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NOTES

STRENGTHENING VICTIMS' RIGHTS IN DOMESTIC VIOLENCE CASES: AN ARGUMENT FOR 30-DAY MANDATORY RESTRAINING ORDERS IN MASSACHUSETTS*

I. INTRODUCTION

Domestic abuse¹ has been a pervasive problem for a number of years, but has recently experienced renewed emphasis at the forefront of American politics. Lawmakers have traditionally considered domestic abuse a private matter to be dealt with in side of the home. As a result, domestic abuse was a divisive political issue for many years. As often happens with controversial legislation, Congress and the state legislatures were slow to pass aggressive statutes addressing this issue. During the late 1970s and early 1980s a wave of legislation across the United States began to treat domestic abuse as a more serious crime.² In 1995, a national tragedy forced the issue of domestic abuse back into the spotlight. In response to the exhaustive examination of O.J. Simpson's volatile marriage to Nicole Brown Simpson, various sectors of the American public, including politicians, lawyers, legislators, and women's groups, renewed an attack on the "po-

* The author dedicates this Note to her parents, Paul and Rochelle, for their love, patience, and support throughout her personal and academic endeavors and for encouraging by example, the values of hard work, compassion, and most importantly family. The author also wishes to acknowledge Boston University Law Professor Lewis Whitman for providing several useful sources of information and offering many helpful comments.

¹ The definition of domestic abuse for purposes of this Note will include attempted or actual or feared physical harm against women or children by their husbands, fathers, or boyfriends, living either inside or outside of the home. Massachusetts law originally limited the definition of domestic abuse to attempted or actual or feared physical harm against "family or household members" (including former spouses or blood relatives). The Massachusetts legislature expanded the definition of domestic abuse victims in 1986 to include women in a "substantive dating or engagement relationship" or "having a child in common [with the abuser] regardless of whether they have ever married or lived together." See MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 1994). However, a significant amount of abuse occurs between adolescents. A study of Massachusetts female homicide victims found that among victims aged 15-19, 30% were killed by their husbands or boyfriends. See MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, IDENTIFYING AND TREATING BATTERED ADULT WOMEN AND THEIR ADOLESCENT CHILDREN: A GUIDE FOR HEALTH CARE PROVIDERS 50 (1992).

² See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecution*, 109 HARV. L. REV. 1849, 1857-62 (1996) (discussing the progression of domestic violence laws).

tentially lethal relationship between an abuser and a victim.”³ The trial cast serious doubts on the adequacy of the traditional efforts to combat domestic abuse: 911 emergency assistance, police protection, legislation, and the judiciary.⁴ As the news media continue to highlight the justice system’s inadequacy, there is an impetus for changes in legislation and for increased public education.

The focus of national attention on the epidemic⁵ of domestic violence prompted President Clinton to issue a proclamation on October 3, 1996, designating the month as National Domestic Violence Awareness Month.⁶ Besides addressing the extent of the problem, Clinton advocated expanding rights for crime victims.⁷ The address publicized the Violence Against Women Act and its reported success in helping thousands of victims find safety from their abusers in new shelters.⁸ Congress passed the Crime Control and Law Enforcement Act in response to its findings that there was an “epidemic of domestic violence” affecting all aspects of women’s lives.⁹ The Act was the symbol of a new effort to fight domestic violence on a national level. The bill also sponsored a toll-free domestic abuse hotline, 1-800-799-SAFE, in an effort to provide support to victims of abuse.¹⁰ Congress produced an amended version of the Crime Control Act in 1998.¹¹

Some states took a similar initiative in confronting the problem by passing statutes requiring mandatory arrests when a victim reports an abuser.¹²

³ Elizabeth Gleick, *No Way Out: The Nation Knows More About How Domestic Violence Traps Its Victims. Will This Awareness Help Kay Weekly?*, TIME, Dec. 23, 1996, at 60.

⁴ See Ellis Cose, *Getting Past the Myths*, NEWSWEEK, Feb. 17, 1997 at 36.

⁵ See 1996 U. ILL. L. REV. 533, 543. Congress passed the Violence Against Women Act as part of the Federal Crime Bill, which President Clinton signed into law in September 1994. See *id.*

⁶ See William J. Clinton, Proclamation No. 6927 reprinted in 40 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1960 (1996). President Clinton stated the intent of the act was to give “law enforcement critical new tools with which to prosecute and punish [abusers]” and to prompt states to join the effort by implementing an optional family violence provision in their welfare reforms. *Id.*

⁷ See *id.*

⁸ See *id.*

⁹ See S. Con. Res. 66, 104th Cong. (1996). Congress found that spousal abuse is usually witnessed by children. See *id.* at 1. Domestic abuse is the leading cause of physical injury to women, and resulted in one million crimes of assault, rape, and murder in a single year. See *id.*

¹⁰ See Clinton, *supra* note 6.

¹¹ See H.R. 2514, 104th Cong. (1998).

¹² See Nancy James, *Domestic Violence: A History of Arrest Policies and a Survey of Modern Laws*, 28 FAM. L.Q. 509, 513 (1994). For examples of mandatory arrest statutes, see COLO. REV. STAT. § 18-6-803.6 (Supp. 1995); CONN. GEN. STAT. ANN. § 46b-38b (West 1995); D.C. CODE ANN. § 16-1031(a) (Supp. 1995); IOWA CODE ANN. § 236.12(2) (West 1994); OR. REV. STAT. § 133.055(2) (Supp. 1994); R.I. GEN. LAWS § 12-29-3 (1994); S.D. CODIFIED LAWS ANN. § 23A-3-21 (Michie Supp. 1995); WASH. REV. CODE ANN. § 10.31.100(2) (West Supp. 1995).

Mandatory arrest policies, however, are inadequate because the abuser often persuades or intimidates the victim into dropping the charges before the case ever gets to court.¹³ To circumvent this problem, the newest proposed protection for victims of domestic abuse is mandatory restraining orders.¹⁴ Massachusetts is in a prime position to set an example for states to follow by establishing a thirty-day mandatory restraining order. The publicity from the domestic abuse case involving former Boston Red Sox baseball player, Wilfredo Cordero, brought the domestic violence issue to the forefront of the media in Massachusetts. The media appropriately seized on Cordero's arrogant denial of the violent act and his complete disregard for the restraining order against him.¹⁵ The Cordero case highlighted the problems inherent in prematurely releasing alleged abusers from custody. Cordero's wife, Ana Cordero, refused to testify after her husband, in violation of an emergency restraining order, came to see her after his 3:30 A.M. release from custody on the day after the alleged abuse.¹⁶

Requests for restraining orders dropped seventeen percent in Massachusetts' district courts between 1993 and 1997. The drop, however, may be due to a victim's fear of inciting her abuser by filing for an order.¹⁷ Women who find the courage to file for a restraining order often appear "disoriented and unfit in front of a judge given the circumstances."¹⁸ It is often difficult for a judge to interpret the conflicting evidence in a scene where a hysterical woman, who is "physically and emotionally frightened by the mere sight of [her] abuser again," confronts a calm and seemingly stable man.¹⁹ If the restraining orders are mandatory and the victims have no control over their issuance, the abuser has

¹³ See George Wattendorf, *Prosecuting Cases Without Victim Cooperation (Focus on Domestic Violence)*, FBI L. ENFORCEMENT BULL., Apr. 1, 1996, at 18.

¹⁴ See Melody K. Fuller & Janet L. Stansberry, 1994 *Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAWYER 2327, 2329-30 (1994). The Colorado Criminal Code provides that any person arrested on domestic violence charges automatically is issued a 'mandatory restraining order,' or no-contact bond, and H.B. 1253 requires that the defendant acknowledge the order on the record before being released on bond. COLO. REV. STAT. §§ 18-1-1001(5), 16-4-103(2). Violation of a restraining order qualifies as a crime and is also punishable as act committed in contempt of court. *Id.* §§ 18-6-803.5, 14-4-104(2)(a).

¹⁵ See Tony Massarotti, *BASEBALL: He's Back! Cordero Returns to Sox Lineup*, *Boston Herald*, July 11, 1997, at 1. In an "alarming interview" with ESPN, Cordero "denied having any problems with his marriage, insisting, 'We don't need (counseling)'." *Id.*

¹⁶ See Matthew Brelis & Judy Rakowsky, *Cordero Case Spotlights Bail Flaws. DA, Activists Say Alleged Abusers Often Released From Custody Too Early*, *BOSTON GLOBE*, June 29, 1997, at B1.

¹⁷ See Lauren Markoe, *Restraining Order Requests Drop Sharply*, *THE PATRIOT LEDGER*, Apr. 10, 1998, at 1.

¹⁸ Beth I.Z. Boland & Susan M. Finegan, *Survey of Key Developments in the SJC's Recent Approach to Domestic Violence Issues: Jacobsen, Frizado, Kwiatkowski, and R.H. v. B.F.*, *BOSTON BAR J.*, Jan./Feb. 1996 at n.59.

¹⁹ *Id.*

less incentive to pressure or blame the victim for the order. There is also a lower risk that the judge will misinterpret the evidence.

The Cordero story highlights the need for more aggressive action by Massachusetts legislators to support and protect abuse victims once they find the courage to report the crime to the police.²⁰ While there are various kinds of domestic abuse, this Note will focus on the most prevalent form: husbands battering wives.²¹ This Note's approach to the problem, however, is applicable to any type of domestic abuse. Part II of this Note explores the growing awareness of domestic violence in American society and its orientation into the legal system. Part III addresses the evolution of current attitudes toward domestic violence held by legislators and law enforcement. Part IV analyzes the inadequacies of Massachusetts law enforcement and public policies addressing domestic violence. Lastly, Part V proposes new and possibly more successful approaches to combating domestic violence and discusses why they should be implemented in Massachusetts.

II. BACKGROUND

A. Domestic Violence in American Culture

1. The Magnitude of the Problem

For many years, domestic violence has been a hidden problem.^{22,23} Domestic abuse is a pervasive problem in the United States, but society has only recently acknowledged it as a problem of epidemic proportions.²⁴ It occurs in families of all races, religions, and economic backgrounds. The statistics indicate that a woman is a victim of physical abuse every nine seconds.²⁵ Approximately twenty percent of all hospital emergency room visits by women result from do-

²⁰ Critics of the Massachusetts system point out that releasing alleged abusers too quickly after arrest puts the victims at risk and allows defendants to convince them not to testify at the next day's arraignment. See Brelis & Rakowsky, *supra* note 16, at B1.

²¹ See Joan Zorza, *Mandatory Arrest for Domestic Violence: Why it May Prove to be the Best First Step in Curbing Repeat Abuse*, CRIMINAL JUSTICE, Fall 1995, at 2. The approach to domestic abuse, outlined in this Note, is also applicable to violence in homosexual relationships or elder abuse within families.

²² See Gleick, *supra* note 3, at 60. In a 1996 address, President Clinton acknowledged that domestic violence is an issue that "has been swept under the rug for quite a long time now. [However,] it's really always existed at some level or another." Clinton, *supra* note 6.

²³ See Clinton, *supra* note 6.

²⁴ See *id.*

²⁵ See Daniel Fox, *Valentine's Day Message is Pain for Some*, BUS. FIRST (Louisville), Feb. 17, 1997, available in 1997 WL 7727977. In fact, every year in America, "more women are abused by their husbands than get married." Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 386 (1994). In addition, there are more than 3 million abused children every year, and that number was expected to rise in 1997. See Fox, *supra*.

mestic abuse injuries.²⁶ Even more alarming, the Department of Justice estimates that "wife assault is underreported by a factor of at least ten to one."²⁷ The most troubling issue, however, is the fact that the law often interferes with—rather than protects—a woman's right to be free from bodily harm.²⁸ By traditionally failing to treat domestic abuse as a serious crime, and by offering women inappropriate remedies, the criminal justice system implicates itself in the battering of women.²⁹

2. Societal Attitudes Impede Efforts by the Justice System to Defeat Domestic Abuse

Spousal battery reflects the existing "broad structures of social and economic inequality in society."³⁰ The social, political, and economic dependence of many women on men provides the framework that enables men to perpetrate violence against women.³¹ The gender inequality stems from a complex set of values, traditions, customs, and habits. Until recently, the lack of domestic violence laws reinforced the policy of a strict right to privacy in the home. For a number of years, society has turned a blind eye to the problem of violence against women.³² This attitude is even more troubling given the fact that several Massachusetts and national studies have found that sixty to seventy-five percent of families containing battered women contain battered children as well.³³ Most states

²⁶ See Clinton, *supra* note 6.

²⁷ FED. BUREAU OF INVESTIGATION, U.S. Dep't of Justice, Crime in the U.S.: Uniform Crime Report 18-19 (1975). The Bureau of Justice Statistics stated that "[u]nder-reporting remains the most serious analytic problem. Available measurements of domestic violence, no matter what their origin or intent are too low." David E. Poplar, *Tolling the Statute of Limitations for Battered Women after Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 DICK. L. REV. 161, 201 (1996) citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE VICTIMS: A STUDY OF VIOLENCE AMONG FRIENDS AND RELATIVES 3 (1980).

²⁸ See ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 35 (1994).

²⁹ See *id.*

³⁰ See generally, R.E. DOBASH & R.P. DOBASH, VIOLENCE AGAINST WIVES: A CASE STUDY AGAINST THE PATRIARCHY (London Open Books, 1980). "Studies show that rather than representing an aberration, violence in the home is widely accepted and tolerated." *Id.* at 54.

³¹ See *id.*

³² See Jay Winsten, *Working Luncheon on Domestic Violence* (June 18, 1991) in CTR. FOR HEALTH COMMUNICATION, HARV. INST. OF PUB. HEALTH 2 (1991). [hereinafter *Working Luncheon*]

³³ See Beth I.Z. Boland, *Facts Should Drive the Child Custody Debate*, MASS. LAWYERS WKLY., Mar. 3, 1997 at A1. A recent report issued by the Massachusetts Governor's Commission on Domestic Violence found that children who witness a mother's abuse suffer the same harm and display the same symptoms as children who are "directly abused." *Id.* They are more likely to attempt suicide, commit crimes against the person, and abuse drugs. See *id.*

refrained from enacting legislation allowing police officers or the courts to interfere in what many officials considered trivial "domestic squabbles."³⁴ Until the 1970s, the issue of domestic abuse was rarely discussed and garnered sparse legislation.³⁵ However, with the increased role of women in higher government and professional positions, and with the development of more powerful and persuasive women's organizations, the once hidden issue has forged its way into national awareness.³⁶ Increasing incidents of domestic violence, especially involving well-known celebrities such as O.J. Simpson, have renewed public demand for tougher legislation.

Women in American society traditionally did not seek legal redress when they suffered domestic abuse in the family.³⁷ Even as women gained respect in the workplace and public life, much of society still expected a woman's obedience to her husband in her private life. These unrealistic expectations shamefully resulted in public acceptance of the occasional punch or slap by an angry husband. Few people realized that the occasional public slap was a symptom of much more violent abusive behavior behind closed doors. The state often would not intervene until a tragedy occurred harming the victim, the abuser, or both. As awareness of domestic violence increased, state legislatures responded and pushed through stronger laws in support of domestic abuse victims.

B. Increased Public Awareness

1. The Acceptance of Battered Women's Syndrome ("BWS") as a Medical Diagnosis and a Theory of Self-Defense

Acceptance of the problem by the scientific community led to the placement of BWS in *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, a manual of diagnostic syndromes with recognized symptoms, and acceptance in the courts as a valid self-defense.³⁸ Before the recognition of BWS, there was little hope that battered women who killed their abusers in defending their own lives would find help in the court system. In the late 1970s and early 1980s, "battered women self-defense" achieved acceptance within the case law of numerous states.³⁹ Until recently, however, women still faced a very difficult bur-

³⁴ See Gleick, *supra* note 3, at 60.

³⁵ See generally, JONES, *supra* note 28, at 7-10.

³⁶ See *id.*

³⁷ See Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303 (1997). Women are often torn between a desire to escape the abuse and a feeling of obligation to keep the family together in the hope that the abuse will stop. See *id.* at 307-09. Many women are so emotionally and economically dependent on their spouses that they can see no alternative to staying in the marriage. See *id.*

³⁸ See Lenore Walker, *Working Luncheon*, *supra* note 32, at 13. See also *infra* notes 48-51 and accompanying text for explanation of BWS.

³⁹ See Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, NOTRE DAME J.L., ETHICS & PUB. POL'Y, 321 (1991). [hereinafter Walker, *Battered Women Syndrome*]

den if they chose to prosecute a batterer. The difficulty in proving an unwitnessed attack or restraining order violation, in addition to the accepted societal stereotypes, led some judges to dismiss cases against alleged abusers.⁴⁰

At common law, all states authorized officers to arrest individuals on probable cause only if the suspected act qualified as a felony. Prior to 1977, all states, including Massachusetts, failed to give statutory authorization for officers to arrest an alleged domestic abuser, unless the officer witnessed the abuse, satisfying probable cause.⁴¹ This was the case even if there was reliable evidence of violence, such as an eyewitness or a documented history of abuse in the household.⁴² Current law adopts a more lenient standard by authorizing officers to arrest suspects for the misdemeanor of domestic abuse as long as the officer has probable cause to believe that such abuse has occurred. In 1993, however, reluctance of some law enforcement officials to arrest alleged batterers, in line with the more relaxed standard, resulted in the domestic violence deaths of forty-one women and children in Massachusetts.⁴³

The increased acceptance of BWS and the perception of abuse as a type of disease prompted legislators to play an active role in gaining control over the epidemic of domestic violence. In Massachusetts, then Governor William Weld organized the Governor's Commission on Domestic Violence in response to the rising epidemic and declared a public state of emergency.⁴⁴ The Commission recommended extensive education of police officers regarding the dynamics of domestic violence and its effects.⁴⁵ Increasing awareness about BWS is the only way to legitimize the doctrine in the eyes of law enforcement, attorneys, and judges. By understanding the cycle of abuse, these authority figures can better help victims by learning how to obtain information necessary for prosecution and provide appropriate protection from abusers. Some courts acknowledge that when women are pressured by their abusers and lose the confidence to testify, the case often becomes too weak to prosecute.⁴⁶ As a result, many courts dismiss these types of cases. If the judicial system provides victims with increased protection, it is likely that more women will report the crime and follow the case through prosecution.

⁴⁰ See *Dismissing Domestic Abuse*, BOSTON GLOBE, Sept. 27, 1994, at A22.

⁴¹ See *Zorza, Mandatory Arrest for Domestic Violence*, *supra* note 21, at 4. See also *infra* notes 57-60 and accompanying text for explanation of the probable cause standard.

⁴² See *Gleick*, *supra* note 3, at 60.

⁴³ See *Don Aucoin, Battering Bills Stuck on the Hill*, BOSTON GLOBE, Jan. 2, 1994, at B1.

⁴⁴ See generally REP. OF THE UNIF. ENFORCEMENT SUBCOMM., GOVERNOR'S COMM'N ON DOMESTIC VIOLENCE (Mass. July 14, 1994).

⁴⁵ See *id.* at Addendum II. The report explains the dynamics of domestic violence, the cycle theory of violence, the obstacles to leaving, and appropriate ways to respond. See *id.*

⁴⁶ See *Dismissing Domestic Abuse*, *supra* note 40, at A22.

2. High Profile Cases Enhance Public Understanding of BWS

One of the first public displays highlighting the seriousness of domestic abuse came with the 1984 television movie, "The Burning Bed."⁴⁷ The reenactment of the Francine Hughes case was one of the first televised demonstrations of the horrifying effects of BWS.⁴⁸ Domestic abuse remains a significant focus in the media through prominent news stories and a variety of television movies. *Time* magazine, for example, published a detailed account of Kay Weekley, a battered woman who, after suffering ten years in "an escalating cycle of violence and reconciliation," took her ex-husband's life in 1992 with a gunshot.⁴⁹ At the time, Jackie Weekley was out on bond for attacking Kay, Kay's sister, and Kay's sister's boyfriend with a butcher knife. Despite pages of police complaints documenting numerous prior incidents of abuse, the jury convicted Kay for murder because they believed the killing was premeditated. West Virginia's Coalition Against Domestic Violence, however, urged the Governor to issue a pardon. The coalition reasoned that since Kay's conviction, the general public "has reached a greater understanding of [domestic abuse]."⁵⁰ The coalition noted that the legal protections for victims of domestic abuse have been "dramatically strengthened in ways that might have averted the tragedy."⁵¹

⁴⁷ See Martha Bayles, *TV Preview: Farrah Torches Her Fluffball Image*, WALL ST. J., Oct. 4, 1984 at 30. Farrah Fawcett, a well-known actress, brought increased recognition to the problem of domestic violence by starring in *The Burning Bed* as abused wife, Francine Hughes. In 1977, Hughes killed her husband after suffering many years of his physical and emotional violence. See *id.*

⁴⁸ Battered Women's Syndrome is the psychological dependency that keeps a battered spouse trapped in a violent relationship, repeatedly forgiving her abuser and even sometimes blaming herself for the attacks. See Gleick, *supra* note 3, at 61. The woman often still loves her husband, even after suffering violent and repeated abuse at his hands. See Kelly, *supra* note 37, at 303-11. As a result of her loss of self-worth, the woman blames herself for the abuse and forgives her husband in the hope that he will change. See *id.* at 308-09. The woman may deny the problem or may stay with her husband for fear that she cannot survive without him. See *id.* at 309-11. The woman's pride in her marriage prevents her from seeking help, while at the same time the abuse works to inspire deep fear and hatred for the batterer. See *id.* at 310. The combination of denial, pride, and fear may result in a fatal attack by a wife against her abuser if she sees no other way out of the situation. American courts now accept expert testimony in Battered Women's Syndrome as a valid defense. See Walker, *Battered Women Syndrome*, *supra* note 39, at 321.

⁴⁹ Gleick, *supra* note 3, at 60.

⁵⁰ *Id.*

⁵¹ *Id.*

III. CURRENT ATTITUDES TOWARD DOMESTIC VIOLENCE

A. Legislatures Begin a Strong Initiative Against Domestic Abuse

1. Mandatory Arrests: "Probable cause" and the Role of Police Officers in Arrest and Prosecution

Many states have taken the important first step in providing more extensive victim support by creating legislation requiring "mandatory arrest."⁵² Oregon was the first state to pass a mandatory arrest statute in 1977.⁵³ A number of states have followed Oregon's example by passing laws to make arrests mandatory in domestic assault cases.⁵⁴ Prior to the 1980s, the preferred law enforcement technique in responding to domestic abuse calls was mediation.⁵⁵ To enforce the newer policies, some police chiefs have taken disciplinary action against officers who fail to comply with the pro-arrest policy "to persuade them to comply . . . and arrest batterers."⁵⁶ While education and more extensive training enables officers to better identify cases of domestic abuse, stronger arrest policies help the state to better protect the women in danger. The increasing support for a policy of mandatory arrest demonstrates recent public support for more aggressive methods toward strengthening victims' rights.⁵⁷ Advocates argue that a mandatory arrest policy shows domestic violence victims that they can depend on full support from the state.⁵⁸ By requiring arrest in all cases where officers find "probable cause"⁵⁹ to arrest a batterer, the justice system can actively stop batterers even when the victim is afraid to take that step herself.⁶⁰

Stronger arrest policies also prevent the commission of more serious crimes in

⁵² A mandatory arrest requires police officers to arrest a suspected batterer whenever they find probable cause that some sort of abuse has taken place. The officers can make the arrest even without the victim's cooperation. See mandatory arrest statutes, *supra* note 12.

⁵³ See JONES, *supra* note 28, at 142.

⁵⁴ See *id.* See also mandatory arrest statutes, *supra* note 12.

⁵⁵ See Barbara Fedders, *Lobbying for Mandatory Arrest Policies*, 23 N.Y.U. L. REV. & SOC. CHANGE 281, 283 (1997).

⁵⁶ See JONES, *supra* note 28, at 142.

⁵⁷ By 1994, the legislatures of twenty-three states and the District of Columbia had adopted mandatory arrest statutes. These statutes removed police discretion in most domestic violence cases by requiring police to make an arrest when they had probable cause to believe that a misdemeanor involving domestic violence had been committed. See Fedders, *supra* note 55, at 289.

⁵⁸ See *id.* at 292.

⁵⁹ The probable cause standard allows police officers to arrest an individual for domestic abuse or violation of a restraining order, even if they do not witness the incident, if they have probable cause to believe such an incident took place. See MASS. GEN. LAWS ch. 209A, § 6 (1996). Prior to this 1988 revision, police officers could not make an arrest unless they had witnessed a misdemeanor act. See Rai Kowal, *Working Luncheon on Domestic Violence*, (Sept. 30, 1991) in CTR. FOR HEALTH COMMUNICATION, HARV. INST. OF PUB. HEALTH 13 (1991). [hereinafter *Working Luncheon II*]

⁶⁰ See discussion *supra* pp. 303, 305-08.

the future.⁶¹ By making arrests for threats or simple assaults, officers can avert rapes and murders.⁶² Critics argue that mandatory arrests deny due process to an accused batterer because they can be made without a victim's substantiation or accusation.⁶³ Instead, the officer may rely on his partially subjective finding of probable cause. Proponents of mandatory arrests counter that argument with the simple logic that "if the slap was serious enough to call police about, arresting for a slap is not inappropriate."⁶⁴ Further, probable cause is one of the highest standards an officer must satisfy to take action against a suspect.

Most states are making headway against the old cultural perception "that a man's house is his castle and what happens in it isn't anybody's business."⁶⁵ National and state education efforts have increased reporting, prosecutions, and convictions.⁶⁶ Even with increased reporting, however, arrests are still made in only half of all responses to calls.⁶⁷ The current system in most states and in Massachusetts does not do enough to protect the victims of domestic abuse crimes after they find the courage to call for help. The best way to strengthen victims' rights is to protect their physical well-being in addition to helping support their mental well-being.

By 1994, every state had enacted a probable cause provision in some domestic violence cases, but its use varies from state to state.⁶⁸ For example, some states mandate arrest upon a probable cause finding in most domestic abuse situations.⁶⁹ Other states, like Massachusetts, only list arrest as the preferred response, or even just a lawful option at the discretion of the officer.⁷⁰ Massachusetts, however, has a more aggressive policy regarding domestic abuse prevention order violations. Upon a finding of probable cause⁷¹ law enforcement officers *must* arrest an individual they believe violated a domestic abuse restraining order.⁷² The provision authorizes officers with probable cause to arrest an alleged abuser for violating a temporary or permanent vacate, restraining, or no-contact order.⁷³ In Massachusetts, arrest is only the preferred response whenever an officer witnesses or has probable cause to believe the person has com-

⁶¹ See Susan Decker, *Stopping Domestic Abuse: More Arrests Mean Fewer Severe Attacks*, FLORIDA TODAY, June 4, 1996, at 1A.

⁶² See *id.*

⁶³ See Claire Papanastasiou Rattigan, *Necessary Shield . . . or Dangerous Weapon?*, MASS. LAWYERS WKLY. Jan. 17, 1994 at 33.

⁶⁴ Decker, *supra* note 61, at 1A.

⁶⁵ Gleick, *supra* note 3, at 63.

⁶⁶ See discussion *infra* pp. 317-20.

⁶⁷ See Gleick, *supra* note 3, at 63. In some cases, if there is no sign of injury, there can be no arrest. Police officers are helpless to do anything because "[i]f you don't have a victim. You don't have a prosecutable crime." *Id.*

⁶⁸ See *id.*

⁶⁹ See mandatory arrest statutes, *supra* note 12.

⁷⁰ See 1996 U. ILL. L. REV., 533 *supra* note 5, at 558.

⁷¹ See *supra* note 59.

⁷² See Gleick, *supra* note 3, at 61.

⁷³ See MASS. GEN. LAWS ch. 209A, § 6 (1996).

mitted a felony, assault and battery, or a misdemeanor involving abuse.⁷⁴ These arrests should be mandatory because they are important to the victim's safety and give her an opportunity to separate herself from her abuser for at least a limited period of time. The distance from her abuser may give the victim enough time to gain the confidence to continue with the prosecution. Massachusetts should therefore require officers to arrest any person they have probable cause to believe has committed the listed crimes.

The new probable cause standard has increased arrests at a staggering rate. In fact, the number of individuals prosecuted for domestic abuse is now twice that of drunken driving arrests.⁷⁵ This increase is likely attributable to those states mandating arrest when police respond to certain types of domestic assaults. For example, in Seattle, Washington in 1984, without a mandatory arrest policy in place, officers made only 87 domestic violence arrests at the time of the incident.⁷⁶ One year later, with the mandatory arrest provisions in place, officers made 448 arrests. Unfortunately, it is difficult to ensure that officers in Massachusetts are following the preferred response approach because the probable cause standard is inherently subjective.⁷⁷ Moreover, police often take longer to respond to domestic abuse calls than to other types of calls, even if there has been an urgent call for help.⁷⁸ This fact reveals that, in some communities, the traditional notion that family abuse is a private matter still lingers. Once officers arrive on the scene, some are reluctant to make an arrest, instead opting to mediate or do nothing at all.⁷⁹ Even if a police department adopts a policy preferring arrest, it will not be effective unless the department enforces the policy.

2. Holding Police Liable for Failure to Respond

Some states are cracking down on inadequate responses by holding police liable for violating "equal protection" under the Constitution.⁸⁰ Three circuit courts of appeals, and some lower courts, have upheld this theory.⁸¹ As a result, many

⁷⁴ See REP. OF THE UNIF. ENFORCEMENT SUBCOMM. *supra* note 44, at Addendum I-2.

⁷⁵ See *id.*

⁷⁶ See Joanne Tulonen, *Impact of the Domestic Violence Prevention Act*, Family Violence Project, Aug. 1995 at 22-23.

⁷⁷ See *Commonwealth v. Rexach* 478 N.E.2d 744, 20 Mass. App. 919 (1985) (officer has duty to use his best judgment to protect wife and should not be faulted as long as he acts reasonably).

⁷⁸ See Lisa G. Lerman, *Statute: A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 94-97 (1984) (citing generally R. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979)).

⁷⁹ See generally JONES, *supra* note 28, at 140-43, 145.

⁸⁰ These suits are typically brought under 42 U.S.C. § 1983 (1996), holding departments liable when their officers take "domestic abuse" complaints less seriously than complaints about other types of assaults. See John Decaire, *Police Are Held Liable for Not Preventing Domestic Violence, How Should Town Counsel Advise Clients?*, 93 LWUSA 133, May 24, 1993, at B10.

⁸¹ See *id.*

municipalities are instituting tougher police policies on handling domestic abuse disputes.⁸² In its *Report on Domestic Violence Uniform Enforcement Standards*, the Governor's Commission on Domestic Violence recommended that police officers be held accountable for their inaction, at least within their departments.⁸³ While the recommendation is a strong first step, individual departments must take the initiative and develop policies for holding officers liable for failure to act. Massachusetts police departments should strengthen their policies by clearly spelling out the prerequisites for arrest, requiring complete and detailed records for domestic violence calls, and then actively enforcing adherence to such policies. This will encourage officers to arrest when the objective conditions are present and will reduce reliance on subjective evaluations of the situation. It also will make it easier to identify when an officer has failed in his duties.

3. Strengthening Domestic Violence Protective Orders: Colorado's Example

Domestic violence protective orders have the dual function of providing the battery victim with enhanced protection of her physical welfare as well as the psychological feeling that the power of the justice system stands behind her. Although many states now have some form of domestic abuse protection orders, only Colorado has mandatory restraining orders. Colorado has taken a number of steps toward extending and improving the statutory support available to domestic abuse victims. In 1994, the Colorado legislature passed several significant domestic abuse bills strengthening both civil and criminal restraining order laws and procedures for domestic violence victims.⁸⁴ The Colorado statutes provide both temporary and permanent restraining orders ("TROs" and "PROs").⁸⁵ Furthermore, the recent legislative changes encourage victims to fight back by making it easier to get TROs.⁸⁶

⁸² See *id.*

⁸³ See REP. OF THE UNIF. ENFORCEMENT SUBCOMM., *supra* note 44, at II-2. Recently, in *Ford v. Town of Grafton*, the Massachusetts Court of Appeals ruled that the town of Grafton was entitled to immunity under the Tort Claims Act despite evidence that the town was negligent in failing repeatedly to arrest a batterer. See *Ford v. Town of Grafton*, 44 Mass. App. Ct. 715, 721 (1998). Ford, the victim, had a restraining order against her former husband. Even when the town repeatedly found him in violation, officers failed to make an arrest. See *id.* In this case, the tragic result left Ford quadriplegic after being shot by her former husband. While the court was sympathetic to her plight, it was forced to follow the legislature's grant of immunity in such cases. See *id.* To avoid such devastating consequences in the future, police departments must ensure that their officers comply with state law and department policy.

⁸⁴ See generally Fuller & Stansberry, *supra* note 14.

⁸⁵ See *id.* at 2327. Judges have broad discretion in issuing temporary restraining orders. They may order that the party refrain from "threatening, molesting injuring or contacting any other party or minor children; exclude a party from family or other home; prohibit visiting the protected person's work place; and award temporary care and control of any minor children for up to 120 days." *Id.*

⁸⁶ See *id.* (discussing procedure for obtaining a TRO). In the 1994 session, the legisla-

To issue a TRO, the court must find that "an imminent danger exists to the life or health of one or more persons."⁸⁷ The court may issue a TRO even though there has been a lapse in time between an abusive act and the TRO filing.⁸⁸ At the TRO hearing, which the court must schedule within fourteen days, the defendant bears the burden of showing cause as to why the TRO should not be permanent.⁸⁹ If a defendant violates a restraining order, it is a crime punishable by contempt of court proceedings.⁹⁰ These procedures enable the victim to take action with continuing support and enforcement from the judicial system.

Colorado has made further progress in victim support by expanding the definition of domestic violence to include "an act or threatened act of violence upon a person with whom the actor *is or has been involved in an intimate relationship*."⁹¹ This includes invasion of home or property or threat thereof. As a result, the statute encompasses many more victims in need of public assistance.⁹² The court also cooperates with victim assistance programs, which are available to provide information about criminal charges, trial proceedings, and other judicial matters.⁹³ By putting the victim's interests first, Colorado has become an example of the proactive approach necessary to lower the instances and increase the prosecutions of domestic violence.

The most progressive measure in Colorado's legislative enactments are the mandatory restraining orders.⁹⁴ The court's ability to issue these orders automatically, without any additional effort by the victim, encourages prosecution. Batterers often exploit the victims' vulnerability by coercing her to drop charges with promises of reform.⁹⁵ Victims' rights advocates want women to "be able to obtain restraining orders quickly and easily, including at night and on weekends."⁹⁶ Some advocates believe that judges should combine sanctions and reha-

ture repealed the statute requiring victims to show proof of the restraining order. The aim of the legislature was to combat domestic violence directly and forcefully because it "is the single largest cause of injury to women in the United States, more common than auto accidents, muggings and rapes combined." *Id.* at 2327 (citing Stark & Flitcraft, *Women-battering, Child Abuse and Social Heredity*, MARITAL VIOLENCE, SOCIOLOGICAL REVIEW MONOGRAPH #31 (Rutledge & Kegan Paul eds., 1985)).

⁸⁷ *Id.* at 2327 (citing COLO. REV. STAT. § 14-4-102(4)).

⁸⁸ *See id.*

⁸⁹ *See id.* at 2328. "If the defendant fails to appear at the show cause hearing, the court must make the TRO a PRO by entry of a default order." *Id.*

⁹⁰ *See id.* at 2329 (citing COLO. REV. STAT. §§ 18-6-803.5, 14-4-104(2)(a)).

⁹¹ *Id.* at 2328 (citing COLO. REV. STAT. § 18-6-800.3) (emphasis added).

⁹² *See id.*

⁹³ *See id.* at 2328.

⁹⁴ *See id.* at 2329. The court automatically issues the restraining order when any person is arrested on domestic violence charges. The order is a no-contact bond that requires the defendant to acknowledge the order on the record before being released on bond. *See id.* (citing COLO. REV. STAT. §§ 18-1-1-1(5), 16-4-103(2)).

⁹⁵ *See discussion supra* pp. 303, 305-08.

⁹⁶ JONES, *supra* note 28, at 216.

bilitation of batterers, and strictly punish any violation as a criminal offense.⁹⁷ To give full effect to the goal of strengthening the likelihood of and success in prosecution, mandatory arrests should be enhanced by a computerized, central system keeping track of restraining orders, "seeking out and arresting violators," and coordinating and training police, prosecutors, civil and criminal court judges, and probation officers.⁹⁸

While all states now allow police officers to arrest batterers for probable cause even when the victim refuses to press charges, the challenge is to empower the victim to support prosecution and thus further increase convictions.⁹⁹ Many states take advantage of media attention to push through tougher legislation on domestic abuse.¹⁰⁰ With the failures of the Cordero prosecution, the recent media attention focusing on domestic abuse fatalities, and a substantial increase in domestic violence reports,¹⁰¹ the time is ripe for the Massachusetts legislature to take aggressive action. The recent enactment of the preferred arrest response in Massachusetts will allow legislators to tout the mandatory arrest and mandatory restraining order as an extension of the legislative scheme, designed to guarantee better conformity with the state policy condemning domestic abuse.¹⁰² Congress intended that victims be able to acquire abuse prevention orders in a quick and efficient manner.¹⁰³ In order to further that goal, Massachusetts needs mandatory arrests and mandatory abuse prevention orders.

⁹⁷ See *id.* at 216-17. Feminist organizers believe that "to be effective, any criminal justice program must begin with a policy of arresting offenders and handing out serious consequences." *Id.*

⁹⁸ *Id.*

⁹⁹ See Gleick, *supra* note 3, at 61.

¹⁰⁰ One *Boston Globe* article highlighted some of the region's most recent episodes of domestic violence:

[W]ith their young children nearby, a man shot and killed his girlfriend in their Dorchester apartment . . . a Quincy woman was slain in her home, allegedly by her estranged husband; another Quincy woman who was reported missing and presumed dead; and a Chelsea man allegedly slashed his estranged wife, her boyfriend, and himself at the Haymarket MBTA busway.

Tina Cassidy & Dan Scannell, *Violence Shatters Another Family*, BOSTON GLOBE, Nov. 16, 1998 at B1, B16.

¹⁰¹ "From 1993 to 1997, at a time when the outcry against domestic violence was climbing — and when the rates of murder, rape, robbery, and aggravated assault between non-relatives dropped 27 percent — domestic reports on those same charges rose 12 percent." Stephanie Ebbert, *Domestic Violence Reports on Rise*, BOSTON GLOBE, Oct. 23, 1998 at B1.

¹⁰² See generally REP. OF THE UNIF. ENFORCEMENT SUBCOMM., *supra* note 44.

¹⁰³ See *Frizado v. Frizado*, 651 N.E.2d 1206, 420 Mass. 592 (1995) (legislature intended domestic abuse prevention proceedings to be as expeditious and as comfortable as reasonably possible for lay person to pursue); *Zullo v. Goguen* 672 N.E.2d 502, 423 Mass. 679 (1996) (legislature intended domestic abuse prevention proceedings to be as expeditious and informal as possible).

IV. FOCUS ON MASSACHUSETTS

A. *The Need for A Renewed Effort in Educating the Public and Law Enforcement*

1. Even After High Profile Cases, Abuse Goes Unpunished and Sports Figures are Still Accepted

Domestic abuse awareness continues to increase with every incident involving a celebrity charged by his spouse or girlfriend, but unfortunately the acceptance of abuse continues in many ways. There has been extraordinary media attention given to domestic abuse in recent years. The O.J. Simpson trial is the most prominent example of widespread publicity on the issue of domestic violence. The recently publicized incidents of abuse exemplify the current system's inability to help domestic abuse victims before it is too late. Even if O.J. Simpson really did not kill his wife Nicole, it is clear that he got away with repeated abuse. The story of Nicole Brown Simpson exemplifies the reluctance of victims to go through with prosecution and the willingness of courts to let batterers off with a slap on the wrist.¹⁰⁴

Other incidents in the sports arena have had similar outcomes. Though Wilfredo Cordero no longer had a job with the Boston Red Sox after he pleaded guilty to domestic abuse, he quickly found a job with another team. *Newsweek* published an article documenting a few well-known sports figures accused of abuse and retaining similar acceptance and rewards within the sports realm.¹⁰⁵ Significantly, the article demonstrated that society often forgets the incidents after a few years. For example, the police arrested Warren Moon for hitting his wife, but he was still paid to play professional football; the police arrested Darryl Strawberry for pulling a semi-automatic weapon on his wife and striking his girlfriend with his fist, but he still received a standing ovation when he returned to major league baseball; a jury convicted Mike Tyson of raping a woman, but he still continued to make millions of dollars boxing; John Daly pleaded guilty to harassment after slamming his wife against a wall, but entered and won golf's British Open three years later.¹⁰⁶ Although public awareness has increased significantly, state legislatures must now overcome the public perception that domestic abuse is somehow not as worthy of condemnation or prosecution as other violent crimes.

¹⁰⁴ See generally JONES, *supra* note 28, at 142-45 (discussing reluctance of victims to prosecute and failure of judges to adequately punish batterers).

¹⁰⁵ See David A. Kaplan, *Are Two Chances Too Many*, *NEWSWEEK*, Aug. 21, 1995, at 66.

¹⁰⁶ See *id.*

2. State Initiatives Further Awareness: The Effort to Educate Law Enforcement Officers and Court Employees

In the past few years, state legislatures and executives have taken a more active role in preventing abuse and assisting women who attempt to escape an abusive environment. In Massachusetts, then acting Governor Paul Cellucci announced, in July, 1997, a "zero tolerance" policy for state employees charged with domestic violence.¹⁰⁷ At the same time, Cellucci encouraged the state's public and private employers to take a similar approach. Many such responses are the product of extensive media coverage and highly publicized domestic assault arrests. Pressure for a stronger governmental response to domestic violence has led to a new agenda of increased judicial and law enforcement education.

In 1993, then Governor Weld's actions in preventing and prosecuting abusers under recommendations from the Commission on Domestic Violence, were a successful first step.¹⁰⁸ The Commission has made significant strides in the fight against domestic violence, such as developing uniform standards for police and district attorneys to promote effective investigation and prosecution of domestic violence cases. Education can help eradicate widespread misconceptions about rights granted and the duties of the criminal justice system under current domestic violence laws. A 1985 confidential survey by the Criminal Justice Training Council ("CJTC"), of Massachusetts Chapter 209A¹⁰⁹ practices found across the board non-compliance.¹¹⁰ Though the CJTC responded with new curricula and police training across the state, the cities and towns most in need of proper training failed to send their officers.¹¹¹ When questioned about his officers' failure to arrest an abuser who threatened a woman in violation of an existing restraining order, one lieutenant responded "we do things our own way here."¹¹² Unfortunately, some police officers are of the opinion that "battered women love what they get and they deserve it."¹¹³ By delineating state policies and outlining training programs through uniform state standards, the Commission can better control the response and follow-through of domestic violence incidents.

Uniform conduct in the criminal justice system is critical to preventing and combating domestic violence in a number of respects. First, Massachusetts' re-

¹⁰⁷ See Adrian Walker, *Cellucci Urges SJC to Suspend Arrested Probate Official*, BOSTON GLOBE, Oct. 23, 1997, at B4. The governor's executive order covers the state's 64,000 workers and extends an invitation to other government branches and private companies to follow suit. The assistance is aimed to deal with batterers and provide support for victims. See *In Memoriam*, BOSTON GLOBE, Dec. 31, 1997, at A14.

¹⁰⁸ The Commission was comprised of representatives from each branch of state government, prosecutors, police, battered women's advocates, human rights activists, batterer treatment programs, health professionals and educators.

¹⁰⁹ This chapter is the General Laws section designed to prevent and punish family abuse. See MASS. GEN. LAWS ch. 209A (1994).

¹¹⁰ See Joan Stiles, *Working Luncheon II*, *supra* note 59, at 4.

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ See *id.*

cent creation of a database tracking all domestic abuse incidents and restraining orders, in addition to other crimes, ensures that the authorities may not easily release batterers with violent records.¹¹⁴ Every time an "abuse prevention order"¹¹⁵ comes before a judge, he must search the statewide domestic violence record-keeping system to more accurately determine whether an imminent threat of bodily injury exists.¹¹⁶ Second, establishing the probable cause standard for mandatory arrests gives all officers the power to prevent further abuse by arresting the attacker, even without the victim's consent. This power will spread the message that domestic violence is a serious crime. Third, and most importantly, requiring a uniform filing for every incident reported will enable the state to track problem areas. Lastly, a detailed official report will allow prosecutors to proceed without the victim's testimony or without any other witnesses. This procedure will prevent attackers from evading punishment for the crime by convincing or coercing a victim to drop the charges.

B. *Increasing Prosecutions and Convictions*

1. The No-Drop Policy—Presently Used Only in Certain Cases

Domestic violence, as much a violation of the law as assault and battery, is and should be prosecuted without hesitation. When a person is accused of assaulting a stranger, no one thinks of asking the victim whether to prosecute the case. This is because everyone agrees that assault is a crime that society should punish to deter future violations of the law, not merely for the injured party's retribution. Yet when the police arrest a man for physically assaulting a wife or girlfriend, or for violating a restraining order, prosecutors and judges routinely drop the charges because the victim is reluctant to proceed or because they do not think it is their business.¹¹⁷ Police and courts should treat both the assault of a stranger and the physical abuse of a loved one as equally serious violations of the law.

In effect, the dismissal of abuse cases makes prosecutors and judges unwitting accomplices in subsequent battering for failing to prosecute the alleged criminal.¹¹⁸ Research shows that the primary reason women drop charges is fear of their attacker.¹¹⁹ The most severely abused and at-risk victims therefore are those least able to prosecute their abusers.¹²⁰ Some advocates against prosecuting do-

¹¹⁴ See *Preventing Domestic Violence*, MASS. LAWYERS WKLY., Oct. 12, 1992 at 10.

¹¹⁵ The abuse prevention order is a restraining order which the court may issue against an alleged batterer if there is substantial likelihood of immediate danger of abuse. See MASS. GEN. LAWS ch. 209A, § 4 (1994).

¹¹⁶ See *Preventing Domestic Violence*, *supra* note 114.

¹¹⁷ See Andrew R. Klein, *Dropping Domestic Abuse Charges Imperils Victims*, THE PATRIOT LEDGER (Mass.), Sept. 11/12, 1993.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.*

mestic violence cases argue that victims have a right to drop the charges when they believe the attacker will reform.¹²¹ Some even argue that victims will be safer if they drop the charges.¹²² This logic is flawed, however, because it fails to account for the crime that was already committed in violation of state law. Moreover, there is no conclusive evidence that women are more at risk if they cooperate with prosecutors.¹²³ In fact, married women who stayed with their abusive husbands were just as likely to be abused again as those who divorced or separated from them.¹²⁴ The prevailing consideration is that both the family and the community suffer when a batterer goes unpunished.¹²⁵

The no-drop policy has proven tremendously effective in other jurisdictions. In San Diego and San Francisco, for example, aggressive prosecution programs with no-drop rules had high conviction rates, often accompanied by batterer's confessions.¹²⁶ More importantly, these aggressive prosecution programs rarely compelled the victim to testify.¹²⁷ Given these results, Massachusetts should expand the use and increase the effectiveness of the no-drop policy.

2. The Benefits of Prosecution Without Victim Cooperation

Despite the increased number of arrests, many women subsequently refuse to testify out of fear or love for their husbands.¹²⁸ This reality forces many prosecutors to proceed with the case relying solely on the testimony of arresting officers. Much of the evidence in such cases are "excited utterances," which are statements made to officers while the victim is still under stress from an assault.¹²⁹ There are two main reasons why law enforcement agencies continue to prosecute cases without the victim's cooperation. First, law enforcement agencies have a strong interest in following these cases through because officers must often respond to repeated domestic disturbance calls from the same address.¹³⁰ Second, "manipulative offenders" may be deterred from violence if they know that prosecutors can pursue the case even when batterers convince their wives or

¹²¹ See Marianne C. Hinkle, *Lawyers of the Year 1996*, MASS. LAWYERS WKLY., Dec. 30, 1996 at B7.

¹²² See Klein, *supra* note 117.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ The overwhelming majority of batterers have substantial criminal histories. The average batterer has a record of fourteen separate criminal complaints. See *id.* The majority have prior arrests for drunken driving and/or drug-related offenses. About forty-three percent have prior arrests for committing violence against male as well as female victims. See *id.* So when a batterer is released, it compromises everyone's safety. See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See Wattendorf, *supra* note 13, at 18.

¹²⁹ See *id.* "Excited statements may be admitted into court through a hearsay exception." *Id.* at 19.

¹³⁰ See *id.*

girlfriends not to testify.¹³¹

Cambridge prosecutors dealt with this situation in the case involving former Red Sox baseball player Wilfredo Cordero. Officers arrested Cordero on July 11, 1997 and prosecutors charged him with "assaulting his wife, using a weapon against her, [and] threatening her."¹³² Ana Cordero refused to testify after her husband came to see her on the same night following his arrest, in violation of a restraining order. Prosecutors added a restraining order violation to their list of allegations and decided to pursue the case without her testimony.¹³³ A District Court Judge ruled that her statements on the night of her husband's arrest were admissible as "excited utterances."¹³⁴

While prosecuting without the victim's testimony is one option, a better approach would be to create a system where all victims feel secure enough to report and prosecute voluntarily. Such a system would allow for stronger cases and increase the number of successful prosecutions against offenders. Rather than deciding on a case-by-case basis, Massachusetts should adopt an absolute no-drop policy, along with a mandatory restraining order policy, when there is sufficient evidence. This policy would display strong support for a woman's right to be free from bodily harm and would acknowledge the seriousness of domestic abuse crimes.

3. Quick Bail-outs

Another problem with Massachusetts' domestic violence arrest and prosecution procedures is that many alleged abusers are released on bail too quickly after the arrest is made.¹³⁵ Often, husbands and boyfriends who are arrested for the first time are not even held in jail overnight, but are bailed out of jail soon after their arrest.¹³⁶ In Cambridge, fifteen out of twenty-seven men arrested at night or over the weekend on first-time charges of beating women, were bailed out shortly after apprehension.¹³⁷ When alleged abusers are promptly released, the victim often loses the will to cooperate with prosecutors.¹³⁸ The victim often disavows statements and drops charges after her husband or boyfriend convinces her not to prosecute.¹³⁹

Ana Cordero's attempt to drop the charges against her husband is not unusual. In another publicized Massachusetts case, the authorities charged television news reporter Mike Macklin of WHDH-TV (Channel 7) with assault and battery stem-

¹³¹ See *id.*

¹³² William F. Doherty, *Wife's Early Statements May be Used Against Cordero*, BOSTON GLOBE, Oct. 11, 1997, at A18.

¹³³ See *id.* The statements are admissible because they "were made soon after the event, while the alleged victim was still excited by it and likely to tell the truth." *Id.*

¹³⁴ See *id.*

¹³⁵ See *The Governor's Cordero Bill*, BOSTON HERALD, July 25, 1997 at A24.

¹³⁶ See Brelis & Radowsky, *supra* note 16, at B1.

¹³⁷ See *id.*

¹³⁸ See Brelis & Rakowsky, *supra* note 16, at B1.

¹³⁹ See Wattendorf, *supra* note 13, at 18.

ming from a July 4, 1997 incident.¹⁴⁰ His girlfriend called the police after Macklin allegedly pulled her out of their apartment and dragged her down the hallway.¹⁴¹ She refused treatment, declined to get a restraining order, and bailed out Macklin herself.¹⁴² Due to the girlfriend's refusal to testify against Macklin, with whom she continued to live, Boston Municipal Judge Linda Giles placed Macklin on pretrial probation.¹⁴³

The best way for the government to stop domestic abuse is to educate the community and to intervene before more serious abuse occurs. It is clear that we need a better system for identifying potentially violent behavior and intervening to prevent further abuse and possible homicides of domestic abuse victims.¹⁴⁴ Attorney General Scott Harshbarger acknowledged the need to "improve our ability to identify, target and respond to chronic and serial domestic violence abuses" by targeting batterers who pose a heightened risk of committing violent and lethal acts and protecting the potential victims against whom the violence may be directed.¹⁴⁵ Proactive enforcement of restraining orders may give the victim enough security to prosecute. Orders would only become available after the victim or a concerned citizen reaches out by making the initial call to arrest an attacker. The orders, only affect abusers after officers find probable cause to make an arrest.

Once a victim reaches out for help, the government should be responsible for facilitating her first step toward recovery. Mandatory restraining orders may persuade some victims to call the police and others to assist in prosecution because that first phone call is enough to initiate the protection. Victims often drop charges when they feel they must fight the system, in addition to their attackers. Mandatory restraining orders support the victim and encourage her to prosecute. Furthermore, a recent increase in the severity of punishment for restraining order violations combined with a new mandatory restraining order policy, would further enable police to increase arrests and keep violators in jail for a longer period of time.¹⁴⁶

¹⁴⁰ See John Ellement, *TV Reporter is Placed on Pretrial Probation*, BOSTON GLOBE, Oct. 2, 1997, at B3.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See Bill West, *Letters to the Editor*, BOSTON GLOBE, Oct. 20, 1997, at A13.

¹⁴⁵ See Edward T. McHugh, *Harshbarger Targets Domestic Abuse*, TELEGRAM & GAZETTE, (Mass.), Jan. 6, 1998 at A1. Harshbarger, in his run for governor in 1998, proposed increased penalties for serial or chronic domestic abuse offenders and extension of temporary restraining orders from a one year to a five year maximum without renewal. In justifying his proposals, Harshbarger pointed to a study sponsored by the National Institute of Justice of the Quincy District Court which found that, "during a recent nine-month period, twenty-eight percent of the men arraigned for domestic abuse of a female partner received prior restraining orders, with seventy percent of them involving the same partner and forty-seven percent involving more than one victim." *Id.*

¹⁴⁶ See MASS. GEN. LAWS ch. 209A, § 3 (1994). Any new violent act violating an abuse prevention order will result in a minimum 90-day incarceration. See *id.*

4. Discrepancies in Issuing and Enforcing Restraining Orders

Under current law, a woman may request an emergency restraining order against her alleged abuser.¹⁴⁷ In considering this request, the judge must search the statewide domestic violence record keeping system to determine if there is an imminent threat of bodily injury to the petitioner.¹⁴⁸ The petitioner has the burden of proving there is substantial likelihood of immediate danger of abuse to herself or her children.¹⁴⁹ The record keeping system ensures that judges have notice of any prior domestic abuse charges or convictions when evaluating the need for a restraining order. Once a domestic abuse prevention order is issued, law enforcement officers "shall use every reasonable means to enforce" such an order.¹⁵⁰

Under Massachusetts law, it is a criminal offense to violate a court order to refrain from abusing the plaintiff or to vacate the household.¹⁵¹ Though Massachusetts has a reputation for adopting tough laws to protect domestic violence victims, the enforcement of those laws is "faltering badly in many communities."¹⁵² State figures reveal that "many district courts . . . dismiss most violations — sometimes even those involving assaults with bats, knives, and other dangerous weapons."¹⁵³ Some police argue that it is pointless to arrest batterers when battered women fail to appear in court and assist in prosecution.¹⁵⁴ This attitude, however, hurts the victims, women who may have followed through given the necessary protection and opportunity that mandatory restraining orders provide.

Some Massachusetts judges are reluctant to issue TROs because a number of battered women never show up to extend the order.¹⁵⁵ There are still judges who order battered women to reconcile with their husbands and laugh them out of court.¹⁵⁶ One Massachusetts study demonstrates the traditional judicial bias against issuing restraining orders. The study found that seventy-one percent of women who obtained temporary restraining orders in Brockton District Court in 1982 did not appear at a hearing ten days later.¹⁵⁷ The fault in that instance, however, lay with the court. Subsequent studies demonstrate that women are more likely to follow through with restraining orders when given education

¹⁴⁷ See *id.* § 7.

¹⁴⁸ See *id.* The record keeping system ensures that any alleged abuser subject to an outstanding warrant may be apprehended upon notice to the appropriate law enforcement officials. See *id.*

¹⁴⁹ See MASS. GEN. LAWS ch. 209A, § 4 (1994).

¹⁵⁰ *Id.* § 7.

¹⁵¹ See *id.*

¹⁵² Allison Bass, *The War on Domestic Abuse: State Records Reveal Discrepancies in Enforcing Restraining Orders*, BOSTON GLOBE, Sept. 25, 1994, at B1.

¹⁵³ *Id.*

¹⁵⁴ See JONES, *supra* note 28, at 142.

¹⁵⁵ See *id.* at 143.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

about their options. In the Quincy District Court, for example, where there is a separate office for restraining orders and support groups run by the prosecutor's office, only 2.8 percent of the women failed to show up for the hearing.¹⁵⁸ The solution lies with making restraining orders easier to acquire and providing battered women with the support they need to follow through.

Some states have approached judicial inadequacy by redesigning their court systems to handle the increasing reports of abuse. In November 1996, Washington, D.C. acknowledged the unique nature and pervasiveness of domestic abuse by creating a special team of judges to handle domestic abuse cases.¹⁵⁹ Similarly, in 1997, New York City created special courts to handle domestic abuse cases.¹⁶⁰ These new policies enable domestic violence victims to get a fair hearing before a properly educated and experienced judge. Providing victims with more information about prosecution and victim assistance programs, better allows Courts to stem the violence. This information will give victims the confidence necessary to go forward with prosecutions and extricate themselves from the batterer's control. As a result of increased efforts in education, court employees are better equipped to inform domestic violence victims on the necessary procedures if they wish to leave or prosecute their abusers.¹⁶¹ The next step is to ensure that victims have the psychological and physical strength to leave.

V. THE NEED FOR INCREASED EFFORTS IN MASSACHUSETTS

A. *Tougher Laws Across the Nation Show Progress in Combating Domestic Abuse*

1. Instituting Tougher Laws With Better Coordination Decreases Domestic Attacks

The effective use of established law enforcement agencies in a more effective manner is an essential first step in cracking down on domestic violence. In the past, despite the fact that officers were repeatedly called to the same home, victims rarely received help from either the police or court system.¹⁶² Police were reluctant to arrest an abuser and often left without interfering when a victim changed her story upon their arrival.¹⁶³ Widespread education of police officers in recent years has led to increased domestic violence arrests. In Florida, a state law effective July 1, 1995, makes it easier for police to arrest people in domestic

¹⁵⁸ See *id.* at 144.

¹⁵⁹ See Lorraine Dusky, *Domestic Abusers Face the Music in Nashville*, USA TODAY-WEEKEND MAG., Jan. 19, 1997, at A12.

¹⁶⁰ See *id.*

¹⁶¹ See generally REP. OF THE UNIF. ENFORCEMENT SUBCOMM., *supra* note 44. Officers and other justice system administrators can assist victims in obtaining medical attention, finding an alternative shelter, and informing the victim of her rights and how to file a restraining order or begin prosecuting her attacker. See *id.*

¹⁶² See Dusky, *supra* note 159, at A12.

¹⁶³ See *id.*

disputes.¹⁶⁴ Estimates show that more victims are now reporting crimes, probably because they feel more comfortable calling officers and asking for assistance.¹⁶⁵ Many cities are adopting the new strategies used in Florida and Nashville, that pit police, prosecutors, and judges against batterers.¹⁶⁶

Members of the justice system play an important cooperative role in halting the epidemic of domestic violence. For this reason, many communities are making a renewed effort to better combine the endeavours of judges and police officers. In 1994, Rhode Island's attorney general unveiled a more aggressive policy for police to follow when dealing with domestic abuse cases.¹⁶⁷ The policy calls for police to arrest the "primary aggressor," and advise victims to seek a restraining order.¹⁶⁸ By training the police force to educate victims, a state can empower victims to help themselves. In another example, a Wisconsin state bar commission determined that understanding the dynamics of domestic abuse "is a critical first step in better handling of domestic violence in the justice system."¹⁶⁹ The commission studied the relationship between domestic violence and the judicial system, while trying to design new policies to deal more effectively with the problem of domestic abuse.¹⁷⁰ By providing a more educated, controlled, and efficient judicial system, states can battle domestic abuse from another front. The thirty-day mandatory restraining order is a better way to protect victims and succeed in prosecutions.

2. The § 209A Judicial Guidelines Do Not Adequately Protect Victims' Rights

A mandatory abuse prevention order would simplify Massachusetts' new § 209A guidelines for judicial procedures.¹⁷¹ While the § 209A guidelines are an

¹⁶⁴ See Decker, *supra* note 61, at 1A. Authorities believe that the tougher policy "will short circuit some abusive situations, reducing the number of cases that escalate to killing." *Id.* "The number of domestic violence-related killings dropped 15.2% in 1995." *Id.*

¹⁶⁵ See *id.* Law enforcement's perception of the law is now pro-arrest and "officers are obligated to make arrests if there are signs of physical abuse—whether it be a bruise, a cut or even just a red mark." *Id.*

¹⁶⁶ See Dusky, *supra* note 159, at A12. Nashville was one of the first cities to use a collaborative effort between police, prosecutors, and other professionals to help reduce domestic abuse crimes. The officers now go into domestic violence situations knowing that the victims need help and how to give that help to them. See *id.* For some sample mandatory arrest statutes, see COLO. REV. STAT. § 13-4-104 (1997); IOWA CODE § 236.12 (1994); WIS. STAT. § 968.075 (1994).

¹⁶⁷ See *R.I. Unveils Domestic Calls Plan*, BOSTON GLOBE, Nov. 1, 1994, at 30.

¹⁶⁸ See *id.* Rhode Island Attorney General Jeffrey Pine said "the aim is to reduce deaths and serious injuries." *Id.* Pine and police hope the policy will reduce mortality rates in domestic abuse assaults. See *id.*

¹⁶⁹ Diana Molvig, *Violence and the Judicial System: Stemming the Tide of Violence in Our Courthouses*, WISCONSIN LAWYER, July 1997, at 13.

¹⁷⁰ See *id.*

¹⁷¹ See Toni Locy, *Judges Get Restraining Order Guidelines*, BOSTON GLOBE, Mar. 3, 1994, at 26 (explaining judicial guidelines for the issuance of abuse prevention orders).

important first step in strengthening the chances for successful prosecution of batterers, they are not enough. The instructions include "more decisive language telling judges they can bar a defendant from his or her workplace, home or school if the victim proves the likelihood of physical harm."¹⁷² The problem is that presently, the law places the burden of proof on the vulnerable victim seeking the restraining order. The benefit of having a mandatory restraining order is that once the victim works up the courage to call the police and have the batterer arrested, the system can reinforce that decision with positive measures of protection and support.

B. Mandatory Restraining Orders Do Not Violate Due Process Rights of Defendants

1. Statutory Appeal Procedures Provide Adequate Protection of Defendants' Rights

Many opponents of mandatory restraining orders and mandatory arrests argue that such a system violates the defendant's due process rights.¹⁷³ Colorado handles this dilemma by ensuring that the court give the defendant a chance to defend himself in a show cause hearing.¹⁷⁴ The mandatory restraining order would be in effect for thirty days, *unless* the defendant chose to challenge the order at a hearing. It is unlikely that Massachusetts courts will find a due process problem because the issuance of a prevention order is a civil proceeding, which the defendant may appeal in the same manner as any other court order or arrest. Further, by modeling Colorado's approach of affording the defendant an opportunity to be heard within fourteen days of the order's issuance, Massachusetts can avoid any due process concerns. By allowing defendants an opportunity to show cause why the order was undeserved, constitutional rights will not be hindered.¹⁷⁵ Additionally, to make the initial arrest for domestic abuse, the police would have found probable cause as evidentiary support for further judicial action. Massachusetts already has the necessary system in place with its handling of TRO requests when a plaintiff demonstrates a substantial likelihood of immediate danger of abuse.¹⁷⁶ If necessary, a court may issue such an order without giving prior notice to the defendant. The defendant then has an opportunity to be heard on the question of continuing that order no later than ten business days after its issuance.

The procedure for obtaining the proposed mandatory restraining orders would be comparable to the procedure for issuing emergency restraining orders. When the court is closed for business, such relief may be granted at the discretion of any justice in the Superior, Probate and Family, District, or Boston Municipal

¹⁷² *Id.* at 26. These guidelines are just recommendations, however; "they are not law." *Id.*

¹⁷³ See Lerman, *supra* note 78, at 61, 94-97. (1984).

¹⁷⁴ See Fuller & Stansberry, *supra* note 14, at 2328.

¹⁷⁵ See *Frizado*, 651 N.E.2d at 1206, 423 Mass. at 679.

¹⁷⁶ See MASS. GEN. LAWS ch. 209A, § 4 (1994).

Court departments if the plaintiff demonstrates substantial likelihood of immediate danger of abuse.¹⁷⁷ In those cases, the legislature approves of the issuance without a full hearing. The defendant's opportunity to be heard must follow the same procedures as with a TRO. Due process concerns in the case of mandatory 30-day restraining orders can be alleviated in a similar manner. The defendant's opportunity to be heard should occur within ten business days.¹⁷⁸ If the defendant fails to appear, as happens under the current procedures, the court could maintain or extend the order.¹⁷⁹ Extending the present TRO and emergency restraining order procedures to a mandatory restraining order will satisfy the defendant's due process rights.

2. The Mandatory Restraining Order is Only an Extension of the Accepted Mandatory Arrest

One criticism of orders issued without a full hearing is that they go on the defendant's permanent record without giving him a chance to respond.¹⁸⁰ Dorchester District Court Judge Sydney Hanlon responds, "that's what the Appeals Court is for and the statute is necessary considering the frequency and severity of domestic violence in today's society."¹⁸¹ Instituting this procedure would provide battered women with the necessary protection without requiring them to meet an additional burden in court. The reality is that "the vast majority of abusers brought into courts for restraining orders are not law-abiding men who have a bad girlfriend or bad wife."¹⁸² In fact, according to a study of Quincy cases in 1990, eighty percent of alleged abusers had a prior criminal record.¹⁸³

The challenge is to find better ways to prevent further abuse and increase the number of arrests leading to prosecutions. The mandatory arrest is one way to accomplish this goal. The success of mandatory arrest policies across the country has been a significant factor in prompting further statutory change and widespread use by police departments.¹⁸⁴ Mandatory restraining orders can help ensure that the increased arrests resulting from the new policy changes result in prosecutions.

Mandatory restraining orders are, in a way, only an extension of the original arrest, as the restraining order is issued only after finding probable cause of domestic abuse. Massachusetts, and a number of other states, also apply the mandatory arrest policy to violations of a restraining order.¹⁸⁵ Usually such mis-

¹⁷⁷ See *id.* § 5.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See Rattigan, *supra* note 63, at 33.

¹⁸¹ *Id.* (internal quotations omitted).

¹⁸² *Id.* (internal quotations omitted).

¹⁸³ See *id.*

¹⁸⁴ See Hon. Lewis L. Whitman, MASS. FAM. L. MANUAL Vol. 1, § 34 (Mass. Continuing Legal Educ., Inc. ed., 1996).

¹⁸⁵ See MASS. GEN. LAWS ch. 209A, § 6 (1996).

demeanors require an arrest warrant, but an exception is made for protective order violations. The logic for instituting a mandatory arrest policy is the same behind a mandatory restraining order: domestic violence is a serious crime and should be punished without regard to the personal feelings of the victim.

There are a number of additional arguments for and against the criminalization of domestic violence. The supporters argue that assault is a crime no matter who is the victim and domestic violence should be taken as seriously as other violent crimes. The criminal process acknowledges a woman's right to be free from bodily harm under the Commonwealth's protection. The direct deterrent through arrests, prosecutions, and convictions sends a clear message that society condemns the batterer's conduct.¹⁸⁶ One criticism of mandatory restraining orders is that they intrude on a woman's right to be with her husband and deny the opportunity for rehabilitation. This view is inconsistent with the criminal justice system's approach of punishing offenders for violent crimes as a form of rehabilitation. If society wants to rehabilitate, it must take that approach in all crimes, and not discriminate as to crimes against women.

One option to make mandatory restraining orders more acceptable to critics may be to allow the alleged abuser to go before the court as soon as the next day to prove to a judge that the order was unjustified and should be removed. This approach will allow the victim some support immediately following the arrest of her batterer in addition to relieving her of the burden of proof. Another option is to decrease the length of the restraining order by a week or maybe two. Simple experimentation is the best way to discover the most successful way to prosecute batterers and protect the victims. Many states took the first step by instituting mandatory arrest policies. The next step is to ensure that those arrests lead to successful prosecutions and convictions.

C. *Battered Women Need Increased Protection to Encourage Reporting and Prosecution of Abusers*

1. Protecting a Woman's Right to Be Free From Bodily Harm

The proof is overwhelming that most battered women drop charges against their batterers out of fear: for their lives, for their children, or for their economic well-being.¹⁸⁷ That fear is not unfounded. Abusive men are likely to find, stalk, and kill the women who leave them.¹⁸⁸ Our society offers "elaborate and expensive witness protection programs for some of the worst thugs who turn state's evidence."¹⁸⁹ We owe the same obligation to innocent victims in prosecuting do-

¹⁸⁶ See *Strategies For Confronting Domestic Violence: A Resource Manual*, U.N. CTR. FOR SOC. DEV. AND HUMANITARIAN AFFAIRS, 11th Sess., U.N. Doc. E/CN.6/1993/12/Annex (1993).

¹⁸⁷ See Klein, *supra* note 117.

¹⁸⁸ See Walker, *Working Luncheon*, *supra* note 32, at 5. More women are killed by abusive partners than commit homicide themselves. See *id.*

¹⁸⁹ Klein, *supra* note 117.

mestic violence. The dramatic increase in prosecutions and convictions shows that new state and federal programs supporting victims of domestic violence work. There is indisputable evidence that women will leave their abusive situations if we find some way to give them assistance and enable them to keep themselves and their children safe.¹⁹⁰

Former Surgeon General C. Everett Koop named domestic violence as the number one health hazard facing American women.¹⁹¹ The Massachusetts Act to Further Protect Abused Persons, passed in 1991, sent a strong message that domestic violence will not be tolerated in Massachusetts.¹⁹² This amendment showed that Massachusetts is aware of the seriousness of domestic violence, and committed to improving the protection of battered women and children. Women will only come forward if the authorities give them a reason to believe that they will be safe. Realizing this, Attorney General Scott Harshbarger proposed longer sentences for restraining order violations, stating that "a few well-publicized five-year sentences should make some batterers think twice."¹⁹³ Increased police intervention, such as removing or even arresting the instigator of domestic violence, has served to reduce the number of domestic violence homicides.¹⁹⁴

The safety of battered women and children can best be ensured by encouraging courts and law enforcement officers to arrest batterers when they find a problem, and actively protect the women who already proved the need for a restraining order. A mandatory restraining order, after a "probable cause" arrest, will convince battered women that the state is committed to protecting their personal, and their children's, welfare while prosecuting the batterer for his crime. Moreover, it will prevent the batterer from persuading or coercing the victim to request dismissal of the charges. The combination of mandatory restraining orders and a no-drop policy will deter future abuse and increase the number of prosecutions and convictions.

2. By Actively Enforcing Restraining Orders, the State May Prevent Further Abuse

Police liability suits¹⁹⁵ may compel officers to follow their departmental domestic violence policies more stringently. Unless the departments institute new policies to actively enforce restraining orders, many needless abusive incidents

¹⁹⁰ See Walker, *Working Luncheon*, *supra* note 32, at 6.

¹⁹¹ See Stacey Kabat, *Working Luncheon*, *supra* note 32, at 26-27.

¹⁹² See *id.* at 26-27.

¹⁹³ James Alan Fox, *Spousal Murders are Declining, Thanks to Social Services*, BOSTON GLOBE, Nov. 9, 1997, at D7.

¹⁹⁴ See *id.* Domestic homicide is declining in Massachusetts and the United States. Over the past 15 years, the number of American women murdered by their husbands or ex-husbands has dropped by a third. "The decline largely reflects the increased range of social and legal services — from shelters for battered women to temporary restraining orders — available to help women escape an abusive relationship before becoming a murder statistic." *Id.*

¹⁹⁵ See generally Decaire, *supra* note 80.

will occur. Police should enforce protection orders by seeking out and arresting violators rather than relying on emergency phone calls.¹⁹⁶ Police officers should always take a restraining order violation very seriously. Disobeying such an order constitutes contempt of court and should be regarded as a very serious, offense punishable by imprisonment.¹⁹⁷ Actively enforcing restraining orders is a good way to keep batterers away from their victims. Defendants who violate a protective order should be regarded as dangerous and the assault should be a nonbailable offense.

Massachusetts' computerization of records should make it easy to avoid the common mistake of releasing a defendant who is in violation of a valid restraining order. Even civil court judges presiding over custody, divorce, or child support hearings should review the computerized criminal court records before making a decision. Judges should recognize that a significant number of attacks currently charged as "assault" are actually failed murder attempts.¹⁹⁸ Furthermore, when a batterer's violation of a restraining order results in his convincing his victim to withdraw the order, the contact should still constitute a punishable violation. Taking restraining order violations more seriously will protect the victim as well as the public at large from future harm.

3. The Multi-Agency Approach

All parts of the criminal justice system must work together in order to prevent abuse and protect victims from their batterers. Once legislatures pass more victim-protective laws such as mandatory restraining orders, the other criminal justice agencies should cooperate in enforcing them. The police are the "gatekeepers" to the criminal justice system.¹⁹⁹ If they fail to enforce the law, the rest of the system cannot work properly. The rest of Massachusetts should follow Somerville's example. Since 1985, Somerville's Police Department has operated an innovative domestic violence unit, which other towns have used as a model.²⁰⁰ Three full-time officers serve restraining orders, collect citywide data, and even provide follow-up assistance to victims.²⁰¹ Most laudable is a proposal by alder-

¹⁹⁶ One approach is to check up on victims, as does a police program in Somerville, Massachusetts, and to respond to neighbor complaints of screaming or fighting. See Sarah Fishman, *Ethics Proposal Still in Limbo . . .*, BOSTON GLOBE, Oct. 5, 1997, at City 4.

¹⁹⁷ See JONES, *supra* note 28, at 216. A recent study indicated that between one-half and three-fourths of all murder-suicides are committed by batterers who fear the infidelity or departure of a wife or girlfriend. If batterers are not under any surveillance, there is a good possibility that they will eventually attack in violation of a protective order. See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See Gail Goolkasian, *Police: Gatekeepers to the Criminal Justice System*, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES, NAT'L INST. OF JUSTICE 29-54 (1986).

²⁰⁰ See Fishman, *supra* note 196, at City 4.

²⁰¹ In 1997, Somerville issued 561 restraining orders, compared with 468 in 1996. Police Lt. Charles Femino attributed the increase to "increased knowledge and education on the part of people. People are reporting more, even minor incidents." Sarah Fishman,

man-at-large, Joe Curtatone, to enhance follow-up services by assigning community police officers to visit victims.²⁰² By using community policing in this proactive manner, communities can better target and prevent repeat abuse.²⁰³

Prosecutions only occur when the police do their job and view domestic violence as seriously as other crimes. Police chiefs may have to bring disciplinary action against officers to compel them to arrest batterers. Even the police chiefs, however, need systematic review to ensure that the state's policies are being carried out. A consistent review procedure is necessary to hold accountable those who are charged with carrying out, reviewing, and amending new domestic violence procedures.²⁰⁴ Regular reviews, in combination with intensive domestic violence training for police officers, prosecutors, judges, and all other personnel in the criminal justice system, will provide the combined enforcement efforts needed to reduce the incidence of domestic abuse.

The effectiveness of protective injunctions depends on the cooperation of all criminal justice officials. Police and judges must be made aware of all state and departmental domestic violence policies. The system will not work unless the appropriate authorities are well-informed about all protective orders and the proper approach to take in handling violations of such orders. The legislature must work together with various women's organizations, shelters, and assistance programs to help victims get the legal, emotional, and financial support they need. The legislature should provide more serious penalties for repeat offenders when rehabilitation efforts and minor sentences fail. Neither the marriage license nor the old notion of maintaining privacy within the family should protect abusive men from criminal charges.

VI. CONCLUSION

Domestic violence will remain a pervasive problem until the criminal justice system takes a more proactive approach in treating domestic abuse as a very serious crime. The state must hold batterers accountable for their violent, unlawful acts, as it does robbers, arsonists, and other criminals. The criminal justice system and society as a whole owe equal protection of the laws to victims of domestic abuse. The right to be free from bodily harm should be equally enforced

Somerville Notes, BOSTON GLOBE, Feb. 8, 1998, at City 7.

²⁰² See *id.*

²⁰³ As this note went to press, Boston became one of fifteen cities to receive federal funding from the U.S. Department of Justice's Violence Against Women Act Office. The office awarded two grants totalling \$650,000. The first grant, in line with this Note's proposed increased community policing, will improve and expand "'No Next Time,' a program that identifies high-risk offenders and works with teams of probation officers to monitor them" *New England News Briefs: Funds Targeted at Domestic Violence*, BOSTON GLOBE, Mar. 11, 1999, at B5. Applying a multi-agency approach, the second grant creates a domestic violence court in the Dorchester community through the combined efforts of the Boston Police Department, the Dorchester Court, the Suffolk County District Attorney, and the U.S. Attorney. See *id.*

²⁰⁴ See JONES, *supra* note 28, at 219.

against batterers who abuse wives or girlfriends as it is against those who assault strangers. It takes a great deal of courage for a battered woman to call for help when her husband or boyfriend, whom she often simultaneously loves and fears, attacks her. A mandatory restraining order after a domestic violence arrest is the best way to empower women because it gives them firm legal support once they make the initial effort to seek help.

As with any mandatory order or policy, there are due process concerns which legislatures must address. The best way to cope with the issue is to offer the defendant a timely opportunity to be heard. Logically, however, the alleged victim requests an order because she cannot escape the batterer on her own. The documented symptoms of battered women's syndrome reveal the need for the mandatory restraining order because the victim is unable to defend herself or reach out for help on her own. While a mandatory restraining order may seem extreme to some, it can give intimidated victims the opportunity to escape the violence, encourage them to leave the abusive relationships, and possibly to actively assist in prosecution. Due process may require the victim be allowed to go to a judge to drop the order, but those who want, and need the order will be able to get it with no extra hassle. Domestic violence victims must not be given an opportunity to drop the charges because domestic violence is also a crime against our society and its laws. A collaborative approach, would apply the mandatory restraining order along with the no-drop policy to encourage victims to prosecute and escape by their own will. Combining these two methods will allow the criminal justice system to support those battered women who cannot help themselves, and strengthen protection for those who find the courage to stand up for their rights.

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