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Marital Violence: The Legal Solutions

By Elizabeth Truninger*

There is a growing concern in our society with the prevalence of violence. Mass media's instant communication of war activities, riots, bombings and police brutality has heightened this concern. But media headlines and the discussion they evoke have largely ignored one of the major areas of violence in modern America—violence within the home.

There are more police calls for family conflicts than for murders, aggravated batteries, and all other serious crimes, and some family conflicts are included in the latter categories. Statistics show that in 1969, homicides within the family accounted for one-fourth of all murders, and over one-half of them involved spouse killing spouse. In previous years the percentage was even higher. Almost 40 percent of the reported aggravated assaults occur in the victim's home and 45 percent of these are committed by someone the victim knows. Yet even these statistics do not reflect the extent of the problem since only 65 percent of the aggravated assaults and 46 percent of the simple assaults are ever reported to the police.

Physical violence is equally common among all income groups and at all educational levels. In fact, the middle class is more oriented toward beating and slapping than the poor. Racially, 44 percent of the

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3. E.g., in 1963 31 percent of the intentional killings were within the family. 1963 FBI Uniform Crime Reports 6. About two thirds of the serious assaults involved persons in the same family or victims and assailants who knew each other. Id. at 8.


5. Id. at 41.


7. Id.
victims in homicide cases were white, 55 percent were black, and less than 1 percent were of other races. In homicide situations involving both spouses, the wife was the victim in 54 percent of the cases. While statistics are not available on the victims of aggravated assaults, which account for 47 percent of the violent crimes, it is known that over 87 percent of the assailants were male and in those cases categorized by the police as "domestic disturbances" the victims were usually female. Thus, while the victims are not necessarily from a particular income bracket, race, or educational level, they are often women who are married or emotionally involved with the assailant.

Frequently, violence is not limited to one episode since parties often have continuing relationships. Varying explanations are offered as to why the relationships are not terminated. One suggestion is that violence fulfills a masochistic need of the woman victim; she invites it in order to deal with the guilt she feels for her "aggressively-tyrannical personality." Another theory is that a masochistic need develops from negative self-imagery. There is no question that women suffer from a negative attitude towards themselves. The Advisory Committee on the Status of Women in California discovered, in a study completed in 1968, that 42 percent of the teen-age girls in California doubted their ability to be successful. However, negative self-imagery may suggest that violence will be tolerated without suggesting that it is sought out by female victims. Of thirty detailed interviews conducted within the last few months with women victims of spousal beatings only one response was indicative of such an attitude—that woman felt she did not deserve a better life. Usually the women suffered from certain romantic delusions concerning married life, believing that their husbands would reform and/or that the marriage must be preserved at all

9. M. Wolfgang, Patterns of Criminal Homicide, cited in Schultz, The Victim-Offender Relationship, 14 Crime & Delin. 135, 139 (1968). Wolfgang suggests that in his study of homicide victims over one-half had arrests for crimes of violence. From this he infers that the assailant could just as easily have been the victim, the role of either victim or assailant being determined largely by chance. Id.
11. Schultz, supra note 9, at 139.
12. California Advisory Commission on the Status of Women, California Women 3 (1971). The Commission's 1971 report suggests that one of the contributing factors for this is the California educational system. In a review of elementary textbooks it was discovered "that fully 75% of the main characters in the stories are male, and that girls are most often presented as helpless, unoriginal, and lacking in curiosity." Id. at 39.
costs for the sake of their families.

The latter is not such an unrealistic evaluation considering the alternative of single life. Child support payments cannot be relied upon to provide even a minimum standard of living, and employment prospects for the working mother are not attractive. In addition, she must find and bear the cost of child care when present facilities in California have a total capacity of 125,000 children and over one million children have such a need. Furthermore, the Internal Revenue Service does not recognize child care as an acceptable business expense. The divorced, deserted or separated woman can deduct only $600 for the care of one dependent and $900 for the care of two or more dependents although she may in fact pay many times that amount. Moreover, society subjects divorcees to extensive psychological pressures. Yet, everyday, women seeking assistance from the legal system are encouraged to employ the unattractive means of divorce in dealing with marital violence. Unfortunately, divorce is one of the few effective solutions.

The following is an examination of the laws and procedures available for dealing with marital violence. The spectrum of applicable regulations extends from criminal statutes such as assault and battery to quasi-criminal procedures such as the peace bond and to civil procedures such as tort actions for assault and battery. The effectiveness of these laws will be evaluated not only in terms of their possible applicability but also in terms of the extent to which they provide a minimum standard of living for children and the extent to which they are enforced.

13. Assembly Interim Committee on Judiciary. Transcript of Proceedings on Domestic Relations, Jan. 8-9, 1964, Los Angeles. Testimony by Dr. James Peterson which quoted a study of William J. Goode, Professor of Sociology at Columbia University of Detroit husbands' reliability in making child support payments. Goode's study showed that 35% always paid, 14% usually paid, 11% paid once in a while, and 40% rarely or never paid.

14. Nationwide in 1970, 36% or 1.8 million of the female-headed families, including those on welfare and those working, had income below the poverty level. Sixty percent of all working women earn less than $5000 as compared to only 20% of all employed males. California Women, supra note 12, at 58. Note that nearly half of the 3.5 million woman-headed families with children under the age of 18 years were on welfare in March 1970. Between 1960 and 1970 the total number of woman-headed families increased by 24% while the total number of families increased only 14%. During this same period the male-headed families below the poverty line was cut in half whereas the number of poor families headed by women remained unchanged. Id. at 35.

15. Id. at 2.


17. California Women, supra note 12, at 1. The number of divorces granted in California from 1960 through 1970 increased 148%. This represents 678,000 final decrees of divorce of which 60% involved families with children under the age of 18 years. Id.
cation but also their actual application. The discussion will, however, be limited to violence causing physical abuse short of death, and the laws discussed will be restricted to those of California.

Legal Protection Available

Society normally deals with violence through either its criminal or civil law procedures. It expects these systems to regulate behavior so as to prevent violence, but in practice the relationship of the assailant to the victim materially affects the operation of the system. If the call for help comes from a wife against her husband, the system is reluctant to interfere.

Criminal Violations

Assault and Battery

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.18

A battery is any willful and unlawful use of force or violence upon the person of another.19

Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison for six months to life, or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars ($5000), or by both such fine and imprisonment ...20

Two provisions common to all jurisdictions and applicable to marital violence are criminal statutes for assault and battery. Such acts are misdemeanors, punishable by incarceration in the county jail.21 For an officer to make an arrest on either of these grounds, the misdemeanor must be committed in his presence or a warrant must have been issued.22 The latter requires a trip by the victim to the district attorney’s office to sign a complaint. However, a “citizen’s arrest” may be made for any public offense committed or attempted in his presence.23 The victim of an assault or battery could therefore make an arrest on her own, and then an officer would be authorized to take the aggressor into custody.24

19. Id. § 242.
20. Id. § 245(a) (West Supp. 1971).
21. Id. §§ 241, 243.
22. Id. § 836.
23. Id. § 837.
24. The Daly City Legal Service office supplies potential or previous victims of marital violence with the form to be completed when making a citizen’s arrest. This insures that if the police are called they will remove the assailant from the home.
Aggravated assault is a more serious, felony offense. An arresting officer need only have a reasonable belief that the felony has been committed and that the person being arrested is the wrongdoer. But this provision deals with great bodily harm and may not be particularly relevant to domestic disturbances.

Each of these statutes suffers in its effectiveness from the hesitancy of authorities to intervene in marital disputes. The stigma from conviction of a violent criminal offense is not lightly imposed, especially when the parties involved are expected to continue living in close quarters. While punishment may remedy the situation, it may more likely aggravate the conditions.

**Wife Beating**

Any husband who willfully inflicts upon his wife corporal injury resulting in a traumatic condition*, and any person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition*, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for not more than 10 years or in the county jail for not more than one year.

An additional statute was enacted in 1945, specifically dealing with wife and child beatings. Since it is a felony offense, a police officer may make an arrest even if the violence did not occur in his presence. The degree of violence required for guilt is indicated in court definitions of “corporal injury” and “traumatic condition.” A “corporal injury” is a “touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person.” A “traumatic condition” is “[a]n abnormal condition of the living body produced by violence as distinguished from that produced by poisons, zymotic infection, bad habits, and other less evident causes, ... the word generally implying physical force.” Thus, it would appear that the harm required is greater than simple assault but less than aggravated assault. Cases indicate that visible bruises and injuries must be present.

26. See text accompanying note 91 infra.
27. [Cal. Pen. Code § 273d (West 1970). In 1957, the words “but not constituting a felonious assault or attempted murder” were deleted from the code, Cal. Stat. 1957, ch. 1342, § 1, at 2673. In 1965, the maximum punishment was increased from two to ten years. Cal. Stat. 1965, ch. 1271, § 4, at 3146.]
29. *Id.*, quoting 63 C.J. 804 Trauma (1933).
30. See, e.g., People v. Burns, 88 Cal. App. 2d 867, 200 P.2d 134 (1948) (in-
This statute obviously should be helpful to victims but there are certain inherent difficulties in its application. Normally the police and the district attorney are unwilling to charge an assailant with a felony. Such a charge involves higher bail, which can strap the parties already limited budget, and, if bail is not possible, the longer incarceration can exacerbate the already volatile relationship. At the same time, an assailant-husband is more likely to contest a felony charge and the delay inherent in processing the indictment may discourage a wife from continuing. If the case does go to trial, she must present objective evidence such as bruises and injuries, yet one victim related to me that her husband always hit her on the side of the head so that bruises would not show. Influenced by social pressures to keep marital altercations private and by lack of knowledge that legal protections are available, victims often do not obtain medical assistance unless broken bones are involved, or police protection unless a neighbor calls for help, so the necessary evidence is frequently unavailable. Therefore, unless a doctor, the police, or the district attorney become involved and as a matter of procedure encourage preserving the record and processing the charge, this statute can provide little protection to the wife.

Other Criminal Statutes

There are other statutes applicable to controlling marital violence. One is commonly known as the crime of disturbing the peace. It applies to conduct such as threatening, quarreling, fighting, or even using "vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner." The statute does not require visible signs of abuse. From my discussion with victims, it is evident that this kind of behavior often occurs in the presence of a police officer. If not, a victim could press charges by a citizen's arrest.

Another statute involves possession of a deadly weapon on one's person with an intent to assault. It can be used where conduct is threatening but actual harm has not been sustained. There is also a felony provision for assault with intent to commit murder, but it is obviously a more difficult charge to prove.

31. E.g., CAL. PEN. CODE §§ 415, 467 (West 1970).
32. Id. § 415.
33. Id. § 467.
34. Id. § 217.
The crime of burglary can also be applied since it requires merely an entering of any house or room with an intent to commit any felony.\textsuperscript{36} The San Francisco police force makes arrests for burglary as well as for the unrelated but associated "actual crime." Unfortunately, when dealing with a "domestic disturbance," they are reluctant to find any crime, burglary or otherwise.

Two other Penal Code provisions applicable to the problem of marital violence are related to Family Law Act procedures for restraining orders\textsuperscript{37} and orders to vacate the home.\textsuperscript{38} One creates a misdemeanor of any willful disobedience of a court order or process.\textsuperscript{39} The other authorizes misdemeanor punishment for an unlawful return to take possession of lands when the individual has earlier been removed by court order.\textsuperscript{40} Essentially, they permit police enforcement of such court orders by making all violations criminal acts.

**Peace Bond**

Security to Keep the Peace, When Required. If, however, there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding five thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to keep the peace towards the people of this State, and particularly towards the informer. The undertaking is valid and binding for six months, and may, upon the renewal of the information, be extended for a longer period, or a new undertaking may be required.\textsuperscript{41}

The peace bond, or security to keep the peace, is similar to a restraining order but is obtained in a quasi-criminal procedure.\textsuperscript{42} An information may be presented to a magistrate "that a person has threatened to commit an offense against the person or property of another."\textsuperscript{43} After testimony has been given to the magistrate, depositions must be signed by the informer and any of her witnesses.\textsuperscript{44} The magis-

\begin{itemize}
  \item \textsuperscript{36} Id. § 459.
  \item \textsuperscript{38} See id. § 4359 (West Supp. 1971).
  \item \textsuperscript{39} "Every person guilty of any contempt of Court, of either of the following kinds, is guilty of a misdemeanor . . . (4) willful disobedience of any process or order lawfully issued by any Court." Cal. Pen. Code § 166 (West 1970).
  \item \textsuperscript{40} "Every person who has been removed from any lands . . . pursuant to the lawful adjudication or direction of any Court . . . and who afterwards unlawfully returns to . . . take possession of such lands, is guilty of a misdemeanor." Cal. Pen. Code § 419 (West 1970).
  \item \textsuperscript{41} Cal. Pen. Code § 706 (West 1970) (emphasis added).
  \item \textsuperscript{42} See In re Way, 56 Cal. App. 2d 814, 133 P.2d 637 (1943).
  \item \textsuperscript{43} Cal. Pen. Code § 701 (West 1970) (emphasis added).
  \item \textsuperscript{44} Id. § 702.
\end{itemize}
trate may then issue a warrant. 45

At the hearing, if the information is sustained, a bond must be deposited with the court. For failure to give an ordered bond, a person is committed to prison 46 and the magistrate may condition his release on payment of the security. 47 The undertaking is broken if the party is later convicted of a breach of the peace, 48 and, again, the district attorney may prosecute. 49 The record of a prior conviction will conclusively evidence a breach of the undertaking. 50

This security procedure originated in England by a 1329 statute, 51 which Blackstone claimed merely codified current practice. 52 In California, however, the procedure is not authorized by the common law so there must be compliance with all statutory requirements. 53

While peace bonds are the sanction used most often to control intrafamily violence by the Illinois and New York City Courts of Domestic Relations, 54 California rarely uses this security procedure. Neither San Francisco nor Alameda County are using it and the latest case anywhere else in the state was in 1943. 55

There are serious deficiencies in the procedure. 56 If the statute had been used its constitutionality would probably have been challenged, yet no appeals have been filed. The statute fails to provide for trial by jury 57 or free counsel, and requires proof beyond a reasonable doubt. It also subjects a person to double jeopardy by providing that conviction for breach of the peace will be conclusive evidence of a violation of the security provision. However, the most serious objection is that an indigent who is unable to provide the bond may be incarcerated in direct violation of the equal protection clause. The Supreme Court recently held in Tate v. Short 58 that it is a violation of equal protection

45. Id. § 703.
46. Id. § 707.
47. Id. § 708.
48. Id. § 711.
49. Id. § 712.
50. Id. § 713.
51. 2 Edw. 3, c. 16.
52. 4 W. BLACKSTONE, Commentaries *252.
56. See Note, "Preventive Justice"—Bonds to Keep the Peace and for Good Behavior, 88 U. PA. L. REV. 331 (1940); 12 AM. JUR. 2d Breach of Peace 146 (1964).
to imprison an indigent for his inability to pay traffic fines. Since no crime is involved in the nonpayment of a peace bond, imprisonment would again be a violation of equal protection. Thus, while the procedure may be described as "an important part of preventive justice," one might also conclude that it is not a solution for victims of marital violence in California today.

Civil Procedure

The Family Law Act

The new Family Law Act, effective January 1, 1970, materially altered both the substance and procedure of California laws concerning divorce. A review of the Report of the Governor's Commission on the Family, however, indicates that the Commission was not concerned with marital violence. Their interest was primarily in preserving the family, with, as expected, marriage counseling as the suggested solution. Thus, their answer to marital violence was to merely codify procedure already followed in California and the standard formerly applied by the courts.

The new act includes a civil court restraining order procedure which may be applied to situations of threatened or repeated acts of violence. But a restraining order can be acquired only after completion of the following steps: (1) The victim must obtain an attorney, paying whatever retainer is required; (2) she must pay costs for filing and for personal service on the husband (unless eligible to file in forma pauperis); (3) she must type and file with the court the initial petition, confidential questionnaire, and VS-243A form; (4) she

59. 9 CAL. JUR. 2d Breach of the Peace § 16 (1953).
60. CAL. CIV. CODE §§ 4000-5138 (West 1970).
62. "During the pendency of any proceeding . . . the superior court may issue ex parte orders . . . (2) enjoining any party from molesting or disturbing the peace of the other party; (3) excluding either party from the family dwelling or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, as provided in Section 5102 . . ." CAL. CIV. CODE § 4359 (West Supp. 1971).
63. "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling except as provided in Section 4518 or, in proceedings . . . of this part, upon application of either party in the manner provided by Section 527 of the Code of Civil Procedure, the court may order the temporary exclusion of either party from the family dwelling or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, until the final determination of the proceeding." CAL. CIV. CODE § 5102 (West 1970).
64. CAL. CIV. CODE § 4359 (West Supp. 1971).
must prepare and file with the court an order to show cause; 66 (5) for an ex parte order that the husband vacate the home, she must give a detailed explanation of the need for the order; 67 and (6) she must serve the husband with the ex parte order and order to appear at least 10 days before the hearing unless the court, on special request, reduces the time of notice. 68 If the husband violates the order, contempt proceedings may be instituted, 69 and the husband must then be served with this order at least 10 days before the hearing unless, again, the court on special request reduces the time for notice. At the hearing, if the husband is found in contempt, he will probably not be sentenced to jail for the first violation. If he does not appear, a body warrant will be issued and another date for a hearing will be set.

Needless to say, a restraining order can hardly be deemed an expeditious solution, and the same can be said for the dissolution proceeding itself. While the waiting period has been reduced to six months 70 from the service of the petition, delay in obtaining a court date on a congested calendar can prolong the time before one is eligible for a final judgment. In addition, while the new law eliminates unpleasant hearings with accusations and counter-accusations, it also eliminates the court's power to compensate the victim for cruelty suffered. 71 In practice, the old provision tended to result in awards of more than half the community property whether the cruelty was name-calling or aggravated assault. Now, the only compensation for cruelty is through civil actions for assault and battery or claims under the "Victims of Crime" legislation.

Civil Actions for Assault and Battery

In many jurisdictions, a wife may not sue her husband for assault and battery because of spousal immunity. 72 In those states where suits have been permitted, the exception has often been limited to intentional torts which may or may not include intentional infliction of mental distress unaccompanied by physical injury or suits filed after death or divorce. 73

66. See id. Rules 1226, 1285.
68. See id. § 1005 (West Supp. 1971).
70. Id. § 4514 (West 1970).
71. Id. § 146 (1872) (repealed 1969).
73. Id.
California did not extend the right of civil action for assault and battery to spouses until 1962. In *Self v. Self* the wife alleged that "the defendant husband . . . 'unlawfully assaulted plaintiff and beat upon, scratched and abused the person of plaintiff,' and that as a result plaintiff 'sustained physical injury to her person and emotional distress, and among other injuries did receive a broken arm.'" The husband's motion for a summary judgment was granted by the trial court.

On appeal, the California Supreme Court reversed the trial court's judgment, thus overruling several older California cases supporting interspousal immunity. Justice Peters examined the policy basis for interspousal immunity. While interspousal immunity was based originally on the common law doctrine of the legal identity of husband and wife, the justice remarked that "the social order upon which this concept was predicated no longer exists." The married women's emancipation acts, passed in the early nineteenth century, should have reflected that social change, but these were interpreted by courts as being limited to protecting the wife's property only. The rationale of courts retaining the common law spousal immunity doctrine in spite of such legislation was that it was needed for preservation of the family. The fear was that allowing the tort action "would destroy the peace and harmony of the home, and thus would be contrary to the policy of the law." In rejecting this position, Justice Peters quoted Dean Prosser who argued that it is difficult to perceive how peace and harmony could be preserved by denying a beaten wife any legal action but a criminal action while protecting her property in both criminal and civil courts.

The court also based its decision on other California statutes regulating the relationship between spouses, namely, the wife's right to sue and be sued in her own name, and her right to consider any personal injury recovery as her separate property. Thus, a wife may sue

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74. 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).
75.  Id. at 684, 376 P.2d at 65, 26 Cal. Rptr. at 97.
76.  Id. at 685, 376 P.2d at 66, 26 Cal. Rptr. at 98, or as Blackstone stated, "By marriage the husband and wife are one person in law . . . that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . ." 1 W. BLACKSTONE, COMMENTARIES *442.
77.  Self v. Self, 58 Cal. 2d at 685, 376 P.2d at 66, 26 Cal. Rptr. at 98.
78.  Id.
79.  Id. at 684-85, 376 P.2d at 66, 26 Cal. Rptr. at 98.
80.  Id. at 690, 376 P.2d at 69, 26 Cal. Rptr. at 101.
81.  CAL. CODE CIV. PROC. § 370 (West 1954).
82.  CAL. CIV. CODE § 5109 (West 1970).
her husband and none of the recovery is subject to his claims. 83

Compensation of Victims of Violent Crimes

It is doubtful whether a wife gains much, other than the principle, from an ability to sue her husband for intentional torts. Recognizing that tort actions often fail to compensate victims, 84 California was the first state to pass remedial legislation authorizing the state to indemnify needy victims of violent crime. 85 Compensation to the victim of a crime is dependent upon need and covers only “necessary expenses directly related to the injury.” 86 However, indemnification may be totally denied if the victim “has not cooperated with the police in the apprehension and conviction of the criminal committing the crime.” 87

Law enforcement agencies are required to provide forms “to each person who may be eligible to file a claim pursuant to this [legislation],” 88 but I know of no assaulted wife who has been informed of this provision. In operation, the compensation to victims legislation has not been of aid to the assaulted wife and perhaps would not be available even if the wife knew of the program and applied. Willard Shank, in his review of the California provision, 89 suggested that intrafamily crime or victim participation may disqualify one from compensation. He noted that under the law as passed in 1965 the perpetrator and his family were not eligible. While there is no mention of such disqualification in the 1967 amendment, there still remains the question of who actually caused the injury. 90

Attorney Perception of the System’s Operation

For the last three and one-half years, I have worked in a legal service office, devoting the last year and one-half to domestic relations problems. The specific problem of marital violence has continually demanded my attention and, with the limited means available to aid the

86. Id. § 13963.
87. Id.
88. Id.
89. Shank, supra note 84.
90. Id. at 91.
client, it has been a frustrating experience. If one can assume that violence is as common with the "haves" as with the "have nots," then private attorneys are familiar with the problem and may have had similar difficulties with the system. To determine the validity of that assumption, I have conducted a survey on attorney perception of the system's operation.

A survey questionnaire was sent to seven legal services offices (Bay Area and Sacramento) and to ninety-two private attorneys, with responses received from all seven legal service offices and from twenty-one attorneys. The private attorneys are now, or were in the last few years, members of the Family Law Section of the San Francisco Bar Association and/or members of the Queen's Bench, a northern California women lawyer's organization. This limited return causes serious statistical problems in terms of extrapolating from the data, but the responses have a consistency much higher than probability would suggest and they indicate a great similarity in the experiences of the sampled attorneys. Thus, I believe that generalizations are possible.

**Police Enforcement**

Less than one-fourth of the attorneys felt that the police were of help to their clients in dealing with violence, although it was generally accepted that "calling the police" was often the only solution at the time. Most attorneys believed the police did not want to become involved in marital disputes, and, in their experience, they found that the police would not make an arrest without a specific court order or without having actually observed the violence. The attorneys offered excuses for this failure—primarily, police concern that if an arrest is made the assailant will be bailed out and return to really hurt the victim, or that too often the victim will fail to follow through with a criminal charge, making the police more reluctant to render assistance the next time in similar situations.

In addition to police reluctance in making arrests, two private attorneys were concerned that the "legal advice" given by the police was often incorrect and served to reinforce the assailant's belief that he had a right to behave violently. Also, most legal service attorneys expressed concern about police attitudes toward domestic disturbance calls. They believed that police aggravated situations by a seeming insistence on defining the behavior as noncriminal. Police advise the

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91. Survey conducted by Elizabeth Truninger on file at The Hastings Law Journal.
wife that she has a civil problem and recommend that she obtain a restraining order. Even after a restraining order is obtained police sometimes tell the client-victim to call her lawyer claiming an inability to enforce the order.

This data shows that police have a consistent policy of avoiding arrests in domestic disturbance cases. One reason may be that domestic disturbance calls have in the past been extremely dangerous. Over 107 police officers were killed between 1960 and 1969 while answering these calls.92 A more likely explanation is that police attitudes are the result of their training. In many jurisdictions police are taught to avoid arrest and to seek mediation of such controversies.93 In fact, this is the recommendation of the International Association of Chiefs of Police training bulletin.94

For the victim, this alternative is thoroughly unsatisfactory. Not only does it minimize the seriousness of the husband’s actions and misstate the law, but also it effectively traps the wife with children in the home. If the husband refuses to permit the children to leave with the mother, she often remains. Arrest is the only legal procedure in California whereby police can immediately remove an assailant-husband from the home, at least temporarily.

Probably the clearest example of police refusal to remove a husband from the home was related by a client seeking a court order to vacate. The woman had known her husband for some time before she married him. When he became violent then, she would call the police and have him put out of the apartment. But she had children by him and was pressured into marriage for the children’s sake. Now, when she calls the police, though it is still her apartment and she pays the rent, the most the police will do is escort her from her home.

While these domestic disturbance situations are a serious police problem, few police forces have attempted to create new methods to deal with them. An exception is the Oakland Police Department which has created a special violence prevention unit (similar to one in New York City) to respond to domestic disturbance calls. The officers still do not make arrests though they do attempt to identify the underlying problems. The parties are then referred to an appropriate agency for assistance. The officers later return to determine whether referral advice was actually followed and to assess whether the referral

92. 1969 FBI Uniform Crime Reports 43; Parnas, supra note 1, at 920.
93. Parnas, supra note 1, at 930.
94. International Association of Police Chiefs, Training Key No. 16, Handling Disturbance Calls 3 (1965).
agency has given priority to assisting the parties. It would be interesting to examine the statistics of this police unit to see whether the nonarrest procedure is successful.

**District Attorney**

Few of the attorneys in private practice had filed criminal complaints with the district attorney's office. Those who had advised clients to file charges believed the solution was ineffective, but they attributed the fault to their clients. As FBI statistics reveal, complainants often do not follow through on their charges. In a study of Chicago's Court of Domestic Relations, it was discovered that over one-half of the cases were dismissed at the request of the complainant or by her failure to appear.

Legal service attorneys have met with varied success from county to county in referrals to district attorney offices. It has been my experience that the victim is reluctant to anger the assailant by criminal action. She will go to the district attorney only in a serious battery situation. The problem is that the district attorney usually proceeds slowly so as not to aggravate the situation further. Often only a citation hearing will be set up. Unfortunately, while proceeding deliberately may help preserve families, it also effectively discourages a wife from continuing with her complaint. The district attorney's office is also criticized for minimizing the seriousness of the husband's acts during its conciliation efforts. One client described the process as her husband being told that beating his wife was a "no-no." In addition, if a hearing is obtained, the court is often lenient for first arrests although it is probably not the first episode of violence. The only client I interviewed who had recently proceeded to a hearing complained that she was told her presence in court was not necessary and that she found out later her husband was given only a suspended sentence and six months probation. Because of these unsatisfactory results, women who seek help from the district attorney usually proceed to another agency, often at his suggestion. Many are referred to legal assistance offices for restraining orders. Again, the question arises: Is an orientation toward avoiding the criminal process advisable?

**Restraining Orders**

Interestingly, most private attorneys felt that restraining orders

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95. 1961 FBI **UNIFORM CRIME REPORTS** 11.
had some effect, either on police, inducing them to make an arrest, or on assailants who were responsive to court authority. Most legal service attorneys, however, felt that restraining orders were of little value stating that police will refuse to enforce the restraining order “because it is a civil matter” or because it will be ignored by their clients’ husbands. In any event, because of that belief and/or because of limited staffs, they reported that such orders were seldom obtained.

It is difficult to judge which position is correct. Different results may merely reflect different assailants. A San Francisco domestic relations judge reports that he has granted numerous temporary restraining orders but has never received a request for a contempt hearing on a restraining order violation.\(^9\) These failures to bring contempt actions may indicate that orders were successful or that returning to court to enforce ineffective orders was too much trouble. With no statistics available, it is impossible to reach a meaningful conclusion.

To meet the enforcement objection of legal service attorneys, two offices include a provision in restraining orders that authorizes police enforcement if a husband violates an order. Some minimal feedback indicates that such orders assist the victim in obtaining police protection.

If a dissolution action is pending, many husbands will vacate the home voluntarily upon an order to show cause, but the problem situation remains where a husband refuses to leave. This accentuates the principal failing of the current system. Restraining orders and orders to vacate the home must be obtained in dissolution proceedings, so they are not responsive to emergency situations, however effective they may be when finally received. A few wives are so afraid of angering their husbands they would rather move out themselves to avoid any confrontation than remain to weather the cumbersome legal process. The order to vacate procedure should be streamlined to provide emergency relief.

**Dissolution Actions**

Generally, the attorneys surveyed felt that if violence is a symptom of a disintegrating marriage, a dissolution action may be the only solution. They found that a wife seeks dissolution only after a history of conflict and reconciliation. She makes her decision when she can neither believe her husband’s promises of no more violence

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\(^9\) Judge Morton R. Colvin, Superior Court Judge in the City and County of San Francisco, in a speech given Apr. 22, 1971 for a program on “Marital Violence and Its Legal Solutions.”
nor forgive the past episodes of violence. She finally reaches her threshold of suffering and thereby rejects violence as a life style. The assailant-husband, through the dissolution action, is forced to recognize that their marital relationship cannot be preserved or controlled through violence. While a husband may be resentful of the outside interference of the court, he can learn to accept the termination of their unhealthy relationship and, usually, the end of the violence as long as fault is not emphasized. Thus, instead of condemning dissolution as causing disintegration of the family unit, the attorneys praised it as a healthy step toward ending sadomasochistic relationships likely to end in tragedy.

Marriage Counseling

Those private attorneys who have had experience with marriage counseling believe that it is generally ineffective. As one attorney put it: counseling is done in a limited time, the problems are handled superficially if they are identified at all, and often the assailant will not participate. Most legal service attorneys have had similar experiences; however, two offices have used a counseling service with some success—one using a court counseling service\(^98\) and the other using a private agency.\(^99\)

This response is surprising since marriage counseling is the panacea for most family law experts. Of course, counseling which discourages violence is often obtained indirectly, as in the process of resolving custody or visitation issues, and is not reflected in the survey responses. Frequently, success results not from the actual counseling but rather from this intervention of a third party who places the violence in a different perspective.

Recommendations

Despite the volume of legislation dealing with marital violence, most attorneys perceive the system as basically ineffective. This is due in large part to the attitude of agencies responsible for carrying out the legal provisions. Namely, they are oriented to nonenforcement. A study of the victim's perception of the system is presently being prepared and to date this research has produced data similar to what is reported here. In addition, an evaluation of the program used by the

\(^98\) Sacramento Legal Aid.

\(^99\) Marin County Legal Aid has been able to obtain greatly reduced rates for legal aid referrals.
Oakland Police should be made.

Apparently, the solution at this time is either to make "nonenforcement" effective by providing parties with intensive aid to solve their underlying problems, or to enforce the laws applicable to a situation. If the latter position is taken, certain modifications of existing laws are necessary. The police officer should be required by administrative policy or by statute to inform a complainant of her right to make a citizen's arrest. In addition, the process of obtaining temporary restraining orders and orders to vacate the home should be shortened, and instead of requiring the filing of a petition for dissolution, the orders should be available in routinely scheduled hearings the next court day after the assailant's arrest. No attorney should be required (as in small claims court) and the order should be effective for a thirty day period. In cases where no arrest is made, the victim should be able to schedule a hearing expeditiously (again, similar to the small claims procedure). In either case, whether there has been an arrest or not, immediate relief should be given so that parties will have time to either seek counseling or decide whether to continue their relationship.

In addition to providing emergency methods to deal with marital violence, society must in the future emphasize that marital violence will not be tolerated. Such violence has been functional in this society because it helps to preserve a life style which husbands play the dominant role in the marriage relationship. Society must question that relationship and create alternative life styles. Preliminarily, this means instilling a sense of value in women and a recognition of this value in men. In addition, marriage must be a partnership where the terms of marital contracts permit both parties to keep reasonable and equal levels of self esteem. In the event a marriage fails, the single parent household must be made a viable institution. These or similar responses are necessary if society is to solve the problem of marital violence in America.

100. CAL. CIV. CODE § 5101 provides: "[T]he husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." On September 13, 1971 at the California State Bar Convention the delegates voted not to repeal this legislation. The tenor of the arguments was that the role of the husband as the head of the household must be preserved not for legal reasons (since this statute does not control the wife's place of domicile) but for sociological reasons. While the convention did approve amending California Civil Code section 4518 to provide that an ex parte temporary restraining order may be obtained without a return date before the time of trial for a dissolution, the tenor of the arguments on this proposition was concern over the crowded domestic relation court calendar rather than over the problem of marital violence.