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PROTECTING BATTERED WIVES: THE AVAILABILITY OF LEGAL REMEDIES

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ABSTRACT

Abused wives have often times been victims of neglect by legal authorities due to the long-held belief that the criminal law system should not intrude into family problems. Unfortunately, this attitude ignores the seriousness and extent of spousal violence. This paper first examines traditional legal thought with regards to violence in the family. It is then argued that drafting new laws may help to protect the battered wife, but other considerations such as enforcement and community support must be addressed if law is to provide effective remedies. Remedies other than criminal ones should be pursued exhaustively in the attempt to achieve a permanent, long-term solution. A balanced approach is urged where spouse violence is treated as a serious law enforcement problem, but not where every interaction is subject to criminal sanction.

The proper role of law when dealing with family disputes and violence has been subject to considerable re-interpretation and debate. There was a time in ancient Rome when the legal system could not interfere with the husband's control of intra-family affairs unless he acted in a manner which could be viewed as exceedingly unreasonable or unjust. Even decisions of life and death were entrusted in the male. This extreme situation has slowly been changed so that it is now permissible for the civil law system to impose itself on certain family matters. However, the same cannot be said for the criminal law system.

This paper will examine the past roles of the civil and criminal law systems in regulating intra-family conduct and will examine the issues surrounding proposals for increased criminal law intrusion into the family. First, an overview of family violence will be presented, with the main focus on spouse violence. Second, a look will be taken into the American and English legal traditions with respect to spouse behavior. Finally, if in certain instances criminal law remedies are to be preferred over matrimonial ones when dealing with family violence, what types of enforcement problems could be anticipated ?

The Nature and Extent of Spouse Violence

Due to difficulties of measurement and a general lack of empirical data, the extent of spouse violence is not accurately known. What does seem certain is that there is in fact widespread abuse occurring in American families resulting in numerous injuries. To begin with, the home is a setting where high intensity emotions are likely to be found (Goldstein, 1975:66). There is a great deal of evidence which would support this contention. The risk of serious attack from a spouse, family member, or friend is almost twice as great as from strangers (Eisenberg and Micklow, 1977:140-141). In a study of Detroit, it was found that 76.4 percent of conflict motivated homicides occurred in private homes and 28.7 percent of the time it occurred in the home shared by both the victim and the perpetrator (Bannon, 1973). In Chicago, between September 1965 and March 1966, 46.1 percent of all major crimes except murder perpetrated against women took place at home (Martin, 1976:11). Of the figures available on domestic complaints, 82 percent in Montgomery County, Maryland, were filed by women (Martin, 1976:13). One could also cite increasing divorce rates as further evidence of spouse conflict, although there may be other factors which have led to this increase.¹

Knowing the approximate extent of the problem or that a problem exists at all are not the only important aspects. In determining what the role of criminal law should be, it is also important to look at the form that this violence takes.

It is the wife who is usually the initial victim. In a study by Richard Gelles, it was found that 47 percent of the husbands surveyed hit their wives at least once a year, while 25 percent hit their wives from six times a year to daily (Gelles, 1974:50-51). These assaults normally occur in the kitchen or bedroom, with most homicides occurring in the latter. They are also more likely to occur on weekends and on holidays (Gelles, 1974:106-107, Pokorny, 1965). This violence rarely takes place if an individual who is not a family member is present (Gelles, 1974:107-108). Finally,

¹One such factor is the change which has occurred in divorce laws. Since divorce laws now make it much easier to obtain a divorce, it would be expected that the rates would increase. However, since the rates are so high, it would seem safe to say that there is a great deal of conflict in the home. Of course this conflict need not be violent.

alcohol appears to be a factor, although it would be unsound to treat it as a casual one (Martin, 1976:55-56, Gelles, 1974:111, Michigan Women's Commission, 1977:19-20).

When these assaults occur, what factors influence the response which the wife will take? First, the availability and response of the legal system greatly affects the alternatives a wife has. The problem of non-response on the part of legal authorities will be dealt with at a later point, but suffice it to say that the criminal law system has frequently been accused of non-response; often times the result of written policy guidelines.

Second, the fact that safe houses are not yet a viable alternative for large numbers of battered wives also has a profound effect on the choice of response. These homes are few in number and have been severely limited by funding restrictions. Frequently those homes which have been established cannot provide needed services other than a place to temporarily hide out. This is unfortunate since a 1976 study showed that of a total of 101 victims of domestic violence in a Michigan county, 38.5 percent required housing, 33.3 percent required financial aid, 79.1 percent wanted legal information, and 77.1 percent wanted counseling (Michigan Women's Commission, 1977:123).

Third, many women cannot leave the abusive situation because of their inability to survive economically if they were to set up a separate household for themselves and their children (Chapman, 1978:253, Martin, 1976:83). In marriages where the husband is violent, he will often times effectively isolate his wife and will be in total control of the family finances (Chapman, 1978:253). In some states, if a wife leaves the household even to escape assaults from her husband, she may be found guilty of desertion and forfeit the right to alimony should she file for divorce (Chapman, 1978:254). Not only this, but a battered wife living in a shelter or in someone else's household frequently cannot qualify for welfare because Aid for Dependent Children regulations require that she have her own household.

Fourth, the medical profession, including psychiatrists, are of little help to the woman seeking an alternative to the violent home. Doctors seldom report abuse cases involving spouses (Eisenberg and Micklow, 1977:155). Women many times reject psychiatric help because of the stigma associated with such treatment and the cost of such treatment. Some victims have reported that their psychiatrists tell them they are "masochistic" and that "all women like to be dealt with

firmly" (Michigan Women's Commission, 1977:84-85). Unfortunately this attitude also pervades other professions including the legal profession.

Fifth, fear is a factor of importance when considering the possible responses of the wife. If there is a perception on the part of the battered wife that outside agencies such as the police, the medical profession, social service agencies, and the courts will not adequately protect her if she turns to them, the fear of retaliation by her husband may be overwhelming. She may feel it better to endure the present abuse rather than risk having to suffer worse beatings or assaults in the future.

In attempting to understand why there is still a great deal of non-response, it is useful to look at the American and English traditions in terms of the role of law in domestic matters. In both instances, legal tradition appears to be an important element in explaining present practices.

The American Tradition

While it is perhaps true that the United States is over-litigated, there has been a reluctance to extend the arm of the law into family matters. This is slowly changing, but present policy still reflects traditional legal philosophy.

The word "family" is derived from the Roman word familia, signifying the totality of slaves belonging to an individual (Martin, 1976:27). Wives were a part of this totality. Both women and children were considered property of the male head-of-the-household and they were subject to his desires as were any other slaves and property. As it was mentioned earlier, the male even had the power to take the life of his wife and children as long as he was acting in a just manner. For the most part, this strict patriarchal view was carried over to the United States and became an integral part of American law.

In the United States, women were considered property and the male was expected to exercise control over her. In certain instances the male was legally responsible for the actions of his wife. If a woman attempted to assert herself, it was expected that the husband beat her to keep her in line. Our law permitted this wife-beating for correctional purposes within certain limitations. This is evident in a series of North Carolina cases in the late 1800's. In one, State v. Black, it was stated, "A husband is responsible for

the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself (60 N.C. 262 (1864))." The only limitations placed upon this use of force was that it not cause permanent injury and that he not hit his wife with a switch thicker than his thumb (State v. Rhodes, 61 N.C. 453 (1868)).

What was especially evident in these opinions was the treatment of the family as a separate government with the husband as the ruler. This view of families led to the legal system refusing to impose itself on family matters for fear that by imposing itself, it would only disrupt family living rather than provide cures for certain conflicts.

Every household has and must have a government of its own, modeled to suit the temper, disposition, and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day will be remembered for life...We will not inflict upon society the greater evil of raising the curtain upon domestic privacy to punish the lesser evil of trifling violence" (State v. Rhodes, 61 N.C. 453 (1868)).

In 1874, there appeared to be a change in approach by the North Carolina Court. It was stated, "We may assume that the old doctrine that a husband had a right to whip his wife, provided he use a switch no larger than his thumb, is not law in North Carolina...The husband has no right to chastise his wife under any circumstances (State v. Oliver, 70 N.C. 60 (1874))." However, the Court still refused to expand its own role in handling domestic disputes: "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

Another interesting phenomenon in the American tradition is the

so-called marriage contract. A marriage contract is unlike most other contracts. Its provisions are unwritten, its penalties are unspecified, and the terms of the contract are typically unknown to the 'contracting' parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any options in most cases about these terms. One wonders how many men and women would agree to the marriage contract if they were given the opportunity to read it and to consider the rights and obligations to which they were committing themselves (Weitzman, 1974:1170).

Common law saw the marriage contract as an incorporation of the legal rights of the woman into those of the husband. The very legal existence of the woman was to be suspended during the marriage (Martin, 1976:36). This was known as the Law of Coverture. Some recognition of the woman's legal existence began to occur with the passage in some states of the Married Women's Property Acts. These allowed women to retain control over property they may have had before marriage and to seek employment and retain their earnings. Recently, most states now allow the woman to break the marriage contract (divorce) if her husband has been adulterous, has inflicted mental or physical cruelty, and in some states, there need be no fault to break the marriage contract.²

It can be seen that the American legal system has been very reluctant to interfere with family matters and the rights of the husband. It should be noted that this discussion of legal tradition is far from comprehensive and has only dealt with the judicial tradition. Later, when enforcement is examined, the actions of the police and prosecutors will be looked at.

It would be a mistake to leave the impression that the American perspective has not changed over the years. The civil law system has become increasingly active as evidenced by new child custody laws, by an acceptance of divorce litigation, by improving the availability of restraining orders against the husband, and in some states by the imposition of marriage property laws on individuals living together, but not legally married. It is also now possible to bring tort actions against a spouse in certain instances. However,

² Many states had allowed only one ground for divorce; that being adultery by the woman. Therefore, it was virtually impossible for a woman to obtain a divorce since adultery on the part of the husband was not recognized in many places as a legitimate ground for divorce.

it must again be emphasized that the criminal law system has not undergone as much change and has remained relatively static over the years.

The English Tradition

As might be expected, the English and American traditions are very similar. The value in looking at the English tradition separately is that it is not marked by the numerous variations due to differing state laws. It can provide a clear picture of the changing role of law in family matters and these changes are very similar to those which have occurred in many U.S. jurisdictions at various times. Of special interest in the English tradition is the concept of cruelty and its evolution.

The concept of cruelty was first incorporated into the law as a defense to a petition for restitution of conjugal rights. No one would compel a wife to return and grant conjugal rights to a husband from whose cruelty she had fled. Cruelty at this point in England was defined as deadly hatred between the spouses evidenced by violence causing danger to life (Biggs, 1962:10).

Later, as a result of action taken by the Roman Catholic judges of the English ecclesiastical courts, cruelty was made a ground of divorce a mensa et thoro. "When it has been said on one hand that 'the wife need not comply with the husband's request to resume cohabitation because he has been cruel', it was not hard to extend it on the other by saying 'The wife need no longer live with her husband because he has been cruel' (Biggs, 1962:10)." This type of divorce was not legally permanent, but was similar to the notion of separation today. Marriage still remained indissoluble by the courts. Only a private Act of Parliament could permanently dissolve a valid marriage.

In 1857, the Matrimonial Causes Act was passed. It created a Court for Divorce and Matrimonial Causes to take over the duties previously held by the ecclesiastical courts. A decree of 'judicial separation' was permitted and in addition to adultery and cruelty, desertion for two years or more was added as a grounds for divorce a mensa et thoro. Cruelty was also recognized as an aggravating feature in a petition for divorce a vinculo matrimonii on the ground of adultery (Biggs, 1962:12).

The Matrimonial Causes Act of 1937 extended the grounds for divorce beyond adultery by including the new grounds of cruelty, desertion for three years, and incurable insanity. Of course these

new grounds for permanent legal divorce could hardly be described as overly lenient by today's standards, and one is struck by how recent this change was.

In terms of definitional evolution, the concept of cruelty was expanded to include threats of violence and the admission of conduct from which the likelihood of subsequent violence might be inferred. Later, even non-violent conduct or threats were included in the definition of cruelty. These areas of cruelty include drunkenness, willful communication of venereal disease, provocation, abuse, false accusations, nagging, maltreatment of children, offenses against third parties, and other abnormal marital relations (Biggs, 1962).

What can be seen above is very similar to the American trend; an expansion of civil or matrimonial remedies, but a strong reluctance to use criminal remedies. The English perspective views civil remedies as being more appropriate because they are more subjective and therefore more flexible than criminal standards. "On the one hand is the objective viewpoint of the criminal law, whereas on the other is the subjective attitude more appropriate to matrimonial law (Biggs, 1962:6)." Civil law is seen as more capable of dealing with the personality factors which lead to conflict in the marriage, whereas the criminal law theoretically must treat all parties the same if their conduct was the same. However, it is well established that personality does have some importance in the criminal law system, primarily evidenced in the sentencing stage.

If this attitude were to change in England, but more importantly in the United States, and criminal laws dealing with such offenses as assault and rape were modified to include offenses between spouses in the language of the statutes, would there be any significant change in the behavior of legal authorities? It is often naively assumed that changes in the written law are the ultimate solution to a particular problem. However, enforcement is perhaps the key to the success of any law, and there are some potential problems which could exist in the enforcement of criminal laws in family situations.

Criminal Remedies: The Enforcement Problem

Even with our existing set of laws, most of which can be applied in domestic situations, enforcement has been a very large problem. This problem encompasses the police, the prosecutor, and virtually any other legal actor. Each encounters unique obstacles and each

has developed ways to avoid enforcing criminal laws in domestic situations.

When a woman being assaulted by her husband calls the police, her call for help is usually given low priority. Del Martin (1976) suggests that it is not uncommon for responses to be anywhere from twenty minutes to several hours and that sometimes there will be no response at all. Police departments often use "call screening" because of understaffing, and those calls reporting family troubles are usually the first calls screened out (Michigan Women's Commission, 1977:70).

If the police do respond, they seldom take any action. Family disturbances are treated as an order maintenance problem rather than a law enforcement one.³ By the time the police respond, fear may have overcome the victim so that she will not desire to offer a complaint or to adequately describe the assault (Martin, 1976:76).

It would be a mistake to assume that all police departments would respond alike if new criminal statutes were adopted. James Q. Wilson describes three types or styles of police behavior: the watchman style, the legalistic style, and the service style. Understanding each of these makes it possible to determine within certain limitations whether or not changes in the criminal code would have any immediate practical significance.

The watchman style emphasizes order maintenance rather than law enforcement. This emphasis is made into the operating code of the

³Procedure outlined for police at the Police Training Academy in Michigan:

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

department. Police emphasizing this style tend to judge the seriousness of infractions less by what the law says about them than by their immediate and personal consequences. It therefore makes distributive justice the standard for handling disorderly situations (Wilson, 1974:157).

How are family disputes handled using this style? "For the most part, private disputes - assaults among friends or family - are treated informally or ignored, unless the circumstances (a serious infraction, a violent person, a flouting of police authority) require an arrest (Wilson, 1974:141)." What is interesting in the above passage is that an assault is not necessarily considered violent, since a "violent person" is treated differently from others. It seems therefore, that changes in the written criminal code would have little effect in those areas utilizing this police style.

In the legalistic style, the police will see law enforcement as their primary function. They will produce many arrests and are likely to intervene formally rather than informally. They will encourage the signing of a complaint rather than encourage conciliation as a means of avoiding future trouble.

Changes in the criminal code may be taken more seriously in this style. However, Wilson warns that private disputes are still seen as less important than public disturbances and that the police are willing to overlook certain situations. This points out a potential danger. Police in this style may not respond to family disputes at all. If they do respond, there is pressure from their administrators to arrest. The police may find arrest in domestic situations against their personal beliefs, and this might lead to them avoiding the situation entirely.

The service style is a middle approach where the police take seriously all requests for either law enforcement or order maintenance, but are not likely to use formal sanctions such as arrest. This style is usually found in homogenous, middle-class communities. Therefore, the police are very sensitive to community attitudes and will tend to act accordingly.

Wilson states, "though there will be family quarrels, they will be few in number, private in nature, and constrained by general understandings requiring seemly conduct (Wilson, 1974:200)." If the changes in the criminal code are the result of wide-spread community concern or are strongly supported by the community, the service style can be very effective in enforcement activities. This

is so because it has been noted that the police in a service style environment are very sensitive to community desires and attitudes. However, if the changes are the work of a few and are not representative of community norms, the service style may be the least effective of the three styles. One desirable aspect of this style is that it attempts to strike a balance between law enforcement and order maintenance; an approach which may be the best for domestic calls.

Besides these orientations of the police department, other factors will influence the degree of enforcement. Enforcement capabilities depend upon how much time and money are available. "First, a community decides how much it wants to invest, generally speaking, in law enforcement. Once that decision is made, there are subdecisions about how to parcel out these resources (Friedman, 1977:131)." Usually, police departments are understaffed and underfunded which leads to the "call screening" mentioned previously. Again, family disturbance calls will be given low priority because of this resource limitation, and changes in the criminal code are not going to change this situation.

Police are not the only crucial actors in the enforcement process. Prosecutors are also an important link. Standards set by prosecutors for accepting a case for trial are very strict and narrow which means that wife-assault cases will not often go to trial. No prosecutor is willing to stake his reputation upon the number of "family squabbles" he prosecutes (Eisenberg and Micklow, 1977:45). While this political reality is important, there are also practical problems which lead prosecutors to avoid taking wife-assault cases to trial.

Evidence problems are enormous. Since there are usually no witnesses to see any of the injuries being inflicted, it is often times just the word of the wife against that of the husband. With prevailing community attitudes toward female victims, the prosecutor is left with little chance of success; whether the case is heard by a judge or a jury.

Another problem is time and money; the same difficulty as the police face. Often times the woman will drop her complaint and therefore, the prosecutor is not going to give priority to such cases. He simply cannot afford the time and money to prepare the case and select a jury, only to have the wife back out. This has led to a "cooling off" tactic of delay. While the prosecutor has legitimate

reasons for using this method, it tends to compound the problem. The delays allow for more fear to grip the victim, only adding to the number of dropped complaints.

As it can be seen, enforcement of any new criminal laws dealing with family violence would be difficult. It has been a long-held tradition or custom that criminal laws should not be utilized in family matters. Whether or not this tradition can be changed or not, a necessary condition for effective enforcement, depends on a number of factors. These include: (a) the utilitarian and moral significance of the tradition to its adherents, (b) the extent to which the custom enjoys popular support, (c) the degree to which practice of the custom is visible to enforcement agencies, (d) the extent to which the custom is of such a nature that a general change may eliminate individual drives to follow it and, (e) the degree to which the change in custom meets current community needs (Zimring and Hawkins, 1971). Many of these factors present problems for any immediate hope of significant change. However, point (e) offers some hope since it is slowly becoming recognized that there is a need to deal with violence occurring in the home. The innovative function of law and its ability to redefine relations among people should not be minimized.

Recommendations and Discussion

1. There should be increasing use of civil and matrimonial remedies. More flexible divorce laws should help to allow women to escape abusive situations more frequently. Any moves to make divorce more difficult should be resisted. Stricter laws regulating the issuances of marriage licenses may be desirable. An especially promising area is the use of tort actions. With the partial demise of inter-spouse immunity doctrines tort actions could be used as a means of obtaining monetary help for those women who have found it necessary to leave the home. One desirable aspect of tort actions versus criminal ones is the burden of proof required of the women. In criminal cases the woman must prove her case beyond a reasonable doubt, but in civil cases her burden of proof would only be the preponderance of the evidence.

2. Assault within the family needs to be treated more as a law enforcement problem than it is currently. Quick police response is crucial, even if they decide to use informal tactics once they have arrived on the scene. No response on the part of the police is intolerable and displays gross indifference or ignorance of the potential danger facing the woman. Police officers need to receive

better training in order to effectively handle these cases. This training must include tension management and investigative techniques to be utilized when handling the report of violence in the home.

3. Research is needed to assess what combinations of police and community resources might be effectively used to handle complaints of domestic violence (Michigan Women's Commission, 1977:118). If there is to be effective enforcement of current laws or proposed new ones, the community must give support, both normatively and financially, to enforcement authorities such as the police and prosecutor.

4. There needs to be more pressure put on the medical profession to report suspected cases of spouse abuse and to cooperate more fully with legal authorities. Hopefully, educational programs for medical practitioners can accomplish this goal rather than punitive measures. The legal system must be seen by doctors as a potential friend, not an adversary.

5. Changes in the criminal code are needed to provide a catalyst for new attitudes and patterns of behavior. Self-defense laws should be rewritten to provide more flexible standards in wife-assault cases. However, over-criminalization must be avoided. Too often the criminal law ends up regulating conduct which should not be regulated by criminal laws. Solutions other than criminal remedies should be exhaustively pursued and these will probably be much more effective in the long-term. Issues such as marital rape must be approached very cautiously and all remedies other than criminal ones should be given full consideration. If this caution is not exercised, legitimate changes in the criminal code risk disrepute because of a few bad changes.

6. While safe houses have provided a much needed escape alternative for battered women, other alternatives need to be explored. The woman should not be the one to have to leave the home with her children and the legal system must provide a means for removing the offender quickly and effectively from the home. It is no wonder that many women return to the violent home when they are forced to live in a semi-institutional setting with their children.

To conclude, changes in the criminal code, while in many instances necessary, will not have much practical significance unless much broader and significant legal and social changes take place. Effective enforcement depends on community support. This may mean very

large resource allotments to community agencies and these prospects do not look good at the present time. In the move to show that assaults are not that different whether they occur in the home or on the streets, it should not be forgotten that the family is a unique social institution in many respects, and may require different approaches than is normally the case in criminal matters. A balanced approach is the best where violence is taken seriously as a law enforcement problem, but not where every interaction within the family is subject to criminal sanction.

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