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# THE SUBJECTION OF WOMEN . . . STILL: UNFULFILLED PROMISES OF PROTECTION FOR WOMEN VICTIMS OF DOMESTIC VIOLENCE

JAMES MARTIN TRUSS



> [T]he legal principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement. . . .[1]

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1. John S. Mill, *The Subjection of Women*, *in* ESSAYS ON EQUALITY, LAW, AND EDUCATION 261, 261 (John M. Robson ed., 1984).



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> If no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.[2]

## I. INTRODUCTION

Throughout American history women have fought to realize a full and independent legal identity, equal to that possessed by men.[3] Nonetheless, issues such as domestic violence have often remained obscured due in part to the judicial system's reluctance to intrude into "family matters."[4]

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2. State v. Oliver, 70 N.C. 60, 61–62 (1875).

3. *See* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* (noting that "throughout this country's history, women have been denied the most basic rights of citizenship, allowed only limited participation in the marketplace, and otherwise denied access to power, dignity, and respect"), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 151 (David Kairys ed., 1990); *see also* IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 109–10 (1990) (discussing 18th-century social philosophy of Immanuel Kant and Jean-Jacques Rousseau, which excluded women from public realm to further man's goals); *cf.* Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (upholding state's exclusion of women from practice of law and declaring that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"); People v. DeStefano, 467 N.Y.S.2d 506, 510–14 (Co. Ct. 1983) (analyzing historical origin and continued existence of spousal rape exception, whereby husband could not be convicted of raping his wife); John S. Mill, *The Subjection of Women* (arguing for women's suffrage and termination of social domination of women by men), *in* ESSAYS ON EQUALITY, LAW, AND EDUCATION 261, 275 (John M. Robson ed., 1984). Not until 1971 did the United States Supreme Court explicitly extend the guarantees of the Constitution's Equal Protection Clause to women. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) (rejecting state statute's preference for male administrators over female administrators on equal protection grounds).

4. *See* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* (explaining omission of wife beating from original definitions of criminal assault on ground that man could chastise his wife), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 155 (David Kairys ed., 1990). "Even today, after courts have explicitly rejected the definitional exception [omitting wife abuse from assault definition] and its rationale, judges, prosecutors, and police officers decline to enforce assault laws in the family context." *Id.*; *see also* Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1285 (1994) (recognizing historical tendency to ignore domestic violence "due to the traditional view that violence in the home constitutes a 'private matter' "). Under the antiquated doctrine of "coverture," which meant that a wife is under the "cover" of her husband, a married woman had virtually no legal identity separate from her husband. *See* Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 423–24 n.6 (1990) (citing "medieval doctrine of coverture" as basis for "assuming the wife's continuing assent to sexual acts"). The language of early American courts displays a great hesitance to intrude into the province of the home. *See Oliver*, 70 N.C. at 61 (disapproving husband's corporal punishment of wife, yet asserting that "from

Although courts have long-since renounced the common-law rule that allowed a husband to discipline his wife,[5] the plight of the battered woman remained largely ignored by courts and legislatures.[6]

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motives of public policy, and in order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints"). *But cf.* Adams v. Adams, 100 Mass. 365, 371 (1868) (discussing common law writ of *supplicavit*, which may issue to require husband to refrain from further acts of violence other than that necessary to govern and moderately chastise his wife); French v. French, 4 Mass. 587, 587–88 (1808) (granting divorce on grounds of single, unprovoked physical attack); Elizabeth Pleck, *Criminal Approaches to Family Violence 1640-1980* (expounding on legislative response of 17th-century Protestants who, in 1641, declared: "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault" (quoting criminal code of Massachusetts Bay Colony)), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 19, 22 (Lloyd Ohlin & Michael Tonry eds., 1989). The scope of the problem of domestic violence is immense; it is a "criminal, social, behavioral, and medical problem," and is, of course, not limited to violence against women. FRANK G. BOLTON & SUSAN R. BOLTON, WORKING WITH VIOLENT FAMILIES 20 (1987). A coherent discussion of the myriad aspects of domestic violence is well beyond the scope of this Comment. For more comprehensive discussions of the various aspects of domestic violence, see 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE (Lloyd Ohlin & Michael Tonry eds., 1989) (collecting and reviewing articles dealing with all aspects of family violence).

5. *See, e.g.*, Fulgham v. State, 46 Ala. 143, 146–47 (1871) (stating that privilege to chastise one's wife, "ancient though it may be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law"); Commonwealth v. McAfee, 108 Mass. 458, 461 (1871) (declaring that "[b]eating or striking a wife violently . . . is not one of the rights conferred on a husband by the marriage"); Gorman v. State, 42 Tex. 221, 223 (1875) (noting that husband's right of control over wife does not extend to punishment and correction, but is limited to protection and self defense); JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS 56 (1905) (discussing "exceedingly questionable" right of chastisement).

6. *See* Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 533 (1993) (describing historical attitude of indifference with regard to domestic violence held by courts, police, and prosecutors); Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 709 (1989) (noting that, even after most states repudiated right of chastisement, "wife abuse was a hidden social problem" until feminist movement increased awareness of problem); *see also* Anna T. Laszlo & Thomas McKean, *Court Diversion: An Alternative for Spousal Abuse Cases* (analyzing causes of police and judicial nonresponsiveness to domestic violence as being linked to narrow views of proper police and judicial roles), *in* U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 327, 329 (1978); Barry R. Schaller, *Perspectives on Family Violence: Problems and Solutions*, CONN. L. TRIB., Jan. 16, 1995 (commenting that progress in reducing domestic violence is "impeded by the fact that women still do not enjoy political, economic and social power on an equal basis with men"), *available in* LEXIS, Legnew Library, Allnws File.

That many men currently abuse their wives and partners is an unsavory and unfortunate, yet inescapable, fact.[7] The pervasiveness and severity of domestic violence are widely documented.[8] Current estimates indicate that as many as four million women per year become victims of domestic violence;[9] domestic violence is a leading cause of injury to women.[10] In

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7. *See* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Violence Assault Complaints*, 75 GEO. L.J. 667, 671 (1986) (discussing systemic nature of problem of domestic violence against women and noting that, although number of spousal homicides is roughly equal for women and men, women are much more likely to suffer recurrent abuse); *see also Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1501 (1993) (stating that "[b]y any standard, domestic violence must now be regarded as a pressing social and legal problem in the United States"). Men also endure abuse at the hands of their wives and partners. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10–11 (1991) (comparing study which reported that men and women endure domestic violence in nearly equal numbers with studies reporting much higher incidence of violence against women). This Comment's focus is restricted to domestic violence against women, and adopts the definition of domestic, or "family violence" as

> an act by a member of a family or household against another member of a family or household that is intended to result in physical harm, bodily injury or assault, or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, or assault, excluding the reasonable discipline of a child by a person having that duty.

TEX. FAM. CODE ANN. § 71.01(b)(2)(A) (Vernon Supp. 1995). With the exception of Part II of this Comment, all references to wives are intended to encompass battered women cohabitating with their abusers, whether or not they are married. *Cf.* TEX. FAM. CODE ANN. § 71.01(b)(5) (Vernon Supp. 1995) (defining "household" as "unit composed of persons living together in the same dwelling whether or not they are related to each other").

8. United States v. Gaviria, 804 F. Supp. 476, 479 (E.D.N.Y. 1992); *see* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2828 (1992) (stating that, "on an average day in the United States, nearly 11,000 women are severely assaulted by their partners"); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 546 (1988) (discussing Federal Bureau of Investigation statistics on domestic violence and noting that stories concerning violence against women "are terrifying, and the number of studies on the issue are legion"); Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 707 (1989) (discussing prevalence of wife abuse in United States and identifying difficulties with precise measurement of instances of abuse). Though domestic violence has been a social problem for the entire course of American history, widespread social consciousness of the problem is a relatively recent phenomenon. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 26 (1991).

9. *See, e.g.*, Proclamation No. 6619, 58 Fed. Reg. 58,255 (1993) (stating that 40% of female victims of homicide were murdered by their husbands or boyfriends); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 272–73 (1985) (noting immensity of problem of domestic violence against women, with one-tenth to one-fifth of all American women suffering abuse in any given year); Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*,

Texas alone, 161 women died at the hands of their husbands or partners in 1993.[11]

Nearly as troublesome as its prevalence is the attitude with which legal institutions have historically responded to the problem of domestic violence.[12] Only within the last fifteen to twenty years have Americans witnessed any concerted legal effort to address domestic violence.[13] During

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32 ARIZ. L. REV. 665, 665 (1990) (stating that "[b]etween four and forty million women are estimated to be affected" by domestic violence); Don Colburn, *Domestic Violence—AMA President Decries "A Major Public Health Problem,"* WASH. POST, June 28, 1994, at Z10 (asserting that any doctor treating adult patients will have treated " 'at least one victim of family violence within the past two weeks' " (quoting American Medical Association President Robert E. McAfee)); Barry R. Schaller, *Perspectives on Family Violence: Problems and Solutions*, CONN. L. TRIB., Jan. 16, 1995 (acknowledging that woman is beaten every 18 seconds and that "homes in which family violence occur are virtual cauldrons for the brewing of societal violence of all forms"), *available in* LEXIS, Legnew Library, Allnws File. *But see* Armin A. Brott, *Battered-Truth Syndrome: Hyped Stats on Wife Abuse Only Worsen the Problem*, WASH. POST, July 31, 1994, at C1 (criticizing "wildly varying number of women who are supposedly beaten by men each year").

10. Elizabeth M. Schneider, *Particularity and Generality: Challenges to Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 523 (1992).

11. *See* Ronda Templeton, *Revamping Touted of How Protective Orders Handled*, SAN ANTONIO EXPRESS-NEWS, Nov. 13, 1994, at A10 (reporting statistics from Texas Department of Public Safety). In 1992, 29% of all female murder victims nationwide were killed by husbands or boyfriends. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 17 (1992) (reporting that nearly half of all murder victims knew or were related to their assailants). In contrast, only 4% of all male murder victims were slain by their wives or girlfriends. *Id.*; *cf. Close to Home: Violence Behind Closed Doors*, WASH. POST, Nov. 13, 1994, at C8 (stating that, "[i]f a woman is murdered in this country, 44 percent of the time the killer is her husband or boyfriend"). *See generally* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 274 (1985) (discussing likelihood of domestic violence ending in fatality of either abuser or victim).

12. *See* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 672 (1986) (noting that, notwithstanding magnitude and severity of domestic violence, "law enforcement systems have failed to respond to the pleas of these victims"); *see also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 267–68 (1985) (emphasizing tardiness of societal response to centuries-old problem of wife battering); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1505, 1526 (1994) (noting that proponents of strong responses to domestic violence justify their position on grounds of historical and attitudinal inertia in legal systems which has perpetuated subordination of, and violence against, women).

13. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 268 (1985) (recognizing significant advancements in legal response to domestic violence within last 15 years); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1505, 1505 n.1 (1994) (attributing "history" of state response to domestic violence to "the last two decades, with such efforts only reaching significant proportions in the 1980s"). *But cf.*

the 1970s, the feminist movement heightened public awareness and political pressures, spurring legislation directed at remedying domestic violence.[14]

In Texas, this awakening began in 1979 with the enactment of Title IV of the Texas Family Code,[15] making civil protection orders available to victims of domestic violence.[16] To protect victims, a judge can exclude the abuser from the home and prohibit any contact with the victim for a specified period of time.[17] Demonstrating a genuine desire to curb domestic violence, the Texas Legislature frequently returned to the well, amending the statute six times between 1983 and 1993.[18] Despite these

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Nolin v. Pearson, 77 N.E. 890, 890 (Mass. 1906) (expounding on prohibition of corporal correction of wife by husband that 1641 law established); Elizabeth Pleck, *Criminal Approaches to Family Violence 1640-1980* (evaluating sporadic periods of social awareness concerning domestic violence, which in some instances entailed legislation prohibiting violence against women and children), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 19, 19–51 (Lloyd Ohlin & Michael Tonry eds., 1989).

14. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 26–27 (1991) (discussing feminist movements that helped increase social consciousness on issues of domestic violence, which, in turn, eventually led to legislative action); Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1285–86 (1994) (discussing efforts of feminist movement in bringing attention to problem of domestic violence); *see also* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 62 (1992) (explaining emergence of domestic violence legislation in 1970s). *See generally* Frances Olsen, *The Sex of Law* (detailing different feminist perspectives on nature of law as social institution and contributions of each ideology), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 453, 459–64 (David Kairys ed., 1990).

15. Act of April 19, 1979, 66th Leg., R.S., ch. 98, 1979 Tex. Gen. Laws 182, 185–89 (codified as amended at TEX. FAM. CODE ANN. §§ 71.01-71.19 (Vernon 1986 & Supp. 1995)).

16. *See* TEX. FAM. CODE ANN. § 71.04 (Vernon Supp. 1995) (providing requirements for application for protective order); *see also* Gerald S. Reamey, *Legal Remedial Alternatives for Spouse Abuse in Texas*, 20 HOUS. L. REV. 1279, 1307 (1983) (analyzing newly created remedy for spouse abuse in Texas and labeling civil protective orders remedies that are injunctive in nature); Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 356 (1992) (discussing enactment of Title IV as providing new remedy for spouses and cohabitants involved in violent relationships).

17. *See* TEX. FAM. CODE ANN. § 71.11(a)-(b) (Vernon Supp. 1995) (providing wide array of mechanisms within protective order for protection of victim of domestic violence).

18. *See* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 356–66 (1992) (tracing frequent amendments to Title IV). In addition to the basic protective order scheme, the Texas Legislature also refined criminal statutes designed to address domestic violence. *See id.* at 366–73 (analyzing Texas criminal statutes concerning domestic violence prevention).

efforts, the frequency of domestic violence continues to escalate, as does the frequency of the ultimate act of domestic violence—murder.[19]

On June 1, 1991, the Texas Supreme Court created the Gender Bias Task Force of Texas (Task Force) "to consider whether gender bias does exist in the judicial system in Texas, and, if such gender bias does exist, to determine the nature and extent of such bias and to propose measures for its reduction and ultimate elimination."[20] In March 1994, the Task Force released a final report that echoes what many victims of domestic violence have known all along: the Texas protective order scheme often fails to protect.[21] For many women, protective orders are difficult or impossible to obtain.[22] Often, women that actually obtain protective orders find them difficult to enforce.[23] More fundamental, though, is the ignorance

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19. *See* Margaret C. Hobday, Note, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1286 (1994) (stating that "the epidemic of violence has not abated—abusive partners continue to beat their 'loved ones' to death"); Ronda Templeton, *Revamping Touted of How Protective Orders Handled*, SAN ANTONIO EXPRESS-NEWS, Nov. 13, 1994, at A10 (reporting on increase in incidence of domestic violence against women in general and episodes of spousal homicide). One indicator of the increasing incidence of violent crimes is the number of persons arrested for such crimes. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 222 (1992) (compiling statistics on arrests for "offenses against family and children" that reveal significant increase in number of arrests reported between 1983 and 1992). Women are proportionally much more likely to be murdered in a domestic violence situation than in non-family related situations. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., SPECIAL REPORT: MURDER IN FAMILIES 1 (1994) (reporting that 45% of victims murdered by family members were female, compared to 18% of non-family victims).

20. SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 1 (1994).

21. *See id.* at 5 (finding that Texas judicial system fails to adequately protect victims of domestic violence); Janet Elliot, *After Gender Bias Study, Now Comes the Hard Part*, TEX. LAW., Apr. 4, 1994, at 1 (pointing out tragic irony in Austin woman's death at hands of ex-husband on same day that *Gender Bias Task Force of Texas Final Report* was released in Austin); *cf.* Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 667 (1990) (blaming "lax enforcement of laws and lagging cultural attitudes" for perpetuating vulnerability of women to domestic abuse).

22. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 69–70 (1994) (explaining problems of some women that make protective orders virtually unavailable options); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 84 (describing factors that make protective orders hard to obtain such as economic hardship or non-marital status).

23. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 72–76 (1994) (analyzing attitudes of police and prosecutors that constitute barriers to effective enforcement of protective orders); *see also* City of Grafton v. Swanson, 497 N.W.2d 421, 423 (N.D. 1993) (stating it is problematic that inadequate police response to domestic violence is significant reason domestic violence persists); Melissa P. Phipps, *North*

of the dynamics of domestic violence permeating the ranks of law enforcement personnel, prosecutors, and judges.[24] This ignorance may tend to exacerbate, rather than alleviate, the inherent danger faced by women who seek legal protection.[25]

Against a historical-legal backdrop—which legitimated violence against women and largely obscured women's independent legal identities—this Comment examines the dynamics of power and control that define the battering relationship. Next, this Comment discusses legislative enactments designed to remedy domestic violence in Texas. Building upon the recent report of the Task Force, this Comment advances three discrete amendments to Title IV designed to increase the effectiveness of protective orders. Finally, this Comment examines the ignorance manifest in an often non-responsive judicial system and urges fulfillment of the Texas Legislature's promises to educate and protect.

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*Carolina's New Anti-Stalking Law: Constitutionally Sound, But Is it Really a Deterrent?*, 71 N.C. L. REV. 1933, 1937 (1993) (noting difficulty in enforcement of restraining orders for harassment victims); Matthew J. Gilligan, Note, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285, 293 (1992) (noting that protective orders have little effect on persistent stalkers, which are often spurned husbands or partners); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 336 (1994) (noting difficulty encountered in seeking to enforce protective order when judges are reluctant to impose sanctions for violations of order). In the 1970s, before the term "battered woman" gained popular recognition, police departments had formal policies advocating non-intervention in domestic violence cases. *See* Gerald T. Hotaling et al., *Intrafamily Violence, and Crime and Violence Outside the Family* (identifying policy embodied in International Association of Chiefs of Police training manual that recommended "policy of noninterference"), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 315, 317 (Lloyd Ohlin & Michael Tonry eds., 1989).

24. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 76–78 (1994) (commenting on epidemic of unenlightened attitudes concerning nature of domestic violence); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 269 (1985) (commenting on misconceptions among law enforcement officials about battering relationships); *see also* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 3 (1993) (asserting that judicial system's ignorance of special dynamics within violent family relationship "beg[s] for solution"); Doris S. Wong, *State Court Workers to Get Domestic Violence Training*, BOST. GLOBE, Jan. 29, 1994, at 28 (reporting on lack of judicial understanding for reasons women do not leave abusive partners).

25. *See* Lynn H. Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 206 (1990) (explaining situation in which judge's ignorance of victim's inability to leave abusive partner led to callous denial of her application for protection); *cf.* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1068 (1991) (noting that provisions in law which give abusers additional power tend to enhance abusive situation).

## II. MACROCOSM: A CULTURE OF VIOLENCE AND DOMINATION

### A. *A Man's Right to Chastise His Wife: The Common-Law "Rule of Thumb" and Other Devices*

> We will not inflict upon society the greater evil of raising the curtain upon domestic privacy to punish the lesser evil of trifling violence.[26]

Perhaps the most notorious example of a Western law that sanctioned violence against women is the common-law "rule of thumb."[27] This rule permitted men to beat their wives with a rod or stick "no larger than a man's thumb" or small enough to "pass through a wedding band."[28] Early proponents justified the rule as a natural and necessary right of control, incident to the man's role as head of the family.[29] Another justification for a man to beat or "discipline" his wife was that the husband

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26. State v. Rhodes, 61 N.C. 453, 459 (1868).

27. *See* Bailey v. People, 130 P. 832, 835–36 (Colo. 1913) (criticizing common-law rule of thumb that allowed husband to beat spouse); *see also* Bradley v. State, 1 Miss. (1 Walker) 156, 158 (Miss. 1824) (announcing husband's right to chastise or discipline his wife), *overruled by* Harris v. State, 14 So. 266 (Miss. 1894); Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 709 (1989) (tracing history of right of chastisement from 18th century to late 20th century). *But cf.* Christopher Fotos, *Wife Beating Was Never Legal*, WASH. POST, Jan. 25, 1995, at A24 (criticizing as "feminist fiction" notion that common-law rule of thumb allowed husbands to beat their wives). Violence against women is, of course, older than the common law. *See* Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 666 (1990) (asserting that society has tolerated unspoken crime of wife beating since Biblical times).

28. People v. Romero, 13 Cal. Rptr. 2d 332, 341 n.14 (Ct. App. 1993); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 547–48 (1988).

29. *See* Hand v. Hand, 133 N.W.2d 63, 68 (Iowa 1965) (describing antiquated "remedy" of wife beating as former means for husband to control or discipline his wife); *Bradley*, 1 Miss. at 157 (asserting that "as an abstract proposition," question of whether husband could commit assault and battery upon wife "will not admit of doubt"). An old English couplet illustrates the man's recourse as follows: "A woman, a dog, and a walnut tree, the more you beat them the better they be." *Hand*, 133 N.W.2d at 68. Modern research confirms that the lingering belief that men have the right to beat women is, in part, based on gender roles learned as children. *See* Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 708 (1989) (describing domestic violence as "a social phenomenon, intertwined with a social structure in which men dominate women"). America has witnessed brief periods of social consciousness of the problems of domestic violence throughout its history. *See* Elizabeth Pleck, *Criminal Approaches to Family Violence 1640-1980* (commenting on misconception that family violence was "discovered" in 1960s, when, in fact, "Puritans of colonial Massachusetts enacted the first laws anywhere in the world against wife beating"), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 19, 19 (Lloyd Ohlin & Michael Tonry eds., 1989).

was often civilly or criminally liable for her actions.[30] Though early American courts were quick to denounce the rule of thumb as "barbaric," they often protected a man's right to use "gentle restraint" over his wife to protect his position as head of the household.[31]

Compounding this tacit approval of violence against women were popular myths that obscured domestic abuse. The "unity of husband and wife" and the "sanctity of the home" limited abused spouses' remedies to divorce or criminal actions.[32] The "unity of the spouses" fiction impliedly ratified the husband's domination and control of his wife and expressly

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30. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *445 (commenting on origins of man's right to discipline his wife). Blackstone noted that:

> For as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer.

*Id.*; *see Bradley*, 1 Miss. at 157 (asserting husband's right to chastise wife "because he is answerable for her misbehaviour"). Some researchers criticize the notion that wife beating was legal by attributing a myth-status to the rule of thumb. *See* Elizabeth Pleck, *Criminal Approaches to Family Violence 1640-1980* (tracing legal response to family violence in Early America, and attributing rule of thumb to English judge who purportedly first espoused the rule and afterward was ridiculed for his views), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 19, 32–33 (Lloyd Ohlin & Michael Tonry eds., 1989).

31. *See* Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (D. Conn. 1984) (explaining early 19th-century law allowing men to beat their wives and later " 'restrictions on the right of chastisement evolved through cases which defined the type, severity, and timing of permissible wifebeating' "); Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Protect Them When the Police Won't?*, 95 YALE L.J. 788, 792 (1986) (noting that, "[a]t common law, the husband was recognized as the ruler of the home"); *see also* Barber v. Barber, 153 N.Y.S. 256, 258 (App. Div. 1915) (asserting husband's right to physically eject his wife from room when she failed to comply with his request that she leave); Skinner v. Skinner, 5 Wis. 449, 451 (1856) (stating that, "when the wife is ill treated on account of her own misconduct, her remedy is a reform of her own manners"). In *Bradley*, the Mississippi Supreme Court stated that "[i]f the defendant now before us, could shew from the record in this case, he confined himself within reasonable bounds, when he thought proper to chastise his wife, we would deliberate long before" convicting the husband of assault and battery. *Bradley*, 1 Miss. at 158.

32. *See* Bradwell v. State, 83 U.S. (1 Wall.) 130, 141 (1872) (stating maxim of common law that "a woman had no legal existence separate from her husband"); 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (declaring that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage"); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* (explaining ramifications for women of judicial system's absence from "private sphere," which extended into 20th century with law governing married women's limited property rights), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 154–57 (David Kairys ed., 1990).

precluded any possible tort recovery for injuries he inflicted.[33] Treating husband and wife as one within the context of a male-dominated society rendered women invisible from the eyes of the law.[34] Moreover, emphasis on the sanctity of the home allowed courts to ignore domestic violence against, and domination of, women as "private matters."[35] This tradi-

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33. *See* Guffy v. Guffy, 631 P.2d 646, 652 (Kan. 1981) (Prager, J., dissenting) (commenting on interspousal tort immunity that was "creature of the common law . . . based on fiction of marital unity"); Frye v. Frye, 505 A.2d 826, 832 (Md. 1986) (discussing interspousal tort immunity as arising from wife's legal existence being subsumed by that of husband); *see also* Korman v. Carpenter, 216 S.E.2d 195, 197 (Va. 1975) (rejecting "outmoded fiction that husband and wife are of 'one flesh,' " yet approving policy concerned with preserving marriages); *cf.* Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Protect Them When the Police Won't?*, 95 YALE L.J. 788, 792 (1986) (analyzing common-law doctrine of coverture as mechanism for perpetuating man's right to rule his wife, even by physical means).

34. *See Bradley*, 1 Miss. at 158 (displaying eagerness to ignore domestic violence in stating that, "[t]o screen from the public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every other case of misbehaviour"); *see also* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* (explaining that "law's absence [from private sphere] devalues women and their functions: women are not sufficiently important to merit legal regulation"), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 156 (David Kairys ed., 1990). The "legal unity" doctrine is now, at least nominally, a relic of the common law. *See* Tevis v. Tevis, 382 A.2d 697, 700 (N.J. Super. Ct. App. Div. 1978) (rejecting "identity of the spouses" as "a fiction no longer acceptable on any basis"); *cf.* Patrick N. Parkinson, *Who Needs the Uniform Marital Property Act?*, 55 U. CIN. L. REV. 677, 681 (1987) (discussing shift in marital property law from "Blackstonian position in which husband and wife were one in the law—and that one was the husband—to a position where the spouses are separate but equal partners"). The "unity of the spouses" fiction subsumed the woman's separate identity such that she was not permitted to testify for or against her husband or to initiate a suit against him. *See* Duplechin v. Toce, 497 So. 2d 763, 765 (La. Ct. App. 1986) (noting traditional rule prohibiting suits between spouses founded upon "theory that such suits disrupt domestic tranquility"); 1 WILLIAM BLACKSTONE, COMMENTARIES *443 (discussing "union of the person" rationale supporting wife's incapacity as witness for or against husband). Though these rules favored domination of women within a marriage, they worked to the detriment of men as well. Drake v. Drake, 177 N.W. 624, 625 (Minn. 1920) (refusing to allow husband to enjoin wife's verbal abuse until legislature deemed it prudent to disturb tranquility of domestic relations "by dragging into court for judicial investigation at the suit of a peevish, faultfinding husband, or at the suit of a nagging, ill-tempered wife, matters of no serious moment, which, if permitted to slumber in the home closet would silently be forgiven or forgotten").

35. Margaret C. Hobday, *A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute*, 78 MINN. L. REV. 1285, 1285 (1994). Family violence was a private matter, and the domain of women was firmly within this private realm. *See Bradwell*, 83 U.S. at 141 (declaring that "[t]he paramount destiny and mission of woman are to fill the noble and benign offices of wife and mother"). Some commentators have criticized the language commonly used to describe violence within the family. *See* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of*

tional justification for non-action in private family matters—to avoid disturbing domestic harmony or tranquility—is all the more suspect within the context of domestic violence.[36] As one court noted:

> The chief reason relied upon [to deny tort remedies for battered spouses] . . . is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.[37]

### B. *Modern Institutional Violence Against Women*

A modern corollary to the notion that domestic violence is a private concern is the widely held idea that domestic violence is not a serious matter.[38] Statutes authorizing civil protective orders did not emerge until

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*Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 231 n.5 (1994) (stating that "term 'domestic violence' is a misnomer because it suggests that violence that occurs in the home or among family members belongs in a different category than other forms of violence").

36. *See Tevis*, 382 A.2d at 700 (criticizing "harmony of the home" rationale for disallowing tort suits between spouses when husband beat his wife since there is no harmony to preserve). The genesis of the notion that domestic violence is a merely private concern has been traced to the late 18th-century disinterest in the enforcement of morality, which had been a primary reason for earlier Puritan interest in outlawing wife beating. *See* Elizabeth Pleck, *Criminal Approaches to Family Violence 1640-1980* (identifying shift in legal and social thinking with regard to domestic violence that began after waning enforcement of laws against fornication), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 19, 19 (Lloyd Ohlin & Michael Tonry eds., 1989); *see also* Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Protect Them When the Police Won't?*, 95 YALE L.J. 788, 791–92 (1986) (analogizing modern police policies of non-interference with common-law justification for man's right to chastise wife under family privacy doctrine).

37. *Tevis*, 382 A.2d at 700.

38. *See* Natalie L. Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 268 (1987) (noting propensity of some prosecutors to treat domestic violence lightly by ignoring problem until victims demand prosecution); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) (commenting on attitudes within modern police departments that treat domestic violence as not serious or worthy of concern);

the mid-1970s, and despite subsequent improvements, problems with enforcement continue.[39]

Law enforcement officers often treat violence against women lightly by focusing attention on the woman as provocateur,[40] refusing to confront the abuser as a criminal[41] and avoiding outright their responsibility to

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*see also* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* (commenting on judicial system's hesitance to regulate "private sphere" in areas of tort and criminal law), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 155 (David Kairys ed., 1990). Until recently, a gap existed between research on domestic violence and research on other forms of criminal violence, which perhaps illustrates a historical tendency to view domestic violence as fundamentally different than "ordinary" crime. *See* Gerald T. Hotaling et al., *Intrafamily Violence, and Crime and Violence Outside the Family* (discussing traditional separation of studies of domestic violence and other crime and hypothesizing that separate approach may be justified because violence in families is fundamentally different than other crime), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 315, 316 (Lloyd Ohlin & Michael Tonry eds., 1989).

39. *See* Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 666–67 (1990) (stating that spouse abuse is now illegal in all 50 states due to focus of psychologists and sociologists during 1970s). For a thorough discussion of the wave of legislation on domestic violence during the 1970s and early 1980s, see Lisa G. Lerman et al., *State Legislation on Domestic Violence* (comparing recently enacted legislation from different jurisdictions), *in* ABUSE OF WOMEN: LEGISLATION, REPORTING, AND PREVENTION 39, 48–55 (Joseph J. Costa ed., 1983).

40. *See Kelly*, 478 A.2d at 370 (discussing common myth that abused women purposefully provoke husbands into beating them); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47, 50 (1992) (stating that some police officers remove victim from home, rather than spouse, or admonish victim "to be a better wife"). One commentator has identified another common myth: that abused women who kill their abusers do so only in non-confrontational situations. *See* Holly Maguigan, *Battered Woman and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 391–97 (1991) (analyzing appellate opinions in cases in which women killed their abusive mates so as to dispel myth that women only do so when men are sleeping or are otherwise unaware).

41. *See* Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1113, 1150 (1994) (commenting on law enforcement officers' failure to arrest abusers when evidence of criminal assault is unmistakable). *But cf.* 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, 246 (1994) (criticizing assumption that law enforcement officers are sympathetic toward abusers because assumption fails to account for race-based bias against Latino men). Even after a victim has obtained a protective order, officers are often hesitant to make arrests for violations of the order. *See* Kit 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, 224–25 (1993) (discussing common problem of police refusing to enforce orders when violator commits further domestic violence). Among the excuses with which police justify their failure to enforce protective orders are (1) the violence was committed outside the officer's presence, (2) the violation did not

keep the peace.[42] Although domestic "disturbances" are particularly volatile and unwelcome situations for law enforcement officers, many officers do not perceive that their indifference to the victim's plight perpetuates the abuse.[43] Frustration with inadequate protection, therefore, has led some victims of domestic violence to initiate civil rights suits against law enforcement officers and municipalities.[44]

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result in independent violence, and (3) the victim invited the abuser to violate the order. *Id.*

42. *See* Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 84 (1983) (describing Detroit Police Department's former written policy to "recognize the sanctity of the home" and handle situation "without making an arrest"); Gerald S. Reamey, *Legal Remedial Alternatives for Spouse Abuse In Texas*, 20 HOUS. L. REV. 1279, 1302 (1983) (noting that police remain hesitant to arrest, despite simplification of procedures for arrest); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) (commenting on historical police tendency to ignore domestic-abuse calls or to intentionally delay response for hours). One by product of police non-intervention in domestic violence cases is the emergence of civil suits against municipalities. *See* Thurman v. Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (concluding that law enforcement officers with notice of domestic violence have affirmative duty to "take reasonable measures to protect").

43. *See* McKee v. City of Rockwall, 877 F.2d 409, 424 (5th Cir. 1989) (stating that police reluctance to intervene in domestic violence situations increases women's vulnerability); Bartalone v. County of Berrien, 643 F. Supp. 574, 575 (W.D. Mich. 1986) (imposing liability upon police officer for failure to protect after victim asked for protection, whereupon victim was shot by her husband with shotgun); City of Grafton v. Swanson, 497 N.W.2d 421, 423 (N.D. 1993) (recognizing direct correlation between ineffective police intervention in domestic violence cases and continued existence of such violence). Officers often perceive domestic violence calls as extremely dangerous. *See* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 139 (1984) (commenting that police leave scene of domestic violence incident as soon as possible "hoping to prevent their own injury"); Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965 (1986) (asserting that officer "hearing 'family disturbance' on his or her radio perceives virtually as much danger as if call had been 'robbery in progress' "). Although some perceive that domestic violence calls are especially dangerous for police officers, evidence suggests that this is not the case. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 52 (1992) (stating that "domestic disturbance incidents, which account for 30% of police calls, account for only 5.7% of police deaths").

44. *See* Brown v. Grabowski, 922 F.2d 1097, 1100 (3d Cir. 1990) (explaining that civil rights claim was based upon allegations of "sloth and callousness" of police department failing to adequately respond to domestic violence); *see also* Eagleston v. Guido, 41 F.3d 865, 869 (2d Cir. 1994) (asserting civil rights violation because police failed to arrest husband after numerous violations of protective order culminating in husband stabbing wife 30 times); Hynson v. City of Chester, 864 F.2d 1026, 1028 (3d Cir. 1988) (discussing civil rights claim based upon police officers' failure to arrest abuser who killed woman only 20 hours after police responded to domestic-abuse call); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 53 (1992) (discussing genesis of movement toward civil actions against police for failing to protect

Many prosecutors and judges tend to treat domestic violence cases as unimportant or private.[45] Prosecutors are hesitant to charge abusers, or they may bring a lesser charge than the offense mandates.[46] Additionally, prosecutors often are eager to forego prosecution when the victim dis-

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victims of domestic violence as rooted in frustration with policy of non-intervention). The facts of the *Brown* case are illustrative of the tragic consequences of police inaction.

> Deborah Evans was found frozen to death in the trunk of her car in February of 1985 in a motel parking lot in Iselin, New Jersey. Clifton McKenzie, Evans' former live-in boyfriend, had abducted her and imprisoned her there. In a separate episode, which occurred shortly before this fatal abduction, McKenzie had held Evans hostage for a period of three days, during which he repeatedly threatened and sexually assaulted her. During the weekend following this preliminary reign of terror, members of Evans' family and Evans herself related these events to Patrolman William Schwartz and Detective Felix Grabowski of the Police Department of Roselle Borough, where Evans lived and where most of the events took place. Despite the entreaties of Evans and her family, however, no criminal charges against McKenzie were filed.

*Brown*, 922 F.2d at 1099–1100.

45. *See* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965 (1986) (recognizing that lawyers and judges tend to avoid tough domestic violence cases and receive similar criticisms as those directed at police departments). One Texas judge, while perhaps anomalistic in his candor, denied a protective order because, in his words, "[m]y main concern is keeping marriages together." Mark Ballard, *Edinburg Judge Awash in Criticisms*, TEX. LAW., Feb. 17, 1992, at 8. After denying a protective order to a woman who accused her husband of beating her, the judge remarked that "[i]f he hits her again, well, she can always file assault charges, and if he hits her hard enough, she can file aggravated assault. And if he kills her, you can put him away for murder." *Id.* Research in the middle and late 1970s identified a judicial resistance to responding to domestic violence issues. *See* Gerald T. Hotaling et al., *Intrafamily Violence, and Crime and Violence Outside the Family* (suggesting that prosecutors and judges treat domestic violence as private matter, mandating punishment only when it resulted in death or serious injury), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: A FAMILY VIOLENCE 315, 317 (Lloyd Ohlin & Michael Tonry eds., 1989). A related concern arises when one recognizes within legal institutions a seemingly serious, yet somewhat apathetic attitude toward domestic violence. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 11 (1986) (suggesting that murder among family members or acquainted persons is societal problem beyond control of law enforcement agencies).

46. *See* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965 (1986) (noting prosecutorial practice of charging domestic abusers with lesser crimes than actual offense mandates); Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727, 733 (1988) (stating that "prosecutors regularly refuse to charge husbands with domestic violence"); Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1146 (1994) (noting that some jurisdictions developed "no-drop" policies to combat prosecutorial reluctance to pursue domestic violence cases); *see also* Rene Lynch, *Spousal Abuse Is Rarely Prosecuted as a Felony in O.C. Crime: Statistics Indicate an Absence of Vigorous Pursuit of Cases in the County—95% of Arrests End Up as Misdemeanors*, L.A. TIMES, June 26, 1994, at A1 (reporting that in Orange County, California, 95% of felony domestic abuse arrests resulted in misdemeanor charges).

plays any unwillingness to proceed.[47] Judicial responses to domestic violence cases, such as ordering mediation of the conflict or granting mutual protective orders, also reflect misapprehensions of the dynamics of domestic violence.[48] Perhaps the most serious and dangerous flaw of some prosecutors and judges is an all-too-common, callous disregard for the gravity of a domestic-abuse victim's situation.[49] A stark example of these insensitive attitudes, present within even the highest echelons of Ameri-

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47. *See* Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 861 (1994) (noting routine practice in many jurisdictions for prosecutors to drop domestic violence cases "because the victim requests it, refuses to testify, recants, or fails to appear in court"); Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1145 (1994) (describing tendency of some prosecutors to treat domestic violence cases lightly or to readily agree to drop charges when victims balk at prosecution). This reluctance to champion the victim's case illustrates a misunderstanding of the victim's ability to control her situation. *Cf.* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 278 (1985) (recognizing victim's lack of control over situation and need for early intervention). Complicating an already difficult task is the fact that many domestic violence victims refuse to testify against their abusers. *See* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986) (declaring that "[n]one of us in the legal system needs a sociologist to tell us that family violence victims are often reluctant witnesses").

48. *See* Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 886–905 (1985) (criticizing use of mediation in domestic violence settings). *But see* Anna T. Laszlo & Thomas McKean, *Court Diversion: An Alternative for Spousal Abuse Cases* (failing to recognize dangers of court-ordered mediation in stating that "[c]ourt diversion of spouse abuse cases allows parties to recognize the underlying issues resulting in violent behavior"), *in* U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 327, 355 (1978). A judge's ignorance can be displayed in a failure to recognize the difficulty abused women encounter upon leaving a relationship. *Cf.* Mark Ballard, *Edinburg Judge Awash in Criticisms*, TEX. LAW., Feb. 17, 1992, at 8 (reporting on one controversial Texas judge who deems protective orders "worthless piece[s] of paper" and criticizes abused women for seeking orders of protection rather than divorce). In one recent civil rights case, a woman unsuccessfully attempted to sue the Illinois Judicial Inquiry Board for failing to investigate or act in response to her complaints about a judge's mishandling of her domestic violence case. *See* Jackson v. Illinois Judicial Inquiry Board, No. 93-C4690, 1993 U.S. Dist. LEXIS 12315, at *6 (N.D. Ill. Sept. 2, 1993) (concluding that plaintiff lacked standing to challenge state judicial board's decision not to investigate alleged judicial misconduct in domestic violence cases).

49. *See* Hope Keating, Comment, *Battered Women in Florida: Will Justice Be Served?*, 20 FLA. ST. U. L. REV. 679, 681–82 (1993) (discussing "insensitive and even hostile" attitudes of prosecutors handling domestic violence cases); *see also* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 3 (1993) (noting "[a]cross the board" failure to recognize special nature of "victim-offender relationship and other family dynamics"). *But see* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 518 (1993) (arguing that prosecutors are sensitive to domestic violence issues).

can legal institutions, was depicted in a cartoon that was circulated at a November 1994 State Bar of Texas directors meeting:

> [Picture: A man lean over a chair in which his female partner sits] What if I was to give you a choice, Helen. . . . I can say I'm sorry for being insensitive to your needs and not taking your feelings about our relationship seriously, whereupon we make up and possibly even conclude the discussion with lovemaking . . . or I could just take a .357 magnum and paint the wall with your spoiled-little-white-bitch brains.[50]

A fundamental ignorance of the dynamics of domestic violence shapes the attitudes of many officers, prosecutors, and judges.[51] This ignorance manifests itself in their responses to domestic violence situations, which increase the risk of violence against the victim and reinforce the abuser's misconception that his behavior is appropriate.[52]

## III. MICROCOSM: THE BATTERING RELATIONSHIP

Domestic violence is a form of domination; the tools, like the object, are power and control.

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50. *See* Robert Elder, *The Bar's Bored of Directors*, TEX. LAW., Nov. 28, 1994, at 2 (reprinting and commenting on cartoon displaying cavalier attitude toward victims of domestic violence); *see also* Jonita B. Borchardt, *"Vile" Cartoon Wasn't Funny*, TEX. LAW., Jan. 9, 1995, at 25 (lambasting State Bar for circulating loathsome cartoon).

51. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 269 (1985) (suggesting that legal response to domestic violence is half-hearted because of ignorance concerning dynamics of battering relationships). *But cf.* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 6 (1994) (arguing that present use of battered woman syndrome to help courts understand battering relationship is insufficient because of negative implication that women are not capable of self-governance, which exposes women to state interference in ways not applied to men).

52. *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 12 (1984) (identifying problems caused by unenlightened judicial response to domestic violence such as perpetuation of violence through non-enforcement of laws). The Attorney General's Task Force noted that "[t]his under-enforcement of the laws tells victims and assailants alike that family violence is not really a serious crime, if a crime at all." *Id.*; *see* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 107 (1987) (illustrating danger to abused women caused by judicial system's expectation of self-help because batterers not only abuse women for trying to fight back, but also for compliance and submission). Non-enforcement or half-hearted enforcement of the law obviously fails to provide immediate protection; more troublesome though, is that such attitudes ultimately endanger victims more by tacitly approving of the violence. *See* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 137 (1984) (analyzing tradition of far-less-than adequate legal intervention in domestic violence cases, when most effective mechanism for extinguishing domestic violence is swift and consistent negative reinforcement).

### A. *Profile of the Abuser*

Men who abuse women come in all shapes and sizes and represent every segment of society.[53] Abusers often can conceal the darker side of their personality from co-workers, friends, and even non-cohabitating family members.[54] Abusers commonly perceive themselves as merely assuming the "traditional" male role as head of the home, which allows them to rationalize their violent behavior.[55] For abusers who were them-

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53. U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 11 (1984); *see* ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES: THE DYNAMICS OF DOMESTIC VIOLENCE 29 (1987) (phrasing as oldest truism that domestic violence infects all aspects of society); Virgie L. Mouton, Note, *Wife Abuse Legislation in California, Pennsylvania and Texas*, 7 T. MARSHALL L. REV. 282, 286 (1982) (identifying common misconception that abuse occurs only among lower classes as opposed to more affluent classes); *cf.* Matthew Goldstein, *Complaining Witness's Absence Presents Hurdle at Trial of Judge*, N.Y. L.J., Jan. 26, 1995, at 1 (discussing case of Bronx judge accused of assaulting female partner). *But see* F.G. Bolton, *The Domestic Violence Continuum: A Pressing Need for Legal Intervention*, 66 WOMEN L.J. 11, 13 (1979) (stating that "the major stress within this [violent] family is its participation in lower socio-economic status"). The notion that wife beating occurs only in lower-class families is an ancient one. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *445 (discussing civil-law tradition permitting men "to beat his wife severely with scourges and sticks," and stating that "the lower rank of people . . . still claim and exert their ancient privilege").

54. *See* Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 331–32 (1994) (recognizing that abusers' ability to exhibit very different public and private personas leads society to "question whether domestic abuse actually occurs"); *see also* ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES: THE DYNAMICS OF DOMESTIC VIOLENCE 21 (1987) (describing case of high-level officer at Securities and Exchange Commission who resigned after his repeated wife beating became public knowledge). Wife abuse exists within the most "dignified" quarters of society. *See* ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES: THE DYNAMICS OF DOMESTIC VIOLENCE 21 (1987) (reporting observation of Washington, D.C. physicians that "a list of abusive men [in Washington, D.C.] would look like a *Who's Who* of Capitol Hill luminaries").

55. *See* DANIEL J. SONKIN ET AL., THE MALE BATTERER: A TREATMENT APPROACH 44 (1985) (noting that abusive men often fail to live up to "traditional male stereotype" and still perceive themselves as traditional men); Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 707–08 (1989) (commenting on gender stereotypes learned as children that abusive men internalize and conform to by aggressively dominating women); *see also* Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 430 (1994) (noting that even adolescent abusers consider themselves privileged to abuse their partners, usually based on gender-role expectations). Abusers also commonly blame their violent behavior on the victim or other people. Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 279 (1985).

selves reared in violent households, this assumption concerning traditional male roles is especially deep-rooted.[56]

Notwithstanding a self- and super-imposed veil of normalcy, the man who abuses his wife is simultaneously out of control and violently in control.[57] Unable or unwilling to manage his own anger, frustration, low self-esteem, or powerlessness within the culture outside the home, the abuser develops a subculture of domination within the home.[58] The abuser employs an arsenal of verbal and physical attacks and threats with which he satisfies a desperate need to control.[59] Typically, abusers are

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56. *See* Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 707 (1989) (noting that children who witness abuse in their homes are much more likely to re-create abuse in adult relationships). Boys who grow up learning from home experiences that abusing women is a man's right are unlikely to encounter serious challenges to this notion because of popular culture's fixation on "macho heroes and docile female stereotypes." *See* ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES: THE DYNAMICS OF DOMESTIC VIOLENCE 38 (1987) (explaining "generational transfer theory" in which boy imitates parents' violent behavior).

57. *See* ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 88–89 (1994) (noting that abusers are intent on controlling victim and turning her into what he wants her to be); Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 708 (1989) (recognizing abuser's paradoxical explanation for their behavior as "both deliberate and uncontrollable"); *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 51–52 (1987) (explaining that batterers often cite provocation as rationale for their abuse of women, whereas victims "attribute the occurrence of violence to power struggles").

58. *See* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2117 (1993) (identifying "culture of battering" characterized by "subtle phrases and modes of interaction that have meanings and symbols idiosyncratically shared by the two parties"); *see also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 286 (1985) (explaining abuser's insatiable need to dominate and constrain his wife, and his self-doubt, low self-esteem, and insecurities); Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1138 (1994) (describing abusers as lacking self-esteem, "feeling powerless to control their lives," and "atypically anxious and depressed"); *cf.* Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1420 n.177 (1993) (stating that reasons abusers give for beating their victims are often things beyond victim's control). The abuser's low self-esteem is partially a function of unassertiveness or an inability to get what they want in a non-threatening manner. *See* DANIEL J. SONKIN ET AL., THE MALE BATTERER: A TREATMENT APPROACH 44 (1985) (investigating sources of abuser's feelings of low self-esteem, including lack of communication skills for "emotional realm").

59. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 286–88 (1985) (associating various abusive actions with need to control). The injuries that abusers inflict range

excessively dependent upon their victims and are extremely jealous.[60] Therefore they attempt to isolate their victims from family and friends and, in some cases, from any contact whatsoever with the world outside the home.[61] This combination of extreme dependence and violent control makes the abuser a dangerous man to live with, but an even more dangerous man to leave.

### B. *Abused Women and the Battered Woman Syndrome*

Although incidents of domestic violence against women range from the isolated and relatively mild to the vicious, continuous, and deadly, many abused women share common experiences that, when understood, can assist officers, prosecutors, and judges in dealing with violent relationships.[62] "Battered woman syndrome," developed by Dr. Lenore Walker

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in severity depending upon the man's propensity to violence. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 69 (1987) (listing injuries that abusers inflicted upon their wives and partners as "bruises, cuts, black eyes, concussions, broken bones, and miscarriages caused by beatings, . . . damage to joints, partial loss of hearing or vision, and scars from burns, bites, or knife wounds"). Abusers also commonly employ threats to kill or injure their victims, themselves, or third persons in an attempt to persuade the victim to stay in the relationship. *Id.* at 67; *see* ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES: THE DYNAMICS OF DOMESTIC VIOLENCE 29 (1987) (comparing abusive men to "animal traps with hairspring release mechanisms, needing little excuse to become destructively angry").

60. *See* State v. Bednarz, 507 N.W.2d 168, 170 (Wis. Ct. App. 1993) (describing batterers as "jealous, accusatory, controlling, criticizing and demanding"); *see also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 279 (1985) (stating that abusers are especially adept at employing fear, manipulation, persuasion, and coercion to force victims to stay in relationship).

61. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2827 (1992) (discussing trial court finding that "[s]ecrecy typically shrouds abusive families. . . . Battering husbands often threaten their wives or children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her"). An abuser's constantly watchful eye, while initially interpreted as a showing of affection, may turn into an obsession for control over his victim. *See* Irene H. Frieze & Angela Browne, *Violence in Marriage* (examining how "attentiveness" may evolve into "a requirement that [the wives] account for every hour of their time"), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 163, 186 (Lloyd Ohlin & Michael Tonry eds., 1989).

62. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 277–78 (1985) (stating that effective legal intervention in violent relationships must be preceded by understanding of parties involved and nature of abusive relationships); *see also* Irene H. Frieze & Angela Browne, *Violence in Marriage* (observing that most research dealing with domestic violence has focused upon women as victims of violence), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 163, 170 (Lloyd Ohlin & Michael Tonry eds., 1989). The term "battered woman," though a term of art used to describe a psychological condition, is sometimes used to describe women who have not suffered continuous abuse.

and others, is a subcategory of post-traumatic stress disorder occurring in women who are, or have been, "in intimate relationships with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse."[63] To help understand and explain battered women's experiences, researchers developed theories based upon common behavioral patterns that illuminate the dynamics of violent relationships.[64] One such theory, the "cycle theory of violence," challenges common stereotypes concerning battered women and provides answers to the frequently repeated question: "Why didn't she leave?"[65]

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*See* David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1056 (1989) (criticizing definition of battered woman as being overinclusive).

63. LENORE WALKER, THE BATTERED WOMAN SYNDROME 203 (1984). Battered woman syndrome and "[t]he cycle of victimization and dependence that develop in systematically abused women [are] now . . . established psychological phenomen[a]." United States v. Gaviria, 804 F. Supp. 476, 479 (E.D.N.Y. 1992); *see* State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) (acknowledging that no easy answer exists for understanding woman's failure to leave an abusive spouse after continuous and vicious, physical and psychological attacks). Battered woman syndrome is neither a mental disease nor a mental defect. *See* United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) (recognizing battered woman syndrome as behavioral and psychological reaction to long-term abuse).

64. *See* People v. Romero, 13 Cal. Rptr. 2d 332, 336 (Ct. App. 1992) (discussing psychological condition of "learned helplessness" that is used to help explain inaction of women experiencing battered woman syndrome); People v. Aris, 264 Cal. Rptr. 167, 178 (Ct. App. 1989) (reviewing testimony of Dr. Lenore Walker concerning learned helplessness as aspect of battered woman syndrome akin to "psychological paralysis"). Subjection to repeated cyclical patterns of violence leads to the victim's "inability to predict her own safety or the effect that her behavior will have on the abuser," which places the victim in state of learned helplessness. People v. Yaklich, 833 P.2d 758, 760–61 (Colo. Ct. App. 1991); *see* Hope Keating, Comment, *Battered Women in Florida: Will Justice Be Served?*, 20 FLA. ST. U. L. REV. 679, 684 (1993) (illustrating that "cycle theory of violence explains how women become victims of abuse and fall into learned helplessness"); Joan M. Schroeder, Note, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 557 (1991) (stating that cycle theory of violence and learned helplessness "help explain the battered woman syndrome" and why women might stay with abusers).

65. State v, Kelly, 478 A.2d 364, 371 (N.J. 1984); *see* Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 368 (1992) (examining concepts of "cycle of violence" and "learned helplessness," which interpret victim's behavior to judges and juries who may view victim's behavior as illogical); *see also* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 392–94 (1993) (discussing battered woman syndrome as explanation to why some women kill rather than leave their abusive mates); Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 557 (1991) (explaining that learned helplessness and battered woman syndrome help explain why women stay with abusive mates); *see also* Monique M. Gousie, Comment, *From Self-Defense to Coercion:* McMaugh v. State *Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder*, 28 NEW ENG. L. REV. 453, 459 (1993) (discussing increasing willingness of states to admit battered woman syndrome

The first phase of this three-phased cycle begins with "minor" battering.[66] During this first phase, the woman is predominately compliant—often minimizing the violence—and may even feel that she deserves the abuse.[67] As these minor battering incidents continue, tension builds between the batterer and the woman until the batterer erupts uncontrol-

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testimony to "dispel common myths" such as that "a battered woman is always free to leave her aggressor"). Numerous courts have permitted evidence of battered woman syndrome to explain the actions of women victims accused of assaulting or murdering their abusers. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1979) (acknowledging possible admissibility of Dr. Lenore Walker's testimony on battered woman syndrome); Hawthorne v. State, 408 So. 2d 801, 806 (Fla. Dist. Ct. App. 1982) (approving of expert testimony on battered woman syndrome because jurors may not understand why victim would not leave or inform police or friends); Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981) (reversing trial court's exclusion of expert testimony on battered woman syndrome); State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) (recommending expert testimony on battered woman syndrome to assist jurors in understanding victim's action or inaction); Commonwealth v. Rodriguez, 633 N.E.2d 1039, 1042 (Mass. 1994) (reversing trial court for failure to admit evidence of past history of abuse against woman accused of murdering husband); *Kelly*, 478 A.2d at 375 (finding expert testimony on battered woman syndrome relevant to victim's state of mind at time she stabbed husband); State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990) (recognizing "substantial scientific acceptance" warranting admissibility of expert testimony on battered woman syndrome); *see also* State v. Hickson, 630 So. 2d 172, 174–75 (Fla. 1993) (surveying states admitting evidence of battered woman syndrome and discussing differences in applicability between jurisdictions). *See generally* Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 667 (1990) (delineating present uses of battered woman syndrome testimony in cases involving women who struck back at their aggressors). A recent Rhode Island case construed a woman's claim that she suffered from battered woman syndrome as "newly discovered evidence" justifying a new trial after she was convicted of murder along with her husband. *See* McMaugh v. State, 612 A.2d 725, 732 (R.I. 1992) (stating that battered woman syndrome evidence could rebut element of premeditation or completely exonerate woman if believed by jury).

66. LENORE WALKER, THE BATTERED WOMAN 79 (1979). These minor incidents of abuse can consist of "a slap in the face, a smack on the rear end, a pinch on the cheek or arm, a playful punch, and hair pulling." *Id.*; *see* Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 369 (1992) (recognizing relatively mild battering as first stage of cyclical pattern of violence). Women victims often respond to this initial violence with shock, disbelief, withdrawal, and self-doubt. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 52–53 (1987). Most victims do not try to leave the relationship after the first incident. *Id.* The women who do leave at this point often return upon the abuser's pleadings. *Id.*

67. LENORE WALKER, THE BATTERED WOMAN 56 (1979); *see Kelly*, 478 A.2d at 371 (describing first phase of cycle theory of violence characterized by verbal abuse and minor battering); State v. Bednarz, 507 N.W.2d 168, 170 (Wis. Ct. App. 1993) (explaining this "tension building phase" when victim "tries to please, walks on eggshells and does not want to rock the boat"); *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 63 (1987) (describing abused women's "repeated attempts to understand the explosions and to look for ways to work through the problem"); Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 369

lably into phase two—the "acute battering incident."[68] The acute battering incident is an extremely violent act or acts, after which the abuser enters phase three, in which he displays seemingly intense love toward his victim.[69] Victimized women may believe that the acute battering was an isolated incident or, if it was not the first such incident, that it will not continue.[70] The abuser's intense, if short-lived, display of caring and affection in phase three may convince the victim not to leave the relation-

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(1992) (explaining women's reaction to minor battering "by becoming docile, placating her partner, or by making studied attempts to avoid him").

68. LENORE WALKER, THE BATTERED WOMAN 59 (1979); *see Kelly*, 478 A.2d at 371 (stating that phase-one tension becomes intolerable until trigger sets off serious violence); *Bednarz*, 507 N.W.2d at 170 (describing expert's characterization of this stage as "explosion stage"). The term "acute battering incident" fails to capture the true heinousness of the violence. *Cf.* State v. Borrelli, 629 A.2d 1105, 1107 (Conn. 1993) (detailing man's attacks on wife, including smothering her with pillow, tying "her hands and feet together with rope behind her back," cutting her lips with knife, and holding "a cigarette lighter near her genital area"); Commonwealth v. Rodriguez, 633 N.E.2d 1039, 1041 (Mass. 1994) (describing man's attacks on wife as he "verbally abused the defendant; hit and punched her on many occasions; tried to strangle her with an extension cord; raped her; punched her in the abdomen while she was pregnant with their son; threw bleach in her face; and held a baseball bat to her head and threatened to kill her with it"); Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 665 (1990) (illustrating severity of violence in "not an unusual couple," in which husband "punctured [wife's] lung with his fist, ruptured her spleen with steel-toed boots and broke[ ] her nose with a beer bottle").

69. LENORE WALKER, THE BATTERED WOMAN 66 (1979); *see Kelly*, 478 A.2d at 371 (describing third phase of battering cycle by extreme contrition and affectionate behavior from battering male). This phase is referred to as the "loving respite" phase. *See* Fennell v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985) (describing three phases of cycle of violence, of which third phase is "characterized by calm and loving behavior of the batterer, coupled with pleas for forgiveness"). If the woman attempts to fight back or "talk back" after the man abuses her, she may only provoke more severe violence. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 107 (1987) (addressing enhanced danger to women who attempt to fight back against abuser).

70. *See* LENORE WALKER, THE BATTERED WOMAN 67 (1979). If the women grew up in violent households, they are more likely to believe that the abuse is normal. *Kelly*, 478 A.2d at 372. An identifiable coping mechanism for abused women, and for others experiencing traumatic events, is to "redefine" or minimize what has happened to them. *See* Irene H. Frieze & Angela Browne, *Violence in Marriage* (comparing typical response of battered woman with similar re-interpretations created by cancer victims), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 163, 197 (Lloyd Ohlin & Michael Tonry eds., 1989).

ship.[71] As these cycles continue, the victim becomes more passive and compliant; eventually, she convinces herself that she cannot escape.[72]

The most violent and deadly attacks often occur when abused women attempt to leave their abusers.[73] As the abuser's web of control over his

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71. *See Bednarz*, 507 N.W.2d at 170 (describing third stage when abuser "often apologizes, sends gifts and love letters, blames other things or persons—such as alcohol or family pressures—and promises to change"); Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 370 (1992) (stating that abuser's loving behavior "reinforces the reasons she was first attracted to him and the reasons she loves him"). After multiple revolutions of the cycle, the battered woman becomes "psychologically trapped." *See* United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) (referring to response of women who are subjected to continuous and systematic abuse by their male partners). The theory of learned helplessness is also used to explain why women sometimes do not leave abusive relationships. *See id.* (discussing effects of learned helplessness on battered women and how they are misinterpreted as indicating weak character); *cf.* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 118 (1987) (explaining woman's frustration and eventual submission that led to her killing husband when husband kept finding and abusing her after repeated attempts to leave).

72. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 282–83 (1985) (analyzing victim's emotional dependence upon abuser and low self-esteem acquired as result of numerous cycles of violence); *see also* Rick Brown, Note, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 668–69 (1990) (analogizing battered woman's situation with that of a "hostage or prisoner of war," and acknowledging factors fueling victim's sense of hopelessness, such as financial dependence, lack of assistance, shame, guilt, and fear); *cf.* Cindy Loose, *Case Has Area Hot Lines Jumping*, WASH. POST, June 24, 1994, at A22 (commenting on recent increase in calls to domestic violence hotline as women viewing domestic abuse on television begin to realize that they too are being abused). With every new cycle of violence, the victim becomes more entrenched until she feels powerless to leave. *See Casey*, 112 S. Ct. at 2828 (stating that "[m]any victims of domestic violence remain with their abusers, perhaps because the perceive no superior alternative"); *Bednarz*, 507 N.W.2d at 170 (explaining victim's conflicting feelings of guilt, need, pity, and hope); *see also* Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 370 (1992) (noting that "[a]fter the battered woman is repeatedly subjected to the cycle of violence, she comes to believe that her batterer is omnipotent"). Even when battered women leave their abusers, economic pressures may force them to return. *Casey*, 112 S. Ct. at 2828; *see* State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) (suggesting that "emotional and financial dependency" are primary reasons women do not leave their abusers). Focusing on the victim's lack of control, one commentator has asserted that the most important factors concerning battering are: "(1) the abused woman cannot control the batterer; (2) the violence will only cease through intervention; and (3) the sooner the intervention comes after the couple's first violent incident, the better the prognosis for ending the abuse permanently and keeping the family together." Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 278 (1985) (footnotes omitted).

73. *See* People v. Yaklich, 833 P.2d 758, 761 (Colo. Ct. App. 1991) (acknowledging that "abuse often escalates at the time of separation," making attempt to leave abuser

victim begins to unravel, he becomes more desperate and violent than ever before.[74] Domestic violence is much more likely to become lethal as the abuser attempts to maintain control over his victim, focusing his enhanced rage and desperation on the victim's attempt to separate.[75] Abused women often seek legal assistance at the point of separation; tragically, it is at this same point that the judicial system too often fails to protect.[76]

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particularly dangerous); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 58 (1991) (examining how abusers fail to cope with women leaving, and describing their feelings of abandonment and loss of control leading them to kill); Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Perceived Problems with Today's Injunction System*, 19 OHIO N.U. L. REV. 271, 271 (1992) (discussing concept of "separation assault," and noting that 50% of all women who leave their spouses because of abuse are harassed, followed, or attacked by their spouses).

74. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991) (stating that, at point of separation when victim first seeks legal assistance, "the batterer's quest for control often becomes most acutely violent"). Sexual assault, one notorious form of male domination of women, is likely to occur in the most violent relationships and can be used as a tool to attack the woman's attempt to leave. *See* Irene H. Frieze & Angela Browne, *Violence in Marriage* (analyzing research on violent marriages and finding that most violent episodes include both sexual and physical assaults), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 163, 189 (Lloyd Ohlin & Michael Tonry eds., 1989); *see also* DANIEL J. SONKIN ET AL., THE MALE BATTERER: A TREATMENT APPROACH 72–80 (1985) (compiling and analyzing factors that may help predict when incident of abuse is likely to become lethal). An abuser's threats of violence, which often precede physical abuse, are frequently directed particularly at the woman's attempt to leave the relationship. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 66–67 (1987). The abuser will even threaten to kill himself when the woman suggests ending the relationship. *Id.*

75. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6 (1991) (stating that domination and control in battering relationship is particularly focused on moment of separation); Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 930 (1991) (stating that "risk of extreme violence can be even higher when the victim attempts to leave the relationship"); *cf.* Bob Hohler, *Court's Shield Can Draw a Bullet*, BOSTON GLOBE, Oct. 7, 1992, (Metro), at 1 (suggesting that increase in spousal murders could coincide with increase in issuance of protective orders because such orders instigate violent reactions from abusers).

76. *See* Linda R. Keenan, Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407, 408 (1985) (stating that "[m]any experts agree that the legal system fails to protect battered wives").

## IV. PROTECTION OF THE FAMILY: TEXAS'S STATUTORY RESPONSE

### A. *Title IV of the Texas Family Code*

In 1979, the Texas Legislature recognized that domestic violence was a problem in need of both civil and criminal statutory reform.[77] The civil remedial scheme, entitled "Protection of the Family," was a statutory amendment to the Family Code that allowed victims of family violence to obtain civil protective orders against their abusers.[78] In the protective

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77. *See* Act of April 19, 1979, 66th Leg., R.S., ch. 98, 1979 Tex. Gen. Laws 182, 185–89 (codified as amended at TEX. FAM. CODE ANN. §§ 71.01-71.19 (Vernon 1986 & Supp. 1995)) (creating Title IV of Texas Family Code to protect family members against acts of violence committed by other family members); *see also* McKee v. City of Rockwall, 877 F.2d 409, 424 (5th Cir. 1989) (discussing 1979 amendment to Texas Penal Code and noting that "[t]he Texas legislature felt it was necessary to make it explicit that husbands cannot beat their wives"). *See generally* Virgie L. Mouton, Note, *Wife Abuse Legislation in California, Pennsylvania and Texas*, 7 T. MARSHALL L. REV. 282, 299 (1982) (describing Texas, California, and Pennsylvania legislative responses to domestic violence as concessions that "a spouse abuse problem exists"). Subsequent amendments to the Code of Criminal Procedure clarified the legislature's commitment to eliminating domestic violence:

> (a) Family violence is a serious danger and threat to society and its members. Victims of family violence are entitled to the maximum protection from harm and abuse or the threat of harm and abuse as is permitted by law.
>
> (b) In any law enforcement, prosecutorial, or judicial response to allegations of family violence, the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim.

TEX. CODE CRIM. PROC. ANN. art. 5.01(a)-(b) (Vernon Supp. 1995); *see* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965 (1986) (stating that legislative intervention became necessary because everyone has reason to dislike domestic violence cases).

78. *See* Virgie L. Mouton, Note, *Wife Abuse Legislation in California, Pennsylvania and Texas*, 7 T. MARSHALL L. REV. 282, 297–99 (1982) (explaining Texas's then-recently-enacted civil protective order statute and comparing it to similar statutes in California and Pennsylvania). Prior to 1979, the legal alternatives available to abused women in Texas were largely limited to criminal prosecutions and divorce actions, neither of which adequately addressed the imminent danger of the victim's predicament. *See* Gerald S. Reamey, *Legal Remedial Alternatives for Spouse Abuse in Texas*, 20 HOUS. L. REV. 1279, 1287–99 (1983) (examining array of civil and criminal remedies available to victims of domestic violence before enactment of Title IV). Other civil remedies were available; however, they were often tailored too narrowly to offer protection to the majority of abuse victims. *See* Lisa G. Lerman, *Legal Help for Battered Women* (discussing shortcomings of peace bonds, divorce, or tort actions as solutions for victimized women), *in* ABUSE OF WOMEN: LEGISLATION, REPORTING, AND PREVENTION 29, 33–35 (Joseph J. Costa ed., 1983). The initial definition of family violence was "the intentional use or threat of physical force by a member of a family or household against another member of the family or household, but [not including] the reasonable discipline of a child by a person having that duty." Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 11, 1979 Tex. Gen. Laws 182, 185–89 (codified as amended at TEX. FAM. CODE ANN. § 71.01(b)(2) (Vernon Supp. 1995)); *see* Gerald S. Reamey, *Legal Remedial Alternatives for Spouse Abuse in Texas*, 20 HOUS. L. REV. 1279, 1280 (1983) (commending legislature's choice of definition because it "realisti-

order, a judge may, among other things, prohibit a party from committing further family violence, exclude him from the household, and prohibit him from communicating with the family.[79] Recognizing the urgency of a victim's predicament, the legislature designed a relatively expedient and inexpensive scheme for obtaining protective orders.[80] Moreover, the leg-

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cally avoids the term 'wife-beating' as too simplistic a description of abusive relationships"). Notably, initial definitions of "family" and "household" were broad enough to extend protection to related, married, and formerly married persons, as well as to cohabitating, yet unmarried persons. Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 11, 1979 Tex. Gen. Laws 182, 185–89 (codified as amended at TEX. FAM. CODE ANN. § 71.01(3),(5) (Vernon Supp. 1995)). The Act also applied to persons who formerly lived together, whether or not they ever married, so long as one had filed an application for protective order. *Id.*

79. Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 11, 1979 Tex. Gen. Laws 182, 185–89 (codified as amended at TEX. FAM. CODE ANN. § 71.11 (Vernon Supp. 1995)). The protective order might also prohibit an abuser from going to or near any place listed in the order. TEX. FAM. CODE. ANN. § 71.11(b)(3),(4) (Vernon Supp. 1995). This provision raises interesting issues in light of the court's ability to strike the address of the person to be protected from the public records. *See* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 367–68 (1992) (analyzing "Kafkaesque" implications of statement in Penal Code rejecting, as defense for violating protective order, that protective order did not list place defendant was arrested for visiting). The tension is this: if the protective order does not specify the victim's address, how can the defendant be penalized for going somewhere he does not know is off limits? *Id.* Section 71.11 also allows the court to grant exclusive possession of a child and to prohibit the respondent from removing the child from the applicant. TEX. FAM. CODE. ANN. 71.11(a)(1)(A), (a)(3) (Vernon Supp. 1995). The judge can require one or both of the parties "to counsel with a social worker, family service agency, physician, psychologist, or licensed professional counselor, or to complete a batterer's treatment program." *Id.* § 71.11(a)(5); *see* TEX. HUM. RES. CODE ANN. § 51.001-011 (Vernon 1990 & Supp. 1995) (creating family violence shelters that provide counseling and education for both victims and abusers); *see also* Leonore Walker, *Wife Beating: Causes, Treatment, and Research Needs* (discussing need for multiple levels of intervention, including treatment programs for batterers and victims, as well as shelters and other institutional support), *in* BATTERED WOMEN: ISSUES OF PUBLIC POLICY 160, 163 (1978). Section 71.11 also contains a catch-all provision that, on its face, vests the judge with significant discretion in formulating remedies. *See* TEX. FAM. CODE ANN. § 71.11(a)(7) (Vernon Supp. 1995) (allowing judge to "prohibit a party from doing specified acts or require a party to do specified acts necessary or appropriate to prevent or reduce the likelihood of family violence"); *see also* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 9 (1994) (suggesting that Texas judges become aware of full "range of options available for the disposition of cases involving domestic violence").

80. *See* TEX. FAM. CODE ANN. § 71.09(a) (Vernon 1986 & Supp. 1995) (providing for hearing on application for protective orders within 14 days of filing with clerk of court, unless applicant requests later date); *id.* § 71.04(e) (setting fee for application for protective order). Section 71.04(e) precludes the clerk from charging an applicant more than $36 "under any circumstances," even if multiple citations are required. *Id.* § 71.04(e) (Vernon Supp. 1995); Op. Tex. Att'y Gen. No. DM-298 (1994) (construing § 71.04(e) as absolutely prohibiting clerk from charging over $36, even if multiple citations are required, and noting

islature empowered courts to enter immediate, temporary protective orders if "there is clear and present danger of family violence."[81] To enforce either temporary or permanent protective orders, courts may exercise their civil contempt powers, which usually entail assessing fines or short confinements.[82]

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that "[t]he legislature designed Title IV of the Family Code in part to provide protective orders to persons who are poor"). In 1989, the legislature changed the time within which a hearing on an application for protective order must be held from 20 to 14 days, except that prosecutors in counties with populations greater than 1.5 million are allowed to request a period of 20 days. Act of May 27, 1989, 71st Leg., R.S., ch. 614, § 6, 1989 Tex. Gen. Laws 2014, 2016 (codified as amended at TEX. FAM. CODE ANN. § 71.09 (Vernon Supp. 1995)); *see* Gerald S. Reamey, *Legal Remedial Alternatives for Spouse Abuse in Texas*, 20 HOUS. L. REV. 1279, 1288 (1983) (noting practical necessity of quick and inexpensive remedies for domestic-abuse victims).

81. Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 11, 1979 Tex. Gen. Laws 182, 185–89 (codified as amended at TEX. FAM. CODE ANN. § 71.15 (Vernon 1986 & Supp. 1995)). These expedited orders can be granted ex parte. *See* TEX. FAM. CODE ANN. § 71.15(a) (Vernon Supp. 1995) (suspending requirement of notice to other party when court finds clear and present danger). The temporary order was included to cover emergency situations; therefore, its duration was limited. *See id.* § 71.15(b),(c) (Vernon 1986) (confining temporary order's duration to 20 days but providing for additional 20-day extensions). To counter the possibility of fraudulently obtained protective orders, § 71.15(e) allowed "[a]ny member of the family or household [to] . . . file a motion to vacate a temporary ex parte order"). *See id.* § 71.15(e) (requiring judge to set hearing on motion to vacate "as soon as possible"). Although there are no Texas cases defining the proof needed to exclude an abuser from the household on an ex parte order, the language of the Texas statute requires a previous act of family violence and a clear and present danger of further violence. *See id.* § 71.15(h)(2),(3) (permitting exclusion from household pursuant to temporary, ex parte protective order when abuser has committed family violence within past 30 days and "there is a clear and present danger of family violence . . . in the foreseeable future").

82. *See* Lee v. State, 799 S.W.2d 750, 752–53 (Tex. Crim. App. 1990) (discussing court's contempt powers in conjunction with violation of civil protective order). As noted by the Court of Criminal Appeals in *Lee*, the protective order must specifically direct a person to do, or refrain from doing, certain acts before it can support an exercise of the court's civil contempt powers. *Id.* The contempt power is a power inherent in the authority of a court to exercise its jurisdiction and enforce its orders and decrees. *See* TEX. GOV'T CODE ANN. § 21.001(a) (Vernon 1988) (defining inherent powers and duties of courts). The permissible punishments are contained in § 21.002 of the Government Code, which provides in part:

> (b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than $500 or confinement in the county jail for not more than six months, or both such fine and confinement in jail.
>
> . . .
>
> (e) This section does not affect a court's power to confine a contemner to compel him to obey a court order.

*Id.* § 21.002(b), (e). Although a civil contempt proceeding is, by definition, a civil matter, it should conform closely to criminal procedure because of its quasi-criminal nature. *See* Op.

Demonstrating a steadfast commitment to eliminating domestic violence, the legislature broadened and strengthened the statutory framework through frequent amendments and additions.[83] The legislature's first significant change extended protective orders to women involved in pending divorce actions.[84] In addition, the first round of amendments brought more prosecutors and courts to the battle against domestic violence and attempted to ensure applicants' protection by deleting the victim's address from the application.[85] This concern for confidentiality of the victim's location arose again in a subsequent amendment permitting judges, "[o]n the request of a member of a family or household," to strike the victim's address and telephone number from all but confidential court

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Tex. Att'y Gen. No. JM—977 (1988) (asserting that civil contempt proceeding is somewhat analogous to a criminal proceeding).

83. *See* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 357–66 (1992) (tracing and analyzing legislative amendments to Title IV and other legislation between 1983 and 1991). By 1983, Texas had developed one of the most comprehensive statutory schemes of all of the states scurrying to remedy domestic violence. *See* Lisa G. Lerman et al., *State Legislation on Domestic Violence* (outlining scope of statutes for each state that had passed legislation designed to prevent domestic violence), *in* ABUSE OF WOMEN: LEGISLATION, REPORTING, AND PREVENTION 38, 48–51 (Joseph J. Costa ed., 1983).

84. Act of June 19, 1983, 68th Leg., R.S., ch. 631, § 1, 1983 Tex. Gen. Laws 4046, 4047 (codified as amended at TEX. FAM. CODE ANN. § 3.581 (Vernon 1993)). The statute initially contained a loophole that allowed a husband against whom a protective order was pending to nullify the protective order by filing for divorce. Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 11, 1979 Tex. Gen. Laws 182, 186 (codified as amended at TEX. FAM. CODE ANN. § 71.06 (Vernon Supp. 1995)). Titled "Dismissal of Application," Section 71.06 initially provided: "If a suit for the dissolution of marriage is pending, no application or portion of an application involving the relationship between the spouses or their respective rights, duties, or powers may be considered, and the application or portion of the application relating to those parties shall be dismissed." *Id.* Because a woman is particularly susceptible to abuse during the pendency of a divorce, the statute failed to protect some who most needed protection. The 1983 amendments substituted the words "has been filed before the date on which an application for a protective order is filed and that suit is pending on the date that the application is filed" for the words "is pending." Act of May 24, 1983, 68th Leg., R.S., ch. 607, § 4, 1983 Tex. Gen. Laws 3857, 3859 (codified as amended at TEX. FAM. CODE ANN. § 71.06 (Vernon Supp. 1995)). The current version of § 71.06 requires the judge to advise the applicant to seek the protective order under § 3.581 of the Family Code. TEX. FAM. CODE ANN. § 71.06(b) (Vernon Supp. 1995).

85. *See* Act of May, 24, 1983, 68th Leg., R.S., ch. 607, § 3, 1983 Tex. Gen. Laws 3857, 3858–59 (codified amended at TEX. FAM. CODE ANN. § 71.05(a)(1) (Vernon 1986 & Supp. 1995)) (deleting requirement that applicant state address in application for protective order); Act of May 24, 1983, 68th Leg., R.S., ch. 607, § 1, 1983 Tex. Gen. Laws 3857, 3857 (current version at TEX. FAM. CODE ANN. § 71.01(b)(1) (Vernon 1986)) (expanding courts permitted to grant protective orders to include district courts, courts of domestic relations, juvenile courts having jurisdiction of district courts, county courts, or any other court as later designated by statute).

documents.[86] The legislature continued to broaden the scope of protection by redefining "family" to include unmarried "biological parents of the same child"[87] and, only a few years later, by affording former members of a household protection, irrespective of whether they were members of the household when the violence was committed.[88]

### B. *Texas Criminal Statutes*

Chapter Five of the Texas Code of Criminal Procedure is the criminal analogue to the civil protective order scheme in Title IV.[89] With its enactment of Chapter Five in 1985, the legislature clearly emphasized that victim protection is the paramount goal of all legal officers involved in domestic violence cases.[90] Chapter Five commands that the primary duties of police officers investigating domestic violence calls are "to protect

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86. Act of May 24, 1985, 69th Leg., R.S., ch. 469, § 1, 1985 Tex. Gen. Laws 1638, 1639 (current version at TEX. FAM. CODE ANN. § 71.111 (Vernon Supp. 1995)). This provision was again amended in 1989 to permit the court to strike the applicant's place of employment or business and the child-care facility or school attended by a child protected by an order. Act of May 29, 1989, 71st Leg., R.S., ch. 614, § 11, 1989 Tex. Gen. Laws 2014, 2018; Act of May 27, 1989, 71st Leg., R.S., ch. 739, § 21, 1989 Tex. Gen. Laws 3306, 3310 (codified as amended at TEX. FAM. CODE ANN. § 71.111 (Vernon Supp. 1995)).

87. Act of May 27, 1985, 69th Leg., R.S., ch. 583, § 4, 1985 Tex. Gen. Laws 2201, 2203 (codified as amended at TEX. FAM. CODE ANN. § 71.01(b)(3) (Vernon 1986 & Supp. 1995)).

88. Act of May 25, 1987, 70th Leg., R.S., ch. 677, § 3, 1987 Tex. Gen. Laws 2528, 2528 (codified as amended at TEX. FAM. CODE ANN. § 71.04(d) (Vernon Supp. 1995)).

89. *See* Act of May 27, 1985, 69th Leg., R.S., ch. 583, § 1, 1985 Tex. Gen. Laws 2201, 2201–02 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 5.01-07 (Vernon Supp. 1995)) (enacting criminal legislation for prevention of domestic violence by proper enforcement of civil protective orders); *see also* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965–67 (1986) (discussing recent addition of Chapter Five of the Code of Criminal Procedure as "latest legislative attempt to address the problem of family violence," and noting that "it is no longer fashionable for the legal system to ignore family violence").

90. *See* TEX. CODE CRIM. PROC. ANN. art. 5.01 (Vernon Supp. 1995) (stating seriousness of problem of family violence and stressing entitlement of victims to protection by law). Sensitive to the fact that some victims do not know they are entitled to protection, the legislature requires that the following notice be given to all victims:

> NOTICE TO ADULT VICTIMS OF FAMILY VIOLENCE
> It is a crime for any person to cause you any physical injury or harm EVEN IF THAT PERSON IS A MEMBER OR FORMER MEMBER OF YOUR FAMILY OR HOUSEHOLD.
> Please tell the investigating peace officer:
> IF you, your child, or any other household resident has been injured; or
> IF you feel you are going to be in danger when the officer leaves or later.
> You have the right to:
> ASK the local prosecutor to file a criminal complaint against the person committing family violence; and

any potential victim of family violence, enforce the law, and make lawful arrests."[91] Within the statute, the legislature also reminds police, prosecutors, and judges that familial relationships between abusers and victims does not suspend their duty to uphold the law and protect victims of crime.[92] To facilitate the execution of these duties, the legislature made

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APPLY to a court for an order to protect you (you should consult a legal aid office, a prosecuting attorney, or a private attorney). For example, the court can enter an order that:
(1) the abuser not commit further acts of violence;
(2) the abuser not threaten, harass, or contact you at home;
(3) directs the abuser to leave your household; and
(4) establishes temporary custody of the children and directs the abuser not to interfere with the children or any property. . . .

TEX. CODE CRIM. PROC. ANN. art. 5.04 (Vernon Supp. 1995); *see Lawyers Against Domestic Violence*, 49 TEX. B.J. 1070, 1071 (1986) (commenting on domestic violence victims' tragic lack of understanding of their legal rights); *see also* Kit 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, 227 (1993) (explaining that police officers fail to provide domestic violence victims with information about available protection even though statutes specifically impose this duty upon officers).

91. TEX. CODE CRIM. PROC. ANN. art. 5.04 (Vernon Supp. 1995). Moreover, Chapter Five requires police officers who respond to domestic violence complaints to fill out reports fully documenting the circumstances of the incidents. *See id.* art. 5.05 (providing procedure for documenting family violence investigations and circumstances surrounding alleged incidents of domestic violence). The report required by Article 5.05 must contain the following information:
(1) the names of the suspect and complainant;
(2) the date, time, and location of the incident;
(3) any visible or reported injuries; and
(4) a description of the incident and a statement of its disposition.

*Id.* art. 5.05(a). Article 5.05 also requires police departments to organize the reports and make them available to local prosecutors and officers responding to subsequent domestic violence calls. *Id.* art. 5.05(b),(c). Apparently so that adequate statistics can be compiled concerning domestic violence statewide, Article 5.05 requires that all reports be provided to the Texas Department of Public Safety. *See id.* art. 5.05(e) (providing that report shall go to bureau of identification and records). A bill pending before the Texas Senate would permit police officers to remain on the scene of an incident of domestic violence to protect the victim and allow time for the victim to relocate. Tex. S.B. 284, 74th Leg., R.S. (1995).

92. TEX. CODE CRIM. PROC. ANN. art. 5.01 (Vernon Supp. 1995). The legislative statement contained in Article 5.01 provides in part: "In any law enforcement, prosecutorial, or judicial response to allegations of family violence, the responding law enforcement or judicial officers *shall protect the victim, without regard to the relationship between the alleged offender and the victim.*" TEX. PENAL CODE ANN. art. 5.01(b) (Vernon 1995) (emphasis added). Concerned with the legal response to domestic violence situations, the legislature declared that duties otherwise imposed in the Code are not affected by the existence of a familial relationship between the offender and victim. *See* TEX. CODE CRIM. PROC. ANN. art. 5.03 (Vernon Supp. 1995) (providing that officer's duties under Chapter 2, and duties of police and magistrates, are not "waived or excepted" because of familial relationship between parties).

"violation of a protective order" a crime.[93] An abuser violates a protective order when he commits family violence or goes near the prohibited locations outlined in the protective order.[94] To provide expedient protection to victims of domestic violence, the legislature amended Article 14.03 of the Code of Criminal Procedure, which authorizes warrantless arrests.[95] An officer may arrest an abuser without a warrant when the

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93. TEX. PENAL CODE ANN. § 25.07 (Vernon 1994) (formerly designated as TEX. PENAL CODE ANN. § 25.08). Apparently in an effort to remind (or instruct) officers of the judicial system that assault can occur between husband and wife, the legislature amended the definitions of assault and aggravated assault. *See id.* § 22.01(a)(1)-(2) (stating that assault is committed when person "intentionally, knowingly, or recklessly causes bodily injury to another, *including the person's spouse*," or "intentionally or knowingly threatens another with imminent bodily injury, *including the person's spouse*") (emphasis added); *id.* § 22.02(a)(1) (stating that aggravated assault is committed when person commits assault and "causes serious bodily injury to another, *including the person's spouse*") (emphasis added). While the addition of "including the person's spouse" is technically unnecessary—as there is no privilege to assault a spouse—the addition illustrates the institutional inertia that the crime of spousal assault must overcome. *See* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 367 (1992) (noting that, since assault was already illegal, new crime of violation of protective order was only substantive addition to criminal offenses). The legislature expressly provided for multiple penalties arising out of the violation if such violation constitutes an offense under another section of the Penal Code. TEX. PENAL CODE ANN. § 25.07(c) (Vernon 1994); *see* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 367 n.91 (1992) (recognizing that criminal offense committed in violation of protective order could result in penalties for assault, criminal violation of protective order, and civil violation of protective order—a triple penalty). A violation of § 25.07 is a Class A misdemeanor. TEX. PENAL CODE ANN. § 25.07(g) (Vernon 1994); *see id.* § 12.21 (assessing punishment for Class A misdemeanor at: "(1) a fine not to exceed $4,000; (2) confinement in jail for a term not to exceed a year: or (3) both such fine and confinement"). A 1993 amendment to § 25.07 deleted the enhanced punishment provision for multiple offenses that formerly upgraded the offense to a third-degree felony. *See* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3628 (current version at TEX. PENAL CODE ANN. § 25.07(g) (Vernon 1994)).

94. TEX. PENAL CODE ANN. § 25.07(a)(1)-(2) (Vernon 1994). Section 25.07 prohibits, among other things, "communicat[ing] with a member of the family or household in a threatening or harassing manner," either directly or through a third person. *Id.* In *Lee v. State*, a man convicted of violating a protective order challenged his conviction on the ground that the protective order was insufficient to support a criminal offense. Lee v. State, 799 S.W.2d 750, 751 (Tex. Crim. App. 1990). In *Lee*, the defendant initially signed an agreed order specifying that he was not go near his former wife's workplace or residence. *Id.* He was arrested for violation of the protective order when he went to his wife's house and was subsequently convicted and sentenced to 180 days in jail. *Id.* Though the agreed order did not begin with words like "decree" or "order"—which would have been necessary for the court to invoke its contempt powers—the order was sufficient to support a criminal sanction because it warned of the possible criminal consequences for a violation. *Id.* at 754.

95. Act of June 13, 1985, 69th Leg., R.S., ch. 583, § 2, 1985 Tex. Gen. Laws 2201, 2203 (current version at TEX. CODE CRIM. PROC. art. 14.03 (Vernon Supp. 1995)). While the

officer has probable cause to believe (1) that the abuser violated a protective order outside of the officer's presence, or (2) that the abuser committed an assault resulting in bodily injury to a member of the abuser's family or household.[96]

Though artful drafting alone will not eliminate domestic violence, the legislature has demonstrated a continued commitment to refining the written law through frequent amendments to both the civil and criminal statutes. Indeed, critics accuse the legislature of being unnecessarily detailed, or overly attentive, to the slightest ambiguity.[97] Despite this criticism, the current version of Title IV is recognized as one of the best-drafted statutes of its type. Unfortunately—as the recent report of the Task Force noted—serious problems with the Texas judicial system's implementation of these statutes exist.[98]

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Texas Court of Criminal Appeals has not considered the constitutionality of § 14.03 in the context of domestic violence cases, the Texas Attorney General passed on the matter in 1987. *See* Op. Tex. Att'y Gen. No. JM-751 (1987) (declaring that subsections (a)(2) and (a)(3) of § 14.03 are not facially unconstitutional). A warrantless entry into a home to arrest an abuser is unconstitutional unless consent or exigent circumstances exist. *Id.*

96. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(3),(4) (Vernon Supp. 1995). Article 14.03 also contains a curious, mandatory, warrantless arrest provision that mandates arrest when "the peace officer has probable cause to believe [a person] has committed an offense under § 25.07, Penal Code (violation of Protective Order), if the offense is committed in the presence of the peace officer." *Id.* art. 14.03(b). If the offense was committed in the presence of the officer, then the office has, a fortiori, probable cause to believe it was committed. *See* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 373 (1992) (criticizing "absurd" language of Article 14.03(b) because officer could not "witness a crime *without* having probable cause to believe that it happened").

97. *See* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. TEX. L. REV. 353, 365 (1992) (criticizing legislature for enacting unnecessary clarifications).

98. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 66 (1994) (explaining "core perception" on part of many Texans that "Texas justice system does not sufficiently protect women from violence"); *see* Mark Ballard, *Edinburg Judge Awash in Criticisms*, TEX. LAW., Feb. 17, 1992, at 8 (reporting on joking treatment of litigants in domestic violence cases by Edinburg, Texas judge); Janet Elliot, *After Gender Bias Study, Now Comes the Hard Part*, TEX. LAW., Apr. 4, 1994, at 1 (discussing recent Task Force findings that Texas judicial system does not adequately protect women victims of domestic violence, and analyzing difficulties facing committee charged with trying to implement Task Force recommendations); *see also* Meredith J. Duncan, Comment, *Battered Women Who Kill Their Abusers and a New Texas Law*, 29 HOUS. L. REV. 963, 964 (1992) (noting that, in Texas, at least 650,000 men consistently abuse their partners and that domestic violence continues to escalate). The failure to act may be as simple as not informing a victim of her legal rights, but the ultimate injury to the woman is nonetheless severe. *See* Brown v. Grabowski, 922 F.2d 1097, 1116 (3d Cir. 1990) (rejecting claim that failure to inform woman of her right to protection as required by statute was due

## V. The Gender Bias Task Force of Texas

The Supreme Court of Texas created the Gender Bias Task Force of Texas in response to an increased awareness of the particular problems faced by women in the courts.[99] For more than two years, the Task Force solicited information on gender bias in the Texas judicial system from the general public, litigants, attorneys, judges, and experts.[100] After organizing and analyzing the information, the Task Force concluded that incidents of gender bias occur in the Texas judicial system with alarming, if not altogether unexpected, frequency.[101] In part, the Task Force concluded (1) that "women experience hostile, demeaning, or condescending treatment by attorneys and judges and may be held to higher standards than their male counterparts," (2) that "women face both financial and logistical barriers to access to the courts," and (3) that "there is a lack of understanding at all levels of the judicial system of the dynamics of crimes against women."[102] While the effects of gender bias are wide-

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process violation when woman was ultimately found frozen to death in the car in which her boyfriend-murderer imprisoned her).

99. *See* Supreme Court of Texas, Gender Bias Task Force of Texas Final Report 1 (1994) (explaining creation, general mandate, and particular objectives of Task Force). The State Bar of Texas Women and the Law Section proposed such a study of gender bias of the Texas judicial system in November 1989. *Id.*

100. *See id.* at 1–2 (discussing methodology employed by Task Force, including public hearings, regional meetings, and surveys of attorneys, judges, and rape crisis centers).

101. *See id.* at 3 (stating that "too many Texans—both men and women—experience discriminatory or inequitable treatment in the Texas judicial system simply because of their sex"). Although the Task Force relied heavily on perceptions of gender bias via written surveys of attorneys and judges, the Task Force also held hearings, which solicited opinions directly from the public; the reader must decide how closely the Task Force's report mirrors the reality of Texas judicial practice. *Cf.* Lisa Ander, *Gender Bias? Some Attorneys See*, Hous. Post, Aug. 2, 1994, at A13 (reporting on Task Force findings of gender bias, and noting perceptions of 90% of female lawyers and 33% of male lawyers who experienced gender bias in Texas courts); Janet Elliot, *Women Split with Bar: Alimony, Sexual Predators Legislation Tops Agenda*, Tex. Law., Jan. 30, 1995, at 1 (reporting statement from president of Texas Women Lawyers that implementation of Task Force's recommendations is "high priority" on legislative agenda).

102. *See* Supreme Court of Texas, Gender Bias Task Force of Texas Final Report 3 (1994). The Task Force also found that "[b]iased behaviors and attitudes at all levels of the judicial system affect women's credibility in court and may have an impact on both the litigation process and the case outcome" and that "[t]he adversarial nature of the family law system perpetuates gender inequities and often has severe financial repercussion for women." *Id.* The Task Force concluded that men also face bias in the Texas judicial system:

1. There is a bias against awarding men custody of their children; gender stereotypes and the adversarial nature of the family law system profoundly affect the ability of non-custodial fathers to have continued involvement in their children's lives.
2. Men are often treated more harshly than women in the criminal justice system.

spread,[103] the task force heard "dramatic and poignant" testimony about the effects of institutionalized gender bias on the victims of domestic violence.[104] The following discussion expands upon particular problems identified by the Task Force, proposing mechanisms designed to improve the judicial system's response to domestic violence.

## VI. Particular Problems Confronting Domestic Violence Victims in Texas and Mechanisms for Improvement

### A. *Lack of Access to Protective Orders*

Any remedy for domestic violence, no matter how adequate in theory, is useless to those who cannot avail themselves of it. Although the maximum fee for obtaining a protective order is thirty-six dollars, low and middle income women without independent funds may lack basic means of survival after a court-ordered separation.[105] The Task Force found that civil protective orders often are ineffective because judges fail to award adequate support for the victims of family violence who are living

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3. Male juveniles are treated more harshly than female juveniles in many aspects of the juvenile justice system.

*Id.*; *see* Christine M. Durham, *Gender Equality in the Courts: Women's Work Is Never Done*, 57 Fordham L. Rev. 981, 981 (1989) (finding that women face serious inequities in court systems across country because of persistent gender bias).

103. *See* Supreme Court of Texas, Gender Bias Task Force of Texas Final Report 17 (1994) (stating that "the results of the task force's inquiry into the nature and scope of gender bias reveal an intricate pattern of interactions and practices in the Texas court system"). The Task Force identified strong perceptions of gender bias and discussed the ways in which such biases prejudice women in (1) the treatment of women litigants and attorneys, (2) the division of property upon dissolution of a marriage, (3) the allocation of spousal support, (4) the determination of conservatorship and visitation, (5) allocation of child support, (6) the treatment of sexual assaults, and (7) the treatment of sexual discrimination and harassment. *Id.* at 26, 45, 48, 51, 58, 81, 91. Similar studies in other jurisdictions have also identified many harmful manifestations of gender bias in judicial systems. *See, e.g.*, Christine M. Durham, *Gender Equality in the Courts: Women's Work Is Never Done*, 57 Fordham L. Rev. 981, 981–82 (1989) (surveying findings of New York and New Jersey's gender bias task forces, including that women suffer bias in "domestic violence, criminal law, matrimonial disputes, economic rights, courtroom procedures and court administration").

104. Supreme Court of Texas, Gender Bias Task Force of Texas Final Report 66 (1994).

105. *See* Tex. Fam. Code Ann. § 71.04(e) (Vernon Supp. 1995) (requiring that total fees for protective order not exceed $36 under any circumstances); *see also* Supreme Court of Texas, Gender Bias Task Force of Texas Final Report 69 (1994) (recognizing lack of access to funds as crucial impediment to women seeking protective orders); *cf.* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2828 (1992) (noting that "social and economic isolation of [battered] women" is common).

apart from the abuser pursuant to a protective order.[106] Section 71.11 of the Family Code expressly authorizes judges to "require the payment of support for a party or for a child of a party if the person required to make the payment has an obligation to support the other party or the child."[107] Severe financial strain on a woman seeking protection under a protective order may induce a premature or unwarranted dissolution of the order to ease her burden of separate maintenance.[108] Judges should squarely address the likely financial repercussions of a protective order and require the abuser to pay sufficient support. To this end, the Texas Legislature should amend Title IV of the Family Code to include the following:

> Section 71.10 Findings
>
> . . . .
>
> (e) Upon request of the applicant, or on the court's own motion, the court shall consider the financial and employment status of the applicant and respondent and, when the court deems necessary to effectuate the purposes of the protective order, shall require the payment of support in accordance with Section 71.11(a)(4) of this code.

### B. *Inappropriate Remedies*

#### 1. Mutual Protective Orders

In addition to barriers to access, the Task Force found that judges often issue mutual protective orders when only one party offers evidence of abuse.[109] Although Section 71.10 of the Family Code states that protective orders may apply only to a party who "the court finds has committed family violence and is likely to commit family violence in the foreseeable future," Texas judicial practice often is to the contrary.[110] This practice is

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106. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 70 (1994) (reporting that 46% of women and 27% of men answering attorney survey claim that adequate support is rarely or never awarded).

107. TEX. FAM. CODE ANN. § 71.11(a)(4) (Vernon Supp. 1995).

108. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 62–63 (1991) (discussing common experience of women who, attempting to leave abusive partners, find lack of resources and support necessary to prolong effective separation).

109. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 68 (1994) (reporting that 46% of male attorneys and 53% of female attorneys responding to survey stated that mutual protective orders were issued when only one party presents evidence of abuse).

110. TEX. FAM. CODE ANN. § 71.10(d)(1) (Vernon Supp. 1995). *See id.* § 71.121 (stating that "[a] court may not enter a single protective order that applies to both the respondent and the applicant unless the order embodies an agreement of the parties under Section 71.12(a) of this code"); *id.* § 71.12(a) (providing that, "[t]o facilitate the settlement of a proceeding under this chapter, two or more parties to the proceeding may agree in

problematic for a number of reasons. Mutual protective orders implicitly place blame on the victim even though the abuser has offered no evidence of any victim misconduct.[111] Moreover, mutual protective orders befuddle police responding to a protective order violation, leading to either the arrest of both the victim and the abuser or the failure to arrest the abuser at all.[112] Although the language of Section 71.10 is relatively clear, the following proposed amendment appropriately limits judicial discretion in considering respondent applications for protective orders:

> 71.121 Request by Respondent for Protective Order
>
> . . . .
>
> (d) A court may not issue a protective order against an applicant for a protective order unless the court finds that the applicant has committed acts of family violence and is likely to commit acts of family violence in the foreseeable future.

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writing, subject to approval of the court, to do or refrain from doing any act that the court could order under Section 71.11(a) of this code").

111. SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 68 (1994). A participant at the Austin public hearing stated:

> Too often battered women go into court to obtain a protective order and leave with a mutual protective order which, in effect, places some of the blame for the crime on the victim. The court may also mandate her to receive therapy as if by fixing the victim, domestic violence will go away.

*Id.* (reporting testimony of Anna B. Burleson given at Austin public hearing); *see* Silvija A. Strikis, Note, *Stopping Stalking*, 81 GEO. L.J. 2771, 2777 n.42 (1993) (noting that "through like treatment of the victim and the aggressor, [mutual protective orders] may be perceived by aggressors as a justification of their actions"). Issuing a mutual protective order absent evidence that the woman also committed violent acts could violate the woman's due process rights. Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1056 (1992).

112. *See* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1061–62 (1992) (discussing enforcement problems with mutual protective orders, including that "police are not sure how to proceed" so "they often arrest no one or both parties"). When police treat inappropriately ordered mutual protective orders as though they offset or cancel each other, the primary purpose of the protective order is rendered nugatory. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 68 (1994) (identifying concern that "mutual protective orders are less likely to be enforced" because each cancels out other); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 44 (1991) (recognizing inappropriateness of mutual protective orders when only one party commits abuse, as such orders can hinder enforcement attempts).

2. Mediation

Commentators have written a great deal about mediation in cases involving domestic violence.[113] Mediation is inappropriate when the parties possess grossly disparate bargaining power.[114] Because power imbalances define the relationship between victim and abuser, mediation of cases involving domestic violence issues may perpetrate a second-order abuse on the victim by ignoring the abuser's coercive power.[115] Texas

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113. *See, e.g.*, LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 137 (1984) (stating that "[t]he mediation and conflict resolution approach, so successful in other adversarial areas of the law, serves only to reinforce men's violent behavior"); Mary P. Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 727 (1993) (noting that even mediation enthusiasts agree that cases involving serious domestic violence should not be mediated); Andree G. Gagnon, Recent Development, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 275 (1992) (asserting that mediation sends message that battering is not criminal, ignores power imbalance between parties, and increases risk of harm to victim); Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 710 (1989) (explaining criticisms of mediation as method for addressing domestic violence).

114. *See* Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 588 (1988) (discussing problems of employing mediation in situations when parties possess disparate bargaining power). "Since mediation is dependent upon some parity in bargaining power, the process will most likely be subverted when one party is in fear of the other unless the mediator fails to play the traditional role of a third party neutral." *Id.*; *see* Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 861 (1985) (stating that "[t]he danger in attempting to mediate between parties when an inequality of bargaining power exists has been widely acknowledged by both critics and advocates of dispute resolution"); *see also* Linda R. Keenan, Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407, 438 (1985) (analyzing inappropriateness of forcing woman to negotiate with batterer " 'at arm's length' " because of unequal bargaining power).

115. *See* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* (asserting that mediation for family cases exemplifies "idea that law is inappropriate in the private sphere"), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 155 (David Kairys ed., 1990); *see also* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 77 (1994) (discussing inappropriateness and ineffectiveness of mediation in cases involving domestic violence). *But see* ANNA T. LASZLO & THOMAS MCKEAN, COURT DIVERSION: AN ALTERNATIVE FOR SPOUSAL ABUSE CASES (asserting that mediation is preferred over arbitration because "an agreement made voluntarily by the disputants is more likely to resolve the underlying problem, since the parties must recognize their individual responsibilities in preventing any further violence"), *in* U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 327, 354 (1978). Mediation "fails to fully recognize that women may be seriously disadvantaged by a process which places them in an unrestrained bargaining situation with men who are generally economically dominant and more powerful." Mary P. Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV.

judges seldom order mediation prior to issuing a protective order; however, a few judges continue to employ mediation in cases involving domestic violence.[116] Although Texas judges have broad discretion in ordering, and are even encouraged to order mediation in domestic-relations cases,[117] such discretion is inappropriate in cases involving domestic violence. The potential for abuse justifies a general policy disfavoring mediation and like alternatives in any case involving domestic violence.[118] Accordingly, the following proposed amendment to the Civil Practices and Remedies Code would preserve the public policy favoring mediation whenever appropriate while reducing the likelihood that mediation will unfairly favor abusers:

> Section 154.0021 Restrictions on Availability of Alternate Methods of Dispute Resolution for Cases Involving Family Violence.
>
> In any proceeding involving an application for a protective order under Chapters III or VII of the Family Code, a court may not order the parties to submit to any method of alternative dispute resolution as otherwise provided by statute, unless: (a) the court first finds that the party or parties alleging family violence would not be unfairly prejudiced thereby; or (b) both the applicant(s) and respondent(s) have agreed in writing to submit to a method of alternative dispute resolution.

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717, 719 (1993); *see also* Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 931 n.11 (1991) (asserting that mediation is inappropriate because powerless victim is required to share in blame).

116. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT app. B at Table 8C (1994) (reporting that only three percent of female judges and one percent of male judges responding to judicial survey order mediation before granting protective orders).

117. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (Vernon Supp. 1995) (providing authority for court, "on its own motion or the motion of a party," to order alternative dispute resolution). The Texas Legislature adopted a policy favoring alternative dispute resolution and made it clear that the courts are responsible for furthering that policy. *See id.* § 154.002 (declaring that "[i]t is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship"); *id.* § 154.003 (stating that "[i]t is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002"); *see also id.* § 152.001-.004 (providing authority for counties to create alternate mechanisms for dispute resolution).

118. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 9 (1994) (recommending that "[m]ediation, as it is currently practiced, should not be ordered in any family-law case in which one of the parties is a victim of domestic violence"). A bill is currently pending before the Texas Senate that would divest judges sitting in a divorce suit of the discretion to order alternative dispute resolution. Tex. S.B. 7, 74th Leg., R.S. (1995).

## VII. Enforcement Problems: Response of the Judicial System

The effectiveness of any legal remedy ultimately depends upon the availability of enforcement mechanisms. Legislatures can vest individuals with rights and remedies, but without the coercive power of the state, those rights and remedies are unenforceable and therefore useless.[119] Obstacles to effective enforcement are demoralizing and dangerous problems for victims, and they reduce the protective order to a hollow remedy.[120]

### A. *Police*

As the domestic violence victim's "first line of defense," law enforcement officers must understand the dynamics of domestic violence and respond appropriately.[121] One-half of the women responding to the Task

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119. *See* Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 Vand. L. Rev. 991, 997–98 (1993) (illuminating possibility that protective orders are useless when they cannot be obtained or cannot be enforced, and noting that police sometimes find restraining orders with bodies of murder victims); Bella English, *A Bill to Help Stop Battering*, Boston Globe, Dec. 3, 1990, at 23 (asserting that protective orders "aren't worth the paper they're written on if they aren't enforced by the cops and the courts").

120. *See* Supreme Court of Texas, Gender Bias Task Force of Texas Final Report 5 (1994) (explaining findings of Task Force, including that Texas judicial system's handling of domestic violence cases and protective orders fails to protect women from violence); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267, 272 (1985) (arguing that widespread ignorance concerning nature of battering among police, prosecutors, and judges has resulted in ineffectiveness of overall legal response); *see also* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 61 (1992) (stating that "[f]ailure to enforce a protective order 'increases the victim's danger by creating a false sense of security' "); *cf.* Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. Rev. 329, 338 (1994) (noting documented reluctance of judges to order incarceration for violation of protective order, even when abuser violates order numerous times).

121. *See* City of Grafton v. Swanson, 497 N.W.2d 421, 423 (N.D. 1993) (recognizing urgency of effective police intervention because "on the scene" enforcers play principal role in protecting battered women). Often, police officers are citizens' only direct link to the judicial system. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 47 (1992) (stating that police officers represent only meaningful contact with "the law" for most citizens, ultimately determining whether they ever get to courthouse). Unfortunately, police officers responding to domestic violence calls often underestimate the risk of further violence to the victim, even when evidence of abuse is clear. *See* Thetford v. City of Clanton, 605 So. 2d 835, 836–37 (Ala. 1992) (describing officer's failure to file statutorily required report after witnessing indications of physical abuse on woman later killed by her husband). The primary duties of police officers responding to domestic violence complaints are defined in Article 5.04 of the Code of Criminal Procedure, which provides in part:

Force's judicial survey believed that law enforcement officers frequently do not take domestic violence seriously enough.[122] Moreover, significant percentages of the attorneys and judges responding to the surveys indicated that law enforcement attitudes frequently discourage victim cooperation in domestic violence cases.[123] Far too often, women victims of domestic violence encounter police officers who treat domestic violence as non-serious, non-criminal, or as a private matter best settled within the home.[124] These misconceptions of domestic violence contribute to of-

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(a) The primary duties of a peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence are to protect any potential victim of family violence, enforce the law, and make lawful arrests of violators.

(b) A peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence shall advise any possible adult victim of all reasonable means to prevent family violence, including giving written notice of a victim's legal rights and remedies and of the availability of shelter or other community services for family violence victims.

TEX. CODE CRIM. PROC. art. 5.04(a),(b) (Vernon Supp. 1995). The Code contains an additional provision allowing police officers to remain at the scene of an alleged incident of domestic violence to verify the allegation and to prevent further violence. *Id.* art. 14.03(c).

122. SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT app. B at Table 8C (1994); *see* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Violence Assault Complaints*, 75 GEO. L.J. 667, 675 (1986) (describing police inaction in domestic violence cases as reflecting attitude that such violence is not serious). One factor influencing the perpetuation among police officers of the belief that domestic violence is not serious is that much of a new officer's training is received on the job with a senior officer. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 49 (1992) (suggesting that experienced officers who train new recruits are most likely to complacently cling to policy of non-intervention); *see also* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965 (1986) (repeating response of general public criticizing "the policy and diminution of police discretion in family violence cases").

123. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT app. B at Table 9A, 9B (1994) (reporting percentages of survey respondents that thought law enforcement attitudes frequently discourage victim participation as: (1) male attorneys—13%; (2) female attorneys—21%; (3) male judges—12%; and (4) female judges—37%). Additionally, many attorneys responded that law enforcement officers at least sometimes discourage victim participation. *See id.* (describing respondents holding this view as: male attorneys—29%, female attorneys—30%); *see also* Kit 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, 228 (1993) (noting that many police officers try to dissuade victim from pursuing charges or seeking assistance).

124. *See* McKee v. City of Rockwall, 877 F.2d 409, 424 (5th Cir. 1989) (Goldberg, J., dissenting) (discussing police officer's hesitancy to invade privacy of family or people cohabitating because of belief that man's home is sacrosanct); Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Protect Them When the Police Won't?*, 95 YALE L.J. 788, 788 (1986) (relating that woman's tragic story of unsuc-

ficers' failure to arrest men abusing their wives or violating protective orders.[125] This practice not only leaves victims unprotected, but also re-

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cessful attempts to obtain police protection "is unfortunately an all too common one in our society"); Sandra G. Boodman, *What Can Be Done? The Formidable Task of Treating Batterers*, WASH. POST, June 28, 1994, at Z11 (stating that domestic abuse continues to be regarded as private, not public matter); *see also* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Violence Assault Complaints*, 75 GEO. L.J. 667, 675 (1986) (recognizing tendencies of police officers to classify domestic violence as inherently less criminal than identical violence between strangers, to treat such violence as private matter, and to consider intervention in domestic violence cases "a waste of police time and resources"). In the most egregious cases, police may joke with the abuser while ignoring the victim, accuse the victim of "asking for it," or simply tell the victim that the abuser can do as he pleases in his own home. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47–48 (1992) (stating that some police officers respond to domestic violence calls "by laughing in the woman's face"); David Jackson, *Police Brutality Often Begins at Home*, CHI. TRIB., Mar. 29, 1991, (North Sports Final), at 1 (reporting that police officers responding to domestic violence call would joke with abuser because he was fellow officer). The Texas Legislature's cognizance of potential police officer non-feasance is illustrated by a 1985 amendment to the Code of Criminal Procedure, which states:

> A general duty prescribed for an officer by Chapter 2 of this code is not waived or excepted in any family violence case or investigation because of a family or household relationship between an alleged violator and the victim of family violence. A peace officer's or a magistrates duty to prevent the commission of criminal offenses, including acts of family violence, is not waived or excepted because of a family or household relationship between the potential violator and the victim.

TEX. CODE CRIM. PROC. ANN. art. 5.03 (Vernon Supp. 1995). In a further effort to require police officers to respond to domestic violence situations appropriately, the legislature added the following language to the warrantless arrest statute:

> (c) If reasonably necessary to verify an allegation of a violation of a protective order or of the commission of an assault against a member of the family or household, a peace officer *shall remain at the scene of the investigation to verify the allegation and to prevent the further commission of family violence.*

*Id.* art. 14.03(c) (emphasis added).

125. *See* Eagleston v. Guido, 41 F.3d 865, 869 (2d Cir. 1994) (describing husband's stabbing of wife 30 times despite her entreaties to police department that husband was violating protective order); *McKee*, 877 F.2d at 410 (discussing instance when woman called police after live-in boyfriend assaulted her and police drove her out of abuser's sight rather than arrest him, and noting that abuser later located her and stabbed her with knife); *see also* Kit 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, 225 (1993) (describing how some police officers refuse to arrest abusers because they assume that woman broke order by allowing abuser to come into contact); Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Protect Them When the Police Won't?*, 95 YALE L.J. 788, 789–90 (1986) (claiming that failure of police to respond appropriately to domestic violence situations is based on (1) "stereotypic view that men have the right to beat their wives," (2) "police policy . . . motivated by a discriminatory intent to harm women," or (3) police belief in "a man's right to rule the home as he pleases"). As a general observation, police officers who endear gender biases are probably more likely to ignore woman-beating because such violence is a form of hate crime, which

inforces abusers' beliefs that their behavior is appropriate.[126] Some commentators advocate mandatory arrest laws, which remove police discretion and ensure criminal treatment of criminal offenses.[127] Although arrest should be the general rule, blanket policies such as mandatory arrest may actually increase the risk of violence for some victims.[128]

A more effective and malleable solution would be to dissolve officers' notions that domestic violence is private or non-criminal by educating

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is not completely repugnant to the officers' preconceived notions. *Cf.* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 524 n.23 (1992) (acknowledging that "[b]attering is now being articulated as a bias-motivated hate crime intended to intimidate or injure an individual because of her gender"). The myth that domestic violence against women is a private matter is also being eroded by the characterization of domestic violence as a violation of international human rights. *Id.*

126. *See* Bartalone v. County of Berrien, 643 F. Supp. 574, 575 (W.D. Mich. 1986) (detailing account in which husband shot wife with shotgun after police failed to respond to wife's requests for assistance); Ashby v. City of Louisville, 841 S.W.2d 184, 185–86 (Ky. Ct. App. 1992) (describing instance in which woman was beaten to death by husband after she obtained protective order and court order directing husband's arrest, but police failed to arrest husband). The abuser's self-perception is further distorted when officers of the law blame the victim for the abuse. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 50 (1992) (stating that some officers "admonish . . . the woman to be a better wife," or assume that "she must enjoy the beatings, or at least not mind them").

127. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 63–66 (1992) (analyzing aspects of state mandatory-arrest statutes, and discussing mixed results of deterrence studies in cities with mandatory-arrest laws); *see also* Fern Shen, *Coalition Urges State to Pass Tougher Domestic Abuse Law*, WASH. POST, Jan. 27, 1994, at M1 (reporting on Maryland proposal for mandatory-arrest law that would remove police discretion in any case in which police have probable cause to believe that someone violated protective order). Article 14.03 of the Code of Criminal Procedure delineates the authority of peace officers to make warrantless arrests in certain circumstances. TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(3) (Vernon Supp. 1995). The Code contains a limited mandatory-arrest provision which states that "[a] peace officer *shall arrest*, without a warrant, a person the police officer has probable cause to believe has committed an offense under Section 25.08, Penal Code (Violation of Protective Order), *if the offense is committed in the presence of the peace officer*." *Id.* art 14.03(b) (emphasis added).

128. *See* Donna M. Welch, Comment, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1156 (1994) (claiming that mandatory-arrest policies are not likely to deter abusers in all situations and may even increase risk of violence against victim when abuser is unemployed). Pro-arrest policies that stop short of mandating arrest maintain police discretion and thus may maximize deterrence while avoiding the backlash of treating all abusers identically. *Id.* at 1161; *see* Ezra Bowen, *Anti-Violence Law Can Be a Weapon in Divorce*, NAT'L L.J., Apr. 11, 1994, at A21 (asserting that mandatory-arrest laws only increase arrests without providing necessary protection to victims).

officers on the dynamics of violent relationships.[129] Officers should be taught how to diffuse the abuser's control over his victim by employing the legislative mechanisms for immediate and long-term protection of domestic violence victims.[130] These mechanisms include, among other things, arresting abusers,[131] helping victims locate temporary assistance,[132] carefully collecting and preserving evidence for prosecution,[133] apprising victims of their rights, and encouraging victims to exercise those rights.[134]

### B. *Prosecutors*

When abusers are arrested for committing acts of domestic violence or violating a protective order, prosecutors often resist prosecuting them, believing that such cases are petty or simply a nuisance.[135] As the Task

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129. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 271 (1985) (arguing that more stringent guidelines for law enforcement officers and prosecutors "would be unnecessary if legal officials understood wife beating and used their discretion wisely to stop it"); *see also* 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, 256 (1994) (concluding that mandatory-arrest policies need to be supplemented by extensive education to inform both police and community). At a minimum, police must be taught how to handle domestic violence situations appropriately. *See* Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 344 (1994) (identifying annual police training as part of successful program for remedying domestic violence).

130. *See* TEX. CODE CRIM. PROC. ANN. art. 5.04(a)-(b) (Vernon Supp. 1995) (establishing protection of domestic violence victims as primary duty of responding law enforcement officer); TEX. GOV'T CODE ANN. § 415.034 (Vernon 1990) (providing for ongoing training of officers on domestic violence issues).

131. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 1995) (providing authority to make warrantless arrests in domestic violence situations); *see also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 309 (1985) (stating that arrest furthers goals of both short- and long-term safety).

132. *See* TEX. CODE CRIM. PROC. ANN. art. 5.04 (Vernon Supp. 1995) (establishing protection of domestic violence victim as primary duty of responding officer).

133. *See* TEX. CODE CRIM. PROC. ANN. art. 5.05 (Vernon Supp. 1995) (providing guidelines for documenting investigation of, and circumstances surrounding, incidents of domestic violence); *id.* art. 14.03(c) (providing authority to remain at scene of domestic violence incident to verify allegation of violence).

134. *See id.* art. 5.04(b) (directing officers to apprise domestic violence victims of rights and any means to prevent further violence).

135. SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 73 (1994). One expert at the Austin public hearing stated:

> Some of the ignorance [about family violence] is on the part of the very persons who are charged with enforcing our family violence laws. Many of our district and county attorneys are committed to doing protective orders and prosecuting batterers, and we

Force discovered, "[m]ore than a third of both male and female attorneys . . . said that prosecutors at least sometimes decline to prosecute domestic violence cases in criminal court, while a similar percentage of female attorneys and judges thought that the attitudes of prosecutors discourage victim cooperation in domestic-assault cases."[136]

Like some police officers, some prosecutors harbor gender stereotypes that influence their handling of domestic violence cases: women "ask for it" by provoking their abusers, or women are inherently untrustworthy and prone to exaggeration.[137] Also problematic is the widespread prac-

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salute them. But others perceive family violence cases as a nuisance and unimportant and frustrating to deal with. Some district and county attorneys espouse baseless views of the law.

*Id.* (reporting testimony of Kathryn Tullos given at Austin public hearing on October 15, 1992); *see* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986) (noting tendency on part of lawyers and judges to avoid these cases); *see also* 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, 250 (1994) (commenting on prosecutorial tendency to treat domestic violence cases as "inconsequential or private matters, ill-suited to state intervention"). The legislature has clearly delineated some responsibilities of prosecutors dealing with domestic violence cases. *See* TEX. CODE CRIM. PROC. ANN. art 5.06 (Vernon Supp. 1995) (prohibiting prosecutors and courts from delaying criminal prosecution because of pending civil action, or from requiring proof of pending divorce action before proceeding with criminal action).

136. SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 73 (1994).

137. *See* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Violence Assault Complaints*, 75 GEO. L.J. 667, 673 (1986) (noting that "[t]he fact that the police, prosecutors, and courts treat wife abusers differently than others accused of assault is a reflection of societal attitudes about the respective roles of men and women in marriage"); *see also* Holly Maguigan, *Battered Woman and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 384 (1991) (discussing common stereotypical notions concerning battered women who generally do not leave relationship, but may explode in violent rage and kill their abusers); *cf.* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 526 (1992) (indicating that Anita Hill's experience in trying to confront Justice Clarence Thomas on sexual harassment charges underscores "the tenacity of views of women as 'unreasonable' and provocative"). A common stereotype is that women are inherently untrustworthy; however, researchers argue that one should assume an abused woman's account of an incident is closer to the truth than the abuser's. *See* DANIEL J. SONKIN ET AL., THE MALE BATTERER: A TREATMENT APPROACH 71 (1985) (suggesting that woman's view of incident is more reliable because: (1) she is more aware during incident, and not under fit of rage; and (2) abusers tend "to minimize and deny the violence out of guilt and shame and as a coping mechanism to avoid facing the reality of their situation"). Another pernicious stereotype is that violence is only directed toward, and accepted by, certain types of women. *See* Liz Kelly, *How Women Define Their Experiences of Violence* (explaining that such stereotypes can mask difficulty in identifying what is violence), *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 114, 122–24 (Kersti Yllö & Michele Bograd eds., 1988); *Assistant District*

tice of dropping criminal charges against abusers.[138] Prosecutors who drop domestic violence cases explain that victims often withdraw their complaints or refuse to testify against their abusers.[139] Even when prosecutors are determined to pursue a criminal conviction, their task is made more difficult by the marital privilege that allows a spouse—even a victim spouse—to refuse to testify against her husband-abuser.[140] Eliminating

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*Attorney Transferred Because of Rape Comment*, UPI, Aug. 31, 1989 (reporting transfer of Bexar County, Texas District Attorney after he commented that "nice girls don't get raped"), *available in* LEXIS, Nexis Library, UPI File.

138. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 74–76 (1994) (examining prosecutorial practice of dismissing criminal charges when victim refuses to testify or withdraws criminal charge against her abuser); *see also* Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 908–10 (1985) (examining effective responses to domestic violence cases that involve "no drop" policies or support mechanisms to encourage victims to pursue remedy); *cf.* UTAH CODE ANN. § 77-36-3(1)(e) (Supp. 1995) (prohibiting court from dismissing domestic violence case unless "it has reasonable cause to believe that the dismissal would benefit the victim").

139. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 73–75 (1994) (relating common observation of victims, advocates, lawyers, and judges that prosecutorial reluctance to proceed with criminal prosecution of abusers is based on frustration with victims' hesitancy to continue). Texas Judge Steve Russell also urges prosecutors to cease practice of "undercharging" family assault. Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986). Filing a charge as serious as can be supported in good faith sends a message to abusers that their conduct is criminal and will not be tolerated. *Id.* Furthermore, a conviction of the most serious offense supportable provides the sentencing judge with the widest array of options in crafting a punishment. *Id.*

140. *See* TEX. R. CRIM. EVID. 504 (providing evidentiary husband-wife privileges). Criminal Rule 504 states in pertinent part:

> (a) General rule of privilege. The spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. . . .
>
> (b) Exceptions. Except in a *proceeding where the accused is charged with a crime committed during the marriage against the spouse*, there is no privilege under this rule (1) in a proceeding in which an accused is charged with a crime against the person of any minor child or any member of the household of either spouse; or (2) as to matters occurring prior to marriage.

*Id.* at 504(2) (emphasis added). This exception has been roundly criticized as "only serv[ing] to perpetuate an almost unimaginable family situation, allowing the domination and victimization of battered spouses to continue." Debbie S. Holmes, Comment, *Marital Privileges in the Criminal Context: The Need For a Victim Spouse Exception in Texas Rule of Criminal Evidence 504*, 28 HOUS. L. REV. 1095, 1129 (1991). Even if victims refuse to testify, prosecutors may use expert testimony to explain why victims are reluctant to testify. *See* State v. Bednarz, 507 N.W.2d 168, 171 (Wis. Ct. App. 1993) (holding expert testimony on battered woman syndrome admissible to explain victim's recantation); Matthew Goldstein, *Complaining Witness's Absence Presents Hurdle at Trial of Judge*, N.Y. L.J., Jan. 26, 1995, at 1 (explaining use of expert testimony to convict batterers when victims are hesitant to testify). *See generally* Rick Brown, Note, *Limitations on Expert Testimony on the Bat-*

the marital privilege may encourage prosecutors to zealously prosecute batterers. In "forcing" victims to testify, prosecutors would be required to balance society's interest in punishing abusers with the possibility of exacerbating the violence against the victim.[141] Prosecutors can also become more adept at prosecuting domestic violence cases without the victim's testimony.[142] To this end, prosecutors can employ expert testimony on battered woman syndrome to help explain why the victim might be

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*tered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665, 668 (1990) (analyzing uses of expert testimony on battered woman syndrome). A bill pending before the Texas Senate would significantly ease the prosecution of abusers when the victim fails to testify. *See* Tex. S.B. 225, 74th Leg., R.S. (1995) (proposing that police be educated on how to fully document domestic violence incident by (1) documenting the injuries to the victim in writing, (2) photographing or videotaping area where assault occurred, and (3) recording statements of victims that may be admissible evidence in later prosecution of abuser).

141. *See* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986) (detailing methods for prosecutors to reassure victims' safety while getting them to court to testify with subpoenas or attachment). Section 24.01 of the Code of Criminal Procedure provides for subpoenas designed to hale the witness into court to testify. TEX. CODE CRIM. PROC. ANN. § 24.01(a)(1) (Vernon 1989). A more intrusive means of bringing a victim before the court is the writ of attachment. *See id.* § 24.12 (providing means for court to command police officer to seize witness and forcibly take her to court). Notwithstanding the questionable propriety of compelling a victim of domestic violence to testify by forcible means, the victim may still invoke her privilege not to testify. TEX. R. CRIM. EVID. 504 (2)(b). While forced prosecution may increase the risk of violence in some cases, failure to prosecute has resulted in death for some women. *See* Garrett v. Gilless, No. 93-6197, 1995 U.S. App. LEXIS 952, at *2 (6th Cir. Jan. 17, 1995) (recounting law enforcement officer's murdering of his daughter and shooting of his wife after Internal Affairs office failed to investigate wife's complaints because she never filed charges). An aggressive stance on domestic violence issues is particularly important for prosecutors because without it, law enforcement loses much of its force. *See* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 7 (1993) (emphasizing importance of aggressive prosecutorial action in domestic violence cases as critical branch of judicial response).

142. *See* Joan M. Schroeder, Note, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 560 n.64 (1991) (detailing preventative measures that prosecutors can take when victim refuses to testify, such as ensuring availability of "medical records, officer witnesses, pictures, and sworn statements"); *see also* Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 344–45, nn.86–87 (1994) (explaining prosecutorial mechanisms designed to ensure prosecution of abusers when victim fails to testify, including careful police documentation of domestic violence incidents). *See generally* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 306 (1985) (justifying prosecution of domestic abusers without cooperation of victims because victims may not be in best position to judge whether to go forward).

reluctant to testify.[143] Also, because Texas peace officers are required by statute to collect certain evidence at the scene of a domestic violence call,[144] prosecutors should encourage officers to carefully document the incident to preserve evidence for a subsequent prosecution without the victim's testimony.[145] In any event, prosecutors should not blindly drop criminal charges without first inquiring into the possibility that the abuser has coerced the victim into dropping the charges.[146] This inquiry requires a sensitive understanding of the dynamics of power and control within violent relationships.

### C. *Judges*

When a victim of domestic violence has her abuser arrested and prosecuted for violating a protective order, too often she encounters a judge who fails to enforce the order.[147] Only fifteen percent of the women and

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143. *See* Joan M. Schroeder, Note, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 561 (1991) (discussing need for expert testimony on battered woman syndrome when victim refuses or is reluctant to testify). Even without expert testimony, prosecutors can pursue a conviction with other types of corroborating evidence. *See* OFFICE OF THE CITY ATTORNEY, CITY OF SAN DIEGO DOMESTIC VIOLENCE UNIT, DOMESTIC VIOLENCE PROSECUTION PROTOCOL 10 (1993) (describing "independent corroboration standard," which includes medical reports, third-party observations of injuries, witnesses who saw or heard incident taking place, 911 calls with victim's or abuser's statements, physical evidence of incident, and party admissions).

144. *See* TEX. CODE CRIM. PROC. ANN. art. 5.05 (Vernon Supp. 1995) (describing information that responding officer must collect).

145. *See* Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 345 nn.86–87 (1994) (noting part of successful domestic violence intervention program as training of police officers in evidence collection techniques, including documentation of "excited utterances" for use at later trial when victim does not testify).

146. *See* TEX. CODE CRIM. PROC. ANN. art. 5.06(2)(b) (Vernon Supp. 1995) (permitting prosecutors to require information for offense report from victim of domestic violence). Texas Judge Steve Russell noted that a policy of dismissing charges based upon the victim's request "amounts to an official invitation for the batterer to intimidate his victim." Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986); *see also* State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) (relaying situation in which abusive husband told wife that if she told police about his abuse, "you will never tell anybody anything again").

147. *See* Constance F. Fain, *Conjugal Violence: Legal and Psychosocial Remedies*, 32 SYRACUSE L. REV. 497, 561–62 (1981) (describing weak judicial response to domestic violence situations in failing to adequately enforce protective orders); *see also* Rorie Sherman, *Domestic Abuse Bills Gain Momentum in Legislatures*, NAT'L L.J., July 4, 1994, at A9 (citing national complaint that judges do not treat domestic violence seriously and do not deal with abusers appropriately). Although non-enforcement is the most serious limitation of protective orders, judges are sometimes hesitant to punish abusers for protective-order violations. *See* NAT'L INST. OF JUST., U.S. DEP'T OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990) (criticizing judi-

twenty-eight percent of the men responding to the Task Force attorney survey stated that judges frequently impose sanctions for violations of protective orders.[148] Some judges, like some police officers and prosecutors, also demonstrate a dangerous lack of understanding of domestic violence, evidenced by judicial practices such as using mediation in cases involving domestic violence, issuing mutual protective orders when only one party has been abused, and unnecessarily delaying hearings for domestic violence cases.[149] In extreme cases, judges' ignorance of domestic

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cial failure to enforce protective orders by not imposing punishment even for repeat offenders).

148. SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 69 (1994). One participant at the Austin public hearing stated that, "I get a lot of accolades when I travel around the country from other states that see the written word of [Texas'] laws, but I very quickly have to say these laws [are] not being enforced." *See id.* (reporting testimony of Deborah Tucker given at Austin public hearing on October 15, 1992); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 332–38 (1994) (noting that, although sheer number of protective orders granted indicates that judges are concerned about domestic violence, this concern often does not extend to sanctioning violations of orders); *see also* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1050 (1992) (finding that judicial bias in courtroom can dissuade victims from seeking enforcement of protective orders). Further illustrating the disempowerment faced by women victims of domestic violence, more than one-fourth of the female judges responding to the Task Force's judicial survey indicated that judicial attitudes discourage victim participation in domestic violence cases. SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 75 (1994).

149. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 75 (1994) (reporting that 29% of female attorneys responding to survey stated that judges imply that victims may have deserved or provoked abuse); *see also* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 16 (1993) (recognizing ignorance of dynamics of family violence as key problem with responding correctly to such violence). This misunderstanding may lead the judge to believe that a woman does not need a protective order. *See* Mark Ballard, *Edinburg Judge Awash in Criticisms*, TEX. LAW., Feb. 17, 1992, at 8 (discussing judge's insensitive treatment of woman applying for protective order). In one case concerning an application for a protective order, the judge ordered the victim and her husband to "hold hands and ordered the husband to apologize to his wife on bended knee." *Id.* The Edinburg judge subsequently denied the application for a protective order, which he called a "worthless 'piece of paper.' " *Id.* The adage that "justice delayed is justice denied" is particularly appropriate in domestic violence cases, when delay perpetuates violence against women. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 66 (1994) (commenting on perception that judges are hesitant to issue protective orders and noting that they can take as long as three months to be served). The Texas Government Code specifically requires judges to "regularly and frequently set hearings and trials of pending matters, giving preference to hearings and trials of," among other things, "orders for protection of the family under Sections 3.581, 71.11, or 71.12, Family Code." *See* TEX. GOV'T CODE ANN. § 23.101(a)(4) (Vernon Supp. 1995)) (governing "primary priorities"

violence surfaces through morbid jokes or unwarranted blaming of victims for their own abuse.[150]

Effective judicial intervention in domestic violence cases requires understanding of the abuser's control over his victim.[151] Treating violations of protective orders lightly and domestic violence as inherently non-criminal further endangers victimized women and fails to punish violent criminal behavior.[152] Such abdication of the judicial function reinforces the abuser's control over his victim and may cause the abuser to think that his

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for setting trial dates of pending matters). However, if a particular court is directed, under another statute, to give priority to a certain type of case, § 23.101 does not affect the other statute. *Id.* § 23.103 (Vernon 1988); *see* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986) (discussing fact that judicial discretion controls how quickly hearing is set even though Texas Government Code § 23.102 requires judges to give protective order applications priority consideration). Long delays in setting hearings on applications for protective orders lead to higher dismissal rates; judges should therefore "preserve" the victim's right to a protective order by hearing the matter as soon as is practicable. *See* Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 966 (1986) (noting that dismissals in domestic violence cases are illusory victories because family violence seldom vanishes with dropping of lawsuit); *see also* Mark Ballard, *Edinburg Judge Awash in Criticisms*, TEX. LAW., Feb. 17, 1992, at 8 (reporting on controversial Texas judge's actions in domestic violence case when he granted mutual protective order after polling packed courtroom on how he should resolve matter).

150. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 75–76 (1994) (retelling accounts of litigants being subjected to jokes about violent abuse against women or being blamed for abuse); *see also* Mark Ballard, *Edinburg Judge Awash in Criticisms*, TEX. LAW., Feb. 17, 1992, at 8 (noting accusations against Texas judge for displaying callous attitude toward domestic violence through his joking or light-handed courtroom demeanor). The choice of language in judicial opinions may also reveal indifference to domestic violence beneath a guise of jocularity. *See* Kelm v. Hyatt, No. 93-3141, 1995 U.S. App. LEXIS 815, at *1-2 (6th Cir. Jan. 18, 1995) (describing husband and wife as not fond of each other). The *Kelm* court described that situation as follows: "[He] characterizes his wife as suffering from both PMS and a manic depressive disorder and engaging in violence in '28 day intervals.' Conversely, [she] denies any psychoses, and instead recounts the history of [his] domestic violence against her." *Id.*

151. *See* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 2 (1993) (stressing need for understanding of special dynamics of family violence before truly effective response can commence).

152. *See* United States v. Taylor, 972 F.2d 1247, 1251–52 (11th Cir. 1992) (describing failure to enforce protective orders as "failure of justice"); Constance F. Fain, *Conjugal Violence: Legal and Psychosociological Remedies*, 32 SYRACUSE L. REV. 497, 562 (1981) (explaining judge's tacit approval of domestic violence through imposition of light "punishments"); *see also* WASH. REV. CODE ANN. § 10.99.010 (West 1990) (establishing legislative policy to ensure enforcement of domestic violence laws because societal attitudes reflected in policies and practices of law enforcement lead to non-enforcement of laws); Roy v. City of Everett, 823 P.2d 1084, 1086 (Wash. 1992) (intimating that continued exposure of woman to husband's violent attacks after woman sought legal protection was attributable to "lack of societal comprehension of the problems relating to domestic violence" and lack of enforcement of domestic violence laws).

behavior is beyond the law or, more dangerously, sanctioned by the law.[153] Judges must employ the wide variety of remedies available in forming and enforcing protective orders, including incarceration and orders to submit to counseling.[154] Therefore, judges must, at a minimum, know the relevant civil and criminal statutes with which they can empower victimized women and dismantle the abuser's web of domination and control.[155] To wield these statutes effectively, judges must also be aware of the enhanced danger faced by women who seek refuge from a violent spouse.[156] Increasing judicial awareness of and responsiveness to the plight of battered women can be accomplished through specialized

153. *See* NAT'L INST. OF JUST., U.S. DEP'T OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 1 (1990) (warning that lenient judicial response may "encourage an offender to believe that violence against a family member is private or acceptable behavior"); Silvija A. Strikis, Note, *Stopping Stalking*, 81 GEO. L.J. 2771, 2810 (1993) (describing instances of implicit and explicit judicial approval of abuser's violence against woman); *see also* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* (stating that, "when the police do not respond to a battered woman's call for assistance, or when a civil court refuses to evict her husband, the woman is relegated to self-help, while the man who beats her receives the law's tacit encouragement"), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 156 (David Kairys ed., 1990).

154. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 9 (1994) (stressing importance of judge's understanding of available options for resolving domestic violence issues and punishing abusers); *see also* Kit 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, 210 (1993) (arguing that improving judicial understanding of state's statute may reduce number of denied protective orders); Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1050 (1992) (stating that "unless judges become aware of protective order legislation and use the statutes effectively in their courts, the legislation means nothing").

155. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 9 (1994) (explaining need for judges to be aware of relevant statutes concerning domestic violence); Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965–66 (1986) (providing summary of practical application of statutes dealing with protective orders and acts of family violence); *see also* Kit 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, 210–12 (1993) (stressing necessity of educating judges about dynamics of domestic violence and state's domestic violence statute).

156. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 66 (1987) (reporting experiences of many battered women who felt that abuser's threats of violence were closely related to woman's leaving relationship). The mere discussion of separation may send an abuser into a rage, as he perceives a loss of control. *See* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1041 (1992) (noting that abusers are likely to "lash out after being charged or having been stigmatized by a conviction").

education and training.[157] To ensure that judges fulfill the statutorily mandated education requirements for domestic violence, the legislature might consider predicating eligibility for re-election on satisfactory completion of all continuing education requirements.[158] In any event, failure to complete these requirements will constitute fertile grounds for debate in any judicial election campaign.

## VIII. The Continued Importance of Education for Protection

Many, if not most, of the problems with availability and enforceability of protective orders share a common origin—a fundamental ignorance of the prevalence and dynamics of domestic violence against women.[159] The

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157. *See* Supreme Court of Texas, Gender Bias Task Force of Texas Final Report 9 (1994) (recommending education for judges who deal with domestic violence issues). The Task Force's specific recommendations concerning judges were:

> Recommendation 18: For the Supreme Court. Judges who deal with issues of family law and domestic violence should receive specialized interdisciplinary training concerning the dynamics of domestic violence, the characteristics of perpetrators and victims of domestic violence, and the range of options available for the disposition of cases involving domestic violence and the sentencing of offenders.
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> Recommendation 22: For Judges. Judges should be aware of the relevant statutes which recognize that a history of abuse can operate as a factor justifying, or mitigating the consequences of, the use of deadly force by a battered person.
>
> Recommendation 24: For Judges. Mediation, as it is currently practiced, should not be ordered in any family-law case in which one of the parties is a victim of domestic violence.
>
> Recommendation 25: For Judges. Mutual protective orders should not be entered without proper pleading and proof.

*Id.*; *see also* Bureau of Just. Assistance, U.S. Dep't of Just., Family Violence: Interventions for the Justice System 17 (1993) (asserting that training will solve many existing problems with domestic violence cases); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. Rev. 329, 353–58 (1994) (recognizing that integral part of successful legal response to domestic violence is cooperative and informed judiciary).

158. *See* Tex. Gov't Code Ann. § 22.011 (Vernon Supp. 1995) (requiring judges who face domestic violence issues to complete education on domestic violence, sexual assault, and child abuse); *see also* Lisa Ander, *Gender Bias? Some Attorneys See*, Hous. Post, Aug. 2, 1994, at A13 (discussing continuing need for Texas judges to obtain education on domestic violence issues).

159. *See, e.g.*, Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 Cal. L. Rev. 423, 465 (1994) (commenting that judges, like police officers, are not immune to stereotypical notions about domestic violence); Silvija A. Strikis, Note, *Stopping Stalking*, 81 Geo. L.J. 2771, 2809 (1993) (recognizing that "lack of police enforcement of restraining orders comes from police ignorance of how to respond to volatile domestic situations"); *cf.* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267, 272 (1985) (stating that widespread statutory reform of judicial system's response to domestic

legislative framework is adequate and in place, but it is simply not being adequately enforced.[160] Unless police, prosecutors, and judges understand that domestic violence is a form of domination and that it is widespread, serious, criminal, and not merely private, they will not reduce its incidence. Although some members of the judicial system take domestic violence—and their duty to prevent it—seriously, too many others do not.[161]

Many women abused by their partners or husbands simply cannot leave the relationship without assistance.[162] The single greatest source of

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violence "would be unnecessary if legal officials understood wife beating and used their discretion wisely to stop it"). *See generally* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039 *passim* (1992) (explaining ignorance as common problem with ineffectiveness of judicial system's implementation of domestic violence legislation).

160. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 68–69 (1994) (discussing widespread perception that protective orders are often not enforced properly); *see also* City of Grafton v. Swanson, 497 N.W.2d 421, 423 (N.D. 1993) (concluding that "[i]neffective police response is a chief reason for continuing high rates of domestic violence"). Activity in the domestic violence arena is heavy in the 74th Texas Legislative Session, as several bills are pending that may significantly strengthen the statutes already in place. *See, e.g.*, Tex. S.B. 7, 74th Leg., R.S. (1995) (divesting divorce courts of discretion to order alternative dispute resolution in cases involving domestic violence); Tex. S.B. 223, 74th Leg., R.S. (1995) (requiring police to "make a reasonable attempt" to give victims notice of imminent release from custody of abuser); Tex. S.B. 224, 74th Leg., R.S. (1995) (creating new section of Family Code to facilitate reporting of domestic violence incidents); Tex. S.B. 284, 74th Leg., R.S. (1995) (enabling police officers to stay with victim for protection or so that victim can relocate); Tex. S.B. 285, 74th Leg. R.S. (1995) (suspending requirement of immediate release upon posting of bail if probable cause exists to fear further imminent violence); Tex. H.B. 418, 74th Leg., R.S. (1995) (prohibiting judges from dismissing application for protective order solely because divorce suit is pending); Tex. H.B. 816, 74th Leg., R.S. (1995) (adding "sexual assault" to definition of family violence). Several other pending bills and resolutions address the pressing need for education on the dynamics of violent relationships. *See, e.g.*, Tex. S.B. 225, 74th Leg., R.S. (1995) (proposing education for police in how to gather evidence of domestic violence and properly document incidents); Tex. S.B. 243, 74th Leg., R.S. (1995) (mandating education on family violence for all children in custody of juvenile authorities); Tex. H.R. Con. Res. 27, 74th Leg., R.S. (1995) (incorporating model judicial education program).

161. *See* SUPREME COURT OF TEXAS, GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 73 (1994) (recognizing commitment of some prosecutors to prosecuting batterers and obtaining protective orders, but stating that others "perceive family violence cases as a nuisance and unimportant and frustrating to deal with").

162. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 63 (1991) (challenging assumption that abused women are unencumbered in their attempts to leave violent relationship); *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 113 (1987) (noting widespread perception among abused women that they could not leave because their abusers or husbands would find and kill them). Considering the reluctance of the judicial system to intervene in violent relationships, it is tragically ironic that abused women are often the crime victims least

assistance that the judicial system can offer is enforcement of the laws designed to protect victims from further abuse.[163] For some members of the judicial system, this means realizing that:

(1) violence is violence, whether "domestic" or otherwise;
(2) violence begets violence, and ignoring the problem will not make it go away;
(3) domestic violence is not a private matter;
(4) domestic violence is not a trivial matter;
(5) domestic violence is about domination and control;
(6) women do not ask to be abused;
(7) men do not have the right to abuse their wives or partners; and
(8) a protective order that is not enforced is merely an expensive piece of paper.[164]

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able to help themselves. *See* Irene H. Frieze & Angela Browne, *Violence in Marriage* (discussing emotional barriers to relief for victims of domestic violence who often exhibit characteristics of "a torture victim" or "prisoner of war"), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 163, 196 (Lloyd Ohlin & Michael Tonry eds., 1989); Kit 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, 211 (1993) (stressing that education of judges on dynamics of domestic violence and particularly on abuser's use of threats can lead to enhanced protection of victimized women). Although some espouse concerns that increased attention paid to the battered woman syndrome will lead to many more women killing their husbands, these concerns are probably unfounded. *Cf.* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 13 (1988) (illustrating that, while 31% of murdered women were killed by husbands or boyfriends, only 5% of murdered men were killed by wives or girlfriends).

163. *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 5–6 (1984) (calling for "strong, coordinated effort by the criminal justice system"); *see also* NAT'L INST. OF JUST., U.S. DEP'T OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990) (stating that properly enforced protective orders can prevent threats or harassment, help provide victims with safe location, and establish safe guidelines for future interactions); Kit 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, 223–25, 233 (1993) (explaining that epidemic nature of non-enforcement is most significant defect in protective order system); Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 931 (1991) (asserting that enforcement of domestic violence laws is most effective way to reduce injury to citizens generally because domestic violence is number one cause of injury to women).

164. *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 11 (1984) (stating that "[a]n assault is a crime, regardless of the relationship of the parties"). "The law should not stop at the front door of the family home." *Id*; *see* Tex. Att'y Gen. ORD-611 (1992) (stating that "[a]n assault by one family member on another is a crime, not a family matter normally considered private"); Steve Russell, *Family Violence: What Lawyers and Judges Can Do*, 49 TEX. B.J. 965, 965 (1986)

These realizations will occur, if at all, only through education about the dynamics of violent relationships, which reveal that the abused woman is the subject of male domination.[165] This is hardly a novel observation; victims, advocates, commentators, and legislatures have demanded education for years. The Texas Legislature has stressed the need for education on domestic violence issues since 1981;[166] more recently, the legislature mandated such education for certain judges[167] and

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(concluding that, although some officers of judicial system will always treat family violence as private, "[f]or those of us who have sworn to uphold Texas law, this debate is over"); *see also* Helen R. Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 708–09 (1989) (discussing feminist research identifying domestic violence as subjugation of women, and stating that "[w]ife abuse is a manifestation of men's domination of women"). The domination within a violent relationship limits the abused woman's choices and, worse yet, her understanding of those choices. *See* United States v. Johnson, 956 F.2d 894, 900 (9th Cir. 1992) (investigating common misconceptions about abused women's freedom to leave their abusers). Domestic violence continuously breeds violence both inside and outside the home in subsequent generations. *See* Lloyd Ohlin & Michael Tonry, *Family Violence in Perspective* (noting increasing evidence that family violence predisposes both victim and abuser to perpetrate violence outside home), *in* 11 CRIME AND JUSTICE: A REVIEW OF RESEARCH: FAMILY VIOLENCE 1, 12 (Lloyd Ohlin & Michael Tonry eds., 1989). Children reared in violent families are more likely to re-enact similar violence upon reaching adulthood. *Id.*

165. *See* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 2–3 (1993) (describing how understanding dynamics of family violence leads to appreciation of legal and nonlegal issues surrounding such violence, and noting that, when judicial system understands nonlegal issues, it is better equipped to address legal ones); Kit 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, 237 (1993) (explaining how education on nature of violent relationships can break down barriers to enforcement); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 63 (1991) (stressing "need to comprehend the related power and control issues common to continuing relationships and to separation, rethink the implicit burden on the woman to leave her home and risk losing her family, and change our perceptions of what it means for her to separate"); *cf.* State v. Hodges, 716 P.2d 563, 567 (Kan. 1986) (realizing need for expert testimony to dispel common myths, such as abused women are always free to leave, they enjoy being beaten, or they intentionally provoke their abusers). A pending Texas Resolution would require that the judicial education program relating to domestic violence be based upon a model developed by the National Judicial Education on Domestic Violence Advisory Committee. Tex. H.R. Con. Res. 27, 74th Leg., R.S. (1995).

166. *See* Act of May 28, 1981, 67th Leg., R.S., ch. 867, § 1, 1981 Tex. Gen. Laws 3313, 3313–16 (codified as amended at TEX. HUM. RES. CODE ANN. § 51.003 (Vernon 1990)) (requiring Texas Department of Human Services to contract statewide for activities advancing work of family violence shelters, which contracts may require provision of education to "professionals in the criminal justice, medical, and social service fields, and for community or civic groups").

167. *See* TEX. GOV'T CODE ANN. § 22.011 (Vernon Supp. 1995) (requiring education on domestic violence, sexual assault, and child abuse issues for district and county court

police officers.[168] Legislative directives notwithstanding, the burden of

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judges who confront such issues). In 1991, the Texas Legislature added § 22.011 to the Government Code, which states in part:

> (a) The supreme court shall provide judicial training related to the problems of family violence, sexual assault, and child abuse.
>
> (b) The supreme court shall adopt the rules necessary to accomplish the purposes of this section. The rules must require each district judge and each judge of a statutory county court to complete at least eight hours of the training within the judge's first term in office.
>
> . . .
>
> (d) The instruction must include information about:
>
> . . . .
>
> (5) available community and state resources for counseling and other aid to victims and to offenders;
>
> (6) gender bias in the judicial process; and
>
> (7) dynamics and effects of being a victim of family violence, sexual assault, or child abuse.

*Id.* § 22.011. The 1993 amendatory act provides:

> (a) Each judge who is in office on December 31, 1993, and is not exempt must complete the judicial training required by Section 22.011, Government Code, as amended by this Act, notwithstanding the requirement that it be completed within the first term of office. The training must be completed before August 31, 1996.
>
> (b) A judge who takes office on or after January 1, 1994, and who is not exempt from or has not otherwise satisfied the requirements of Section 22.011(b), Government Code, as amended by this Act, must complete the judicial training required by that section within the judge's first term of office that begins on or after that date.

Act of May 14, 1993, 73d Leg., R.S., ch. 282, § 2, 1993 Tex. Gen. Laws 1298, 1298 (uncodified amendatory act).

168. *See* TEX. GOV'T CODE ANN. § 415.032 (Vernon 1990 & Supp. 1995) (establishing curriculum for law enforcement officers to be established by Commission on Law Enforcement Officer Standards and Education). Section 415.032 provides in pertinent part:

> (a) The commission may establish minimum curriculum requirements for prepatory, in-service, and advanced courses and programs for schools subject to approval under Section 415.031(b)(1).
>
> (b) In establishing requirements under this section, the commission shall require courses and programs to provide training in the investigation of cases that involve the following:
>
> . . . .
>
> (3) family violence; and
>
> (4) sexual assault.

*See* Act of May 15, 1989, 71st Leg., R.S., ch. 773, § 1, 1989 Tex. Gen. Laws 3380, 3380 (codified as amended at TEX. GOV'T CODE ANN. § 415.032(b)(3),(4) (Vernon Supp. 1995)) (adding "family violence" and "sexual assault" to pre-existing educational requirements). A 1993 amendatory act provided in part that "[t]he Commission on Law Enforcement Officer Standards and Education shall establish the new education and training programs required by this Act not later than January 1, 1994." Act of May 30, 1993, 73d Leg., R.S., ch. 892, § 3, 1993 Tex. Gen. Laws 3535, 3535–36 (uncodified amendatory act); *see also* TEX. GOV'T CODE ANN. § 415.034 (Vernon 1990 & Supp. 1995) (requiring continuing education for police officers every 24 months on family violence); Act of May 30, 1993, 73d Leg., R.S., ch. 892, § 2, 1993 Tex. Gen. Laws 3535, 3535–36 (uncodified amendatory act) (man-

administering this much-needed education has yet to be borne.[169]

## IX. CONCLUSION

During the thirty seconds required to read this conclusion, two women will endure the physical and emotional terror of an abusive partner's rage. They may be slapped, hit, spat upon, shot, stabbed, strangled, thrown, bitten, smothered, or raped. They may be threatened with any of the above. They may now be dead, or perhaps not. They may glimpse a tear in the webs of domination weaved around them. They might decide to seek legal help. Their safety will depend upon the legal system's recognition of, and response to, their plight. Will the legal system respond effectively? Will it respond at all?

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dating completion of first training session under § 415.034 by September 1, 1995 for all persons who were officers as of September 1, 1993); 37 TEX. ADMIN. CODE § 211.100 (West 1994) (providing for annual in-service education on family violence for all reserve or peace officers).

169. The need for education remains acute four years after the Texas Legislature mandated domestic violence education for judges. *See* Lisa Ander, *Gender Bias? Some Attorneys See*, HOUS. POST., Aug. 2, 1994, at A13 (commenting on need for continuing education for Texas judges concerning domestic violence issues). In the first meeting of the committee appointed to implement the Task Force's recommendations, the committee decided that judicial education on domestic violence issues was a top priority. *See* Janet Elliot, *Women Split with Bar: Alimony, Sexual Predators Legislation Tops Agenda*, TEX. LAW., Jan. 30, 1995, at 1 (reporting statement by Judge Charles Baird of the Texas Court of Criminal Appeals, co-chair of implementation committee, that "the committee decided to focus immediately on education for judges"). What some judges understand as business as usual, others perceive as gender bias that perpetuates invidious stereotypes. *See id.* (quoting Texas attorney as stating that "it's time for people in the legal system to start thinking that calling a woman 'little lady' is the equivalent of calling a black man 'boy' "); *see also* Silvija A. Strikis, *Stopping Stalking*, 81 GEO. L.J. 2771, 2810 (1993) (reporting statements from judges to domestic violence victims such as "[i]f you'd had supper on the table this wouldn't happen," "if my wife slept around I'd kick her butt too," and "[y]ou've been married for ten years, you must like being hit"). Though education for Texas police, attorneys, and judges is critical, the burden of strengthening existing statutes and funding support programs remains with the legislature. *See* Katie Sherrod, *Let's Make Homes Safer for Women*, DALLAS MORNING NEWS, Feb. 7, 1993, at J6 (criticizing Texas Legislative Budget Board for proposed 63% cut in spending for shelter facilities that, in 1993, was only slightly higher than amount spent to maintain Fort Worth Zoo).