

Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders

DAVID M. ZLOTNICK*

I. INTRODUCTION

The Nicole Simpson murder has focused public attention on domestic violence as never before.¹ Yet despite an unprecedented level of media coverage and a proliferation of proposed legislation, domestic violence remains the leading health risk for American women.²

No issue in domestic violence reform is as critical as the need to stop the repeat batterer before a homicide occurs, committed either by the batterer or by the victim in self-defense. While a centerpiece of reform in this area has been court intervention through the imposition of a civil protection order, a method of swift and effective enforcement of such orders has been elusive.

The current trend, pushed by some battered women advocates, is to criminalize all violations of protection orders. This approach is a misguided continuation of the search for "magic bullet" solutions that has plagued domestic violence reform. It also relies exclusively on state prosecutors who are often hostile to filing such charges, particularly when the batterer's actions would not otherwise be considered a criminal offense.³

* Director of Litigation, Families Against Mandatory Minimums Foundation, Washington, D.C.; Assistant Professor of Law, Stetson University College of Law, Harvard Law School, J.D. 1986; State University of New York at Binghamton, B.A. 1982. The author served as an Assistant United States Attorney for the District of Columbia from 1989-93 where he prosecuted many domestic violence cases.

The author wishes to thank Matthew Shafit, Joan Zorza and Professors Robert Batey and Martha Minow for their helpful comments on earlier drafts. The research and editing assistance of Karen & Scott Flint, Lorna Salomon, Pamela Rush, Maureen Godwin and Stacey Bohlman is gratefully acknowledged.

¹ See *infra* note 15 and accompanying text.

² See *infra* note 20 and accompanying text.

³ Acts, such as repeated telephone calls, unsolicited letters and visits, are violations of the stay away or no contact provisions that are often part of a civil protection order. These incidents can be extremely distressing for the battered woman although such acts are not otherwise considered criminal conduct or even unwelcome under ordinary circumstances. Telephone Interview with Linda Osmundson, Director

Instead, greater reliance should be placed on criminal contempt sanctions as a remedy for protection order violations. Criminal contempt sanctions can often be instituted and prosecuted by the offended civil party, here the battered woman,⁴ and usually require an expedited hearing which may be critical to her safety.⁵ When coupled with criminal sanctions in appropriate cases, and incorporated into a comprehensive attack on domestic violence, the criminal contempt route empowers the battered woman and assists her in escaping from a violent relationship.⁶

Part II of this Article outlines the social dynamic behind the persistence of domestic violence in the context of the question, "Why do women stay?," and the less often asked question, "Why do men batter?" Part II also explores the flaws of mandatory arrest laws, which typify the "magic bullet" approach that fails to address the complex relationship between the social dynamic of battering and the legal/bureaucratic response.

In Part III, I build on work by Professor Martha Minow⁷ and explore the connection between legal language and domestic violence reform.⁸ Professor Minow has argued that new laws by themselves will not change the common everyday language that accompanies and excuses domestic violence. In other words, entrenched cultural attitudes cannot be changed by legislative fiat. To be effective, legal reforms must purposefully seek to change this language of acceptance into language of rejection and disapproval of domestic violence. Only by using transformative legal language can legislation hope to alter individual beliefs and behavior. Minow also shows that such transformative language must be crafted with each actor in the social dynamic in mind—lawyers, police officers, judges, social workers, and above all, victims whose desperate need is for empowering language, not debilitating "victim talk."⁹

I argue in Part III that domestic violence reforms will be more transformative, and hence more successful, particularly with institutional actors (*e.g.*, police, prosecutors and judges), if they incorporate and

of CASA shelter, Pinellas County, Florida (Mar. 25, 1995).

⁴ See *infra* notes 189–91 and accompanying text.

⁵ See *infra* notes 205–06 and accompanying text for statutes mandating expedited hearings on contempt motions.

⁶ See *infra* part IV.B.

⁷ Professor of Law, The Harvard Law School. Professor Minow has written extensively on family law, feminism, and legal language. See *infra* note 132 for a list of related publications.

⁸ Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990).

⁹ Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1420–21 (1993).

connect with existing societal concepts and practices. In essence, reformers must purposefully seek out existing language and practices as a wedge to promote change in the cultural values underlying domestic violence. However, reformers must be careful to choose only those existing practices and language that can be co-opted for the goal of empowering battered women.

I then make the specific case for combining the concept of empowerment with the everyday and legal uses of "contempt" language in the context of providing a remedy for protection order violations. Contempt language has an everyday meaning that we apply to individuals whose conduct we find despicable. Labelling domestic battering as "contemptible," uses language that shifts the blame away from the victim and rightfully onto the offender. At the same time, contempt language is also powerful legal language, reserved for conduct that violates a court order. Most importantly, criminal contempt sanctions are currently available in most jurisdictions to sanction violations of civil protection orders, either explicitly by statute or under the inherent power of a court to vindicate its orders.¹⁰ Therefore, employing contempt sanctions to punish protection order violations takes advantage of compatible common and legal language, as well as an existing institutional practice. The confluence of these factors presents a unique opportunity to integrate language and policy to address a critical area of domestic violence.

In Part IV, I address the practical implications of this strategy. I show that criminal contempt sanctions offer significant advantages and flexibility when incorporated into a comprehensive attack on domestic violence. In contrast, I demonstrate that the current trend to criminalize all violations of civil protection orders simply repeats the failed single-remedy approach of the past. I conclude with specific suggestions for implementing the criminal contempt and empowerment approach for enforcement of civil protection orders.¹¹

II. THE PERSISTENCE OF DOMESTIC VIOLENCE IN THE UNITED STATES

A. *Introduction to the Problem*

While feminists could fairly charge¹² as recently as 1967 that the

¹⁰ See *infra* notes 185–86.

¹¹ Specifically, the potential double jeopardy consequences of multiple prosecutions of the same act of domestic violence as contempt and under a criminal statute must be considered. See *infra* notes 264–68 and accompanying text.

¹² Raymond I. Parnas, *The American Bar Foundation Survey of the*

domestic battering¹³ of women was the American family's dirty secret, it is now front page news.¹⁴ The Simpson case in California,¹⁵ the Hedda

Administration of Criminal Justice and Past, Present, and Future Responses to Domestic Violence, 69 WASH. U. L.Q. 107, 108 (1991).

¹³ A good definition of "woman battering" is "that pattern of violent and coercive acts perpetrated by a person against a current or former partner, the calculated purpose of which is to control the thoughts, beliefs, or conduct of the partner or to punish the partner for resisting the perpetrator's control." Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 853 n.1 (1994); see also LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1960* 251 (1988) (focusing on the power relationship between males and females and defining wife-beating as "the chronic battering of a person of inferior power who for that reason cannot effectively resist").

As most authors on this subject, I too will refer to victims of domestic violence as women because they constitute the overwhelming majority of victims. For general background on battered women, see Barbara Hart, *Lesbian Battering: An Examination*, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); ELLEN PENCE ET AL., *CRIMINAL JUSTICE RESPONSE TO DOMESTIC ASSAULT CASES: A GUIDE FOR POLICY DEVELOPMENT* (1985); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982).

There has been some conflict whether the term "battered woman" should be limited to those who suffer physical abuse, or whether it should be broadened to include psychological abuse as well. Lenore Walker, who is generally given credit for first popularizing this issue, writes that battering also involves a cycle of behavior and that a couple must go through the battering cycle at least twice for the relationship to qualify. LENORE E. WALKER, *THE BATTERED WOMAN* at xv (1979). Both Lenore Walker's early work and her integrity have recently been severely criticized for her willingness to testify as an expert witness on behalf of accused batterers, most notably O.J. Simpson (much of this debate has taken place on the Internet bulletin boards). For a sampling of this debate see in%femjur@suvm.syr.edu (transcript on file with the author).

¹⁴ It is undisputed that the feminist movement was initially responsible for bringing domestic violence to the forefront of the policy agenda. See, e.g., R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 25 (1992); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 184 (1987); WALKER, *supra* note 13; Bernadette D. Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 995-97 (1989). Social scientists also provided statistical data to support the advocates' claims. The Minneapolis Domestic Violence Experiment generally gets credit for spurring the initial surge of study and legislative reform. The experiment was first reported in Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

Nussbaum case in New York,¹⁶ the Lorena Bobbitt case in Virginia,¹⁷ and a constant stream of well-publicized local tragedies¹⁸ have raised the nation's awareness of domestic violence to perhaps its highest and most sustained level ever.

While this widespread public awareness may be a new phenomenon, those who have worked in the criminal justice and social service professions have long been painfully aware of the pervasiveness and intractability of the nation's domestic violence problem. For the past twenty years, we have witnessed an explosion of academic articles, studies, books, and symposia on the issue.¹⁹ Domestic violence reform work now

Professor Martha Minow argues that media coverage continues to be part of the problem by either over-dramatizing individual cases or by reporting numbing statistics. Minow, *supra* note 8, at 1684-85.

¹⁵ See, e.g., Cindy Loose, *Case Has Area Hot Lines Jumping*, WASH. POST, June 24, 1994, at A22 (noting that since the murder of Nicole Simpson the problem of domestic violence has gripped the national consciousness). The media have also attributed a recent flurry of state and federal legislative action to the concern generated by the Simpson case. See, e.g., Patricia Edmonds, *A Call to Arms Against Spouse Abuse*, USA TODAY, June 23, 1994, at 3A (reporting that the New York Legislature reached an agreement on a bill requiring police to arrest spouse-beaters, that New Jersey passed six new domestic violence bills, and that California proposed new laws to hold spousal abuse defendants longer and maintain a registry of restraining orders); Bill Turque, et al., *'He's Going Nuts'*, NEWSWEEK, July 4, 1994, at 23 (reporting that New York and Colorado passed tough new domestic abuse laws after 911 tapes of Nicole Simpson were played nonstop over the nation's airwaves). Congress also recently passed the Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1916 (codified at 42 U.S.C. §§ 13931-14040 (1994)).

¹⁶ See Marianne Yen, *Verdict Was Compromise, Jurors Say: Doubts About Nussbaum, Defendant's Intent Led to Stalemate on Murder Count*, WASH. POST, Feb. 1, 1989, at A3; Judy Mann, *Steinberg's Excuse Works*, WASH. POST, Feb. 1, 1989, at B3.

¹⁷ See Maria E. Odum & Carlos Sanchez, *A Symbol of Shared Rage; Dozens Rallying Around Va. Woman Who Cut Husband*, WASH. POST, Aug. 12, 1993, at B1.

¹⁸ In 1994, for example, Hillsborough County, Florida had thirty-four domestic murders and approximately 6,400 misdemeanor domestic violence cases. William March, *Cops, Courts Get Tough on Abuse*, TAMPA TRIB., Feb. 8, 1995, at 1. Nationwide, 2,167 women were killed by their spouses, ex-spouses, or lovers in 1992. *Id.* Some of these deaths received extensive and in-depth coverage in the local press. See Sue Carlton, *Road to Mount Enon: The Story of a Domestic Killing*, ST. PETERSBURG TIMES, Jan. 22, 1995, at 1F (Part I of a three-part series chronicling a police officer, Charlie Trice, accused of killing his wife, Darla Trice, after a long history of domestic violence in the marriage).

¹⁹ "Until 1967, not a single book or journal article focused on the law's response to family violence. There was practically no legislation on the subject, nor focused

extends beyond an isolated sphere of interest groups and advocates to include legislative and executive branch agencies and special commissions at all levels of government.²⁰ Even general-membership-legal and other professional organizations have devoted time and resources to the issue.²¹

This activity has generated "solutions" to the problem at a prodigious rate. Over the past twenty years, all fifty states have enacted laws intended to rein in domestic violence.²² As solutions have failed to produce the desired results, some states have enacted more than one major legislative initiative in less than a decade.²³

Despite these concentrated efforts, domestic violence remains the greatest cause of serious injury to American women, accounting for more injurious episodes than rape, auto accidents, and mugging combined.²⁴ Other statistics are just as chilling. A woman is beaten every twelve seconds.²⁵ Fifteen hundred women a year (approximately four per day) die

organizations, reported litigation, or published research." Parnas, *supra* note 12, at 108. The Parnas article also chronicles the explosion of scholarly writings on this subject beginning in the early 1970s. *See id.* at 108-20.

²⁰ The U.S. Surgeon General has found that the battering of women is the "single largest cause of injury to women in the United States." Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46 (1992) (quoting Nikki R. Van Hightower & Susan A. McManus, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (1989)). Many state governors and legislatures have committees and advisory panels studying the issue. *See, e.g.*, GOVERNOR'S TASK FORCE ON DOMESTIC VIOLENCE, THE FIRST REPORT (1994) (Florida).

²¹ *See, e.g.*, *Conference Seeks to Prevent Violence Against Women*, ATLA ADVOCATE, Aug. 1993, at 1 (claiming that an interdisciplinary conference sponsored by the Association of Trial Lawyers of America "broke new ground in uniting physicians, lawyers, law enforcement officials, and representatives of victims' and women's advocacy groups in efforts to stop violence directed at women and provide services for women"); Sherry Stripling, *Asking About Abuse*, CHI. TRIB., June 23, 1992, at 7 (reporting that the American Medical Association started giving special attention to domestic violence in 1990 and is now distributing information on the problem through its newsletters).

²² *See infra* note 169.

²³ Maura B. Johnson, *Home Sweet Home?: New Jersey's Prevention of Domestic Violence Act of 1991*, 17 SETON HALL LEGIS. J. 234, 244 (1993). New Jersey passed two major acts on domestic violence, the first in 1981 and the second in 1991. N.J. REV. STAT. §§ 2C:25-1 to -16 (1982) (repealed 1991); N.J. REV. STAT. ANN. §§ 2C:25-17 to -33 (Supp. 1992).

²⁴ Cris Barrish, *Woman on the Run*, NEWS-JOURNAL (Wilmington, Del.), Feb. 4, 1990, at A1 (citing Federal crime statistics); *see Corsilles, supra* note 13, at 854 n.6.

²⁵ Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention*

at the hands of an abusive male partner.²⁶ Roughly twenty-one thousand domestic crimes against women are reported every week²⁷—more than a million assaults, murders, and rapes in a year.²⁸ These are the reported crimes. Police estimate that for each of these crimes, three more go unreported.²⁹ In all, there are an estimated 1.8 to 4 million incidents of domestic violence each year.³⁰

B. Why Public Awareness Has Not Changed Private Behavior

1. Gender Roles and the Battering Relationship

While part of the failure of the past twenty years of legal reform can rightly be attributed to flaws in the programs and the unwillingness of institutional actors to implement these changes, this can be only part of a serious analysis. An honest appraisal of domestic violence must acknowledge that it is domestic violence's historical roots, which are still deeply entrenched in much of our culture, that account for its persistence.³¹

Program, 74 B.U. L. REV. 329, 329 n.3 (1994) (citing statistics from the FBI and various other sources). Women are nine times more likely to be injured in the home than on the streets. LYNN H. SCHAFFAN, PROMOTING GENDER FAIRNESS THROUGH JUDICIAL EDUCATION: A GUIDE TO THE ISSUES AND RESOURCES 48 (1989) (citing statistics from the Center for Disease Control).

²⁶ Nina Burleigh, *Swaying in the Wind: For Some, Justice Can Be a Cruel Force*, CHI. TRIB., Mar. 18, 1990, § 6, at 1.

²⁷ S. REP. NO. 118, 102d Cong., 2d Sess. III (1992).

²⁸ *Id.*

²⁹ *Id.* Domestic violence also consumes a huge proportion of public services. Battered women account for 20% of all hospital emergency cases, and domestic disturbances are the largest category of calls received by police each year. RICHARD J. GELLES & CLAIRE P. CORNELL, INTIMATE VIOLENCE IN FAMILIES (1985).

³⁰ See *Women and Violence: Hearings Before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong., 2d Sess. 117 (1990) (testimony of Angela Browne).

³¹ Feminist historians trace the roots of wife beating to the historical domination by men of the family—the patriarchy. The absolute authority of husbands over their wives dates back to Roman and Christian law and led to legalized domestic violence into the eighteenth century in Europe, England and early America. R. Emerson Dobash & Russell P. Dobash, *Wives: The "Appropriate" Victims of Marital Violence*, 2 VICTIMOLOGY 426, 427–30 (1978). Only in the late nineteenth century did some states start to prohibit wife beating. Prior to then, it was considered a husband's marital obligation to control and chastise his wife through physical force. *Id.* at 430–31.

In the modern context, Gordon asserts that "violence among family members

In many quarters, a low level of domestic violence is still seen as acceptable³² or at least as a mutual problem in the relationship.³³ On the other hand, men who seriously injure or kill their partners are seen as criminals, not as part of a larger social problem.³⁴ Abusive relationships, however, need to be seen as part of a larger cultural dynamic. This dynamic defines individual ideas about appropriate gender roles which affect behavior within marital/romantic/sexual relationships. Only from this perspective can one recognize the features of our culture's dominant gender roles, held by both men and women, that foster domestic violence in American society.

In more common parlance, one must answer two questions about domestic violence. First, the most common query: Why do women remain in relationships that are unsatisfying, harmful, and even life-threatening?³⁵ The second question, less commonly asked (which in itself says a great

arises from family conflicts which are not only historically influenced but political in themselves, in the sense of that word as having to do with power relations. Family violence usually arises out of power struggles in which individuals are contesting real resources and benefits." GORDON, *supra* note 13, at 3. For example, "[b]eatings kept women from leaving, kept them providing sexual, housework, and child care services (or were intended to do so)." *Id.* at 287.

³² Natalie L. Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 264 (1987); Dobash & Dobash, *supra* note 31.

³³ Elizabeth Topcliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1060-61 (1992). Furthermore, modern developments such as industrialization and urbanization have weakened traditional informal controls over unacceptable levels of marital violence. See GORDON, *supra* note 13, at 279 (more traditional cultures had "[r]ituals of public shaming, known as charivari, skimmington rides, rough music, and misrules, among many other names, involving costumes and floats, dancing, singing rude songs, and, sometimes, physical punishment. [These] were common from the fifteenth through the nineteenth century. . . . Some similar activity in the United States in the nineteenth and twentieth centuries has been discovered."). See generally FAMILY VIOLENCE, AN INTERNATIONAL AND INTERDISCIPLINARY STUDY 69 (John M. Eekelaar and Sanford N. Katz eds., 1978).

³⁴ See SCHECHTER, *supra* note 13, at 210-13 (noting that it is important to see the violence as part of society, not an individual or inter-generational psychological problem).

³⁵ The question is often most succinctly phrased as, "Why does she stay?" See Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solution*, 60 WASH. L. REV. 267, 279 (1985); P.B. Poorman, *Why Does She Stay?* 59 (1980) (unpublished manuscript, on file with author).

deal about our culture's dominant gender role stereotypes), is: Why do men batter?³⁶

For women, one must recognize that they too have bought into the social myths that legitimize the violence—be it through religion,³⁷ law, or the norms of friendships, kinships, and neighborhood groups.³⁸ “One assault does not make a battered woman; she becomes one because of her socially determined inability to resist or escape.”³⁹ Lack of self-confidence and a traditionalist view about family and the feminine role⁴⁰ also figure prominently in a battered woman's psychological profile.⁴¹

In addition to women's conceptions about themselves generally, there is also a dynamic to the abusive relationship that hinders external efforts to control domestic violence. Unlike stranger-on-stranger crime, after which the parties have little or no contact, domestic violence takes place in a relationship to which both parties often remain committed.⁴² Women in particular resist outside intervention when they believe that it threatens the future of the relationship.⁴³ This is especially true for women who define their self-image in terms of their relationships with men.⁴⁴ Further, violent relationships sometimes follow an internal cycle of tension building, release, and reconciliation.⁴⁵ The victim may therefore be less willing to

³⁶ See Waits, *supra* note 35, at 286.

³⁷ Sewell, *supra* note 14, at 986–87.

³⁸ GORDON, *supra* note 13, at 285.

³⁹ *Id.* at 285.

⁴⁰ Waits, *supra* note 35, at 285.

⁴¹ GORDON, *supra* note 13, at 272.

⁴² It has also been argued that all women are socialized to stay with their husbands regardless of their partners' problems. For example, only ten percent of non-alcoholic women leave their alcoholic husbands, while ninety percent of non-alcoholic men leave their alcoholic wives. Similar statistics have been found in marriages involving a partner with a degenerative disease. Telephone Interview with Joan Zorza, Senior Attorney at the National Center on Women & Family Law, New York, N.Y. (Apr. 11, 1995). Battered women frequently state that they want to stay with the batterer, but that they just want the abuse to end. Interview with Linda Osmundson, Director of the CASA Shelter in St. Petersburg, Florida (Mar. 25, 1995). See also *infra* note 146 discussing differences between men and women's conceptions of relationships and conflict resolution.

⁴³ See Waits, *supra* note 35, at 281–82, 286.

⁴⁴ BEVERLY BALOS & MARY L. FELLOWS, LAW & VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 219 (1994). See James B. Boskey, *Spousal Abuse in the United States: The Attorney's Role*, in FAMILY VIOLENCE, AN INTERNATIONAL AND INTERDISCIPLINARY STUDY, *supra* note 30, at 202, 205. *But cf.* WALKER, *supra* note 13, at 80.

⁴⁵ See Michele Ingrassia & Melinda Beck, *Patterns of Abuse*, NEWSWEEK, July 4,

take advantage of intervention offered during a peaceful phase.⁴⁶ Finally, while a woman initially might be strong enough to escape, ongoing exposure to physical and emotional damage can eventually make it difficult for the victim alone to solve the problem.⁴⁷

In addition to these psychological factors, it cannot be stressed enough that critical economic forces are at work as well. Domestic violence often starts slowly or only after marriage⁴⁸ and children,⁴⁹ when leaving presents greater legal and pragmatic obstacles. As long as men continue to earn more than women and women continue to bear the primary burden of child care, male batterers can exert economic coercion,⁵⁰ especially since many victims are unskilled and have young children.⁵¹ While domestic abuse crosses all economic and class boundaries,⁵² the poor, young, less educated, and unemployed are more likely to have abusive relationships, much

1994, at 26, 30-31. Lenore Walker describes three parts to the abuse cycle: "a phase where tension is building and the woman tries desperately to keep the man calm; an explosion with acute battering, and then a period where the batterer is loving and contrite." *Id.* The cycle of battering, remorse and wooing behavior wears women down until they become "brainwashed" into thinking that leaving is impossible. *Id.*; see WALKER, *supra* note 13, at 55-70 (describing in greater detail her cycle theory of violence). However, experts now downplay Walker's cyclical theory of battering, since more recent empirical research suggests it is found only in some battering relationships. Instead, the focus has shifted to the manipulative, opportunistic behavior of the batterer, who seeks to maintain the relationship through whatever means necessary, without regard to a specific timing cycle unique to a battering relationship. Interview with Linda Osmundson, Director of the CASA Shelter in St. Petersburg, Florida (Mar. 25, 1995).

⁴⁶ Although many battered women who are able to leave the relationship are later able to establish healthier relationships, some studies suggest that the success rate for resolving domestic violence within a chronically violent relationship is very low no matter what interventions are used.

⁴⁷ Ingrassia & Beck, *supra* note 45, at 31.

⁴⁸ See Dobash & Dobash, *supra* note 31, at 432.

⁴⁹ See GORDON, *supra* note 13, at 272.

⁵⁰ See S. REP. NO. 164, 102d Cong., 2d Sess. 5 (1991), reprinted in 1992 U.S.C.C.A.N. 133, 137.

⁵¹ One battered women's advocate in the Philadelphia area states that most of her clients "often have two or three small children, are in their late 20s or early 30s, have few or no job skills, and have been abused three to five years." Tina Kelley, *Violence on the Home Front*, PHILA. INQUIRER, Oct. 21, 1990, at C4.

⁵² It is well established that domestic violence occurs in families and relationships of all ages, communities, income levels, races, religions, employment situations, and marital status. See WALKER, *supra* note 13, at 17; Ingrassia & Beck, *supra* note 45, at 28.

as they are to suffer from other societal ills.⁵³ Finally, the poverty, drugs, and alcohol that create dysfunctional families are breeding grounds for batterers and their potential victims.⁵⁴ Programs targeted at domestic violence will run aground if they do not account for the other economic and social problems of many of its victims.⁵⁵

As significant as female gender roles and economic restraints may be, current research suggests that the long-neglected male gender role is at least as significant a contributor to domestic violence.⁵⁶ Most batterers in

⁵³ The assertion that incidences of battering occur more frequently in lower or working-class families than in upper-class families is debatable given the disincentive for upper-class women to report the crime. ROGER LANGLEY & RICHARD C. LEVY, *WIFE BEATING: THE SILENT CRISIS* 43-46 (1977).

⁵⁴ See generally GORDON, *supra* note 13, at 264-66. Some research now disputes the role of alcohol in triggering abuse, finding that it is more of a precipitating event than a cause. *Id.* at 265. In addition, the myth that sexual disagreements were a cause of violence has also been challenged. *Id.* at 269-71.

⁵⁵ The military offers a microcosm of this effect. Domestic violence in the military has increased steadily since the late 1980s and has become so severe that an average of one spouse or child a week is killed by a relative in uniform. Some of the rise can be attributed to better reporting, but other suggested causes are shrinking military budgets, incomes, and prospects for career advancement, as well as rising tension over more frequent deployments. Eric Schmitt, *Military Struggling to Stem an Increase in Family Violence*, N.Y. TIMES, May 23, 1994, at 1; Marc Thompson, *The Living Room War*, TIME, May 23, 1994, at 48.

It may be that different solutions may be appropriate for different classes of batterers, not just by psychological profile, but by economic class and employment status as well. See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 25 (1992) (finding that arrests for domestic violence tends to deter only employed suspects); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1539 (1993) [hereinafter *Developments*] (noting that mandatory arrest studies seem to show that unemployed criminal batterers are least responsive to arrest-oriented enforcement because arrest does not deter them).

⁵⁶ Waits, *supra* note 35 at 286; Daniel G. Saunders, *Husbands Who Assault*, in LEGAL RESPONSES TO WIFE ASSAULT 11-13 (N. Zoe Hilton ed. 1993). While battered women often suffer from low self-esteem, come from an abusive family, abuse alcohol and drugs, remain passive in relationships, become dependent and isolated, and crave approval, attention and affection, some research suggests that it may be that a violent relationship has less to do with the woman herself as with the man with whom she ends up. Ingrassia & Beck, *supra* note 45, at 28-29. But see Gerald T. Hotaling & David B. Sugarman, *Prevention of Wife Assault*, in TREATMENT OF FAMILY VIOLENCE: A SOURCE BOOK 385, 401 (Robert T. Ammerman & Michel Hersen eds., 1990) (noting that exposure to violence while growing up does not predict whether a woman will be abused as an adult).

some way reflect or carry out a model of male behavior that they learned from their parents and upon which they act when challenged.⁵⁷

Society has taught men to assert dominance in their relationships, both within and outside the family.⁵⁸ Second, some level of violence or at least a willingness to engage in violence can be a respected male quality.⁵⁹ Third, family matters are private—for the man, the home constitutes “his castle” where he can retreat from work and competition with other men.⁶⁰ Accordingly, batterers do not accept that their behavior is wrong or that society has any right to interfere in their conduct of personal relationships.⁶¹

More specifically, researchers are finding that there are different profiles for batterers cutting across all strata of society.⁶² Some research divides batterers into two groups, dominant and dependent. The dominant batterer is generally aggressive with society, more severely violent and more likely to have experienced violence in childhood.⁶³ The dependent batterer is violent only in the family and tends to show more remorse.⁶⁴

⁵⁷ Waits, *supra* note 35, at 288; LANGLEY & LEVY, *supra* note 53, at 49.

⁵⁸ Any behavior or perceived challenges to the man's possession, authority, and control can trigger a violent episode. Dobash & Dobash, *supra* note 31, at 438-39. Trivial things like a late meal or talking to another man, though individually inexplicable as “causes,” are better understood in the context of maintaining authority. *Id.* at 439.

⁵⁹ Dobash & Dobash, *supra* note 31, at 434. However, “[c]ontrary to what might be expected, anger and hostility are not consistently related to violence. Some men may act not out of anger but out a sense of a ‘duty to discipline’ their wife.” Saunders, *supra* note 56 at 15.

⁶⁰ David G. Gil, *Societal Violence and Violence in Families*, in FAMILY VIOLENCE, AN INTERNATIONAL AND INTERDISCIPLINARY STUDY, *supra* note 30, at 14,16.

⁶¹ Gail Goolkasian, *Recent Developments: Judging Domestic Violence*, 10 HARV. WOMEN'S L.J. 275, 283 (1987). Now that the focus has turned to men, some batterers are trying to portray themselves as victims, joining the ever larger number of groups huddling under the victimization label. *See Developments, supra* note 55, at 1523 (condemning this approach and arguing that “[a]ny treatment must be coupled with and forcefully convey blame and public disapproval” and strict punishment which “dispels any lingering myths of society's acceptance of wife beating or exaggerated and antiquated notions of family privacy.”); see also *infra* text accompanying notes 148-57 for a discussion of empowerment and “victim talk.”

⁶² David B. Mitchell, *Contemporary Police Practices in Domestic Violence Cases: Arresting the Abuser: Is It Enough?*, 83 J. CRIM. L. & CRIMINOLOGY 241, 244 (1992).

⁶³ Saunders, *supra* note 56, at 18.

⁶⁴ *Id.* at 18-19.

Other psychologists divide batterers into three types of batterers.⁶⁵ The first is the infrequent batterer who does not escalate to serious episodes of violence.⁶⁶ The violent behavior usually results from lack of communication skills and particular social stresses.⁶⁷ The second is the repetitive abuser whose irrational jealousy, fear of abandonment, and an unwillingness to share power in the relationship cause the violent actions.⁶⁸ Such batterers often grew up as the victims of, or witnesses to, abuse.⁶⁹ The third type is the anti-social batterer whose abuse is part of a larger pattern of violence and who, frighteningly, often becomes calmer during the attack.⁷⁰

2. Gender Roles and Institutional Actors

Social attitudes toward domestic violence affect not only the batterer and his victim, but also their families and the social institutions with which they come into contact, particularly the institutional actors with the most daily contact with domestic violence. Many police officers, prosecutors, judges, and social workers were raised and acculturated when a certain level of domestic violence was perceived as acceptable behavior, or at least as a private matter in which societal institutions should play no role.⁷¹ These individuals are susceptible to letting their daily exposure to domestic violence reinforce stereotypes rather than challenge them.

For example, police training under federal grants from the Law Enforcement Assistance Administration (LEAA)⁷² in the 1960s encouraged

⁶⁵ JENNIFER B. FLEMING, *STOPPING WIFE ABUSE* (1979); EDWARD W. GONDOLF, *MEN WHO BATTER: AN INTEGRATIVE APPROACH FOR STOPPING WIFE ABUSE* (1985); James Ptacek, *Why Do Men Batter Their Wives*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 133-57 (Kersti Yllo and Michele Bograd eds. 1988); Ingrassia & Beck, *supra* note 45, at 29-30 (discussing the work of Indiana University psychologist Amy Holtzworth-Munroe).

⁶⁶ Ingrassia & Beck, *supra* note 45, at 32.

⁶⁷ *Id.* But see Margarethe Hyden, *Verbal Aggression as Prehistory of Woman Battering*, 10 J. FAM. VIOLENCE 55, 69 (1995).

⁶⁸ Ingrassia & Beck, *supra* note 45, at 32.

⁶⁹ *Id.*

⁷⁰ This last category of hard-core abusers, representing 10-20% of all batterers, seems beyond the reach of any therapy. Ingrassia & Beck, *supra* note 45, at 32.

⁷¹ Janell Schmidt and Ellen H. Steury, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 CRIMINOLOGY 487, 488 (1989).

⁷² The LEAA has provided special initiatives in the areas of domestic violence, including local police officer training in domestic violence crisis intervention. See DOBASH & DOBASH, *supra* note 14, at 161; see also Sewell, *supra* note 14, at 1000.

the existing police practices of non-arrest, diversion, and the most minimal response to domestic violence situations.⁷³ Psychiatry, and the social work policies it influenced, has been criticized for blaming domestic violence, in part, on female masochism.⁷⁴

Further, institutional actors have been reluctant to get involved, even after policy and legislative reforms. For example, at the patrol level, officers have resisted implementing mandatory arrest laws.⁷⁵ Various reasons have been given: the belief that such situations are dangerous to police officers,⁷⁶ sexism by a still overwhelmingly male profession, and

n.125. These programs have been criticized for reinforcing established police attitudes rather than changing attitudes. DOBASH & DOBASH, *supra* note 14, at 163.

⁷³ See EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 31 (1990); DOBASH & DOBASH, *supra* note 14, at 161-64; MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 232-34 (1980); GAIL A. GOOLKASIAN, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES, ISSUES AND PRACTICE IN CRIMINAL JUSTICE 29 (National Institute of Justice, May 1986). Even police training manuals had a clear non-arrest policy of abusers in the 1970s. See, e.g., Zorza, *supra* note 20, at 48-49 (describing police practices in Michigan). This non-arrest policy "was endorsed by the American Bar Association, whose 1973 *Standards for the Urban Police Function* said that police should 'engage in the resolution of conflict such as that which occurs between husband and wife . . . without reliance upon criminal assault or disorderly conduct statutes.'" Sherman, *supra* note 55, at 10 (quoting ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS FOR THE URBAN POLICE FUNCTION 12 (1973)).

⁷⁴ Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY, 217, 218-20 (1992). According to the Freudians, therefore, the prescribed solution was treatment in which the victim was forced to accept at least half the blame. PLECK, *supra* note 14, at 145-46. This attitude survives in the approach of some social scientists and practitioners who believe that mutual counseling is the best course for couples experiencing continued episodes of violence because each is at fault. Ingrassia & Beck, *supra* note 45, at 32.

⁷⁵ A specific example is New York where although there is a mandatory arrest law and a requirement that the officer file a report for every incident, a 1993 study found that of 200,000 calls, reports were filed in only 30% and arrests in only 7% of the cases. Ingrassia & Beck, *supra* note 45, at 28; see DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 139, 143-44 (1988); Sarah M. Buel, Recent Developments, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213 (1988); Zorza, *supra* note 20, at 65.

⁷⁶ Waits, *supra* note 35, at 314. Though unsupported by statistics, police believe that domestic dispute calls result in "more assaults on policemen than any other kind of encounter." Parnas, *supra* note 12, at 113 (citing U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE; THE CHALLENGE OF CRIME IN A FREE SOCIETY 92, 104 (1967)). However, one study found that while domestic disturbances

traditional notions about family.⁷⁷ Police departments are not the only institutions that have failed to implement the laws enacted to protect battered women. Criminal prosecution rates are still stunningly low.⁷⁸ Prosecutors often place the blame on the failure of many victims to press charges⁷⁹ or to cooperate with the prosecution.⁸⁰ Finally, the courts have

account for 30% of all police calls, they account for only 5.7% of police deaths. Zorza, *supra* note 20, at 52 (citing Joel Gardner & Elizabeth Clemmer, *Danger to Police in Domestic Disturbances—A New Look*, in RESEARCH IN BRIEF 5 (National Institute of Justice, Nov. 1986)). On the other hand, this study did investigate less serious injuries in domestic cases versus other police-citizen contacts. Nevertheless, advocates argue that better officer training can reduce the risk of assault during a domestic incident. BUZAWA & BUZAWA, *supra* note 73, at 108.

⁷⁷ Waits, *supra* note 35, at 311–14. While these factors are important, the bureaucratic nature of police departments is of at least equal importance. Police departments are resistant to change, particularly after years of non-arrest policies and hostile to limits on their traditional discretion. See LANGLEY & LEVY, *supra* note 53, at 168–72 (recounting anecdotal stories of police personnel and official policy of non-arrest for domestic disputes). See *infra* text accompanying notes 124–30 for a discussion of the need to adopt new programs to attack domestic violence within the existing institutional framework and value structure.

⁷⁸ Most domestic violence cases never make it to trial. See BUZAWA & BUZAWA, *supra* note 73, at 58 (noting that as many as 80% of domestic violence cases never make it to trial); Rhea Mandulo, *Programs Aim at Keeping Abuse Cases Alive*, N.Y. L.J., Jan. 6, 1993, at 2 (same for the Manhattan and Bronx areas in New York); Trevor Jensen, *Domestic Court Gets Rocky Start*, SUN-SENTINEL (Ft. Lauderdale, Florida), Oct. 23, 1994, at 1B (reporting that a “high rate” of domestic assault cases in Dade County were dropped because the victims refused to pursue the charges); Deborah Nelson & Rebecca Carr, *Some Frustrated Victims Talk of Taking Up Arms*, CHI. SUN-TIMES, July 24, 1994, at 18 (reporting that “[o]ut of 10,700 battery cases filed in domestic violence court in Chicago in the last year, 7,400 have been dropped so far”).

⁷⁹ Parnas, *supra* note 12, at 111. As a group, prosecutors still think that a majority of victims do not want to prosecute. Ingrassia & Beck, *supra* note 45, at 28 (quoting Mimi Rose, chief of Family Violence and Assault Unit, Philadelphia, Pennsylvania). One of the reasons women will not prosecute may be embedded in the nature of the problem. Due to both the manipulative nature of the batterer and the cyclical pattern of violence followed by kindness, many victims are persuaded to drop the charges. See *supra* notes 46–55 and accompanying text; see also SCHAFFRAN, *supra* note 25, at 49 (citing additional reasons).

However, the criminal justice system does not make it easy for a woman to keep her resolve. For example, in Chicago, of the over 19,000 domestic violence defendants who appeared in Cook County Domestic Violence courtrooms in 1989, only 87 were given jail terms. Only 1,331 were even convicted. The vast majority of cases were dismissed, usually because the victims, who were required to come to

contributed to the characterization of domestic violence as a family matter.⁸¹ As a substitute for firmer sanctions, judges often use a stern lecture from the bench,⁸² probation, or referral for counseling.⁸³ Therefore, gender role stereotypes toward domestic violence have hindered efforts to make social institutions more responsive.

court every two weeks until the defendant showed up, eventually failed to return to court. Burleigh, *supra* note 26, at 2.

⁸⁰ Waits, *supra* note 35, at 321-27. As with the police, however, institutional factors are also at work. For prosecutors, such cases lack the prestige associated with drug, murder, or white-collar crime cases. In addition, many domestic violence charges are misdemeanors relegated to the most inexperienced and overworked prosecutors. See LANGLEY & LEVY, *supra* note 53, at 163 (noting that most prosecutors think their careers will not be enhanced by prosecuting domestic violence cases); U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 93 (1982) [hereinafter RULE OF THUMB] (describing the low priority prosecutors place on spousal abuse complaints); Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7 (1979). See *infra* notes 244-51 and accompanying text discussing prosecutors' institutional interests.

⁸¹ Waits, *supra* note 35, at 327-28. Judges are often insensitive, showing particular impatience with women who show emotion before the bench. Kin Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 207 (1993).

⁸² Waits, *supra* note 35, at 328.

⁸³ Early in domestic violence reform, counseling was seen as a way to weed out the heavy case load. For example, prosecution was often deferred until after a showing that mediation had failed. Parnas, *supra* note 12, at 111. Mediation and counseling as primary solutions continue to be heavily criticized. Lerman says mediation and counseling are not helpful because they ignore "criminality of the abuser's behavior and reinforces his control within the relationship." Lerman, *supra* note 74, at 220; see also AMA, DIAGNOSTIC & TREATMENT GUIDELINES ON DOMESTIC VIOLENCE 12 (Mar. 1992) (noting that counseling for couples is not recommended if domestic violence is present); Zorza *supra* note 20, at 72, 72 & n.235 (noting that family counseling and mediation are known to increase domestic violence). But mediation and counseling still have their advocates; *Developments, supra* note 55, at 1541-43 (describing the advantages and disadvantages of diverting the batterer to a counseling program). The better view is that mediation and counseling only work, if at all, in conjunction with the real threat of prosecution and criminal penalties.

C. *Twenty Years of Domestic Violence Reforms: Strengths and Weaknesses*

1. *An Overview*

Viewed from this historical⁸⁴ and sociological perspective, it is less surprising that domestic violence has proven difficult to overcome in only twenty years of social and legal reform. Nevertheless, it is important to briefly review the history of domestic violence reform to determine why these efforts have not better addressed the underlying cultural attitudes.

The primary response is that at least initially, the scope of needed reform was simply so overwhelming that consideration of this issue was at times both unrecognized and premature. For example, when advocates began the current phase of domestic violence reform in the late 1960s and early 1970s, social services such as shelters and other emergency assistance had to be established and funded from scratch.⁸⁵ Legal reformers were in a similar position. They had to eliminate the most blatant, overt forms of societal approval for domestic violence such as the marital rape exception⁸⁶ and spousal testimonial immunity.⁸⁷ In the criminal justice system, the lack

⁸⁴ Gordon divides society's approach to domestic violence into five stages over the past 100 years. In the late 19th Century, general charitable organizations and moral reform groups, influenced by early feminism, first addressed the issue. The Progressive Era (1910-30) followed with the incorporation of family violence work into professional social work. There was a strong focus on the poor and on intrusive state regulation. The Depression marked a radical de-emphasis on family violence. The rebirth of attention in the 1940-50s had a heavy reliance on psychiatric categories and "pro-family" values. Finally, the feminist movement of the 1960-70s opened up a critique of family and an attack on the underlying roots of family violence. GORDON, *supra* note 13, at 19-26. In fact, defining wife beating as a social problem, not as characteristics of specific violent individuals or relationships, was one of the first great achievements of the feminist movement. *Id.* at 251; see DOBASH & DOBASH, *supra* note 14, at 156-57 (noting that in the late 19th Century the concern for battered women emerged because of the work of the early feminists, but it was cloaked in the context of social purity and temperance groups).

⁸⁵ Even now, most shelters are inadequately funded and overcrowded. MAJORITY STAFF OF SENATE JUDICIARY COMM., 102D CONG., 2D SESS., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 39 (1992); see also *Developments, supra* note 55, at 1506-09 (noting that "[s]helters are typically underfunded, understaffed, and unable to respond fully to the needs of battered women"). *Id.* at 1506.

⁸⁶ See Abigail A. Tierney, *Spousal Sexual Assault: Pennsylvania's Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777 (1986).

⁸⁷ Interspousal immunity was used to prevent victims from testifying against their batterers. As early as 1910, Justice Harlan criticized spousal immunity for torts

of any front line response by the police was initially attacked with class action and other civil suits, which prompted some institutional reforms.⁸⁸ State legislatures then stepped in and also mandated changes in police procedures, including items so basic as to require police to file a report for every domestic call.⁸⁹

However, when reformers did turn to more proactive legislation, there was also in retrospect sometimes an unrealistic hope that a "magic bullet" remedy could be found for each problem area. In the civil arena, one of the first developments was to authorize family courts to issue civil protection orders to victims of domestic violence.⁹⁰ A civil protection order⁹¹ is "a legally binding court order that prohibits an individual who has committed an act of domestic violence from further abusing the victim."⁹² The

between spouses. *Thompson v. Thompson*, 218 U.S. 611, 619-24 (1910) (Harlan, J., dissenting). Prior to the 1970s, only about 16 states had abolished the doctrine. By 1993, 49 states had fully or partially nullified interspousal immunity, effectively allowing a woman to sue for assault or battery. Laura H. Wanamaker, Note, *Waite v. Waite: The Florida Supreme Court Abrogates the Doctrine of Interspousal Immunity*, 45 MERCER L. REV. 903, 905-07 (1994). Interspousal homicide is most likely where marital rape has occurred. *Zorza*, *supra* note 20, at 51.

⁸⁸ See DOBASH & DOBASH, *supra* note 14, at 165-68; Sewell, *supra* note 14, at 1006-08. However, the continued use of civil tort actions has been criticized as ineffective against all but wealthy defendants. See Andrea Benneke, *Civil Rights for Battered Women: Axiomatic & Ignored*, 11 LAW & INEQ. J. 1, 35 (1992).

⁸⁹ See, e.g., Johnson, *supra* note 23, at 237 (describing the policy in New Jersey).

⁹⁰ See 1976 PA. LAWS 1090; 1978 MASS. ACTS 447.

⁹¹ Civil protection orders are known by a variety of names: restraining orders, see, e.g., ALASKA STAT. § 25.35.010 (1991); COLO. REV. STAT. ANN. § 14-4-102 (West 1989 & Supp. 1994); OR. REV. STAT. § 107.718 (1990 & Supp 1994); no-contact orders, see, e.g., WASH. REV. CODE ANN. § 10.99.040 (West 1990 & Supp. 1995); or abuse orders, see, e.g., VT. STAT. ANN. tit. 15, § 1104 (1989 & Supp. 1994); injunctions, see, e.g., FLA. STAT. ANN. § 741.30 (West Supp. 1995); MICH. COMP. LAWS ANN. § 600.2950 (West 1986). For consistency, I will call them "civil protection orders."

⁹² PETER FINN & SARAH COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT at v (1990). There are two types of civil protection orders, ex parte and permanent. Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 43 (1989). Ex parte orders are granted by the courts for emergency situations in which immediate protection is needed. *Id.* Permanent (or full) protection orders are granted after a full adversarial court hearing. *Id.* As discussed in more detail below, these early protection orders were often limited in scope and availability and usually lacked effective enforcement methods. See *infra* text accompanying notes 181-82.

significance of such orders as the foundation for the recognition and protection of domestic violence victims should not be underestimated.⁹³ However, the statutes authorizing these orders did not contain sufficient civil or criminal tools to enforce them.⁹⁴

To some extent, the same lack of follow-through legislation was true when battered women advocates sought relief through the criminal justice system. For example, some reformers concentrated solely on increased criminal penalties for domestic violence.⁹⁵ However, the best example of the "magic bullet" approach was the mandatory arrest stampede of the 1980s.

2. *The Mandatory Arrest Studies*

A widely publicized study of police behavior in Minneapolis, Minnesota published in 1984,⁹⁶ revealed that police officers usually failed

⁹³ Every jurisdiction provides that spouses are eligible for protection orders. FINN & COLSON, *supra* note 92, at 46. About half of the states provide protection for unrelated household members. *Id.*

⁹⁴ Even today, violators of civil protection orders often are not immediately arrested and sanctioned. *See* FINN & COLSON, *supra* note 92, at 49. "For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported. These conditions were not in place in most of the jurisdictions examined for this report." *Id.*; *see also* FINN & COLSON, *supra* note 92, at 58 (cautioning that women should not assume that a violation of a protective order will result in immediate removal of the batterer by police, because state statutes may not allow police to arrest him before a hearing or a warrant is issued).

⁹⁵ *See* Parnas, *supra* note 12, at 118, 153-57 (discussing the full enforcement approach through the criminal law and the limits of this strategy). An example of this approach is the use of so-called "no-drop" policies under which requests by the victim of a battering to drop the case are denied. *See, e.g.*, FLA. STAT. § 741.2901 (Supp. 1994); MINN. STAT. ANN. § 611A.0311 (West 1991 & Supp. 1994); WIS. STAT. ANN. § 968.075(7) (Supp. 1994). Many individual state attorneys' offices have also instituted "no-drop" policies. Corsilles, *supra* note 13, 863-65. *See infra* note 253 for discussion of the weaknesses of "no-drop" prosecution policies. On the other hand, criminal law reform efforts have led to the creation of anti-stalking laws which fill a critical hole in the protection of psychologically and physically battered women. *See* Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 HARV. J. ON LEGIS. 1, 2 & n.3 (1993) (at least 43 states now have statutes designed to protect women against stalking).

⁹⁶ The findings of the Minnesota study, called the "Minneapolis Domestic Violence Experiment," first appeared in Lawrence W. Sherman & Richard A. Berk,

to arrest batterers, even when there was an official policy encouraging arrest. Social scientists suggested that this resistance was generated by, among other things, police officers' personal attitudes about domestic violence, their beliefs about the failure of complainants to prosecute, and the lack of institutional support for such cases from prosecutors.⁹⁷ The Minneapolis study's finding that only ten percent of big city police departments even encouraged the arrest of batterers⁹⁸ led to widespread calls for mandatory arrest legislation requiring police to arrest whenever there was probable cause to believe a battery had occurred.⁹⁹ Mandatory arrest law advocates theorized that if batterers were arrested in greater numbers, they would be deterred from future battering.¹⁰⁰

In response, sixteen states now mandate an arrest when there is probable cause to believe a domestic assault has occurred,¹⁰¹ and other states significantly expanded police powers to make misdemeanor arrests in domestic violence cases.¹⁰² However, despite the reported benefits of mandatory arrest laws in some situations,¹⁰³ recent follow-up studies suggest less than encouraging results from mandatory arrest policies.¹⁰⁴

The Specific Effects of Arrests for Domestic Assaults, 49 AM. SOC. REV. 261 (1984).

⁹⁷ See *Developments*, *supra* note 55, at 1535-36.

⁹⁸ This study was conducted on the eve of the release of the Minneapolis report by one of its authors. Sherman, *supra* note 55, at 23.

⁹⁹ *Developments*, *supra* note 55, at 1536. In response to the Minneapolis report, the U.S. Attorney General recommended arrest as the standard police procedure to domestic assault and it was this recommendation that seems to have propelled the policy. U.S. DEP'T OF JUSTICE, ATTORNEY GEN.'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 17-24 (1984) [hereinafter U.S. TASK FORCE ON FAMILY VIOLENCE]. However, the authors of the Minneapolis study recommended only a presumption for arrest, not a mandatory policy. Sherman, *supra* note 55, at 21.

¹⁰⁰ Waits, *supra* note 35, at 316; see also Lisa Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 130 (1984).

¹⁰¹ *Domestic Violence Fact Sheet* (National Center on Women and Family Law, Inc. 1994). Maryland is the most recent state to join this group.

¹⁰² *Developments*, *supra* note 55, at 1537 n.68.

¹⁰³ An example would be the prevention of further serious violence during a critical battering episode. *Developments*, *supra* note 55, at 1537-38 (describing benefits of mandatory arrest laws).

¹⁰⁴ Parnas, *supra* note 12, at 150-51. Follow-up studies indicate that arrest alone will not deter the woman's batterer. See, e.g., Franklin W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990); J. David Hirschel & Ira W. Hutchison, III, *Female Spouse Abuse and the Police Response: The Charlotte North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY, 73, 115 (1992); Lawrence W. Sherman, et al., *From Initial Deterrence to Long-Term Escalation: Short Custody Arrest for Poverty Ghetto Domestic Violence*,

For example, researchers did not find a deterrent effect in every city studied.¹⁰⁵ Further, deterrence was significantly affected by the batterer's employment status.¹⁰⁶ The lower down the economic ladder, the less effect a mandatory arrest had on future behavior.¹⁰⁷ In some cities, mandatory arrest policies actually worsened recidivism over time.¹⁰⁸ Some studies suggested that an arrest could backfire against the victim by provoking additional assaults after the batterer was released.¹⁰⁹

In retrospect, it is not surprising that arrest alone does not work effectively. As one researcher eloquently remarked:

The world is all too full of aggressive, impulsive individuals who are willing to take risks in order to vent their temper or get their way. They are often poorly educated and lack solid judgment and planning skills. [Many have no interest in protecting] their reputations or arrest histories. Some are often intoxicated or under the influence of drugs . . . others have grown so depressed or bitter that they simply don't care anymore. These types of individuals are not impressed by the risk of short-term incarceration, although for some of them, genuinely harsh sanctions such

29 CRIMINOLOGY 821 (1991). However, in response to the anti-mandatory arrest data now coming out, Lerman argues that these new studies are myopic and ignore the experience of battered women. She states that while studies of arrest policies can provide valuable information, they focus only on this facet of a social problem and result in a "test tube attitude." Lerman, *supra* note 74, at 218-19. Experiments need to take into account many other factors, such as the context of the arrest, behavior of police officers, how the case is prosecuted, the victim's wishes, and the kind of sanctions imposed. *Id.*; see also Cynthia G. Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 1201 (1992) (noting that the problem overall with quantitative research is that it divorces factors from their "socio-economic and historical context").

¹⁰⁵ Hirschel, *supra* note 104, at 117.

¹⁰⁶ Dunford, *supra* note 104, at 184; Sherman, *supra* note 55, at 25.

¹⁰⁷ Perhaps because an arrest would have little or no impact if the batterer is unemployed or seeks only low skill jobs which do not require a background check. See Sherman, *supra* note 55, at 25.

¹⁰⁸ *Id.* at 30-31. It has also been argued that the results of the original Minnesota study were simply not strong enough on which to base national policy. The critics of the study cited such negative factors as sparse victim interview data and limited sample size and makeup of that sample. *Id.* at 20. But see Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Policy Domestic Violence Studies*, 28 NEW ENG. L. REV. 929 (1994) (arguing that arrest is the superior method of deterring domestic violence and criticizing the follow-up studies to the Minneapolis experiment).

¹⁰⁹ See *Developments*, *supra* note 55, at 1538-40. However, this is more likely the result if the batterer believes that the system will not ultimately punish him.

as lengthy prison sentences may have deterrent value.¹¹⁰

For these batterers, a short-term arrest will have little deterrent effect on their willingness to commit another act of domestic violence, just as a short term arrest has relatively little effect at preventing their participation in other crimes.¹¹¹ For many of these reasons, feminists themselves have come to criticize over-reliance on mandatory arrest policies,¹¹² recognizing that many batterers have too much invested in their abusive treatment of their female counterparts to fear arrest alone.¹¹³

On an institutional level, mandatory arrest laws were also flawed because they tried to eliminate institutional resistance by the police by fiat. Proponents failed to recognize that on a practical level, mandatory arrest policies impose significant administrative costs on police. Mandatory policies for agencies, such as police departments, that normally rely heavily on individual discretion can quickly backfire, causing resentment and efforts to undermine dramatic behavioral changes.¹¹⁴ The most

¹¹⁰ Mitchell, *supra* note 62, at 243. One should not necessarily read this quote to mean that the domestic abuse problem is one primarily of the lower classes, only that certain classes of batterers are harder to deter. Arrest does appear to have a deterrent effect on employed batterers, perhaps due to social pressures and particular characteristics of the communities in which they live. See Sherman, *supra* note 55, at 35. However, the fact that "unemployed, socially marginal batterers are not deterred by arrest" should not be surprising. Many burglars, robbers, and drug dealers commit more crimes after they are released, so we cannot assume that arrest would deter batterers from future violence. Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 213 (1992).

¹¹¹ Mitchell, *supra* note 62, at 243.

¹¹² Miriam H. Ruttenger, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U.J. GENDER & L. 171, 191-92 (1994) (arguing that mandatory arrest laws will have a negative impact on African-Americans because of bias in the criminal justice system toward them).

¹¹³ Bowman, *supra* note 104, at 201-04. Some feminists also caution that it is dangerous simply to ask, "Does arrest work?" If the answer is no, then the response is to do away with a policy that police do not like anyway. They prefer to pose a larger question: "Do arrest, prosecution and support services work?" *Id.* Unfortunately, not enough communities have invested enough resources to implement such a coordinated approach.

While I support the comprehensive approach, given tight resources, advocates must resist calls for broad mandatory policies. In the context of arrest policy, this Article suggests restricting mandatory arrests to batterers who have violated an outstanding protection order. See *infra* text accompanying notes 121-22.

¹¹⁴ Moreover, front line service providers in large bureaucratic organizations are adept at circumventing unwelcome policy changes. See, e.g., Kathleen J. Ferraro,

dramatic example has been the practice of police to arrest both the woman and man if there was any evidence of physical resistance by the woman during the altercation.¹¹⁵

Additionally, mandatory arrest policies alone fail to deter batterers due to the lack of action further along in the criminal justice pipeline. Even when police arrest under a mandatory law,¹¹⁶ courts still generally immediately release those arrested.¹¹⁷ When the police must arrest, the discretionary decision to drop weak cases simply is passed to prosecutors.¹¹⁸ When criminal charges are filed, crowded dockets delay action and misdemeanors are given low priority, leading to dismissals when victims become frustrated and drop the charges. Finally, even in the cases that go to trial, juries and judges do not convict often enough or punish severely enough to deter future acts. So long as the penalties for domestic violence are neither swift nor certain, arrests alone will not break the violent dynamic in which both are trapped.¹¹⁹

Policing Woman Battering, 36 SOC. PROB. 61, 63-64 (1989) (finding that after the Phoenix Police Department adopted a mandatory arrest policy, patrol officers made arrests in only 43% of the cases in which the officer had probable cause and the offender was present).

Patrol officers' chief complaint is often the amount of paperwork required to process an arrest. Paperwork takes them off the streets where they prefer to be, therefore they will use their discretion and not arrest in a situation they doubt that a conviction will result.

¹¹⁵ DOBASH & DOBASH, *supra* note 14, at 199; *see also* LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 2-3* (1992). Women have also been accused of using domestic violence arrests as a weapon in divorce proceedings. Ezra Bowen, *Anti-Violence Law Can Be a Weapon in Divorce*, NAT'L L.J., Apr. 11, 1994, at A21. Given the high rate of divorce among police officers, this accusation adds further fuel to their hostility to mandatory arrest policies.

¹¹⁶ Many times police do not arrest a suspected batterer despite mandatory arrest laws. *See, e.g.*, BUZAWA & BUZAWA, *supra* note 73, at 99 (noting that arrests were made in less than 20% of domestic violence calls in Minneapolis, Minnesota); Ingrassia & Beck, *supra* note 45, at 27 (reporting that arrests were made in only 7% of the cases in New York City).

¹¹⁷ U.S. TASK FORCE ON FAMILY VIOLENCE, *supra* note 99, at 105. Thus, other than seeking shelter with an agency or family member, which is not always feasible, there is little the battered woman can hope for to obtain immediate protection at or around the time of a battering episode.

¹¹⁸ As discussed above, many prosecutors are correctly convinced that many domestic violence complainants will eventually drop charges when the batterer asks to return and promises to stop the beatings. *See supra* note 79 and accompanying text.

¹¹⁹ "Failure of coordination will cause failure of any individual remedy." Lerman, *supra* note 74, at 221-22. Without the coordination of law enforcement and

Unfortunately, reliance on top-down mandatory policies that try to reform institutions by command continue today with calls for prosecutorial “no-drop” policies in domestic violence cases.¹²⁰ For similar reasons, “no-drop” policies are also doomed to failure. Like mandatory arrest policies, a “no-drop” prosecution requirement severely restricts the traditional discretion of prosecutors. In addition, these policies pass the responsibility to weed out weak cases to juries, a tactic costly in resources and in public perceptions of domestic violence.

More generally, since no one has really figured out how to eliminate police or prosecutor discretion in practice, there is all the more reason to develop an alternative, or at least a modified approach.¹²¹ For example, mandatory arrests would be more useful when tailored to meet the problem of the recidivist batterer. A mandatory arrest policy for violators of civil protection orders can directly address the immediate needs of victims and take a harder-line approach toward more persistent batterers.¹²² A similarly narrow “no-drop” policy could be formulated for violators of protection orders as well at the prosecution level.

With an understanding of the gender role dynamic that affects both partners in the relationship and the legitimate needs of the institutions that are asked to intervene, it should be clear that single bullet policies that mandate more arrests, more prosecutions or higher statutory penalties, while important components of a broader approach, are doomed as stand-alone solutions.¹²³

social and mental health service providers, programs aimed at helping battered women cannot make a dent in the rate of domestic violence. *Id.* at 222.

¹²⁰ See, e.g., Corsilles, *supra* note 13, at 855.

¹²¹ Sherman, *supra* note 55, at 44.

¹²² New Jersey’s Domestic Violence Act of 1991 modified the state’s mandatory arrest law to broaden its reach and strengthen its impact. Johnson, *supra* note 23, at 249. A police officer must arrest an accused batterer if “1) a victim exhibits signs of injury; 2) a warrant is in effect; 3) there is probable cause to believe there is a violation of a restraining order; [or] 4) there is probable cause to believe a weapon was involved in the act of domestic violence.” *Id.* Even if none of these factors is present, however, the officer may still make an arrest if probable cause exists that the victim was battered. *Id.* Indeed, when no signs of physical injury are present, the officer may consider the history of the parties and any other relevant factor in determining the need for an arrest. *Id.* at 249–50.

Advocates also support laws that require officers to make a report even if no arrest is made. *Developments*, *supra* note 55, at 1553. This gives the police officer some discretion but forces him to think carefully about the incident. Mandatory reports also allow researchers to gather information and increase public awareness. *Id.*

¹²³ See *infra* text accompanying notes 140–47, 242–60.

3. *The Current Comprehensive Approach*

Other than recognition (or perhaps resignation) that eradication of domestic violence as a serious health risk for women will be a long campaign, what guidance can the shortcomings of past efforts afford to reformers today? Clearly, the first message is that solutions directed at one institution or practice will have little long-term impact. Single-faceted policies will not work because they ignore the persistence of batterers, the dynamic of the battering relationship, and the continued resistance (and needs) of the social institutions that deal with domestic violence. As the follow-up mandatory arrest studies suggest, domestic violence cannot be stopped without a "coordinated response by the law enforcement, social service, and mental health systems."¹²⁴

Therefore, the current thinking is that a comprehensive effort directed at the police, the courts, and social service agencies offers the greatest hope for success.¹²⁵ These programs are geared at keeping battered women in the system by addressing their economic and emotional needs, as well as recognizing that a single violent incident may be insufficient motivation for a woman to make a committed effort to change. This approach clearly makes the most sense¹²⁶ and appears to be making headway in some

¹²⁴ Lerman, *supra* note 74, at 220.

¹²⁵ See *Developments, supra* note 55, at 1547-51.

¹²⁶ Salzman, *supra* note 25, at 338-53 (describing the successes of Quincy, Massachusetts which emphasizes a comprehensive approach involving all institutional players and uses a mix of traditional remedies (*i.e.*, non-criminal) and strict enforcement for violations through the criminal law. Quincy stresses its equal emphasis on access for victims and efficient criminal processing of batterers); see also *Developments, supra* note 55, at 1516-17; Patricia Nealon, *Quincy Program to Aid Battered Women Wins Grant*, BOSTON GLOBE, July 15, 1992, at 27.

Additionally, at the state level, Massachusetts has formed a Domestic Violence Policy Commission specifically to create "a safety net of social and criminal justice services and serve as a clearinghouse for the best practices." Gloria Negri, *Commission is Formed to Develop Policies on Domestic Violence*, BOSTON GLOBE, Aug. 20, 1993, at 25. The goals of the commission are to "standardize enforcement, to empower victims of abuse to transition to violence-free lives, to emphasize prevention by identifying the appropriate sanctions which will stem the escalation of violence, and to create broader public awareness." *Id.*

Another example is Duluth, Minnesota, which has a program that emphasizes victim support and assailant control. *Developments, supra* note 55, at 1517-18. Such efforts use more realistic methods to persuade or force institutional players to be helpful, not hostile. See *id.* at 1551-74. For example, some prosecutors have special domestic violence offices which include counselors and a referral network for

communities.¹²⁷ As part of this effort, some states have created special domestic violence divisions within the court system and provide special training for their personnel. By concentrating cases within a discrete unit, fewer bureaucratic actors are involved, and with training and self-selection, there is hope that traditional attitudes toward domestic violence can be transcended.¹²⁸ Some of these efforts have also employed a second wave of creative approaches, such as removing weapons from homes¹²⁹ and using technology to warn victims when their abusers come near.¹³⁰

Even within a comprehensive approach, however, specific policy choices still must be made.¹³¹ New laws and policies will have little impact

additional services. *Id.* at 1554.

¹²⁷ The San Diego approach is considered one of the nation's most effective. It focuses on special training for police, prosecutors, judges, and medical personnel who deliver standardized remedies to domestic violence. Kathleen McClain, *Charlotte Leaders Hear How San Diego Fights Domestic Violence*, CHARLOTTE OBSERVER, Oct. 22, 1993, at 1C.

¹²⁸ Some advocates worry that creating a special criminal court for domestic violence will trivialize it. For example, in Illinois, Cook County created two domestic violence courtrooms in 1986. These courts handled only misdemeanors, thus all domestic violence cases were filed as misdemeanors, regardless of the seriousness of the assault. Separating domestic violence courts from other courts risks perpetuating the stereotype that domestic violence is a less serious crime. Burleigh, *supra* note 26, at 3. On the other hand, limiting the number of courts reduces the amount of re-training necessary. Florida seems to be experiencing mixed results with its new domestic violence courts. *See, e.g.*, Jenson, *supra* note 78, at 1B (reporting research showing that while there is a decrease in physical abuse from batterers who have been through the system, there is frequently an increase in psychological or mental abuse).

¹²⁹ The 1991 Domestic Violence Act in New Jersey allows police officers to seize any weapons which they reasonably believe might be used against the victim. Johnson, *supra* note 23, at 250.

¹³⁰ One of the chief criticisms of civil protection orders is that once an order is granted, the woman feels safe, but when the batterer returns, the order is a mere piece of paper. In addition, police often arrive too late on the scene to capture the batterer. One solution to this problem is the electronic monitoring of subjects under restraining orders. Electronic monitoring devices can be set so that they will notify the victim and the police when a batterer comes closer than the order allows. Sheriff Robert Rufo of Suffolk County, Massachusetts, said that these devices "empower the victim because the minute a stalker comes within proximity, he will be known to her and the police." Cheong Chow, *Abused Women Gain a Weapon; High-Tech Warning System Now on the Market*, BOSTON GLOBE, Dec. 5, 1992, at 13. Furthermore, the device can be used to document every instance in which an order has been violated. *Id.* The wearing of such a device also clearly stigmatizes the batterer and prevents him from being perceived otherwise by co-workers, family and friends.

¹³¹ *See Developments, supra* note 55, at 52 (advocating that "criminal

unless they are accompanied by changes in the basic belief systems of abusive men, battered women, police officers, prosecutors, judges, social workers, and society in general. Thus, the task of reformers is not as simplistic as changing laws and policies in order to increase the likelihood and severity of punishment for abusive behavior; rather, they must also transform the way domestic violence is perceived by society.

Part III addresses the relationship between legal reforms and social change in the context of domestic violence. It cautions, however, that legislative solutions must be realistic in their transformative goals. While reforms surely must attempt to change entrenched cultural and institutional values, at the same time they must use or adapt aspects of existing concepts and institutional practices to avoid being rejected out of hand or silently subverted by bureaucratic actors.

III. CONTEMPT AND EMYPOWERMENT: AN ANSWER TO MARTHA MINOW

A. *Words As the "Door to Change" and the Trap of "Victim Talk"*

In two articles, Professor Martha Minow has addressed the question of whether legal reforms can truly change the family violence dynamic of our society. In "Words and the Door to the Land of Change: Language and Family Violence,"¹³² she frames the question as whether "words can stem violence," particularly words used by lawyers. She criticizes the language used in legal texts to describe family violence,¹³³ and compares it with

prosecutions should receive the greatest emphasis of all substantive approaches to domestic violence").

¹³² Minow, *supra* note 8; see also Martha Minow, *The Case of Legal Language*, in *THE STATE OF THE LANGUAGE* (L. Michaels & C. Ricks eds., 1990); Martha Minow & Deborah Rhode, *Questioning the Questions, Reform the Reformers: A Feminist Perspective in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* (Sugerman & Haye eds., 1990); *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT M. COVER* (Martha Minow et al. eds., 1992); Martha Minow, "Forming Underneath Everything that Grows": *Toward a History of Family Law*, 1985 *WIS. L. REV.* 819; Martha Minow, *The Free Exercise of Families*, 1991 *ILL. L. REV.* 925; Martha Minow, *Redefining Families: Who's In & Who's Out?*, 62 *U. COLO. L. REV.* 269 (1991).

¹³³ Minow focused on *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). Three-year-old Joshua DeShaney was beaten by his father so badly that he became paralyzed and lost the function of one-half of his brain. The majority opinion, authored by Chief Justice Rehnquist, used legal rhetoric and unemotional language that blunted the impact of the trauma that Joshua received at the

more evocative descriptions of family violence from literature and music.¹³⁴ She argues that words matter because

[i]n order to change policy and to enforce adapted policies, many words first must be marshalled to convince people of the degree of domestic violence and the need for change. Words play a significant role in changing the external and internal restraints people may feel against committing violence against family members.¹³⁵

Minow asks whether there are words to describe “family violence that do not make it seem routine and familiar.”¹³⁶ While there are important extra-legal efforts underway to combat domestic violence,¹³⁷ a significant percentage of reform has been targeted at legal solutions.¹³⁸ Therefore,

hands of his father. The Court then employed words like “private” and “failure to act” to deny Joshua recovery on his lawsuit against the county. Minow, *supra* note 8, at 1668. Professor Minow described the Court’s choice of passionless language as “a choice to submerge sympathy under fear, a choice to seek and then to cling to totemic concepts—acts omissions, public and private—to avoid confronting our mutual implication in one another’s lives.” *Id.* at 1675.

¹³⁴ Minow argues that the use by legal scholars of more evocative language like that found in literature “may help illuminate the difficulties in speaking about domestic violence” and may help persuade judges and others to do something about it. Minow, *supra* note 8, at 1688–89. She uses literature and music to teach judges how to enlarge their understandings and sympathies of the problems of domestic abuse and how to look at life from the perspective of others. *Id.* at 1694–99.

¹³⁵ *Id.* at 1665 n.2.

¹³⁶ *Id.* at 1665. The silence surrounding domestic violence is so strong that even professionals whose jobs put them in touch with it find themselves without a vocabulary to break through to their clients. A doctor described her experience of asking women if domestic violence was an issue in their lives: “It seemed so out of the blue. . . . I had to find words that didn’t make it seem so odd to people.” Stripling, *supra* note 21, at 7. Other doctors have described similar discomfort. *Id.*

¹³⁷ There are over 1200 shelters for abused women operated nationwide. They offer women temporary lodging and child care, and arrange for transportation, medical care, and legal and social counseling. They also help women readjust to their situation after they leave. Some shelters even offer counseling for batterers. Cris Barrish, *Shelters: Safe Houses for Abused*, NEWS-JOURNAL (Wilmington, Del.), Feb. 4, 1990, at A10. However, even these efforts sometimes require legal intervention of some sort, such as putting women in touch with authorities to file charges and keeping locations of shelters secret. *Id.* Many shelters are forced to turn away two-thirds of women seeking help due to lack of funds, so these women must still look to legal remedies. *Id.*

¹³⁸ Some internal reforms were in response to class action lawsuits brought against police departments. DOBASH & DOBASH, *supra* note 14, at 165–66. Self-reform

Minow places specific emphasis on whether there are different words lawyers can use "to persuade judges, to empower victims,"¹³⁹ since a significant part of society's response to domestic violence is "how the law should respond to individual acts of domestic violence in order to best protect victims and punish batterers."¹⁴⁰ Thus a particular problem for the law, and particularly for criminal law, is to find appropriate language to account for and adjust to the social dynamic underlying individual acts of domestic violence.¹⁴¹

However, Minow does not focus solely on the language used by lawyers. She also asks whether there are words uttered by anyone else that can help to stop the violence.¹⁴² In the domestic violence arena, the group most in need of new words, or in some cases any words at all, are battered women themselves. Without having words to condemn what has been done to them, without knowing words to ask for help from friends and society, without words to tell the batterers that their behavior is unacceptable, there

proved insufficient, prompting most states to enact tougher laws. See Johnson, *supra* note 23, at 236 (describing how New Jersey's original Prevention of Domestic Violence Act of 1981 was ineffective, resulting in the new act in 1991).

¹³⁹ Minow, *supra* note 8, at 1666.

¹⁴⁰ *Developments*, *supra* note 55, at 1503.

¹⁴¹ As lawyers, of course, we must guard against a bias for legal solutions. And, if lawyers participate in a broad-based attack on domestic violence, we necessarily will have to work more closely with battered women advocates and social service agencies. In such cases, we must also be prepared for conflicting ideological approaches and suspicion from those quarters.

I experienced this first hand in 1993 when I was invited as a last minute speaker at a St. Petersburg, Florida workshop to teach battered women advocates to be expert witnesses. My role was to act as a prosecutor and cross-examine a nationally regarded expert on battered women. In the organizational meeting the night before the conference, all the lawyers recruited to participate met with this expert. When she informed us that she had been cross-examined by prosecutors in numerous trials and that there were standard techniques they used, I asked her to share these stories with me in order to improve our overall presentation. She refused to do so, citing her fear of me as a former prosecutor and her uncertainty about who might attend the conference and later share this information in such a way as to hurt the movement. She then had a similar conflict with the public defender present, which suggested a clash of cultures, between lawyers who believe in truth through the adversary system and a member of a movement for whom the safety of its members is preeminent. The program went reasonably well without her divulging her secrets and we all parted on good terms. The lasting import of this event, however, was the recognition of how differently individuals even on the "same side" of this issue perceive their roles.

¹⁴² Minow, *supra* note 8, at 1666.

is little that can be done from the outside.¹⁴³

Yet Professor Minow recognizes that for battered women, and for victims in general, our society's conceptualization of victimization is often as paralyzing as having no words at all.¹⁴⁴ She discusses this dilemma in *Surviving Victim Talk*, stating that victim talk

creates a self-fulfilling prophesy, on the one hand, by suggesting that victims are powerless. Yet on the other hand, rejecting victim talk may lead to blaming powerless people for their own powerlessness. It may also lead to a sense of futility and political passivity for just those people [The battered woman or victim] must then struggle to reconcile a positive self-image with the image of oneself as a powerless and defeated victim.¹⁴⁵

We must therefore offer battered women something more than the label of victims in need of our succor. "Victim talk," Professor Minow points out, "obscures the complex interactions of individual choice, social structures, and the historical legacies within which both individuals and

¹⁴³ One leader at a health clinic spoke out against mandatory reporting of domestic violence incidents by physicians, stating that some women may not seek help if they fear it will be reported.

Part of what we're trying to do is to empower the person to let them actually take the action to make the decisions. . . . We can help them if there are legal issues just by documenting in our medical records what's going on. If they choose to press charges, that's their decision, but I've had women who would only talk to me if I did not have to report them.

Stripling, *supra* note 21, at 7 (quoting Dr. Barbara Meyer, a leader of the Domestic Violence Prevention Project at Group Health Cooperative of Puget Sound, Washington).

¹⁴⁴ Early battered women advocates stressed the victimization of women to change society's attitude that if women did not want the abuse they would leave. Victim concepts such as "learned helplessness" explained this phenomenon. WALKER, *supra* note 13, at 187. Perhaps such an emphasis has entrenched the battered women movement too deeply in victimology.

The over-reliance on images of victimization have also led to calls for eliminating, or at least substantially modifying, the battered woman syndrome defense for women who kill their batterers. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994) (arguing that the battered woman syndrome currently is profoundly anti-feminist because it reinforces a view of women who stay in abusive relationships as deviant and devoid of the free will and personal responsibility that male criminal defendants are assumed to possess).

¹⁴⁵ Minow, *supra* note 9, at 1420-21.

institutions operate.”¹⁴⁶ Public debate and legal solutions that talk about domestic violence only in terms of victimology “neglect the complex solutions needed to sustain and equip victimized individuals to choose differently while also restricting the individuals and social forces that oppress them.”¹⁴⁷

B. *Empowerment Ideology, Not Victimology in Domestic Violence Reform*

The Minow articles suggest a series of interrelated practical questions about the need for new language and policy. First, what words can legal reformers offer to battered women to help them change? Second, will these words allow battered women to acknowledge their victimhood without hamstringing them with their own powerlessness or imposing a paternalistic solution from above? Third, what words do we ourselves use

¹⁴⁶ *Id.* at 1429–30. See also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982). Gilligan’s research reveals that men and women present “different modes of thinking” about relationships. Men tend to value autonomy and see others as opponents in a contest of rights, whereas women tend to value caring and see others as members of a network of relationships on whose continuation they all depend. *Id.* at 59. Coughlin, *supra* note 144, suggests that according to this theory, a woman who stays in an abusive relationship rather than being faulted for not leaving, should be “applauded for her endurance, her perseverance, and self-sacrifice in order to nurture her violently explosive spouse and repair, if possible, their pathological interactions.” *Id.* at 89.

¹⁴⁷ Minow, *supra* note 9, at 1430. Another reason to transcend “victim talk” is that victims often lack the social vision to clearly see their problem or a way out. Many battered women will initially deny at great lengths that they are battered women. Others will take the blame for the battering.

Feminist scholars, in particular, have emphasized yet another reason to be suspicious of a normative scheme that relies wholly on preference satisfaction, beyond recognizing the problems of ambivalence and the need to look carefully at the social context in which preferences are formed. Relatively disempowered people, as women frequently are in relationship to men, may be unable to form truly self-promoting preferences. The most ready, and dramatic examples, are of women in long-term battering relationships. Their ostensible “desires” may simply be to do whatever will accommodate the batterer’s wishes, hoping, often vainly, that if they are able to anticipate each conceivable whim, that they can avoid being victimized.

Mark Kelman, *A Critique of Conservative Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 444 (David Kairys ed. 1990) (endnote omitted).

in our roles as advocate, prosecutor, and judge in order to enable this process to occur in domestic violence reform? Finally, if we can identify such words, what are their implications for legal solutions?

The women's movement, and other victims' movements seeking to escape the throes of "victim talk," have already identified a central word/concept for liberation—empowerment.¹⁴⁸ Literature from the battered women's movement consistently employs this theme because empowerment ideology offers the battered woman language to take control of her life and to take the initiative to seek assistance from organizations, friends, and family. Empowerment translated into social action takes the form of shelters and economic independence programs to provide the practical means to break the economic and psychological binds to the batterer.¹⁴⁹

¹⁴⁸ See, e.g., CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 32–45 (1987) (Rather than focus on whether men and women are "different," MacKinnon argues that the focus of feminist analysis should be on the power differential between the genders in current society. Therefore, the empowerment of women is a central component of her dominance theory of feminism.); National Coalition Against Domestic Violence, *A Current Analysis of the Battered Women's Movement* (January 1992) at 5. This advocacy booklet states the following:

One key prerequisite to the ending of violence is the empowerment of all women and children. Women and children must be able to direct our own lives, and control our own bodies. . . . Empowerment can only be achieved through collective action, and an understanding that battering is a societal and political problem as well as a personal and family problem.

In addition to the legal and economic constraints inhibiting their ability to leave or obtain help to leave the relationship, battered women are often also unable to take advantage of what help is available due to fear and incapacitation. Therefore, for those working with battered women as lawyers or advocates, the goal is not just to provide legal services, shelter, or counseling. The goal is to empower them and help "them realize that domestic violence should not be tolerated and that ending a relationship is an option. . . ." Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363, 1387 (1993) (book review).

¹⁴⁹ One empowering view of battering is to see that women are not beaten

just from subordination but also from contesting it. Had women consistently accepted their subordinate status, and had men never felt their superior status challenged, there might have been less marital violence. To focus on women's "provocations," and to examine men's grievances against their wives, is not to blame women but, often, to praise them. It is to uncover the evidence of women's resistance.

GORDON, *supra* note 13, at 286.

But empowerment language has its limitations, both in general and in this setting.¹⁵⁰ Generally, empowerment ideology can lead to divisiveness and separatism,¹⁵¹ in which the victimized group rejects outside assistance as paternalistic and tainted by past actions or dominant cultural attitudes.¹⁵² This is particularly true when institutions needed to effectuate specific reforms (e.g., the justice system and its component parts) have been part of the problem in the past.

More importantly, empowering battered women addresses only one-half of the domestic violence equation. Words must still be found to challenge and constrain the batterer's actions.

Finding words that lawyers can use that both transform our institutions' approach to domestic violence and empower battered women is therefore more difficult than saying "empowerment" and moving on.¹⁵³

¹⁵⁰ A wonderful word, "empowerment speak" can obscure the very difficult social interaction between a professional, who clearly sees that the relationship is unhealthy and in fact dangerous for a woman, but nevertheless finds the appropriate language to encourage, support, confront, or demand that a woman change her behavior.

¹⁵¹ For example, "[r]adical feminists tended to favor separatism and emphasized the need to develop a women's culture, rather than building coalitions with men as liberal and socialist women did." MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 19 (1994); see also MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 104 (1983); SARAH L. HOAGLAND, *LESBIAN ETHICS: TOWARD A NEW VALUE* 57-58 (1988).

¹⁵² Battered women empowerment ideology can be problematic for women who are members of a racial or ethnic minority. Black women may share the view of a sexual assault coordinator in Oakland, California, who stated, "I am black first. My culture and anything else comes after. . . . Our husbands and boyfriends may be perpetrators, but we are also concerned about what will happen to them in the racist [justice] system." *World's Women Speak As One Against Abuse*, L.A. TIMES, May 27, 1991, at E1; see Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994) (Latina women need special support services due to cultural disadvantages); Elizabeth Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 535 (1992) (battered immigrant women may not be able to call police if they fear deportation).

Similarly, some African-Americans are rethinking their allegiance to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and its integrative ideal. Instead, they are experimenting with separatist educational institutions, once derided as a throw-back to the discredited "separate, but equal" doctrine. See Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992).

¹⁵³ See *infra* text accompanying notes 239-43 for a discussion of the disagreement between feminists and others over the role of criminalization of

Nevertheless, there have been some successes. For example, as previously noted, the dominant question generally asked about battered women is: "Why do they stay?" However, the actual data suggests that the most serious violence (including more than half the murders of battered women by their partners) occurs after the woman has left the home or after repeated efforts to leave.¹⁵⁴ Newspapers are full of stories of domestic murders committed precisely because the victim was attempting to leave the relationship or avail herself of a legal remedy such as a protection order.¹⁵⁵ Feminist scholars recognizing the phenomenon that serious domestic violence is frequently the result of leaving, not the failure to leave, have urged a new label—separation assault.¹⁵⁶

This is more than a mere cogent naming of sociological data. The term "separation assault" explodes the myth that battered women are passive creatures who share the blame for their plight because they knowingly elect to remain in the path of violence. By removing blame and telling them that they are entitled to society's help in exercising their right to live where and with whom they want, it also empowers women.

As a legal matter, prosecutorial policy and judicial sentencing of those who commit "separation assault" can be seen as comparable to stranger-on-

protection order violations.

¹⁵⁴ Separation assaults also indicate that a large problem in domestic violence is not that "women won't leave," but rather the real dangers of doing so. Martha Mahoney, *Legal Images of Battered Woman: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991); see also ANGELA BROWNE, WHEN BATTERED WOMEN KILL 114 (1987).

¹⁵⁵ Parnas, *supra* note 12, at 153 (noting that the FBI reported in 1986 that husbands or boyfriends were responsible for 30% of female homicides); see also, Larry Dougherty, *Victims of Abuse Should Choose Flight over Fight*, ST. PETERSBURG TIMES, Mar. 7, 1994, at 1B (reporting stories of two women who were shot to death by former boyfriends after histories of abuse); Bill Sanderson, *Judge Ignored Violence Policy Husband Sent Home: Wife Killed*, THE RECORD, Aug. 8, 1991, at A1 (wife clubbed to death with a baseball bat after judge ignored guideline to remove the batterer from the home, and prohibited him only from entering her bedroom); *Woman Was Denied Protection Before Death*, PHILA. INQUIRER, Jan. 2, 1987, at B12 (woman killed by former boyfriend after police prevented her from filing assault complaints against him).

¹⁵⁶ The separation assault concept may also explain some anomalies in the arrest studies which indicate that many couples were not living together anymore after arrest. Rather than conclude that the arrest was the trigger for the separation, perhaps it was the decision to separate that caused the assault. See Frisch, *supra* note 110, at 209. It is suggested that perhaps arrest is ineffective in stopping the "expected progression of violence . . . rather than to fault the arrest for the subsequent violence." *Id.* at 214.

stranger assault and not diminished as merely “family violence.”¹⁵⁷

C. Let's Hold Batterers in Contempt

While “separation assault” does to some extent focus blame on the batterer who is unwilling to give up the relationship, it still primarily addresses the battered woman, and more specifically only those who try to leave. Other than attempting to label every aspect of domestic strife as “criminal,”¹⁵⁸ theorists have been less successful finding words for the batterer's actions.

In this vein, this Article suggests a word for the batterer's side of the equation—contempt. I mean contempt in two senses, one designed for the legal system and another for society in general. As a familiar legal word contempt means “a sanction for failure to obey a court order.”¹⁵⁹ In more common usage, however, contempt is defined as “the act of despising.”¹⁶⁰ When both the legal system and society hold batterers in contempt, surely we have found transformative language to better express how we feel about men who physically and emotionally harm the women they profess to love.¹⁶¹ Furthermore, when batterers are held in contempt by all strata of

¹⁵⁷ But see Mahoney, *supra* note 154, who warns that an overemphasis on separation assault risks protecting only those women who separated or tried to separate before being assaulted. The woman who still lives with the batterer but asserts an intent to separate also needs protection from an attack that is caused by her assertion. *Id.* at 65.

¹⁵⁸ See *infra* text accompanying notes 239–69 for a discussion of criminalization.

¹⁵⁹ Contempt is a willful disobedience of the court's authority. Contempt can be classified as either civil or criminal. Civil contempt results when a party fails to do something for the benefit of another party, but the offense is not directly against the dignity of the court. Criminal contempt, however, entails a direct offense upon the court, such as disobedience of a lawful order resulting in the obstruction of the administration of justice. BLACK'S LAW DICTIONARY 318 (6th ed. 1991).

¹⁶⁰ WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 180 (1965); *see also*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 438 (2d ed. 1987) (defining contempt as “the feeling with which a person regards anything considered mean, vile, or worthless”).

¹⁶¹ Like “separation assault,” this renaming runs the risk of marginalizing those battered women who fall outside its definition, either by failing to try to leave, or here, by not having a protection order at the time of the battery. *See supra* notes 32–55 and accompanying text. While this is certainly a risk, the potential remains that as society begins to view batterers contemptuously, more battered women will be empowered to obtain a protection order earlier in the relationship. Eventually, perhaps, marriage contracts themselves could be required to contain binding language that the parties agree not to batter each other within the relationship and that such

society; when it is a label to be avoided like child molester, perhaps then the violence will stop.¹⁶²

How can the concept of "contempt" be integrated into the legal response to domestic violence? I believe that one path to this goal can be to make criminal contempt the preferred, initial sanction for a violation of a protection order. The use of criminal contempt sanctions for this purpose should have multiple positive consequences both for the legal system and on societal attitudes.

First, as noted, contempt language has an everyday meaning that we apply to individuals whose conduct we find despicable. This concept meshes well with current societal values about bullies—those who use physical force against a substantially smaller person, or a victim who is unwilling to fight.¹⁶³ Using language that focuses on the bullying, "contemptible" quality of domestic violence thus shifts the focus away from the victim and rightfully onto the offender.¹⁶⁴

This shift also transfers into the courtroom. Rather than dwelling on the history of the relationship (such as the woman's decision to stay), a criminal contempt proceeding is primarily about the batterer and the judge.

language could be interpreted as having the same legal effect of a court order, making contempt an immediately available sanction.

¹⁶² Others have suggested additional renamings of domestic violence. Charlotte Bunch, director of the Center for Global Issues and Women's Leadership at Rutgers University, argues that gender violence should be counted as a human rights abuse, claiming it is "the most pervasive and insidious human rights abuse in the world today." Hendrix, *supra* note 152. Legally, such a recognition would increase the remedies available, particularly for women seeking political asylum who are fleeing forced marriages, abuse or incest. At home, she advocates reclassifying domestic violence as a hate crime. *Id.*; see also, Nancie L. Katz, *Domestic Violence: A Civil Rights Crime? Massachusetts Court Extending Protection*, CHI. TRIB., Apr. 16, 1994, at 1 (describing as a "path-breaking development" a Massachusetts case in which the court held that a repeat abuser would face civil rights charges if he assaulted any women). Congress has established "a Federal civil rights cause of action for victims of crimes of violence motivated by gender." in the Violence Against Women Act. Pub. L. No. 103-322, 108 Stat. 1916 (codified at 42 U.S.C. § 13981(a) (1994)).

¹⁶³ The average height and weight differential between men and women is not present in every relationship and obviously weapons are a great equalizer. Therefore, it is important to again recognize a significant reason there are so many more male batterers is the gender role difference in the willingness to resort to violence to solve interpersonal problems. Walker, *supra* note 13, at 15.

¹⁶⁴ See Waits, *supra* note 35, at 288 ("He is violent at home because he has a bully's 'sure winner' mentality. He beats his wife because he can win a physical battle with her, and because he can get away with it, so long as society does not intervene.").

The court's narrow interest is in whether the contemnor did something that violated the court's outstanding order.¹⁶⁵ This places the batterer on the defensive. Because of the existence of the order, and the often accompanying lecture of the issuing court to avoid situations that could lead to violations, it is harder for the batterer to claim that the woman provoked him or instigated the confrontation.

Furthermore, purely within legal culture, contempt language is quite powerful.¹⁶⁶ The extreme deference paid to the court by attorneys is ultimately backed by the contempt power.¹⁶⁷ Moreover, potentially any defiance or evasion of a court order can result in this sanction.¹⁶⁸ The potency of legal contempt language is transmitted to clients through their lawyers. Attorneys carefully coach their clients how to behave in front of the judge and instruct them to comply with all court orders to the letter. Contempt sanctions also occupy a distinct status in a civil case because it is the only way a civil litigant can be incarcerated. While rarely resulting in this ultimate sanction, nevertheless, contempt motions are filed in a wide variety of civil proceedings based on in-court behavior, for discovery violations and for violations of injunctions. Most importantly, contempt sanctions are applicable to civil protection order violations, either by statute or under the inherent power of a court to vindicate its orders.

Employing contempt sanctions to punish protection order violations takes advantage of compatible common and legal language and an existing

¹⁶⁵ A Denver family court judge described her view of violations of protection orders as follows, "to call a restraining order just a piece of paper is to demean the authority of the court. . . ." Gail D. Cox, *The Court of St. Joan: An Innovative Protective Order Court in Denver Hears Pleas from People Who Can't Wait for Routine Justice*, NAT'L L.J., Nov. 9, 1992, at 1 (attributing to Judge Jacqueline St. Joan).

¹⁶⁶ See Edward G. Mascolo, *Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171 (1990) (tracing the historical roots of the contempt power and contempt's crucial past and present function in ensuring the ability of courts to administer justice).

¹⁶⁷ See Teresa Hanger, Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553 (1987) (discussing rationales for permitting courts the power to punish in-court contempt in summary fashion).

¹⁶⁸ Sometimes this fear is ameliorated by humor. Among my former colleagues at the U.S. Attorney's Office, a lawyer heading to court bearing news that the office would not comply with a judge's request was told to bring a toothbrush in the event he or she was "stepped back" to the holding cell after a finding of contempt. Nevertheless, in four years of practice, I knew of only one federal public defender who was held in contempt for outrageous courtroom behavior.

institutional concept and practice that is powerful and widespread within the legal system. The criminal contempt sanction strategy also simultaneously reconceptualizes social attitudes toward domestic batterers while providing a needed remedy for violations of protection orders. Therefore, the use of criminal contempt sanctions to enforce domestic protection orders presents a unique opportunity to integrate language and policy to transform a critical area of domestic violence reform.

Criminal contempt sanctions for protection orders can also fill a critical gap in society's response to domestic violence in which the criminal law has been unable alone to provide an effective remedy. Part IV explores this idea in more depth, with particular attention being paid to the potential for the criminal contempt route to empower battered women and the practical advantages of this remedy as an initial response to a violation of protection orders.

IV. CIVIL PROTECTION ORDERS AND CRIMINAL CONTEMPT SANCTIONS

A. Civil Protection Orders Are a Core Component of Society's Response to Domestic Violence

1. An Overview of Civil Protection Orders

Civil protection orders are now available for battered women in all fifty states and the District of Columbia.¹⁶⁹ They permit a victim of

¹⁶⁹ See ALA. CODE § 30-5-7 (1989); ALASKA STAT. § 25.35.010 (1991); ARIZ. REV. STAT. ANN. § 13-3602 (1989 & Supp. 1994); ARK. CODE ANN. § 9-15-201 (Michie 1993); CAL. FAM. CODE § 6300 (West 1994); COLO. REV. STAT. ANN. § 14-4-102 (West 1989 & Supp. 1994); CONN. GEN. STAT. ANN. § 46b-15 (West 1986 & Supp. 1994); DEL. CODE ANN. tit. 10, § 949 (Supp. 1993); D.C. CODE ANN. § 16-1003 (1989 & Supp. 1994); FLA. STAT. ANN. § 741.30 (West Supp. 1995); GA. CODE ANN. § 19-13-4 (1991 & Supp. 1994); HAW. REV. STAT. § 586-3 (1993); IDAHO CODE § 39-6304 (1993); ILL. ANN. STAT. ch. 750, para. 60/214 (Smith-Hurd 1993 & Supp. 1994); IND. CODE ANN. § 34-4-5.1-2 (West Supp. 1994); IOWA CODE ANN. § 236.4 (West 1994); KAN. STAT. ANN. § 60-3107 (1967 & Supp. 1993); KY. REV. STAT. ANN. § 403.740 (Michie/Bobbs-Merrill 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46:2136 (West 1982 & Supp. 1995); ME. REV. STAT. ANN. tit. 19, § 766 (West 1981 & Supp. 1994); MD. CODE ANN., FAM. LAW § 4-506 (1991 & Supp. 1994); MASS. ANN. LAWS ch. 209A, § 3 (Law. Co-op. 1994); MICH. COMP. LAWS ANN. § 600.2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West 1990 & Supp. 1995); MISS. CODE ANN. § 93-21-7 (1973 & Supp. 1993); MO. ANN. STAT. § 455.035 (Vernon 1986 &

domestic violence to obtain a binding order from a court that at the minimum prohibits an abuser from committing further acts of violence.¹⁷⁰ Such orders may also enjoin other conduct (*e.g.*, all contact whatsoever with the woman), award custody of children to the woman, limit the batterer's visitation rights, grant the woman possession of the residence or other property, and award child support or other economic relief.¹⁷¹

Obtaining a civil protection order is usually a two-step process.¹⁷² First, the victim petitions the court *ex parte* for a temporary order that provides emergency injunctive relief restraining the batterer from inflicting further violence.¹⁷³ The emergency order will remain in effect for a short duration, usually only a few weeks.¹⁷⁴ The emergency order must then be served on the batterer along with notice of an adversary hearing.¹⁷⁵

Supp. 1993); MONT. CODE ANN. § 40-4-121 (1993); NEB. REV. STAT. § 42-924 (1988 & Supp. 1993); NEV. REV. STAT. ANN. § 33.020 (Michie 1986); N.H. REV. STAT. ANN. § 173-B:4 (1994); N.J. STAT. ANN. § 2C:25-29 (West 1982 & Supp. 1993); N.M. STAT. ANN. § 40-13-4 (Michie 1994); N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1995); N.C. GEN. STAT. § 50B-3 (1989); N.D. CENT. CODE § 14-07.1-02 (1991 & Supp. 1993); OHIO REV. CODE ANN. § 3113.31 (Anderson 1989 & Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4 (West 1992 & Supp. 1995); OR. REV. STAT. § 107.718 (1990 & Supp. 1994); 23 PA. CONS. STAT ANN. § 6108 (1991); R.I. GEN. LAWS § 15-15-4 (1988 & Supp. 1994); S.C. CODE ANN. § 20-4-60 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5 (1992); TENN. CODE ANN. § 36-3-605 (1991); TEX. FAM. CODE ANN. § 71.11 (West 1986 & Supp. 1995); UTAH CODE ANN. § 30-6-2 (1989 & Supp. 1994); VT. STAT. ANN. tit. 15, § 1104 (1989 & Supp. 1994); VA. CODE ANN. § 16.1-253.1 (Michie 1988 & Supp. 1994); WASH. REV. CODE ANN. § 10.99.040 (West 1990 & Supp. 1995); W. VA. CODE § 48-2A-6 (1992 & Supp. 1994); WIS. STAT. ANN. § 813.12 (West Supp. 1992); WYO. STAT. § 35-21-104 (1994). Use of these orders to protect battered women is growing within jurisdictions. Parnas, *supra* note 12, at 124; Finn, *supra* note 92, at 43.

¹⁷⁰ See, *e.g.*, W. VA. CODE § 48-2A-6 (1992 & Supp. 1994) (providing that a protection order "shall direct the respondent to refrain from abusing the petitioner").

¹⁷¹ Most states provide for this and similar type of relief in their statutes. See, *e.g.*, ALA. CODE § 30-5-7 (1989) (describing the options available to the court to fashion appropriate relief). For a list of statutes authorizing protection orders, see *supra* note 135.

¹⁷² While the specific requirements for obtaining a protection order vary somewhat from state to state, the basic procedures are similar. See Kinports & Fischer, *supra* note 81, at 165-66.

¹⁷³ See, *e.g.*, ALASKA STAT. § 25.35.020 (1991).

¹⁷⁴ See *id.* § 25.35.020(c) (providing that the emergency order will remain in effect for 20 days).

¹⁷⁵ See, *e.g.*, ARK. CODE ANN. § 9-15-206(e) (Michie 1993); CONN. GEN. STAT. ANN. § 46b-15(e) (West Supp. 1994); MINN. STAT. ANN. § 518B.01 Subd. 7(b) (West 1990 & Supp. 1995); see also Kinports & Fischer, *supra* note 81, at 165-66. For a

Second, the court will hold a subsequent hearing during which the civil protection order may be made semi-permanent, lasting anywhere from several weeks¹⁷⁶ to a year or longer.¹⁷⁷

Civil protection orders, as opposed to criminal sanctions, are prospective. They explicitly seek to alter the future behavior of the batterer. The remedies offered by protection orders are also broader than criminal remedies because they are available to deal with conduct that the police might otherwise overlook as not serious.¹⁷⁸ In addition to providing a measure of protection, a civil protection order serves to bring the batterer and victim into the domestic violence system.¹⁷⁹

While civil protection orders were initially limited to certain classes of persons and were sometimes difficult to obtain,¹⁸⁰ their availability and

discussion of *ex parte* and full (or permanent) protection orders, see *supra* note 92.

¹⁷⁶ See, e.g., IDAHO CODE § 39-6306(1) (1993) (fixing the duration for a final protective order at three months); LA. REV. STAT. ANN. § 46:2136D (West 1982 & Supp. 1995) (same).

¹⁷⁷ See, e.g., ILL. ANN. STAT. ch. 750, para. 60/220(b) (Smith-Hurd 1993 & Supp. 1994) (fixing the duration of a protection order at two years); N.H. REV. STAT. ANN. § 173-B:4III (1994) (fixing the duration of a final protection order at one year, but providing for extensions if necessary).

¹⁷⁸ *Developments, supra* note 55, at 1514; Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1047-48 (1992). For example, courts have imposed punishment on defendants for violating protection orders for following a petitioner, *People v. Whitfield*, 498 N.E.2d 262 (Ill. Ct. App. 1986); having unwanted flowers and pizza delivered to the petitioner's home, *Saliterman v. State*, 443 N.W.2d 841 (Minn. Ct. App. 1989); sliding a letter under the petitioner's door, *State ex rel. Delisser v. Hardy*, 749 P.2d 1207 (Or. Ct. App. 1988); and making unwanted telephone calls, *People v. Brockelman*, 862 P.2d 1040 (Colo. Ct. App. 1993); *State ex rel. Emery v. Andisha*, 805 P.2d 718 (Or. Ct. App. 1991).

¹⁷⁹ *Developments, supra* note 55, at 1514; Caitlin E. Borgmann, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280, 1323 (1990).

¹⁸⁰ Initial problems that battered women encountered with civil protection orders related to their accessibility. The forms that had to be filled out to start the process moving were numerous and difficult to complete without assistance. Kinports & Fischer, *supra* note 81, at 171-75. Moreover, many women found it difficult to get to the courthouse during business hours. *Id.* at 178. Slow service also created problems for battered women, the most obvious problem being the vulnerability that women were exposed to by not having the protection of the order between filing and serving. *Id.* at 222-23.

In years past, some states refused to provide protection to a woman unless she and the batterer were married, making it difficult to obtain protection against former spouses. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for*

flexibility¹⁸¹ has grown dramatically in recent years.¹⁸² There is now near universal agreement that civil protection orders are an essential part of

Battered Women: An Analysis of State Statutes and Case Law, 21 HOFSTRA L. REV. 801, 815 (1993). But most states now do not require that the batterer and victim live together. *Id.*

Courts are also sometimes reluctant to extend the protection of domestic violence statutes. *See, e.g.*, *Woodin v. Rasmussen*, 455 N.W.2d 535 (Minn. Ct. App. 1990) (refusing to extend protection under MINN. STAT. ANN. § 518B.01, subd. 2(b) because an unborn child was not a "child in common" as required under the statute); *Croswell v. Shenouda*, 646 A.2d 1140 (N.J. Super. Ct. Ch. Div. 1994) (holding that a prior terminated pregnancy does not qualify as "child in common" under N.J. STAT. ANN. § 2C:25-19d).

¹⁸¹ In fact, an acknowledged advantage of civil protection orders is the range of remedies available to the court. Topliffe, *supra* note 178, at 1064.

¹⁸² Issuance of civil protection orders are at record levels. For example, in Massachusetts by September 1992, 45,000 orders had already been issued. Adrian Walker, *Restraining Orders Are at Record High*, BOSTON GLOBE, Sept. 23, 1992, at 1. However, some statutes authorizing the issuance of protection orders still lack key critical remedies such as requiring the courts to award exclusive possession of the residence to the woman and authorizing the courts to issue orders based solely on verbal threats. *See* Kinports & Fischer, *supra* note 81, at 195-96, 200-01.

Moreover, while most courts now routinely grant an initial protection order, there are still some jurisdictions in which courts have frustrated the enforcement of the statutes by delaying grants of the initial emergency order, or denying such an order altogether. Judges have great discretion regarding the issuance of protection orders and many will not issue one absent proof of serious acts of violence. BUZAWA & BUZAWA, *supra* note 73, at 115-17. A protective order is a significant restriction on an individual's liberty and judges are naturally circumspect of violating an individual's due process rights, particularly when issuing ex parte orders. *Id.* Ex parte prejudgment orders have been challenged on procedural due process grounds in the past, most notably in *Fuentes v. Shevin*, 407 U.S. 67 (1972), and courts remain cognizant of this when issuing them. *See* Nadine Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95, 99-103 (1980). Indeed, most statutes require that ex parte orders be issued only upon a showing of something similar to "[c]lear and convincing evidence of immediate and present danger of abuse." W. VA. CODE § 48-2A-5 (1992 & Supp. 1994). Furthermore, some courts will decline to issue a protection order if the woman delayed seeking it or previously dropped it. Kinports & Fischer, *supra* note 81, at 189-95.

Another serious problem women face when deciding whether or not to obtain a protection order is how the man will react. One study indicates that 10% of women are beaten simply because they obtained a protection order. Kathleen J. Ferraro, *Cops, Courts, and Woman Battering*, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS* 173 (Pauline B. Bart & Eileen G. Moran eds., 1993).

domestic violence reform.¹⁸³ But while everyone agrees that greater enforcement of civil protection orders is necessary, lack of enforcement is still cited as the principal weakness of protection orders.¹⁸⁴

2. *Civil Protection Orders Are Currently Enforced Through Contempt Sanctions and Criminal Prosecution*

Varying state to state, a violation of a civil protection order is punishable as a misdemeanor, by civil or criminal contempt, or by both criminal and contempt sanctions. Approximately forty states currently have statutes criminalizing violations of protection orders.¹⁸⁵ Just over thirty-

¹⁸³ DOBASH & DOBASH, *supra* note 14, at 167.

¹⁸⁴ *Developments, supra* note 55, at 1511, 1521. The unwavering enforcement of protection orders, as well as serious sanctions imposed on violators, are necessary to reduce recidivism and prevent escalation of the violence; David A. Ford & Mary J. Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 140 (N. Zoe Hilton ed., 1993) [hereinafter LEGAL RESPONSES].

¹⁸⁵ ALA. CODE § 30-5A-3 (Supp. 1993); ALASKA STAT. § 11.56.740(b) (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-2810B (1989 & Supp. 1994); ARK. CODE ANN. § 9-15-207(b) (Michie 1993); CAL. PEN. CODE § 273.6(a) (West Supp. 1995); COLO. REV. STAT. ANN. § 18-6-803.5(2)(a) (West 1989 & Supp. 1994); CONN. GEN. STAT. ANN. § 53a-107(b) (West Supp. 1994); DEL. CODE ANN. tit. 10, § 950(e) (Supp. 1993); FLA. STAT. ANN. § 741.31 (West Supp. 1995); GA. CODE ANN. § 19-13-6(b) (1991); HAW. REV. STAT. § 586-11 (1993 & Supp. 1994); IDAHO CODE § 39-6312(1) (1993); ILL. ANN. STAT. ch. 750, para. 60/221(c) (Smith-Hurd 1993 & Supp. 1994); KAN. STAT. ANN. § 60-3107(g) (Supp. 1993); KY. REV. STAT. ANN. § 403.763(2) (Michie/Bobbs-Merrill 1984 & Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 769 (West 1981 & Supp. 1994); MD. CODE ANN., FAM. LAW § 4-509(a) (Supp. 1994); MASS. ANN. LAWS ch. 209A, § 7 (Law. Co-op. 1994); MINN. STAT. ANN. § 518B.01 Subd. 14(a) (West 1990 & Supp. 1995); MO. ANN. STAT. § 455.085(8) (Vernon Supp. 1995); MONT. CODE ANN. § 45-5-626(1) (Supp. 1993); NEB. REV. STAT. ANN. § 42-924(3) (Supp. 1992); NEV. REV. STAT. ANN. § 33.100 (Michie 1986 & Supp. 1993); N.H. REV. STAT. ANN. § 173-B:8III (Supp. 1994); N.M. STAT. ANN. § 40-13-6(E) (Michie 1994); N.C. GEN. STAT. § 50B-4 (1989); N.D. CENT. CODE § 14-07.1-06 (1991 & Supp. 1993); OHIO REV. CODE ANN. § 2919.27 (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 60.6A (West 1992 & Supp. 1995); R.I. GEN. LAWS § 15-15-3(3) (1988 & Supp. 1994); S.C. CODE ANN. § 16-25-50 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-13 (1992); TEX. FAM. CODE ANN. § 71.16 (Supp. 1995); UTAH CODE ANN. § 30-6-6(5) (1989 & Supp. 1994); VT. STAT. ANN. tit. 13, § 1030 (Supp. 1994); VA. CODE ANN. § 16.1-253.2 (Michie 1988 & Supp. 1994); WASH. REV. CODE ANN. § 26.50.110(1) (West Supp. 1995); W. VA. CODE § 48-2A-10d (Supp. 1994); WIS. STAT. ANN. § 813.12(8) (West Supp. 1993); WYO. STAT. § 6-4-404 (1988).

two states and the District of Columbia specifically authorize either civil or criminal contempt as a remedy.¹⁸⁶ About half the states permit violations to be prosecuted both as contempts and misdemeanors.¹⁸⁷ However, even where not specifically authorized by statute, state judges generally retain

¹⁸⁶ ALA. CODE § 30-5-10(b) (1989); ARIZ. REV. STAT. ANN. § 13-3602I (Supp. 1994); ARK. CODE ANN. § 9-15-210 (Michie 1993); COLO. REV. STAT. ANN. § 14-4-105 (West 1989 & Supp. 1994); CONN. GEN. STAT. ANN. § 46b-15(g) (West 1986 & Supp. 1994); DEL. CODE ANN. § 950(e) (Supp. 1993); D.C. CODE ANN. § 16-1005(f) (1989); GA. CODE ANN. § 19-13-6(a) (1991); IDAHO CODE § 39-6312 (1993); ILL. ANN. STAT. ch. 750, para. 60/223(b) (Smith-Hurd 1993 & Supp. 1994); IOWA CODE § 236.8 (West 1994); KAN. STAT. ANN. § 60-3110 (Supp. 1993); KY. REV. STAT. ANN. § 403.760 (Michie/Bobbs-Merrill 1984 & Supp. 1992); LA. REV. STAT. ANN. § 46:2137 (West 1982 & Supp. 1995); ME. REV. STAT. ANN. tit. 19, § 769 (West 1981 & Supp. 1994); MD. CODE ANN., FAM. LAW § 4-508 (Supp. 1994); MICH. COMP. LAWS ANN. § 600.2950(6) (West 1986); MINN. STAT. ANN. § 518B.01 Subd. 14(c) (West 1990 & Supp. 1995); MISS. CODE ANN. § 93-21-21 (Supp. 1993); N.H. REV. STAT. ANN. § 173-B:8II(a) (1994); N.J. STAT. ANN. § 26:25-30 (West Supp. 1994); N.Y. FAM. CT. ACT § 846 (McKinney 1983 & Supp. 1995); N.C. GEN. STAT. § 50B-4 (1989); N.D. CENT. CODE § 14-07.1-06 (Michie 1991 & Supp. 1993); OHIO REV. CODE ANN. § 3113.31(L)(1)(b) (Anderson Supp. 1992); OR. REV. STAT. ANN. § 107.720(4) (1990 & Supp. 1994); 23 PA. CONS. STAT. ANN. § 6114 (1991 & Supp. 1994); R.I. GEN. LAWS § 15-15-3(d) (1988 & Supp. 1994); TENN. CODE ANN. § 36-3-610 (1991 & Supp. 1994); VT. STAT. ANN. tit. 15, § 1104(d) (1989 & Supp. 1994); VA. CODE ANN. § 16.1-279.1 (Michie 1988 & Supp. 1994); WASH. REV. CODE ANN. § 26.50.110(5) (West Supp. 1995); W. VA. CODE § 48-2A-10a (Supp. 1994).

The use of civil contempt alone to enforce protection orders may not be very effective. Civil contempt sanctions are coercive in nature and are avoidable through obedience. *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2557 (1994). Civil contempt cannot be used to incarcerate batterers for past acts of violence. If a batterer is incarcerated for some reason under civil contempt, he can purge himself by promising to comply with the protection order and thus "carries the keys of his prison in his own pocket." *Id.* at 2558 (quoting *In re Nevitt*, 117 Fed. 448, 451 (8th Cir. 1902)). Criminal contempt, on the other hand, can be used to punish a batterer for previous acts committed outside the presence of the court. *Id.* Under criminal contempt, the batterer is not furnished the keys to his prison.

¹⁸⁷ At least 23 states allow the punishment of violations of protective orders by contempt or misdemeanor charges. The states are Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Minnesota, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, Vermont, Virginia, Washington, and West Virginia.

See note 152 for a list of state statutes allowing contempt charges and note 151 for a list of state statutes providing for misdemeanor charges. The recent statutory trend is to buttress contempt charges with misdemeanor charges. Klein & Orloff, *supra* note 180, at 1097.

the power to punish violations of court orders by contempt;¹⁸⁸ thus contempt sanctions are available in most jurisdictions.

While statutes providing for criminal contempt vary, there are two major ways of seeking such sanctions—either through prosecutions by the state¹⁸⁹ or through actions prosecuted by the battered women themselves, *pro se*,¹⁹⁰ or with the assistance of private counsel.¹⁹¹ While this flexibility is certainly one feature that makes contempt sanctions an attractive remedy,¹⁹² it is more important that contempt sanctions offer an opportunity to empower women; further, they are more practical than criminal prosecutions for violations because they are faster and encounter

¹⁸⁸ But see FLA. STAT. § 741.2901(2) (West Supp. 1995), which eliminated provisions for criminal contempt and mandated that all protection order violations be prosecuted as criminal violations.

¹⁸⁹ Some states require that criminal contempt actions be prosecuted only by the state. See, e.g., *In re Dahlem*, 844 P.2d 208 (Or. Ct. App. 1992) (holding that punishment of past contempt must be initiated by district attorney; a private party cannot seek punitive sanctions).

¹⁹⁰ If the victims of domestic abuse had to rely on overworked public prosecutors to prosecute their contempt actions, many victims would never see relief, or the relief would come too late to help. See *Green v. Green*, 642 A.2d 1275 (D.C. 1994) (quoting a letter from the Office of Corporation Counsel in the District of Columbia that indicated that the Office would be “hard pressed” to prosecute all of the contempt motions filed in D.C. Superior Court); *State ex rel. O’Brien v. Moreland*, 778 S.W.2d 400 (Mo. Ct. App. 1989) (noting the problems inherent in placing the responsibility for prosecuting criminal contempt motions on county prosecuting attorneys). At least two states, North Carolina and Utah, explicitly recognize that *pro se* contempt motions must sometimes be filed and require that the clerk of court provide help for *pro se* complainants prosecuting contempt actions. N.C. GEN. STAT. § 50B-4(a) (1989); UTAH CODE ANN. § 30-6-4 (Supp. 1994).

¹⁹¹ The prosecution of criminal contempt actions by the victim of a domestic battery is not novel. Litigants in domestic relations actions and other civil actions have long enforced a court order through a *pro se* action or through their own counsel. Joan Meier, *The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 89 (1992). The right to prosecute a criminal contempt action will not raise the specter of “private prosecutors.” To the extent this right to prosecute their own action is explicitly extended to battered women by specific domestic violence statutes, safeguards can be built in to limit such actions solely to the enforcement of the civil protection order and not to other aspects of the intra-family litigation such as divorce or child custody.

While I believe that self-prosecuted contempt motions offer the greatest opportunity for empowerment, the difficulties of obtaining counsel and administering a purely private system clearly suggest that a dual state and private prosecution system be authorized. See *infra* note 199 and accompanying text.

¹⁹² See *infra* notes 199–202 and accompanying text.

less resistance from institutional actors.

B. *Criminal Contempt Sanctions for Violation of Civil Protection Orders Will Empower Battered Women*

A civil protection order initially empowers the battered woman by giving her a written legal document that legitimizes her right to be free from violence at the hands of her abuser. Many orders boldly highlight that a violation of the order constitutes contempt of court or a criminal offense.¹⁹³ Battered women believe that civil protection orders will be effective and are often told by police officers that nothing can be done for them without such an order.¹⁹⁴ Furthermore, all institutional participants support orders and want them obeyed.¹⁹⁵

Under a civil protection order, the battered woman is placed at the center of the decisionmaking process.¹⁹⁶ She can now fairly easily obtain a temporary order without counsel to provide much needed protection in emergency situations. However, the process also allows her to weigh her options before seeking a permanent order which can be tailored to her specific situation.¹⁹⁷ From initiation of the process, civil protection orders empower women by legitimizing their claims of abuse and demonstrating to them that they have access to and the support of societal institutions.¹⁹⁸

If the order is violated in a jurisdiction in which the self-help system of

¹⁹³ See, e.g., ARIZ. REV. STAT. ANN. § 13-3602I (Supp. 1994); LA. REV. STAT. ANN. § 46:2137B (West 1982); MASS. ANN. LAWS ch. 209A, § 7 (Law. Co-op. 1994); N.H. REV. STAT. ANN. § 173-B:4IV (1994); N.Y. FAM. CT. ACT § 846(b) (McKinney Supp. 1995); TEX. FAM. CODE ANN. § 71.16(b) (Supp. 1995); UTAH CODE ANN. § 30-6-6(5) (Supp. 1994); VT. STAT. ANN. tit. 15, § 1104(d) (Supp. 1994).

¹⁹⁴ Zorza, *supra* note 20, at 60. Being told by the judicial system that one's complaint is valid is empowering and may encourage battered women to come to the courts for redress of their problems. Goolkasian, *supra* note 61, at 277-78.

¹⁹⁵ Officers often tell battered women that they cannot take any action unless the women have protection orders. Zorza, *supra* note 20, at 60-61. Indeed, many police officers may not take any action until they actually see the protection order. Police officers need to know the terms of the order and the date the order expires. If an officer takes action that is not warranted by a valid protection order, or acts upon an expired order, the officer may be exposed to charges of false arrest. BUZAWA & BUZAWA, *supra* note 73, at 117.

¹⁹⁶ BUZAWA & BUZAWA, *supra* note 73, at 114-15.

¹⁹⁷ Most statutes authorizing protection orders allow judges to tailor the remedies to suit a particular woman's need. See *supra* note 169 for a list of the statutes authorizing protection orders.

¹⁹⁸ BUZAWA & BUZAWA, *supra* note 73, at 114.

private initiation and prosecution is permitted, the battered woman has the power to file the initial contempt motion and can conduct the hearing herself or through counsel.¹⁹⁹ This route avoids reliance on overburdened and often unsympathetic prosecutors' offices and provides an opportunity for battered women's groups to establish their own advocacy network.²⁰⁰ Even where only the state prosecutor may prosecute the contempt action, the battered woman is still empowered because it is the order she initiated that is the legal source of the conviction rather than the criminal law.

Providing criminal contempt as an option also increases the flexibility of a battered woman's available remedies.²⁰¹ The very experience of having a choice can itself be empowering. For example, one battered woman might trust the court that issued the protection order and would prefer to have the issue litigated there. Another might prefer to force the batterer to face a jury in a criminal case. Multiplying their options empowers battered women while protecting them from further abuse.²⁰² Regardless of the method used to obtain the criminal contempt sanction, the significant involvement of the victim in the civil protection order process and the potential for renaming the batterer's conduct as contemptuous make the criminal contempt route both an empowering and

¹⁹⁹ While in many states criminal contempt hearings can be conducted *pro se*, see *supra* note 191, the results of *pro se* criminal contempt actions are mixed. See DISTRICT OF COLUMBIA COURTS, FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS 153-54 & n.272 (May 1992) [hereinafter D.C. TASK FORCE] (finding that in the D.C. Superior Court in 1989, 75% of all contempt actions were *pro se*, but contempt was found in only 55% of cases tried and 14% of all contempts filed). Respondents in criminal contempt proceedings are entitled to all the due process protections including the right to counsel and proof beyond a reasonable doubt. *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2560 (1994). It is the imbalance between a *pro se* petitioner and a respondent represented by counsel that has led to a low rate of successful *pro se* contempt actions. D.C. TASK FORCE, *supra*, at 154.

²⁰⁰ The availability of criminal contempt need not turn into another excuse for police and prosecutors to do nothing. The use of criminal contempt sanctions by women must be augmented by the police and prosecutors. This can be done by allowing them to act in ways consistent with their values, for instance, by requiring mandatory arrests and misdemeanor prosecution only for violent violations of a protective order.

²⁰¹ Contempt proceedings might also allow women to end the violence without ending the relationship with the abuser in that filing a contempt proceeding might be seen by the batterer as a less drastic measure than pursuing criminal charges, even if the potential for incarceration is the same. See Kinports & Fischer, *supra* note 81, at 199-200; Topliffe, *supra* note 178, at 1047-48.

²⁰² Topliffe, *supra* note 178, at 1049.

transformative experience for the battered woman.

C. Practical Advantages of Criminal Contempt As the Immediate Remedy for Violation of Protection Orders

1. Contempt Is Faster and Faster Is Better

In addition to the empowerment potential of criminal contempt sanctions, this route also offers practical advantages to the traditional criminal process. First and foremost, the criminal contempt route is often faster than the criminal justice system.²⁰³ Contempt orders can either be filed as emergency orders in the family court, or be transferred over to the criminal division, thus obtaining priority over other cases.²⁰⁴

In the states that explicitly authorize contempt sanctions for violations of protection orders, contempt proceedings are often specifically given an expedited hearing under the statute.²⁰⁵ For example, in Connecticut, when

²⁰³ See Klein & Orloff, *supra* note 180, at 1126 (noting that contempt actions allow battered women "to obtain swift enforcement of civil protection orders and thereby secure their immediate safety. . ."). For example, in *United States v. Dixon*, 113 S. Ct. 2849 (1993), it took the prosecutor's office over nine months to indict the defendant after a series of violations and serious assaults. On the other hand, the victim's motions for contempt of the civil protection order of the very same incidents were litigated within just two months of filing. See Brief for Amici Curiae, Women's Legal Defense Fund et al. at 3-5, *Foster v. United States* (No. 89-449).

²⁰⁴ Courts often allow contempt motions to be filed on an emergency basis for good cause shown. See, e.g., *Burgess v. Burgess*, 568 So. 2d 934, 935 (Fla. Dist. Ct. App. 1990) (emergency contempt hearing on husband's failure to comply with support obligations), *review denied*, 581 So. 2d 1307 (Fla. 1991), *review dismissed*, 589 So. 2d 289 (Fla. 1991); *Sakun v. Taffer*, 643 N.E.2d 1271, 1273 (Ill. Ct. App. 1994) (emergency contempt motion for failure to comply with settlement agreement); *Michael v. Michael*, Nos. 93-CA-0094, 93-CA-0901, 1995 WL 11200, at *2 (Miss. Jan. 12, 1995) (emergency motion to find plaintiff in contempt of temporary custody order); *Banker v. Banker*, No. C-920774, 1993 WL 547154, at *1 (Ohio Ct. App. Dec. 1, 1993) (emergency motion for contempt of court's order to pay mortgage payment).

²⁰⁵ CONN. GEN. STAT. ANN. § 46b-15(g) (West 1986 & Supp. 1994) (providing for expedited hearing held within five days of service of the motion for contempt on the respondent); ILL. ANN. STAT. ch. 750, para. 60/223(b)(2) (Smith-Hurd 1993 & Supp. 1994) (providing for expedited hearing); IOWA CODE § 236.8 (West 1994) (providing for a contempt proceeding not less than five days and not more than 15 days after issuance of a rule to show cause); LA. REV. STAT. ANN. § 46:2137A (West 1982 & Supp. 1995) (providing for hearing within five days of filing motion for contempt); MINN. STAT. ANN. § 518B.01 Subd. 14(e) (Supp. 1995) (requiring

a motion for contempt is filed for a violation of a protection order, a hearing must be held within five days of the service of the motion on the defendant.²⁰⁶ Even when no specific time period is stated in the statute, courts have required a speedy hearing to effectuate the legislative intent of ensuring the battered woman's safety.²⁰⁷

When contempt motions can be heard in the issuing court, there can be additional time savings. While domestic court dockets are by no means under-utilized,²⁰⁸ they are usually less crowded than misdemeanor dockets.²⁰⁹ Also, because many jurisdictions permit victims to initiate the actions themselves, battered women need not wait for police to make an arrest or prosecutors to file charges.²¹⁰

respondent to appear and show cause within 14 days of filing of affidavit noting violation); N.H. REV. STAT. ANN. § 173-B:8II(a) (1994) (requiring defendant to appear within 14 days for a contempt hearing after violation); N.C. GEN. STAT. § 50B-4 (1989) (providing for a hearing on earliest possible date); TENN. CODE ANN. § 36-3-612(1) (1991 & Supp. 1994) (requiring a hearing within 10 days of arrest for contempt); WASH. REV. CODE ANN. § 26.50.110(5) (West Supp. 1995) (requiring respondent to show cause within 14 days); W. VA. CODE § 48-2A-10a(b) (Supp. 1994) (requiring a hearing for respondent to show cause within five days of the filing of contempt petition).

²⁰⁶ CONN. GEN. STAT. ANN. § 46b-15(g) (West 1986 & Supp. 1994).

²⁰⁷ See, e.g., *Snyder v. Snyder*, 629 A.2d 977 (Pa. Super. Ct. 1993), in which the court quoted with approval a trial court's reflections as to the purpose of the enforcement provisions of Pennsylvania's Protection From Abuse Act, 23 PA. CONS. STAT. ANN. § 6108 (1991): "The emergency nature of the judicial process pursuant to the Protection From Abuse Act requires that this Court act swiftly to prevent continued abuse and deal with contempt situations in an expeditious manner lest the violation giving rise to the contempt become a criminal action for homicide." *Snyder*, 629 A.2d at 981.

²⁰⁸ Statistics indicate that domestic violence caseloads have grown 38% over the past four years. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992 26 (1994) [hereinafter CASELOAD STATISTICS].

²⁰⁹ For example, in the Superior Court of the District of Columbia, 18,298 misdemeanor cases were filed in 1993, which averaged out to 550 cases per judge. A manageable caseload per judge is 350. *Hearings on the Budget Request of the Superior Court of the District of Columbia Before the Subcomm. on the District of Columbia of the House Appropriations Comm.*, 102d Cong., 2d Sess. 2 (1994) (statement of Chief Judge Eugene N. Hamilton), available in WESTLAW, 1994 WL 233373 (F.D.C.H. May 18, 1994). Misdemeanor filings in limited jurisdiction courts throughout the country in 1992 ranged from a low of 1,861 per 100,000 in Colorado to 8,292 per 100,000 in Texas. CASELOAD STATISTICS, *supra* note 208, at 37.

²¹⁰ This delay should not be underestimated. A family court judge in Florida estimated that it took approximately three weeks to hold a hearing when battered women were permitted to initiate the action, even though state prosecutors had to take

Once initiated, contempt hearings can often be concluded faster than criminal trials.²¹¹ Since contempt is generally punishable by less than six months' imprisonment, contempt proceedings are tried before a judge, eliminating jury selection and other time-consuming aspects of jury trials.²¹² Bench trials also spare the victim the perils and stresses of a jury trial.

Granting a speedy hearing is essential because batterers are more likely to respond to a fast contempt mechanism than a slower criminal prosecution, because deterrence is generally more potent when a quick punishment follows an infraction. From a batterer's unique psychological perspective, however, contempt also offers distinct advantages. Batterers are manipulative individuals²¹³ who think they can talk their way out of trouble or evade the constraints that society imposes on individual behavior.²¹⁴ Also, because they tend to conceive relationships in terms of

over the action. Now that protection order violations must be prosecuted under a criminal statute the police must investigate and the state attorney's office must review the investigation; only then can the investigation results be placed on the misdemeanor docket. This judge indicated it now takes three to six months to try these cases. Reformers must remember that a major reason victims withdraw criminal complaints is that the criminal justice system is just too slow. *See, e.g.*, CHIEF JUDGE H. JOSEPH COLEMAN, FINAL REPORT OF THE WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, GENDER AND JUSTICE IN THE COURTS 30 (1989).

²¹¹ But see BUZAWA & BUZAWA, *supra* note 73, at 112, who claim that "[c]ontempt of court, the traditional mechanism for enforcement, is slow and cumbersome." These authors, however, cite to no authority for this proposition and do not discuss the expedited hearing provisions of modern statutes. *See supra* notes 205-06 and accompanying text.

²¹² A jury is required only in "serious" criminal contempt actions involving possible incarceration for more than six months. *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2557 (1994).

²¹³ Men who batter often manipulate their partners through intimidation, isolation, and economic coercion. Leslie Berger, *The Battle Over Batterers*, L.A. TIMES, Oct. 13, 1993, at E1.

²¹⁴ Some studies have shown that batterers often suffer from communicative skills deficits vis-à-vis their private lives and relationships with their wives. Daniel G. Saunders, *Husbands Who Assault: Multiple Profiles Requiring Multiple Responses*, in LEGAL RESPONSES, *supra* note 184, at 14. But other evidence indicates that it is common for batterers to have discrepancies between their private and public lives. Matthew Mosk, *Simpson Case Sets Off Domestic Abuse Alarm*, L.A. TIMES, June 26, 1994, at B1 (quoting Jamie Leigh, Executive Director of the Coalition Against Domestic and Sexual Violence). Men who batter their wives—like O.J. Simpson for example—often appear very charming to people not familiar with their private lifestyles. *Id.*; WALKER, *supra* note 13, at 26.

power,²¹⁵ they tend to respond only to a specific threat from an identifiable person whom they perceive as more powerful.²¹⁶ A directive from a family court judge that he or she will lock up the batterer for contempt, which is then followed by a contempt hearing before the same judge, is therefore more effective than the general threat of criminal prosecution²¹⁷—especially since many batterers do not regard their behavior as criminal.²¹⁸

2. Institutional Actors Are Less Resistant to Criminal Contempt Sanctions

Critics frequently complain that participants in the process (*i.e.*, police, prosecutors,²¹⁹ and judges²²⁰) are unwilling to take violations of protection orders seriously and prosecute them vigorously.²²¹ However, such

²¹⁵ See Lerman, *supra* note 74, at 220 (noting that abusive behavior allows men to establish and maintain control in their relationships).

²¹⁶ See *id.* (noting that men engage in abusive activity because no one, including friends or other family members, have ever required them to stop).

²¹⁷ See Goolkasian, *supra* note 61, at 282–83 (discussing the “powerful message” that judges can deliver to a batterer). Indeed, the threat of criminal sanctions may not deter recidivists who are familiar with the defects in the ability of the criminal justice system to dispense justice. Saunders, *supra* note 214, at 25.

²¹⁸ Batterers generally perceive the threat of criminal sanctions as both unfair and unlikely. See Goolkasian, *supra* note 61, at 283. Thus, the civil protection order and contempt mechanism can be seen as fairer to the batterer and as offering a gradual method for transforming the batterer’s mindset. Unlike immediate criminal prosecution, the civil protection order first puts the batterer on specific notice that his behavior will not be tolerated and then gives him an opportunity to correct himself before contempt sanctions are imposed.

²¹⁹ See Ford & Regoli, *supra* note 184, at 130–31.

²²⁰ A problem with the implementation of civil protection order statutes has been the judicial practice of issuing mutual protection orders. See Kinports & Fischer, *supra* note 81, at 167 & n.16 (citing similar problems with Illinois judiciary); Curtis Krueger, *Domestic Violence Laws Called Adequate*, ST. PETERSBURG TIMES, Feb. 4, 1994, at 4B (reporting that about 80% of Florida judges who handle domestic violence cases sometimes issued illegal mutual restraining orders). Some states have confronted this problem by explicitly discouraging the use of mutual protection orders. See, *e.g.*, ARIZ. REV. STAT. ANN. § 13-3602G (Supp. 1994) (providing that a mutual order shall not be granted automatically and requiring a verified petition to do so); ILL. ANN. STAT. ch. 750, para. 60/215 (Smith-Hurd Supp. 1994) (prohibiting the use of “mutual orders” completely but allowing “correlative separate orders” if both parties can prove abuse by the other party); UTAH CODE ANN. § 30-6-6(3) (Supp. 1994) (providing for mutual orders only upon stipulation).

²²¹ The most significant criticism of the judiciary that remains today includes the

criticism fails to differentiate among the various enforcement methods. In many cases, the criminal contempt sanction accommodates the needs of bureaucratic actors better than the other methods and thereby will result in more effective enforcement of protection orders.

Most significantly, implementation of criminal contempt sanctions can be tailored to the resources and commitment level of the various institutional actors. In jurisdictions where the prosecutor's office is willing to cooperate, separate domestic violence contempt units have been established with some success.²²² Where prosecutors lack the resources or commitment, advocates can devote the financial and human resources of women's groups and request the pro bono efforts of sympathetic members of the domestic relations bar to provide legal assistance.²²³

refusal to give jail time for violations of protection orders. Kinports & Fischer, *supra* note 81, at 232; Karen Freifeld, *Abuse Hits Home*, NEWSDAY, Sept. 25, 1994, at A4 (reporting that in 1993 in the Bronx, N.Y., of 208 batterers facing criminal contempt charges for violating protection orders, only 38 went to jail). Statistics indicate that actual jail time, if given, is very low. RULE OF THUMB, *supra* note 80, at 44-45. Thus, the potential advantages of immediate arrest, fines, and jail time are often not realized. Johnson, *supra* note 23, at 240 & n.39 (citing SANDY CLARK, N.J. COALITION FOR BATTERED WOMEN, SUMMARY OF THE NEW AMENDMENTS TO THE PREVENTION OF DOMESTIC VIOLENCE ACT PROPOSED BY S-2011 (1988)). However, I argue that framing the issue as a contempt of court is still superior to the misdemeanorization of violations. See *infra* text accompanying notes 239-69.

²²² Keeping contempt actions within a specific unit, rather than shuffling cases from one prosecutor to another as in many misdemeanor sections, minimizes the discomfort of forcing women to share intimate details of life with strangers. See Estar Soler, *Domestic Violence Is a Crime: A Case Study—San Francisco Family Violence Project*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 21, 29 (Daniel J. Sonkin ed. 1987). In Pinellas County, Florida, one such unit existed before the Florida legislature abolished criminal contempt as a remedy for domestic violence. See FLA. STAT. ANN. § 741.2901(2) (West Supp. 1995). When one prosecutor was asked what he liked about his job, he replied that he liked putting bad people in jail. He added that he found judges much more likely to incarcerate individuals for violations of orders than for misdemeanors for the same conduct. Interview with Don Gibson, Assistant District Attorney, in Pinellas County, Fla. (Mar. 1993). This anecdote reinforces my belief that criminal contempt as a remedy for violation of protection orders is more in synch with current institutional beliefs and practices than criminal charges for every type of civil protection order violation.

²²³ The Foster case, discussed *supra*, began as a contempt hearing brought by a legal services agency called AYUDA on behalf of Mrs. Foster. See *supra* note 203; Kinports & Fischer, *supra* note 81, at 174-75; see Topliffe, *supra* note 178, at 1052-53 (discussing the need for more participation from the bar in enforcing protection orders).

The police, prosecutors, and the courts are also more likely to support criminal contempt actions because they arise in contexts that do not overburden their resources or challenge their long-held notions about domestic violence.²²⁴ For example, police officers called to the scene of a battery by a repeat violator are more likely to arrest the offender if the complainant has obtained a civil protection order, or in the case of the persistent batterer, if she has subsequently filed contempt charges for additional incidents.²²⁵ Her behavior demonstrates her consistency and persistence, giving institutional actors reason to believe she will follow through with the prosecution.²²⁶ The paper trail of repetitive violations signals to the officers that this offender is dangerous and does not respect the legal system.²²⁷

There is also hope that courts will be more willing to punish contemnors than domestic violence defendants. Judges simply do not like being disobeyed, particularly when they have issued a direct order to someone,²²⁸ and studies suggest that judicial behavior can have profound

²²⁴ I again refer to the Assistant District Attorney in Florida. *See supra* note 222. He displayed no sign of familiarity with empowerment or battered woman syndrome. To the contrary, he used "prosecutor talk," focusing primarily on his satisfaction with an incarceration result. Thus, when a reform strategy is more consistent with existing institutional objectives, it is likely that less retraining (sensitizing) is necessary.

²²⁵ BUZAWA & BUZAWA, *supra* note 73, at 114 (noting that the use of protective orders will give police a method for recognizing recidivists and shows them that the victim is willing to go to court to stop the abuse; this justifies an increased response by the police). Even then, however, a recent national survey shows that police officers frequently refuse to make a misdemeanor arrest for a violation of a protective order unless the violation also appears to constitute a criminal offense. If it is not a criminal offense, they tell the victim to see an attorney or go to court. Kinports & Fischer, *supra* note 81, at 224-25. The reason for this reluctance to arrest may be that police officers have traditionally tried to minimize their involvement in domestic dispute cases, often because they identify with the husband and consider an intrusion into a man's home a violation of the walls of his castle. Peter G. Jaffe et al., *The Impact of Police Laying Charges*, in LEGAL RESPONSES, *supra* note 184, at 66. Apparently, some officers still retain this view and frequently try to avoid an arrest in domestic dispute cases. However, police attitudes have progressed considerably in the past few years as society's views toward women batterers have progressed. *See id.* at 88.

²²⁶ BUZAWA & BUZAWA, *supra* note 73, at 114.

²²⁷ *Id.*

²²⁸ Indeed, contempt sanctions themselves were designed to allow a judge who has been disobeyed to vindicate his or her authority and punish the disobedience. Otherwise the judicial power vested in judges would be a mere mockery. *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 796 (1987).

effects on the outcome of domestic violence cases.²²⁹

3. *The System for Holding Batterers in Criminal Contempt for Violation of Protection Orders Can Be Improved*

Despite the flexibility and empowerment advantages of the criminal contempt route, approximately twenty states²³⁰ have not yet authorized it as a remedy for violations of protection orders.²³¹ To the extent these states have not acted due to perceived flaws in the criminal contempt delivery system, these problems actually can be addressed fairly easily through existing institutions or existing methods of reform.

For example, if judges are refusing to incarcerate domestic violence contemnors, sanctions for the violation of civil protection orders can be stiffened. Some states now require mandatory jail terms for repeat violators of protection orders.²³² As with other areas of sentencing disparities, courts can be reined in by sentencing guidelines.²³³ For the police, a

²²⁹ Goolkasian, *supra* note 61, at 277 (citing B. SMITH, NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, NON-STRANGER VIOLENCE: THE CRIMINAL COURT'S RESPONSE 96 (1983)).

²³⁰ Some statutes do not differentiate between criminal and civil contempt, making classification of the statute difficult. Civil contempt is a fairly useless remedy in the domestic violence context because it rarely can be invoked to incarcerate the batterer. See *supra* note 159, for a discussion of the difference between civil and criminal contempt.

²³¹ This may be the case because of perceived weaknesses of the contempt remedy. See *Developments, supra* note 55, at 1512-13. Indeed, Florida abolished the use of indirect criminal contempt sanctions to enforce compliance with domestic violence protection orders. FLA. STAT. ANN. § 741.2901(2) (West Supp. 1995).

²³² Johnson, *supra* note 23, at 257-58.

²³³ Dissatisfaction with sentencing disparities in general has led to sentencing reform primarily through the passage of sentencing guidelines, most notably the Federal Sentencing Guidelines. Most criticism of the sentencing guidelines has to do with the underlying statutory mandatory minimums for certain crimes such as drugs rather than the concept of guidelines. See, e.g., Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994).

There is clearly a need for similar guideline sentencing for contempt of civil protection orders. Various schemes for mandatory or guideline range sentences for repeat domestic offenders have been adopted in several states, and various others have been proposed. Topliffe, *supra* note 178, at 1046. One approach adopts the equivalent of mandatory minimum sentences for violations of protection orders with provisions

modified version of the mandatory arrest concept would limit the mandatory arrest scenario to situations in which a batterer has violated an order, a policy more consistent with their own discretionary judgments.²³⁴

The most significant area, however, to ensure that criminal contempt sanctions work is the provision of legal services.²³⁵ If legislatures fund special units within state attorney's offices for these prosecutions, at least the financial aspect of this problem will be relieved.²³⁶ If battered women are to be responsible for bringing some or all of their own contempt actions, there is a definite need for more lawyers (both full-time and pro bono) to work in this field.²³⁷ However, rather than being seen as an obstacle, the provision of legal services for battered women should be

allowing for the increase of sentences for repeat violations. Examples of this approach have been adopted in Illinois, Hawaii, and California. *Developments, supra* note 55, at 1513. The 1991 Prevention of Domestic Violence Act in New Jersey provides that a violation of a protection order is contempt "which if it results in a conviction of a second or non-indictable domestic violence offense, requires a minimum term of thirty days in jail." Johnson, *supra* note 23, at 257. Some states have gone further and made some violations of a protection order felonies. *See, e.g.*, N.D. CENT. CODE § 14-07.1-06 (Supp. 1993); OHIO REV. CODE ANN. § 2919.27 (Anderson 1993); TEX. FAM. CODE ANN. § 71.16 (West Supp. 1995); WASH. REV. CODE ANN. § 26.50.110(4) (West Supp. 1995).

²³⁴ See Johnson, *supra* note 23, at 257 (noting that under the 1991 Prevention of Domestic Violence Act in New Jersey, probable cause to believe a protection order has been violated requires an arrest and a bail hearing before a judge).

²³⁵ It is possible, but difficult for a lay person to prosecute a criminal contempt action *pro se*. See D.C. TASK FORCE, *supra* note 199, at 153-54.

²³⁶ I still believe that there are empowerment advantages to battered women pursuing these remedies on their own behalf through counsel. See *supra* text accompanying notes 193-202.

²³⁷ Contempt is an option that "does not seem particularly attractive, however, because bringing contempt charges is expensive, time-consuming, and likely to require the services of an attorney." Kinports & Fischer, *supra* note 81, at 230-31 (citing a survey that found that almost 75% of respondents think that the contempt process is too lengthy or complicated and that most women do not attempt it). Battered women also have a difficult time retaining counsel on their own as the batterers often control the resources. In addition, few lawyers outside legal services specialize in bringing contempt actions. Many lawyers simply do not want to take domestic cases. Finally, a battered woman may be disqualified for legal aid if her husband's income is counted. See LANGLEY & LEVY, *supra* note 53, at 178-85 (describing the difficulty women have in retaining sufficient legal services). Thus, it is particularly imperative that local bars, law schools, and firms take responsibility in this area. Topliffe, *supra* note 178, at 1045. The creation of legal services specifically to assist battered women in obtaining and enforcing civil protection orders should be seen as part of the process of empowerment and social action.

perceived as an organizing tool for mobilizing sympathetic members of the bar.²³⁸ To the extent that *noblesse oblige* may be an insufficient motivation, legal aid rules can be altered to omit the income of the spouse from the eligibility calculation and provisions for payment of attorney's fees to the prevailing party can be added.

D. *The Role of Substantive Criminal Charges for Violations of Civil Protection Orders*

1. *Feminists Are Mistakenly Advocating the Over-Criminalization of Protection Order Violations*

Despite the many advantages of criminal contempt outlined above, some battered women advocates are now seeking the criminalization of violations of civil protection orders to the exclusion of other remedies.²³⁹ The most expansive proposals would convert protection order violations

²³⁸ See Wendy E.D. Smith & Cheryl J. Terai, *Project Challenge: Pro Bono Opportunity in Private Corporate Practice*, 96 W. VA. L. REV. 355 (1994) (describing major law firms' sponsorship of program in Pennsylvania which assists women in obtaining protection orders and enforcing them through contempt motions).

²³⁹ Professor Natalie Loder Clark states: "Only vigorous prosecution, brought and continued at the state's initiative, teaches the abuser that such behavior is unacceptable to society." Natalie L. Clark, *Crime Begins At Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 281 (1987). Professor Clark also argues against victim-initiated remedies. *Id.* at 269. Another advocate in Chicago states: "One of our mistakes [in writing the law] was pushing for those orders of protection. We moved away from prosecution. Now we are going back to prosecute, prosecute." Burleigh, *supra* note 26, at 1 (quoting Margaret Luft of Uptown Center Hull House Woman Abuse Action Project).

With regard to enforcement of protection orders, Finn and Colson argue for statutes that make protection order violations a misdemeanor. FINN & COLSON, *supra* note 92, at 49. Contempt has been criticized as expensive and time-consuming. Kinports & Fischer, *supra* note 81, at 230.

While clearly there are some advocates explicitly pushing for criminalization of protection order violations, the actual trend of state statutes in this direction may be more the result of an unconscious drift in policy rather than a conscious and uniform decision by domestic violence reformers. For example, the *Model Code on Domestic and Family Violence* drafted by the National Council of Juvenile and Family Court Judges discusses criminal penalties for violations but does not distinguish between criminal charges and contempt sanctions. See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 302(3)(a) (Nat'l Couns. of Juv. and Fam. Ct. Judges 1994). In a conversation with the author, a member of the drafting committee acknowledged that this distinction was not considered by the drafters at the time.

into misdemeanors that otherwise would not constitute substantive criminal behavior (*i.e.*, violations of “stay away” and “no contact” provisions).²⁴⁰ Some jurisdictions, such as Florida, recently abolished use of the contempt sanction, requiring that all violations of civil protection orders be referred to the local state attorney’s office for criminal prosecution as misdemeanors.²⁴¹

These advocates contend that criminalization of all acts of domestic violence will serve to transform cultural and institutional attitudes toward such violence, so that it will come to be seen as a crime in the ordinary sense.²⁴² They also criticize the use of civil process (*e.g.*, the contempt sanction), characterizing it as a “soft” approach that fails to treat battering as a crime worthy of punishment.²⁴³

This overemphasis on criminal prosecution is misguided for many reasons. First, as discussed above, pursuing a contempt sanction for violation of a civil protection order can be an empowering experience for a

²⁴⁰ FINN & COLSON, *supra* note 92, at 52 (suggesting states convert to criminal prosecution of protection order violations as the preferred remedy, but acknowledging that a statute allowing police to arrest for criminal contempt of a protection order is another option).

²⁴¹ FLA. STAT. ANN. § 741.2901(2) (West Supp. 1995). The Florida Supreme Court noted that the law abolishing the use of indirect criminal contempt might suffer from a separation of powers problem. The court questioned whether the legislature had the authority to eliminate the judicial power to punish those who violate a court’s orders. *In re* Report of the Comm’n on Family Courts, 646 So. 2d 178, 180 & n.1 (Fla. 1994).

Florida battered women’s groups supported the pure criminalization approach, in part, due to frustration that not enough was currently being done to enforce protection orders via contempt. They also believed there might be double jeopardy problems with dual enforcement through contempt and criminal sanctions. *See infra* text accompanying notes 264–68. In retrospect, one Florida battered women’s advocate now believes that the elimination of criminal contempt may have been a mistake. Interview with Linda Osmundson, Director of the CASA Shelter in St. Petersburg, Fla. (Mar. 25, 1995).

²⁴² These advocates rebut charges that this will overburden the criminal justice system by arguing that domestic violence should be a priority and deserves a priority resource allocation. *Developments, supra* note 55, at 1526–27. This argument begs the question particularly in regard to non-criminal acts such as “stay away” violations. Secondly, while acknowledging that domestic violence is a priority, advocates who argue that it should not be treated differently than other crimes ignore the different psychological aspects of this crime. *See id.* at 1527 (treating domestic violence as a special crime may have stigmatizing effects for victims).

²⁴³ Civil protection orders “merely proscribe . . . future conduct with uncertain enforcement and ineffective sanctions for violations.” *Id.* at 1511.

battered woman if the system works properly. Second, the criminal justice system will resist the complete criminalization of civil protection order violations, despite hopes to the contrary. Third, past experience has shown that over-reliance on a single solution is a mistake. Fourth, a pure criminalization approach is overly optimistic about society's willingness to brand every protection order violation a criminal act.

Despite the wishes of these advocates, domestic violence does not behave like an "ordinary" crime and prosecutors and police have legitimate grievances about being forced to treat it as such. While police and prosecutors can be blamed for the reluctance of some victims to prosecute, the battering theory itself acknowledges that many battered women drop charges because they have not yet realized that the cycle will repeat itself or the batterer is able to manipulate them into dropping the charge.²⁴⁴ Even sympathetic prosecutors recognize that criminal prosecution alone is not going to provide the cure.²⁴⁵

Further, prosecutors have credible institutional concerns with the pure criminalization approach.²⁴⁶ Overloading the criminal justice system with more, primarily misdemeanor cases will have several deleterious effects. More cases mean more delay.²⁴⁷ Misdemeanor cases, particularly in urban court systems, can take significant time to wend their way to trial.²⁴⁸ More

²⁴⁴ It is true that the attitudes of the prosecutors and the judiciary encourage women to drop cases, BUZAWA & BUZAWA, *supra* note 73, at 58, but many women, rightly or wrongly want these cases dropped, perhaps because of battered woman's syndrome, reconciliation, economic fears, or general distrust of the court system. *Id.* at 59. Using contempt sanctions as the first line of attack accomplishes two goals. First, there is a process of self-selection that will weed out many cases. Second and more importantly, criminal prosecution can be reserved for cases involving physical violence.

²⁴⁵ "Prosecution isn't a panacea. It's like a tourniquet. We put it on when there is an emergency and we keep it on as long as necessary. But the question is, then what?" Ingrassia & Beck, *supra* note 45, at 32 (quoting Mimi Rose, Chief of the Family Violence and Assault Unit at the Philadelphia District Attorney's Office).

²⁴⁶ While prosecutorial resources are "free" to battered women complainants, so goes the old adage that you get what you pay for. Social reform costs money and to some extent, that money would be better spent on private attorneys committed to prosecuting contempt actions or on more funds for a smaller group of "domestic violence" prosecutors rather than adding to the general pool for the district attorney's office.

²⁴⁷ The fact remains that in some jurisdictions, over half of all domestic battery cases are dismissed prior to trial or plea. *See* sources cited *supra* note 78. For the effect that so-called "no-drop" policies might have on prosecution rates, see Corsilles, *supra* note 13.

²⁴⁸ Some misdemeanor cases in the District of Columbia can take up to a year to

delay and backlog invariably lead to more dismissals, as witnesses disappear or victims grow weary of endless court appearances.²⁴⁹ Dismissals demoralize victims²⁵⁰ and further frustrate police and prosecutors,²⁵¹ who are generally interested only in cases with a high likelihood of success (which means a conviction).²⁵² No-drop policies and subpoenas that compel battered women to testify against their will are time-consuming and have significant potential to further victimize women.²⁵³ Finally, delayed adjudication is a serious health risk for any woman whose batterer has already ignored a civil protection order. The first concern, therefore, should be a speedy adjudication of the civil protection order violation.

Pure criminalization advocates also ignore entrenched attitudes toward

go to trial. Paul Duggan, *Fighting Backlog, D.C. Prosecutors Dismiss Almost 1,000 Cases*, WASH. POST, June 13, 1993, at B3. The number of misdemeanor cases clogging the court systems has been previously noted. See *supra* note 209.

²⁴⁹ See Duggan, *supra* note 248, at B3 (reporting that because of the heavy caseloads and busy judges, cases get repeatedly delayed until they are finally dismissed).

²⁵⁰ "At the heart of criminal enforcement of domestic violence complaints is the phenomenon of discretionary dismissal by the prosecutor, before the charge can be determined on the merits either by guilty plea or by trial." MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, *reprinted in* 15 WM. MITCHELL L. REV. 825, 882-83 (1989) [hereinafter MINNESOTA TASK FORCE]. Especially in misdemeanor cases, dismissal can be as high as 80-90%. *Id.* at 883.

²⁵¹ "In studies of courts operating under regular assault statutes, investigators have typically found that approximately 80% of all cases of domestic violence are dismissed by the court either at the victim's request or because the victim failed to appear in court." CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 33 (Claudine SchWeber & Clarice Feinman eds., 1985). Some prosecutor offices may resist "no-drop" policies for domestic violence cases as interfering with their discretion and as a drain on resources for the prosecution of other crime. Corsilles, *supra* note 13, at 875.

²⁵² See *supra* note 80 and accompanying text.

²⁵³ Corsilles, *supra* note 13, at 875. If the subpoena power is not used properly, it may lead to further victimization. If a battered woman is subpoenaed to appear but later refuses to do so because she has reconciled or any other reason, a contempt filed against her would be a second victimization. See MINNESOTA TASK FORCE, *supra* note 250, at 885-86; SCHECHTER, *supra* note 13, at 175; see also Parnas, *supra* note 12, at 134. No-drop policies also impose significant work load burdens on prosecutors preparing for trial. The amount of time needed to prepare for a case involving a non-cooperative witness should not be underestimated. It may require multiple efforts to serve subpoenas and force the prosecutor to put the victim on the witness stand without the opportunity to prepare her.

misdemeanor cases, particularly those tried before juries.²⁵⁴ Misdemeanor cases usually have the lowest conviction rate, as jurors are more willing to find a reasonable doubt for what they perceive as a minor crime.²⁵⁵ This is sure to be exacerbated when a jury is presented with criminal charges for incidents such as a violation of a stay-away or no-contact order.²⁵⁶ Further, rules of evidence, such as the general prohibition on the introduction of prior bad acts, will often exclude pertinent evidence of a prior battering relationship.²⁵⁷

With respect to the courts, these arguments ignore the realities of bail and sentencing in criminal courts. Pretrial detention or high bail are usually reserved for defendants who have committed the most violent offenses or those persons likely to flee.²⁵⁸ Judges are reluctant to detain defendants who are employed, particularly if they are providing for minors. The pure criminalization approach is unlikely to result in immediate detention pending trial in all but the most violent cases.

In addition, criminal docket judges hear about an extraordinary amount of violence on a day-to-day basis. It is unrealistic to assume that incarceration rates for nonviolent violations of protection orders will be significant. As suggested, however, judges as a group tend to look particularly unfavorably on those who directly challenge their authority, such as by disobeying a civil protection order. Thus, pure criminalization advocates miss an opportunity to take advantage of an institutional bias in favor of incarceration by presenting the case as a contempt of court issue, preferably before the court that issued the protection order. Ultimately, criminalization advocates must recognize that single solutions for a complex social problem are bound to fail.²⁵⁹ Particularly in the criminal

²⁵⁴ As noted earlier, such cases traditionally get the fewest resources and the least experienced prosecutors. *See supra* note 80 and accompanying text. While some jurisdictions have had success with specialized domestic violence units, ultimately the most experienced prosecutors will still prefer felonies and other higher profile cases.

²⁵⁵ This is most often true in cases where the sole witness is the victim.

²⁵⁶ From a libertarian perspective, one could also argue that our society already criminalizes enough conduct and creating even more criminal statutes in and of itself is not good for society.

²⁵⁷ *See, e.g.*, FED. R. EVID. 404.

²⁵⁸ *See, e.g.*, Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (1985 & Supp. 1994) (requiring a judicial officer to detain a person prior to trial if no conditions can reasonably assure the appearance of the person at trial or the safety of the community).

²⁵⁹ Drunk driving represents another serious public policy problem that has seen a broadening of sanctions beyond criminal prosecution such as revocation of driver's licenses for the failure to take a breathalyzer test. *See M. Elizabeth Fuller, Comment,*

justice system, for which discretion is so fundamental a component, inflexible directives will be resisted.²⁶⁰ As with any crime, there is an upper limit on full enforcement of criminal laws against domestic violence.²⁶¹

On a theoretical level, the pure criminalization advocates are too far ahead of current cultural values.²⁶² Given the high level of violence in our society, and especially in some communities, juries resist branding an individual a criminal when there is no act of violence, as in the violation of a stay-away order.²⁶³ Therefore, this attempt to transform public opinion through labeling all acts associated with a domestic violence as criminal simply goes too far. While words can open the door to change, those words must bridge existing beliefs with new facts, such as in the separation assault context. While more severe criminal penalties for domestic violence are necessary and the criminalization of protection order violations can be a useful step, alone they will not be effective. On the other hand, because the legal and everyday label of contempt is a better mesh with societal values,

Implied Consent Statutes: What Is Refusal?, 9 AM. J. TRIAL ADVOC. 423 (1986).

²⁶⁰ The general point that mandatory provisions and criminalization of all aspects of domestic violence is counterproductive receives strong support from Parnas, see *supra* note 12. He forcefully states that it is time for victim advocates to "stop their narrow, gender-focused arguments for further change. More important, it is time for policy makers to resist pressures from them." *Id.* at 191-92.

²⁶¹ A critique of full enforcement is that police ignore a broad range of other offenses. DONALD BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 185 (1980). The failure of efforts at full enforcement can be seen in other areas such as the Reagan-Bush zero tolerance for drugs and mandatory minimum sentencing. Battered women advocates must be realistic. They must recognize that "a budget-constrained legal system will never devote significant post-arrest resources to the prosecution, incarceration and rehabilitation of offenders who have, after all, usually been guilty only of a simple misdemeanor." Daniel Polsby, *Suppressing Domestic Violence with Law Reforms*, 83 J. CRIM. L. & CRIMINOLOGY 250, 251 (1992).

²⁶² See Schneider, *supra* note 152 (discussing the need for close attention to the interrelationship of theory and practice in this area and cautioning against too much "grand theory" and personal narrative which characterize much of recent feminist legal scholarship).

²⁶³ As the level of violence in our society escalates, prosecutors and courts may be reluctant to put much effort into prosecuting and convicting people who are guilty of only a misdemeanor. Polsby, *supra* note 261, at 251. In this era of fiscal constraint, many prosecutors and courts would like to see even fewer acts characterized as misdemeanors so that more resources can be devoted to the most serious violent crimes. Richard Barbieri, *Saving Money on Misdemeanors; Faced With a Statewide Budget Crisis, a Few Prosecutors Are Rethinking Their Opposition to ADR and Other Cost-Saving Alternatives to Prosecution*, RECORDER, June 1, 1993, at 1.

a resulting incarceration for violation of a protection order is more apt to be accepted as a just result.

Lastly, the pure criminalization approach is sometimes justified on the ground that successive prosecutions of the same act of domestic violence for contempt of a protection order and the criminal law might constitute double jeopardy.²⁶⁴ This was a particular concern after the Supreme Court's double jeopardy decision in *Grady v. Corbin*.²⁶⁵ However, the Supreme Court reversed *Grady* in *United States v. Dixon*,²⁶⁶ which specifically considered the double jeopardy consequences of successive prosecutions for contempt and a criminal offense arising from the same acts of domestic violence.²⁶⁷ In *Dixon*, a sharply divided Court reinstated serious felony charges against a batterer who had already been held in contempt for all but one of a series of acts.²⁶⁸ While ambiguous language in the *Dixon* decision may still present a double jeopardy issue, careful consideration of that issue before pursuing the contempt remedy can avoid a double jeopardy bar to criminal prosecution of serious incidents of domestic violence.²⁶⁹ In less serious cases, particularly non-violent cases where criminal prosecution is unlikely, the double jeopardy issue should not dissuade legislatures from authorizing both remedies for violations of protection orders.

²⁶⁴ See *supra* note 11; *United States v. Dixon*, 598 A.2d 724 (D.C. 1991), *rev'd*, 113 S. Ct. 2849 (1993).

²⁶⁵ 495 U.S. 508 (1990), *overruled in part by* *United States v. Dixon*, 113 S. Ct. 2849 (1993).

²⁶⁶ 113 S. Ct. 2849 (1993).

²⁶⁷ Note that the criminal prosecution was an offense under a traditional criminal statute, not a "new" misdemeanor for violation of a protection order. Dual prosecution for contempt and a misdemeanor violation of a protection order still present a double jeopardy problem. For those batteries for which both sanctions are sought, traditional criminal statutes must be used.

²⁶⁸ 113 S. Ct. 2849 (1993).

²⁶⁹ See forthcoming article by author. In *Dixon*, Justice Scalia's opinion requires a court to compare the language of the contempt order or finding of contempt with the statutory language of the criminal offense under the "elements test." If the contempt order or finding too closely tracks the criminal statute's language, the criminal charge can be found to be a lesser included offense of the contempt, even if it carries a more severe penalty, and thus violative of the double jeopardy rule. See also Kirsten Pace, *Fifth Amendment—The Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy*, 84 J. CRIM. L. & CRIMINOLOGY 769 (1994).

V. CONCLUSION: THE PROPER CHRONOLOGICAL MIX: CONTEMPT FIRST, CRIMINAL PROSECUTION SECOND

While contempt sanctions have substantial benefits and a pure criminalization approach is unwise, the question that still remains is: What is the best approach for punishing violations of civil protection orders? Consistent with the current comprehensive approach, a system that includes a mix of contempt and criminal prosecution would likely produce the best results.

More specifically, contempt should be the preferred initial remedy because it can be faster²⁷⁰ and it offers a better chance of some sobering jail time before a sufficiently violent act yields the rare pretrial detention. Second, contempt sanctions as the initial remedy will serve the empowerment goal by enabling battered women to psychologically break the binds to their batterers.

However, just as a pure criminalization approach will not work, contempt sanctions, while offering certain advantages, are not a panacea that will effectively punish and deter all batterers. The average maximum sentence under contempt statutes, of sixty to one-hundred-eighty days, will not always be sufficient to punish violations of protection orders. For cases involving assaultive conduct, traditional criminal charges such as assault and battery must be available to take advantage of the greater penalties for first degree misdemeanors and the substantial sentences for felonies. In some jurisdictions, newly created misdemeanors for violations of protection orders could serve the same function in some cases.

For the most hard-core violent batterer, severe criminal penalties will still be the only solution.²⁷¹ Any domestic violence reform package must treat such batterers as the most violent criminals are treated, including preventive detention and high bail.²⁷² On the other hand, in cases involving purely technical violations of specific provisions of a protection order such as a stay-away clause, criminal contempt sanctions alone should generally

²⁷⁰ See *supra* notes 180–89 and accompanying text. If in a particular case or jurisdiction, criminal prosecution turns out to be as fast or faster, the contempt and criminal charge can always be consolidated and tried by the state in criminal court.

²⁷¹ Contempt appears to be effective against batterers who are not extremely violent but less effective against extremely violent batterers. Topliffe, *supra* note 178, at 1046.

²⁷² Additional measures that can be taken in the most serious cases include notice to victims and confidentiality of their addresses, prohibition on reduction in bail without the knowledge of the initial court's reasons, and determination of the defendant's criminal record prior to setting bail. Johnson, *supra* note 23, at 243 n.60.

be sufficient and will offer the best chance for incarceration, if necessary. In cases involving violent acts, however, contempt can still be the first remedy pursued by the victim, independent of criminal prosecution, although cognizant of the potential double jeopardy issue. This strategy allows prosecutors to retain their traditional discretion²⁷³ without permitting the batterer to escape swift punishment.

An approach taking advantage of the speed and empowerment features of contempt and the stiffer penalties under criminal law is consistent with the comprehensive approach to domestic violence reform that seems to yield the best results.²⁷⁴ A contempt and criminal sanction approach also can be easily integrated with domestic violence courts and specialized prosecution units. Lastly, the need for attorneys to prosecute these actions in some jurisdictions can be seen as a positive avenue for concerned attorneys and advocacy organizations to take beneficial social action. Thus, in most significant respects, using contempt and criminal sanctions in unison is a winning proposition for battered women and the institutional actors involved in domestic violence control.

²⁷³ Such factors include the seriousness of the assault, assessment of future dangerousness, and the interests of the complainant in proceeding. Certainly, in the most violent cases, or cases involving weapons or a risk to minors, prosecutors should have a decided bias in favor of proceeding even in the absence of the complainant's cooperation.

²⁷⁴ See, for example, MINN. STAT. ANN. § 518B.01, subd. 14 (West 1990 & Supp. 1995) which provides that a violation of a protection order is both a misdemeanor and contempt of court. *Id.*

