot solve the problem. Many law enforcement officials, even when instructed in battering realities, are reluctant to relinquish their faith in battering myths.²⁶¹ Such attitudes bespeak a fierce, if not always conscious, commitment to the time-honored excuses for legal inaction. Police will not arrest abusers because they assume that the legal system cannot help the couple, or because they view the beatings as consensual. They may agree with the batterer that family violence is a private matter and a waste of their time when they could be out pursuing "real" criminals.²⁶² Frequently they do not want to deal with the highly

257. WAYNE COUNTY POLICY, *supra* note 248, details ways in which officers should discourage the filing of domestic assault charges. In theory, the victim always has the option of filing a private complaint, but battered women are of course unlikely to take this step. Furthermore, private complaints are generally given less serious and expeditious treatment than those initiated by the police. J. HAMOS, *supra* note 7, at 36 n.4.

258. RESPONDING TO SPOUSE ABUSE, *supra* note 197, at xii–xiii (officers frequently make this assumption and generally express frustration with domestic violence calls). Of course, this attitude by the police in turn discourages the battered woman from pressing charges. POLICE KEY # 245, *supra* note 1, at 149, notes that "the two conflicting views produce a 'chicken-versus-the-egg' controversy that is useless to pursue." It recommends instead that the police focus on their job and arrest batterers.

259. See *infra* notes 313–15 and accompanying text.

260. See *supra* note 245.

261. See CURRICULUM GUIDE, *supra* note 251, at 7–8 (police often blame victim and find excuses for abuser's behavior). Police may fear that labeling abusers as criminals will only increase their violence. As has been demonstrated, however, *supra* note 245, such labeling in fact has a strong deterrent effect on batterers.

262. CURRICULUM GUIDE, *supra* note 251, at 8 (field of domestic violence has low esteem among police). This attitude is ironic in light of the high percentage of their time which police spend on domestic disturbance calls, see *supra* note 24. In addition, police often do not follow standard evidence-gathering procedures in domestic violence cases. See PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 22 (evidence is often nonexistent in family violence cases). Naturally, this further hinders prosecutorial efforts.

Unfortunately, the police are exposed so frequently to interpersonal conflicts and violence that they can become indifferent to the human suffering involved. RESPONDING TO SPOUSE ABUSE, *supra* note 197, at xiii. See generally UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, NATIONAL CRIMINAL

charged emotions involved and abdicate their responsibilities by pleading lack of expertise.²⁶³ Finally, police are concerned about the possible violence that is often directed against them by the batterer. When this concern is combined with their distaste for intervention in what they see as private matters, police may place their own safety above the victim's, a priority they would not make or accept if the crime were one between strangers.²⁶⁴

Underlying police mistakes may be fundamental disagreement with the values and goals posited in this article. Some officers may believe that a man has a right to use force to "show his wife who's boss" around the house.²⁶⁵ Others may think that preservation of the family, even the abusive family, should be the law's chief aim.²⁶⁶

One final point must be considered. Many male police officers will inevitably identify with the batterer²⁶⁷ and not the victim and, of course, police forces are still predominantly male.²⁶⁸ The batterer's psychology is more familiar to them than the victim's.²⁶⁹ Some consciously or subconsciously perceive parallels in their own lives that lead them to forgive the husband, as they themselves would wish to be forgiven.²⁷⁰

In fairness, it should be added that the police are not wholly to blame for their response to abuse; further, the picture is not as uniformly bleak as it once was. The police's behavior was for many years consistent with widely accepted social norms.²⁷¹ The law²⁷² and other parts of the legal establish-

JUSTICE REFERENCE SERVICE, *POLICE STRESS: A SELECTED BIBLIOGRAPHY* (1979).

263. See *supra* note 197. The police's desire to avoid the interpersonal elements of battering, combined with the low prestige of this type of work, often result in an emphasis on a social services rather than criminal law approach to wife abuse, see *infra* note 274 and accompanying text.

264. See Parnas, *supra* note 248, at 916 (police training emphasizes dangerousness of domestic disputes); RULE OF THUMB, *supra* note 6, at 13 (police often view domestic quarrels as high-danger, no-win situations).

265. See CURRICULUM GUIDE, *supra* note 251, at 7-8 (police officers often believe in male domination in the family).

266. See St. Petersburg Times, May 21, 1984, at 1B (New York City detective and police academy instructor acknowledges that the traditional police attitude has emphasized keeping the family together).

267. CURRICULUM GUIDE, *supra* note 251, at 7.

268. One study found that women police officers as a group handled domestic disputes better than men, apparently because the women's superior verbal skills allowed them to take charge of the scene in a less threatening manner. Elias, *The Urban Cop: A Job for a Woman*, Ms. Magazine, June 1984, at 17 (reporting on the finding of a doctoral dissertation by Commander Ken Hickman of the Los Angeles Police Department).

269. CURRICULUM GUIDE, *supra* note 251, at 7-8; see also New York Times, July 24, 1984, § 1, at 10, col. 5 (according to Minneapolis Police Chief Anthony Bouza, law enforcement "is a macho, largely masculine world and many think a man's home is his castle or that the woman had it coming").

270. Studies in England indicated that police have one of the highest rates of wife abuse of all occupations. L. WALKER, *supra* note 1, at 24.

271. See *supra* notes 182-205 and accompanying text.

272. Probably the most serious legal impediment was the traditional rule that police could not make warrantless arrests for misdemeanors unless the crime had occurred in their presence. Most states have

ment²⁷³ were often obstacles to reform. So were certain "experts" who asserted that neither party should be blamed for family disputes, and concluded that battering should be treated with mediation techniques, rather than with criminal sanctions.²⁷⁴ The situation today is slightly less dark than in the past, because in a few places the legal system has significantly improved its handling of battering cases.²⁷⁵ Nevertheless, traditional

now abolished this rule through statutes that permit warrantless arrests in spouse abuse cases. See generally *Expansion of Arrest Power*, *supra* note 110. In states where a warrant is no longer required, police trainers must insure that officers are aware of their new powers. *Elements and Standards*, *supra* note 220, at 10. See *infra* note 296 for a fuller discussion of police training needs.

Police have also been unsure about what constituted probable cause in domestic abuse cases, probably again evincing inappropriate distinctions between family violence and other crimes. Lerman's model statute, *supra* note 1, at 128–30 defines probable cause in the battering context, and includes a provision that probable cause may be present based solely on the victim's statement.

273. See TASK FORCE REPORT, *supra* note 12, at 11 (even when abusers are arrested, prosecutors and judges may not take domestic violence seriously); RESPONDING TO SPOUSE ABUSE, *supra* note 197, at xiii (police express frustration at actions of other parts of criminal justice system with respect to battering cases).

274. See Parnas, *supra* note 248, at 917 (police training on domestic disturbances emphasizes mediation skills and being impartial between parties). See generally authorities collected and summarized in UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE AGENCY, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, POLICE CRISIS INTERVENTION: A SELECTED BIBLIOGRAPHY (1978), many of which are directed toward family violence. These works, typical of those produced during the 1960's and 1970's, encouraged the police to view battering as non-criminal; they advised police to calm the immediate crisis, refer disputants to appropriate community agencies, and not to make arrests.

Police mediation only aggravates the battering relationship because it reinforces the victim's acceptance of responsibility and the abuser's evasion of it. Mediation makes sense for non-violent family disputes, POLICE KEY # 245, *supra* note 1, at 149, or when probable cause is lacking, RESPONDING TO SPOUSE ABUSE, *supra* note 197, at 33. But mediation is no substitute for criminal sanctions where serious injury has occurred or is threatened, *Police Key # 246*, *supra* note 246, at 153, or when one party has the kind of power and control that wife beaters have over their victims, PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 6. The problem occurs because the police have failed to distinguish between violent and non-violent family disturbances and have treated all intrafamily calls as appropriate for non-criminal intervention. CURRICULUM GUIDE, *supra* note 251, at 1. Indeed, the experimental program that gave rise to the popularity of mediation was intended only to keep verbal disputes from escalating into physical ones. However, its results were widely misinterpreted, as many police departments assumed its results could also be applied to cases in which physical violence had already occurred. RULE OF THUMB, *supra* note 6, at 18–19. See *infra* note 324 (mediation is inappropriate as a pre-trial or post-conviction dispositive for those batterers who are arrested).

275. See, e.g., OAKLAND POLICE TRAINING BULLETIN, NO. III-J, *Special Order # 3853* (November 1, 1979) cited in *Elements and Standards*, *supra* note 220, at 10 (the decision to arrest should not be based on either the relationship of the parties or on the officer's views about whether the complainant will want to prosecute). A number of police departments, including those in New York, Houston, and Minneapolis, have adopted policies favoring arrest in domestic violence cases. St. Petersburg Times, May 21, 1984, at 1B, col. 1. In Minneapolis, the change was a direct consequence of the findings of the Sherman & Berk study, discussed *supra* note 245, and has resulted in a three-fold increase in the number of domestic assault arrests. New York Times, July 24, 1984, § I, at 10, col. 5. The International Association of Police Chiefs has also changed its mind and now favors arrest in abuse cases. Compare INT'L ASSOC. OF CHIEFS OF POLICE TRAINING KEY # 16 (1965), cited in Parnas, *supra* note 248, at 929–30 n.59 (arrest should be used in domestic disturbance calls only as a last resort) with

police dogmas and deeds remain the norm. The odds are still good that a batterer will not be arrested, even if he has caused fairly serious damage.²⁷⁶

Under current conditions, the best solution would be to enact a statute requiring police to arrest batterers.²⁷⁷ Arrest has proven its utility in the war against abuse, but we cannot rely on resistant police officials to effectively and consistently exercise their normal discretionary powers to make such arrests.²⁷⁸ We also cannot and should not rely on battered women to effectuate a policy of arrest. Most battered women are unable to assert themselves against their mates. In any case, it is primarily the legal system's job to deter criminals, especially when the victims of crime are in a poor position to defend themselves.

One benefit of a mandatory arrest law is that it will create a statewide police policy.²⁷⁹ It can also keep domestic violence from escalating.²⁸⁰ Finally, it will force the police to treat battering as a crime, even if their beliefs about abuse remain outdated and sexist. The effectiveness of a mandatory arrest law may over time affect opinions as well as actions, but meanwhile batterers will be deterred and victims protected.²⁸¹

This law undoubtedly will deprive the police of their accustomed discretion.²⁸² However, police have failed to show they can be trusted in domestic

POLICE KEY # 245, *supra* note 1, at 150 (encouraging arrest).

Pence, *supra* note 9, describes the interagency project against domestic violence in Duluth, Minnesota. The Duluth program is considered one of the most successful anti-battering efforts in the nation.

276. Lerman, *supra* note 1, at 127. *See also* RESPONDING TO SPOUSE ABUSE, *supra* note 197, at xii (19% of officers surveyed indicated that they would avoid arrest whenever possible). The statistics from St. Petersburg, Florida could well be typical: arrests are made in only 1.7% of the domestic dispute calls logged. St. Petersburg Times, May 21, 1984, at 1b, col. 1.

277. *See* Lerman, *supra* note 1, at 126-27. So far as my research reveals, Oregon is the only state that makes arrest mandatory in domestic violence cases. OR. REV. STAT. § 133.055(2) (1981). Oregon law also requires arrest if an abuser violates a previously entered protective order. OR. REV. STAT. ANN. § 133.310(3) (West 1983). In Washington, Minnesota, and North Carolina arrest is mandatory for violation of protection orders, WASH. REV. CODE § 26.50.110(2) (Supp. 1984), MINN. STAT. ANN. § 518B.01 (14) (West Supp. 1984), N.C. GEN. STAT. § 50B-4(b) (Supp. 1981), but is discretionary in other abuse situations, WASH. REV. CODE ANN. § 10.99.030(3)(a) (West Supp. 1985), MINN. STAT. ANN. § 629.341 subd. 1 (West Supp. 1984); N.C. GEN. STAT. § 15A-401(b)(3) (Supp. 1981). Under Delaware law, arrest is mandatory for violation of protective orders, DEL. CODE ANN. tit. 13, § 1510 (Replacement vol. 1981) but warrantless arrest for misdemeanor domestic assault is not authorized. *See supra*, note 272. *See also* Pastoor, *supra* note 248, at 557-66 for a pointed attack on the adequacy of enforcement of anti-abuse statutes by Minnesota law enforcement agencies.

278. *But see* Sherman & Berk, *supra* note 204, at 270 (police should have policy of arrest in battering cases, but discretion is inherent in police work and should be maintained).

279. It will also prevent the police from using discretionary arrest laws discriminatorily. *Cf.* J. HAMOS, *supra* note 7, at 43 (many fear that police treat poor and/or minority batterers more harshly than affluent whites).

280. *See supra* note 45-47 and accompanying text.

281. One of the reasons why Minneapolis Police Chief Anthony Bouza instituted an arrest-prone policy was to eliminate male officers' preconceptions about abuse. New York Times, July 24, 1984, § 1, at 10, col. 5.

282. In Minnesota, a mandatory arrest law, favored by battered women's advocates and the Duluth

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violence cases. Battered women cannot afford to wait for the police to "see the light."

It is also true that police aversion to arresting batterers is so strong that the law may be evaded in some cases. However, wholesale flouting of any law by the police cannot be assumed. Furthermore, if police should disregard their duties, battered women's advocates can seek injunctions or money damages to compel police compliance.²⁸³ In other words, a mandatory arrest statute gives victims and their supporters much greater leverage with the police than they have when arrest is discretionary.²⁸⁴

Finally, a mandatory arrest law might cause overcrowding of local jails, since it would initially result in more batterers being incarcerated.²⁸⁵ However, the mere fact that mandatory arrest statutes may create a need for more jail space is not a valid argument against their enactment. As with any piece of legislation, the real issue is whether the benefits of mandatory arrest laws outweigh their costs. In view of what we know about battering, cost/benefit analysis strongly favors mandatory arrest laws. Because arrest is the legal system's most effective deterrent to battering, requiring police to arrest batterers is sensible long-term social policy. Over time, arresting abusers should lead to fewer domestic assaults, and therefore fewer arrests.

Even if a mandatory arrest statute does cost a few more tax dollars in the short run,²⁸⁶ these expenditures are easily justifiable to anyone who values

Police Department, was defeated when the Minneapolis Police Chiefs and Sheriffs Association mounted a vigorous statewide campaign against it. Letter to author from Ellen Pence, Director of Minnesota Program Development and supervisor of Domestic Abuse Intervention Project in Duluth (an inter-agency project coordinating domestic abuse services among law enforcement, criminal justice, and human services agencies) (March 19, 1984).

Regardless of whether a mandatory arrest law is enacted, legislators may wish to immunize law enforcement officers from civil or criminal liability for good faith efforts made to protect victims. See Lerman, *supra* note 1, at 130. Police sometimes cite fear of litigation as an excuse for not taking stronger action against batterers. RESPONDING TO SPOUSE ABUSE, *supra* note 197, at 5. By removing the threat of litigation, police immunity statutes eliminate this excuse.

283. Cf. *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983) (action in tort allowed when police failed to comply with law that mandated arrest of batterer for violation of restraining order). Battered women's advocates will have to rely largely on state court enforcement, since the United States Supreme Court has been increasingly reluctant to interfere in police matters. See e.g., *City of Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983) (federal injunctive relief improper in cases where plaintiff alleged that police had frequently used chokeholds against suspects who posed no threat to police safety).

284. But see Lerman, *supra* note 1, at 128 n.183 (even discretionary arrest laws may be interpreted as requiring affirmative action from the police).

285. See *New York Times*, July 24, 1984, § I, at 10, col. 5 (number of arrests tripled after institution of policy favoring arrest in domestic assault cases).

286. Increased costs from a mandatory arrest law are not necessarily inevitable. Expenditures might not need to increase if the criminal justice system did a better job of distinguishing between individuals who should be incarcerated after their arrest and individuals who should not. Cf. *St. Petersburg Times*, Jan. 18, 1985, at 5A, col. 1 (American Correctional Association policy statement favors change in prison classification system, reserving prisons for most dangerous offenders). For instance, more jail space would be available to house batterers and other persons who pose a real threat to the physical safety of

the safety of battered women and their children. In recent years American society has shown increased willingness to expend resources on deterring violent crime,²⁸⁷ at least when the perpetrator and the victim are strangers. It should be equally willing to spend money to protect battering victims.

The advantages of arrest have already been detailed, but what further benefits might arise from the certainty that accompanies a compulsory arrest law? That is, what behavior can we predict from batterers and victims if both groups know that police intervention will result in the abuser's arrest? Such predictions are currently speculative, since mandatory arrest laws are still so rare and limited in scope. Nonetheless, there is reason to be optimistic. Battered women want the police to arrest their husbands;²⁸⁸ any seeming ambivalence stems from confusion and fear of retaliation.²⁸⁹ Armed with the knowledge that the police will assure her safety, battered women may be more likely to call the authorities, to cooperate with them, and to put the resulting period of safety to good psychological and physical use. They will also be relieved of the weight of deciding whether their partners should be arrested.²⁹⁰

Predicting how batterers will react is more difficult, both because we know so little about them and because society has to date so condoned their behavior. We can expect a mandatory arrest law to deter²⁹¹ at least some

others if less space were taken up by indigents charged with petty property crimes. Cf. Gettinger, *Has the Bail Reform Movement Stalled?* 6 CORRECTIONS 26, 34-35 (1980), reprinted in F. REMINGTON, D. NEWMAN, E. KIMBALL, H. GOLDSTEIN & W. DICKEY, CRIMINAL JUSTICE ADMINISTRATION 456 (1982) (on any given day in New York City, 250 people are held in jail because they lack \$25.00 to pay for bail).

287. See Chaiken & Chaiken, *Crime: Trends and Targets*, 7 WILSON Q. 103, 108-09 (1983) (state, local, and federal spending on criminal justice increased by 147% during the 1970's, compared to an increase in total government spending of only 109% during the same period); St. Petersburg Times, Jan. 18, 1985, at 3A, col. 1 (according to Census Bureau statistics, in 1982 American cities for the first time spent more money on police than any other budget item; as recently as 1965, police were only the fourth largest municipal expense).

288. See *supra* text accompanying notes 196-97.

289. See L. WALKER, *supra* note 1, at 65.

290. It could be argued that if a battered woman knew that a call to the police would lead to her husband's arrest, she might not call out of love for him or because she feared increasing his anger. It is true that anything (including the ability to have him arrested) that increases her power and independence may lead to a violent reaction from the abuser. See *supra* notes 78-81 and accompanying text. But her increased power can also increase her feelings of self-confidence and control, feelings that must be fostered in order for the violence to be terminated. Further, it seems unlikely that a battered woman who would call the police under a discretionary statute would fail to do so under a mandatory arrest statute. In fact, today the battered woman who calls the police is in a more precarious position than if a mandatory arrest statute were on the books: she may increase the batterer's anger without receiving any protection from the police. See also New York Times, July 24, 1984, § Y, at 10, col. 5 (Minneapolis police, under policy favoring arrest, are now making arrests at times when the victim says she does not want arrest). Cf. PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 38 (in cases where charges are not brought, prosecutors sometimes send warning letters to abusers; prosecutors recognize the potential danger of this practice, but believe that the peril to the victim is probably no greater than if they did nothing).

291. Because of the ingrained nature of battering, abusers will not stop completely unless they

batterers. The deterred group might include those who are relatively controlled in their violence,²⁹² those who have the most to fear from public exposure of their behavior,²⁹³ and those who want to stop beating their wives but who need an incentive to seek help. Of course, arrest alone will not deter the most intractable men, but at least it will temporarily get them away from their families and into the criminal justice system where they belong.

A compulsory arrest law will do more than just reduce battering now. As an emphatic statement of social norms, it should have an even greater impact on future generations. If boys were raised in a society that accepted no excuses for wife abuse, and was prepared to punish it, many might never become abusers. If girls were raised in a society that told them that battering was not the woman's fault and promised to take their side if their husbands beat them, they might never become long-term victims.

2. *Other Improvements in Police Procedures*

Arrest of the abuser is the linchpin of an effective police response, but other actions would also be beneficial. Better recordkeeping and evidence collecting procedures would help protect both officers and victims,²⁹⁴ and should be legislatively mandated.²⁹⁵ So should training for police on the nature of abuse and how to handle battering calls.²⁹⁶ As has been demonstrated, much work needs to be done to overcome police ignorance about

receive outside help, *see supra* text accompanying notes 43–44. Knowing that they will be arrested if the police are called may well encourage some batterers to seek therapy on their own. Even those men who deny their problem might fear arrest enough to batter less frequently or less severely. *See supra* note 120 and accompanying text (batterers do have some control over their violence).

292. *See supra* note 166 and accompanying text.

293. This group might include many middle- and upper-class batterers, *see supra* note 33.

294. Police departments often have no systematic way of identifying repeat offenders. That is, neither the dispatcher nor the responding officer has any way of knowing (other than through personal recollection) whether a particular residence or suspect has previously been involved in domestic violence. Parnas, *supra* note 248, at 940–42. Because battering escalates over time, and because police are more likely to be called to the most violent households, inadequate reporting practices endanger everyone concerned.

295. *See Lerman, supra* note 1, at 122, 131–33 for suggested statutory language.

296. *RULE OF THUMB, supra* note 6, at 91. *See J. HAMOS, supra* note 7, at 44–45 and Lerman, *supra* note 1, at 133–35 for citations to statutes incorporating training requirements. *CURRICULUM GUIDE, supra* note 251, is an excellent manual.

Currently, domestic abuse receives too little attention in police training sessions, and is often lumped together with other types of interpersonal conflicts (such as barroom brawls and landlord-tenant arguments) in which the psychological dynamic is totally different. *See Pastoor, supra* note 248, at 599–607 for a description and critique of police training on domestic violence in Minnesota. Some officers realize that they have been poorly educated about the best ways to handle abuse cases, and therefore might be responsive to a more extensive training program. *RESPONDING TO SPOUSE ABUSE, supra* note 197, at xiii.

wife beating. While many law enforcement officials may be so biased as to be unreachable, others may be less resistant, especially if issues such as police safety and protection of children are emphasized.²⁹⁷ To be effective, training cannot be designed by the police alone. Instead, it must be developed in conjunction with experts in battering, such as abuse shelter directors.²⁹⁸

Labelling the batterer a criminal is important, but so is assisting his victim. Police should take an active interest in the welfare of the battered woman. They should inquire about her needs for medical treatment, shelter and counseling, and should be able to direct her to appropriate community agencies.²⁹⁹ The police are also in an ideal position to launch the victim in the painful but crucial process of objectively assessing her life with the batterer.³⁰⁰ The abused woman must realize that the police alone cannot stop the violence.³⁰¹ Trained and sympathetic police officers can help her recognize that the batterer's behavior is outside her control, and that she should focus her energy on taking steps to assure her own safety.

3. *Post-Arrest Restrictions on Batterers*

Once in custody, batterers need time for the rage of the severe battering phase to subside. The objective of victim safety cannot be achieved if abusers are released too quickly after their arrest.³⁰² States should adopt a law that provides that batterers can be held for twenty-four hours or over the weekend without bail being set.³⁰³ Additionally, in setting bail, judges should treat wife beating as seriously as they would a similar assault between strangers.³⁰⁴

After the batterer is released, the legal system must restrain him from misusing his freedom to harrass and reinjure his wife. Unless she wants to

297. See *supra* notes 177-80 & 247 and accompanying text.

298. J. FLEMING, *supra* note 56, at 229. See N.J. STAT. ANN. § 2C:25-4 (West 1982).

299. See Lerman, *supra* note 1, at 124-26 for a legislatively created notice to victims of their rights and available services.

300. See *supra* note 156 and accompanying text (immediately after a severe battering incident, the victim is most prepared to reassess her relationship with the batterer).

301. POLICE KEY # 246, *supra* note 246, at 162; HOSPITAL PROTOCOL, *supra* note 86, at 18.

302. RULE OF THUMB, *supra* note 6, at 42; Note, *supra* note 11, at 269.

303. See, e.g., MINN. STAT. § 629.72 (Supp. 1981); N.C. GEN. STAT. § 15A-534.1 (Supp. 1981). See also TASK FORCE REPORT, *supra* note 12, at 105-06 (states should adopt statutes permitting overnight incarceration in domestic violence cases). Denial of bail is proper if necessary to protect a witness. See *United States v. Carbo*, 288 F.2d 282, 285 (9th Cir. 1961), *cert. denied*, 396 U.S. 868 (1962). Therefore, a 24-hour no-bail rule for batterers would constitute a legislative finding that, in light of the battering cycle, abusers should be incarcerated for that amount of time in order to insure that they do not reinjure their wives.

304. See *supra* text accompanying notes 194-95 and *infra* text accompanying notes 342-44.

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resume her relationship, his bail should be conditioned on his staying away from her.³⁰⁵ If he violates this condition, bail should be revoked.³⁰⁶

C. Prosecutorial Response

The police can only activate the legal process. In order to break the cycle of violence permanently, prosecutors and judges must use their power to cancel the batterer's "hitting license." Like the police, these legal officers have erred in their historical reactions to abuse.³⁰⁷ This subsection will detail proper prosecutorial conduct.

Once prosecutors accept the serious, criminal nature of battering, they should conclude that the state has a duty to pursue wife beating cases.³⁰⁸ Under this view, the victim is not the leader of prosecutorial efforts; rather, she is a witness whose participation the state must support and encourage.

305. It is generally agreed that judges have inherent authority to set such conditions on bail. *Jacobson v. Schaefer*, 441 F.2d 127, 130 (7th Cir. 1971). Therefore, no legislative change is necessary to effectuate this policy. However, a specific authorizing statute, *see* statutes cited in PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 87 n.9, may be helpful to remind judges of their power and to encourage them to use it. Violation of such an order should be made a separate crime. *See* CITY OF SEATTLE MUNICIPAL CODE § 12A.04.195, *cited in Elements and Standards, supra* note 220, at 13.

It is also important that authorities keep the victim's whereabouts confidential, so that the batterer cannot try to intimidate her. PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 54.

306. Here again, accurate recordkeeping is important. When police are called to a subsequent disturbance, they need to know that the batterer is violating a court order and is therefore subject to arrest even if he has committed no new act of violence against his wife. PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 77.

307. *See, e.g.*, authorities cited in Pence, *supra* note 9, at 248–49 nn.9–15; RULE OF THUMB, *supra* note 6, at 93 (prosecutors have often treated the victims of abuse as if they were the criminals); PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 15–17; Comment, *supra* note 5, at 563. *See infra* notes 342–44 and accompanying text for a discussion of unhelpful judicial attitudes toward battering.

Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIM. 56 (1984) is a fascinating treatment of the subject of prosecutorial attitudes toward battering. Ellis constructs an imaginary conversation between a "Questioner," who wants to know why prosecutors so often fail to press charges in domestic violence cases and an all-too-realistic "Prosecutor," whose rationalizations for this failure include the perceived nonseriousness of many spousal assaults, *id.* at 62–70, the supposed inappropriateness of state intervention into "private" family disputes, *id.* at 70–76, and the perception of the victim as not credible, as having provoked the assault, or as unwilling to cooperate with the prosecution, *id.* at 76–95.

308. *See* LOS ANGELES CITY ATTORNEY CRIMINAL BRANCH TRIAL MANUAL, Chapter 5, *quoted in Elements and Standards, supra* note 220, at 13: "The decision to prosecute a criminal case is the responsibility of a public prosecution agency, not the victim of the offense."

Prosecutors also play an important "middleman" role in the criminal justice system; they are in a unique position to educate and influence both police and judges. *See* Belsky, *On Becoming and Being a Prosecutor*, 78 Nw. U.L. REV. 1485, 1512–13 (1984). Prosecutors can improve judicial performance by recommending appropriate dispositions for abuse cases, *see infra* text accompanying notes 328–35. They can help the police by communicating their commitment to vigorous enforcement of anti-domestic violence laws. Such a commitment encourages both arrest of batterers and better evidence-collection procedures. *See* PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 36–38.

In order to provide that support and encouragement, prosecutors must understand the special relationship between victim and accused in the family violence context; however, that special relationship does not excuse a lack of prosecutorial initiative. Indeed, assertiveness from the state's attorney is even more necessary in abuse cases than in crimes between non-intimates. A neutral prosecutorial stance—one that gives the victim great freedom to choose not to pursue criminal action—may have merit when the victim's decisions are reached freely.³⁰⁹ However, when the accused has great emotional and physical influence over the victim, the state should exert more of its authority on behalf of the victim.³¹⁰

A commitment by the state's attorney to assume responsibility for prosecution of wife abuse must be translated into concrete policies and procedures. The first such policy is one that strongly favors the filing of charges in battering cases.³¹¹ The level of proof required to support the filing of charges should be no greater than that required in incidents between strangers, nor should the prosecutor refuse to file based on a general assumption that abused women will not be willing to testify against their husbands.³¹²

Prosecutors' offices must make pursuit of battering cases a priority, and must have trained staff who are experts in dealing with the problem.³¹³ If

309. *But see* UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, VICTIM AND WITNESS ASSISTANCE 2-3 (May 1983) (criminal justice personnel have increasingly realized the need for assistance programs for all victims, regardless of their relationship to the accused). One tangible way in which domestic violence victims could be helped would be to make them eligible for victims' compensation programs, something that only a few states currently permit. *See* Reamey, *supra* note 12, at 1294 (Texas law denies compensation if victim resides in same household as offender). *See generally* A Survey of 27 Victim Compensation Programs, 63 JUDICATURE 485 (1980).

310. *Cf.* A. GANLEY, *supra* note 95, at 88 (it is unrealistic to expect battering victim to be primary motivator of change in her abuser, in part because she is in crisis and a primary characteristic of someone in crisis is inconsistency).

311. RULE OF THUMB, *supra* note 6, at 94. Prosecutor's offices that have adopted such policies include those in Los Angeles, California and Duluth, Minnesota, *The Silent Crime*, *supra* note 3, at 26. The filing guidelines adopted by the King County, Washington (Seattle) Prosecuting Attorney's Office, *reprinted in* PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 169-86, are particularly well done.

312. Many prosecutors still follow these misguided principles. *See, e.g.*, RULE OF THUMB, *supra* note 6, at 33; Comment, *supra* note 5, at 564. Prosecutors may sometimes discourage a victim unintentionally, by making her feel that she is responsible for whatever penalty the abuser received. PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 33. Given the battered woman's guilt and her husband's power over her, prosecutors must help her see that the batterer's problems with the law result from his violence, not her testimony against him.

Prosecutors may also assign a low priority to domestic violence cases because they assume that the chances of obtaining a conviction are low and that therefore involvement in such cases will not advance their careers. *Id.* at 33. While historically it has been harder to obtain a conviction in non-stranger vs. stranger crimes, RULE OF THUMB, *supra* note 6, at 33, this is not inevitably the case, *see infra* note 314.

313. In large urban areas, it may be appropriate to assign one or more prosecutors full-time to a domestic violence unit. PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 56. Jurisdictions with such units include Philadelphia, Seattle, Los Angeles, Santa Barbara (California), Miami, Westchester County (New York), and New York City. J. HAMOS, *supra* note 7, at 40 n.5. PROSECUTION OF SPOUSE

these staff members sympathize with the abused woman's dilemma, and take time to explain to her the advantages of testifying, they can greatly enhance the chances of her cooperation and the abuser's conviction.³¹⁴

Perhaps the toughest question for the prosecutor comes when, despite his or her best efforts, a battered woman insists that she wishes the charges against her husband dropped.³¹⁵ In response to this problem, some prosecutors' offices have instituted "no-drop" policies in abuse cases. Where such policies exist, the prosecutors will decline to drop charges based merely on the victim's request.³¹⁶ In at least one case, an overly zealous prosecutor went one step further by using the court's subpoena power to compel the victim's testimony and jailing her for contempt of court when she refused to testify.³¹⁷

The basic theory behind no-drop policies is sound, since it constitutes a strong statement of societal responsibility for deterring batterers. Additionally, such policies rob the abuser of much of his coercive power against the victim. However, except perhaps in cases of severe violence or recidivism,³¹⁸ battered women should not be further victimized by being held in contempt if they remain staunch in their unwillingness to testify.³¹⁹

ABUSE, *supra* note 110, and *Elements and Standards*, *supra* note 220, both contain detailed descriptions of devices that have proven useful in increasing cooperation from battering victims.

314. See, e.g., *The Silent Crime*, *supra* note 3, at 26 (conviction rate in Duluth increased from 20% in 1979 to 82% in 1983); PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 34 (victim cooperation increased dramatically in Santa Barbara, Los Angeles, and Seattle, and in some places is now comparable to cooperation rates for victims of stranger to stranger crimes).

315. When prosecutors deal seriously with abuse, this question often becomes academic. Once the batterer realizes that the prosecutor "means business," he will often plead guilty. *The Silent Crime*, *supra* note 3, at 26; see also Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585, 597-98 (1970) (domestic violence cases rarely present serious issues of guilt).

Prosecutors can also increase the likelihood of victim cooperation by tailoring their recommendations to the victim's needs and desires. Thus, if she wants the abuser to receive counseling, the state's attorney can help her realize that her testimony against her husband is a means to that end. See *Elements and Standards*, *supra* note 220, at 13.

316. See PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 13.

317. *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J. Aug. 22, 1983, at 4, col. 3 & 4 [hereinafter cited as *Victim Jailed*] (case involving battered woman Maudie Wall of Anchorage, Alaska). A similar tactic was used in a much-publicized child sexual abuse case in Solano County, California. A 12-year old girl was placed in solitary confinement when she refused to testify against her stepfather, who had allegedly fondled her. She was released a week later when it became apparent that she was not going to change her mind. "No-Drop" Prosecution Policies Sometimes Backfire Against Victims, RESPONSE TO VIOLENCE IN THE FAMILY AND SEXUAL ASSAULT (May/June 1984) at 5.

318. In such cases, the state's interest in preventing severe violence may override the victim's wishes. In making these decisions, the prosecutor must be in a position to insure the victim's safety. See S. SCHECHTER, *supra* note 1, at 175 (advocates for battered women fear that prosecutors will not give adequate consideration to victim safety). Cf. Lerman, *supra* note 1, at 140-41 (in reinstating charges when diversion to counseling fails, prosecutors must consider whether they can give the abused woman adequate protection).

319. See *Victim Jailed*, *supra* note 317, at 5 (Jeanine Firro, prosecutor in Westchester County, New York, who has overseen that office's no-drop policy for six years, quoted as disagreeing with action taken

The prosecutor should first consider whether the charges can be proved without the victim's testimony.³²⁰ Failing that, the state's attorney should delay dropping charges, perhaps for a period of thirty days or so.³²¹ During this period, the contrite phase may (unfortunately) pass, and the victim may again be prepared to cooperate.

If the prosecutor decides to go forward, he or she must next determine whether a case is appropriate for pretrial diversion. Such diversion should occur as soon as possible after the batterer's arrest and should emphasize counseling for the batterer,³²² rather than couples counseling or family mediation.³²³ Diversion can be advantageous but also treacherous. On the positive side, diversion can be accomplished more swiftly than full-scale prosecution, thus taking advantage of the batterer's high motivation during

in Anchorage case; she stated that her office has never sought contempt against a recalcitrant abuse victim).

320. See St. Petersburg Times, May 16, 1983, at 1B, col. 1 (Connie M. Burnett, Special Projects Coordinator for State's Attorney's Office in Pinellas County, Florida, notes that police reports, testimony from persons other than the victim and evidence collected by the police are sometimes sufficient to go forth without the victim's testimony). Of course, the abuser can subpoena his wife. However, the sources that discuss ways of proving the prosecution's case without her testimony do not discuss that possibility. From this it will be inferred that, because of their relationship, he will not usually force her to testify either for or against him.

321. Ohio has adopted such a policy, see J. HAMOS, *supra* note 7, at 43; see also *Elements and Standards*, *supra* note 220, at 13 (in Seattle, victim is told that dismissal will not occur until time of trial: if she can at that time truthfully testify under oath that her desire to drop charges is not the product of threats or coercion, charges will be dropped).

322. A. GANLEY, *supra* note 95, is an in-depth description of a program for batterers. The goal of any such program must be behavior-oriented: the abuser must stop battering. Other goals that the batterer may have (such as keeping his marriage intact), may be a basis for motivating him, but are not an appropriate focus of therapy. Cf. *supra* text accompanying notes 93-95 (family unity not appropriate as a primary goal of criminal law system). Group therapy with other batterers is generally considered to be the most appropriate type of counseling. J. FLEMING, *supra* note 56, at 298. But regardless of the specific techniques employed, the abuser's denial and externalization must be confronted and he must be forced to accept responsibility for his behavior. The batterer must then be helped to learn how to react to stress non-violently.

If the therapy is successful and the couple is still together, then couples counseling may be appropriate. At the point where the man is no longer violent, counseling for both partners can rebuild trust and improve channels of communication that battering distorts. However, the counselor must be knowledgeable about the dynamics of battering, and must make sure that both people are taking responsibility for their own actions and are not falling back into old, destructive patterns. A. GANLEY, *supra* note 95, at 91-92.

323. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984), persuasively argues that mediation is an inappropriate response to family violence. Accord, Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 L. & INEQUALITY 493 (1984). But see Bethel & Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15 (1982) (mediation can be effective in some domestic violence cases); Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 J. LAW & INEQUALITY 21, 30-31 (1984) (criticism of mediation assumes that formal legal system will deal better with the problem of male domination than will mediation).

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the contrite, loving phase.³²⁴ Under these circumstances, there exists a greater likelihood that counseling will succeed in changing the abuser so much that he can stop his violent behavior. Diversion also permits him to earn a living so he can support his family, and even maintain a relationship with his wife, if that's what she wants.³²⁵ The dangers of pretrial diversion to counseling include its possible misuse by prosecutors who do not want to be bothered with what they perceive as trivial cases³²⁶ and its being used as a haven for abusers who merely want to avoid going to trial.³²⁷

Safeguards must be established so that the benefits of counseling can be reaped and its pitfalls avoided. The first safeguard is to set selection criteria for which batterers will be allowed to choose diversion to counseling. Batterers who are charged with inflicting serious injury or those who have previously participated in a diversion program should be excluded. The former group should not be diverted, at least at the pretrial phase, because diversion is not a strong enough message that their conduct is socially intolerable.³²⁸ The latter group consists of men whose past history shows that counseling has not altered their behavior. Consequently, they must be forced to pay a greater price for their violence in the hope that an increased penalty will result in increased motivation to change.³²⁹

For those men who qualify for pretrial diversion under the selection criteria just discussed, the victim's consent should be required before diversion is permitted.³³⁰ This requirement recognizes that she knows the batterer better than the prosecutor does, and that she stands to lose most if

324. See PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 96 (Domestic Intervention Program in Miami tries to interview potential candidates for diversion while they are still being held overnight in jail; batterers in this group are typically much more receptive than those who are considered for diversion at later points in the legal process).

325. See *id.* at 49 (it is important for prosecutors to match the legal system's desire for deterrence with the victim's needs; doing so increases likelihood of successful outcome).

326. S. SCHECHTER, *supra* note 1, at 166-67.

327. PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 96. Jeffrey Perez, who runs a program for batterers in New Orleans, recognizes how easily batterers can manipulate an unwary legal system: "These guys are real slick and real glib. They can play therapy off against the court system and not have to be responsible." *The Silent Crime*, *supra* note 3, at 26.

328. See RULE OF THUMB, *supra* note 6, at 94; MODEL TREATMENT PROGRAM, *supra* note 36, at 52 (Cook County, Illinois program accepts pre-trial diversion only for men charged with a misdemeanor, not felonious assault). Lerman would permit prosecutors to divert cases even if serious damage had been inflicted. See Lerman, *supra* note 1, at 136-37. However, her proposed statute lists the degree of the defendant's violence as a criterion that prosecutors should weigh in making the diversion decision.

329. See Lerman, *supra* note 1, at 136 (proposed statute bars previously diverted abusers from pre-trial diversion program).

330. *Id.* (model statute required that victim give her consent only after a consultation outside the defendant's presence). Of course, without an adjudication of guilt, the defendant's consent to any type of pretrial diversion, including counseling, is a constitutional requirement.

the diversion is unsuccessful.³³¹ Further, because a battered woman will invariably minimize her assailant's actions, she should be believed when she says that diversion will not deter her partner's violence.³³² The requirement of victim consent for diversion contradicts the general principle that the victim is not responsible for the batterer's punishment, but it guards against prosecutors using diversion as a dumping ground for unwanted cases. In this instance, victim safety must come first.³³³

The most important safeguard to insure the proper use of pretrial diversion to counseling is the prosecutor's staunch commitment to the reinstatement of charges if the batterer engages in violent conduct or otherwise violates the rules imposed by the counselor.³³⁴ This commitment must be unequivocally communicated to the batterer so that he knows that counseling cannot be used to evade responsibility for his actions.

Some may argue that counseling will not work with reluctant patients, and that batterers will not benefit from treatment if they agree to it merely because they find it preferable to prosecution. Such a blanket assertion fails to recognize the interplay between internal and external motivators. Batterers rarely acknowledge their problems without outside pressure.³³⁵ Even with such pressure, some batterers will not change, but with others there is hope that external compulsion will ultimately transform into internal accountability.

When batterers successfully complete a counseling program, they will be rewarded with having the charges against them dropped.³³⁶ However, the possibility of backsliding must be acknowledged. Thus counseling programs should conduct follow-up visits to ensure that recovered batterers have remained non-violent.³³⁷

331. These factors distinguish spouse abuse from other types of crimes, where victims are given at best consultative rights. However, a recent trend has been to increase the rights of victims of all types of violent crimes. See generally *Symposium: Victims' Rights*, 11 PEPPERDINE L. REV. 1 (1983).

332. For this reason, it would be rare for a victim to withhold her consent in a case where a conscientious prosecutor seeks diversion.

333. If prosecutors could be trusted to use their discretion wisely, similar results to a victim's consent requirement would be achieved through a policy that the victim's wishes are to be accorded great but not binding deference, especially when the victim opposed diversion.

334. S. SCHECHTER, *supra* note 1, at 166-67. Because batterers deny and minimize, the counseling program must maintain communication with the battered woman to make sure that further abuse is not occurring. *Id.*

335. A. GANLEY, *supra* note 95, at 87. Legal compulsion can be effective not only in getting an abuser into a treatment program, but in motivating him to stay in it. *Id.* Cf. Lerman, *supra* note 1, at 142 (desire to avoid a criminal record is often a strong incentive for batterers to successfully complete a diversion program).

336. Although their official records should be expunged, private records should still be kept for future reference. Lerman, *supra* note 1, at 141-42.

337. A. GANLEY, *supra* note 95, at 92.

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All the prosecutorial actions suggested in this section could be accomplished without statutory amendments. As with the police, however, it may be advisable for the legislature to nudge prosecutors into action. A specific legislative statement that each state's attorney bears responsibility for the prosecution of spouse abuse cases would be helpful.³³⁸ Legislation might also require special training for prosecutorial staff, indicate appropriate means for encouraging victim participation in abuse prosecutions, and set parameters for diversion programs.³³⁹

More drastic and specific legislation on the prosecutorial role in wife abuse cases is not currently appropriate. First, excessively rigid laws could potentially oppress abuse victims.³⁴⁰ Second, as long as we know so little about how to deter batterers, we should not lock ourselves into programs that may prove ineffective.³⁴¹ Finally, because police response has been so limited to date, we cannot be sure how state's attorneys will respond once faced with the increased caseload that will occur once police start taking battering seriously. If prosecutors do not respond appropriately, then tougher, more confining legislation may be necessary.

D. Judicial Response

The judiciary is the final element of the criminal justice system. Because police and prosecutors have usually siphoned off battering cases from criminal treatment, judicial attitudes are largely untested. Still, what information is available is not encouraging. Operating on ignorant assumptions, judges often inquire into victim provocation and abuser excuses, and may consider both as mitigating factors.³⁴² Even if the batterer is convicted, his

338. Cf. Lerman, *supra* note 1, at 121–24 (establishing duties for police in domestic abuse cases). More generally, it may be helpful to include in domestic violence statutes legislative “findings” about the seriousness of domestic violence and the state's obligation to curb it. Such findings do more than educate legislators and the public. They also leave a permanent legislative history that might not otherwise be compiled. *Id.* at 67–71.

339. See, e.g., *id.* at 135–43 and statutory provisions cited therein.

340. See *supra* text accompanying notes 315–20.

341. See PROSECUTION OF SPOUSE ABUSE, *supra* note 110, at 111 (there are no hard statistics about the success of diversion programs for batterers).

342. In the process of compiling its report, RULE OF THUMB, *supra* note 6, the United States Civil Rights Commission heard testimony from a number of judges. Its findings are not encouraging. For example, many judges believe that battered women are masochists or that they exaggerate the seriousness of the violence they suffer to punish “philandering husbands or boyfriends.” *Id.* at 56. Others adhere to “family privacy” myths, one going so far as to chide a battering victim for washing her “dirty-linen in public.” *Id.* at 56–57.

It is all too common for judges to blame the victim for failing to take action against the abuser. *Id.* at 49. Or they may be more comfortable with perceiving wife beatings as merely “isolated incidents of aberrant behavior between consenting adults rather than as examples of a widespread societal prob-

penalty may be no more than a stern lecture from the judge, perhaps ending with the extraction of a promise that the abuser will not hurt his wife again.³⁴³ Judges have been unduly reluctant to sentence batterers to jail, often deferring excessively to the victim's wishes or overemphasizing family unity.³⁴⁴ Even supervised probation or court-ordered counseling have only recently become alternatives.

Many factors, including age, limited turnover, inclination toward traditional attitudes, and male domination of the profession, make a sharp turnaround in judicial attitudes toward battering unlikely. However, prosecutors can help transform judicial perceptions. They can educate judges about the true nature of the abusive relationship—including the uselessness of “the lecture” as a deterrent—and steer judges away from such false issues as provocation. Further, if state's attorneys seek appropriate punishment for abusers, judges may defer to the prosecutor's judgment.³⁴⁵ Legislatively, we need firm and strict sentencing guidelines for batterers, guidelines that treat recidivism harshly.³⁴⁶ There should be statutory safeguards to ensure that judges do not seek refuge in knee-jerk referrals to counseling.³⁴⁷ When counseling is an appropriate alternative, the legal system's interest in permanent deterrence must be protected. This can be accomplished by incorporating the counseling component into a supervised probation program, under which battering, harassment of the victim, or failure to comply with counseling criteria will result in automatic revocation of probation.³⁴⁸ Legislation should also encourage the imaginative use of judicial discretion. Judicial power does not need expansion, but judges need to be reminded of their ability to order a wide range of

lem.” *Id.* at 96.

By failing to understand the battering relationship, judges may in effect encourage evasion of responsibility. *See, e.g.*, S. SCHECHTER, *supra* note 1, at 26 (judges may discourage victim from pursuing legal remedies by saying such things as, “You don't want him to go to jail, do you?”).

343. Parnas, *supra* note 315, at 598–99.

344. *See* RULE OF THUMB, *supra* note 6, at 56–59 (judges believe strong legal action may lead to breakdown of the family, which is per se bad). A chilling example of how family unity is sometimes valued more than victim safety is *Librizzi v. Chisholm*, 55 A.D.2d 954, 391 N.Y.S.2d 154 (1977). In that case, the wife had been stabbed seriously enough to need hospitalization. The family court had therefore decided to transfer the case to criminal court. The appellate court reversed this decision, saying that the family court should handle the matter and encourage the parties' reconciliation. The husband's violence “was thus treated merely as an incident of the marital relationship, and apparently the possibility of reconciliation can outweigh any degree of severity.” Comment, *supra* note 5, at 567 n.109.

345. *See* Belsky, *supra* note 308, at 1513 (judges look to prosecutors for information on a variety of issues, including bail, diversion, and sentencing).

346. *See, e.g.*, FLORIDA SENTENCING GUIDELINES COMMISSION, GUIDELINES MANUAL 1–3 (1983) (establishing guidelines for sentencing; extent of victim's injury and perpetrator's prior record important elements of scoring system).

347. *Cf.* guidelines for pre-trial diversion discussed *supra* text accompanying notes 328–33.

348. J. FLEMING, *supra* note 56, at 232–33. *See also* RULE OF THUMB, *supra* note 6, at 96 (mandatory counseling programs can be effective, especially if they come after conviction).

alternatives in dealing with battering cases. Because the discretion of the criminal sentencing judge is so vast, judges should use this discretion to insure protection of victims and their children, as well as to deter abusers.³⁴⁹

VI. CONCLUSION

The roots of battering run deep in American society. For every person—whether police officer, prosecutor, judge, legislator or citizen—who has come to understand wife abuse, there are many more who remain ignorant. For every person who is willing to face up to the problem, there are many more who want to pretend that it doesn't exist or that it only happens to other people.

We have made a start. As Gloria Steinem noted, it is a measure of progress that today we have a term for battering. "A few years ago, [it was] just called *life*."³⁵⁰ We must continue to strive on all fronts to destroy the weed of family violence. The job will not be finished easily or soon. The law cannot do the job alone, but it can help. If we want a less violent future for our children, we cannot afford complacency. Legal reforms can bring us closer to the day when "you can't beat a woman" is a reality and not just a slogan on a button.

349. Non-contact orders with victims are appropriate, as are orders specifying conditions for visitations with children. The latter is important since visitations are often a pretext for further battering. See, e.g., *INTIMATE VICTIMS*, *supra* note 16, at 16.

350. G. STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 149 (1983).