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THE HALL OF MIRRORS: WIFE ABUSE AND THE LAW IN AN ERA OF SOCIAL CHANGE

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The feminist reform movement has focused public attention on the great number of women who are beaten by their husbands and the unresponsiveness of the legal system to this critical situation.[1] For all concerned with the dignity of women, eradication of wife abuse[2] is an essential goal.[3]

Many present and proposed solutions concentrate either on erasing the sexist attitudes which breed and condone wife abuse,[4] or on helping the beaten wife to become the kind of person unlikely to be victimized.[5] These approaches are inadequate solutions

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1. *See* Gingold, *One of These Days—Pow—Right in the Kisser: The Truth About Battered Wives*, MS., August 1976, at 51; Newman, *The Wife Beaters*, PARADE MAGAZINE, June 1975, at 37; Segal, *Violent Men . . . Embattled Women*, COSMOPOLITAN, May 1976, at 238; Stuart & McEvoy, *Middle Class Violence*, PSYCH. TODAY, November 1970, at 52; *Battered Wives: Cheswick Woman Paid*, NEWSWEEK, July 9, 1973, at 37; *The Wife Beaters*, MCCALLS MAGAZINE, June 1975, at 110; *The Wife Beaters*, WOMAN'S DAY, March 1976, at 61.

2. The term wife abuse, rather than wife battering or wife assault, is used throughout the article to avoid confusion with legal definitions of assault and battery. *See* Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 135 n.1 (1977).

3. *See, e.g.*, [1976-1977] 3 FAM. L. REP. (BNA) 2527 (report on International Law Conference on Violence in the Family).

4. Because wife abuse has only recently become a public issue, research into its causes has just begun. Of the theories so far advanced, those which concentrate on various manifestations of sexism and sex role stereotyping seem to offer the most reasonable explanations. The frustrations which a man experiences in trying to be powerful and "manly" in a social and economic environment wherein most people have little power or satisfaction can be vented on the one person over whom he has complete power. D. MARTIN, BATTERED WIVES 61-64 (1976). In addition, many people are socialized in a violent family environment. The sons of abusive husbands often grow up to abuse their wives. Similarly, many abused wives are the daughters of abused women. *Id.* at 22-24. Social pressures on a woman to maintain a happy home can produce the shame and guilt which lead many abused wives to endure the abuse rather than leave the home or seek help. *Id.* at 79-83. Finally, the sexist attitudes pervading the legal system exacerbate the problem and delay its solution. R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS 172-73 (1977).

5. One typical solution is expressed as follows:

> A woman must establish that she will not tolerate being beaten. She must issue an ultimatum and be prepared to back up her statements with action. Only after a husband is convinced that his wife will not put up with his abusive actions can any real progress be made toward changing his violent behavior.

R. LANGLEY & R. LEVY, *supra* note 4, at 203.

for the problem of wife abuse. Attitudes change slowly. Although sexism must be constantly challenged and combatted, the abused wife needs immediate and effective protection. In addition, although for an individual wife, self-help or self-reform is perhaps the only viable short term solution, we contend that it is irresponsible, immoral, and ultimately ineffective for the law to demand of the victim that she not allow herself to be victimized. The legal justice system must do more; it must act quickly and forcefully to protect a victim who, without such protection, will be forced to continue living with her assailant, subject to further attacks of increasing severity.[6] To adequately protect abused wives, the law, not the victim, must change.

An analysis of the nature of social change or revolution explains the dynamics of the social and legal structure which must be changed to effectively cope with the problem of wife abuse. Theorists of ideological revolution posit[7] that when a paradigm[8] in a particular region of human endeavor is challenged successfully it loses its universal influence. This brings on a period of crisis, characterized by conflict, contradiction, and controversy over competing perspectives[9] which continues until a new perspective gains universal acceptance and becomes the paradigm for that activity.[10]

At one time the universal view held that the relative positions of men and women were divinely ordained, naturally logical, and unalterable.[11] As a result of reformist activism that paradigm has

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6. *See generally* Gingold, *supra* note 1.

7. In this discussion, the term "ideological revolution" includes both social and scientific ideology. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970) (scientific ideology); Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286-87 (1962) (social ideology).

8. A paradigm is an accepted theory, view, or standard which supports an entire body of scientific or sociological activity. T. KUHN, *supra* note 7, at 10.

9. T. KUHN, *supra* note 7, at 93.

10. Woodard, *supra* note 7, at 287.

> History can . . . be viewed as the chronicle of the rise and fall of various standards. And the most cataclysmic phases in the saga of any society, the so-called "watershed" periods, are those in which fundamental standards are supplanted by new ones; standards which, by condemning conduct and conditions theretofore condoned, or vice versa, generate a new type of pressure either to reform the existing, or to devise new, social institutions.

Id.

11. "The biologists of the ancient world—of whom the foremost was Aristotle —had affirmed that, saving unusual circumstances, males of all species live longer than females. . . . Males represented the perfection of the human species; females were an imperfection of nature. . . ." Herlihy, *The Natural History of Medieval Women*, NATURAL HISTORY, March 1978, at 56. "Men live longer than women *naturaliter*, 'according to the natural order.' " *Id.* at 56, 59.

lost its universality.[12] Social and legal attitudes toward the status of women are clearly in a crisis stage,[13] and both civil and criminal law reflect uncertainty, ambivalence, and the presence of unsettled and opposing views.[14] Newly emerging standards, by condemning behavior which had previously been condoned, are generating pressure to reform the legal system's response to women who are abused by men.[15] In order to achieve justice, the legal system must apply to abusive husbands those sanctions used against persons who cause physical harm or death to others.

I. SOCIAL IDEOLOGY AND THE LAW

Efforts directed at changing the orientation of the legal justice system toward abused women and abusive husbands must incorporate an understanding of both the relationship between social values and the law, and the intrinsic characteristics of ideological revolution.[16] Past reformations of social and legal attitudes toward economic class structure and racial superiority suggest the manner

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12. "Whatever might have been the common law view of the right of a husband to chastise his wife, the modern view is clearly to the contrary and inhibits the use of physical force or violence upon the person of the wife." Berberian v. Berberian, 109 R.I. 273, 277, 284 A.2d 72, 74 (1971).

> For this Court now to act on Hawkins' formulation of the medieval view that husband and wife are "esteemed but as one Person in Law, and are presumed to have but one Will" would indeed be "blind imitation of the past." It would require us to disregard the vast changes in the status of woman—the extention of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English speaking world generally but emphatically so in this country.

United States v. Dege, 364 U.S. 51, 54, *rehearing denied*, 364 U.S. 854 (1960).

13. *See* note 16 *infra* and text accompanying note 29 *infra*.

14. See, for example, the discussion of interspousal tort immunity at text accompanying notes 117-48 *infra*.

15. For illustrations of changing standards and judicial attitudes in the criminal law, see note 49 *infra*.

16. T. KUHN, *supra* note 7. "Revolutions" of political and social ideology parallel those of scientific thought. *Id.* at 92. Scientific revolutions, Kuhn says, "necessitate the community's rejection of one time-honored . . . theory in favor of another incompatible with it." *Id.* at 6. They are always accompanied by controversy. "[E]ach transform[s] . . . the world within which scientific work [is] done." *Id.* Once the previous institution or belief has been challenged, a crisis occurs in which a choice must be made between competing paradigms. *Id.* at 93-94. Thus, once the concept of women as naturally inferior beings no longer held sway, the legal and social attitudes toward women were in crisis. The crisis exists today, resulting in contradictory societal responses, with controversy accompanying each change. Laws not enforced by police, prosecutors, or judges, and inconsistent police response to "domestic disturbances" furnish quick manifestations of the turmoil that inheres in the crisis stage. *See* text accompanying notes 49-115 *infra*.

in which statutory and case law develop to reflect social values. A brief digression to examine the effect of Social Darwinism and the industrial revolution on the status of the poor, and the social context of the rise and fall of the "separate but equal" doctrine will illustrate the pertinent relationships.

Social Darwinism applied theories of natural selection to social class structure; assuming that those who rose to the top did so because they were most "fit" and that the poverty stricken were at the bottom because they had been "selected out."[17] Continuing development of the industrial revolution altered society's concept of poverty. Under the new view, a person's economic status no longer reflected her or his character, but was instead a result of economic cycles beyond the control of the individual.[18] This modern approach removed much of the stigma from low economic status and made the poor deserving of social and legal assistance.

Regardless of our current view of the past, interpretation of the law occurs within the context of the social definitions then extant. The law thus has integrity within its particular social environment.[19] "It is important not to delude ourselves into thinking that [what we regard as] ideological monstrosities were constructed by monsters."[20] *Plessy v. Ferguson*[21] established the "separate but equal" doctrine applied by the Supreme Court in public education cases. In 1954, the Court in *Brown v. Board of Education*[22] reached the conclusion that "separate but equal" was inherently

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17. Betten, *American Attitudes Toward the Poor*, 65 CURRENT HISTORY 1, 2 (1965). "Although most Social Darwinists did not advocate a complete end to charity, they did argue that charity perpetuated the weaker elements of society and that destitution was useful in culling inferior people." *Id.* at 3.

18. Woodard, *supra* note 7, at 304-05.

19. Snyder, *Legal Change and Social Value*, in IMPACT ERA: LIMITATIONS AND POSSIBILITIES 144-45 (1976). Kuhn's analysis of the nature of scientific revolution illustrates the concept of a paradigm within the ideology of its own time.

> The more they [scientists] study, say, Aristotelian dynamics, . . . the more certain they feel that those once current views of nature were, as a whole, neither less scientific nor more the product of human idiosyncrasy than those current today . . . . [S]cience has included bodies of belief quite incompatible with the ones we hold today.

T. KUHN, *supra* note 7, at 2.

"Rather than seeking the permanent contributions of an older science to our present vantage, they attempt to display the historial integrity of that science in its own time." *Id.* at 3.

20. W. RYAN, BLAMING THE VICTIM 21 (1971).

21. 163 U.S. 537 (1896).

22. 347 U.S. 483 (1954) ("separate but equal" educational facilities are inherently unequal and thus deny equal protection).

unequal. Each interpretation of the Constitution was correct within the context of the social ideology of its time. *Plessy* rested on the foundation of a pervasive belief in the superiority of the white race. By the time the Court decided *Brown*, however, social reformers and the Court had successfully challenged the reasoning on which *Plessy* was based.[23] The paradigm based on the belief in white supremacy had lost its universal acceptance. As one social ideology gave way to the beginnings of another, the legal orientation toward the rights of racial minorities was correspondingly altered.

The Social and Legal Status of Women

At one time, similarly, it was considered to be within the natural order for a woman to be subjected to the control of her husband.[24] This perception of the physical subservience of married women harmonized with the then existing political structure. Politically, legally, and socially, a woman upon marriage was subsumed by her husband. She retained virtually no personal, contractual, or property rights.[25]

The truth of how women came to hold this inferior position may be lost in prehistory, but possible scenarios have been presented in mythology, as well as in works of history and sociology.[26]

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23. *See* McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Gaines v. Canada, 305 U.S. 337 (1938). For a discussion of the development of the jurisprudential attitude which led from *Plessy* to *Brown*, see Graham, *A Jurisprudence of Equality: The Fourteenth Amendment and School Desegregation*, 11 AKRON L. REV. 203, 209-19 (1977).

24. "Ye wives, be in subjection to your own husbands . . . ." 1 *Peter* 3:1-3:5. "The existence of civil and religious laws giving men superior rights over women nurtured the belief—born in the dim past in the smoke-filled caves of primitives—that men also had the right to beat their wives." R. LANGLEY & R. LEVY, *supra* note 4, at 31-32. "For too long, Anglo-American law treated a man's physical abuse of his wife as different from any other assault, and, indeed, as an acceptable practice." Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974, 975 (1977), *rev'd*, 407 N.Y.S.2d 165 (1978).

25. *See* text accompanying notes 118-22 *infra*.

26. We can imagine that when people lived at the mercy of nature, physical attributes determined social order. Women, the child bearers, were unsuited for long hunting or war-making sojourns, and the physical size and strength of men gave them power and authority.

Welsh legends relate that in the early times of the great and powerful tribes, women were accorded freedom, respect, and love, although the monarchy was held by males. The connection between intercourse and conception was unknown. Pregnancy and childbirth were miracles wrought by women and the gods. Fatherhood was an unknown concept; a man's heirs were the children of his sisters or other female relatives. Sex was free and always an incident of love. Rape was virtually nonexistent; marriage unknown.

For example, Brownmiller, in *Against Our Will*,[27] posits this explanation of the earliest acceptance of male domination by women who were, anatomically, the natural prey of the men:

> [A]mong those creatures who were her predators, some might serve as her chosen protectors. Perhaps it was thus that the risky bargain was struck. Female fear of an open season of rape, and not a natural inclination toward monogamy, motherhood, and love, was probably the single causative factor in the original subjugation of woman by man, the most important key to historic dependence, her domestication by protective mating.[28]

Woman thus gave up her freedom for protection. In this social context wife beating was accepted as an incident of ownership. "If Brownmiller is right, the female of the species paid a great price for protection. She sacrificed her power and, through monogamous loyalty to her husband, became the exclusive property of her protector."[29] This concept of natural order prevailed unchallenged until the twentieth century, when it began to wither.

Isolating the precise factors which cause an ideology to lose its power is never easy. A variety of technological developments along with movements for social and legal equality certainly contributed to the downfall of old notions of male superiority. Struggles for equality of opportunity regardless of race, nationality, religion, and social position, foreshadowed the feminist reform movement.[30] Technological advances, from the industrial revolution to the computer age, have minimized the extent to which power derives from

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Observation of cattle breeding eventually developed perception of the connection between sexual intercourse and pregnancy. The desire was born in men to know their own children. The only way to accomplish this was to require sexual fidelity by the women. In return, the men had to bind themselves also. Voila! Marriage. A new era dawned—inheritance through the male line, the reduction of women to the status of property, rape, the exaltation and protection of virginity, jealousy, guilt, and, of course, adultery. For a rich and lyrical rendition of these legends, see E. WALTON, THE ISLAND OF THE MIGHTY (1970) (from the fourth branch of THE BOOKS OF THE WELSH MABINOGION).

27. S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).

28. *Id.* at 16.

29. D. MARTIN, *supra* note 4, at 26. "With the advent of the pairing marriage, the man seized the reins in the home and began viewing the people in it as units of property that comprised his wealth—in short, as chattel." *Id.* at 27. "If a woman showed any signs of having a will or a mind of her own, it seemed only natural that she be beaten as a strong-willed horse might be whipped and finally subdued." *Id.*

30. "Although the industrial revolution did not directly cause feminism, it provided the context for the first collective assault on traditional ideas about woman's 'place.' " W. CHAFE, WOMEN & EQUALITY 24 (1977).

physical strength. Medical developments creating effective birth control methods have maximized a woman's choice with respect to childbearing. These advances have greatly expanded the range of potential roles women can play in society.

Whatever the causes, the old ideology has lost its universal influence and faces strong competition.[31] Thus, attitudes toward the status of women in our society are now at a crisis stage. Patterns of social behavior between men and women, including married couples, are changing along with traditional legal responses to these relationships.[32] Pressure is building to reform the attitude of the legal system toward abused women and abusive husbands, with a greater emphasis on using the power of that system to protect the victims.[33]

The Search for Solutions

As new standards emerge condemning wife abuse, pressure increases for reform of the existing institutional response. The design of the response will be based on the perceived causes of wife abuse. We may perceive the problem to be internal to the victim, and therefore find solutions which change or help her to not invite or allow such abuse. Alternatively, the energy of society's institutions may be directed toward dealing in a universal manner with the source of the abuse, the abusive husband.[34]

Concentrating on the actions or characteristics of the abused wife "blames the victim."[35] This can include two approaches.

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31. For example, although the Federal Equal Rights Amendment has not been fully ratified, many states have added versions of the Amendment to their own state constitutions.

32. Stimpson, *Sex, Gender and American Culture*, in WOMEN AND MEN: CHANGING ROLES, RELATIONSHIPS, AND PERCEPTIONS 201 (A. Cater ed. 1977).

33. One of the greatest functions fulfilled by reformers is to sense that, in one way or another, for one reason or another, man's ability to control his environment has developed to a point where society can realistically aspire to abolish conduct or conditions theretofore conceived to be, and accepted as, unalterable.

Woodard, *supra* note 7, at 287.

34. We recognize that the abusive husband is also society's child. *See* note 116 *infra*.

35. "Blaming the victim" is an intellectual process whereby a social problem is analyzed in such a way that the causation is found to be in the qualities and characteristics of the victim rather than in any deficiencies or structural defects in his environment. In addition, it is usually found that these characteristics are not inherent or genetic but are, rather, socially determined. They are stigmas of social origin and are, therefore, no fault of the victim himself. He is to be pitied, not censured, but nevertheless his prob-

Either the victim is actually to blame, or if she is not to blame, the problem nevertheless is caused by her own characteristics. The first view sees the wife as being or doing something which invites or incites her husband to abuse her. She nags, denies him sex, neglects the housekeeping, serves T.V. dinners, and may even in truth want to be beaten.[36] The response is to pity the husband[37] and, afford no remedy to the undeserving wife. She had better learn to be a "good wife" in order to preserve marital harmony.[38]

A more humanitarian approach concedes that the husband is the non-incited aggressor, but still sees the problem and its solution in terms of characteristics of the wife. She must learn to stand up to her husband and not accept the violence.[39] Failing this, she must gain emotional strength and learn a skill or trade, thereby establishing her independence, and either leave the home or "kick the bum out."[40]

The victim reform approach is especially appealing to those working "in the field" with abused wives. And for the individual victim who cannot wait until society and the law change, this may be the most realistic approach. The assertive, confident, and inde-

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lems are to be defined as rooted basically in his own characteristics.

Ryan, *Emotional Disorder as a Social Problem; Implications for Mental Health Programs*, 41 AMER. J. ORTHOPSYCH. 638, 639 (1971).

36. Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RIGHTS L. REP. 138 (1977). "The theory of feminine masochism is one of the more enduring concepts of Sigmund Freud, who frequently addressed himself to the 'woman problem.' Freud believed that masochism—pleasure in pain—is inherent in the normal female nature . . . ." *Id.* at 143.

37. When a battered woman told a therapist that she was extremely frightened "of [her] husband because he had tried to strangle [her] the night before, the therapist answered: 'But ma'am, do you ever think how terrible it is for your husband that you're so afraid of him?' " B. WARRIOR, WORKING ON WIFE ABUSE 1-2 (1977) (directory of people and organizations working to combat wife abuse). This book may be obtained by writing to the author at 46 Pleasant St., Cambridge, MA 02139.

38. One wife, after being beaten, overheard the officer who refused to arrest her husband say, "Maybe if I beat my wife she'd act right too." Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974, 977 (1977), *rev'd*, 407 N.Y.S.2d 165 (1978).

39. It's important that a woman do two things to break the battered-wife syndrome. One is . . . not to accept herself as a person deserving to be beaten. This requires active, positive steps by the woman, which may include seeking professional help both psychiatric and legal, discussing her feelings with her husband and perhaps ultimately leaving him.

R. LANGLEY & R. LEVY, *supra* note 4, at 203.

40. We want to "make the victims less vulnerable, send them back into battle with better weapons, thicker armor, a higher level of morale." W. RYAN, *supra* note 20, at 28.

pendent person is, indeed, less likely to be victimized by other individuals or by society.[41] But it hardly seems appropriate for society or our legal system to accept such a stopgap measure as an ultimate remedy.[42]

The greatest problem with concentrating on the victim is that such an approach inevitably forces the woman to either change herself or get out of the marriage. For many women, divorce is not a viable or acceptable course.[43] Most abused women need and seek protection from abuse, including a response from police and the courts which does not tolerate wife abuse.[44] Concentrating on the victim also avoids dealing forcefully and effectively with the aggressor through the criminal justice system. "[U]ntil interspousal assault is characterized and treated as a crime, a bodily injury crime that society will not tolerate, it has little chance of early solution."[45]

An approach focusing on the abusing husband could provide the abused wife with the immediate protection she needs and deserves. Additionally, this approach would affirm that the law is enforced for the benefit of society; that the problem of abused wives is not only an individual problem, but a detriment to society as a whole.[46]

Arguments against arrest and detention of the abusing husband emphasize his role as provider for his family. This is part of the

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41. *Id.*

42. Similarly, the store owner may keep a gun to scare off thieves, as the police cannot guard the store at all times. Nevertheless, the law accepts responsibility for arresting and dealing with the thief, and does not require the store owner to handle thieves single-handedly.

43. A divorce may not be acceptable for religious or social reasons. In addition, a woman may not be able to afford private legal counsel and may not be eligible to obtain help through a legal aid society either because she has too much income or because divorces are low priority cases at legal aid offices. Note, *supra* note 2, at 152 n.120 (1977).

44. Although it seems likely that once a woman brings legal action against her husband divorce is inevitable, this may not always be the case. At any rate, the law should not require that divorce proceedings be instituted before any relief is available.

45. Eisenberg & Micklow, *supra* note 36, at 161.

46. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 9 (1972).

An analogy discussed in W. RYAN, *supra* note 20, is the problem of lead paint in apartment houses, which causes blindness and brain damage when eaten by children. Public health departments may produce materials urging parents to watch their children to prevent their ingesting paint, stressing the responsibility of the parents in safeguarding the health of their children. This approach focuses on the victims. In this situation, Ryan's "universalistic" approach would mean enforcing the existing statutory sanctions against landlords for using or retaining the lead paint. *Id.* at 22-23.

view that wife abuse is merely a family matter, to be interfered with as little as possible by the forces of the law. However, the woman who has been severely and repeatedly beaten by her husband until she is desperate enough to call the police has a different view of her problem.

> When the victim calls the police, her essential concern is protection. She wants the law to stop her husband from beating her. She is demanding her rights as a citizen to protection from violent force. She is also demanding justice. She wants the person who has committed an assault on her body taken away, punished, and prevented from assaulting her again.[47]

Thus, between the two possible approaches to wife abuse, focusing on the victim and dealing with the abuser, the latter will provide a comprehensive solution to the problem. Although focusing on the victim can provide temporary relief to individual victims, it can not solve the problem permanently. The legal justice system must strive for long-term remedies based on affirmative condemnation of abusing husbands. The new standards emerging from the ideological crisis demand such a remedy.

Although withering, the old ideology is hardly dead. The abused wife seeking redress through police and the courts will face substantial hurdles, including an illogical, intimidating, and inhumane array of laws and legal procedures seemingly designed to guarantee frustration, failure, and ultimately, injustice.[48] Undoubtedly, if the abusing husband committed such brutal and repeated attacks on persons other than his wife, he would be arrested and incarcerated with little concern for the financial situation of his family. It is cruelly ironic that concern for the wife's financial well-being becomes a primary consideration only when she is the victim and her physical and emotional health are jeopardized.

II. THE CRIMINAL LAW

Introduction

The old common law view which allowed a husband to beat his wife has disappeared from the de jure criminal justice system.[49]

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47. R. LANGLEY & R. LEVY, *supra* note 4, at 162.

48. Eisenberg & Micklow, *supra* note 36, at 147.

49. In Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974, 975-76 (1977), *rev'd*, 407 N.Y.S.2d 165 (1978), the court stated, "If the allegations of the instant complaint . . . are true, only the written law has changed; in reality wife beating is

But the remaining hurdles that effectively discourage and prevent abused wives from getting help through today's criminal justice system illustrate that the system retains de facto license for spousal abuse. The obstacles include failure to arrest, systematic nonenforcement and regressive judicial interpretation of existing laws, and an absence of effective remedies.

Any individual who has been assaulted can, and should, reasonably expect prompt and effective police response. In many reported instances, however, when confronted with a domestic situation, police officers avoid their obligations.[50] They encourage the offensive behavior, intimidate or demean the woman, and in most cases neither escort the woman to receive medical help nor arrest the offender.[51]

At the prosecutorial stage, a woman is faced with a discretionary system of selective enforcement. This barrier results in further screening and diversion of potential interspousal litigation. Prosecutors, like police officers, are reluctant to encourage prosecution.[52]

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still condoned, if not approved, by some of those charged with protecting its victims."

The early cases allowed at least moderate chastisement. Bradley v. State, 1 Miss. (1 Walker) 156 (1824) (husband permitted to moderately chastise wife without subjecting himself to "vexatious" prosecution); State v. Rhodes, 61 N.C. 453 (1868) (criterion of indictable assault is effect produced, not instrument or manner of producing it); State v. Black, 60 N.C. (Win.) 262, 263 (1864) ("unless some permanent injury be inflicted . . . the law will not invade the domestic forum or go behind the curtain . . . .").

Just prior to the turn of the century, however, sentiment changed, and beating one's wife fell into disfavor. Fulgham v. State, 46 Ala. 143 (1871) (wife is entitled to same protection of her person as husband); Bailey v. People, 54 Colo. 337, 342, 130 P. 832, 834 (1913) (defendant's assertion that husband has right to control acts and will of wife by physical force rejected as "nothing less than monstrous at this period of our civilization"); Commonwealth v. McAfee, 108 Mass. 458 (1871) (husband indicted for manslaughter); State v. Pettie, 80 N.C. 335 (1879) (two-year imprisonment for assault and battery against wife not cruel and unusual punishment). *See also* State v. Dowell, 106 N.C. 722, 11 S.E. 525 (1890); W. LAFAVE & A. SCOTT, *supra* note 46, at 608.

This change in judicial attitudes was expressly acknowledged in Harris v. State, 71 Miss. 462, 14 So. 266 (1893). "This brutality found in the ancient common law . . . [has been] . . . repudiated in the administration of criminal law in our courts." *Id.* at 464, 14 So. at 268.

50. *See* notes 64-75 *infra* and accompanying text. The great majority of these beatings take place in the home. "Boston City Hospital reports that approximately 70 per cent of the assault victims received in its emergency room are known to be women who have been attacked in their homes, usually by a husband or lover." D. MARTIN, *supra* note 4, at 12 (footnote omitted). *See id.* at 16-17.

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

52. *See* text accompanying note 81 *infra*.

The offenses of assault and battery are well defined by statute. There is nothing whatsoever in these laws to prohibit their being construed to apply to cases involving spousal abuse.[53] As a practical matter, bruises and lacerations resulting from beating, punching, or slapping are sufficient to sustain criminal prosecution for the misdemeanor of assault and battery.[54] Unfortunately, these laws have been applied in only a handful of cases of interspousal violence.[55] Statistically, formal complaints are rarely filed when any of the above offenses are committed by a man against his wife.[56] The reluctance of the male dominated criminal justice system to interfere in "family quarrels" effectively deprives an abused wife of the protection of assault and battery law.[57]

Thus, upon reaching the decision to seek a remedy from the legal justice system, a woman faces a series of hurdles and filters that avoid or delay the institutional response. Too often this results

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53. "The problem is not a lack of law . . . the problem is that existing laws are systematically unenforced . . . women whose husbands beat them—often on a regular basis—have no effective remedy within the system as it now operates." R. LANGLEY & R. LEVY, *supra* note 4, at 154 (quoting Susan Jackson, attorney in San Francisco).

54. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." CAL. PENAL CODE § 240 (West 1970).

"A battery is any willful and unlawful use of force or violence upon the person of another." CAL. PENAL CODE § 242 (West 1970).

A criminal assault is distinguishable from a battery in that the former is merely an unlawful attempt to use force to the injury of another, while the latter is the actual unlawful use or commission of such violence.

55. *See* note 49 *supra*.

"By definition, spousal abuse constitutes assault, or aggravated assault depending on the seriousness of the attack, even though the Pennsylvania criminal justice system refuses to treat it as such." Note, *Domestic Relations—The Protection From Abuse Act—Pa. Stat. Ann. tit.* 35, §§ *10181-10190* (Purdon Supp. *1977*), 51 TEMP. L.Q. 116, 123 (1978) (footnotes omitted).

56. D. MARTIN, *supra* note 4. San Francisco District Attorney's Office Bureau of Family Relations reported that only eight of several thousand cases processed during 1973-1974 led to a formal complaint and prosecution. *Id.* at 109-10. In Columbus, Ohio only two per cent of 3,626 direct complaints resulted in criminal charges. *Id.* at 112.

57. D. Martin, A Feminist Analysis of Wife Beating, at 3 (May 5, 1977) (unpublished report prepared for American Psychiatric Association Special Session—Battered Women: Culture as Destiny, Toronto, Canada).

> Wife beating is tolerated in a legal system characterized by ancient chastisement rights and the subordination of women in marriage. Moreover, reinforced by the nonacknowledgment of its criminal aspects, wife-beating reflects the devaluation of women as human beings. The legal system only offers the battered wife a band-aid for her wounds, both physical and psychological.

Eisenberg & Micklow, *supra* note 36, at 159.

in further beatings. When the present system fails to punish the offender the law loses its potential deterrent effect. By failing adequately to perform their duties, the police, the prosecutors, the judiciary, and the legislators are all impliedly "blaming the victim."[58] This approach leaves the wife-victim, rather than the husband-abuser, at the mercy of the criminal justice system.

The Police Function

Police departments, the only public agency readily accessible on a twenty-four hour basis, are typically the first outside help sought by an abused wife. Police calls for family conflicts outnumber those for aggravated batteries, murders, and all other serious crimes combined.[59] Officers dread these "domestic disturbance" calls. This apprehension may result from the high incidence of violence directed at responding officers.[60] Furthermore, many police officers dislike dealing with, or are unable to cope with, the emotional state of the parties.[61] Notwithstanding their reluctance, police officers must respond to these calls effectively. Abused women expect and deserve immediate response.[62] Once called, officers have an obligation to respond and to reduce the possibility of recurring violence.[63]

In an overwhelming majority of these calls, no arrest is made. Instead, the police often encourage the woman to reason with her assailant, and discourage her from demanding that an arrest be made.[64] This psychological restraint denies the victim her rights to

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58. *See* notes 35-48 *supra* and accompanying text.

59. Parnas, *The Police Response to the Domestic Disturbance*, 1967 WISC. L. REV. 914 n.2.

60. Connecticut Task Force on Abused Women: Abuse and the Law (Jan. 1977) (unpublished report). "Disturbances" were the largest incident-related death category during the period of 1960-1965. "Fifty-eight officers or 21% of the 278 policemen killed in the United States during that period were responding to disturbance calls." Parnas, *supra* note 59, at 920 n.25 (citation omitted).

61. D. MARTIN, *supra* note 4, at 97.

62. *See* D. MARTIN, *supra* note 4, at 92.

63. Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 L. & CONT. PROB. 539, 542 (1971). "[T]he police owe a duty of protection to battered wives, in the same manner they owe it to any citizen injured by another's assault . . . ." Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974, 977 (1977), *rev'd*, 407 N.Y.S.2d 165 (1978). This case is discussed in full in notes 77-79 *infra* and accompanying text.

64. D. MARTIN, *supra* note 4, at 92-93. *See also* Maidment, *The Law's Response to Marital Violence in England and the U.S.A.*, 26 INT. & COMP. L.Q. 403, 408 (1977).

be uninjured and to have the offender arrested. Although in other potentially harmful situations, such as the typical barroom assault, the police may also encourage conciliation, violence within the home presents more potential for additional severe physical injury to the victim. As a practical matter, the victim of domestic violence often can not remove herself from the premises, especially if there are children in the home.

When presented with a domestic situation, the police often suggest that the husband could be out on bail or personal recognizance within hours.[65] Such suggestions are accurate. The man *will* be out on bail, and the woman *should* be informed of that fact. This information, however, should not be offered merely to psychologically restrain the woman from demanding an arrest. Rather, the officer should neutrally inform the victim of the probable duration of detention, so that she may plan her actions accordingly.

Responding officers also underscore the husband's role as the woman's only source of income. They point out that an arrest could result in the loss of his job, an increase in the marital violence, or both. Often, the police will discourage the complaining victim by telling her she has a civil problem and should call an attorney.[66] All of these typical police reactions to domestic disturbance calls avoid confrontation of the problems that sparked the complaint in the first place.

This tepid police response frustrates beaten women who have turned to society for help by denying them a desperately needed remedy. Additionally, police leniency reinforces abusive behavior.[67] An apathetic police response intensifies the abuser's perception that socially acceptable behavior includes beating his wife.[68] The reinforcement of this social license to abuse, coupled with the antagonizing nature of a police call to the aggressor, makes calling

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65. D. MARTIN, *supra* note 4, at 94. Perhaps a modified system of temporary detention should be used in these situations to detain the offender until an immediate protection order is issued by a magistrate.

66. *See* R. LANGLEY & R. LEVY, *supra* note 4, at 164.

67. *See* D. MARTIN, *supra* note 4, at 64 (Commander James D. Bannon, Address to American Bar Association Conference, Montreal, Canada (1975)). Commander Bannon has been a member of the Detroit Police Department since 1949 and is also working toward a doctorate in sociology.

68. D. MARTIN, *supra* note 4, at 98, (paraphrasing Commander James D. Bannon). In Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974, 977 (1977), *rev'd*, 407 N.Y.S.2d 165 (1978), the court remarked, "Even more disturbing are incidents alleged in the affidavits in which the responding officers are quoted as giving support to the assaulting husband."

the police one of the most counterproductive steps an abused woman can take. A woman who calls the police as a desperate measure to end a beating, then, is confronted by a painful irony when this measure aggravates, rather than alleviates, the violence. Police, as the first social institution called on to respond to a domestic beating, must reform many of their approaches and techniques in order to effectively discharge their obligation to minimize grossly antisocial behavior.

Police reform is impeded by the officers' personal attitudes because police officers are socialized in the same manner as the citizens they are expected to protect. Since patterns of abuse are common within a family structure[69] police officers who come from violent families may have a predisposition toward domestic violence that is as severe as the aggressor's. One study reported that a police officer told an abused woman that he beat his own wife; another officer told a woman to "go to bed with him like he wants."[70] One commentator believes that these attitudes are a result of the police officers' training; they are taught to avoid arrest.[71] In doing so, police officers ignore the special circumstances of domestic violence that favor arrest and that require immediate protection for the woman.[72]

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69. Studies have shown that when children grow up in a home where their father beats their mother, a male child is more likely later to beat his spouse, and a female child is more likely to be beaten by her husband. The Battered Woman: Criminal and Civil Remedies, at 1 (May 5, 1977) (unpublished report prepared for American Psychiatric Association Special Session—Battered Women: Culture as Destiny, Toronto, Canada).

70. L. Frost, B. Karl, G.J. Stillson MacDonnell, & D. Minasian, Connecticut Task Force on Abused Women: Household Violence Study—North Central and Capital Regions, at 11 (March 1977) (unpublished report).

71. Parnas, *supra* note 59, at 931 n.64. The Michigan Police Training Academy procedure, set forth in D. MARTIN, *supra* note 4, at 93, states:

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.

(footnote omitted).

72. *See* text accompanying notes 64-65 *supra*.

The law of arrest compounds these problems by not allowing for routine apprehension in domestic disturbances. In most jurisdictions, an arrest for a misdemeanor can be made on the spot only if the act has been committed in the presence of an officer, or if a warrant has been issued. Because police are usually called to the scene after a beating, the victim must go to the district attorney's office or the clerk of courts for a warrant to be issued.[73] This procedure is too slow to offer the needed protection.

The law of arrest poses obstacles to swift detention of assailants. Several alternatives exist to overcome these barriers. First, an officer can, without a warrant, arrest upon the reasonable belief that a felony was committed and that the person identified committed the crime.[74] Because of the prevailing attitudes regarding domestic violence and the subjectivity involved in this determination, few arrests are made. Second, in many jurisdictions the victim can make a citizen's arrest even if the offense is a misdemeanor. Under this procedure the officer can take the accused into custody and the complainant is then liable for false arrest if the accused can show that the complainant fabricated the charge. Even though this avenue imposes no liability upon the officer, the police rarely inform the abused wife of this possibility.[75] Finally, when the conduct complained of consists of threats or quarrelling using "vulgar, profane language, and such conduct occurs in the officer's presence" the charge of "disturbing the peace" may be used to arrest the offender.[76]

A formal challenge to the deficiencies of police department response to domestic disturbance calls has been made in New York City. In *Bruno v. Codd*,[77] plaintiffs, abused women, brought suit

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73. D. MARTIN, *supra* note 4, at 90.

74. The Battered Woman: Criminal and Civil Remedies, *supra* note 69. D. MARTIN, *supra* note 4, at 90.

75. D. MARTIN, *supra* note 4; The Battered Woman: Criminal and Civil Remedies, *supra* note 69.

76. Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 264 (1971).

77. 90 Misc. 2d 1047, 396 N.Y.S.2d 974, 976 (1977), *rev'd*, 407 N.Y.S.2d 165 (1978) (defendant police department's motion for summary judgment denied). In response to defendant police officers' argument with regard to municipal immunity and the discretionary power of the police officers, the court stated:

> Plaintiffs do not seek to abolish the traditional discretionary powers of the police; they merely seek to compel the police to exercise their discretion in each "particular situation," and not to automatically decline to make an arrest solely because the assaulter and his victim are married to each other.

Id. at 1047, 396 N.Y.S.2d at 976.

against the police department, the family court, and the city probation employees. The complaint alleged that police officers called to the scene of a husband's assault on his wife "uniformly refuse[d] to take action," even if the physical evidence showed injury. The plaintiffs also alleged that officers told the victims that they were unable to render assistance or make an arrest solely because the victim was the wife of the assailant. The court denied the police department-defendants' motion for summary judgment because of the existence of a factual issue as to whether the police had performed their duty of providing wives with proper police service.

On June 25, 1978, corporation counsel Allen G. Schwartz, the attorney for Police Commissioner Robert McGuire, signed a 1000-word consent judgment obligating the police to arrest men who commit felonious assault, or any other felonies, against their wives as long as there is reasonable cause to believe that the husband committed the crime.[78] The agreement dispensed with adjudication of the factual issue of past police conduct. A motion to dismiss the complaint, made by the remaining defendants, the city probation and family court employees, was granted on appeal.[79]

But, in Hartzler v. City of San Jose, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (1975), the court of appeals affirmed the superior court's dismissal of an action for wrongful death brought by the woman-decedent's administrator. Here, a woman had been killed by her estranged husband after the police had failed to respond for 45 minutes. There had been 20 calls to the police in the past, and on one occasion the estranged husband had been arrested. The court held the police department had absolute immunity from failure to provide sufficient police protection. *But cf.* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

78. Bruno v. McGuire, No. 21946176 (N.Y. App. Div., June 26, 1978) (consent decree). Under the agreement, the police will send officers out whenever a woman calls and says her husband has assaulted or threatened her. In addition to arresting in felony cases, if there is reason to believe that a lesser crime has been committed, the officers must still arrest unless they have proper "justification" not to arrest. They will not refuse to arrest just because the woman has not first been to family court. In addition, the officers may not use the potential reconciliation of the husband and wife as an excuse not to arrest.

The police also agreed to mandatory arrests in all cases where the woman has been to family court, has obtained an order of protection, and subsequently was assaulted or threatened by her husband. The police further agreed that upon intervention in a husband-wife assault, they will remain on the scene, temporarily, to protect the wife and assist her in obtaining medical help if necessary. If the husband has left the premises, the police will follow "the same procedure for locating the husband as would be followed in cases" of crimes outside the family. Finally, supervisors at police precincts are responsible for their subordinates' compliance with all requirements of the agreement.

79. Bruno v. Codd, 407 N.Y.S.2d 165 (1978).

Prosecutorial Function

In most jurisdictions, screening and diversion by the prosecutor's office may result in the individual prosecuting attorney's decision not to prosecute. Even if a victim is successful in having an arrest effected, this system of selective enforcement makes it difficult for her to proceed with criminal litigation. Most prosecutors' perceptions of domestic disputes often produce dismissals and reductions of charges.

Perhaps prosecutors are reluctant to encourage litigation because a criminal charge mandates high bail, and upon conviction, long incarceration.[80] At the San Francisco District Attorney's Bureau of Family Relations, the following "fundamentals" must exist before a complaint is authorized and a warrant sought: (1) a crime as defined by the California Penal Code, (2) identification of a specific defendant, (3) proof, such as witnesses and documents (if children are the only witnesses the district attorney will not accept the case), (4) severe injuries, and (5) willingness of the victim to testify.[81] The unlikelihood of all of these factors existing, particularly "severe" injuries and proof thereof, accounts for the failure to prosecute in the majority of cases brought to the attention of the bureau of family relations.

Faced with reluctant prosecutors,[82] often a complainant is forced to accept intermediary steps such as warning letters, civil protection orders,[83] or peace bonds.[84] There is generally no statutory basis for peace bonds, and they are only as strong as subsequent enforcement. Because they are seldom enforced, they are ineffective.

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80. Truninger, *supra* note 76, at 264.

81. D. MARTIN, *supra* note 4, at 109.

82. It is simply unfair, in light of the systematic discouragment that victims receive from the police and the time-consuming and almost insuperable hurdles to prosection erected by the district attorney's office, to blame the women for failing to follow through against their attackers and to use this failure as a primary excuse for nonenforcement of the law . . . . In many cases the reason a victimized woman drops charges or refuses to testify is not that she needs to be violently abused but the opposite need, to avoid a violent retaliation.

R. LANGLEY & R. LEVY, *supra* note 4, at 179-80 (quoting Susan Jackson, attorney in San Francisco).

83. *See* notes 154-57 *infra* and accompanying text.

84. Peace bonds are warnings ordering the aggressor to cease molesting or assaulting his wife. A California statute continues the bond for six months after issuance, and the court may require the accused to post bond not exceeding $5,000. CAL. PENAL CODE § 706 (West 1970). The most recent appellate case involving § 706 was decided in 1943. *In re* Way, 56 Cal. App. 2d 814, 133 P.2d 637 (1943).

Peace bonds may also involve constitutional problems because they fail to provide for trial by jury, fail to provide free counsel, fail to require proof beyond a reasonable doubt, and may subject a person to double jeopardy by providing that a conviction for breach of peace will be conclusive evidence of violating the security provision.[85]

If the police fail to arrest the abusing husband, the victim can file a complaint on her own initiative with the local clerk of courts, the district attorney, or the prosecutor. The facts in *Bruno v. Codd*[86] illustrate the difficulty with such an approach. The plaintiffs alleged that family court petition clerks failed to allow petitioners timely access to the judge and abused their discretion in determining whether the complaints were sufficient to warrant preparation of a petition.

Thus, prosecutors, like police authorities, avoid invoking the law.[87] Instead, efficient dispositions are achieved by discouraging women from pursuing prosecution. Once again women are faced with tacit condonation of the abuser's conduct and the likelihood of further violence.

Judicial Function

Even if the prosecutor decides to prosecute, the next hurdle to surmount is the court system. The issuance of a warrant is usu-

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85. Truninger, *supra* note 76, at 266. If an indigent is unable to post bond he may be jailed in violation of his rights under the equal protection clause. This feature generates further constitutional problems. *See* Tate v. Short, 401 U.S. 395 (1971) (imprisoning indigent for failure to pay traffic fines violated equal protection).

86. 90 Misc. 2d at 1047, 396 N.Y.S.2d at 979 (1977). The defendant probation department employees' motion to dismiss the complaint was denied due to evidence demonstrating a "callous disregard by probation officers of the statutory rights of women . . . who need immediate protection from assaults by their husbands." However, the New York Supreme Court, Appellate Division, First Department, reversed on the ground that the record did not present a properly justiciable cause. Bruno v. Codd, 407 N.Y.S.2d 165 (1978).

Similarly, a suit filed in 1975 in Cleveland, Ohio, Raguez v. Chandler, No. C74-1064 (N.D. Ohio, filed Feb. 9, 1975) resulted in a consent decree in which the prosecutor agreed to provide the relief requested, to give full consideration to each case on its merits, to schedule a prosecutor's hearing or request an investigation by the detective bureau if an arrest warrant or summons is not issued and the complaint is not frivolous, to provide and notify the woman of her rights to re-evaluation of a decision not to prosecute an alleged assailant, and to notify the police that men who assault women will be prosecuted.

87. D. NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA 129-30 (1974).

One chief prosecutor has stated that "the sanctity of the marriage is more sacred than the criminal law and the one-punch fight . . . it overrides the criminal code." R. LANGLEY & R. LEVY, *supra* note 4, at 157-58, (quoting Chief Prosecutor of Washtenaw County, Michigan).

ally a discretionary act by a magistrate, which occurs at a citation or preliminary hearing. This procedure rarely considers the future safety of the woman. Moreover, it may serve to distract the complainant from her original purpose and lead her to believe erroneously that something is being done. "The woman who actually manages to have an arrest made and withstands the conciliation attempts of the prosecutor's office must expect cynicism regarding her intentions at every stage, even inside the courtroom itself."[88] In Chicago's Court of Domestic Relations, "brief hearings are held, commonly followed by the imposition of an unfilled-out, unsecured, unrecorded, but threateningly imposed 'peace bond.' "[89] The Chicago magistrates who were interviewed all acknowledged the sham, extra-legal nature of the peace bond. Often domestic violence proceedings are not accorded traditional courtroom dignity.

In Detroit, where the proceedings are conducted in an ordered, dignified manner, "the lack of problem-solving dispositions remains the same."[90] Judges may attempt to "string the case out" to allow the parties to resolve their differences, and then dismiss the case. Or, if this isn't successful, and a finding of guilty occurs, Detroit judges generally place the defendant on probation.[91] Hence, although sanctions are imposed, little is accomplished.[92]

The judicial problem is not limited to failure to enforce existing laws, but also includes regressive judicial interpretation of current law. To illustrate, California has a statute making it a felony for a man to inflict corporal injury on his wife.[93] The harm re-

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88. D. MARTIN, *supra* note 4, at 114-15. Martin also states, "if judges would get tough and act like judges, rather than counselors or even practical jokers, perhaps battered women could obtain relief through the judicial process." *Id.* at 118.

89. Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733, 748 (1973). *See also* notes 84-85 *supra* and accompanying text.

90. Parnas, *supra* note 89, at 749.

91. *Id.*

92. *See* text accompanying notes 55-57 *supra*.

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

CAL. PENAL CODE § 273d (Deering 1971) (amended 1977). The new section reads as follows:

Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in

quired to sustain a conviction under this California law is greater than simple assault but less than aggravated assault.[94] Nevertheless, in *People v. Jones*,[95] a woman was convicted of manslaughter for killing her husband while defending herself against an assault as defined in California Penal Code section 273(d). Under California law, homicide while resisting a felony is justifiable.[96] The court held that a felony of the type defined in section 273(d) would not sustain an acquittal on grounds of justifiable homicide.[97] The judge in *Jones* stated that "the legislative purpose in enacting section 273(d) . . . was to reduce domestic conflict, not to promote resort to violence . . . ."[98] Such reasoning indicates that courts have the attitude that the criminal justice system is not the place for domestic problems.[99]

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the state prison, or in the county jail for not more than one year.

CAL. PENAL CODE § 273.5(a) (Deering Supp. 1978).

Corporal injury is not defined by the statute, but has been held to be a "touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person." People v. Burns, 88 Cal. App. 2d 867, 873, 200 P.2d 134, 137 (1948).

94. People v. Mitchell, 155 Cal. App. 2d 665, 318 P.2d 157 (1957) (broken jaw and contusions about the face, constituting aggravated assault—conviction pursuant to § 273d affirmed); People v. Burns, 88 Cal. App. 2d 867, 200 P.2d 132 (1948) (injuries and bruises on face and body, constituting simple assault—conviction pursuant to § 273d reversed). Aggravated assault is frequently classified as such by virtue of statutory provision when the assault is of a serious or heinous nature.

95. 191 Cal. App. 2d 478, 12 Cal. Rptr. 777 (1961).

96. CAL. PENAL CODE § 197 (Deering 1976).

97. Although in *Jones* the court instructed the jury that the requirement for justifiable homicide would be satisfied if there were reasonable apprehension of death or great bodily harm, it was found that there was no such fear, although the deceased had picked up a table knife, raised it, and threatened to kill the defendant. One recent case, however, reached a different result. In People v. Cameron, 53 Cal. App. 3d 786, 126 Cal. Rptr. 44 (1976), the court rejected an equal protection argument involving § 273d and affirmed the conviction. The plaintiff argued that it applied only to married men, that the definition of the crimes was vague, and that it subjected one to cruel and unusual punishment. *Cf.* People v. Thomas, 65 Cal. App. 3d 854, 135 Cal. Rptr. 646 (1976) (§ 273d applied with same result with regard to child abuse).

98. 191 Cal. App. 2d at 482, 12 Cal. Rptr. at 780.

99. The Battered Woman: Criminal and Civil Remedies, *supra* note 69.

> The handling of domestic dispute cases by our courts is only one example of the failure of our criminal process to serve even loosely defined "correctional" functions . . . . The lectures, threats, fines, permissive referrals, unsupervised probation, or even probation with pro forma supervision which are substituted accomplish little in the reduction of recidivism. With respect to domestic disputants in court, few are sentenced to jail, and the great majority are handled summarily and off-the-cuff. What little innovation is utilized by our courts is frequently and disturbingly extralegal.

Parnas, *supra* note 89, at 747-48.

Legislative Function

A recent development has been the enactment of legislation aimed at intra-family offenses. This legislation gives courts a wider range of dispositional powers to effect rehabilitation rather than retribution. Both New York[100] and the District of Columbia[101] have enacted statutes which divert intra-family offenses from the criminal court, making them civil or family offenses. These statutes take away from the complainant the physical protection provided by arrest and successful criminal prosecution. Pennsylvania and Massachusetts, however, have adopted legislation which places an affirmative duty on the police and the courts to provide temporary protection for persons suffering abuse.[102]

The New York statute requires that cases involving truly criminal conduct be transferred to the criminal court. It was construed in *Montalvo v. Montalvo*,[103] as defining the policy that wives and others bringing assault charges against family members generally do so to secure practical help, not criminal conviction and punishment. The family court will retain jurisdiction if it finds that the processes available are likely to be helpful to the family.

The District of Columbia statute seeks to assure that those charged "will be, if they are offenders, civil offenders. . . . We do not wish to stigmatize them. We want to keep their earning capacity and also the possibility of self-respect and their connection with the family."[104] Once again, the woman's future safety is jeopardized in order to preserve her husband's social and economic standing in the community.[105]

As a result of the inadequacies of the existing remedies, Pennsylvania recently adopted legislation which provides tempoary relief for abused women.[106] Upon a showing of immediate and present danger of abuse, the court of common pleas has the jurisdiction to issue a temporary order of protection which requires the

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100. N.Y. FAM. CT. ACT (29A) § 812 (McKinney 1975).

101. D.C. CODE ANN. § 16.1001 (1973).

102. PA. STAT. ANN. tit. 35, §§ 10181-10190 (Purdon 1977); 1978 Mass. Acts ch. 447.

103. 55 Misc. 2d 699, 286 N.Y.S.2d 605 (1968). *See also* People v. Berger, 40 App. Div. 2d 192, 338 N.Y.S.2d 762 (1972).

104. Judge Joseph Ryan, Proceedings, D.C. Bar Association's Orientation on the Superior Court 124-26 (Jan. 9, 1971), in Thompson, *Representing the Accused Charged with an Intrafamily Offense*, 18 PRAC. L. 41, 42 (Dec. 1972).

105. Fields, *Representing Battered Wives, or What to do Until the Police Arrive*, [1976-1977] 3 FAM. L. REP. (BNA) 4025.

106. PA. STAT. ANN. tit. 35, §§ 10181-10190 (Purdon 1977).

abuser to vacate the home.[107] The act alleviates the problem of physical abuse for the duration of the court order.

Massachusetts has also adopted an act providing certain temporary protection for persons suffering abuse.[108] The act mandates that any court order which has been issued as a result of a domestic dispute shall bear the following language: "VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE." Massachusetts law enforcement agencies are directed to establish procedures whereby an officer at the scene of the alleged violation will know the terms of the orders. The officer is also directed to use every reasonable means to enforce the orders. Additionally, any violation of the orders is a misdemeanor.[109]

Section two of the act describes the methods by which a petitioner may procure an order protecting her from abuse, and enumerates the terms which may be included.[110] If the plaintiff demonstrates a substantial likelihood of immediate danger of abuse,

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107. Note, *supra* note 55. Because it offers only temporary relief, the act is effective as an emergency measure only. There are no provisions for rehabilitation or other methods of ending the abuse. Before the act, the woman had the option to leave, but the burden was on her to provide her own alternate living arrangements. *See* Commonwealth *ex rel.* Pitucci v. Pitucci, 200 Pa. Super. Ct. 591, 189 A.2d 912 (1963) (wife's right to support defeated upon her withdrawal from husband's home without adequate legal reason such as grounds for divorce or separation). Strong emotional and psychological factors, such as guilt due to the myth that the wife is responsible for marital harmony, are also involved in a woman's decision to leave.

108. 1978 Mass. Legis. Serv. 198 (West). The text of this act is reprinted in full in McLellan, *Massachusetts Divorce Practice and Procedure*, 1 W. NEW ENG. L. REV. 277, 321 n.191 (1978).

109. 1978 Mass. Legis. Serv. 198 (West) (to be codified as MASS. GEN. LAWS ANN. ch. 208, § 34C).

110. 1978 Mass. Legis. Serv. 199 (West) (to be codified as MASS. GEN. LAWS ANN. ch. 209A, § 3). The order may include:

> (a) ordering the defendant to refrain from abusing the plaintiff, whether the defendant is an adult or minor;
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> (b) ordering the defendant to vacate forthwith the household;
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> (c) awarding the plaintiff in the case of husband or wife temporary custody of a minor;
>
> (d) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody, or both, when the defendant has a legal obligation to support such person;
>
> (e) ordering the defendant to pay to the person abused monetary compensation for losses suffered as a direct result of the abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses and reasonable attorney fees.

Id.

the court may enter a temporary order without notice, and thereafter notify the defendant and give him an opportunity to be heard.[111]

Chapter 209A, section 6 of the Massachusetts General Laws directs any law officer to use all reasonable means to prevent further abuse,[112] including the right to arrest even if the violation is a misdemeanor pursuant to section thirty-four C of chapter 208.[113] This provision partially alleviates a weakness in the law of arrest.[114] The Massachusetts act, like the Pennsylvania act, provides relief from abuse for the duration of the court order. However, the Massachusetts act provides that the terms and conditions of the disposition of any criminal complaint may include "referral of the defendant to a clinic, facility or professional for one or more examinations, diagnoses, counseling or treatment; . . . or release of the defendant to the custody of a residential treatment facility."[115] Thus, by virtue of the new act, Massachusetts courts are given the discretion to order rehabilitation services for the offender.[116]

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111. MASS. GEN. LAWS ANN. ch. 209A, § 4 (West Supp. 1979).

112. MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1979). Other reasonable means include the following:

> (1) remaining on the scene as long as there is a danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit;
>
> (2) assisting such person in obtaining medical treatment necessitated by an assault, including driving the victim to the emergency room of the nearest hospital;
>
> (3) giving such person immediate and adequate notice of his rights;
>
> (4) arresting the person if the officer has probable cause to believe that a felony has been committed, or a misdemeanor has been committed in the officer's presence, or a misdemeanor has been committed pursuant to section thirty-four C of chapter two hundred and eight.

Id.

113. *See* text accompanying note 109 *supra*.

114. *See* notes 72 & 73 *supra* and accompanying text.

115. 1978 Mass. Legis. Serv. 202 (West) (to be codified as MASS. GEN. LAWS ANN. ch. 276, § 42A).

116. Clearly, "the police owe a duty of protection to battered wives, in the same manner they owe it to any citizen injured by another's assault. . . ." 90 Misc. 2d at 1047, 396 N.Y.S.2d at 977. This is not to say, however, that abusive husbands are not themselves in need of help as "victims of society." This may indeed be true of all those who commit criminal acts. But the personal deprivations, agonies, or frustrations of the perpetrator do not prevent his or her arrest as a burglar, murderer, or saboteur.

The legal response to wife abusers might well include counseling and vocational training. This might be seen as society's compensating the abuser for whatever it did to him.

III. THE CIVIL LAW

In addition to criminal sanctions, civil remedies should be available to any victim of violence. Civil remedies are needed when the criminal justice system denies protection to abused wives because of the perception that "domestic quarrels" are family matters, not to be interfered with by police and criminal courts. In a further search for aid, an abused wife may therefore seek justice through the civil law. However, here she will also find additional legal and procedural barriers. Civil remedies needed by the wife include tort actions, orders of protection and divorce.

Interspousal Tort Actions

As outlined earlier, when social standards which were once universally accepted begin to lose their assumption of validity, a stage of crisis emerges, characterized by an abundance of contradictory beliefs and behavior.[117] The law, reflecting the crisis, retains much of the old while tentatively exploring the new, and becomes, itself, wrought with controversy. The law of interspousal tort immunity illustrates the impact on the legal system of the emerging crisis in social ideology.

At common law, it was well settled that, under coverture, the personal and property rights of a woman were virtually suspended during marriage.[118] The civil law made the husband and wife into one person—that one being the husband.[119] A wife could not sue or be sued in tort, own property, or make contracts.[120] Even a wife who lived apart from her husband and earned her own living could not bring an action for injury to her property by third persons.[121]

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117. *See* notes 7-10 *supra* and accompanying text.

118. Coverture implies that a woman is "under the protection of her husband, and the common law will not allow her to do anything which may prejudice her rights or interests, without his advice, consent and approval. . . . This sole act of a *femme covert* was simply void. . . ." Osborn v. Horine, 19 Ill. 124, 125 (1857).

119. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 598 (W. Jones ed. 1915).

120. *See Interspousal Violence: Insights But No Instant Answers*, [1976-1977] 3 FAM. L. REP. (BNA) 2527.

121. Moores v. Carter, 17 F. Cas. 714 (1828). Ann Moores lived apart from her husband Benjamin Moores, and "by her industry had become possessed of a small dwelling-house," which the defendants had broken into, vandalized and burglarized. Not only could Ann not bring an action in trespass herself, it was improper for her to be joined in the action; for as she had owned nothing, she had lost nothing.

> Every species of personal property which the wife may acquire by purchase, by her own labor, or by gift, during the coverture, belongs to the husband,

In addition, anything a wife earned belonged to her husband.[122]

Coverture required that even where there was personal bodily injury to the wife, she could sue only by joining her husband.[123] If she were to sue her husband in tort, he would be on both sides of the controversy, joined in an action against himself. Thus a wife was barred from bringing an action in tort against her husband, no matter how grievous the harm he inflicted, irrespective of whether the attack constituted a sufficient ground for divorce.[124]

In the post Civil War era all American jurisdictions passed Married Women's Acts or Emancipation Acts.[125] These laws were designed to remove the common law disabilities of a married woman and to give her the status of a *femme sole*.[126] A wife was given the right to own property in her own name, to enter into contracts, to keep her own earnings, to sue or be sued, to dispose of property in a will, and to establish her own separate place of residence with or without the permission of her husband.[127]

The acts varied greatly in language[128] and judicial interpreta-

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and consequently an injury to that property, or the taking of it away, can only give a right of action to the husband, and not to the wife.

The dwelling-house, and all the goods and chattels purchased or owned by the wife, belonged to the husband, and for an injury done to that property the husband alone must sue. This doctrine is too well settled to be controverted. . . .

Id.

122. "Services performed by a wife, for another for compensation, are presumed to be given on the husband's behalf." Plummer v. Trost, 81 Mo. 425 (1884). Where a wife's father gave her money, with which she purchased fowls and material for sewing, and, by sale of the fowls and her labor on the materials and other work, she accumulated money, it belonged to her husband's estate. Appeal of Speakman, 71 Pa. 25 (1872). The husband's right to the services and earnings of his wife is absolute. Belford v. Crane, 16 N.J. Eq. 265 (1863).

123. Long v. Morrison, 14 Ind. 595 (1860). In a malpractice suit for personal injuries to the wife by a physician, the wife, if surviving, would not be able to maintain a separate action.

124. *See* Abbott v. Abbott, 67 Me. 304 (1877). Mrs. Abbott was beaten, bound in irons, and forcibly imprisoned in an insane asylum by her husband and his cohorts. Her injuries at their hands were grounds for divorce because American law no longer allowed a man to strike his wife. However, as the assault took place during coverture, the wife could maintain no action against her husband or his confederates.

125. *E.g.*, MASS. GEN. LAWS ANN. ch. 209, § 6 (West 1958); MISS. CODE ANN. § 93-3-3 (1972); S.C. CODE § 10-216 (1962).

126. Note, *Husband and Wife Are Not One: The Marital Relationship in Tort Law*, 43 UMKC L. REV. 334, 336 (1975).

127. R. LANGLEY & R. LEVY, *supra* note 4, at 39.

128. MO. REV. STAT. § 451.290 (1977) reads as follows:

A married woman shall be deemed a *femme sole* so far as to enable her to carry on and transact business on her own account, to contract and be con-

tion regarding the possibility of interspousal tort suits was divided. The very passage of the acts is evidence of the initial breakdown of the social paradigm which had given birth to and sustained the common law approach. The varied interpretations demonstrate the controversy inherent in the crisis of social ideology which followed the breakdown. Some judges were quick to embrace a new concept of the role of women in society and their rights under the law.[129] Others clung to the familiar, astounded by the audacity of a notion which, to them, challenged the sanctity of the very basis of American life, the family.[130]

In some jurisdictions, therefore, the language giving married women the legal right to "sue and be sued" was construed to grant a wife the right to bring an action against her husband for damages resulting from assault and battery or other intentional torts. In eloquent opinions, these courts declared that civilization and justice had progressed to the point of holding a man liable for assaults upon the person of his wife. The fact that a man was married to his victim could no longer exempt him from such liability.[131]

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tracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her . . . with or without her husband being joined as a party. . . .

"A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife." HAWAII REV. STAT. § 573-5 (1976). "A married woman may, in all cases, sue and be sued without joining her husband with her to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture." ILL. REV. STAT. ch. 68, § 1 (1959). "Husband and wife may sue each other." MISS. CODE ANN. § 93-3-3 (1972). "Nothing in this chapter contained shall enable a husband or wife to contract with or to sue each other . . . ." N.J. STAT. ANN. § 37:2-5 (West 1968). "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." N.C. GEN. STAT. § 52-5 (1976). "A married woman may sue and be sued as if she were unmarried. When the action is between herself and her husband she may likewise sue or be sued . . . ." S.C. CODE § 10-216 (1962).

129. "The Legislature . . . has given the wife an action against the husband for injuries to her property rights, and we can hardly conceive that the Legislature intended to deny her the right to sue him separately, in tort, for damages arising from assaults upon her person." Johnson v. Johnson, 201 Ala. 41, 44, 77 So. 335, 338 (1917).

130. State v. Rhodes, 61 N.C. (Phil. Law) 453 (1868). In dicta the court stated that although husbands have no right to whip their wives, courts won't interfere, because to do so would inflict on society the greater evil of "raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence." *Id.* at 459.

131. Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and

In a majority of jurisdictions, however, the spectre of litigious, designing, or malevolent women suing their husbands for alleged injuries, dragging the private aspects of marriage through the "mud" of litigation, was more than the courts could face.[132] Although many of the acts, read literally, would allow such actions,[133] the courts were able to interpret the words to fit judicial concepts of the proper order of the universe, by construing the acts strictly, as being in derogation of the common law.[134] In *Thompson v. Thompson*[135] for example, the United States Supreme Court construed a Washington, D.C. statute which read "married women shall have the power . . . to sue separately . . . for torts committed against them as fully and freely as if they were unmarried. . . ."[136] The majority, relying on the floodgate theory,[137] and determined to protect the privacy of marriage, held that the statute could not have been intended to allow a wife to bring an assault and battery action against her husband.

> protect' her. We have progressed that far in civilization and justice . . . . Wives are no chattels. There are half a million women voters in North Carolina. They do not need to beg for protection for their persons, their property or their characters. They can command it.

105 S.E. at 210 (complete quotation in unofficial reporter only). "If [the wife] may sue him for a broken promise, why may she not sue him for a broken arm?" Brown v. Brown, 88 Conn. 42, 46, 89 A. 889, 891 (1914). "If a married woman is either injured or damaged by another's illegal act, the statute gives her a remedy even though that other is her husband. . . ." Gilman v. Gilman, 78 N.H. 4, 5, 95 A. 657, 657 (1915). "[W]e are unable to perceive wherein either public policy, or society, or the sanctity of the home, or the sacred relations of marriage, is better protected by denying her a reasonable compensation for injuries maliciously and feloniously inflicted upon her by a husband with a shotgun loaded with buckshot . . . ." Fiedler v. Fiedler, 42 Okla. 124, 129-30, 140 P. 1022, 1025 (1914).

132. The right to sue her husband in an action of assault and battery may perhaps be covered under the literal language . . . but I think such was not the meaning and intent of the legislature . . . the effect of giving so broad a construction . . . might be to involve the husband and wife in perpetual controversy and litigation—to sow the seeds of perpetual domestic disorder.

Longendyke v. Longendyke, 44 Barb. 366, 368-69 (N.Y. 1863).

133. *E.g.*, WIS. STAT. ANN. § 246.075 (West 1969). For a complete discussion of the interpretation of statutes in derogation of the common law, see 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION ch. 61 (4th ed. 1974).

134. "Statutes which . . . establish rights or provide benefits . . . not recognized by the common law have frequently been held subject to strict . . . interpretation [and] . . . are given the effect which makes the least . . . change in the common law." *Id.* at 41.

135. 218 U.S. 611 (1910).

136. *Id.* at 615-16.

137. "[T]his construction would at the same time open the doors of the courts to accusations of all sorts of one spouse against the other. . . ." *Id.* at 617.

The dissenting opinion, by Justice Harlan, joined by Justice Holmes and Justice Hughes, insisted that the function of the Court was to decide only what the statute said, and not what it should say.[138] Although this dissent has been widely quoted and praised in both cases[139] and commentary,[140] the majority holding remains the law regarding interspousal tort immunity in the District of Columbia.[141] In addition to the District of Columbia, a dwindling majority of American jurisdictions continues to uphold interspousal tort immunity.[142]

The trend, however, is definitely toward abrogation of the doctrine, especially in situations where its underlying policies are considered inapplicable. When the harmony of the home has already been severely disrupted, as where the husband has been beating his wife, the basis for denying recovery for intentional physical attacks no longer exists.[143] Terminating the marriage by separation, death, or divorce further emphasizes the absence of an underlying rationale.[144] As the foundations of interspousal tort immunity lose all but historical significance, the doctrine comes under increased attack.[145] "The entering wedge is recognition that there is a tort, but disability to sue for it; . . . when the reasons for the disability

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138. "[I]t is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly expressed will of the legislative department." *Id.* at 621 (Harlan, J., dissenting).

139. "We are impelled to say that the philosophy of this great jurist appeals to us with more force and soundness and impresses us as more in harmony with the modern legislative intent on this question. . . ." Fiedler v. Fiedler, 42 Okla. 124, 129, 140 P. 1022, 1025 (1914). *See also* Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

140. *E.g.*, Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 156 (1961); Note, *Domestic Relations—Husband & Wife—Right of Wife To Sue Husband for Tort*, 32 OR. L. REV. 60, 65 (1952).

141. "The doctrine of interspousal immunity prevails in the District of Columbia." Edmunds v. Edmunds, 353 F. Supp. 287, 288 (D.C. Cir. 1972).

142. *E.g.*, Florida, Georgia, and Illinois. *See* note 145 *infra*.

143. We hold that when a husband inflicts intentional harm upon the person of his wife, the peace and harmony of the home has been so damaged that there is no danger that it will be further impaired by the maintaining of an action for damages and she may therefore maintain an action.

Apitz v. Dames, 205 Or. 242, 271, 287 P.2d 585, 598 (1955).

144. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 863-64 (4th ed. 1971) (footnotes omitted).

145. For compilations of states which hold majority and minority positions, see Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343, 355-58 (1965); 4B PERSONAL INJURY (Matthew Bender) §§ 5-9 (1970 & Supp.); Annot., 43 A.L.R.2d 632 (1955 & Supp.).

fail, the tort becomes actionable."[146] Of the growing minority of jurisdictions which have abrogated interspousal immunity, some have done so for both intentional tort and negligence actions,[147] while others have retained some limitations on the right of the husband and wife to sue each other in tort.[148] The state of the law, then, remains in flux, reflecting the conflicting views extant today of the social and legal nature of the husband-wife relationship.

Although for many abused women, a judgment proof husband or fear of retaliation give a remedy in tort little significance, in appropriate circumstances the abused wife must have such a remedy available to her. Where no personal or legal bar to litigation or judgment exists, an award of damages may give an abused wife the money she needs to get away from her husband and start a new life. In addition, the availability of such suits may have a deterrent effect on some abusive husbands. At any rate, the denial of legal recourse to the victim of an intentional tort simply because the tortfeasor is her spouse, is based on the tenets of a fading social order. The emerging social paradigm, which assumes equal treatment of women under the law, gives rise to demands that such disabilities be removed.

The Family Courts

Another area of the civil law to which many abused wives turn for assistance is that administered by the family courts. Available remedies include a variety of injunctive orders as well as actions pertaining to the marriage relationship, such as separation and divorce. However, a woman seeking protection from her abusive husband through the family courts is likely to find only a time consuming and costly process which, in the end, avails her no relief.

In some states, primary jurisdiction for adjudication of all intrafamily violence cases lies with the family court.[149] But family court judges in these and other jurisdictions often treat the abused wife no better than do those in the criminal courts. The family court's ambivalent attitude regarding interspousal violence illustrates the legal response to the uncertain and changing state of social attitudes toward married women. Although statutes and case law may at times reflect the revolutionary notion that it is the duty of the legal sys-

146. W. PROSSER, *supra* note 144, at 863.

147. For example, Arkansas, Alaska, California, Connecticut, Minnesota, and New Mexico. *See* note 145 *supra*.

148. For example, Oregon and Wisconsin. *See* note 145 *supra*.

149. *See* text accompanying notes 100-15 *supra*.

tem to protect women from abusive husbands,[150] those charged with administering the law remain champions of the older ideology regarding women, family, and marriage.[151] Family court clerks and probation officers may misstate the law to women seeking court assistance.[152] Judges may ignore statutory provisions imposing stricter sanctions and operate on the assumption that their role is to achieve reconciliation rather then to protect the victim of abuse.

Family law and courts are supposedly acting in the interests of the family unit, though at the expense of married women. The attitude of the legislature, police and judges is that they are dealing not with a public crime, but with signs of a troubled marriage.[153]

One remedy offered by the family court is an order of protection, or restraining order, which theoretically requires that a husband stay away from his wife. In practice, however, obtaining the order involves retaining an attorney, filing petitions, and then waiting ten days before testifying at a hearing. During this time the woman is unprotected from her husband.[154] Even if she has the stamina and determination to obtain the order, she is very likely to find that if her husband violates the order it will not be enforced against him, and may merely serve to incite him to further violence against her.[155] Such restraining orders waste time, energy, money,

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150. *See* Baker v. City of New York, 25 App. Div. 2d 770, 269 N.Y.S.2d 515 (1966), holding that the issuance of a protective order to a woman who had been beaten by her husband created a special duty in the police to protect her.

151. [T]hose who execute decisions . . . mediate the written word with their cultural inheritance and personal prejudice. As a result, even where the law has provisions to aid the battered wife . . . [she] may find a major obstacle in the stereotypical ideas of marriage, of appropriate behavior within marriage, and of marital violence which are held by the law officials with whom she must deal.

Comment, *Battered Wives: Some Social and Legal Problems*, 2 BRIT. J.L. & SOC'Y 201 (1975).

152. "And, in one alleged incident, a woman in fear of her husband's attacks was informed by a petition clerk that seeing a judge would not 'help' unless she was prepared herself to serve a summons upon her husband." 90 Misc. 2d at 1047, 396 N.Y.S.2d at 979.

153. Goodman, *Abused by her Husband—And the Law*, N.Y. Times, Oct. 7, 1975, at 35, col. 2.

154. For attempts by the legislatures of Pennsylvania and Massachusetts to remedy this situation, see notes 106-15 *supra*.

155. "The order may make a woman feel more secure, but it does so falsely and only temporarily, because the man will be free to assault her again and will do so." Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 157 (1977). The failure to enforce restraining orders parallels the problem with subsequent enforcement of peace bonds by the criminal courts. *See* note 84 *supra*.

and emotion and consequently many legal aid attorneys refuse to obtain them. "To raise the hopes of a woman by obtaining a meaningless piece of paper is cruel and shows a lack of respect for the intelligence of our clients."[156]

In addition, in most jurisdictions, either by law or by custom, a restraining order will only be issued if separation or divorce proceedings have been initiated.[157] Thus this remedy is not available to the woman who has not yet decided on divorce.[158]

"These failures of the legal system restrict the victim's liberty, forcing her to suffer beatings which over the years increase in frequency and severity."[159] The abused wife may thus be forced, by the failure of police and the courts to stop her husband from beating her, to seek dissolution of her marriage. This will have been accomplished, ironically, by the very family court system which has denied the woman protection by fashioning remedies based on a policy of preserving the family unit.

For women who decide that divorce or separation is the best solution in their particular situation, the law of divorce presents many illogical obstacles based on an outmoded social order. Although some jurisdictions have adopted "no-fault" dissolutions with no other grounds for divorce,[160] others retain fault defenses which preclude equitable alimony settlements and distribution of property.[161]

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156. D. MARTIN, *supra* note 4, at 109. ***But see*** notes 106-15 *supra* and accompanying text.

157. For example, see Connecticut Task Force on Abused Women: Abuse and the Law 2 (Jan. 1977) (unpublished report).

158. *See* note 43 *supra*.

159. Fields, *supra* note 105.

160. A typical statute of this kind is as follows:

§4506. Grounds for dissolution or legal separation

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity.

§ 4507. Irreconcilable differences defined

Irreconcilable differences are those grounds which are determined by the court to be substantial reason for not continuing the marriage and which make it appear that the marriage should be dissolved.

CAL. CIV. CODE §§ 4506, 4507 (West 1970).

No-fault dissolution statutes vary from state to state with some requiring waiting periods, separation agreements, actual separation, or agreement of both parties before a divorce will be granted. H. KRAUSE, FAMILY LAW IN A NUTSHELL 295-99 (1977).

161. These are generally jurisdictions which, without revising all their divorce

Divorce reform is moving rapidly, and many jurisdictions allow no-fault divorces where agreed to by both parties.[162] A few jurisdictions grant divorces on no-fault grounds only.[163] For the woman who does not fear her husband, the major reason for wanting a divorce is the desire for independent legal status, including the right to remarry.[164] For the abused wife, however, divorce can mean that she will have some protection through the legal system if her ex-husband threatens or abuses her, as well as redress through the civil tort law.[165]

In those jurisdictions which retain fault defenses, it may be necessary to prove continued and violent attacks to obtain a divorce.[166] In addition, a woman who has left the home may be found to have abandoned or deserted her husband. The presumption of desertion created by her having left the home is difficult to rebut without evidence to corroborate her claims of having been forced to flee out of fear of her husband's violence against her and her children.[167] Once determined to have been at fault, the woman may be denied the divorce. If the divorce is granted to the husband, the woman may, on the basis of being at fault, be denied alimony or an equitable property settlement.[168]

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law, simply tacked a ground such as "irreconcilable differences," or simply proof of actual separation, onto a list which included grounds such as adultery, cruelty, and abandonment. *See, e.g.*, N.Y. DOM. REL. LAW art. 10, § 170 (McKinney 1977).

For an intensive discussion of various grounds for dissolution and property settlements in Massachusetts, see McLellan, *supra* note 108.

162. For a rundown of the grounds for divorce as of August 1, 1977 in each state in the country, see Freed & Foster, *Family Law in the Fifty States: An Overview*, [1976-1977] 3 FAM. L. REP. (BNA) 4047.

163. See the California statute at note 160 *supra*.

164. H. KRAUSE, *supra* note 160, at 361-62.

165. "[D]ivorce is a very practical remedy. Divorce and the accompanying support and custody decrees give a woman economic and psychological freedom. A divorce judgment is also the best way to get the man out of the house. . . ." Note, *supra* note 2, at 159. In addition, interspousal tort immunity does not apply, of course, to people who are no longer married for torts committed after the dissolution of their marriage.

166. "The battered wife should be aware that hospital, medical, police, and criminal court records can be used to prove her claims of abuse in her divorce proceedings." R. LANGLEY & R. LEVY, *supra* note 4, at 215.

167. "Wives of professional or businessmen have a hard time proving physical cruelty unless they have photographs, witnesses or medical reports. Judges are deferential to and identify with high-status men. They do not believe wives who claim that these men have committed the 'lower class' act of wife beating." Fields, *supra* note 105, at 4026.

168. "[I]f a divorce is granted against a wife on a 'fault' ground, she is precluded from obtaining alimony. . . ." Krane v. Krane, 83 Misc. 2d 714, 715, 373

Some states allow divorce on both fault and no-fault grounds. In these jurisdictions, the husband of a woman who files for a no-fault divorce may counterclaim on the basis of fault, challenging the wife's right to an equitable property settlement.[169] Thus the woman must obtain her husband's consent or acquiescence to the divorce, an unlikely occurrence in wife abuse situations; or, the wife may be coerced into giving up her property rights in return for an uncontested divorce.

In those jurisdictions which allow divorce only on grounds such as irreconcilable differences, the fault of either party is not a factor. In this context, alimony and property settlements are based on need and other circumstances unrelated to fault.[170]

Because of the inaction of the legal system, the woman often has no choice but to leave the home and seek alternative shelter. The old social ideology maintains that a woman belongs in her home no matter what, and that any woman who leaves the home may be presumed to have abandoned her husband, forcing him as the aggrieved party to seek divorce.[171] As this assumption loses its force, however, it becomes possible to view the break-up of a marriage as being the fault of neither party, or to decide that the fault of either is not a relevant factor. The abused wife is particularly needful of this approach. The very nature of wife abuse ensures that there typically are no witnesses other than children.[172] It is pat-

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N.Y.S.2d 275, 276 (1975). "[J]udgment of divorce based upon the misconduct of the wife, . . . precludes the wife from receiving alimony or from receiving possession of the marital residence. . . ." Orloff v. Orloff, 49 App. Div. 2d 975, 975, 373 N.Y.S.2d 888, 890 (1975).

169. Gamino v. Gamino, 199 So. 2d 202 (La. 1967). The wife contended that the husband had abandoned the marital home. The record showed that the wife, without her husband's consent, rented an apartment on a street on which her husband had refused to live. The wife was granted a divorce, but "[a]s a wife is not entitled to alimony unless she proves her freedom from fault . . . and as . . . she was equally guilty of fault, she is not entitled to alimony." *Id.* at 203.

170. This is not always the result. For instance, the Michigan Court of Appeals has said that although the legislature has eliminated the fault standard for dissolution of marriages, it did not intend to modify traditional fault grounds for determining custody, support, alimony, and property division. Kretzschmar v. Kretzschmar, 48 Mich. App. 279, 285, 210 N.W.2d 352, 355 (1973), discussed in Eisenberg & Micklow, *supra* note 36, at 153.

171. For a discussion of the way in which the Michigan courts have handled cases where the wife alleges physical assault, see Eisenberg & Micklow, *supra* note 36, at 152-53.

172. E. Hilberman & K. Munson, Sixty Battered Women: a Preliminary Report, at 3-5 (May 5, 1977) (unpublished report prepared for American Psychiatric Association Special Session—Battered Women: Culture as Destiny, Toronto, Canada).

ently unjust that in addition to being forced out of her home, she should then have that desperate flight used against her in divorce or property settlement proceedings.

Thus, the family courts and family law treat abused wives in much the same manner as do other areas of the law. Although the treatment is not surprising in light of the present social and ideological climate, the failure of family courts to come to grips with the problem of domestic violence is disappointing because this specialized part of the legal system ought to be among the first to adapt to the needs of abused women.

CONCLUSION

As feminist reformers successfully challenge outdated concepts regarding the social and legal status of married women, contradiction and confusion in the law of domestic violence will continue to reflect the resulting ideological crisis. Slow and uneven movement often characterizes the development of new ideologies. The turmoil that naturally accompanies social change will eventually subside with the ascendency of a new paradigm. As new attitudes become part of the fabric of our social order, the law will respond with statutes and case law which protect wives from abuse and afford them equal concern and respect under the law.

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