NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 8
Issue 1 *VOLUME VIII Fall 1990 Part One*

Article 5

1990

Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination

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EXPLAINING THE LEGAL SYSTEM'S INADEQUATE RESPONSE TO THE ABUSE OF WOMEN: A LACK OF COORDINATION

I. INTRODUCTION

The battering of women has reached epidemic proportions in the United States. Surveys indicate that between one-third and one-half of the 4,611 women murdered in the United States in 1988 were killed by a husband, boyfriend or ex-mate.[1]

Unfortunately, information about the severity of such violence is sparse, because little data has been collected on actual injuries sustained in any particular incident. Nevertheless, one analyst has reported that "the average severity of the injuries sustained by victims of spousal assaults is significantly greater than those sustained by victims of assaults by strangers."[2] More women are admitted to emergency rooms after being battered by their partners than are treated for muggings, car accidents, and rapes combined.[3]

Violence between partners is often serious and even fatal. Fatalities from abuse are all too common: the batterer may kill his victim,[4] she may kill him[5] or one of them may commit suicide in order

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1. Feeney, *Getting The OP is Easy*, N.Y. Daily News, Sept. 3, 1989, at 54, col. 1.

2. *See* Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 78 n.27 (1983) (citing Gaquin, *Spouse Abuse: Data From The National Crime Survey*, 2 VICTIMOLOGY: AN INT'L J. 635, 640-41 (1977-78)). This survey indicates that while only 5% of all assaults are perpetrated by spouses or ex-spouses, these incidents account for 12% of all assaults resulting in injury, 14% of assaults requiring hospitalization, 16% of all assaults requiring medical care, and 18% of those resulting in loss of more than one day from work. *Id.*

3. Feeney, *supra* note 1.

4. Two thousand to four thousand women are killed each year as a result of family violence. *See* O'Reilly, *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23.

to escape an unbearable situation.[6] Moreover, statistics indicate that domestic disturbances account for a substantial portion of all crime-related injuries and deaths of intervening police officers.[7]

These chilling statistics, which document the plight of battered women, reflect a traditional problem: women have been battered for centuries[8] without any protection from the courts.[9] Although public perceptions of the battered woman and her abusive male partner have improved,[10] misconceptions about the reality of the battering relationship still permeate the legal system.[11] The law's dedication to the elimination of the problem is half-hearted and its reaction remains misguided.

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5. *See, e.g.*, Comment, *Defense Strategies for Battered Women Who Assault Their Mate: State v. Curry*, 4 HARV. WOMEN'S L.J. 161 (1981) (according to an estimate from Cook County, Illinois, 40% of all women incarcerated there on homicide charges were accused of killing a man who had previously battered them).

6. *See* O'Reilly, *supra* note 4, at 24.

7. Waaland & Keeley, *Police Decision Making in Wife Abuse: The Impact of Legal and Extralegal Factors*, 9 LAW & HUM. BEHAV. 355 (1985). A 1978 article in *Police Magazine* reported that 40% of all police injuries and 20% of all police deaths on duty are the result of becoming caught in a family dispute. *See The Silent Crime*, *supra* note 4, at 24. Moreover, the nation's police spend one-third of their time responding to domestic violence calls. *Id.*

8. *See generally* Davidson, *Wife Beating: A Recurring Phenomenon Through History*, in BATTERED WOMEN: A PSYCHO-SOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 2 (M. Roy ed. 1977).

9. In 1765, a London Magistrate ruled that a man could beat his wife if he used a stick no thicker than a man's thumb. *See* Calvert, *Criminal and Civil Liability in Husband-Wife Assaults*, in VIOLENCE IN THE FAMILY 89 (S. Steinmetz & M. Straus eds. 1975).

10. *See* O'Reilly, *supra* note 4, at 26 (newspapers, judges, hospitals, neighbors, even a growing number of exasperated police officers have begun to understand the dimensions of the problem).

11. Sergeant Louis Mancuso of Manhattan's Ninth Precinct believes that there are often extenuating circumstances which do not warrant arrest, one being that "[m]aybe she wasn't giving him what he needed sexually." *Id.* at 24. The legal system is not alone in its misunderstanding of the battering relationship. Even those non-legal "professionals" who battered women would expect to comprehend their situation (*i.e.*, doctors, social workers and psychiatrists) have frequently been less helpful than the police and have actually perpetuated the battered syndrome, *e.g.*, "[d]octors fail to note signs of abuse, label battered women psychotic or hypochondriacal, prescribe tranquilizers and tell them to go home, and 'make a women doubt her own sanity' by sending her to a family therapist." *Id.* (quoting Evan Stark, research associate at Yale's Institution for Social and Policy studies and his wife, Dr. Anne Flitcraft).

Powerful social forces permit and even encourage abuse.[12] These forces continue to influence legal institutions and personnel, and undermine the legal system's desire and ability to combat the problem.[13] Even if these forces were purged from the legal system, they would probably continue to operate in society at large. As long as social forces and attitudes condone battering, the legal system alone can never provide a complete solution to battering. Nevertheless, the law and those responsible for enforcing it can play a critical role in reducing domestic violence. Someone must move against abuse, and no other societal institution has the legal system's clout to protect victims and to force batterers to face the consequences of their transgressions.

The legal system must respond in unison. There must be coordinated intervention among legislators, police, prosecutors and judges. This Note will address the legal system's inadequate response to the plight of battered women. The separate attempts of the legislature, police, prosecutors and judiciary to confront the problem will be analyzed. Generally, analysis will show that although attitudes maintaining the legal system's reluctance to use its powers against batterers have improved, a full-scale vigorous legal response has not been offered by any one of the individual players, nor by the legal system as a whole. Finally, this Note will suggest that only through a policy of coordination, with prosecutors aiding judges, legislators releasing the hands of police and the discretion of the judiciary, and with the entire legal system coming together to aid the victim, can the problem of battered women be seriously considered and effectively managed.

II. THE LEGISLATIVE RESPONSE

Historically, the law has not afforded battered women much protection from their male abusers. Until the early twentieth century, the law explicitly permitted men to beat their wives.[14] American common law in the early nineteenth century allowed a man to chastise his wife "[w]ithout subjecting himself to vexatious prosecutions for assault and

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12. *See* authorities cited in Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 269 n.9 (1985).

13. *See infra* notes 195-214 and accompanying text.

14. For example, a medieval theological law gives a man permission to castigate and beat his wife. E. DAVIS, THE FIRST SEX 255 (1971). Further, a sixteenth century Russian Household Ordinance describes the most effective way to beat one's wife. W. MANDEL, SOVIET WOMEN 12 (1975).

battery, resulting in the shame and discredit of all parties concerned."[15]

The legislative response to judicial reluctance to support the rights of battered women was painstakingly slow. Eventually, intensified public concern with family violence brought about legislative attempts to act. By the latter half of the 1970's, many legislative initiatives had been undertaken to pass legislation in aid of battered women.[16] For example, Pennsylvania enacted a law enlarging the number and scope of alternative dispositions available to a court confronted with an abused spouse case.[17] A Massachusetts statute spelled out the duties of investigating law enforcement officials in protecting abused spouses and expanded the number of circumstances under which arrests could be made for offenses committed outside a law officer's presence.[18] The two most common

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15. Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138 (1977) (citing Bradley v. State, 2 Miss. (2 Walker) 156, 158 (1824); "repudiated as a revolting precedent" in Harris v. State, 71 Miss. 462, 464, 14 So. 266 (1894)).

16. Schecter, *Coping with Family Violence Strategies and Tactics for the 1980's*, 6 VT. L. REV. 325, 327-28 (1981).

17. *See* 35 PA. CONS. STAT. ANN. §§ 10181-10190 (Purdon 1977). The statute authorized the court to

> grant any protective order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children, which may include:
> (1) Directing the defendant to refrain from abusing the plaintiff or any minor children;
> (2) Granting possession to the plaintiff of the residence or household to the exclusion of the defendant . . . .

Id. § 10186.

18. *See* MASS. GEN. LAWS ANN. ch. 209A, §§ 1-6 (West 1980). The statute provided that any law officer who had reason to believe that a family or household member had been abused

> shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is immediate danger . . . ; (2) assisting such person in obtaining medical treatment . . . ; (3) giving such person immediate and adequate notice of his or her rights; (4) arresting any person whom the officer has probable cause to believe has committed a felony; (5) arresting any person who has committed, in the officer's presence, a misdemeanor which involves abuse; (6) arresting

types of statutory enactments were (1) laws allowing victims to obtain protective orders against abusers[19] and (2) laws providing aid to supportive services, such as emergency shelters for battered victims.[20]

As the 1970's progressed, the trend of legislative initiative moved away from helping the abuse victim and towards imposing criminal sanctions on the abuser. The change in legislative direction was reflected in legislation creating new "family violence" offenses by using existing assault laws to punish violent acts within the family.[21]

> any person whom the officer has probable cause to believe has committed a misdemeanor pursuant to section thirty-four C of chapter two hundred and eight.

Id. § 6.

19. Schecter, *supra* note 16.

20. *Id.* For a state-by-state survey of domestic violence legislation at the end of the 1970's, see Lerman & Livingston, *State Legislation on Domestic Violence*, RESPONSE TO VIOLENCE IN THE FAM. & SEXUAL ASSAULT, Sept./Oct. 1981, at 1, 6-28.

21. Schecter, *supra* note 16, at 328-30. *See, e.g.*, the following California statute:

> *Corporal injury; Infliction by spouse upon his or her spouse or by her person cohabiting with person of opposite sex.*
>
> (a) 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 the state prison for 2, 3 or 4 years, or in the county jail for not more than one year.
>
> (b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

CAL. PENAL CODE § 273.5 (West Supp. 1982). Another example of such legislation can be seen in the following Washington statute:

> *PURPOSE - Intent*
>
> The purpose of this chapter is to recognize the importance of domestic violence legislation as a serious crime against society and to assure the victim of domestic violence the maximum protection from the abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes

Although the 1970's witnessed an emergence of new legislative initiatives in the area of wife-battery, important proposals were rejected in many states and on the federal level.[22] Much of the legislation designed to protect battered wives did not provide adequate funding or resources to accomplish the objectives of the draftsmen.[23] Police and state officials undermined the effectiveness of legislation by failing to vigorously implement the statutes.[24] As recently as 1978, only nine states had legislation which dealt seriously with domestic violence, although several other states had begun to make provision for shelter homes for battered women.[25]

In response to this legislative rejection, advocates for battered women worked to create a legal system responsive to the needs of the abused. Indeed, most of the domestic abuse laws have been enacted largely as a result of the work of legal services attorneys and the staffs of

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> are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

WASH. REV. CODE ANN. § 10.99.010 (1980).

22. Schecter, *supra* note 16, at 330.

23. *Id.*

24. *Id.*

25. *The Progress Of State Domestic Violence Legislation*, 4 Fam. L. Rep. (BNA) No. 5, at 4027 (July 25, 1978) (study presents domestic violence laws, whether pending or enacted in 50 states).

battered women's shelters.[26] As a result, many states have passed extensive legislation to provide early intervention in domestic abuse cases[27] and to reform existing domestic violence laws.[28]

A summary of the New York Legislature's attempt to grapple with the plight of battered women provides insight into an individual state legislature's response. In 1962, the New York State Legislature adopted the Family Court Act,[29] "intending to provide practical help" to abusers rather than punish them by means of criminal prosecution.[30] By the mid-1970's, however, it became obvious that the New York Legislature's response was grossly inadequate:[31] men still attacked and beat their wives or lovers, and the government was simply not providing women

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26. Schecter, *supra* note 16, at 327. The New York City Bar, with the help of the Victim Services Agency, has recently taken an important step towards alleviating the problem of too few lawyers for the growing number of battered women seeking help by initiating a pilot program in Bronx and Manhattan Family Courts called the Family Court Summer Assistance Project For Battered Women. Nance, *22 Summer Associates Assist Battered Women in the Bronx*, N.Y.L.J., Aug. 1, 1990, at 2, col. 1.

27. *See* Lerman, *A Model States Act, Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61 (1984). This article presents a model act which consolidates and addresses remedies needed for domestic violence into one comprehensive statute. It asserts that the primary goal of any law on domestic violence should be to protect the victim. *Id.* Accordingly, the Model Act facilitates the victim's ability to gain access to the courts and to request protection. *Id.* The Model Act also acknowledges the need for improved police response to domestic violence and specifies particular police duties. *Id.* Finally, the Model Act considers the appropriate treatment of abusers and includes both punitive and rehabilitative dispositional options. *Id.*; *see also* Note, *Montana's New Domestic Abuse Statute: A New Response to an Old Problem*, 47 MONT. L. REV. 403 (1986) [hereinafter Note, *Montana's New Domestic Abuse Statute*]; *see generally* Note, *Domestic Relations: Legal Responses to Wife Beating: Theory and Practice in Ohio*, 16 AKRON L. REV. 731 (1983) [hereinafter Note, *Domestic Relations*].

28. *See* Lerman, *supra* note 27, at 63.

29. N.Y. FAM. CT. ACT § 111 (McKinney 1963). For an excellent analysis of the New York Family Court Act from its inception, see Note, *Jurisdiction Over Family Offenses in New York: A Reconsideration of the Provisions for Choice of Forum*, 31 SYRACUSE L. REV. 601 (1980).

30. N.Y. FAM. CT. ACT art. 8 commentary at 125 (McKinney 1983). There was a general consensus in 1962, when the Family Court Act was drafted, that treatment, not prosecution, was the best societal response to family violence. *Id.*

31. *Id.* Regardless of the good intentions to deal with the problem of domestic violence from a sociological standpoint, the fact is that existing procedures were not protecting women. Women were still being beaten and even killed. *See* Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

with adequate protection.[32]

An important reform in New York[33] was the legislature's amendment of the Family Court Act in 1977.[34] The legislature realized that protecting family members and putting an end to domestic violence were primary goals which must be met before the use of remedial tools such as counseling and reconciliation.[35] This amendment produced two important weapons for fighting domestic violence: (1) victims were given their choice of forums[36] and (2) the Family Court's power to issue "protective orders" was greatly strengthened.[37]

Prior to September 1, 1977, the filing of a petition in family court pursuant to article 8 of the Family Court Act was the only way to initiate a family offense proceeding.[38] In 1977, the New York Legislature enacted new legislation in order to provide the battered spouse with more effective relief.[39] This "enabling" statute allowed the battered woman to commence a family court proceeding by filing a petition in family court[40] or to commence a criminal action by filing an accusatory instrument in a criminal court[41] for any act that was designated a family offense in § 812 of the Family Court Act.[42] Initially, it became apparent that electing family court under the choice-of-forum provision effectively barred a subsequent proceeding in the alternative criminal court forum. The legislature responded to this pitfall in the application of the statute through enactment of a 1978 amendment which permitted a battered spouse to change forums within seventy-two hours of the filing of an

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32. One case, Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), presents lucid evidence of the continued existence of domestic violence. *See infra* notes 90-94 and accompanying text.

33. *See* Note, *Sorichetti v. City of New York Tells the Police that Liability Looms for Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333 (1985) [hereinafter Note, *Sorichetti*].

34. 1977 N.Y. Laws 449.

35. *See* N.Y. FAM. CT. ACT art. 8 commentary at 125 (McKinney 1983) (emphasizing that the legislature's first priority is to protect family members by ending the violence).

36. 1977 N.Y. Laws 449.

37. *See* N.Y. FAM. CT. ACT art. 8 commentary at 128 (McKinney 1983). Protective orders are discussed *infra* notes 44-67 and accompanying text.

38. N.Y. FAM. CT. ACT § 821 (McKinney 1975).

39. 1977 N.Y. Laws 449.

40. *Id.* §§ 1, 3.

41. *Id.* §§ 1, 3, 10.

42. *Id.*

accusatory instrument or a family court petition.[43] By granting a choice of forum, the legislature attempted to ensure better access to the courts for battered women.

The 1977 amendments also strengthened the family court's power to issue protective orders.[44] Protection orders "are court-issued temporary or permanent orders which direct an assailant to refrain from further abusive conduct."[45] More importantly, especially in the eyes of battered women, a certificate setting forth the terms of the order of protection, when presented to a peace officer, authorized the officer to take into custody a person charged with violating the order.[46] Through this "remedial and protective tool," the legislature saw the opportunity to directly confront the problem of spousal abuse.[47] Such an order may require the petitioner or the respondent:

> (a) to stay away from the home, the other spouse or the child;
> (b) to permit a parent to visit the child at stated periods;
> (c) to abstain from offensive conduct against the child or against any person to whom custody of the child is awarded;
> (d) to give proper attention to the care of the home;
> (e) to refrain from acts of commission or omission that

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43. *See* N.Y. CRIM. PROC. LAW § 100.07 (McKinney Supp. 1979); N.Y. FAM. CT. ACT §§ 812(2)(e), 821(2), 821(3)(b) (McKinney Supp. 1979).

44. *See* N.Y. FAM. CT. ACT. art. 8 commentary at 128 (McKinney 1983). This SECTION specifically focuses on legislatively enacted civil remedies available to battered women. A discussion of the criminal remedies available through state or municipally instigated action was better suited for analysis within the discussion in SECTION VIA, *infra* text accompanying notes 158-94, because criminal legislation is an area in which the legislature can act in unison with the police, *i.e.*, mandatory arrest statutes to fight abusers. The analysis of the problems with civil protection orders and the possible solutions should convey the message to the reader that although the legislature has made an effort, it has not yet decided to completely solve the problem.

45. In the context of family violence, protection orders are so defined. Note, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703 (1982) [hereinafter Note, *Restraining Order*].

46. N.Y. FAM. CT. ACT § 168 (McKinney 1983).

47. Note, *Sorichetti*, *supra* note 33, at 342. The legislature viewed the protective order as an indication to the abuser that the courts have deemed it necessary to provide the holder of the order with the needed protection. *Id.* (citing N.Y. FAM. CT. ACT. art. 8 commentary at 128 (McKinney 1983)). By creating such an impression on the abuser, the courts hoped that the protective order would prevent further assaults. *Id.*

> tend to make the home not a proper place for the child.[48]

Orders of protection, however, have not lived up to the New York Legislature's expectations. Presently, access to orders of protection can be an unnavigable obstacle course for domestic violence victims.[49]

In February 1988, Justices Milton L. Williams, Deputy Administrative Judge for New York City, and Robert Keating, New York City Criminal Court Administrative Judge, initiated a task force to investigate the problems of the city's summons court which handles the tens of thousands domestic violence cases and requests for orders of protection.[50] In June 1989, the investigating committee, comprised of thirteen judges, lawyers and crime experts, released its findings in the Report of The Task Force On The Civilian Initiated Complaint System in the New York City Criminal Court.[51] The Task Force Report found that the civil-initiated complaint system created by the legislature poorly served domestic violence victims.[52] According to the Task Force Report, "the byzantine nature of the present [New York City] civilian-initiated complaint process makes it difficult for at-risk persons to obtain

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48. N.Y. FAM. CT. ACT § 842 (McKinney 1988). The order generally requires a defendant to stay away from a person or premise, or to refrain from verbal or physical abuse. Feeney, *Orders of Illusion*, N.Y. Daily News, Sept. 3, 1989, at 54, col. 1. If the person named on the order is proven to have violated the instructions, he is guilty of contempt. *Id.* Tenants, landlords, merchants and social service workers all avail themselves of "OP's," but the vast majority of the more than 40,000 active protective orders in New York City are held by women seeking to protect themselves from men. *Id.* In 1989, 8,000 women in the Bronx filed family offense petitions seeking orders of protection according to Laurie Milder, Director of the Community Outreach Law Program at the Association of the Bar of the City of New York. *See* Nance, *supra* note 26.

49. This discussion of the shortcomings of orders of protection deals with the difficulties in actually obtaining the certificate. An analysis of whether the order of protection means anything to those required to enforce it is undertaken in SECTION III, *infra* text accompanying notes 68-108.

50. Feeney, *The Court of Blunders*, N.Y. Daily News, Sept. 4, 1989, at 16, col. 2.

51. NEW YORK STATE TASK FORCE ON PROCESSING CIVILIAN COMPLAINT SYSTEM BY THE NEW YORK CITY CRIMINAL COURT, REPORT OF THE TASK FORCE ON THE CIVILIAN-INITIATED COMPLAINT PROCESS IN THE NEW YORK CITY CRIMINAL COURT (1989) [hereinafter REPORT OF THE TASK FORCE].

52. *Id.* at 35.

even an order of protection in a timely fashion."[53] The Task Force Report concluded that only the most determined victims were likely to pursue their quest for an order of protection and "many complainants with legitimate grievances find the system too onerous."[54]

Statutorily required relationships have also proven to be a major hindrance to court access for abused women seeking orders of protection.[55] Montana's former order of protection statute made relief available only to abused spouses.[56] There was also a limitation excluding former spouses.[57] This marriage requirement has little correlation with the type of person who will seek assistance, because spouses are not the only victims of women beating.[58] Moreover, incidents of women beating commonly occur among former spouses.[59] Thus, unmarried or divorced women in Montana who were victims of domestic violence could not petition for an order of protection.[60] In 1985, the Montana Legislature specifically changed the law to increase the availability of domestic abuse orders of protection.[61] Some states now

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53. *Id.*

> The existing process is marked by slow starts and false hopes and expectations. . . . A persistent, vituperative applicant with a petty claim should not have the right to see a judge and prosecute his or her claim while a fearful victim of domestic violence is unable to obtain redress because of the complexity of the process and the lack of a supportive setting.

Id. at 47.

54. *Id.* at 35. The report further stated that "no one is available to explain the possible consequences of their decision. Nor is anyone available . . . to provide emotional support, practical assistance, or a referral to a shelter should they decide that they cannot go home." *Id.*

55. *See* Note, *Montana's New Domestic Abuse Statute*, *supra* note 27.

56. MONT. CODE ANN. § 40-4-106(1), (3) (1983).

57. *Id.*

58. Gaquin, *Spouse Abuse: Data from the National Crime Survey*, 2 VICTIMOLOGY: AN INT'L J. 635, 635 (1977-78).

59. *Id.*

60. The order of protection statute provided the sole civil remedy available to domestic abuse victims. Note, *Montana's New Domestic Abuse Statute*, *supra* note 27, at 413 n.95.

61. The relationship between the victim and the abuser must be that of a "family or household member." MONT. CODE ANN. § 40-4-121(3)(a) (1985). Under the new law "persons who may request relief . . . include spouses, former spouses and persons

have a household requirement that demands that the "participants in the battering relationship" occupy the same home.[62] This ignores the reality that some couples have longstanding relationships and/or children but have never lived together.[63] These arbitrary restrictions, to the extent that they deny relief to otherwise qualified persons, frustrate the goal of providing an alternative civil remedy for battered women.

Civil orders of protection are the most widely used remedy for wife beating.[64] Battered women prefer obtaining an order of protection to initiating a criminal prosecution.[65] Numerous studies indicate, however, that these orders are not effective in stopping the battering of women.[66] The fact remains that "Orders of Protection are only worth the paper they are written on."[67] Existing civil protection order legislation must be improved by increasing access and improving procedures. Finally, the legislature must take heed of the plight of the battered woman. The question remains, however, whether the legislatures' efforts have been supported by the other arms of the legal system.

III. THE POLICE RESPONSE

As society's peacekeepers, law enforcement personnel are in a position to help battered women.[68] Police involvement in domestic disturbances exceeds their combined involvement in murder, rape, and all

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cohabiting or who have cohabited with the other party within one year immediately preceding the filing of the petition." *See id.* § 40-4-121(3)(b).

62. Note, *Restraining Order*, *supra* note 45, at 707.

63. *Id.*

64. *Id.* at 740.

65. *Id.*

66. *Id.* Twenty-year-old Erica Due of Nassau County was stabbed and strangled by her husband, James Due, on July 27, 1989, while under the protection of her third court order, issued July 3, 1989. Feeney, *Sentenced To Death?*, N.Y. Daily News, Sept. 3, 1989, at 54, col. 3. Authorities said she had received two temporary orders following assaults by her husband on September 8 and November 8, but failed to attend hearings to get them extended. *Id.* She was killed three hours before she was to testify about the most recent assault charge before Nassau District Court Judge Mark Mogel. *Id.*

67. E. Yaroshefsky, Private Practitioner, Remarks at a Panel Discussion on Battered Women, presented by the Legal Association for Women at New York Law School (Nov. 13, 1989).

68. *See, e.g.*, Waaland & Keeley, *supra* note 7.

other forms of aggravated assault.[69] Police policy toward battered women assumes many forms, varying from outright refusal to arrest batterers and recognize domestic violence as a criminal matter,[70] to a practice of giving domestic violence calls lower priority than non-domestic disputes.[71] This is logical considering that official police policy has often stressed avoidance of arrest whenever possible.[72] Sometimes police policy is explained in written manuals[73] and other times it is demonstrated by a pattern of police behavior that treats assaults by men against their wives less seriously than assaults by strangers.[74]

Despite the belief and preference of some people that police respond to the crime of wife battering by enforcing the law against the wife batterer,[75] the policy of many jurisdictions is to encourage non-arrest or mediation by police officers.[76] In one survey it was found that less than twenty-five percent of the jurisdictions examined required the full enforcement of the law and the arrest of the wife batterer.[77] The results of this survey show that police policy was a clear reflection of

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69. *Id.*

70. Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't*, 95 YALE L.J. 788, 788-89 nn.3-4 (1986).

71. *Id.* at 794 n.13.

72. *See generally* Pence, *The Duluth Domestic Abuse Intervention Project*, 6 HAMLINE L. REV. 247, 248 n.1 (1983) (author presents various authorities supporting this position).

73. Eppler, *supra* note 70, at 790. An example of a typical police manual is the Madison, Wisconsin *Police Department Newsletter* which indicates that appropriate police responses to domestic violence cases may range from mediation of the dispute to referral to counseling agencies, and finally, to arrest. F. REMINGTON, D. NEWMAN, F. KIMBALL, H. GOLDSTEIN & W. DICKEY, CRIMINAL JUSTICE ADMINISTRATION CASES AND MATERIALS ch. 3 (rev. ed. 1982) (citing MADISON, WIS. POLICE DEP'T NEWSLETTER (Sept. 26, 1978)). Many police manuals base their guidelines on the Model Rules For Law Enforcement Officers Developed by the International Association of Chiefs of Police. INTERNATIONAL ASS'N OF CHIEFS OF POLICE, MODEL RULES FOR LAW ENFORCEMENT OFFICERS: A MANUAL ON POLICE DISCRETION, TRAINING KEY NO. 16, HANDLING DISTURBANCE CALLS (1974).

74. Eppler, *supra* note 70, at 790.

75. *See* Finesmith, *supra* note 2, at 75.

76. *Id.*

77. *Id.* Those jurisdictions identified in the Finesmith survey as requiring the full enforcement of the law and the arrest of the wife batterer are: Barstow, Los Angeles, and San Francisco, Cal.; Atlanta, Ga.; Normal, Ill.; Detroit, Mich.; Dayton, Ohio; Seattle and Spokane, Wash. *Id.* at 94 n.135. This policy is generally expressed in police regulations. *Id.* at 92-94.

either strong or weak state laws in the jurisdictions examined.[78]

Recent history sheds an unfavorable light on the police response to domestic violence. During the 1950's and 1960's the police response could best be classified as one of passive reluctance to help the victim.[79] For example, the police in Detroit, Michigan, during the 1950's often refused to take action when confronted with domestic disputes and when they did arrest it was usually followed by a referral to a misdemeanor complaint bureau which did no more than to release the abuser on an informal, unenforceable bond.[80] Similarly, in Chicago in the early 1960's, the primary police responses were ad hoc informal attempts at conflict resolution by police responding to calls for help.[81]

The justifications for police non-enforcement policies in wife abuse cases are numerous. The many rationalizations include preserving the traditional principle that "a man's home is his castle,"[82] avoiding arrest in situations in which the physical abuse of a woman by her husband is purported to be acceptable within the couple's culture,[83] and maintaining the efficient and economic administration of the state's law enforcement agencies by regarding wife battering as a minor crime and the arrest of wife batterers as a low priority.[84] Other rationalizations have been: avoiding arrest in situations in which the family could ill afford the economic impact of the husband's arrest (*e.g.*, time lost from work)[85] and respecting a couple's privacy by not interfering in private marital matters.[86] Regardless of the specific rationalization, none of

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78. *Id.* at 94 n.135.

79. *Id.* at 84-85.

80. *Id.* at 84.

81. *Id.* at 84-85.

82. *See* Marcus, *Conjugal Violence: The Law of Force and The Force of Law*, 69 CALIF. L. REV. 1657, 1660 (1981); Parnas, *The Police Response to the Domestic Disturbance*, 4 WIS. L. REV. 914, 931 (1967).

83. Parnas, *supra* note 82, at 930 (the couple's culture refers to their joint subscription to traditional opinions about male and female roles).

84. *See, e.g.*, Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135 (1977) [hereinafter Note, *Case for Legal Remedies*].

85. *See* Marcus, *supra* note 82, at 1670; Parnas, *supra* note 82, at 930.

86. *See* Note, *Case For Legal Remedies*, *supra* note 84, at 169; Marcus, *supra* note 82. Further attempts at justification include preventing the possibly severe retaliation against the battered wife by the arrested husband after release and preserving the marriage and family which could be endangered by the intervention of the criminal justice process. *See* Finesmith, *supra* note 2, at 85-86. The assailant may choose to exploit the protection of the right of privacy by claiming that (1) he is the head of the

these policies can accomplish the broad reach of arresting the batterer. Arrest is the linchpin of an effective police response because it communicates to the battered woman that the legal system does not blame her for the abuse inflicted and that she will not have to tolerate it.[87] Arrest conveys a similar message to the batterer. It signifies that society condemns his conduct and will hold him accountable for it.[88] Moreover, even if an arrest does not lead to a conviction, it is the most effective way for police to protect women from further abuse.[89]

The police response to the plight of the battered women has markedly improved as a result of several cases imposing liability on the police because of inadequate protection given to battered women who were eventually murdered by their abusive husbands. In *Bruno v. Codd*,[90] twelve battered wives in New York City, suing on behalf of themselves and all other battered wives similarly situated, challenged the non-arrest policies of the New York City Police Department.[91] The state supreme court held that "the police owe a duty of protection to battered wives"[92] and that they are "not to automatically decline to make an arrest simply because the assaulter and his victims are married to each other."[93] The parties subsequently entered into a consent decree which required, *inter alia*, that if the police had probable cause that an abuser had committed a felony or violated a protection order, they must arrest the

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household and can claim the right of privacy for all its members, regardless of their wishes and (2) that there are competing interests involved and his right to privacy is superior to his spouse's request for protection. Marcus, *supra* note 82. In response, victims in interspousal assault cases seek legal intervention, the antithesis of privacy. *Id.* Moreover, effective intervention necessarily mandates disclosure of the misconduct that has occurred. *Id.*

87. *See* Finesmith, *supra* note 2, at 109.

88. *Id.* at 104-05 (abusers are likely to see themselves as law-abiding citizens unless they are arrested). *But see generally* Steinman, *Lowering Recidivism Among Men Who Batter Women*, 17 J. POLICE SCI. & ADMIN. 124 (1990) (study finding that men with criminal records reoffended and arrest coordinated with other sanctions increased abuse among offenders whose victims called for police help).

89. Eppler, *supra* note 70, at 791. There is preliminary evidence that post-arrest counseling for a non-incarcerated batterer reduces recidivism. *See* Lerman, *Criminal Prosecution of Wife Beaters*, RESPONSE TO VIOLENCE IN THE FAMILY, Jan./Feb. 1981, at 1, 12. The necessity of mandatory arrest guidelines for police departments is further discussed in SECTION VIA, *infra* notes 158-72 and accompanying text.

90. 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977).

91. *Id.*

92. *Id.* at 1050, 396 N.Y.S.2d at 977.

93. *Id.* at 1049, 396 N.Y.S.2d at 976.

abuser, and further, that officers must provide justification for refraining from making an arrest when they had probable cause to believe that an abuser had committed a misdemeanor against his spouse.[94]

Citing *Bruno*, a Connecticut District Court in *Thurman v. City of Torrington*,[95] held that similar police inaction was a denial of the equal protection of the laws.[96] In *Thurman*, the plaintiff Tracy Thurman filed a complaint which alleged a § 1983[97] civil rights violation of her constitutional rights resulting from the nonperformance or malperformance of duties by a series of official defendants.[98] These defendants included the police of the City of Torrington and the City of Torrington itself. The plaintiff's essential premise was that the Torrington police violated her right to equal protection in that they rendered less attention or protection to battered women domestic violence victims than to anonymous non-related battery victims.[99] The court denied the defendants' motion to dismiss.[100] At trial, a jury awarded Tracy Thurman $2.3 million in damages against the individual police officers, to compensate her for the brutal stabbing that resulted from the police's reported refusal to arrest her menacing husband.[101]

New York City, however, needed an extra boost to supplement *Bruno*. The New York City Police Department was forced to drastically change its arrest procedures in 1984 after Josephine Sorichetti won a $2 million damage award against the city for its failure protect her from her menacing husband.[102] Despite the issuance of a protective order to Josephine Sorichetti, her numerous pleas to have her husband arrested for death threats to her and her daughter Dina, and the extensive police knowledge of her husband's violent behavior, the police had refused to

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94. Finesmith, *supra* note 2, at 86.

95. 595 F. Supp. 1521 (D. Conn. 1984).

96. *Id.* at 1528.

97. 42 U.S.C. § 1983 (1982).

98. *Thurman*, 595 F. Supp. at 1524.

99. *Id.* at 1526-27.

100. *Id.* at 1529.

101. *Id.* The parties later settled for $1.9 million. *See* Eppler, *supra* note 70, at 795 n.31.

102. Sorichetti v. City of New York, 95 Misc. 2d 451, 408 N.Y.S.2d 219 (Sup. Ct. 1978).

take any action.[103] Frank Sorichetti was eventually convicted of attempted murder of Josephine Sorichetti's daughter.[104] Although the majority of the damages were awarded in the civil suit to Josephine Sorichetti's daughter for the police department's breach of its duty to provide her with reasonable protection,[105] the court stated in no uncertain language that a protective order was a "court given shield to [potential] victims."[106]

These three cases indicate that courts are willing to impose on the police a duty to take a substantially greater role in preventing domestic violence. Are the police, however, willing to take up the mantle, or do they need to be pushed further?

The police response has markedly improved. By 1985, the New York City Police Department had adopted patrol guidelines which mandated arrest in all felony assaults and in all misdemeanors when a crime is committed in front of a police officer.[107] By March 1988, the New York City Police Department had updated the procedures for family offenses and domestic violence to reflect the current legal guidelines and department policy.[108]

The legal system, however, cannot rely completely on the police to use their discretion wisely in battering cases. Support from the other arms of the legal system is unquestionably needed to insure an effective police response.

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103. Sorichetti v. City of New York, 65 N.Y.2d 461, 466, 482 N.E.2d 70, 73, 492 N.Y.S.2d 591, 594 (1985). Frank Sorichetti threatened to kill his wife and told her that she would be making "the sign of the cross" before the weekend was over; he told Dina that she had better make the "sign of the cross" too. *Id.* To Josephine this statement meant he intended to kill Dina as well. *Id.* In January 1975, Frank attacked and punched Josephine in the chest so forcefully that he sent her "flying across the room." *Id.* at 464, 482 N.E.2d at 74, 492 N.Y.S.2d at 593. In July 1975, Frank attacked her with a butcher knife, cutting her hand and also threatened to kill both her and her children. *Id.* at 464, 482 N.E.2d at 74, 492 N.Y.S.2d at 595.

104. *Id.*

105. *Id.* at 465, 482 N.E.2d at 71, 492 N.Y.S.2d at 593.

106. *Id.* at 469-70, 482 N.E.2d at 75-76, 492 N.Y.S.2d at 596-97.

107. *See* Greer, *City Police Have Changed Their Approach to Family Disputes*, N.Y. Times, Mar. 25, 1985, at B5, col. 3.

108. *See* REPORT OF THE TASK FORCE, *supra* note 51, at app. F ("New York City Police Department Interim Operation Order # 17").

IV. THE PROSECUTORIAL RESPONSE

The police can only activate the legal process. In order to interrupt the cycle of violence permanently, prosecutors must intervene in the battering relationship and use their power to stop abuse. Like the police, prosecutors have erred in their historical reactions to abuse. Prosecutors have often viewed women's abuse complaints as extralegal family matters which have no place in the judicial system.[109] They have argued that the heavy penalty and high bail for such crimes, in light of the domestic relationship, increases the chance that either the man will contest the charges, or the woman will drop the charges, with the result often being no conviction.[110] Prosecutors have developed various diversion techniques to avoid prosecuting women abuse cases. District attorneys are known to have flatly refused cases of battered women without any consideration of the particular facts,[111] and frequently, after taking the case for evaluation, they refuse to prosecute for spurious reasons[112] or to simply avoid aggravating the situation.[113]

The prosecutorial response has been ineffective for the same reasons that the judicial response[114] has failed: both legal arms have neglected to treat women abuse seriously enough. Prosecutors, like police officers, are reluctant to pursue a criminal charge against a man who has abused his wife or woman friend, even when there has been an arrest.[115] A lack of perseverance has been common. For example, Denise Markham, lawyer and supervisor for the Domestic Violence Advocacy

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109. Note, *Case for Legal Remedies*, *supra* note 84, at 149 (prosecutors express concern that prosecuting a man will take away a woman's support and force her onto welfare).

110. *Id.*

111. *Id.* at 149 n.97 (citing Memorandum of Law in Support of Motion for Class Certification and Preliminary Injunction at 2, and Complaint for Declaratory and Injunctive Relief at 2, Raquez v. Chandler, (No. C74-1064) (N.D. Ohio, filed Feb. 4, 1975)).

112. *Id.* at 149 (for example, prosecutors tell battered women that they cannot prosecute because prosecutors are not permitted to get involved in domestic matters).

113. *See* Trunninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 273 (1971). District attorneys' offices have also been criticized for minimizing the seriousness of the husband's acts during its conciliation efforts. *Id.* "One client of Legal Service attorneys described the process as her husband being told that beating his wife was a no-no." *Id.*

114. *See infra* notes 130-57 and accompanying text.

115. Note, *Case for Legal Remedies*, *supra* note 84, at 149.

Project in Chicago, estimates that about 90% of the domestic violence cases in Cook County, Illinois, are charged as misdemeanors, no matter how severe the injuries.[116]

A troubling issue for prosecutors which may deserve some of the blame for the reluctant prosecutorial attitude towards wife abuse is the manner in which to proceed when a battered woman is either reluctant to press charges[117] or wants to drop charges in a pending matter.[118] Estimates of domestic violence victims who drop charges or refuse to cooperate with prosecutors can be staggering. In New York City these estimates range from 50% to 80%.[119] The reasons for the abundance of dropped complaints vary. Frequently, the charges are dropped by the battered woman because she is "sweet-talked" into dropping her complaint or because of threats made to herself or her children.[120]

Prosecutorial response to the "dropped complaint" problem is evidence that prosecutors have allowed the victim to be the leader of prosecutorial efforts, instead of a mere witness whose participation the state must support and encourage. It should be made clear that the prosecutor, not the victim, is responsible for enforcing the law.[121] When prosecutors deal seriously with abuse and convince the batterer that the former "mean business" the batterer will often plead guilty.[122]

One solution that has been presented by prosecutors' offices is adoption of "no-drop" policies in abuse cases. Where such policies exist, the prosecutors will decline to drop charges merely on the victim's

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116. Blodgett, *Violence in the Home*, 73 A.B.A. J. 66, 68 (1987). Rep. Lois Hagerty, R. Montgomery County (Pa.), a former Assistant District Attorney in Montgomery County, stated that "[n]othing about the cases was treated seriously." *Id.*

117. Eppler, *supra* note 70, at 808 n.82.

118. *Id.*

119. Feeney, *When There Is No Justice*, N.Y. Daily News, Sept. 4, 1989, at 16, col. 4. Mary Haviland, Director of the Coalition for Criminal Justice Reform for Battered Women, estimates that less than ten domestic violence cases a year in New York City actually go to trial. *Id.* at 17, col. 1. "Misdemeanors almost never go to trial," Haviland said, "and defense attorneys are only too happy to call a prosecutor's bluff." *Id.*

120. *Id.* at 16, col. 4. April La Salata's husband, Anthony, defied several orders of protection. *Id.* She delayed divorcing him and wavered in her perseverance because he threatened to kill her mother. *Id.* He later stabbed her and finally succeeded in killing her with a shotgun blast in her own driveway. *Id.*

121. Note, *Domestic Relations*, *supra* note 27, at 734.

122. O'Reilly, *supra* note 4, at 26.

request.[123] The basic theory behind no-drop policies is sound, since it constitutes a strong statement of societal responsibility for deterring batterers. Additionally, such policies rob the abuser of much of his coercive power against the victim.[124] However, except in cases of severe violence or recidivism, battered women should not be further victimized by being held in contempt if they remain staunch in their unwillingness to testify.[125]

Another suggestion has focused on the prosecutor's understanding of the victim's concerns and his setting goals for prosecution which correspond to these concerns.[126] For example, the prospect of a stiff fine or incarceration may dissuade a battered woman from continuing with prosecution if she has young children and no means of support.[127] This theory reasons that when prosecutors tailor their strategies to relief battered women desire from the criminal justice system, both victims and prosecutors will benefit.[128]

The creation of any special relationship cannot excuse a lack of prosecutorial initiative. When a victim is able to reach her decisions freely, this "concern-tailored" approach can be useful. However, when the accused has great emotional and physical influence over the victim, the state must intercede forcefully on behalf of the victim. There must be a commitment by prosecutors to assume responsibility for the prosecution of woman abuse. This commitment must be translated into concrete policies that are carried out. Prosecutors' offices must make pursuit of battery cases a priority, and must have trained staff who are experts in dealing with the problem.

Whatever the solution, it will only materialize when prosecutors accept the serious criminal nature of woman abuse and conclude that the

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123. *See* L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 64 (1981).

124. A good example of a "no-drop" policy is the position taken by Ohio prosecutors who view the state, not the battered woman, as the plaintiff, and who refuse to drop the charge at the request of the complainant. Note, *Domestic Relations*, *supra* note 27, at 735.

125. *See* Riley, *Spouse Abuse Victim Jailed after No-Drop Policy Invoked*, Nat'l L.J., Aug. 22, 1983, at 4, col. 3.

126. Note, *Domestic Relations*, *supra* note 27, at 734.

127. *Id.* at 736. A woman who wants the abuse ended but does not want to end her relationship with the defendant, may want to impress upon the defendant that his conduct is criminal and could result in a stiff penalty. *Id.*

128. *Id.* at 735.

state has a duty to prosecute wife beating cases, not to dismiss them.[129]

V. THE JUDICIAL RESPONSE

Until quite recently the role of judges in domestic violence cases has received scant public attention. Despite marked progress over the last decade in changing police department policies to protect battered women, judicial attitudes and courtroom practices have for the most part lagged behind.[130] This discrepancy may result in part from the impact of public attention on police policies while judges are relatively removed from public scrutiny.[131] The paucity of the judicial response to the plight of battered women is derived mostly from judicial misconceptions about the nature of woman abuse.[132] Judges are subject to the same myths about domestic violence as are members of the general public.[133] The results that are disappointing. For example, many judges believe that battered women are masochists or that they exaggerate the seriousness of

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129. In support of prosecutors, it must be noted that they frequently handle 150 to 200 cases at a time (in larger cities) and regardless of how conscientious they may be, some cases are going to fall by the wayside. Feeney, *supra* note 119, at 16. There are simply not enough people and resources in large urban centers like New York City to handle the enormity of women seeking legal relief. *Id.* Prosecutors have attempted to improve the prosecutorial response. *See* MARYLAND STATE ATTORNEY'S OFFICE, DOMESTIC VIOLENCE POLICIES AND PROCEDURES (1989) (the Maryland State Attorney's Office has created guidelines stressing vigorous prosecution of domestic violence cases as crimes against the community).

130. *See generally* Note, *Recent Developments: Judging Domestic Violence*, 10 HARV. WOMEN'S L.J. 278 (1987) [hereinafter Note, *Recent Developments*].

131. *Id.* A shocking example of judicial insensitivity was displayed by Somerville, Mass., District Court Judge Paul Heffernan in 1986 when he scolded Pamela Nigro Dunn for seeking judicial intervention and for wasting his time in court. McNamara, *'No Quick Fix' in Abuse Case, Judge Rules*, Boston Globe, Nov. 13, 1986, at 1, col. 1. Judge Heffernan told Paul Dunn, her husband, "[y]ou want to gnaw on her and she on you fine, but let's not do it at the taxpayer's expense." *Id.* at 13, col. 1. Although Judge Heffernan granted Pamela Nigro Dunn a protection order, he denied her request for increased protection. *Id.* Paul Dunn later kidnapped, shot, stabbed and strangled his wife, and then left her body in the town dump. McNamara, *Judge Criticized after Woman's Death*, Boston Globe, Sept. 21, 1986, at 1, col. 1.

132. *See generally* Note, *Recent Developments*, *supra* note 130.

133. *Id.* at 279. For a description of these myths, see Gookasian, *Confronting Domestic Violence: A Guide For Criminal Justice Agencies*, in NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE ANNUAL REPORT 2-4 (1986).

the violence they suffer to punish "philandering husbands or boyfriends."[134] Other judges adhere to "family privacy" myths, one going so far as to chide a battery victim for washing her "dirty linen in public."[135]

It is not uncommon for a woman who has overcome the complex procedures of family court to face a judge who may be predisposed against the use of the courts in family disputes.[136] Many judges feel that woman abuse court processes are an unfair weapon in a family quarrel.[137] Judges often inquire into victim provocation and abuser excuses and may consider both as mitigating factors. Even if the batterer is convicted, the penalty may be nothing more than a stern lecture from the judge, perhaps ending with the extraction of a promise that the abuser will not hurt his wife again.[138] Judges routinely allow first offenders and even repeaters to be freed on low or no bail.[139] "Judges don't usually do anything the first time a man violates an order of protection."[140] The reluctance of judges to sentence batterers to jail can often have tragic consequences.[141]

The judicial response, however, has not always been negative. Two New York cases, more than twenty years apart, depict a judiciary that was willing to contribute once the battering relationship reached the courtroom. In *Baker v. City of New York*,[142] a husband shot his

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134. *See* U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 12, 91 (1982) [hereinafter RULE OF THUMB].

135. *Id.* at 56-57.

136. Note, *Case for Legal Remedies*, *supra* note 84, at 155.

137. *Id.* at 155 n.139.

138. Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585, 598-99 (1970).

139. Feeney, *Orders Of Illusion*, N.Y. Daily News, Sept. 3, 1989, at 54, col. 1. Judges in New York City too frequently declare assaults and violations "adjourned in contemplation of dismissal," which is the equivalent of a court finding the defendant not guilty of any of the alleged conduct. *Id.* If the defendant obeys the orders of the judge for a period of time (up to six months) the case is dismissed and the defendant's record is expunged. *Id.* Therefore, if the defendant is brought before the bench again, no one knows that he has a history of violence. *Id.*

140. Blodgett, *supra* note 116, at 69. According to Barbara Hart, a founder of the Washington, D.C., based National Coalition Against Domestic Violence, "[m]en usually get one free shot at violating their protection order in most states." *Id.*

141. *See, e.g.*, *supra* note 131.

142. 25 A.D.2d 770, 269 N.Y.S.2d 515 (App. Div. 1966).

estranged wife while in the waiting room of the domestic relations court.[143] She had held a protective order issued in her favor against her husband.[144] About a month prior to the incident, the police responded to a call from the woman, but when presented with the protective order, they had refused to take further action, saying it was "only a piece of paper" and "no good."[145] Upon seeing her husband several weeks later at a scheduled meeting in the domestic relations court, the woman expressed her fear of being exposed to him and requested permission to remain in the office where she was located.[146] The court personnel denied her request and sent her to the waiting room where some twenty minutes later her husband shot her.[147] The court held that the existence of the protective order was sufficient to create a special relationship and therefore the police owed a special duty of protection to its carrier.[148]

Twenty-three years later, in *Merola v. Merola*,[149] an appellate division judge reversed the order of a family court judge which had permitted the respondent-husband to return to the marital residence. An order from family court granted the petitioner-wife an order of protection pursuant to Family Court Act § 842 which required the respondent to refrain from committing any further acts of harassment or disorderly conduct and from using foul and abusive language.[150] However, notwithstanding its finding of a family offense, the family court permitted the respondent to return to the marital premises on the condition that he comply with the terms of the order of protection.[151] Upon appellate review of the record, which demonstrated that the respondent had conducted himself in a bizarre, offensive and frightening manner towards the petitioner, the court concluded that the family court had erred in failing to direct the respondent to vacate and stay away from the marital premises.[152] The judge recognized that the respondent had not engaged in any physical violence against the petitioner, but stated that the petitioner's well-founded fear of the respondent mandated a directive to

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143. *Id.* at 771, 269 N.Y.S.2d at 517.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 771, 269 N.Y.S.2d at 518.
148. *Id.*, 269 N.Y.S.2d at 517.
149. 146 A.D.2d 611, 536 N.Y.S.2d 842 (App. Div. 1989).
150. *Id.*
151. *Id.*
152. *Id.* at 611-12, 536 N.Y.S.2d at 843.

the respondent to vacate and stay away from the marital residence.[153] The order of protection was tailored according to the judge's directive.[154]

Baker and *Merola* symbolize an effective judicial response at different points in the battering relationship. In *Baker*, the court reached the only applicable holding possible once the wife had been shot, namely, holding the police liable for their failure to protect the wife.[155] In *Merola*, the appellate judge intervened after the family court judge had failed to provide an appropriate order of protection and before the husband was allowed to return to the marital premises.[156] Both judicial responses, although no guarantee of safety for the seriously-injured wife in *Baker* and the unharmed wife in *Merola*, show that judges can be far from ambivalent towards the abuse of women.

The importance of judges' attitudes and their behavior cannot be taken lightly. Within their own courtrooms, judges can communicate a powerful message about the justice system's view of domestic violence.[157] Although decisions such as *Baker* and *Merola* are a hopeful indication that judicial abstention from the domestic violence realm has ended, judicial misconceptions about the problem of battered women and the legal system's appropriate response can still be improved.

VI. COORDINATION

The legal system as an entity has not produced a uniform and coordinated response to the problem of battered women. This final section is divided into two parts: (1) a discussion of how the individual arms of the legal system can coordinate their actions in order to achieve a more effective response; and (2) why societal beliefs, reflected in the legal system's response, may be the ultimate barrier against the battering relationship.

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153. *Id.* at 612, 536 N.Y.S.2d at 843.

154. *Id.* at 611, 536 N.Y.S.2d at 842.

155. *Baker*, 25 A.D.2d at 772, 269 N.Y.S.2d at 578.

156. *Merola*, 146 A.D.2d at 612, 536 N.Y.S.2d at 843.

157. *See* Note, *Recent Developments*, *supra* note 130, at 282. This argument is explored more fully in SECTION VIA, see *infra* notes 158-214 and accompanying text, for a discussion of whether there is an appropriate alternative to mandatory arrest.

A. The Need To Work Together

Although the least visible, the legislature has enough resources to initiate a more effective response through the prompting of the other legal arms. The legislature can guide the police by enacting mandatory arrest legislation. A police policy of mandatory arrest is the product of strong domestic violence legislation.[158] In support of mandatory arrest legislation is a Police Foundation study finding that arrest is the most effective police response to the battering of women.[159] The study compared three forms of police response to domestic violence: arrest, counseling, and sending the assailant away for a few hours; the conclusion was that arrest was the most effective response in reducing domestic violence.[160] There are other compelling benefits of mandatory arrest laws. Arrest advances the goal of short-term victim safety and abuser deterrence. Family violence occurs in an emotionally charged atmosphere with the threat of physical injury too often becoming the reality.[161] If the spouses are not separated and the husband's rage is not given time to dissipate, the beating may continue after the police leave. This possibility is increased when an arrest is made or a misdemeanor citation is issued and the abuser is released from custody immediately.[162] Arrest also conveys a message to the batterer that his conduct is wrong and that society and the legal system will hold him accountable for it.[163] When succeeded by similarly strict measures from other legal personnel, arrest begins a process that tells the batterer that he can either be rewarded for stopping his actions or punished for continuing them. Incarceration tells the batterer that he cannot deny responsibility.

Counter-arguments to mandatory arrest laws have pointed to judicial lecturing of the batterer as a possible solution.[164] One study of the criminal court response to non-stranger violence found that judges can deter future violence by issuing warnings or lectures to defendants concerning the "inappropriateness and seriousness of their violent

158. *See* Finesmith, *supra* note 2, at 94.

159. *See generally* Sherman & Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REP., Apr. 1989.

160. *Id.* at 3.

161. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 105 (1984) [hereinafter ATTORNEY GENERAL'S REPORT].

162. *Id.*

163. *Id.* at 104-05.

164. *See* Note, *Recent Developments*, *supra* note 130, at 283.

behavior."[165] Other studies have shown that a stern admonition can help to persuade a defendant from future violence.[166] Some experts have asserted that since neither party should be blamed for family disputes, battering can be treated with mediation techniques practiced by the police, rather than with criminal sanctions.[167] In response to these arguments, both judicial admonition and police mediation have been attacked as ineffective.[168] "No matter what role the judge assumes, even if he is the most knowledgeable, perceptive, compassionate and communicative judge imaginable, probably only temporary relief from violence can be accomplished by such a lecture before the next case in the day's long docket."[169] Furthermore, the goals of mediation -- communication, reasonable discourse and joint resolution of adverse interests -- work against the most immediate relief the battered woman desires.[170] The goals she seeks are protection from violence, compensation, possession of her home without the batterer, and security for her children.[171] The empirical data show that the therapeutic (mediation) model for handling battering is ineffective and that firm law enforcement including imprisonment is required to deter wife abuse.[172] Because arrest is the legal system's most effective deterrent to battering, legislative enactment in that direction is a sensible long-term policy.

Legislatures can also educate judges as to the criminal nature of woman abuse and the statutory tools available to confront the

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165. *See* B. SMITH, NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, NON-STRANGER VIOLENCE: THE CRIMINAL COURT'S RESPONSE 96 (1983).

166. *See* ATTORNEY GENERAL'S REPORT, *supra* note 161, at 36.

167. *See* Parnas, *supra* note 82, at 917 (police training on domestic disturbance emphasizes mediation skills and impartiality in dealing with the parties).

168. *See* Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585 (1970) [hereinafter *Judicial Response*]; Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266, 268 (1984). Mediation may actually perpetuate battery by protecting the batterer from criminal sanctions; this protection reinforces the husband's belief in his right to beat his wife and it absolves him of blame for his actions and insulates him from social stigma. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battery Cases*, 2 LAW & INEQUALITY: J. THEORY & PRAC. 493, 518 (1984).

169. *Judicial Response*, *supra* note 168, at 598-99.

170. *See* Lefcourt, *supra* note 168.

171. *Id.*

172. *Id.*; *see also* Sherman & Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

problem.[173] As demonstrated by the Pamela Nigro Dunn case,[174] judges often fail to take domestic violence seriously, believing that victim's fears of future harm are unjustified.[175] Additionally, many judges are unfamiliar with their respective state Domestic Violence Acts and may fail to provide adequate remedies because they are unknowledgeable about pertinent statutes.[176] Legislatively-enacted training programs can educate judges about the courtroom attitude which will most effectively convey the legal system's condemnation of battering as a criminal act.[177] A training program can also educate judges as to new laws on domestic violence which would encourage greater public compliance.[178] The goals of all training programs should be to encourage judges to counter batterer's notions that the justice system quietly allows unpunished violence against women[179] and to stress the importance of judge's behavior in ending domestic violence.[180]

Legislatures can also act on a more comprehensive scale, affecting the entire legal system through the enactment of a single legislative act. Many states, through some form of a domestic violence act, have attempted to create a coordinated and consistent response to domestic violence. For example, the Montana State Legislature specifically addressed the problem by passing a domestic abuse act which defined

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173. *See* Note, *Recent Developments*, *supra* note 130, at 277.

174. *See supra* note 131.

175. *See* Note, *Recent Developments*, *supra* note 130, at 279.

176. *Id.* at 281.

177. *See id.* at 283. Judges must be encouraged to examine the messages they may unwittingly convey during hearings of domestic violence cases. *Id.* Frequently, the defendant will try to justify his violent behavior by describing general problems in his relationship with the victim. *Id.* Judges sometimes allow defendants to "tell their own story" in the hope of aiding a reconciliation. *Id.* This approach condones the defendant's view that there may be a valid reason for the battering and does not convey the message that battering is an illegal way of dealing with problems. *Id.*

178. *Id.* at 281. "Formalized study can do for the average judge, and for nearly every judge much that private study cannot do." Leflar, *Continuing Education for Appellate Judges*, 15 BUFFALO L.J. 370, 376 (1966).

179. *See* Note, *Recent Developments*, *supra* note 130, at 282. Consider that although many members of the judiciary were experienced and successful practitioners before ascending to the bench, it has been recognized that assuming the judicial mantle does not necessarily convert a trial or office lawyer into a wise, knowing, and effective judge. *See generally* Brady, *The Illinois Domestic Violence Act of 1986: A Selective Critique*, 19 LOY. U. CHI. L.J. 797 (1988).

180. *See* Note, *Recent Developments*, *supra* note 130, at 279.

domestic abuse as a crime,[181] makes arrest the preferred response to that crime,[182] requires police officers to file a written report when they do not arrest,[183] requires police officers to provide victims with a notice of victim's rights,[184] and establishes that an alleged abuser's bail must be personally determined by a judge.[185] The Montana Legislature responded to findings that police officers usually refuse to arrest the abuser, that prosecutors refused to prosecute domestic abuse cases, and that the previous legislature had done nothing to change that inaction.[186] Other examples include Ohio's Domestic Violence Act, which contains a comprehensive program to enhance the availability of legal relief for domestic violence victims;[187] the Illinois Domestic Violence Act of 1986;[188] the Idaho Domestic Violence Crime Prevention Act;[189] and the North Carolina Domestic Violence Act.[190]

While the legislature can mandate that the police take a tougher stance towards batterers, it is unlikely that police officers will begin or continue to arrest without prosecutorial support.[191] It is not feasible to encourage police to arrest if a batterer will eventually be released to assault his wife within a few hours.[192] It is well within a prosecutor's power to ask that a high bail be set for someone who is likely to pose a danger to the community. By bringing charges themselves, prosecutors not only remove from the battered woman some of the responsibility of instigating action against the batterer; they can also decrease the number of repeat offenders the police will have to arrest. The police, in return,

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181. *See* Note, *Montana's New Domestic Abuse Statute*, *supra* note 27 (referring to MONT. CODE ANN. § 45-5-206 (1985)); *see also* N.Y. FAM. CT. ACT § 821 (McKinney 1975).

182. Note, *Montana's New Domestic Abuse Statute*, *supra* note 27, at 404 (referring to MONT. CODE ANN. § 46-6-401(2)).

183. *Id.* (referring to MONT. CODE ANN. § 46-6-421).

184. *Id.* (referring to MONT. CODE ANN. § 46-6-422).

185. *Id.* (referring to MONT. CODE ANN. § 46-9-302).

186. *Id.* at 405-06.

187. *See* Note, *Domestic Relations*, *supra* note 27, at 705.

188. ILL. REV. STAT. ch. 40, paras. 2311-1 to 2313-5 (1987). For an analysis of this act, see Brady, *supra* note 179, at 798.

189. IDAHO CODE § 39-6301-17 (1988). For an analysis of this act, see Trout, *Domestic Violence Crime Prevention Act*, 32 ADVOC. 7(3) (1989).

190. For an analysis of this act, see Duane, *North Carolina's Domestic Violence Act: Preventing Spouse Abuse*, 17 N.C. CENT. L.J. 82 (1988).

191. Finesmith, *supra* note 2, at 106.

192. *Id.*

can make the prosecutor's job easier by providing the latter access to reports of prior calls for assistance and arrest with reference to a specific batterer. This will enable repeat offenders to be identified more easily to prosecutors who in turn will be able to bring more severe charges against the batterer. Prosecutors can help the police by communicating their commitment to vigorous enforcement of anti-domestic violence laws. Such a commitment encourages both the arrest of batterers and sets a standard for the rest of the legal system.

Prosecutors can also help transform judicial perceptions. They can educate judges about the nature of the abusive relationship, including the uselessness of the lecture as a deterrent, and steer judges away from such false issues as provocation. Because judges look to prosecutors for information on a variety of issues,[193] including bail and sentencing,[194] judges might defer to the prosecutor's judgment if the later seeks appropriate punishment for the abusers.

B. Societal Beliefs Find Reflection in the Legal System

At the core of the legal system's inability to bond and tackle the problem of woman-battery is the ingrained attitude of society that approves of the abuse of women.[195] Societal acceptance of family violence has pervaded the legal system and caused it to offer the same justifications for condoning the battery of women which society has. When asked to defend this justification, legal personnel proffer a variety of superficially plausible reasons to explain their inaction.[196] These reasons, because they are so widely accepted among legislators, police officers, prosecutors and judges, have developed into major obstacles

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193. *See* Belsky, *On Becoming and Being a Prosecutor*, 78 NW. U.L. REV. 1485, 1513 (1984).

194. *Id.*

195. A significant number of Americans accept and even approve of family violence, with men more likely than women to condone domestic abuse. *See* M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY 47 (1984) (couples were asked what they thought about partners slapping each other around; over 8% of the men and slightly over 4% of the women thought it was "necessary"; over 15% of the women related it as "good"; it was considered "normal" by 28% of the men and over 23% of the women).

196. Waits, *supra* note 12, at 299.

blocking legal remedies for abused women.[197]

Just as society has been reluctant to invade the sanctity of the family, the legal system has deferred to family privacy as a basis for non-intervention.[198] Studies clearly indicate that police have traditionally been reluctant to interfere in family disputes[199] and the rate of prosecution and conviction in criminal complaints drops strongly when there is a prior or present relationship between the alleged assailant and the victim.[200]

Another societal belief that has been incorporated into the legal system is the idea that the cost required for stopping the abuse of women is better spent elsewhere.[201] This argument assumes that the welfare of battered women and their children is unimportant compared to the time and safety of legal officials. The fear is that if the law started to take battering seriously, it would be overwhelmed by abuse cases.[202] This response also extends past financial cost to other factors; for example, the police often view domestic quarrels as high danger, no-win situations in which the victim is uncooperative and the policeman's efforts are better spent apprehending "real" criminals.[203]

All of these justifications can be exposed for precisely what they are: unjustifiable neglect. Legal doctrines that limit governmental interference with the family are grounded on reasons that have no

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197. *Id.*

198. Basler, *Prior Relations Cited as a Factor in a Felony Case*, N.Y. Times, Feb. 24, 1982, at B1, col. 1 (description of a case involving a pregnant woman who was beaten and then burned with a hot iron by her former boyfriend; the former boyfriend was arrested on a charge of felony assault but the Manhattan District Attorney's Office reduced the charge to a misdemeanor).

199. *See* Pence, *supra* note 72, at 251-52; Buzawa, *Police Officer Response to Domestic Violence Legislation in Michigan*, 10 POLICE SCI. & ADMIN. 415, 415-16 (1981) ("police have historically taken the position that it was not their responsibility to intervene in domestic violence conflicts"); M. SCHULMAN, *supra* note 195, at 40 (police failed to respond to 17% of all calls for help from battered women).

200. RULE OF THUMB, *supra* note 134, at 33.

201. *Id.* at 13.

202. *See* Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW & CONTEMP. PROBS. 539, 539-40 (1971) (courts and police wish to divert domestic violence cases away from the criminal justice system because the system cannot keep up with the demands imposed by these cases).

203. *See* RULE OF THUMB, *supra* note 134, at 13.

application to the problem of woman battery.[204] The law respects decisions on intra-family arrangements because society assumes that family members can reach responsible decisions free of governmental intrusion.[205] This rationale must fail because the battering relationship is so blatantly harmful that no decision can be considered acceptable for the woman. Another justification offered is that policies favoring family autonomy may reflect a lack of confidence in governmental wisdom. This reasoning would allow families to make bad decisions for themselves for fear that governmental decisions may be worse.[206] This reasoning is dangerous when battering is chosen as family behavior and the results are tragic.[207] The legal system's rationalization that the cost of stopping wife abuse is a bad priority and outweighs its benefits is economically and morally wrong. Ignoring the problem will only compound it for future generations. Moreover, we cannot accept the sacrifice of victim's lives as a fair price for the legal system's convenience.

If there is one excuse that has permeated the legal system through societal belief and has contributed to an uncoordinated response from the legal system, it is the belief that someone else is better able to deal with the problem. This argument offers the rationalization that legal institutions are ill-equipped to deal with complex social and psychological problems like battering and should thus avoid them.[208] This argument fails to rebut the reality that when the stakes are high enough, and when the alternatives to legal intervention are inadequate, the legal system does not hesitate to intercede and resolve the problem.[209] Although battery involves difficult and sensitive issues, it is clear that someone must move against abuse, and that no other social institution has the legal system's clout to protect victims and to force batterers to face the consequences of

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204. Lerman, *supra* note 27, at 69-70 (family privacy doctrines rest on the importance we attach to the home as a safe haven; because the home is not a safe place for domestic violence victims, the policies behind these doctrines argue in favor of governmental intervention into family violence, not against it).

205. *See, e.g.*, Waits, *supra* note 12, at 300 n.186 (citing McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953)) (Kathleen Waits points out that the law traditionally would not interfere with support arrangements in the on-going family).

206. *Id.* at 300.

207. *Id.*

208. *See* authorities cited in Waits, *supra* note 12, at 301 n.197.

209. Examples would include child custody and bias-related discrimination. *Id.*

their transgressions.[210]

The non-enforcement practice of the legal system with respect to the abuse of women is a reflection of prevailing societal values and attitudes regarding public intervention in domestic assault cases.[211] Historically, women have been defined in our society as subordinate to men. As a result, men have been given a disciplinary role in the family, which has ostensibly legitimized the use of violence against women.[212] Examining the history of the legal system's response to battery may lead many to believe that the legal system is the institution in our society which enforces those moral standards we establish for ourselves.[213] If society condones battering, by action or inaction, the legal system absorbs this view and perpetuates the violence it is supposed to alleviate.[214]

VII. CONCLUSION

The individual arms of the legal system have attempted to confront the problem of battered women. Legislatures have provided tools for the fight.[215] The police response, once wholly unsatisfactory,[216] has markedly improved.[217] Prosecutorial inaction[218] has been met with progressive solutions.[219] Judges have attempted to eliminate their conformity to domestic violence myths[220] by enforcing the law on those who refuse to protect abused women.[221] The

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210. *Id.* at 302. Kathleen Waits would narrow down the "legal system" to "criminal law" because she sees the criminal law as the primary tool for deterring wife abuse and other violent behavior due to its ability to label behavior as socially unacceptable. *Id.* at 270 n.11.

211. Pence, *supra* note 72, at 249.

212. *Id.*

213. *Id.*

214. *Id.*

215. *See, e.g., supra* notes 29-48 and accompanying text.

216. *See supra* notes 76-86 and accompanying text.

217. *See supra* notes 107-08 and accompanying text.

218. *See supra* notes 109-16 and accompanying text.

219. *See supra* notes 123-29 and accompanying text.

220. *See supra* notes 130-35 and accompanying text.

221. *See supra* notes 141-48 and accompanying text.

battering of women, however, remains a deadly reality.[222] Powerful social forces which permit and encourage abuse[223] have found reflection in the legal system's response to the problem.[224] Moreover, for every person, whether legislator, police officer, prosecutor, judge, or citizen who has been enlightened about the abuse of women, there are countless who remain ignorant. By taking unequivocal action against battering, the legal system can eventually make inroads against the social forces that condone abuse.[225] The individual arms of the legal system need to respond in unison and coordinate their response. The legal system as a whole can curtail the abuse of women.

Matthew Litsky

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222. *See supra* notes 1-11 and accompanying text.

223. *See* authorities cited in Waits, *supra* note 12.

224. *See supra* notes 195-214 and accompanying text.

225. *See* D. MARTIN, BATTERED WIVES 174-75 (1976). In response to the argument that "you cannot legislate attitudes":

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

Id.