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## LAW IS THE ANSWER? DO WE KNOW THAT FOR SURE?: QUESTIONING THE EFFICACY OF LEGAL INTERVENTIONS FOR BATTERED WOMEN

LEIGH GOODMARK\*

“The law can curtail wife abuse, and it must.”<sup>1</sup>

“Oh, no, I’m never calling the police. I’ve called them before and that was a big mistake. No, they won’t help me.”<sup>2</sup>

“But back then my lawyer says it wasn’t worth having an ex parte, that it wouldn’t do me any good anyway. It wasn’t going to be bulletproof, he said, so why bother. And by this time, I understood where he was coming from.”<sup>3</sup>

My favorite cases as a fledgling attorney were divorces for battered women. There was something so gratifying about severing the last legal tie between a survivor and her abuser.<sup>4</sup> I believed that I was using my legal skills to help free my clients from their abusive relationships and move on with their lives. My clients invariably cried and thanked me profusely — because, I believed, they were just as happy to be finally, forever rid of their abusers as I was to see them go.

How hopelessly naïve I was. Conveniently, I forgot that my clients who had children with their abusers would be pulled into the courts by batterers using the legal system as a new forum for their abuse. I ignored the reality that

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1. Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 302 (1985).

2. ELAINE J. LAWLESS, *WOMEN ESCAPING VIOLENCE: EMPOWERMENT THROUGH NARRATIVE* 28 (2001) (quoting Cathy, a participant in a battered women’s support group) (internal quotation marks omitted).

3. *Id.* at 189 (quoting Margaret, a survivor of domestic violence) (internal quotation marks omitted).

4. Given that the latest federal statistics show that 85% of the victims of domestic violence are women and that the vast majority of my battered clients were women, I have chosen in this article to refer to victims/survivors of domestic violence as women and their abusers as men. See CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP’T OF JUSTICE, *INTIMATE PARTNER VIOLENCE* 1 (2001).

batterers continue to stalk their victims — and in many cases, increase their violence — after separation.<sup>5</sup> And I refused to hear the doubts my clients expressed about ending their relationships, turning a deaf ear to their intuitions that perhaps these relationships had not ended after all. I did not understand that finality within the legal system was not finality in the real world.

As a lawyer, I had a circumscribed set of solutions that I could offer my battered clients: civil protection orders, custody and visitation orders, divorces, alimony and child support, and assistance in understanding and negotiating cases in the criminal system. Although I could help clients access shelter beds and counseling services, legal interventions were the primary remedies available to battered women in my jurisdiction, and the majority of women were steered towards those interventions. My community's situation was not unusual; since the advent of the Violence Against Women Act ("VAWA"), resources have been poured into the development of criminal and civil legal responses to the needs of battered women.<sup>6</sup> And almost all of these legal interventions are premised on the notion that battered women want to end their relationships, invoke the power of the legal system to keep their batterers away, and ultimately sever all legal ties with their abusers.

The legal system developed around the needs of battered women has undoubtedly helped hundreds of thousands of women and is certainly one crucial component for ensuring that battered women are safe from abuse.<sup>7</sup> But what can the legal system do for a woman who wants to remain with her abuser? How does invoking the power of the criminal system against their abusers affect battered immigrant women? Can turning to the legal system create dangers for battered women? Have we focused our resources so narrowly on legal recourse that we have failed to develop other alternatives?

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5. "[D]ivorced or separated persons were subjected to the highest rates of intimate partner victimization . . ." *Id.* at 5; Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1115 (1996) (stating that divorced and separated women report being battered fourteen times as often as women living with their abusers and account for 75% of all battered women killed by their abusers). In his study of the Massachusetts courts, James Ptacek found that 48% of the affidavits of women seeking restraining orders in the Dorchester and Quincy District Courts included separation assault. JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE* 80 (1999). For a discussion of the issues surrounding separation violence, see generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

6. U.S. DEP'T OF JUSTICE, *GRANT DESCRIPTIONS & APPLICATION KITS* (2003), at <http://www.ojp.usdoj.gov/vawo/applicationkits.htm>.

7. In this article, I have chosen to focus on the central components of the legal system designed to protect battered women and hold batterers accountable: criminal proceedings, civil restraining orders and family law. Laws specific to victims of violence exists in other areas as well — torts, insurance, and welfare, to name a few — but those areas are beyond the focus of this article.

Developing a system premised primarily on legal responses to domestic violence has created a number of unintended consequences for battered women and precluded communities, governments, and advocates from thinking creatively about developing meaningful, non-legal options for these women, their abusers, and their children. This article will briefly examine the legal interventions most frequently employed by battered women and their advocates and detail the problems faced by battered women as a result of reliance on these strategies. Finally, this article will urge lawyers to think beyond the legal system when responding to domestic violence.

## I. LEGAL RESPONSES TO DOMESTIC VIOLENCE

Until the 1970s, the response to a battered woman's cry for help was often silence. Since its inception, one key goal of the battered women's movement has been to create options for women seeking haven from abusive relationships.<sup>8</sup> Community responses, in the form of safe houses and shelters, were soon followed by advocacy for effective civil and criminal justice interventions on behalf of battered women.<sup>9</sup> The growth in legal responses to domestic violence has been spurred over the last decade by VAWA, which was specifically intended to fund improved law enforcement, prosecution, and victim services.<sup>10</sup> To date, the Office on Violence Against Women has provided more than \$1 billion in grant funds to develop resources to assist battered women.<sup>11</sup> While representation and resources are still not available for all of the women who need them, VAWA has allowed states, localities, and non-governmental programs to vastly improve their legal responses to domestic violence and prompted police and prosecutors to redouble their efforts to hold batterers criminally accountable.<sup>12</sup> Advocates organizing and lobbying, coupled with the influx of resources, led to the development of civil protection orders and domestic violence provisions in custody and visitation statutes, increased criminal penalties for domestic violence, and the adoption of mandatory arrest and no-drop policies.<sup>13</sup>

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8. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 2* (1982).

9. Fernando Mederos & Julia Perilla, *Community Connections: Men, Gender and Violence 1*, at <http://endabuse.org/bpi/discussion2/Discussion2-short.pdf> (last visited Jan. 8, 2004). Susan Schechter notes that it was not "society" generally that called attention to the need for such solutions, but feminists and grassroots activists. SCHECHTER, *supra* note 8, at 3.

10. NAT'L CENTER FOR STATE COURTS, STATE JUSTICE INST., *REPORT ON TRENDS IN THE STATE COURTS 34* (1997).

11. DIANE STUART, U.S. DEP'T OF JUSTICE, *ABOUT THE OFFICE ON VIOLENCE AGAINST WOMEN* (2003), at <http://www.ojp.usdoj.gov/vawo/about.htm>.

12. Attorney General John Ashcroft, Remarks at the Annual Symposium on Domestic Violence (Oct. 29, 2002), at <http://www.ojp.usdoj.gov/vawo/nac/agremarks.htm>.

13. SCHECHTER, *supra* note 8, at 4.

### A. *The Civil System's Response*

Frustrated with the unwillingness of police and prosecutors to protect battered women, advocates in the 1970s turned to the civil legal system.<sup>14</sup> Relief came in the form of civil protection orders and changes to custody law.

#### 1. Civil Protection Orders

First appearing in state law in the 1970s, by 1989 all fifty states and the District of Columbia had enacted statutes providing civil remedies for battered women via protection orders, known as the “grandmother of domestic violence law.”<sup>15</sup> Civil protection order statutes enable victims of violence to petition for a variety of types of injunctive relief, including orders prohibiting abusers from continuing to assault, threaten, harass, or physically abuse victims; requiring that they stay away from victims’ homes, places of employment, children’s schools, and other places frequented by the victim; precluding batterers from contacting their victims; granting custody, visitation, child support, alimony, and other monetary relief; compelling the batterer to participate in treatment programs; and requiring that the abuser vacate the couple’s shared home.<sup>16</sup> State statutes vary on who may apply for relief, against whom, how abuse is defined, the level of proof required to obtain relief, and the types of relief available.<sup>17</sup>

Civil protection orders provide victims with a quicker, more comprehensive, less difficult to obtain form of protection than that which is available in the criminal system.<sup>18</sup> While these orders are intended to prevent victims from further violence rather than to punish perpetrators,<sup>19</sup> the orders

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14. Before 1972, the only civil legal tools available to battered women were injunctions pursuant to divorces or legal separation, remedies that were short in duration, available in limited states, difficult to enforce, and useless for battered women not married to their batterers. Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 CLEARINGHOUSE REV. 1142 (1994). For a discussion of the evolution of the feminist legal response to battering, see ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 42-53 (2000).

15. Barbara J. Hart, *The Legal Road to Freedom*, in *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* (1993), available at <http://www.mincava.umn.edu/documents/hart/legalro.shtml>.

16. For a comprehensive discussion of the relief available through civil protection orders, see generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

17. *Id.* See also Hart, *supra* note 15, at 40.

18. Klein & Orloff, *supra* note 16, at 801. Protective orders are also available in the criminal system, frequently as a condition of bail or pre-trial release. Those orders cannot provide the kind of comprehensive relief available through most civil protection order statutes and generally last only until the case ends, as compared to civil protection orders, which generally last for at least one year. *Id.* at 1167.

19. Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy,”* 11 S. CAL. INTERDISC. L. J. 361, 368 (2002).

are enforceable through civil and criminal contempt, and in most states, violation of a civil protection order is a misdemeanor offense.<sup>20</sup>

Victims have openly questioned how a piece of paper, even one issued by a court, can keep them safe.<sup>21</sup> A recent study showed, however, that women who obtain and maintain civil protection orders may be safer over the nine-month period following an initial threat or abusive incident than victims who choose not to pursue an order.<sup>22</sup> The study's lead researcher stated, "[C]ivil protection orders appear to be one of the few widely available interventions for victims of intimate partner violence that has demonstrated effectiveness."<sup>23</sup> That study noted that only about 20% of the approximately two million victims of domestic violence in the United States each year seek such orders.<sup>24</sup> Other studies have reported that women who secure protection orders report increases in their emotional well-being, sense of security, and control over their lives.<sup>25</sup> Battered women in a Maryland study stated that simply filing for a restraining order was one of the most helpful strategies available.<sup>26</sup> One commentator suggested that this form of "[l]egal intervention works to interrupt the pattern of domination and control by directly restructuring the relationship level between the victim and abuser."<sup>27</sup>

## 2. Custody and Visitation Statutes

Civil protection orders can give victims of violence temporary custody of their children, but mothers frequently found that the violence against them and their children was considered unimportant or irrelevant in permanent custody

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20. Klein & Orloff, *supra* note 16, at 1095-98.

21. "My restraining order was a joke — its protection as flimsy as my hope that he would just forget about me." Cecile Gilmer, *My Ex Pointed a Gun at Me and Said He'd Kill Us Both.*, JANE, Aug. 2003, at 86. My clients frequently expressed these sentiments as well. See also PTACEK, *supra* note 5, at 169-72.

22. See generally Victoria Holt et al., *Do Protective Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREVENTIVE MED. 16 (2003).

23. HEALTH BEHAVIOR NEWS SERV., PROTECTION ORDERS CURB PARTNER VIOLENCE, BUT FEW SEEK THEM (2003), at <http://www.newswise.com/articles/2003/11/ORDERS.HBN.html?sc=wire>. But see Ko, *supra* note 19, at 373-74 (citing mixed results in studies looking at the deterrent effect of protection orders).

24. HEALTH BEHAVIOR NEWS SERV., *supra* note 23.

25. See Ko, *supra* note 19, at 369-70 (discussing various studies). Jane Murphy notes that how to measure the effectiveness of protective orders is "open to debate. Much of the existing empirical research examining the impact of the new array of legal remedies define 'improved safety' in terms of orders obtained or rates of reabuse" rather than by hearing the stories of the women who engage with the state. Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 504 (2003) (citing studies).

26. See Murphy, *supra* note 25, at 509.

27. Ko, *supra* note 19, at 370.

disputes.<sup>28</sup> Studies showing that batterers were more likely to seek custody of their children and more likely to receive custody than other men confirmed the anecdotal reports of battered women frustrated by domestic relations' judges unwillingness to factor evidence of domestic violence into their custody decisions.<sup>29</sup>

Advocates began to push for case law and statutory reform in the 1980's, contending that domestic violence should be considered a factor in custody determinations.<sup>30</sup> Later, with the growing popularity of joint custody presumptions, battered women's advocates began to argue that states should also codify presumptions against awarding batterers custody.<sup>31</sup> A number of influential groups joined their efforts. In 1990, the United States Congress adopted a resolution expressing the sense of Congress that batterers should not be awarded custody of their children.<sup>32</sup> Similar policy statements from the National Council of Juvenile and Family Court Judges, the American Bar Association, and the American Psychological Association quickly followed this first national pronouncement on the issue.<sup>33</sup>

Judges and attorneys, who had long contended that the behavior of abusive men towards their wives had no bearing on how they treated their children, were stunned. But counselors working with batterers have amassed an impressive catalog of justifications for factoring a batterer's violence towards his partner into custody determinations. Such justifications include the batterer's tendency towards authoritarianism, under involvement, neglect, and irresponsibility as a parent; the batterer's undermining of the mother, both overtly and through his use of violence against her; his self-centeredness; and his manipulateness.<sup>34</sup> Batterers directly and indirectly interfere with their victims' parenting and use children as weapons post-separation.<sup>35</sup> Studies estimate that in 30-60% of homes where an abuser is battering his partner, he is

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28. See Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do For Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 254 (1999).

29. See Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 608 n.37 (2001) (citing studies).

30. *Id.* at 604.

31. *Id.* at 610.

32. H.R. 172, 101st Cong. (1990).

33. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (1994); A.B.A., THE IMPACT OF VIOLENCE ON CHILDREN 15 (1994); AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY 99 (1996).

34. See generally LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 29-36 (2002).

35. *Id.* at 64-70, 75-76.

battering the children as well.<sup>36</sup> Rates of sexual abuse of children and incest are also higher among batterers than other men.<sup>37</sup> While each batterer's parenting style is different, "one cannot say that any batterer is a fully responsible parent. Whether or not it is the batterer's intention, exposing children to domestic violence has multiple negative effects on them, including inherently damaging their relationships with their mother."<sup>38</sup>

By the beginning of 2001, forty-seven states and the District of Columbia had adopted legislation requiring that domestic violence be considered in custody determinations; seventeen states and the District of Columbia have statutes creating a rebuttable presumption against awarding joint or sole custody to batterers.<sup>39</sup> While evidence on the efficacy of these statutes is mixed,<sup>40</sup> difficulties in their implementation "should not discourage states from enacting statutes creating a presumption against custody to batterers."<sup>41</sup>

## B. *The Criminal System's Response*

### 1. Criminalizing Domestic Violence

Traditionally, domestic violence was considered a matter between a man and his wife, an area where law enforcement had no jurisdiction. "[O]fficers believed and were taught that domestic violence was a private matter, ill suited to public intervention."<sup>42</sup> Police officers frequently told abusive spouses to take a walk around the block to cool down and attempted to mediate between abusers and their victims.<sup>43</sup> Not until the 1970s did the criminal system begin to treat assaults committed by intimate partners in the same way that it handled assaults committed by strangers.<sup>44</sup> Efforts to increase the responsiveness of the criminal system were buoyed by the Department of Justice's 1984 *Report of the Attorney General's Task Force on Family Violence*, which detailed the

36. NAT'L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFO., IN HARM'S WAY: DOMESTIC VIOLENCE AND CHILD MALTREATMENT, at <http://www.calib.com/nccanch/pubs/otherpubs/harmsway.cfm> (last visited Jan. 8, 2004).

37. BANCROFT & SILVERMAN, *supra* note 34, at 84-97

38. *Id.* at 29-30.

39. Lemon, *supra* note 29, at 613.

40. Goodmark, *supra* note 28, at 262-69 (providing examples of failure to follow statutory presumptions against awarding batterers custody); Lemon, *supra* note 29, at 622-67.

41. Lemon, *supra* note 29, at 676.

42. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992).

43. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 YALE J.L. & FEMINISM 3, 14 (1999); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996); Zorza, *supra* note 42, at 48-50.

44. For a discussion of how battered women's advocates pushed the criminal system to recognize "wife beating" as a crime, see SCHECHTER, *supra* note 8, at 159-61.



failures of the criminal justice system in family violence cases and made recommendations for improvement.<sup>45</sup>

“Assault and battery is always a crime,”<sup>46</sup> but some states have created a separate category of domestic violence crimes.<sup>47</sup> These statutes differ in how domestic violence is defined and the types of relationships that are protected.<sup>48</sup> Creating domestic violence crimes distinct from the already existing assault and battery statutes was intended to call attention to these crimes and underscore the state’s commitment to protecting battered women.<sup>49</sup> To help ensure compliance with court orders, the majority of the states have also criminalized violation of a civil restraining order.<sup>50</sup>

Ensuring that domestic violence was treated as a crime was certainly a first step towards building a responsive legal system. But advocates soon found that the police were reluctant to move from a “walk around the block” regime to one where allegations of domestic violence required police to investigate

45. U.S. DEP’T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE 10-16 (1984).

46. SCHECHTER, *supra* note 8, at 159.

47. *See, e.g.*, ALA. CODE §§ 13A-6-130 - 132 (2002); COLO. REV. STAT. § 18-6-800.3 (2002); KAN. STAT. ANN. § 21-3412a (2002); N.J. STAT. ANN. §§ 2C:25-17 - 18 (West 2003); WASH REV. CODE § 10.99.020 (2002).

48. *See, e.g.*, ALA. CODE §§ 13A-6-130-132 (2002) (including in its definition a current or former spouse, parent, child, any person whom the defendant has a child in common, a present or former household member, or a person who has or had a dating or engagement relationship with the defendant); COLO. REV. STAT. § 18-6-800.3 (2002) (including in its definition a person with whom the actor is or has been involved in an intimate relationship. “Intimate relationship” means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time); KAN. STAT. ANN. § 21-3412a (2002) (including in its definition violence by a family or household member against a family or household member); N.J. STAT. ANN. §§ 2C:25-17 - 18 (West 2003) (including in its definition spouses or co-habitants); WASH REV. CODE § 10.99.020 (2002). Including in its definition:

“Family or household members” mean[ing] spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

*Id.*

49. N.J. STAT. ANN. §§ 2C:25-18 (West 2003); WASH REV. CODE § 10.99.010 (2002).

50. The move to criminalize violation of a restraining order was largely motivated by the Violence Against Women Act [hereinafter “VAWA”], which made having a such a statute a precondition for receiving VAWA grant funds. Violence Against Women Act, 42 U.S.C. § 3796hh (2000). VAWA’s requirement that jurisdictions receiving funding be “pro-arrest” also prompted a number of jurisdictions to adopt mandatory arrest laws and policies. *Id.*

and, when appropriate, arrest.<sup>51</sup> Advocates soon began to press for another tool to ensure that batterers would be held accountable: mandatory arrest laws.

## 2. Mandatory Arrest Laws

Mandatory arrest laws were designed to deprive police of discretion in determining whether to make arrests when responding to domestic violence calls. Mandatory arrest laws require that a police officer make an arrest if he has probable cause to believe that a crime of domestic violence has been committed.<sup>52</sup> These laws are now in place in twenty states and the District of Columbia.<sup>53</sup> Mandatory arrest laws have been credited with improving police response to domestic violence; in the District of Columbia, the arrest rate in domestic violence cases went from 5% in 1990 to 41% in 1996 after the inception of the mandatory arrest law.<sup>54</sup> The research is mixed on whether arrest deters further violence.<sup>55</sup>

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51. Sue Ellen Schuerman, *Establishing a Tort Duty for Police Failure to Respond to Domestic Violence*, 34 ARIZ. L. REV. 355, 358 (1992).

52. Giving police the power to make warrantless arrests in misdemeanor cases preceded the drive for mandatory arrest laws. While police could arrest without warrants on probable cause in felony cases, the majority of domestic violence cases are charged only as misdemeanors. Allowing police to make warrantless arrests in misdemeanor cases, therefore, is crucial for the success of mandatory arrest policies. Zorza, *supra* note 42, at 61. Mandatory arrest laws followed because “some observers question[ed] whether anything short of stripping the officer of his discretion is effective in increasing arrests of batterers.” Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 558 (1999).

53. ALASKA STAT. § 18.65.530(a)(1) (Michie 2002); ARIZ. REV. STAT. § 13-3601 (2002); COLO. REV. STAT. § 18-6-803.6 (2002); CONN. GEN. STAT. § 46b-38b (2002); D.C. CODE ANN. § 16-1031 (2001); HAW. REV. STAT. § 709-906 (2002); 750 ILL. COMP. STAT. 60/304(a)(1) (1999); IOWA CODE § 236.12 (2000); KAN. STAT. ANN. § 22-2307 (2002); LA. REV. STAT. ANN. § 46:2140 (2003); ME. REV. STAT. ANN. tit. 19-A § 4012 (West 2003); MO. REV. STAT. § 455.085 (2000); NEV. REV. STAT. § 171.137 (2002); N.J. STAT. ANN. § 2C:25-21 (West 1995); N.Y. CRIM. PROC. LAW § 140.10 (McKinney 2003); N.D. CENT. CODE § 14-07.1-10 (1997); OR. REV. STAT. § 133.055.2 (2001); R.I. GEN. LAWS § 12-29-3 (2002); S.D. CODIFIED LAWS § 25-10-36 (Michie 2003); UTAH CODE ANN. § 30-6-8(2) (1998); WASH. REV. CODE § 10.31.100(2) (2000); WIS. STAT. § 968.075(2) (2002).

54. Epstein, *supra* note 43, at 14.

55. CHRISTOPHER D. MAXWELL ET AL., U.S. DEP’T OF JUSTICE, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 2 (2001) (arguing that arrest produces a modest deterrent effect but acknowledging other results); Johanna Niemi-Kiesiläinen, *The Deterrent Effect of Arrest in Domestic Violence: Differentiating Between Victim and Perpetrator Response*, 12 HASTINGS WOMEN’S L.J. 283, 293-301 (2001). Jeffery Fagan concludes that “formal (legal) sanctions are effective when reinforced by informal social controls and weakened when those informal controls are absent.” Social costs include “loss of job, relationship and children, social status in the neighborhood, and whatever substantive punishment” the legal system metes out. JEFFREY FAGAN, U.S. DEP’T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 26 (1996). Laura Dugan, Daniel S. Nagin & Richard Rosenfeld, *Do Domestic Violence Services Save Lives?*, NAT’L INST. JUST. J. (forthcoming 2004) at 22 (arguing that mandatory arrest laws can “cut both

Mandatory arrest laws ensured that a greater number of cases were coming into the criminal system and to the attention of prosecutors. Prosecutors frequently found, however, that victims were reluctant to testify against their batterers.<sup>56</sup> This reluctance stemmed from a number of sources: ambivalence about employing the legal system against their partners, mistrust of the justice system, and/or the belief that the batterer would simply be more dangerous to her because of her participation.<sup>57</sup> But failure to pursue the larger numbers of cases coming into the system as a result of mandatory arrest laws could have dissuaded police from taking these laws seriously.<sup>58</sup> Confronting huge numbers of battered women who recanted their stories of abuse, asked that charges be dropped, or simply refused to appear in court to testify, prosecutors began to look for ways to push domestic violence cases forward in the face of the victim's reluctance.

### 3. "No-Drop" Policies

Some prosecutors' offices, beginning with San Diego, California, and Duluth, Minnesota in the 1980s, saw "no drop" policies as the answer to this problem.<sup>59</sup> No-drop or pro-prosecution policies prevent prosecutors from dismissing charges at the victim's request.<sup>60</sup> Instead, prosecutors are required to pursue any case where there is sufficient evidence.<sup>61</sup> Prosecutors' offices throughout the country adopted no-drop policies,<sup>62</sup> explaining to victims and batterers that decisions to pursue a domestic violence case would be made by the government, not the victim. This strategy is intended to take the onus off

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ways" — for and against victim safety); Jackquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1, 5 (2003) (finding that arrest for domestic violence decreases the risk of femicide). See generally Joan Zorza, *Mandatory Arrest*, in ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1023-28 (David Levinson, ed. 2002).

56. See generally Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y. & L. 465 (2003).

57. *Id.*

58. Hanna, *supra* note 43, at 1893 (arguing that "[w]hen police do make an appropriate arrest, only to see the case dismissed at trial because the victim did not want to proceed, their decreased confidence in the value of arrest can undermine their diligence when policing domestic violence").

59. BARBARA E. SMITH ET AL., AN EVALUATION OF EFFORTS TO IMPLEMENT NO-DROP POLICIES: TWO CENTRAL VALUES IN CONFLICT iii (2001).

60. Hanna, *supra* note 43, at 1862.

61. *Id.*

62. In one study of 142 large prosecutors' offices, 66% reported that they had adopted no-drop policies. Epstein, *supra* note 43, at 15 n.63.

the victim to pursue the case against her abuser and render threats against the victim ineffective, as she is no longer able to ask that charges be dismissed.<sup>63</sup>

With the widespread adoption of no-drop policies has come further refinement in the practice. Prosecutors' offices employ either "hard" or "soft" no-drop policies. Hard no-drop jurisdictions push cases forward regardless of the victim's wishes.<sup>64</sup> In these jurisdictions, if the victim's testimony is deemed essential, prosecutors will even subpoena reluctant victims to testify and arrest or request imprisonment of victims who refuse to appear pursuant to the subpoena.<sup>65</sup> Victims in hard no-drop jurisdictions are also expected to participate extensively in pre-trial preparation, signing statements, being photographed and interviewed, and providing the state with information.<sup>66</sup> In soft no-drop jurisdictions, which are thought to be more prevalent,<sup>67</sup> victims are not forced to testify in criminal matters but are provided with services designed to increase comfort with the criminal system and are encouraged to cooperate.<sup>68</sup> In cases where the victim will not testify despite receiving these services, and the case cannot be made without her, prosecutors are likely to dismiss charges despite the no-drop policy.<sup>69</sup>

The adoption of evidence-based prosecution policies has further enabled prosecutors to pursue cases when the victim is unwilling to participate. In evidence-based prosecution, police and prosecutors focus on gathering sufficient physical and testimonial evidence to make their cases without the victim, rendering the victim's testimony useful but unnecessary for conviction — much the way that homicide cases, where victims are not available to testify, are investigated.<sup>70</sup> Police collect and prosecutors use evidence like 911

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63. These policies have been hailed by victim advocates for removing the burden from the victim and ensuring that perpetrators are held accountable for their criminal actions. See Ellen Reed, *October is Domestic Violence Awareness Month*, HANNIBAL COURIER-POST, Oct. 9, 2002, at <http://www.hannibal.net/stories/100902/hap1009020030.shtml>. There is almost no research on the efficacy of these policies. FAGAN, *supra* note 55, at 17. The downside of such policies will be discussed in Section II, *infra*.

64. *Id.* at 1863.

65. Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 181 (2003). San Diego's policy "is to pursue every provable felony case, regardless of the victim's wishes. Under this city's hard no-drop policy, the prosecutor can request a continuance and a bench warrant when a victim fails to appear or cooperate if the case cannot be proved without her testimony." Hanna, *supra* note 43, at 1863.

66. Hanna, *supra* note 43, at 1867.

67. *Id.* at 1863.

68. *Id.* at 1863-64.

69. *Id.* at 1864.

70. Mills, *supra* note 52, at 561. One prosecutor's office defines evidence-based prosecution as "an effort to successfully prosecute a case of domestic violence based on a thorough investigation and the gathering of all available physical, audio and photographic evidence without requiring or relying solely on testimony from the victim." WARREN COUNTY PROSECUTOR'S

tapes, statements to responding officers, photos of injuries, the testimony of medical personnel, physical evidence, and witness statements to make their cases.<sup>71</sup> With all of that evidence, the victim is no longer essential, and the prosecutor can proceed without her.

Studies have found that fewer cases are dismissed and more batterers are convicted in jurisdictions adopting no-drop policies.<sup>72</sup> No-drop policies are also credited with decreasing levels of violence and recidivism.<sup>73</sup> Domestic homicides dropped from thirty in 1985 to seven in 1994 after San Diego implemented its hard no-drop policy.<sup>74</sup> Some victim advocates argue that no-drop policies are beneficial to victims who are initially reluctant to cooperate, “resulting in feelings of empowerment for her that can alter the balance of power in the battering relationship and lower rates of future violence.”<sup>75</sup>

While most advocates would agree that the legal mechanisms developed to respond to domestic violence over the last thirty years are far from perfect, few would argue that we have made astonishing strides in improving the capacity of the legal system to provide victims of domestic violence with protection and needed supports and hold batterers criminally and civilly accountable for their actions. For legions of battered women, turning to the legal system for recourse has meant increased safety and stability — for some, the legal system has been the difference between life and death.

What lies beneath the surface, however, is the awareness of the damage that the legal system can do. Battered women’s legal advocates have long debated the pros and cons of various strategies used by the legal system to address domestic violence and have made numerous suggestions about how to make the legal system more responsive to the needs of battered women. Few

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OFFICE, DOMESTIC VIOLENCE UNIT, at <http://www.wcpo-nj.us/DomesticViolenceUnit.htm> (last visited Jan. 8, 2004).

71. SMITH ET AL., *supra* note 59, at iii. For a discussion of a variety of evidentiary issues in cases involving domestic violence, see Jane H. Aiken & Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Bench*, COURT REV., Summer 2002, at 12-22.

72. SMITH ET AL., *supra* note 59, at 47 (evaluating effectiveness of no-drop policies in San Diego, California, Omaha, Nebraska, Everett, Washington, and Klamath Falls, Oregon — all sites funded under VAWA Grants to Encourage Arrests Program).

73. Epstein, *supra* note 43, at 15-16.

74. Hanna, *supra* note 43, at 1864. For a discussion of San Diego’s methods, see Joan Zorza, *Battered Women Behave Like Other Threatened Victims*, DOMESTIC VIOLENCE REP., August/September 1996, at 5.

75. Jennice Vilhauer, *Understanding the Victim: A Guide To Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L. J. 953, 961 (2000). The way in which “no drop” policies are instituted can make a crucial difference for battered women. Deborah Epstein, Margaret Bell, and Lisa Goodman have suggested a “prosecution in context” approach, which allows the system to “respond more flexibly to an individual victim based on a comprehensive understanding of the psychological, relational, and socio-cultural contexts in which she is operating.” Deborah Epstein et al., *supra* note 56, at 472.

have suggested, however, that reliance on the legal system, in and of itself, is a problem. But the legal system creates more problems than it solves for some women, and the best efforts of advocates to use the legal system to keep battered women safe have had decidedly negative consequences for some of their clients. In the next section, I will consider the unintended negative consequences fostered by using the legal system to address domestic violence.

## II. UNINTENDED CONSEQUENCES

### A. *Penalizing Women Who Choose to Stay*

Like many battered women's advocates, I have done a substantial amount of training for judges, lawyers, social workers, and others on the dynamics of domestic violence — a sort of “DV 101” class. One of the major objectives of such training is to help participants understand the barriers battered women face when seeking to leave abusive relationships.<sup>76</sup> I generally ask my audiences to brainstorm a list of reasons why a battered woman remains in an abusive relationship. They usually offer, “Religion. Money. Immigration. Culture. Kids. Low self-esteem.”<sup>77</sup> They can articulate a number of factors that keep battered women in their relationships against their will. But when I raise the possibility that the battered woman still loves her abuser despite the violence and wants to make the relationship work, there is often an uncomfortable silence.

The majority of our responses to domestic violence, and certainly the legal responses, are largely premised on the idea that all battered women want — or should want — to separate from their abusers.<sup>78</sup> As Susan Schechter notes,

Current solutions to domestic violence offer tremendous help and important options to women who have resources and who want to leave their partners or end their relationships. Women can petition the court to evict violent men, can move to a shelter, can ask the police to arrest their partners, and can fight more effectively for custody in some states.

“But,” Schechter asks, “what about everyone else?”

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76. I also suggest to them that we are asking the wrong question, that we should be asking “Why doesn't he stop the violence?” rather than “Why doesn't she leave?” Advocates have been asking this question since the beginning of the battered women's movement. See SCHECHTER, *supra* note 8, at 79. The first question might guide us toward policy responses that are less reliant on the legal system and more on community based interventions.

77. All of these are, in fact, reasons why battered women do not leave their relationships, along with a host of others. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1232-40 (1993).

78. Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1019 (2000).

Advocates have always said that women have the right to be in safe and respectful relationships. The domestic violence movement's historic goal has been to end violence and coercion, not to have women leave their relationships.<sup>79</sup>

Similarly, Professor Esther Jenkins of Chicago State University argues, "Black women don't want men removed from their families. They want their relationships fixed."<sup>80</sup> While their reasons may be emotional, economic, religious, cultural, or child-centered, the reality is that a substantial number of battered women have no intention of leaving their partners.<sup>81</sup> As Donna Coker notes, "Some marriages are worth saving. Sometimes women are successful at getting their partner to stop the violence."<sup>82</sup>

Most people are uncomfortable with the idea that a woman would choose to maintain a relationship with an abusive man. Staying in a violent relationship (and refusing to assist with prosecution) has been cited as proof that a woman is not acting on her own volition.<sup>83</sup> Kate Waits explains, "Ideally, with enough understanding and encouragement, the battered woman will assess her situation realistically, start to unlearn her helplessness, and will agree to help the legal system as a witness against her husband."<sup>84</sup> At best, staying in a violent relationship is seen as evidence that the victim has not been provided with sufficient services, legal and otherwise.

79. SUSAN SCHECHTER, EXPANDING SOLUTIONS FOR DOMESTIC VIOLENCE AND POVERTY: WHAT BATTERED WOMEN WITH ABUSED CHILDREN NEED FROM THEIR ADVOCATES 7 (2000).

80. Lynn Ingrid Nelson, *Community Solutions to Domestic Violence Must Address Cultural Roots and Beliefs*, ASSEMBLING THE PIECES, Winter 2002, at 2; see also Deborah Sontag, *Fierce Entanglements*, N.Y. TIMES, November 17, 2002, §6 (Magazine), at 52 (explaining Sylvia's perspective: "She never wanted Michael locked up; she wanted him to change. She wanted to rehabilitate her family, not to break it up.")

81. A study of battered women in Maryland found that 17% of women interviewed at sites providing domestic violence services intended to continue their relationships at the time that they sought assistance. Over a one-year period, that number fluctuated between 24% and 33%. MARY ANN DUTTON ET AL., ECOLOGICAL MODEL OF BATTERED WOMEN'S EXPERIENCE OVER TIME: A NATIONAL INSTITUTE OF JUSTICE SPONSORED STUDY: INITIAL DESCRIPTIVE FINDINGS 4 (2000).

82. Coker, *supra* note 78, at 1019.

83. Hanna, *supra* note 43, at 1883.

84. Waits, *supra* note 1, at 307. Professor Waits's comment refers to the theory of learned helplessness, first articulated by Dr. Lenore Walker in her 1979 book, *The Battered Woman*. Walker explains that victims of violence learn over time that their efforts to placate their batterers to avoid violence are useless, and therefore do nothing at all to protect themselves, including leaving abusive relationships. See LENORE WALKER, *THE BATTERED WOMAN* (1979). This theory has been countered by many advocates of domestic violence, who contend that battered women are active survivors who use the means most likely to keep them safe and alive to counter the violence, which can include staying in a violent relationship, and who are frequently thwarted by "community passivity and economic barriers." Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1248 (2001).

As is clear from the story that began this article, I too believed that all battered women should leave their abusers, and I was happiest when I could help them get divorced. But along with a growing number of voices, I find myself asking the question Schechter asks: what about everyone else? What about those women who are looking for ways to stop the violence from within their relationships? What does the legal system offer them?

The short answer is — not much. Having your husband or boyfriend arrested and jailed may be an unappealing prospect if your goal is to minimize violence from within the relationship. Civil protection orders can offer a blanket provision precluding the partner from assaulting, harassing, or physically abusing the victim while they continue to live together — but those things are already unlawful.<sup>85</sup> Custody and divorce laws do nothing for women who choose to remain with their partners. The significant progress made to improve the legal system for women who are interested in leaving their partners offers very little for those who want to stay.

### *B. Lawyers Know Best*

Embedded in the belief that all battered women want to or should want to leave their abusers is another assumption: that all women should turn to the legal system for assistance in leaving. While battered women's lay advocates routinely argue that legal remedies are not the best choice for all battered women, those who work within the legal system increasingly fall prey to this assumption.<sup>86</sup>

Legal system professionals have helped to create this assumption by being vested in the changes that they have made to their systems. The attitude among many police officers, judges, and lawyers is, "We've made the changes you fought for, and we're doing business the way you asked. Therefore, there is no defensible reason why you wouldn't want to use our systems." This attitude fuels the zealous application of mandatory arrest and no-drop policies.

Creating a norm that assumes that women who want to keep themselves (and their children) safe will turn to the legal system has created unintended consequences for battered women. Women who ask that their abusers not be arrested or refuse to cooperate in prosecutions are seen as suffering from learned helplessness, as recalcitrant, or as dishonest. One particularly problematic dilemma for battered women has arisen in the context of civil protection orders. Getting a civil protection order is seen as so routine that professionals increasingly seem to believe that all battered women should get one. Nowhere is this more of an issue than in "failure to protect" cases in the

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85. Courts may be unwilling to approve such narrowly tailored relief as these limited protection orders, seeing them as "counter productive" because they fail to separate the parties. Coker, *supra* note 78, at 1019.

86. *Id.* at 1018.



child welfare system. “Failure to protect” refers to the battered woman’s inability to fulfill her duty to protect her children from exposure to domestic violence or from violence being done to the children by her abusive partner.<sup>87</sup> In many jurisdictions, social workers routinely order battered women to get civil protection orders, ignoring the battered woman’s wishes and calculations about her safety, as well as the reality that civil protection orders have become a venue for hotly contested litigation. Getting an order can require a full-blown, multi-day evidentiary hearing — not an easy thing to do without legal representation, which, despite VAWA’s largesse, is still disturbingly unavailable in many jurisdictions.<sup>88</sup> When the battered woman does not secure an order, for whatever reason — safety concerns, lack of representation, losing a hearing — social workers and judges assume that she has not made the requisite efforts to protect her children from domestic violence and may institute child abuse or neglect proceedings against her.

This assumption that civil protection orders are in and of themselves “protective” can now be found in state law. In the District of Columbia, for example, filing for a civil protection order is considered proof that a mother attempted to protect her child — the only such action singled out for mention.<sup>89</sup> This provision clearly reflects a value judgment that battered women should turn to the legal system — rather than shelters, community organizations, counselors, or other supports — for protection.

87. Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child An Acceptable Solution When Her Child Witnesses Domestic Violence*, 69 *FORDHAM L. REV.* 1487, 1489-91 (2001) (defining failure to protect in the context of domestic violence).

88. One recent study suggests that “the provision of legal services significantly lowers the incidence of domestic violence.” Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 *CONTEMP. ECON. POL’Y.* 158, 167 (2003). Nonetheless, access to legal services is limited, particularly for immigrant women. See Jenny Rivera, *The Availability of Domestic Violence Services for Latinas in New York State: Phase II Investigation*, 21 *BUFF. PUB. INT. L.J.* 37, 62 (2003) (explaining that 37.5% of domestic violence service providers in New York included legal services, and only 29.1% provided legal services in Spanish).

89. D.C. CODE ANN. § 16-2301(9)(A) (2003) stating that:

[T]he term “neglected child” means a child: (i) who has been abandoned or abused by his or her parent, guardian, or custodian, or whose parent, guardian, or custodian has failed to make reasonable efforts to prevent the infliction of abuse upon the child. For the purposes of this sub-subparagraph, the term “reasonable efforts” includes filing a petition for civil protection from intrafamily violence.

*Id.* Other jurisdictions can bypass the mother altogether, with statutes that allow the state to petition for a civil protection order on the child’s behalf. See, e.g., MD. CODE ANN., FAM. L. § 4-501(i)(2)(ii) (1999). Although not always codified, state child protective services agencies also use evidence of the mother’s failure to obtain a civil protection order to prove the mother failed to protect. Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment*, 11 *WASH. U. J.L. & POL’Y* 157, 173 (2003).

### C. *The Legal System Is Dangerous*

Pushing battered women to use the legal system is particularly problematic because turning to the system can be dangerous for battered women. Most obviously, battered women are frequently warned by their abusers not to contact the police or the courts for help; when they do, the results can be disastrous.<sup>90</sup> Separation related violence is alarmingly common among battered women reaching out for assistance.<sup>91</sup> But there are a number of other ways in which legal recourse can create huge problems for battered women.

On the criminal side, mandatory arrest laws have ushered in a new problem for battered women: dual arrests. Officers faced with conflicting stories and little or equivocal physical evidence (for example, injuries inflicted on the abuser by the victim while defending herself) are prone to throw up their hands and declare, "I'm bringing you both in." Since the inception of mandatory arrest laws, dual arrests have risen substantially.<sup>92</sup> Problems for the battered woman do not end with the arrest; she also faces the prospect of having her children removed by child protective services, being charged inappropriately, being pressured to plea bargain, being wrongfully convicted, having her arrest and conviction history used against her in subsequent custody proceedings, losing her job, and having the batterer use the threat of criminal prosecution to continue to control her.<sup>93</sup> Even if the battered woman is not initially arrested,

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90. This assumes, of course, that a battered woman would receive assistance from the police. But as recent events in Tacoma, Washington have made clear, turning to the criminal system for support is not an option for the large numbers of women battered by police officers. The common refrain of such victims is "I can't go to the police. He is the police." See, e.g., *N.P.R. Morning Edition: Efforts Being Made to Deal with Domestic Violence Among Police Officers* (NPR radio broadcast Aug. 14, 2003) (quoting Crystal Brame, murdered wife of Chief of Police David Brame). Some jurisdictions are developing policies to respond to calls involving police officers alleged to have committed domestic violence. Michael P. McKinney, *Board Adopts Policy for Police Accused of Abuse*, PROVIDENCE J., December 19, 2002, at C1.

91. See *supra* note 4 and accompanying text.

92. Coker, *supra* note 78, at 1043. A study examining Wisconsin's implementation of mandatory arrest showed that arrests of women increased twelve times after inception, as opposed to two times for men. L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VIOLENCE & VICTIMS 125, 126 (1994). In Los Angeles, women made up 7% of the people arrested for domestic violence in 1987 — and 14.3% by 1995, after the adoption of the mandatory arrest law. John Johnson, *A New Side to Domestic Violence: Arrests of Women have Risen Sharply Since Passage of Tougher Laws*, L.A. TIMES, April 27, 1996, at A1.

93. Coker, *supra* note 78, at 1044-45. Statutes that require police to arrest only "primary aggressors" might not prevent battered women from being arrested, as their actions may not meet the legal definition of self-defense. *Id.* at 1045.

in hard no-drop jurisdictions she faces the prospect of being pressured to testify and arrested if she fails to comply with a subpoena.<sup>94</sup>

As batterers become more savvy about the legal system, the race to the courthouse to file for a civil protection order has become more common.<sup>95</sup> Even when the victim does file first, her abuser can answer with a petition of his own. Most states permit courts to issue cross-civil protection orders, although some require that both parties file for an order before doing so.<sup>96</sup> Often, the batterers' petition mirrors the victims' but for one important detail: all of her allegations have suddenly happened to him, perpetrated by her. Courts sometimes find it difficult to make credibility determinations in domestic violence cases, and where there is no physical or other evidence, their job becomes even more difficult. The victim may seek the legal system's protection and in the end, find herself subject to a civil protection order. Why is this problematic? Because, as previously mentioned, violation of a civil protection order may be punishable both through contempt (civil or criminal) and as a criminal misdemeanor. One fabricated charge of violation of a civil protection order could culminate with a battered woman facing criminal charges because she sought protection for herself. A civil protection order can also be introduced as evidence in a custody trial, used to trigger the presumption against awarding custody to a perpetrator of domestic violence.<sup>97</sup>

The very act of seeking legal assistance in a restraining order or other type of case can endanger the battered woman. As Judy Wolfer of Baltimore, Maryland's House of Ruth explains, lawyers represent power.<sup>98</sup> Retaining a lawyer changes the power differential between the battered woman and her abuser. Standing in court, the batterer can see that his partner now has someone on her side, providing input from the world outside the relationship

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94. An Albany woman was recently "jailed for her own protection" after failing to appear pursuant to a grand jury subpoena. Carol Demare, *Victim Jailed for Own Safety*, THE TIMES UNION (ALBANY), September 13, 2003, at B5.

95. Nina W. Tarr, *The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases*, 13 S. CAL. REV. L. & WOMEN'S STUD. (forthcoming 2004) (describing the impact of such a race on the victim of violence).

96. Klein & Orloff, *supra* note 16, at 1074-78. See, e.g., D.C. SUP. CT. DOMESTIC VIOLENCE UNIT R. 11, stating:

The Court may not issue a civil protection order unless a petition signed under oath has been filed and served upon the individual who is the subject of the order pursuant to Domestic Violence Unit Rules 2 and 3 and the Court, after a hearing, has made specific findings that there is good cause to believe that the individual has committed or is threatening to commit an intrafamily offense.

*Id.*

97. Klein & Orloff, *supra* note 16, at 887.

98. Judy Wolfer, Address at the House of Ruth Domestic Violence Legal Clinic (Sept. 3, 2003) (notes on file with author) (all information relating to House of Ruth in this paragraph come from this address).

and depriving him of control. Battered women recognize how threatening the involvement of a lawyer can be to the batterer, and as a result, how dangerous seeking legal assistance is for them. Frequently, battered women who have chosen not to pursue civil protection orders after consulting with the House of Ruth legal staff ignore their lawyer in the courtroom so that the batterer will not know that they have reached out for assistance.

Even when the battered woman is the sole recipient of a civil protection order, she is not necessarily immune from prosecution for its violation. Although advocates have long argued that civil protection orders restrain only the actions of the defendant, courts have begun to disagree. In Kentucky, Judge Megan Lake Thornton fines victims who contact their batterers after obtaining restraining orders.<sup>99</sup> Another Kentucky judge holds battered women in contempt of court for such contact, jailing one woman who returned to her abusive husband (as well as the husband) for ten days.<sup>100</sup> This trend is spreading; advocates in Indiana report similar prosecutions.<sup>101</sup> The Supreme Court of Ohio recently ruled, however, that “an individual who is the protected subject of a temporary protection order may not be prosecuted for aiding and abetting” violation of the order.<sup>102</sup> Continuing contact and communication (including reconciliation) between battered women and their abusers is common, even when a civil protection order exists. These cases put battered women on notice that once they seek help from the legal system, they must stop all contact or be prepared to face potential penalties.<sup>103</sup>

Mothers seeking assistance from the criminal and domestic relations systems have yet another system to be wary of: the child protection system. Over the last several years, the child protection system has become increasingly interested in cases involving domestic violence, largely due to research showing how harmful domestic violence can be for some children.<sup>104</sup>

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99. Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 218-19 (2003). Judge Thornton noted, “It drives me nuts when people just decide to do whatever they want.” Francis X. Clines, *Judge's Ruling Creates Outcry in Kentucky*, N.Y. TIMES, January 8, 2002, at A14.

100. Morley, *supra* note 99, at 219.

101. E-mail from Gail R. Waymire, Executive Director, Community Anti-Violence Alliance, Inc., Angola, Indiana, to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (Aug. 11, 2003) (on file with author).

102. *State v. Lucas*, 795 N.E.2d 642, 643 (Ohio 2003).

103. Contact is not the only violation that can lead to prosecution. One District of Columbia woman falsely alleged to have impeded visitation was recently given a suspended jail sentence. Telephone interview with Professor Catherine Klein, Professor Catholic University of America Columbus School of Law (August 18, 2003).

104. See, e.g., Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839 (1999); PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 21-28 (2003); CAROLINE MCGEE, CHILDHOOD EXPERIENCES OF DOMESTIC VIOLENCE (2000).

While some argue that the child protection system's increased involvement in these cases is a positive development, providing battered women and their children access to a range of services for which they would otherwise not qualify,<sup>105</sup> battered women and their advocates have historically been skeptical that the child protection system will protect the relationships between battered mothers and children.<sup>106</sup>

That skepticism is borne out by stories like the ones told by the plaintiffs in *Nicholson v. Williams*.<sup>107</sup> In *Nicholson*, a class of battered mothers challenged New York City's Administration for Children's Services' ("ACS") policy of removing children from battered mothers who had "engaged in" domestic violence — by being assaulted in front of their children.<sup>108</sup> Shawline Nicholson's case came to ACS's attention after police and paramedics responded to a 911 call to find her battered and bleeding — the first time her daughter's father had ever abused her. Nicholson learned that her children had been removed by ACS as she lay in the hospital with a broken arm, fractured ribs, and head injuries; the children were not returned for several weeks, and the neglect petition against her was not dismissed until seven months after the initial removal.

Some jurisdictions have adopted laws and policies requiring that police report domestic violence cases involving children to child protective services.<sup>109</sup> Another *Nicholson* plaintiff, Shiqipe Berisha, had her child removed after being arrested along with her batterer, who had dragged her across her apartment by the hair while she held her son. The petition filed by ACS alleged that she had been arrested for endangering the welfare of her child and charged with assault in the third degree — although the prosecutor declined to press charges before the neglect petition was ever filed.<sup>110</sup> Prosecutors, too, have begun reporting cases involving children.<sup>111</sup> Battered women looking only to remove batterers from their apartments might find themselves fighting to keep their children after seeking assistance from the criminal system.

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105. Linda Spears, *Building Bridges Between Domestic Violence Organizations and Child Protective Services*, at 3-5 (2000), available at [http://www.vawnet.org/NRCDVPublications/BCSDV/Papers/BCS7\\_cps.php](http://www.vawnet.org/NRCDVPublications/BCSDV/Papers/BCS7_cps.php).

106. See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 833-37 (2001).

107. *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

108. *Id.* at 168-73 (all facts in this section come from the court's recitation of the facts).

109. See generally LEIGH GOODMARK, PROMOTING COMMUNITY CHILD PROTECTION: A LEGISLATIVE AGENDA 68-74 (2002).

110. *Nicholson*, 203 F. Supp. 2d at 189-90 (pointing out the danger of dual arrest, described *infra*).

111. *Id.*

The same harsh possibility exists on the civil side. Women who file for civil protection orders have found themselves embroiled with child protective services after the protection order judge makes a report to child protective services from the bench.<sup>112</sup> In a recent Pennsylvania case, the judge went a step further, denying the mother's request for a Protection From Abuse Order on behalf of her children (a remedy permitted under Pennsylvania's statute) but removing her children and immediately placing them in foster care.<sup>113</sup>

There is a tremendous amount of energy and thought going into bringing child protective services and domestic violence advocates together to work on behalf of battered women and their children.<sup>114</sup> Professionals working with battered mothers and children exposed to violence are changing the way they look at their clients and at each other. But still too often, battered women are finding that when they become involved with the child protection system, they are viewed as mothers who have failed their children by being abused and are suffering the consequences.<sup>115</sup> As long as this is the reality for battered mothers, turning to a legal system that is likely to report them to the child protection system remains a danger.

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112. This was the regular practice of one of the judges who sat in the District of Columbia's Domestic Violence Unit during the time I practiced there. In New York, one of the *Nicholson* plaintiffs, Crystal Rhodes, was reported to ACS by the State Central Register after Ms. Rhodes failed to appear for a hearing to extend her order of protection. Only after the children were removed was Ms. Rhodes able to explain that she could not attend the hearing because the papers she needed for court were in her apartment, which she had fled to protect herself and her children from ongoing violence. *Id.* at 187-88.

113. See *Gall v. Gall*, No. 1720 MDA 2002, 2003 Pa. Super. LEXIS 4597, at \*P5 (Pa. Super. Ct. Dec. 24, 2003).

114. The National Council of Juvenile and Family Court Judges spearheaded those efforts with its seminal publication, *THE NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE* (1999) (better known as the "Greenbook"). The Greenbook has spurred communities throughout the country to work towards increased collaboration between child protective services, domestic violence agencies, and the courts. The federal government has supported these efforts in numerous ways, most notably by funding the efforts of six jurisdictions — Santa Clara and San Francisco, California; El Paso County, Colorado; Grafton County, Vermont; St. Louis, Missouri; and Lane County, Oregon — to implement the Greenbook's guidelines. *Id.* My observation about the continued risk to battered women is in no way meant to denigrate the impressive efforts being made at these sites, and in other communities where, despite the lack of targeted resources, people who care about these issues are finding ways to work towards the Greenbook's goals.

115. In one community actively working on these issues, I met a battered mother whose three-day old child was removed from her care. Her act that constituted neglect, calling her abusive boyfriend to take her home from the hospital when no one else was available to help her. For another example of how battered mothers fare in the child protection system, see Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 745-52 (1998).

Finally, battered women risk losing their children when they turn to the legal system for divorces and custody adjudications. As noted previously, research shows that batterers are more likely to fight for custody, and when they fight, they are more likely to receive custody.<sup>116</sup> Batterers are also more likely to receive visitation rights than men who have not had protective orders entered against them.<sup>117</sup> Battered mothers must also contend with “friendly parent” provisions when they bring custody cases. These provisions require courts to consider which parent will be more likely to foster continuing, meaningful contact between the children and the other parent.<sup>118</sup> Most statutes are silent as to the relative weight to be given friendly parent and domestic violence provisions.<sup>119</sup> Courts can therefore find that the battered mother’s unwillingness to foster continuing contact (based on her experiences with the batterer as spouse and parent) is more relevant to the custody determination than the history of violence that has rendered her “unfriendly.”<sup>120</sup> Opposing joint custody, which requires the victim to interact regularly with the batterer, or asking for supervised visitation to protect the child and herself from violence can mark the victim of violence as an “unfriendly parent.” Despite advocates’ success in changing the custody law, battered mothers still face significant chances of losing their children when they turn to the legal system for assistance.

#### D. *The Law Demands Physical Violence*

The legal system reacts to and punishes crimes — assaults, batteries, harassments, stalking, and destruction of property. These are offenses for which abusers can be arrested, tried, and convicted; for which restraining orders can be issued; and which, in many states, constitute the type of evidence admissible in custody cases where domestic violence is alleged.<sup>121</sup> But, the

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116. A recent study of the Massachusetts courts verifies that this trend continues. CARRIE CUTHBERT ET AL., *BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 16-17* (2002). See also ARIZ. COALITION AGAINST DOMESTIC VIOLENCE, *BATTERED MOTHERS’ TESTIMONY PROJECT: A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE* (2003) (raising similar issues).

117. JAFFE ET AL., *supra* note 104, at 20-21.

118. *Id.* at 68.

119. Minnesota is the exception. See MINN. STAT. § 518.17(a)(13) (2002) (stating that “except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child” shall be considered in determining the child’s best interests).

120. See, e.g., *Vachon v. Pugliese*, 931 P.2d 371, 377 (Alaska 1996) (reversing lower court order awarding custody of child to father based on mother’s unwillingness to foster contact between father and child and rejecting mother’s allegations that she fled with child because of domestic abuse and stalking).

121. *Lemon*, *supra* note 29, at 615-17.

legal system's definition of domestic violence and the totality of battered women's experiences of domestic violence bear little resemblance to one another. While many abused women are victims of physical violence, the daily reality of their abuse is so much more than physical violence, a reality not reflected in the narrow range of behaviors that the legal system can reach.

Anyone who has attended domestic violence training in the last twenty years has learned about the cycle of violence. First articulated by Lenore Walker in *The Battered Woman*, the cycle has three parts: the tension building phase, the acute battering phase (characterized by physical violence), and the honeymoon phase.<sup>122</sup> That model set the stage for an uncritical acceptance of received wisdom that all abusive relationships were characterized by periods of physical violence and that that violence defined a relationship as abusive.

Professor Evan Stark has noted, however, that “[m]uch of the assaultive behavior in battering relationships involves slapping, shoving, hair-pulling, and other acts which are unlikely to prompt serious . . . police concern.”<sup>123</sup> These relatively minor forms of physical violence serve only to reinforce the “ongoing strategy of intimidation, isolation and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children and friends; and work.”<sup>124</sup> But, Stark points out, attempts to address the use of these other tactics “had virtually no legal standing.”<sup>125</sup>

Battered women have frequently told me that the physical abuse that they experienced was not the most damaging part of their relationships. The emotional abuse of being told that you are worthless, stupid, a bad mother; the isolation from family and friends; the dependence created by tight control over money and movement; the threats of losing custody of children — these were the things that hurt my clients most deeply.<sup>126</sup> Research bears out the stories of my clients; a recent study found that psychological abuse can be as harmful to the health of a victim of violence as physical abuse.<sup>127</sup> But the legal system often fails to provide redress for this non-physical violence.

By focusing so intently on physical violence, the legal system refuses to recognize how the other types of violence experienced by battered women

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122. WALKER, *supra* note 84, at 55.

123. Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985-86 (1995).

124. *Id.* at 986.

125. *Id.*

126. Other women’s stories echo this sentiment. “You know, it’s funny, remembering, compared to all these other women I would see in the shelter, mine was not as bad as theirs but the more I would learn about emotional abuse, to me emotional is worse than the physical . . .” ELAINE J. LAWLESS, *WOMEN ESCAPING VIOLENCE: EMPOWERMENT THROUGH NARRATIVE* 182-83 (2001).

127. HEALTH BEHAVIOR NEWS SERV., *PSYCHOLOGICAL PHYSICAL ABUSE EQUALLY HARMFUL TO HEALTH 1* (2002), available at <http://www.newswise.com/articles/view?id=ABUSE.HBN>.



affect their ability to function as parents and as people. Even in jurisdictions where the importance of considering the totality of the violence has been acknowledged in case law,<sup>128</sup> the threshold for securing a civil protective order remains a criminal act — physical abuse or the threat of physical abuse. Custody statutes that require a conviction for domestic violence or some sort of criminal violation before considering the violence prevent scores of battered mothers from benefiting from these laws.

Highlighting the narrowness of the legal system's reach does not beg the conclusion that emotional abuse should become a crime or the predicate for the issuance of a civil protection order.<sup>129</sup> Rather, my intent is to point out that the legal system will be largely useless for the untold numbers of women for whom physical abuse is a secondary issue, if indeed it is an issue at all. Moreover, by elevating physical violence over the other facets of a battered woman's experience, the legal system sets the standard by which the stories of battered women are judged. If there is no assault, she is not a victim, regardless of how debilitating her experience has been, how complete her isolation, or how horrific the emotional abuse she has suffered. And by creating this kind of myopia about the nature of domestic violence, the legal system does battered women a grave injustice.

#### *E. The Legal System Deprives Battered Women of Agency and Dignity*

Victim empowerment is the guiding philosophy behind most domestic violence programs.<sup>130</sup> The empowerment model is based on the belief that the battered woman will best know how to keep herself safe given her "unique ability to predict the abuse, to use techniques to minimize the violence, and to assess when it is safe to leave."<sup>131</sup> Battered women's advocates argue that for women leaving violent, controlling relationships, it is crucial not to replace one form of control with another by having advocates and others tell the battered woman what she should do and how she should do it. The most common legal

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128. See *Cruz-Foster v. Foster*, 597 A.2d 927 (D.C. 1991) (holding that court must consider "entire mosaic" of relationship — not just immediate threat of violence — before making determination about extension of civil protection order).

129. There are states, however, which include emotional abuse as a condition for which relief is available under the civil protection order statute. See Klein & Orloff, *supra* note 16, at 869-70. Other states, like Pennsylvania, have rejected attempts to include psychological abuse in their restraining order statutes. Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, in *CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE* 17 (Claudine SchWeber & Clarice Feinman, eds. 1985). Moreover, some immigration provisions recognize emotional abuse as a form of domestic violence. Klein & Orloff, *supra* note 16, at 870.

130. For a discussion of victim empowerment in the legal setting, see Han, *supra* note 65, at 163-64.

131. Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 627 (2000).

responses to domestic violence in criminal cases — mandatory arrest and no-drop policies — stand in stark contrast to this empowerment focus.<sup>132</sup>

Perhaps no issue has been so hotly debated among battered women's legal advocates and scholars as whether and to what extent it is appropriate for the state to substitute its judgment for that of a battered woman when making decisions about arresting and prosecuting batterers. Some advocates believe that "[t]he advent of the mandatory arrest policy was the first major loss of agency for battered women."<sup>133</sup> Opponents contend that mandatory arrest and pro-prosecution policies deprive battered women of the right to make choices that will profoundly affect their lives,<sup>134</sup> ignore that battered women are the best judges of the efficacy of and dangers posed by the criminal justice system's intervention, sacrifice individual battered women to the greater good of all women, and essentially recreate the victim's abusive relationship, placing the state in the shoes of the batterer.<sup>135</sup> Defenders of mandatory arrest and no-drop prosecution generally acknowledge that such policies deprive individual battered women of choice, but argue that the benefit to all battered women — particularly those who are too disempowered or afraid to pursue criminal sanctions — outweighs the harm done to the individual.<sup>136</sup> Moreover, these advocates argue, adopting mandatory arrest and no-drop prosecution policies sends a powerful message to batterers and to society as a whole about the criminal nature of domestic violence and the legal system's intention to hold batterers accountable for their actions.<sup>137</sup> In this way, they argue, mandatory policies can be empowering for victims, showing them that the power of the state is behind them.<sup>138</sup>

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132. The same debate is apposite as to the victim's ability to have a criminal no-contact order — frequently a condition of bail — dismissed. Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937 (1999). Fagan points out that this deprivation of agency is due in part to the coexisting policy goals of punishing offenders and protecting victims, which "may be reciprocal as policy but may be in conflict at the operational level." Fagan, *supra* note 55, at 39.

133. Tarr, *supra* note 89, at 191.

134. Epstein, *supra* note 43, at 17.

135. *Id.*; Han, *supra* note 65, at 166; Mills, *supra* note 52, at 554-55. Mills details how the emotional abuse inflicted by the state in mandatory arrest and prosecution mirrors the emotional abuse battered women suffer at the hands of their batterers. *Id.* at 587-94. Mills further argues that the ability to choose whether to prosecute may give her the power she needs to take steps to stop the violence. Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 U.C.L.A. WOMEN'S L.J. 183, 191 (1997).

136. Barbara Fedders, *Lobbying for Mandatory Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 290 (1997).

137. Hanna, *supra* note 43, at 1856; Jones, *supra* note 131, at 634.

138. Han, *supra* note 65, at 177.

Both sides agree that, to a greater or lesser extent, these policies deprive battered women of agency: the ability to make crucial, potentially life and death, decisions, by and for themselves. But how important is agency to a battered woman? Should the state step in when “an abuser has brutally and systematically deprived a woman of her ability to exercise independent judgment”?<sup>139</sup> There is no easy answer to this question; while changes in the criminal system have undeniably benefited scores of battered women, they have just as certainly harmed others. The salient point for the purposes of this discussion is simply to note that when battered women turn to the legal system for assistance, they may find themselves deprived of the ability to make crucially important decisions about their safety and well-being.<sup>140</sup>

Despite ongoing efforts to educate police, prosecutors, lawyers, and judges, some still look suspiciously at battered women, doubting their claims, their parenting ability, their judgment, and sometimes, their sanity. The stories of abuse narrated by battered women are discounted; battered women are told that their fears are groundless, overblown, or concocted to deprive their abusers of their liberty or contact with their children. Victims who don't fit the “profile” — physically injured, afraid for their lives, willing to separate — are treated skeptically. Client after client has told me how the police refused to arrest their batterers, refused to listen to their stories, and refused to honor their restraining orders.<sup>141</sup> Legal system professionals also question the capacity of battered women to make judgments about whether to pursue cases.<sup>142</sup> While many judges treat battered women seeking assistance with dignity and respect,

139. Jones, *supra* note 131, at 609. Jones argues that only women who have been “coercively controlled” — who are “limited in their ability to protect themselves because of the psychological effect of abuse and the abuser’s control of their lives” and cannot take advantage of “existing legal remedies because the physical abuse affects their internal survival mechanisms” — should have guardians appointed for them. *Id.* at 613. In her estimation, even mandatory arrest and no-drop policies are insufficient to protect this subcategory of battered women. *Id.* at 629-35.

140. They may also lose more tangible benefits. One battered woman explained that she wished her case had never gone to court; after he was jailed, the woman, who worked nights, had to quit her job because her boyfriend cared for their daughter while she worked. Emily Stone, *Domestic Abuse: When to Back Off*, BURLINGTON FREE PRESS, August 10, 2003, at 1.

141. Columnist Colbert King has written several articles about the shoddy treatment of battered women in the District of Columbia. See Colbert I. King, *Battered in Washington*, WASH. POST, June 1, 2002, at A19; Colbert I. King, *Chandra Levy: The Bigger Story*, WASH. POST, May 25, 2002, at A31.

142. A Lake County, Indiana prosecutor commented that:

[T]he victim does not understand that the relationship is in the honeymoon stage, and the defendant is acting that way only because he has criminal charges hanging over his head. The prosecutor further expressed that the victim also does not understand that as soon as the charges are dropped the defendant will go back to his old ways and the violence will begin again.

Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 396-97 (2001).

“in some cases judges’ responses amounted to a secondary victimization.”<sup>143</sup> Of particular concern to battered women and their advocates is the perception that judges doubt battered women’s honesty and question their motives for seeking protection, particularly when children are involved.<sup>144</sup> Even when the system reaches the right conclusion, it often damages the dignity of battered women along the way.

#### F. *The Legal System Can’t Deliver on Its Promises*

Battered women who seek the assistance of the legal system do so because the system holds out the promise that it can stop the abuse and keep them and their children safe. Instead, what many women find is that the legal system itself becomes the batterer’s forum for terrorizing his victim, and judges and others often give him the tools to perpetuate the abuse.

Mrs. Martin came to me after years of her husband’s physical abuse of herself and her children. After a multi-day hearing, Mrs. Martin was granted a civil protection order, temporary custody of her children, and child support. Mr. Martin was awarded supervised visitation at the office of his counselor. Over the course of the three years that I represented Mrs. Martin, we appeared in court at least once a month, and usually more often, responding to Mr. Martin’s repeated filings. Mrs. Martin was re-assaulted while dropping her children off for a “supervised” visit — his counselor allowed Mr. Martin to lurk in the parking lot, waiting for her to arrive. We went back to court after this assault to prosecute the violation of the restraining order. We returned again when Mr. Martin sought to have his visitation rights reinstated. At the visitation hearing, the court heard the testimony of Mr. Martin’s counselor, who testified that he was unaware of the history of child abuse. Mrs. Martin ultimately lost one job because of her repeated court appearances. Her former husband’s unwillingness to pay child support left her and her children financially desperate on more than one occasion, but taking him to court — and risking the loss of another job — became more than she was willing to undertake. Eventually, Mrs. Martin stopped seeking enforcement of her child

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143. PTACEK, *supra* note 5, at 151. Judicial demeanor can have a tremendous effect on a battered woman’s experience of the court system. *Id.* at 150-61.

144. Joan S. Meier, *Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L 657, 662-63 (2003). One morning in court, I saw a mother trying to explain to a judge that she was concerned about her child visiting with his violent father. As the mother tried to explain that she did not want the visitation to end, but simply wanted to explore alternatives to unsupervised weekend visits, the judge cut her off curtly, snapping, “If I hear that you’re interfering with his visitation in any way, I’ll change custody. Do you understand me?” The notion that battered women seek protection in order to gain advantage in divorce and custody matters is so pervasive that to articulate concerns about children in the context of a restraining order hearing almost automatically exposes battered women to charges of misusing the system.

support order, wanting nothing more than to avoid another encounter with the legal system.

Mrs. Martin's experience is not unusual. Advocates and commentators have recognized that batterers use the legal system to abuse their victims when they can no longer reach them by other means.<sup>145</sup> Much has been written about this phenomenon in the context of custody litigation, where batterers routinely seek to punish their victims by seeking custody of children with whom they may have had only minimal contact prior to separation.<sup>146</sup>

There are other arenas for this re-victimization as well: modifications, extensions, and violations of child support, visitation, and civil protection orders all lend themselves to misuse by batterers. A study of the Massachusetts courts found that batterers regularly file multiple, harassing or retaliatory motions; make false allegations against their victims in court; manipulate the court system to avoid child support; and use parallel actions in various courts and jurisdictions to gain advantage.<sup>147</sup> Judges assist in trivializing the violence by elevating the importance of other aspects of the battered woman's life.<sup>148</sup> Little can be done to prevent such harassment; courts are rightly reluctant to deprive any litigant of the ability to petition the court for redress, and matters such as child custody, visitation, and child support are subject to review until the child reaches the age of majority.<sup>149</sup> As a result, batterers routinely manipulate the legal system to continue their abuse — a bitter lesson for the battered woman who puts her trust in that system.

Battered women who go through the grueling process of criminal prosecution frequently find their abusers punished by nothing more than probation, a remedy which would work if closely supervised, with real consequences for violation.<sup>150</sup> But too often, batterers on probation are scantily

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145. See, e.g., BANCROFT & SILVERMAN, *supra* note 34, at 76, 125 (stating, "Threatened or actual litigation regarding custody or visitation can become a critical avenue for the batterer to maintain control after separation.").

146. See, e.g., *id.* at 113-28.

147. CUTHBERT ET AL., *supra* note 116, at 59-62.

148. One mother in the District of Columbia was denied custody despite a finding that her partner had been abusive because she had engaged in "irresponsible childbearing" by having other children out of wedlock. E-mail from Lydia Watts, Executive Director, Women Empowered Against Violence, Inc., to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (Aug. 25, 2003) (on file with the author). See also Goodmark, *supra* note 28, at 268-69 (describing cases where judges found mothers' shortcomings more important than domestic violence, despite domestic violence provisions of custody statutes).

149. See, e.g., D.C. CODE ANN. § 16-914 (Supp. 2003)

150. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508 (1998) (stating that as a former domestic violence prosecutor, she was frustrated with "the unwillingness of judges to sentence domestic violence offenders to incarceration, opting most often for batterer treatment as a condition of probation). See also *id.* at 1521-22 (noting that frequently when prosecutors decide to go forward with a

supervised, and violations of probation are occasion for little more than a lecture by a judge and a promise from the batterer to do better. Even if the batterer is sentenced to jail time, the duration is usually short; although most domestic violence cases should be prosecuted as felonies, they are usually charged and tried as misdemeanors instead.<sup>151</sup> Parole violations, too, are rarely pursued or treated seriously, unless they involve further violence. A similar problem exists on the civil side; enforcement of civil protection orders, via misdemeanor prosecution or civil or criminal contempt, is infrequent,<sup>152</sup> and the punishment, if any, rarely promises the battered woman any real hope of safety. Battered women engage these systems because they offer the promise of safety and accountability — but too often, the promise is illusory.<sup>153</sup>

### G. *The Legal System, Women of Color, Immigrant Women, and Poor Women*

To build support for legislative and policy changes benefiting victims of domestic violence, battered women's advocates stressed that domestic violence occurred among all races, ethnicities, religions, and classes.<sup>154</sup> While this may be true, the experience of domestic violence is profoundly different for women of color, battered immigrant women, and poor women — as is the impact of using the legal system to address violence against them.

African-American women experience domestic violence more often than either white women or women of other races.<sup>155</sup> Native American women experience all forms of violence, including domestic violence, at twice the rates of white women. One study found that domestic violence occurred in 15.5% of Indian marriages, with 7.2% reporting severe violence (as opposed to 14.8% and 5.3% of white couples).<sup>156</sup> Immigrant women are also more likely

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domestic violence case, that “the final disposition is often a period of probation, either pre- or post-conviction, contingent upon completion of a batterer treatment program”).

151. Hart, *supra* note 15, at 8.

152. In some jurisdictions, criminal contempt prosecutions are rare because of inequities in availability of counsel. The victim, who must prove her case beyond a reasonable doubt, is not entitled to counsel; the batterer, because he faces imprisonment, is entitled to court appointed counsel. Few victims are able to meet their burden proceeding alone, facing seasoned criminal defense attorneys.

153. As Donna Coker writes, “The assumption that the criminal justice system offers the best chance of increasing a woman’s safety overstates the efficacy of the system in stopping the violence while simultaneously understating the importance of the availability of women’s other resources.” Coker, *supra* note 106, at 826.

154. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1258-60 (1993).

155. RENNISON & WELCHANS, *supra* note 4, at 4 (explaining that African-American women experience domestic violence at a rate 35% higher than white women and 2.5 times the rate of women of other races).

156. Joseph Espinosa, *Native American Battering*, at <http://www.uic.edu/classes/socw/socw517/nativeamericanbattering.htm> (last visited Jan. 8, 2004).

than other women in the United States to experience domestic violence.<sup>157</sup> Thirty to fifty percent of Latina, South Asian, and Korean immigrant women report sexual or physical abuse by an intimate partner.<sup>158</sup> The severity of the violence against immigrant women may also be greater.<sup>159</sup> Consequently, policies addressing domestic violence disproportionately affect these women.<sup>160</sup> The impact of such policies on women of color and immigrant women should therefore be contextualized within their experiences with the systems being used and considered carefully before they are implemented.

Making the legal system the primary vehicle for addressing domestic violence presupposes that battered women will seek support from that system. That assumption is faulty, however, for women of color and battered immigrant women.

Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people.<sup>161</sup>

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157. Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1403 (1993); Maria L. Imperial, *Self-Sufficiency and Safety: Welfare Reform for Victims of Domestic Violence*, 5 GEO. J. ON POVERTY L. & POL'Y 3, 6 (1997) (noting that “[b]attered immigrant women are among the most vulnerable victims of domestic violence because they often lack crucial community and familial supports as well as the ability to communicate in English”).

158. Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367, 367 (2002).

159. *Id.* It is difficult to get a true sense of the rates of violence among these populations, however, because the majority of women don't report domestic violence or define themselves as battered. See ROBERT C. DAVIS & EDNA EREZ, U.S. DEP'T OF JUSTICE, IMMIGRANT POPULATIONS AS VICTIMS: TOWARD MULTICULTURAL CRIMINAL JUSTICE SYSTEM, 1-5 (May 1998).

160. Tjaden and Thoennes note, however, that:

[D]ifferences among minority groups diminish when other sociodemographic and relationship variables are controlled. More research is needed to determine how much of the difference in intimate partner prevalence rates among women and men of different racial and ethnic backgrounds can be explained by the respondent's willingness to disclose intimate partner violence and how much by social, demographic, and environmental factors.

PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iv (2000).

161. Crenshaw, *supra* note 154, at 1257.

Latinas may experience a similar hesitancy, based on the abuse and violence perpetrated by police against their community.<sup>162</sup> Seeking help outside the family is not considered acceptable in Asian communities, and language barriers and isolation coupled with this cultural stigma often prevent Asian women from seeking assistance from public systems.<sup>163</sup>

Battered immigrant women must consider an additional risk when seeking help from the criminal system: the risk of deportation. Under the Dole-Coverdale Amendment, codified as Section 350 of the Illegal Immigration Reform and Illegal Immigrant Responsibility Act of 1996 (“IIRIRA”), domestic violence, stalking, sexual violence, and child abuse are all deportable offenses.<sup>164</sup> While IIRIRA was intended to protect battered immigrant women, it creates several notable problems for them. The increase in dual arrests has meant that greater numbers of immigrant women, like other battered women, are being arrested.<sup>165</sup> Frightened that their children will be removed, often unable to understand the proceedings or communicate with their lawyers, these women plead guilty to avoid jail time — and expose themselves to the possibility of deportation.<sup>166</sup> For battered immigrant women who want to remain with their partners, a conviction (or an arrest for violating a civil protection order) can mean having to choose between remaining in the United States or continuing their relationships. For battered women who have separated, deportation of their former partners can mean the loss of child support and other economic assistance, community support, and assistance with parenting. The initiation of deportation proceedings may also trigger further violence.<sup>167</sup>

Advocates of mandatory arrest and prosecution policies argue that such policies eliminate racial bias from the criminal justice system by “ensur[ing]

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162. Coker, *supra* note 78, at 1042-43.

163. SUJATA WARRIER, (UN)HEARD VOICES: DOMESTIC VIOLENCE IN THE ASIAN-AMERICAN COMMUNITY 10 (2002).

164. Hanna R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT’L & COMP. L.J. 27, 31 (2002).

165. See generally Zelda Harris, *The Predicament of the Immigrant Victim/Defendant: VAWA Diversion and Other Considerations in Support of Battered Women*, 23 ST. LOUIS UNIV. PUB. L. REV. 49 (2004).

166. Coker, *supra* note 78, at 1048-49. Because deferred adjudications are also considered final convictions (despite the fact that guilty pleas are withdrawn, and cases dismissed if certain conditions are met), battered women who enter into these agreements also expose themselves to the risk of deportation. Cecelia M. Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 MARQ. L. REV. 163, 181 (1999); Harris, *supra* note 165.

167. Shapiro, *supra* note 164, at 39.



that all perpetrators, regardless of race, are treated similarly.”<sup>168</sup> At least one study suggests, however, that mandatory arrest may increase violence by certain groups, including African-American men. The study concluded that 10,000 arrests of African-American men would produce 1,803 more incidents of violence — with African-American women the primary victims of those additional incidents.<sup>169</sup> While implementing mandatory arrest policies seemed to benefit white women (in this study, mandatory arrests were theorized to have prevented 2,504 acts of violence primarily against white women), that deterrence came at a high cost for African-American women, who were the likely victims of an additional 5,409 incidents of violence.<sup>170</sup> Moreover, depriving police of discretion does not guarantee evenhanded application of the law: “[E]ven in a mandatory arrest regime, the police still must make probable-cause determinations about whether violence has occurred; probable cause is not a colorblind calculation.”<sup>171</sup>

Poor women face additional problems when steered towards the legal system for assistance. Women in low-income households experience violence at significantly higher rates than women with higher annual incomes.<sup>172</sup> Women receiving Temporary Assistance to Needy Families are currently experiencing domestic violence about ten times more often than other women.<sup>173</sup> For these women, marshalling the resources to engage the legal system can be a huge obstacle. Batterers, who tend to be more affluent than their victims (particularly post-separation), are often able to hire private

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168. Mills, *supra* note 52, at 564. Ensuring that police would respond to calls from poor women of color was one of the factors that motivated advocates to seek a mandatory policy. Coker, *supra* note 78, at 1033.

169. Mills, *supra* note 52, at 566.

170. *Id.* For a discussion of how to understand this research, and particularly refuting the assumption that this research suggests that African-American men are simply more violent, *see id.* at 566 n.79.

171. Fedders, *supra* note 136, at 293.

172. RENNISON & WELCHANS, *supra* note 4, at 4. Some have questioned whether poor women simply appear more often in public systems, allowing them to be counted. Higher income women, because of available resources, can employ different strategies — seeking private counseling, divorce, separate households, etc. Apparently, in some jurisdictions, higher income batterers can avoid public systems as well. A recent editorial in Milwaukee questioned the practice of allowing prosecutors to drop charges in exchange for a contribution to a charitable organization. “What’s wrong with these deals, in which a person accused, say, of batter to his wife agrees to donate money to a shelter for abused women in lieu of being charged?” After explaining the myriad problems with such a policy, the editorial suggests that paying restitution to the victim in lieu of charges might be a more appropriate policy. *Deals Not Worth Making*, MILWAUKEE J. SENTINEL, August 17, 2003, at 4J. The latter policy would, of course, also discriminate against low income batterers and their victims.

173. Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER SOC. POL’Y & L. 367, 368 (2003).

counsel, unlike their victims, whose economic status frequently plummets post-separation.<sup>174</sup>

Although VAWA has vastly increased the availability of civil legal assistance for battered women, the supply of lawyers does not begin to meet the demand from battered women. Given that even restraining order hearings have become hotly contested proceedings, and divorce, custody, visitation, and child support matters may take years to resolve, not having counsel can cripple a battered woman's attempts to use the legal system to her benefit. Resorting to the legal system can also deprive victims of violence of whatever economic support they receive from their batterers, particularly if their abusers are jailed, and can mean the difference between keeping a roof over their children's heads and homelessness. Many battered mothers cannot rely on regular child support; batterers are less likely than other fathers to pay.<sup>175</sup> And judges are still reluctant to provide battered women with sufficient resources, via alimony and child support, to protect themselves and their children and to enforce their orders in a way that truly compels compliance.<sup>176</sup> Assisting prosecutors can be costly for battered women as well, requiring them "to take time off from work, to acquire transportation and childcare, or to make other sometimes costly and difficult arrangements."<sup>177</sup> Economics are frequently cited as a reason battered women remain in abusive relationships;<sup>178</sup> they may also prevent battered women from turning to the legal system to attempt to stop the violence.

#### *H. Fathers and the Legal System*

The legal system imprisons fathers, gives them inappropriate custody and visitation, and allows them to use the courts to continue abusing their children's mothers. What it does not do, however, is ask how we can improve batterers' parenting abilities, reducing danger to both children and their mothers and providing a more nurturing environment for the children of battering fathers.<sup>179</sup>

Recent research suggests that batterers can be reached through their children; understanding how their violence affects their children can motivate batterers to change their behavior.<sup>180</sup> Working from this premise, community

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174. See Hart, *supra* note 15, at 4-5.

175. *Id.* at 18.

176. As Barbara Hart has noted, if society is going to impose a duty to protect their children on battered mothers, courts and others must give them the ability to protect, financially and otherwise. *Id.* at 21.

177. Coker, *supra* note 106, at 840.

178. Hart, *supra* note 15, at 18.

179. To better understand why batterers need this kind of intervention, see generally BANCROFT & SILVERMAN, *supra* note 34.

180. David Mandel, *Batterers and Their Children: New Research into Batterers' Perceptions*, ISSUES IN FAMILY VIOLENCE, Spring/Summer 2002, at 5.

organizations are engaging battering fathers in programs designed to help them understand how their violence affects their children and their partners and to change their behavior.<sup>181</sup> Batterer intervention programs have not traditionally included a fatherhood component, although they have certainly touched on fatherhood issues.<sup>182</sup> These programs are specifically designed to help batterers become better fathers, making their children, their mothers, and their potential partners and future children safer.

Molding batterers into nurturing fathers is not the primary focus of the legal system, and I am not arguing that the legal system must take on this task.<sup>183</sup> But to the extent that the legal system's interventions hamper efforts to address fatherhood issues, the system does a disservice to the mothers who must co-parent with these men. Fathers in jail cannot access community-based programs. Fathers awarded custody and visitation without anyone questioning how their behavior affects their ability to parent will think they do not need to address fatherhood issues.

### *I. The Legal System as the Default*

On both the individual and systemic level, the legal system overshadows other, potentially more effective strategies for addressing domestic violence. Attorneys who are unfamiliar with the resources and initiatives focused on domestic violence in the community may fail to connect clients with those resources, focusing instead on the legal solutions they know best. Clients may assume either that their non-legal needs are irrelevant or, not being asked about them, decide not to raise these issues. Believing that an attorney would

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181. Organizations like the Resource Center for Fathers and Families in Minnesota and the Center for Fathers, Families and Workforce Development in Baltimore include work with batterers to improve their fathering skills as a component of their responsible fatherhood programs. See Leigh Goodmark, *When the Parent Is A Batterer: Understanding and Working with Abusive Fathers*, 22 ABA CHILD L. PRAC. 121, 127-28 (2003). See also MARGUERITE ROULET, CENTER ON FATHERS, FAMILIES, AND PUBLIC POL'Y, FATHERHOOD PROGRAMS AND DOMESTIC VIOLENCE 5-6 (2003).

182. Mandel is developing a curriculum on working with batterers as fathers. The curriculum will have two basic themes: exposure to violence in the home harms children, and children can benefit from positive changes in the batterer's behavior towards the other parent. Components of that program will include examining the effects of violence in the home on children, finding ways to stop post-separation abuse, healing the damage done by prior violence, and developing positive parenting/co-parenting skills. David Mandel, *Working with Batterers as Parents: What Would a Curriculum Look Like?*, ISSUES IN FAMILY VIOLENCE, Spring/Summer 2002, at 1-3, 6-7.

183. Fatherhood programs could become a component of the legal system, however, by conditioning access to children on participation in such programs. Louisiana law requires that batterers complete family violence treatment programs before becoming eligible for unsupervised visitation and to rebut the presumption against awarding custody to a batterer. See LA. REV. STAT. ANN. § 9:364 (West 2002). Such treatment could include a parenting skills curriculum designed for specifically for batterers.

certainly provide advice as to all available options, the client may take the attorney's failure to address these issues as evidence that no other options exist.

On a systemic level, the focus of the last thirty years on the development of the legal response to domestic violence has certainly diverted money, attention, and energy from other initiatives.<sup>184</sup> Nonetheless, there are a number of promising initiatives for addressing domestic violence that bypass the legal system altogether, focusing on prevention rather than reacting to violence that has already occurred, the legal system's typical posture. The Family Violence Prevention Fund has conceived a number of projects designed to involve communities in eradicating family violence. Communities are crucial because

abused women turn first to those closest to them — extended family, friends, and neighbors — before they reach out to an organization or a professional service provider. Relatively few access shelter services. And they seek out government institutions — police, courts, and child protection agencies — last.<sup>185</sup>

The Fund's endeavors include the Community Engagement for Change Initiative; Coaching Boys Into Men, and the Founding Fathers Campaign, both designed to provide non-violent role models for boys and engage men in the efforts to end domestic violence,<sup>186</sup> and a twelve part radio micro drama

184. See MS. FOUNDATION FOR WOMEN, SAFETY AND JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM 6 (2003) (discussing how over-reliance on the criminal system leads to over-resourcing of the legal system at the expense of other alternatives). The focus on the legal system has also led to the increasing professionalism of the battered women's movement, a shift whose benefit is hotly debated within the movement. In 1982, Susan Schechter captured this shift, writing, "Seven years ago, battered women were not the 'clients' that they are in some programs today, but rather participants in a joint struggle." SCHECHTER, *supra* note 8, at 4. See also Merle H. Weiner, *From Dollars to Sense: A Critique of Government Funding for the Battered Women's Shelter Movement*, 9 LAW & INEQ. 185, 233-38 (1991) (arguing that "[p]rofessionalization depoliticizes the movement and gives enemies a convenient excuse by which to co-opt its revolutionary possibility." And, "Hierarchy and professionalization both contribute to battered women's own marginalization within the movement.").

185. P. CAITLIN FULWOOD, FAMILY VIOLENCE PREVENTION FUND, PREVENTING FAMILY VIOLENCE: COMMUNITY ENGAGEMENT MAKES THE DIFFERENCE 2 (2002). See also OLIVER J. WILLIAMS & CAROLYN Y. TUBBS, OFFICE OF JUSTICE PROGRAMS, COMMUNITY INSIGHTS ON DOMESTIC VIOLENCE AMONG AFRICAN AMERICANS 16-17 (2002) (finding support among all groups surveyed for collective community response to domestic violence). *But see* MS. FOUNDATION FOR WOMEN, *supra* note 184, at 18 (noting that communities have not always been safe spaces for battered women but suggesting that community can be empowered to protect them).

186. See Family Violence Prevention Fund, *Coaching Boys into Men*, at <http://www.endabuse.org/programs/display.php3?DocID=9916> (last visited Jan. 8, 2004); Family Violence Prevention Fund, *End Abuse: 2003 Founding Fathers*, at <http://www.endabuse.org/programs/display.php3?DocID=9933> (last visited Jan. 8, 2004). See

entitled, "It's Your Business," designed to reach the African American community.<sup>187</sup>

Other community organizations are piloting promising approaches. The Migrant Clinicians Network in Austin, Texas is training migrant farm workers to educate their peers on domestic violence.<sup>188</sup> Male and female advocates recruited from migrant farm worker communities along the U.S./Mexico border practice giving presentations, learn about public speaking, and are given "advocate kits" including brochures and other information on domestic violence, local resources, and "the myths and realities of domestic violence."<sup>189</sup> In 2002, advocates trained 137 individuals in ten presentations and made referrals to local shelters and legal resources.<sup>190</sup>

The University of Minnesota's Aurora Center for Advocacy and Information and its School of Dentistry have teamed to promote screening for domestic violence in dentists' offices.<sup>191</sup> The schools developed a training tailored to dental professionals that uses videos and role playing to practice risk and safety assessment and teaches professionals to spot abnormal behavior patterns relevant to the dental setting (having intimate partners come to every appointment, speak for the patient, etc.).<sup>192</sup> Dental professionals are then linked with advocates, enabling them to refer patients "quickly and with confidence."<sup>193</sup>

generally Mederos & Perilla, *supra* note 9 (describing a range of alternatives for reaching men outside of the criminal justice system); The White Ribbon Campaign, *About Us*, at <http://www.whiteribbon.com> (last visited Jan. 8, 2004) (describing world's largest campaign to involve men in efforts to end violence against women).

187. See Family Violence Prevention Fund, *End Use Campaigns: Reaching African-Americans*, at <http://www.endabuse.org/programs/display.php3?DocID=9904> (last visited Jan. 8, 2004) (describing "It's Your Business").

188. See Migrant Clinicians Network, *Family Violence Prevention*, at <http://www.migrantclinician.org/programs/family%20violence/famvio.html> (last visited Jan. 8, 2004).

189. See Migrant Clinicians Network, *Current MCN Initiatives in Family Violence Prevention*, at [http://www.migrantclinician.org/programs/family%20violence/current\\_initiatives.html](http://www.migrantclinician.org/programs/family%20violence/current_initiatives.html) (last visited Jan. 8, 2004).

190. National Crime Prevention Council, *Effective Strategy: Migrant Farmworkers Advocating in Their Own Communities*, at <http://www.ncpc.org/ncpc/ncpc/?pg=2088-11090> (last visited Jan. 8, 2004). Hopefully, the legal advocates working with these women counseled them thoroughly on the implications of seeking legal assistance.

191. *Id.*

192. *Id.*

193. National Crime Prevention Council, *Effective Strategy: Screening for Domestic Violence at the Dentist's Office*, at <http://www.ncpc.org/ncpc/ncpc/?pg=2088-11088> (last visited Jan. 8, 2004). One receptionist trained by the program elicited a battered woman's story of how she snuck to appointments because her partner would not allow her to see the dentist. The receptionist provided support and linked the woman to advocates who helped her enter shelter. *Id.*

Hairdressers often forge close relationships with clients, who share private details of their lives; “[i]n fact, the question and answer dialog is common between hairdresser and client, even if the two are strangers.”<sup>194</sup> The Women’s Center of Southeastern Connecticut began throwing parties for employees at hair salons on Monday afternoons, when the salons are generally closed.<sup>195</sup> During those parties, they discussed the warning signs of domestic violence, offered tips on broaching the subject with clients, and taught them to listen and look for signs of abuse and to make appropriate referrals.<sup>196</sup> These efforts have expanded to working with other “natural helpers,” like cab drivers and bartenders, to help them recognize domestic violence, feel comfortable initiating conversations about the topic, and provide referrals for services.<sup>197</sup>

Connect’s Community Empowerment Program (“CEP”) is helping communities in New York City develop preventive and early intervention strategies to address family violence. The organization focuses on capacity building in individuals and neighborhoods to give these entities tools to “respond to family violence in ways that are culturally affirming and community-focused.”<sup>198</sup> Since January 2002, CEP has partnered on needs assessments with twenty community based organizations to help them understand the needs of their communities; put on staff development workshops on topics related to family violence; awarded grants to CBOs to develop domestic violence programs; and launched a clinical training program to train CBO staff to facilitate groups for battered women, batterers, and children.<sup>199</sup> All of these approaches are decidedly non-legal; expanding the circle of “professionals” trained to assist battered women.

Legal advocates for battered women are also looking beyond the law. Although Women Empowered Against Violence (“WEAVE”), a Washington, D.C. advocacy organization, began as a legal services provider, its founders recognized from its inception that legal services would be inappropriate for some clients and dangerous for others and has always counseled clients deliberately as to whether legal action would be safe, advisable, and prudent.<sup>200</sup> Over the past few years, the organization has expanded its services to include

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194. National Crime Prevention Council, *Effective Strategy: The Hairdresser Domestic Violence Prevention Project*, at <http://www.ncpc.org/ncpc/ncpc/?pg=2088-11092> (last visited Jan. 8, 2004).

195. *Id.*

196. *Id.*

197. *Id.*

198. E-mail from Alisa Del Tufo, Executive Director, CONNECT, to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (October 27, 2003) (on file with author).

199. *Id.*

200. See generally Women Empowered Against Violence, *Weave’s History*, at <http://www.weaveincorp.org/about> (last visited Jan. 8, 2004) (describing the organization and counseling programs).

case management, counseling, economic advocacy, and a mini-loan program.<sup>201</sup> Approximately 25% of the women who call WEAVE bypass the legal system.<sup>202</sup> Looking beyond the legal system will help to generate and support promising programs like these and better serve the vast majority of battered women, who never report their abuse to authorities.<sup>203</sup>

Strategies for ensuring batterer accountability outside of the traditional adversarial legal model are being studied as well. Donna Coker has suggested that Navajo peacemaking may be a viable intervention strategy for battered women.<sup>204</sup> Brenda Smith urges battered women's advocates to seek solutions that incorporate the principles of forgiveness and redemption, looking at models ranging from the truth commissions used in South Africa post-apartheid to the religious model to practices of indigenous cultures like the Ho'oponopono Process of native Hawaiian healing.<sup>205</sup> Additionally, in this Symposium Issue, Quince Hopkins considers whether restorative justice is appropriately applied to domestic violence cases.<sup>206</sup> These methods challenge our assumptions about how domestic violence cases "should" be handled, infusing the process with a kind of bargaining that battered women's advocates may feel is inappropriate.<sup>207</sup> Exploring innovative strategies is crucial,

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201. *Id.*

202. E-mail from Lydia Watts, Executive Director, Women Empowered Against Violence, Inc., to Leigh Goodmark, Assistant Professor, University of Baltimore School of Law (August 25, 2003) (on file with the author).

203. The 2000 National Violence Against Women Survey estimates that 75% of intimate partner assaults are not reported to authorities. TJADEN & THOENNES, *supra* note 160, at v.

The majority of victims who did not report their victimization to the police thought the police would not or could not do anything on their behalf. These findings suggest that most victims of intimate partner violence do not consider the justice system an appropriate vehicle for resolving conflicts with intimates.

*Id.* It is probably safe to assume that the majority of emotional and other forms of abuse is never reported to authorities either.

204. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 U.C.L.A. L. REV. 1 (1999). Coker concludes that while there are some potential dangers for battered women, including coerced participation, bias against divorce, and imperfect information about the process prior to beginning, Navajo peacemaking is a promising model for intervention. *Id.* at 101-06.

205. See generally Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921 (2003). Like Coker, Smith cautions that these processes may have pitfalls for battered women, but her message is to look to practices like these as a starting point for conversation about how to incorporate forgiveness and redemption into the work we do with battered women.

206. C. Quince Hopkins, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289 (2004). While restorative justice is situated within the legal system, it is an alternative to the traditional adversarial systems discussed earlier in this article.

207. These types of strategies may seem too much like mediation, which has generally been frowned upon in cases involving domestic violence. See, e.g., Leigh Goodmark, *Alternative*

however, if we are to expand the options available to battered women outside of the legal system. Lawyers dedicated to serving battered women need to stay abreast of efforts to develop alternatives to the legal system and be ready to counsel their clients on their merits.

### III. LAWYERING FOR BATTERED WOMEN: WITHIN AND BEYOND THE LEGAL SYSTEM

Lawyers operate in a narrow world, bounded by statutes and case law and our training.<sup>208</sup> We have a particular set of tools in our arsenals and use them regularly, well, and often exclusively. As Linda Mills observed,

[P]rosecutorial agencies usually have difficulty in responding in an individualized manner to domestic violence crimes, or to any crimes for that matter. Typically, prosecutors are trained to use a strategy of prosecution and jail time as a bargaining tool.<sup>209</sup>

Similarly, lawyers working on the civil side of the legal system use the strategies of civil protection orders, custody, divorce, and child support to protect their battered clients. Too frequently, we steer clients towards these tools without thoroughly assessing whether and how they will meet the client's needs, and without counseling clients on the risks that legal strategies can pose. As lawyers, we need women to need legal solutions, or there is no role for us to play; as a result, we push our clients towards the system we know best.

Many, possibly most, of the problems discussed in this article have been pointed out by commentators analyzing the changes to the legal system made in the last thirty years. Frequently, these analyses refer to only one part of the system — mandatory arrest, no-drop policies, civil protection orders, or custody laws — and suggest ways of improving those individual parts of the system to make them more responsive to the needs of battered women. Few, however, have questioned the utility of using the legal system.<sup>210</sup> That is the

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*Dispute Resolution and the Potential for Gender Bias*, JUDGES J., Spring 2000, at 21, 22-24; but see Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 147 (2003) (suggesting that if appropriate safeguards are put into place, mediation can be useful for battered women).

208. Mills, *supra* note 135, at 193-94. For the litigation "narrative" that defines most lawyering, see generally Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. (forthcoming 2004) (on file with author).

209. Mills, *supra* note 135, at 193; see also Meg Obenauf, *The Isolation Abyss: A Case Against Mandatory Prosecution*, 9 U.C.L.A. WOMEN'S L.J. 263, 285 (1999) (describing the disconnect between prosecutor and victim: "Jenny's trauma was fresh and real, and stamping it with a penal code number seemed horribly reductive and cold.").

210. Discussing the limitations of legal reform strategies, Susan Schechter notes, "It is, however, sometimes difficult to recognize these limitations when one is immersed in the fight for reform; when a movement works toward reform, it must act as if the problem can be corrected." SCHECHTER, *supra* note 8, at 177.



question this article is intended to raise: is the legal system so flawed that it hurts, rather than helps, victims of domestic violence?

This question cannot be answered on a collective basis. Individual battered women have individual needs and experiences. For some women, the legal system has been a savior; as Sarah Buel writes, “As a lawyer and a survivor, I can attest to the profound impact of passionate attorneys, advocates and judges, for they have helped keep thousands of victims and me alive for many years.”<sup>211</sup> A recent study in Baltimore, Maryland suggests that substantial numbers of women believe that seeking a civil protection order is a helpful strategy for increasing the safety and improving the well-being of battered women.<sup>212</sup> The legal system can be a powerful tool in the lives of battered women, and I am not suggesting that we dismantle that system, stop seeking ways to improve it, or return to the days when domestic violence was considered a private matter, justifying the unwillingness of the system to intervene. But those of us who believe law can be a solution for battered women also need to acknowledge that the legal system can create more problems than it solves and counsel our clients appropriately.

Ultimately, on the individual client level, much of this discussion centers around the issue of client counseling. Rushing to litigation deprives clients of the counseling that is an oft neglected part of the lawyer’s job.<sup>213</sup> Lawyers for battered women must educate our clients about the reality of the legal system — the good, the bad, and the dangerous — and let our clients make educated decisions about whether to engage with it.<sup>214</sup> We need to ask our clients questions like: What triggers your partner’s violence? Will using the legal system make you safer or endanger you? What has your experience with the criminal system been? What tactics is your partner likely to use in litigation?

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211. Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 744 (1999).

212. Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL’Y & L. 499, 509 (2003). Note, however, that in a list of thirty-nine strategies, only two of the four legal strategies were in the top ten listed by women as helpful, and that women listed filing for a protection order as helpful — not actually getting one. *Id.* at 507-08. A number of women noted that they did not need the permanent order, for reasons including “Motivated him — wake up call. Felt supported.” And “[e]x parte was enough time for her to get her own place.” *Id.* at 513. All of the other strategies listed in the top ten were private strategies, like talking to someone at a domestic violence program. *Id.* at 507-08.

213. See Rubinson, *supra* note 208, at 9-11 (telling the litigation “story,” which does not include counseling as to other options). Providing such a counsel is a lawyer’s ethical obligation. See MODEL RULES OF PROF. CONDUCT R. 2 (2003) (describing the duties of the lawyer as counselor).

214. “Anyone who counsels a woman about getting an Order for Protection has acted irresponsibly if [social, cultural and racial dynamics] are not foremost in the counselor’s mind.” Tarr, *supra* note 89, at 193.

Will your abuser be able to use your past against you? Do you really need a civil protection order or custody order? Are there other supports that might keep you and your child safer? What are the consequences in your community if you use legal strategies? Can you afford — economically and/or emotionally — to have your abuser jailed or deported? We must consider both the “legal and nonlegal dimensions of a client’s problem.”<sup>215</sup> We must ask these questions without thinking about our own role — or lack thereof — in the strategy that the battered woman ultimately chooses. We must honor the choices that battered women make — even if those choices leave us without our preferred tools in working towards her protection.

Counseling must also include an honest assessment of the local legal system and the actors the battered woman may encounter. Are the police attentive to the calls of victims, or do they still suggest a walk around the block? Do prosecutors work cooperatively with battered women, or is the reluctant witness likely to be subpoenaed? Are judges open to hearing about abuse in the context of custody and visitation? Do they weigh the parent’s friendliness more heavily than a history of abuse? Will the judge report the battered woman to the child protection system, or ensure that she has the tools she needs to be protected and protect her children through custody and support orders? Lawyers frequently trade “war stories” about police officers, other lawyers, judges, and courthouse culture. Sharing that information with clients (in a constructive rather than salacious way) is appropriate for a lawyer/counselor. Only after these questions have been raised and answered can the battered woman make an informed decision about whether the legal system will work for her.

On the systemic level, we need to push ourselves to think beyond the legal system, develop expertise in other areas, and collaborate with community based non-legal efforts to address domestic violence.<sup>216</sup> No amount of tinkering around the edges of the legal system, no amount of judicial, police, prosecutorial, and family law attorney training<sup>217</sup> is going to fundamentally change the reality that in some communities and for some women, the legal

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215. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS* 2-15 (1991).

216. Barbara Hart writes,

The law is an imperfect tool; imperfect because of the social and cultural context in which it is embedded. It works best when all the other systems are collaborating in a concerted effort to end domestic violence. Legal strategies collapse if the consciousness of the community is not aligned against violence . . . .

Hart, *supra* note 15, at 12.

217. Not everyone shares this skepticism about judicial training. See Epstein, *supra* note 43, at 44-45 (describing improvements attributable to judicial training in D.C. Superior Court’s Domestic Violence Unit); *but see* Goodmark, *supra* note 28, at 263 (describing how judges participating in training in D.C. Superior Court Domestic Violence Unit failed to properly apply visitation law).

system is not helpful, and in fact can be harmful, recreating the power and control dynamics that the battered woman is trying to escape, exposing her to further violence and other dangers, jeopardizing her relationship with her children and her partner. Lawyers for battered women must accept that we may need to look outside of the legal system for solutions. Our failure to do so may be deadly for our clients.