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Natalie Loder Clark

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# CRIME BEGINS AT HOME: LET'S STOP PUNISHING VICTIMS AND PERPETUATING VIOLENCE

NATALIE LODER CLARK\*

## I. INTRODUCTION

Much has been said and written during the past few years about domestic violence. To a large extent, society is aware of the need for shelters, counselling, legal services, and support groups for the victims of spouse abuse.<sup>1</sup> The victim's needs, psychological characteristics, stages of victimization and recovery, and even the characteristics and needs of the victim's children, are now apparent.<sup>2</sup> Far

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\* Professor of Law, Northern Illinois University. LL.M., Columbia University, 1973; J.D., Marshall-Wythe School of Law, College of William and Mary, 1972; B.A., State University of New York-Albany, 1963. The author wishes to thank research assistants Deborah Krusche Bruck, John Burda, and Bruno Para, students at Northern Illinois University, for their able and energetic assistance in the preparation of this Article.

1. The problem of battered women gained recognition with the women's movement. Early stages of the women's rights movement played a crucial role in achieving criminal prohibitions against wife beating. Nevertheless, the law today fails to afford assaulted spouses full protection and adequate remedies. Oppenlander, *The Evolution of Law and Wife Abuse*, 3 L. & Pol'y Q. 382, 385 (1981). Lenore Walker said,

The legal alternatives necessary for battered women [to reorder their lives] include: adequate police protection, easy access to restraining orders, facilitation of prosecution procedures by assault victims, provision for temporary support and maintenance, speedy divorces, regulated child visitation, and legitimate legal procedures for battered women as defendants.

L. WALKER, *THE BATTERED WOMAN* 206 (1979).

The importance and necessity of safe houses and shelters arises from the sense of community and support that they provide to the abused spouse. *Id.* at 198. In the United States, the establishment of such shelters is "in the infant stage. . . ." *Id.* at 197. The National Organization for Women, women's resource centers, church groups, YWCAs, and community mental health centers have established most of the programs that offer temporary housing. Given the definite limitations from which many shelters suffer, however, much more must be done. Existing shelters suffer from a limited potential for offering educational and vocational training, meeting the needs of children, and eliminating crowding and sickness. *Id.* at 200-02.

2. See generally A. JONES, *WOMEN WHO KILL* (1980); D. MARTIN, *BATTERED WIVES* (1977); L. WALKER, *supra* note 1.

less is known about abusers, perhaps because they typically refuse help or treatment.<sup>3</sup>

Many commentators have noted that, until recently, American society regarded spouse abuse as acceptable behavior.<sup>4</sup> Fortunately, finding appreciation for jokes about wife abuse is increasingly difficult these days; some enlightened audiences even refuse to laugh when the subject of husband abuse is raised.<sup>5</sup> The great emphasis on the remedies available to the *victims* of domestic violence, however, suggests that we still blame the victims, and not the perpetrators, of spouse abuse.

American society can now point with pride to the help and services it offers to an economically dependent abused spouse. A few years ago, many of these services were nonexistent. Today, however, an abused spouse can leave her home and take refuge in a battered woman's shelter<sup>6</sup>—a generally under-funded and some-

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3. Abusers hesitate to recognize that they have a problem. L. WALKER, *supra* note 1, at 36. Even when abusers recognize their problem, two primary reasons exist for their reluctance to seek help: 1) a fear of apprehension by law enforcement authorities, and 2) a lack of facilities able to provide adequate services. *Id.* at 202.

4. See, e.g., Oppenlander, *supra* note 1, at 384-85 (At common law, courts sustained a rule of masculine force that permitted a husband to punish his wife with whip, fist, or any similar instrument.).

5. Family law experts assert that the problem of battered husbands is as destructive to family relationships as the more common problem of battered wives. The reason that less is known and reported about battered husbands is that men must confront different stereotypes when they seek redress for their injuries. Men generally refuse to talk about being battered because they feel it reflects poorly on their masculinity. Many physically abused husbands, moreover, choose to stay at home to protect their children from their wives. Jones, *When Battered Women Fight Back*, 9 BARRISTER 12, 14 (Fall 1982).

6.

Today there is a network of shelters to aid victims of domestic violence. The shelter movement developed as a result of the efforts of people who wished to fill the void left by police officers who did not want to treat domestic violence as crime; by a court system that deliberately made it difficult to press charges; by hospital emergency rooms that ignored the real causes of injury and accepted obviously false explanations that let [the batterer] off the hook; and by traditional social services that were just plain insensitive to the needs of battered women. Now, shelters are rapidly becoming an integral part of our communities.

Mikulski, *Foreword: Family Violence—A National Issue*, 6 VT. L. REV. vii, viii (1981). Because safe shelter provides the battered woman with time to consider her next course of action, its importance cannot be overemphasized, especially when one considers how difficult the decision to leave home is for most battered women. Wesley, *Breaking the Vicious Circle: The Lawyer's Role*, 6 VT. L. REV. 363, 370 (1981). For an illustrative account of one

what shabby place that, nonetheless, provides a safe haven. Children usually can accompany the victim if they are female or pre-teenagers.<sup>7</sup> Through legal aid, pro bono representation, or referrals and money from shelter staff and remaining friends and family, if any, not alienated by the abuser, the victim can seek a divorce, custody, property division, and support. Appalled at the growing class of poverty-stricken divorced women and their children, courts and legislatures even are beginning to put some teeth into the enforcement of these remedies.<sup>8</sup> The victim may even be lucky

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week in a shelter, see T. DAVIDSON, CONJUGAL CRIME — UNDERSTANDING AND CHANGING THE WIFEBEATING PATTERN 155-75 (1978). For an alphabetical listing of shelters, projects and agencies, see J. COSTA, ABUSE OF WOMEN: LEGISLATION, REPORTING AND PREVENTION 337-68 (1983).

7. Shelters often refuse to accept large sons, not only because their appearance may frighten other shelter residents, but also because they may have learned to be abusive themselves from years of watching their parents' interactions. See *infra* note 14.

8. See, e.g., Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305; 42 U.S.C. §§ 650-667 (1983 & Supp. III 1985); 5 C.F.R. § 581 (1986); Omnibus Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 171-176, 96 Stat. 324, 401-04.

One place where this rapid growth of legislation aimed at domestic violence has occurred is New York, where criminal courts have concurrent jurisdiction with family courts to handle cases involving spouse abuse. See, e.g., N.Y. CRIM. PROC. L. § 530.11(1) (McKinney 1984). This broadening of the courts' jurisdiction gives the victim the right to choose the forum which will hear the case. Criminal court judges in New York also have the power to issue temporary and permanent orders of protection, as do judges in many other jurisdictions. N.Y. CRIM. PROC. L. § 530.12(1) (McKinney 1984). Cases upholding the enforcement of these legislative remedies have supported the response of criminal courts to the issue of domestic violence in New York. See, e.g., *People v. Mack*, 53 N.Y.2d 803, 805-06, 422 N.E.2d 572, 573, 439 N.Y.S.2d 912, 913 (1981) (failure to advise victim of her right to elect a forum did not divest either court of jurisdiction to hear assault charges in spite of defendant's contention that such failure rendered any criminal action jurisdictionally defective); *Bruno v. Codd*, 47 N.Y.2d 582, 590, 393 N.E.2d 976, 980, 419 N.Y.S.2d 901, 905 (1979) (negotiated consent decree ordered New York City police officers to respond as soon as possible to every request for assistance and not to refrain from arresting an accused abuser because of a close relationship between the victim and the abuser); *Sorichetti v. City of New York*, 95 Misc. 2d 451, 462-65, 408 N.Y.S.2d 219, 227-29 (N.Y. Sup. Ct. 1978) (interpreting a final order or protection to mean protection for both the mother and child after the father attempted to cut off the child's leg with a saw), *aff'd mem.*, 70 A.D.2d 573, 417 N.Y.S.2d 202 (N.Y. App. Div. (1979)).

Today, 48 states and the District of Columbia have passed legislation designed to protect battered women. The rapid growth of domestic violence law in the United States is the result of the broad interaction between community groups, legal service lawyers, shelter workers and law enforcement officials. Lerman & Goldzweig, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RTS. L. REP. 271 (1980). "To promote enforcement of criminal law against abusers, ten states have enacted legislation making

enough to find a still-functioning job placement and training program for displaced homemakers.

In the context of this impressive array of remedies aimed at the victim, a state's attorney may in a typical case be both annoyed and nonplussed when a victim of domestic violence insists on pursuing criminal charges against an abuser, especially when the victim remained at home for some time after the battery.<sup>9</sup> Prosecutors sometimes may react in such a way even though the act of gathering one's possessions and children and leaving home some time after an assault can actually imply a high degree of real fear that an attack may recur rather than the assumption that all is well. Domestic violence always escalates, and one who has been abused for many years may very reasonably develop a mortal fear.<sup>10</sup> Past experience usually tells the victim that once a current violent episode has ended, a breathing space will elapse before tensions build up and explode again.<sup>11</sup> Unfortunately, in these cases the victim generally is unable to rely on effective police assistance.<sup>12</sup>

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spouse abuse a separate criminal offense whether or not the victim has previously obtained a protection order." *Id.* at 273.

9. For example, one woman sought to press charges despite remaining at home for two days after her husband threatened to kill her and having endured physical abuse from him for a period of several years. An advocate from the local battered women's shelter accompanied the victim to the state's attorney's office and joined in her insistence that the attorney file criminal charges. The advocate argued that the victim had a right to see her abuser punished. Interview with Kathy Kauffman, shelter-staff advocate, Safe Passage, DeKalb, Ill.

The state's attorney hesitated to file because he believed revenge was a poor motive for prosecution. Although the attorney eventually allowed the woman to sign a complaint, he subsequently objected, asserting that he could not possibly obtain a conviction because the victim had remained at home after the violent event occurred. *Id.*

10. One commentator has characterized the fear common to abused spouses as an "awareness of death potential." L. WALKER, *supra* note 1, at 75. In these cases, "[b]attered women all stated that they were aware their batterers could kill them. They knew the threats of violence were not idle and that the batterers were capable of killing the women and/or themselves." *Id.*

11. Domestic violence follows a cyclic pattern: tension building, violence, honeymoon (the "breathing space"). *Id.* at 55. "Having struck a woman a first time seemed to make it easier for the man to do it again. It is as if a taboo is broken and the behavior, once unleashed, becomes uncontrollable." *Id.* at 79.

12. See Comment, *Wife-Beating, Law and Society Confront the Castle Door*, 15 GONZ. L. REV. 171, 182-84 (1979). Some police officers may be reluctant to respond to domestic calls due to the increased fear of injury. Whether an officer's fear of injury is legitimate is somewhat disputed. In 1980, the FBI reported that 33% of assaults on police officers and 12% of

The prosecutor's still too-frequent response may be, "We have serious crimes to take care of. We can't waste time on this." Because at least eighty percent of all perpetrators of violent crimes confined in prisons have been abused or witnessed abuse of other family members as children,<sup>13</sup> however, one may well ask what these "more important" crimes are. The violence prevalent in contemporary society may well be learned at home.<sup>14</sup>

Because children can learn that violence is appropriate behavior when one of their parents abuses the other, the crimes involved in domestic violence should be considered serious. One reasonably may conclude that the primary producer of violence in society is violence in the home. American society has long recognized that the family is its basic unit and the teacher and socializer of children. The acceptance of serious crime in the home teaches perpetrators, victims, future perpetrators, and future victims that these types of criminal behavior are tolerable when confined to the home, away from the public gaze. Moreover, future perpetrators and victims may learn that violent crime is generally appropriate

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all officer deaths occurred while responding to domestic disturbance calls. Note, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1983 U. ILL. L. REV. 261, 267-68. At least one author has classified the FBI's statistics as an "old cop's tale" and has referred to an officer's fear of injury as a reflection of "our general societal disregard for women." Jones, *supra* note 5, at 15. For a statistical evaluation of police response in domestic disturbances, see Worden & Pollitz, *Police Arrests in Domestic Disturbances: A Further Look*, 18 L. & Soc'y REV. 105 (1984); see also Bruno v. Codd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

13. Studies in California and Massachusetts have found that from 80% to "all" (San Quentin) of adult and juvenile inmates convicted of violent crimes came from violent homes. See generally ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, *DO YOU KNOW WHICH CRIME* (1983).

14. "It seems clear that violence as a means of solving problems is a learned form of behavior. A child learns how to 'be' from the models available, and when parents act as if they have no internal means of control, they are demonstrating sanctioned behavior to their kids." J. FLEMING, *STOPPING WIFE ABUSE* 275-76 (1979). Studies have indicated that persons who are battered as children, or who observe battering as an acceptable method of problem solving, tend to repeat the pattern of abuse as adults. For example, in a study involving 1,146 families with children between ages 3 and 17 living at home, child abuse occurred at the rate of 14 incidents for every 100 children. Straus, *Family Patterns and Child Abuse in a Nationally Representative American Sample*, in 1 *THE ABUSED CHILD IN THE FAMILY AND THE COMMUNITY* 213, 215 (1980). Another study found 49.1% of adult abusers had, as young children, witnessed violence between their parents. J. FLEMING, *supra*, at 274; see also Freeman, *Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?* 7 BRIT. J.L. & Soc'y 215, 226 (1980); Comment, *supra* note 12, at 179.

behavior whenever one is angry or frustrated.<sup>15</sup> Despite this connection between domestic violence and other serious crime, some prosecutors do not see domestic violence as a serious problem for the criminal justice system. The apparent message to abusers is clear: if a victim objects strongly enough, the victim can take the initiative and spend the money to find some helpful services to escape; but society, as represented by the state, will ignore abusive behavior in the home unless the victim insists on prosecution.

This Article suggests that criminal prosecutions are the best remedy available for all domestic violence and that prosecutors should seek it in chronic and severe cases even if the victim does not insist upon, nor even request, such action. Tied to the abuser by affection and by emotional, economic, and physical needs, the victim may be blind to the serious nature of violent domestic abuse. The legal system should not remain blind also.

## II. PUNISHING THE VICTIM

The common suggestion that civil remedies available to the victim of domestic violence are more appropriate than criminal remedies does not accord with the seriousness of violent crimes. The widespread refusal to prosecute the perpetrators of such crimes is a serious abuse of prosecutorial discretion, and the effect on the victim can be devastating. Not only is the victim told that crime in the family setting is less serious than similar crimes against strangers, but the victim is also more likely than a stranger-victim to be in continuing danger from the criminal.<sup>16</sup>

The pursuit of civil remedies always involves damaging, if not completely destroying, a family unit that may function adequately most of the time. The victim can take the children and flee, but if

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15. See Comment, *supra* note 12, at 177.

16. Because of marriage or another type of emotional relationship, the victim feels forced to remain close to the abuser. This raises the belief that the victim has no legal recourse, and often allows the crime to go unpunished. See Comment, *supra* note 12, at 172.

A New York Supreme Court Justice recognized the problem when he stated, "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, 1048, 396 N.Y.S.2d 974, 975 (Sup. Ct. 1977), *rev'd in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff'd on other grounds*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

they hide too long from the abuser, who may remain dangerous to them for a long time,<sup>17</sup> many states would find the abused spouse guilty of child-snatching.<sup>18</sup> The victim can get an order of protection, but, as a result, the abuser will be ordered to leave home. The victim can also seek a divorce. Finally, if the abused spouse lives in a jurisdiction that has abrogated interspousal tort immunity for intentional wrongs, the victim can sue the abuser for damages. This final alternative offers no promise of stopping the abuse, however.<sup>19</sup> Even if the abused spouse pursues criminal remedies, under the current system the victim must insist on such remedies strenuously. Finally, because the *victim* must initiate these divisive alternative remedies, the victim ironically can bear the onus of the family's breakup.

The child-victim faces similar possibilities. The child can run away, thus becoming a minor in need of supervision.<sup>20</sup> If the child lives in a jurisdiction that does not recognize parent-child tort immunity,<sup>21</sup> the child-victim can bring an action for damages against

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17. Abuse may continue long after divorce and physical separation. See, e.g., D. MARTIN, *supra* note 2; L. WALKER, *supra* note 1.

18. See, e.g., IOWA CODE ANN. § 710 (West 1979 & Supp. 1986); OREGON REV. STAT. §§ 163.215-163.257 (1985); see also Fugitive Felon Act, 18 U.S.C. 1073 (1982) (original version at ch. 271, § 1, 47 Stat. 326 (1932)), made applicable to parental kidnapping by section 10 of Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 6-10, 94 Stat. 3566, 3568-3573 (1980).

19. Although an interspousal tort suit may result in a damage award, it is not an effective remedy because it fails to provide any physical protection for the abuse victim. Note, *supra* note 12, at 266-67.

20. Juvenile courts and other authorities have recognized that status offenders such as runaway children are much less amenable to correction while remaining in the community. Although removing a child from the home is the last alternative in any case, status offenders must often be contained before they can be counseled. Turner, *Treatment of Juvenile Delinquents*, JUV. & FAM. CT. J., Nov. 1981, at 3-4.

21. Presently, 17 jurisdictions retain the doctrine in whole or in part. See Dennis v. Walker, 284 F. Supp. 413 (D.C.D.C. 1968); Owens v. Auto Mut. Indemnity Co., 235 Ala. 9, 177 So. 133 (1937); Attwood v. Attwood, 276 Ark. 230, 633 S.W.2d 366 (1982); Horton v. Reaves, 186 Colo. 149, 526 P.2d 304 (1974); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Pedigo v. Rowley, 101 Idaho 201, 610 P.2d 560 (1980); Foley v. Foley, 61 Ill. App. 577 (1895); Smith v. Smith, 81 Ind. App. 566, 142 N.E.2d 128 (1924); Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930); Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); Kloppenburg v. Kloppenburg, 66 S.D. 167, 280 N.W. 206 (1938) (noting that state guest statute would preclude parent-child litigation for automobile negligence); McKelvey v. McKelvey,



the abuser, but this alternative offers no promise that the abuse will stop. The child can perhaps persuade an adult, usually a social worker, teacher, or doctor, to file a neglect or abuse petition in juvenile court, requesting placement in foster care, but this alternative has the negative effect of removing the child from all other family members as well as the abuser. Finally, the child or a sympathetic adult may request that a prosecutor file criminal charges. If the abuse involves incest, the state's attorney may well cooperate in this effort. If the abuse involves assault or battery, however, the attorney may refuse to file because the legal right of parents to impose reasonable corporal punishment on their children may preclude establishing assault or battery beyond a reasonable doubt.<sup>22</sup> Although society is less likely to require child-victims to initiate legal process themselves, the remedies available, like those available to spouse-victims, involve destruction of family relationships and affect abusers only indirectly.

Several problems emerge when a spouse or child elects the self-help remedy of running away. Apart from the legal wrongs of child-snatching for the spouse and running away for the minor child, the victim of domestic violence is often economically dependent.<sup>23</sup> For the spouse, running away also creates a permanent limbo in which one remains legally married to a spouse not seen or heard from in years.

The tort remedy also has advantages and disadvantages. If the plaintiff's lawyer consents to take the case on a contingent fee basis, the victim's initial financial outlay may be quite small—filing fees and other such costs. Furthermore, any damages actually recovered may be financial help to an economically dependent vic-

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111 Tenn. 388, 77 S.W. 664 (1903); *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954); LA. REV. STAT. ANN. § 9:571 (West. 1984).

22. When distinguishing abuse from legitimate corporal punishment becomes necessary, the fact that physical assaults on children by parents, caretakers, and teachers often are sanctioned by our culture complicates the determination. Freeman, *The Rights of Children in the International Year of the Child*, 33 CURRENT LEGAL PROBS. 1, 3 (1980). Thus far, only Maine, Massachusetts, New Jersey, Hawaii, Maryland and the District of Columbia prohibit the use of corporal punishment altogether in the educational context. LEGAL RIGHTS OF CHILDREN 526 (R. Horowitz & H. Davidson eds. 1984).

23. See generally A. JONES, *supra* note 2; D. MARTIN, *supra* note 2; L. WALKER, *supra* note 1.

tim.<sup>24</sup> This remedy provides little help, however, where the abuser has little or no money to pay damages. Additionally, personal injury actions for damages are notoriously slow in the court system,<sup>25</sup> and filing suit in such cases is likely to anger the abuser and escalate the abuse. Moreover, interspousal tort immunity<sup>26</sup> or parent-

24. See Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MARSHALL J. PRAC. & PROC. 549, 569 (1978).

25. See generally WALTER E. MEYER RESEARCH INST. OF LAW, DOLLARS, DELAY AND THE AUTOMOBILE VICTIM (1968).

26. See, e.g., *Burns v. Burns*, 111 Ariz. 178, 526 P.2d 717 (1974); *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979); *Hill v. Hill*, 415 So. 2d 20 (Fla. 1982); *Williams v. Ray*, 146 Ga. App. 333, 246 S.E.2d 387 (1978); *Peters v. Peters*, 63 Hawaii 653, 634 P.2d 586 (1981); *Guffy v. Guffy*, 230 Kan. 89, 631 P.2d 646 (1981); *Cloud v. State Farm Mut. Auto. Ins. Co.*, 440 So. 2d 961 (La. Ct. App. 1983); *Aitken v. State Farm Mut. Auto. Ins. Co.*, 404 So. 2d 1040 (Miss. 1981); *Martinez v. Lankster*, 595 S.W.2d 316 (Mo. Ct. App. 1980); *State Farm Mut. Auto. Ins. Co. v. Leary*, 168 Mont. 482, 544 P.2d 444 (1975); *Varholla v. Varholla*, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978); *Chaffin v. Chaffin*, 239 Or. 374, 397 P.2d 771 (1964); *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943).

The following state statutes address interspousal immunity generally: DEL. CODE ANN. tit. 13 § 311 (1981); FLA. STAT. ANN. § 708.08 (West Supp. 1986); GA. CODE ANN. § 19-3-8 (Supp. 1986) (amended in 1983 to remove language providing husband as head of family but continued interspousal tort immunity); HAWAII REV. STAT. § 573-5 (1976); KAN. STAT. ANN. § 23-203 (1981); LA. REV. STAT. ANN. § 9.291 (West Supp. 1986); MISS. CODE ANN. § 93-3-3 (1972) ("Husband and wife may sue each other" construed not to apply to tort actions based on personal injury); MO. ANN. STAT. § 451.290 (Vernon 1986); OR. REV. STAT. § 108.010 (1984) (allows wife to sue husband for intentional tort but not for negligent tort).

Although the above jurisdictions allow interspousal immunity generally, variations do exist. Several jurisdictions uphold and extend immunity to torts committed before divorce, for example. See *Wallach v. Wallach*, 94 Ga. App. 576, 95 S.E.2d 750 (1956); *Ensminger v. Campbell*, 242 Miss. 519, 134 So. 2d 728 (1961); *In re Marriage of Galloway*, 547 S.W.2d 193 (Mo. Ct. App. 1977).

Other jurisdictions uphold immunity but do not extend it to torts committed shortly before divorce. See *Windauer v. O'Connor*, 107 Ariz. 267, 485 P.2d 1157 (1971); *Gremillion v. Caffey*, 71 So. 2d 670 (La. Ct. App. 1954); *Kobe v. Kobe*, 61 Ohio App. 2d 67, 399 N.E.2d 124 (1978).

Finally, some jurisdictions uphold immunity and extend it to torts committed during separation. See generally *Holman v. Holman*, 73 Ga. App. 205, 35 S.E.2d 923 (1945) (one spouse may not sue the other in tort whether they are living together or apart); *Klein v. Abramson*, 513 S.W.2d 714 (Mo. Ct. App. 1974) (wife would have had no cause of action, had she survived, even though at the time of the tort the couple was not living together).

At least two state legislatures have abrogated explicitly the doctrine of interspousal immunity. The Illinois General Assembly recently enacted legislation specifically granting an abused wife the right to sue her husband for an intentional tort and allowing the injured spouse to recover medical expenses, loss of earnings and other damages. See Comment, *Domestic Violence: Illinois Responds to the Plight of the Battered Wife — The Illinois Do-*

child tort immunity<sup>27</sup> precludes suit in many jurisdictions.

Orders of protection, available in a growing number of states, may serve to protect the victims of domestic violence.<sup>28</sup> These orders, however, usually require that the abuser and the victim have no contact whatsoever while the order is in force—terms certainly not conducive to the preservation of the family. Divorce is also a remedy that by its own terms breaks up the family relationship. Because divorce cannot be administered on a contingent fee basis,<sup>29</sup> the victim must have enough money at least to pay a retainer. Although attorney's fees are awarded in appropriate cases,<sup>30</sup> abusers are notoriously difficult respondents in divorce actions. The case may therefore take a long time to conclude and lead to virtually unenforceable interim orders.<sup>31</sup> Furthermore, no guarantee ex-

mestic Violence Act, 16 J. MARSHALL L. REV. 77, 96 (1982); see also N.Y. GEN. OBLIG. LAW § 3-313(2) (McKinney 1978).

27. Many states struggle with the general issue of whether to allow actions between a parent and a minor child for personal torts. Currently, states follow three basic approaches. The first approach involves a modification of the doctrine "by creating exceptions consistent with traditional justifications for the rule. . . ." Heise, *Parental Immunity Doctrine: Continued Application, Modification, or Total Abrogation?*, 8 J. Juv. L. 494, 494 (1984). The second approach involves "total abrogation and application of the reasonable, prudent parent [under] similar circumstances standard. . . ." *Id.* The last approach promotes the "continued application of the doctrine, leaving the task to the state legislature to modify or abrogate the rule." *Id.*

28. A protective order is a judicial order written to prevent an abuser from behaving in a particular manner. Under the Illinois Domestic Violence Act, § 103, ILL. ANN. STAT. ch. 40, para. 2301-1 to 2305-1 (Smith-Hurd Supp. 1986), a protective order can be temporary or final. See Comment, *supra* note 26, at 90.

In some states, orders of protection are available only to spouses, precluding this remedy for a child or paramour of an abuser. In other jurisdictions any family member may obtain an order. Still other states will grant an order to any abused member of the abuser's household. Comment, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703, 704-05 (1982).

29. The ABA Model Code of Professional Responsibility states, "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1979). For a discussion of professional responsibility in family law practice, see generally S. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS § 6.13 *et seq.* (1984).

30. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 310 (1974).

31. If "no penalties for violations are imposed, '[a] frightened woman can get no comfort from knowing that she has enlisted the power of the courts, for if the man is still at large to do as he pleases, a[n] [unenforceable] piece of paper from the court can never stop him.'" Comment, *supra* note 12, at 191-92 (quoting E. PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR 120 (1974)); see also Hoffman & Holmes, *Husbands, Wives and Divorce*, 4 FIVE

ists that divorce actually will stop the abusive behavior.<sup>32</sup> Often, neither party to the marriage wants a divorce; the victim merely wants the abuse to stop and sees no other way to accomplish this end.<sup>33</sup> If both parties prefer to continue their marriage, divorce cannot be a suitable remedy.

For the child-victim, the juvenile court process may succeed in ending the abuse. Court process, however, usually results in either supervision of the child or removal of the child from the family home. In either case, the focus is on the victim. No direct action to punish or control the abuser is possible because such actions are beyond the jurisdictional power of the juvenile court.<sup>34</sup> Once again, as with most of the available remedies, the victim is enabled to escape the abuser, often at great personal cost, but the abuser is not stopped from abusing.

Bringing criminal prosecutions only at the instigation and insistence of the victim creates several problems. The abuser may be subconsciously invited to escalate the abuse because everyone involved knows that if the victim drops the charges and refuses to cooperate in prosecution, the prosecutor will not proceed with the

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THOUSAND AMERICAN FAMILIES—PATTERNS OF ECONOMIC PROGRESS 35, 36 (1975); *Fathers Who Don't Pay*, Wash. Post, Apr. 13, 1984, at A2, col. 1.

32. Judges may fail to recognize that they might place the woman in a dangerous situation by granting the abuser rights to visit the children. Such "visits" often result in continued abuse. To avoid this problem, courts should order that visitation be allowed only in the presence of a third party or at a place other than the abused spouse's home. See Comment, *supra* note 12, at 191. "If a woman manages to get away and obtain a divorce, she still has no guarantee of safety. Some ex-husbands continue to stalk and hunt down 'their women' for years after a divorce, forcing their victims to move and change jobs continually." BATTERED WOMEN 53 (D. Moore ed. 1979).

33. Psychological pressures restrain many women from leaving their husbands because they are raised to believe that they must make their husbands happy. Some women therefore feel responsible for their beatings and may wait years for their husbands to change before they seek divorce. See Gingold, *One of These Days—Pow! Right in the Kisser: The Truth About Battered Wives*, Ms., Aug. 1976, at 51-52.

34. Most juvenile courts have the express authority to order only the following types of sanctions in juvenile cases: specific programs or facilities for the child, with payment by parents; placement of the child in an institution, with parental participation conditioned on the avoidance of other remedies; detention of the child; fines against delinquent children; and restitution by delinquent children. See Peterson, *The Authority of the Court*, Juv. & FAM. CT. J., May 1983, at 7, 14-16.

case. In cases involving violent crimes not in the family setting, such terrorizing of necessary witnesses is actively discouraged.<sup>35</sup>

The messages thus given to the abuser and the victim seem rather strange. The abuser must conclude that abusing a family member is permissible so long as the victim is prevented from complaining to the authorities. The victim, on the other hand, perceives pressure not to object to this particular form of criminal behavior because no one else cares about it or wants to take action to stop the abuser. With most crimes, the initial complaint comes from the victim, and the victim's testimony is often necessary for conviction. Although state's attorneys urge and can even coerce victims to testify in most criminal cases, when violent crime occurs in the home against family members they refuse to take action unless the victim insists upon prosecution and is willing to testify. In many cases, however, the prosecutor could proceed without the victim's testimony because other evidence of the abuser's guilt often exists.<sup>36</sup>

### III. PHILOSOPHICAL JUSTIFICATION

Many writers have commented on the functions of penalizing criminal conduct. With the passage of time, reasons have become increasingly pragmatic. In 1789, Jeremy Bentham wrote:

The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be,

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35. Witness intimidation refers to threats made by defendants to discourage or prevent victims or eyewitnesses from testifying at a hearing or trial of the accused. Three basic forms of witness intimidation exist: (1) a blatant threat or the actual use of force against the witness, (2) family, community or cultural pressures, and (3) fear—whether real or imagined—of repercussions by the accused. Graham, *Witness Intimidation*, 12 FLA. ST. U.L. REV. 240, 244 (1984).

Victims of domestic violence may be particularly susceptible to witness intimidation. A study conducted by New York's Victim Services Agency and the Vera Institute of Justice found that the witnesses most likely to be threatened were witnesses involved in serious cases, witnesses who were acquainted with the perpetrator before the crime, and female witnesses. See Connick & Davis, *Examining the Problem of Witness Intimidation*, 66 JUDICATURE 439, 440 (1983).

36. Other witnesses capable of testifying against the abuser likely include police officers, shelter personnel, teachers, counselors, neighbors, and relatives.

everything that tends to subtract from that happiness: in other words, to exclude mischief.

But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.<sup>37</sup>

Bentham went on to say that punishment should not be permitted when the act in question is not really "mischievous," when punishment cannot prevent mischief, when the punishment is more mischievous than the crime, and when the mischief will abate without punishment.<sup>38</sup> Similarly, a presidential commission wrote:

The action taken against lawbreakers is designed to serve three purposes beyond the immediately punitive one. It removes dangerous people from the community; it deters others from criminal behavior; and it gives society an opportunity to attempt to transform lawbreakers into law-abiding citizens.<sup>39</sup>

Both of these utilitarian views seem to proceed upon the rather jaded assumption that wrongdoers know the values of their society and know themselves to be doing wrong.

In 1531, Martin Luther suggested two purposes of law. The first sought to restrain humankind's natural bent to "unrighteousness" by threatening to punish those who commit clearly wrong acts<sup>40</sup>—an early deterrence argument. The second, however, sought

to reveal unto a man his sin, his blindness, his misery, his impiety, ignorance, hatred and contempt of God, death, hell, the judgment and deserved wrath of God. . . .

This, as it is the proper and the principal use of the law, so it is very profitable and also most necessary. For if any be not a murderer, an adulterer, a thief, and outwardly refrain from sin . . . he would swear . . . that he is righteous; and therefore he conceiveth an opinion of righteousness, and presumeth of his

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37. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 158 (J. Burns & H. Hart eds. 1970).

38. *Id.* at 159.

39. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 7 (1967).

40. M. LUTHER, *A COMMENTARY ON ST. PAUL'S EPISTLE TO THE GALATIANS*, reprinted in J. DILLENBERGER, *MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS* 139 (J. Dillenger ed. 1961).

good works and merits. Such a one God cannot otherwise mollify and humble, that he may acknowledge his misery and damnation, but by the law.<sup>41</sup>

John Calvin wrote in a similar vein in 1559:

[W]hile [the law] shows God's righteousness, . . . it warns, informs, convicts, and lastly condemns, every man of his own unrighteousness. . . . [A]s soon as he begins to compare his powers with the difficulty of the law, he has something to diminish his bravado. . . . Thus man, schooled in the law, sloughs off the arrogance that previously blinded him. . . . [A]fter he is compelled to weigh his life in the scales of the law, laying aside all that presumption of fictitious righteousness, he discovers that he is a long way from holiness, and is in fact teeming with a multitude of vices, with which he previously thought himself undefiled.<sup>42</sup>

Thomas More expressed an even simpler version of the idea: "All laws, they [the Utopians] say, are passed with the sole reason of reminding each man of his duty. . . ."<sup>43</sup>

More recently, Herbert Morris,<sup>44</sup> Robert Nozick,<sup>45</sup> and Jean Hampton<sup>46</sup> have asserted moral education to be a justification for criminal punishments. Indeed, Hampton goes further and suggests that "by reflecting on the educative character of punishment . . . we can provide a full and complete justification for it."<sup>47</sup> She continues:

[A]ccording to the moral education theory, punishment is not intended as a way of conditioning a human being to do what society wants her to do (in the way that an animal is conditioned by an electrified fence to stay within a pasture); rather,

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41. *Id.* at 140-41.

42. J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, reprinted in 20 *THE LIBRARY OF CHRISTIAN CLASSICS*, at 354-55 (1960).

43. T. MORE, *UTOPIA* 94 (Washington Square Press ed. 1965) (1516). The law's role in educating wrongdoers has even earlier antecedents. See, e.g., *Romans* 3:20 ("Through the law comes knowledge of sin.").

44. Morris, *A Paternalistic Theory of Punishment*, 18 *AM. PHIL. Q.* 264 (1981).

45. R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-97 (1981).

46. Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208 (1984).

47. *Id.* at 209.

the theory maintains that punishment is intended as a way of teaching the wrongdoer that the action she did (or wants to do) is forbidden because it is morally wrong and should not be done for that reason. The theory also regards that lesson as public, and thus as directed to the rest of society. When the state makes its criminal law and its enforcement practices known, it conveys an educative message not only to the convicted criminal but also to anyone else in the society who might be tempted to do what she did.

[T]he state . . . wants to use the pain of punishment to get the human wrongdoer to reflect on the moral reasons for that barrier's existence, so that he will make the decision to reject the prohibited action for *moral* reasons, rather than for the self-interested reason of avoiding pain.

[I]t is incorrect to regard simple deterrence as the aim of punishment; rather, to state it succinctly, the view maintains that punishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for *choosing* not to perform an offense.<sup>48</sup>

This educational function of law—to teach members of society that certain behavior is morally wrong or socially intolerable—is undermined by nonenforcement, as is its deterrent effect. As Kadish said:

First, the moral message communicated by the law is contradicted by the total absence of enforcement; for while the public sees the conduct condemned in words, it also sees in the dramatic absence of prosecutions that it is not condemned in deed. Moral adjurations vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere. Second, the spectacle of nullification of the legislature's solemn commands is an unhealthy influence on law enforcement generally.<sup>49</sup>

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48. *Id.* at 212-13.

49. Kadish, *The Crisis of Overcriminalization*, reprinted in 7 AM. CRIM. L.Q. 17, 20 (1968). As his title suggests, Kadish does not propose to resurrect the teaching functions of criminal law; he advocates that society should avoid "use of the criminal law purely to enforce a moral code," such as "the laws prohibiting extra-marital and abnormal sexual intercourse. . . ." *Id.* He concludes correctly that such laws ought to be repealed. His arguments, however, also support this Article's conclusion that criminal laws against domestic violence should be enforced.



Thus, if unenforced the law may produce the opposite of its intended effect: if so inclined, people will behave as the law allows and not as it commands.

For Luther and Calvin, and probably for the author of *Romans* as well, one learns through the law by trial and conviction, self-imposed or otherwise. Because the law of which they speak is the entire scheme of values by which one ought to live, they view conformity to the law as an impossibility; one's conviction of guilt will necessarily come and lead one to seek deliverance through grace.<sup>50</sup>

In contrast, the teaching function of the more limited criminal law spoken of by Thomas More and Jean Hampton and addressed in this Article may be achieved *either* by reading and listening to learn what conduct is prohibited *or* by violating the law and experiencing trial and conviction. If one previously has learned, through lack of enforcement, that the law did not mean what it said, the latter method of teaching may be required. The clichéd rule that "ignorance of the law is no excuse" explicitly permits this learning method in our criminal justice system. Apparently, the justification is based upon the dual assumptions that the law is published and therefore can be known, and that good citizens either ought to know the law intuitively or be able to discern it whenever circumstances reasonably suggest the need.<sup>51</sup>

The legal history of spouse and child abuse reflects a gradual movement from a nearly unfettered right of husbands and fathers to correct, chastise, and punish other family members,<sup>52</sup> to the creation of some limitations,<sup>53</sup> and finally to special recognition of family violence and its remedies.<sup>54</sup> Although the modern statutes preserve a right to batter one's spouse or child with impunity

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50. See J. CALVIN, *supra* note 42, at 355-56; M. LUTHER, *supra* note 40, at 141.

51. See, e.g., *Lambert v. California*, 355 U.S. 225 (1957). In that case, the defendant's conviction for remaining in Los Angeles more than five days without registering as a previously convicted felon was overturned because "violation of [the ordinance]'s provisions is unaccompanied by any activity whatever, mere presence in the city being the test." *Id.* at 229. The Court, quoting Holmes, said, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." *Id.* (quoting O. HOLMES, *THE COMMON LAW* 50 (1881)).

52. See *State v. Jones*, 95 N.C. 588 (1886); 1 W. BLACKSTONE, *COMMENTARIES* 445 (1884).

53. See generally Comment, *Corporal Punishment in the Schools: A Time for Change*, 4 J. Juv. L. 155 (1980).

54. See *supra* note 8 and accompanying text.

under some circumstances that would be criminal if done by a stranger, their overall effect is to resurrect the possibility of criminal responsibility for family batterers who stop short of death or permanent injury. Modern statutes notify the citizenry that domestic violence will be tolerated less than in the past. Case law also exists that upholds criminal charges against family members who perpetrate traditional crimes, almost in the same manner as if the victims had been strangers.<sup>55</sup> In the crime of incest, for example, the victim must be, by definition, a family member.<sup>56</sup>

Many people, however, including some in law enforcement and others who are spouse or child abusers, continue to view domestic violence as a familial, not a societal, problem.<sup>57</sup> Moreover, in any event, many people view so-called simple assaults as minor crimes,<sup>58</sup> sometimes even if committed repeatedly, as long as the perpetrator was legally present in the victim's home. As a result, some reluctance to use criminal remedies for domestic violence persists. Victims are still urged, often by the statutes themselves,<sup>59</sup> to seek civil remedies or other private redress. These civil solutions, however, ignore not only the societal harm resulting from domestic violence, but also the teaching function of the criminal law.

One of the most effective ways to stop domestic violence is to make clear to abusers and potential abusers that society will not tolerate it. Such is the function of law articulated by More, Luther, Calvin, and Kadish, and the *explicit* function of criminal law for at least More and Kadish.<sup>60</sup> Criminal convictions will make clear, as nothing else in adult experience could do, the moral wrong of engaging in domestic violence. Indeed, where criminal law has been so used, it has succeeded startlingly well.<sup>61</sup>

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55. See, e.g., *State v. Smith*, 85 N.J. 193, 426 A.2d 38 (1981).

56. States usually define criminal incest more narrowly than civil incest sufficient to nullify a marriage between relatives. See, e.g., H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 10, 357 (1968).

57. See U.S. DEP'T. OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE FINAL REPORT 22-24 (1984).

58. See *supra* note 12.

59. See *supra* note 8.

60. See T. MORE, *supra* note 43 at 94; Kadish, *supra* note 49, at 32-34.

61. "A victim's chance of future assault was nearly two and a half times greater when officers did not make an arrest. . . . [T]he assaulter views the enhanced stature of the vic-

Legal philosophers have long recognized that criminal punishment need not be severe to be effective. As Barnes and Teeters said, "History shows that severe punishments have never reduced criminality to any marked degree."<sup>62</sup> Certainty of punishment is more effective. According to Bentham, "If punishment consisted merely in taking from the guilty the fruits of his offence, and if that punishment were inevitable, no offence would ever be committed. . . . [T]he more certain punishment is, the less severe it need be."<sup>63</sup>

The most common "fruit" of domestic violence appears to be power—the power to control the persons and lives of one's fellow family members.<sup>64</sup> Although the abuser can no longer exercise that power if the victim leaves the family household, the victim's extreme accommodation—leaving home—provides the abuser with a successful "power play." Criminal remedies, on the other hand, by focusing upon the abuser, leave the rest of the family intact, directly "taking from the guilty the fruits of his offence."<sup>65</sup> Instead of the abuser controlling the victim's person or life, the abuser's life and person are instead subjected to control by the state.

The likelihood of apprehension and conviction could be nearly 100% in non-fatal domestic violence cases. Once a victim makes a complaint, evidence is usually available and the identity of the perpetrator is always known. As a result, punishment could be virtually certain. As previously noted, punishment need not be severe as long as it is certain. Where prosecution has been increased and light sentences imposed, the goal of deterrence has been achieved.<sup>66</sup>

Both philosophy and common sense suggest that criminal remedies are an appropriate societal response to domestic violence. The perpetrator of domestic crimes thus will learn that such conduct is wrong before it escalates into manslaughter, murder, or rape,<sup>67</sup> and

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tim and subsequent arrest and overnight incarceration as a judgment that his behavior is criminal." U.S. DEP'T. OF JUSTICE, *supra* note 57, at 24.

62. H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 286 (3d ed. 1965).

63. J. BENTHAM, *THE THEORY OF LEGISLATION* 201 (N.M. Tripathi Private Ltd. ed. 1975).

64. See L. WALKER, *supra* note 1, at 42-54.

65. J. BENTHAM, *supra* note 63, at 201.

66. See U.S. DEP'T OF JUSTICE, *supra* note 57, at 24.

67. See L. WALKER, *supra* note 1, at 208-09.

before the abuser's children learn that violence is the way to cope with life.<sup>68</sup>

#### IV. THE ABUSER-PERPETRATOR

If abusers do learn violence as a way to cope with stress or express emotions,<sup>69</sup> then society must take actions which teach more appropriate ways to deal with family members. For example, a successful suit for damages teaches the abuser that violent behavior comes only at the money cost of the damage done. The loss of a spouse or custody of a child in a divorce or juvenile proceeding teaches the abuser that the victim can obtain legal assistance to break family ties after episodes of violent behavior. If criminal prosecution depends upon the insistence of the victim, however, the abuser learns that the state will drop the prosecution if the abuser can change the victim's mind. Only vigorous prosecution, brought and continued at the state's initiative, teaches the abuser that such behavior is unacceptable to society.

Those rare instances where such prosecutions have been undertaken and reported have resulted in a phenomenal success rate.<sup>70</sup> The always-present goal of the criminal justice system—rehabilitation—has been achieved. Unfortunately, resistance to the vigorous use of criminal sanctions in the fight against domestic violence still remains. Police officers and prosecutors, who deal with criminals constantly, recognize that almost every offender presents some sympathetic characteristics that make prosecution to the fullest extent possible unattractive as a remedy.<sup>71</sup> This factor, along with time pressures on the criminal courts, may partially account for the reduced charges and lesser penalties of the plea bargaining process. Many criminals have families, jobs, and respectable reputations in the community. The criminal justice system has long recognized, sometimes with approval and sometimes with criticism, the mitigating effect of these factors in

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68. Straus, *supra* note 14, at 220-21.

69. *See id.* at 220.

70. *See* U.S. DEP'T OF JUSTICE, *supra* note 57, at 24.

71. Many state's attorney's offices have a screening process that tends to discourage rather than encourage prosecution. "Very few marital assault arrests survive the prosecutor's screening process." Comment, *supra* note 24, at 563-64.

prosecution and sentencing.<sup>72</sup> When they accompany a perception that the victim "asked for it" or that the crime is not really serious, the chances of vigorous prosecution decline still further.<sup>73</sup>

The prosecutor and judge often can identify in many ways with the abuser. For example, many abusers are employed, respectful, persuasive, and charming.<sup>74</sup> The abuser will promise to reform and often means it.<sup>75</sup> After all, any married person, or anyone else who has shared a sexual relationship with another person, knows how angry one can become when conflicts arise within that relationship. Furthermore, in the domestic case, the abuser explains the anger and minimizes the violent nature of the abuse. The abuser's family is often dependent on the abuser's income, and the judge and state's attorney may assume that the loss of income would be worse than the continuation of the abuse. Moreover, the abuser is likely to have no prior criminal record because earlier instances of abuse, even if handled by the police, are unlikely to have led to arrests or convictions.<sup>76</sup> To the prosecutor and judge, therefore, punishment often seems an inappropriate remedy.

Although rehabilitation is one of the stated purposes of criminal punishment, those who work in the criminal justice system know

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72. For a discussion of the preparation of mitigating evidence, see generally Cotsirilos & Stephenson, *Basic Strategy in Federal Criminal Defense Litigation*, 8 LITIGATION, Fall 1981, at 36, 59.

73. Wives who remain passive and do not confront their abusers may do so out of a reasonable fear of retaliation from the abuser. Unfortunately, a common attitude toward these types of abuse victims can be that they therefore acquiesce in or even provoke attacks. See, e.g., Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 281-83 (1985).

74. The problem of domestic violence cuts across all social lines and affects "families regardless of their economic class, race, national origin, or educational background." Note, *supra* note 12, at 262. Commentators have indicated that domestic violence is prevalent among upper middle-class families. In particular, dentists are the most physically violent of all professionals, while lawyers, the least physically abusive professionals, tend to engage in psychological abuse. *National Bar Association Holds Interspousal Violence Seminar*, 4 FAM. L. REP. 2697, 2698 (1978).

75. Many abusers regret their actions after a violent episode. During the episode, however, "they are either convinced that what they are doing is right, or some outside force (liquor, drugs, wife's behavior) has caused them to lose control." J. FLEMING, *supra* note 14, at 289. Promises to reform are part of the honeymoon phase of the cycle of domestic violence. See L. WALKER, *supra* note 1, at 65-66.

76. Eventually, of course, the profile of an abuser comes to include records of prior arrests and convictions. See Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 10 (1982).

that recidivism rates are high. Studies do not support the hope that prosecution and severe punishment ultimately might lead a criminal to abandon criminal behavior.<sup>77</sup> Because the spouse or child abuser is violent only against the small group that constitutes the abuser's family, leaving the abuser at large is not obviously dangerous to society. The abuser's crime is not so reprehensible or shocking to the public morés that prison time is required to satisfy public outrage. Until state's attorneys learn that criminal prosecution followed by moderate but meaningful sentencing will often stop the abuser from being violent again, no reason seems to exist for prosecuting or punishing this class of criminal.

If the abuser, by use of threats, promises, or a combination of the two,<sup>78</sup> can persuade the victim to be ambivalent about prosecution, the state's attorney will also be dubious about winning the case. The victim who is influenced through uncertainty, fear, or desire not to harm a spouse or parent is unlikely to be a convincing witness. Further to complicate the situation, individuals who may have knowledge of the abuser's activities, such as police officers, staff members and volunteers at battered women's shelters,<sup>79</sup> and family service workers, may not even be asked to testify.

A judge or prosecutor who is not also an abuser may have difficulty believing that the abuser has engaged in serious violence. For some reason, they find believing that punches thrown in a barroom

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77. The rehabilitation theory of punishment has been downgraded for a number of fundamental reasons. First and foremost of these is that punishment does little or nothing to reduce recidivism. In 1967, Robert Martinson collected data from 231 studies of correctional treatment and ultimately concluded "that the present array of correctional treatments has no appreciable effect—positive or negative—on the rates of recidivism of convicted offenders." Lopez, *The Crime of Criminal Sentencing Based on Rehabilitation*, 11 GOLDEN GATE U.L. REV. 533, 550 (1981) (quoting Martinson, *The Paradox of Prison Reform*, reprinted in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, at 309, 317 (G. Erzosky ed. 1972)); see also Von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 10-11 (1983).

78. Many abuse victims subjected to recurrent threats of violence from the abuser are afraid to bring charges or often drop the charges once brought. A study of 7,500 wives in the District of Columbia who sought to file charges against their abusers concluded that "fewer than 200 actually achieved their objective." J. FLEMING, *supra* note 14, at 331.

79. Subpoenaing counselors of battered women's programs and shelters is a recent nationwide trend in domestic violence cases. The danger inherent in this practice is that it creates fear and threatens the confidentiality needed to create a therapeutic environment for the abuse victim. National Center on Women and Family Law, Inc., *Family Law*, 17 CLEARINGHOUSE REV. 1018, 1022-23 (1984).

brawl were meant to and did cause serious harm easier than believing that a violent argument over a late dinner or where to hang a portrait was meant to cause injury, even if injury actually occurred. If the prosecutors or judges are themselves abusers, then they are almost as eager as the defendant to settle or drop the case. They do not want it to be taken seriously.

In short, the abuser may have the opportunity to sidetrack the criminal justice system. The appearance and demeanor of the defendant, and the prosecutor's or judge's own experience of family arguments and reluctance to treat a useful citizen like a common criminal, may combine to outweigh the available evidence of injury done to the victim.

Even when the defendant is not very appealing, or the evidence of serious harm is very strong, a general belief that the abuser's behavior cannot be changed may lead prosecutors and judges not to try. Thus, no one tells the abuser that this violent behavior toward other family members is wrong. As a result, abusers have no motivation to change their behavior. If the victim escapes by severing family ties,<sup>80</sup> the abuser can still acquire a new family and a new victim.

## V. EFFECTIVE CRIMINAL REMEDIES

### A. Murder

The criminal justice system already effectively deals with domestic violence culminating in murder. Fortunately, people take murder seriously, even when it occurs in a domestic setting. Unfortunately, however, murder within the family is not usually seen as the predictable end of domestic violence.<sup>81</sup> If it were so seen, crimi-

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80. One of the most commonly noted reasons for divorce is physical abuse. In addition, wives complain of abuse 11 times more frequently than husbands do in divorce cases. Levinger, *Sources of Marital Dissatisfaction Among Applicants for Divorce*, 36 AM. J. ORTHOPSYCHIATRY 803, 805 (1966); O'Brien, *Violence in Divorce Prone Families*, 33 J. MARRIAGE & FAM. 692, 698 (1971).

81. Studies seem to bely this perception. The FBI, for example, has estimated that 27% of all homicides occur within the family. Dvoskin, *Legal Alternatives for Battered Women Who Kill Their Abusers*, 6 BULL. AAPL 335, 339-40 (1978). A 1958 study, found that 41% of all female murder victims were killed by an intimate, such as a husband. Only 11% of male homicide victims were killed by their wives. M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 213 (1958).

nal prosecution of abusers would be common. The use of vigorous criminal prosecution in cases where domestic violence has not yet reached murderous consequences<sup>82</sup> would reduce the number of such murders, both those committed by unchecked abusers and those committed by desperate victims who see no other available protection for themselves.<sup>83</sup>

### *B. Rape*

Marital rape is a form of violence present in about one-third of the cases seen at women's shelters.<sup>84</sup> In many jurisdictions, spousal rape is not a crime.<sup>85</sup> In those states where it is criminal, the lengthy sentences usually imposed for rape convictions, often statutorily required, make rape an unattractive charge where the aim is rehabilitation. Prosecution for marital rape should be used only when the abuser has not been rehabilitated after earlier convictions for lesser offenses involving domestic violence.

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82. One author has suggested that domestic violence can be prevented by eliminating structural violence (the roots of personal and domestic violence) and replacing it with cooperative values. See Gil, *The Social Context of Domestic Violence: Implications for Prevention*, 6 VT. L. REV. 339, 355 (1981).

83. See generally A. JONES, *supra* note 2, at 281-320.

84. Marital rape is a serious social and legal problem. One study estimates that as many as 14% of all married women may be victims of sexual violence sometime during their marriage. Another study found that marital rape numbers in the millions annually. Harman, *Consent, Harm, and Marital Rape*, 22 J. FAM. L. 423, 424 (1983-84). Because marital rape is not a crime in most states, few statistics are available. The studies that do exist report that approximately 36% of all battered women have been raped by their husbands. Finkelhor & Yllo, *Rape in Marriage: A Sociological View*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 119-20 (1983).

85. "As of January 1984, the rape laws of 28 states still provide an express marital rape exemption; only 8 states have entirely abandoned the exemption." Rickenburg & Schulmon, *Florida, New York, and Virginia Courts Declare Marital Rape a Crime*, 18 CLEARINGHOUSE REV. 745, 745 (1984).

The judiciary has been much more vigorous in refusing to recognize a "common law" marital rape exemption, however. *Id.* The New York Court of Appeals recently became the first court in the nation to eliminate an explicit marital rape exemption from a state criminal-rape statute. The court held that the statutory distinction between marital rape and nonmarital rape was "based upon archaic notions about the consent and property rights incident to marriage" and violated the equal protection clause. *People v. Liberta*, 64 N.Y.2d 152, 163-69, 474 N.E.2d 567, 573, 485 N.Y.S.2d 207, 213 (1984).



### C. Incest

An estimated twenty-five percent of all female children suffer some kind of sexual advance or contact by an adult male relative during childhood.<sup>86</sup> Because society regards incest and other sexual advances upon children with horror, the state is likely to invoke criminal penalties. The statutory sentences accompanying these penalties tend to be long. Some have argued that criminal prosecution in this area should be pursued sparingly and only after efforts at family therapy have failed,<sup>87</sup> but this argument is precisely the one that some people made when society began to object to other forms of domestic violence. The argument now appears to have been wrong in cases of assault and battery; therefore, it should be questioned in incest cases as well.

### D. Child Abuse

Physical abuse of children, like spouse abuse, is under-prosecuted unless it escalates to the point of killing or causing permanent injury to the child involved. The fact that corporal punishment is legal when used on children legally within one's custody as long as it is not excessive and unreasonable<sup>88</sup> severely hinders criminal prosecution in cases where no serious injury has yet occurred. This problem makes the child abuse case an inappropriate avenue to initiate legal change, although prosecutions in this area hopefully will follow quickly once prosecution of spouse abuse cases becomes an established pattern.

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86. Surveys indicate that 5,000 cases of incest are reported each year in the United States. For every reported case, another 10 to 20 go unreported. Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 Mo. L. Rev. 251, 252-53 (1984).

87. Pursuing criminal prosecution can be an embarrassing and traumatic experience for the child incest victim. As Coleman said, "Taking into account all the people involved in an incest investigation, . . . it is not unusual for a child to have to repeat her story six or seven times. . . . [I]t is little wonder that the child suffers severe psychological damage. . . ." *Id.* Some professionals advocate avoiding criminal prosecution because of the great potential for emotional and psychological damage. See *id.* at 273 n.153.

88. For a discussion of legitimate corporal punishment, see Hampton, *supra* note 46, at 217, 217 n.16.

*E. Spousal assault and battery*

Spousal assault and battery is the most seriously under-prosecuted crime in the area of domestic violence. Although assault and battery is a violent crime, many spouses feel free to commit it again and again. A consistent pattern of criminal prosecution and sentencing has the potential not only to reduce the incidence of this crime but also, by breaking patterns of domestic violence,<sup>89</sup> to reduce the number of marital rapes and spousal murders as well.

Once the crime is reported and investigation shows that it actually was committed, the state's attorney should prosecute the case, regardless of the degree of cooperation from the victim. Both the abuser and the victim must be made to realize that assault and battery are crimes, even when they occur in the home. Although the victim may seek to drop the charges out of fear, economic dependence, or an effort to be cooperative or conciliatory with the abuser, the state's attorney is not bound by any of these limitations. The state, not the victim, prosecutes criminals; we need hardly reflect upon the fact that if the judicial system required the victim to press charges, few prosecutions for murder would ever occur!

The assault of one's spouse is no less an offense against the criminal law than is an assault and battery against anyone else. The unusual complications in spousal assault cases arise only from the close relationship between the criminal and the victim. The primary issue raised by these facts is whether the victim consented. The law does not make clear, however, whether one can consent effectively to the crime of assault, thus negating its criminality.<sup>90</sup> Furthermore, the idea that one who remains with an abuser consents to the battery is similar to the now discredited and outmoded notion that marriage gives perpetual consent to rape. Violence is not part of the marriage contract; nor does anything in the law

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89. The Attorney General's Task Force on Family Violence recently made the following recommendations for the justice system: "1. Family violence should be recognized and responded to as a criminal activity. 2. Law enforcement officials, prosecutors, and judges should develop a coordinated response to family violence." U.S. DEPT OF JUSTICE, *supra* note 57, at 10.

90. Consent is a defense to minor types of offensive touching such as a kiss or caress; however, consent is less effective for hard blows and more serious injuries. W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 608 (1972).

require that one either repudiate the whole marriage contract or accept a spouse's violence.

In any given jurisdiction, the first few prosecutions for simple assault and battery occurring in the domestic arena will present problems. Until state's attorneys and judges become accustomed to such cases, as is true with anything new, the case preparation must be unusually careful and thorough. Initially, the effort probably will be disproportionate to the harm caused by the crime. The effort is worth making, however, because the cases will eventually become routine, creating the long term social benefits of diminished domestic violence, and, perhaps, preserved marriages and families.

## VI. THE PROTOTYPICAL CASE

In most cases no special thought or ability is required to establish that an assault and battery occurred. The prime difficulty will be in persuading judges, perpetrators, victims, and defense counsel that the violence matters and that this is a case worth taking seriously. Those members of the criminal justice system must address four factors: 1) that the victims' consent cannot be presumed and in any case is irrelevant; 2) that violent treatment of one spouse or cohabitor by the other is not trivial or minor because severe assaults and batteries do occur in the domestic context; 3) that domestic violence follows consistent and predictable patterns that courts and prosecutors need to understand; and 4) that threats from the abuser are probable and must be handled accordingly.

### *A. Consent*

The victim of spousal battery most likely has not consented to being abused. Consent comes before the act, and even the victim who says "go ahead and hit me" presumably is speaking sarcastically, not giving consent. What will often appear as consent in this area actually is a form of forgiveness or acceptance. If the victim does not leave home and end the marriage after one or two violent episodes, the tradition has apparently been to assume that the victim likes, or at least assents to, the victimization. If the victim does not resort to self help, the criminal justice system will not help either. Failure to move out of the home and get a divorce, however, cannot reasonably be said to equal consent to abuse. The victim

may stay out of fear or in the hope that the violence will cease, leaving only the good parts of the marriage. Neither of these possibilities looks much like the consent given, for example, by prize fighters to be battered by one another.<sup>91</sup>

### *B. Triviality*

A recent newspaper article quoted a lawyer as saying that an order of protection was too readily available in one county in Illinois.<sup>92</sup> He cited a recent case where the judge entered an order of protection against a man as a result of an incident which the lawyer described as a "tussle" over a tape recorder.<sup>93</sup> These statements provide two prime examples of trivialization. The cause of a violent argument often makes the whole incident seem trivial. For example, an argument over a burned meal, use of the car, or a tape recorder does not sound terribly serious to some people. The same method of trivialization, however, could doubtless be applied to other battery cases as well. The causes of barroom brawls often include such earth-shaking items as dart games, football scores, and television program choices. Clearly the original cause of an argument is irrelevant to the degree and significance of the resulting violence; sometimes even murders result from causes such as those listed above.

The other trivialization in the lawyer's statement is the word "tussle." To speak of a violent argument over a tape recorder as a "tussle" conjures up different pictures for people in different relationships. For those who live in non-battering families, the word may suggest a severe verbal argument. For those who have lived in a family where violent argument included punching, hitting, kicking, or other dangerous and harmful behavior, however, the image will be different. The lawyer quoted in the newspaper no doubt heard an account of a violent argument and translated it into terminology appropriate to a less violent marriage. The cure for this type of trivialization is to define carefully the terms one uses and

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91. "[C]onsent of a participant in sports, such as football and boxing, is a defense to tackles and blows, not likely to kill or seriously injure, delivered in accordance with the rules of the game." *Id.*

92. Chicago Tribune, March 2, 1984, §1, at 1, col. 1.

93. *Id.*

to apply language appropriate to the facts, rather than applying one's own misconceptions. The twists of language should not obscure the fact that a violent assault has been committed against a human being.

### *C. Patterns of domestic violence*

A wealth of literature exists concerning "domestic violence syndrome" and other aspects of violent family life. This literature has become relevant in the legal process in many settings: establishing self-defense to murder charges brought against victims of domestic violence who finally kill their abusers,<sup>94</sup> procuring orders of protection,<sup>95</sup> defining cruelty grounds for divorce,<sup>96</sup> determining child custody disputes,<sup>97</sup> and bringing interspousal tort actions.<sup>98</sup> The application of this literature to criminal domestic violence also would prove fruitful. The available literature is the best source for careful construction of evidentiary presentations on domestic violence.<sup>99</sup> One must bear in mind the basics: that domestic violence

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94. For a discussion of self-defense as a defense to murder, see generally A. JONES, *supra* note 2.

95. For a discussion of the advantages and disadvantages of protective orders, see Note, *Spouse Abuse: A Novel Remedy for a Historic Problem*, 84 DICK. L. REV. 147, 157-58 (1979-80); Note, *supra* note 12, at 277-79.

96. For a general discussion of grounds for divorce, see Comment, *supra* note 24, at 553-55.

97. For a discussion of the "best interests doctrine" in child custody determinations, see Gordon, *The Best Interests Doctrine: Its Application in Divorce, Modification and Non-Parental Disputes*, 8 J. JUV. L. 184 (1984). For a discussion of techniques for interviewing a child during custody proceedings, see Newman & Collester, *Children Should be Seen and Heard*, FAM. ADVOC., Spring 1980, at 8, 10-11. For a discussion of mediation and other alternatives to litigation in child custody cases, see Evarts & Goodwin, *The Mediation and Adjudication of Divorce and Custody: From Contrasting Premises to Complementary Processes*, 20 IDAHO L. REV. 277 (1984); Shepard, Philbrick, & Rabino, *Ground Rules for Custody Mediation and Modification*, 48 ALB. L. REV. 616 (1974).

98. For a discussion on the effects of interspousal tort immunity on the abuse victims' ability to obtain redress for injuries, see Note, *supra* note 95, at 151-53; Comment, *supra* note 24, at 569-70.

99. For a discussion of the use of expert testimony as a means of counteracting the common attitudes toward battered women, see Comment, *The Use of Expert Testimony in the Defense of Battered Women*, 52 U. COLO. L. REV. 587 (1981). For an analysis of the prerequisites to the admissibility of expert testimony in abuse cases, see Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U.L. REV. 348 (1982).

escalates, that economic and psychological dependencies form, and that many practical obstacles stand in the way of victim self-help.

### 1. *Domestic violence escalates*

The first instance of violence suffered by a spousal victim is usually short and not terribly severe. Accordingly, viewing the crime as an aberration and thus forgivable is easy. Later in the pattern of violence, however, the same victim faces a serious threat to life and health, and may be past the ability to forgive but nonetheless too afraid to change the situation alone.<sup>100</sup> Since child abuse generally also escalates from small incidents to more violent occurrences, it also might seem acceptable initially to the victim and to those individuals concerned. Unfortunately, the legality of reasonable corporal punishment makes more insidious the tendency to accept as trivial ever-increasing violence against a child.

### 2. *Dependencies and other obstacles to leaving home*

One of the few identified characteristics of batterers is low self-esteem. Low esteem is also one of the consequences of domestic violence for the victim. Both the abuser and the abused thus believe that they cannot survive without the other.<sup>101</sup> Additionally, the victim quite often is isolated from family and friends<sup>102</sup> or at least warned not to tell anyone about the abuse suffered. If the abuser can support the family without the victim's assistance, the victim might well be unemployed. Accordingly, if the victim decides to leave, neither money nor free help are available. Indeed,

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100. See *supra* note 2.

101. See, e.g., BATTERED WOMEN 20-25 (D. Moore ed. 1979). One of the main reasons why battered women often choose to remain in an abusive environment deals with the combination of hope and love. Strong bonds exist between marital partners, and the abused spouse faces a real dilemma in deciding to leave a spouse who apologizes after each beating, pledges love, and intends to change. In addition, many abused spouses feel a great sense of loyalty to their batterers. This aspect only adds to the victim's dilemma. *Id.*

102.

A wife assault victim may be quite isolated. Her husband may actively work at keeping her that way. She probably has few friends or sources of support. If she does have friends, she may never have told them of her home situation. . . .

The more isolated a woman is in her own home, the more dependent she is upon her mate for any input about her value as a person.

J. FLEMING, *supra* note 14, at 87-88.

even if the victim is employed, the batterer might control the family money.<sup>103</sup> Battered women's shelters are the best available solution to these problems, at least for adult victims.

#### *D. Threats*

Batterers who fear losing their victims frequently resort to threats against the victim, the victim's loved ones, or anyone else who offers the victim any help.<sup>104</sup> These threats further discourage the victim and make leaving home harder. The problem of threats from the criminal abuser, however, is one which the criminal justice system is not entirely powerless to handle. Instead of forcing the victim to hide temporarily in a shelter, a more proper and just focus on the criminal, rather than the victim, would suggest the use of mechanisms commonly used in criminal law, such as incarcerating the criminal until trial, revoking bond, or requiring the posting of significant bond to be forfeited if the accused engages in further violent crime before trial. At these preliminary stages, one must take care to prevent the judge's failure to take the threat of domestic violence seriously. One simple method that may be helpful at this point, and later, is characterizing the abuser as "defendant" and "perpetrator," and the abused spouse as "victim" and "complainant," rather than calling them "spouse," "husband," or "wife." Educating the court about the characteristics of domestic violence should pave the way for trials, convictions, and sentences to proceed as they would in a case of nondomestic violence. After a few cases have been prosecuted successfully, such cases will become easy and commonplace.

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103. In the majority of violent marriages, the husband has complete control over family finances and most abuse victims rarely have any money to call their own. J. FLEMING, *supra* note 14, at 83-84. Professor Freeman gave the following example: "In *Scream Quietly or the Neighbors Will Hear*, Eriz Pizzezy quotes one battering husband who taunts his wife by saying to her: 'Where can you go? What can you do?' This encapsulates the state of powerlessness and dependence which many women find themselves in." Freeman, *supra* note 14, at 222.

104. Many abuse victims fear retaliation by their spouses. Fleming describes the personality of the batterer who threatens retribution as a "controller"—a person who is used to getting his or her way. The abuser opposes the victim's attempts to leave because the abuser would then lose the ability to control the victim. Initially, the abuse victim may have been attracted to this type of person because he or she seemed very capable of handling things. J. FLEMING, *supra* note 14, at 294.

## VII. CONCLUSION

Forcing victims of domestic crime to leave home and break up families in order to end the violence in their lives reflects the criminal justice system's abdication of its role in modifying unacceptable behavior. This failure exacerbates the widely lamented social problem of family breakdown and leads directly to the rupture of families that might otherwise become usefully functioning units of society. The burdens and consequences of crime should fall as completely as possible upon the perpetrator of crime, not upon the already injured victim. The necessary laws and procedures are in place; it is past time to use them to end domestic violence—and thereby reduce a major source of all violence—in our society.