

Conjugal Violence: The Law of Force and the Force of Law

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I will be master of what is mine own:
She is my goods, my chattels; she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my any thing

W. Shakespeare, *The Taming of the
Shrew*, Act III, Scene 2

An inclination to hit someone can be blocked by principle, or instead by practicality: he might hit back, people might criticize me, the police might arrest me. In the domestic context, with spouses of unequal strength, these potential controls are substantially reduced.

Definition of assault, and identification of the factors which determine the degree of the crime, has been a relatively easy legislative task.¹ No jurisdiction has promulgated a statutory defense based on the fact that the victim was only a spouse. Yet a privileged status for domestic attackers has been informally accepted by police, prosecutors, and courts.²

A somewhat motley collection of presumptions underlies this acceptance: the classification is supported *inter alia* by a constitutional right of privacy and by claims of victim consent. It is the premise of this Article that while these presumptions cannot be met by invoking the due process clause of the fourteenth amendment, they are analytically defective when measured against even the most comfortable tier of the equal protection clause tests. Predictably, judicial reluctance to

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1. See, e.g., N.Y. PENAL LAW § 120.00 (McKinney 1975): "A person is guilty of assault in the third degree when: 1. With intent to cause physical injury to another person, he causes such injury" "Physical injury" means impairment of physical condition or substantial pain." *Id.* § 10.00(9).

Throughout this Article the word "assault" includes any act, such as kicking, beating, or hitting with an object, that carries a high risk of such injury; excluded are slaps and pushes that do not meet this standard. See Straus, *Wife Beating: How Common and Why?*, 2 VICTIMOLOGY 443, 445 (1977-78) [hereinafter cited as Straus, *Wife Beating*]. The word "spouse" refers to either partner of cohabiting, as well as legally married, couples.

2. See notes 134-45 and accompanying text *infra*. For statistics on the high incidence of conjugal violence, see note 19 *infra*.

confront the entire bundle of interrelated claims head on has shielded the perpetrator rather than the recipient of the injury.

Consequently, the courts have been compelled to deal with the cases of homicidal self-help that have followed upon the granting of a class-based exemption for domestic assailants. Justification for such homicides has been sought in self-defense and insanity, but the standards governing these defenses have been erratically interpreted by trial judges and, where application would be harsh, nullified by juries. Accompanying this poorly stitched pattern has been a plea for separate treatment of defendants who kill battering spouses. Ironically, this plea parallels the advocacy of special status for the batterer, although the two arguments come from vastly different quarters.³

The present disorder is unsatisfactory from every perspective. The constitutionally impermissible exception for assailants increases the potential for intrafamily killings and results in further distortion of legal standards when the killer is prosecuted. The Article concludes that neither the impartial mission of the rule of law nor the neatly tooled goal of individual justice has been served by the governmental response to conjugal violence, and suggests the elements from which a valid approach may be constructed.

I

THE LAW OF ASSAULT

A. Privacy and Private Wrongs

The claim that enforcement of statutes prohibiting assault should depend upon the identity of the victim is hardly persuasive as a legal axiom. How did the present ambivalence concerning application of these statutes to domestic violence evolve?

British common law provides certain Grand Guignol clues. In the early centuries after the Norman Conquest, the English Legislature convened infrequently and the criminal law was originated in large part by judges. By the 17th century, English jurists had created and defined the crimes of assault, battery, murder, and manslaughter.⁴ However, a husband's power over his wife was partially insulated from

3. Compare NEWSWEEK, Jan. 30, 1978, at 54 (women's groups advocating a broadening of the rules of self-defense for women who kill their battering husbands) with the statement of a county chief prosecutor that the criminal code should be discounted in conjugal assault cases, text accompanying note 194 *infra*, and Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733 (1973) (suggesting the ideal response would be to divert cases of domestic violence from the criminal justice system). See Part I, Section B(2) *infra*, especially text accompanying notes 134-45, demonstrating that incidents of intrafamilial assault are in fact treated differently from stranger-precipitated attacks.

4. W. LAFAYE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 58-59 & n.6 (1972). See generally Jackson, *Common Law Misdemeanors*, 6 CAMBRIDGE L.J. 193 (1937).

the ambit of the assault prohibition. As described in Blackstone's *Commentaries*: "[A]s he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children"⁵

The wife's preclusion from protection against such "correction" was coupled with a unique penalty against her if she resorted to violent self-help. If she killed her husband she was guilty of more than homicide—she was held for the crime of petit treason, which was based upon the concept of a serious breach of allegiance. This offense was differentiated from murder in order to apply a peculiar and grotesque punishment. She was drawn and burned; that is, she was tied to a horse and dragged along the rough road to be burned at the stake.⁶

While legalized assault had a Medusa aspect which repelled its adoption in America,⁷ some courts were able to face the concept when it appeared in a less direct form. A right of privacy was invoked as an overriding factor that barred legal intervention on behalf of the victim while avoiding approval of the violence. This doctrine was memorialized by the North Carolina Supreme Court's decision in *State v. Rhodes*:⁸ "[H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to the public curiosity and criticism, the nursery and the bed chamber."⁹

Echoes of this approach, minus the court's pear-shaped tones, still resonate. A New York probation officer refused court access to a woman whose husband had beaten and later threatened her with a knife in the presence of her four children. Affidavits filed by a social worker

5. 1 W. BLACKSTONE, COMMENTARIES *444.

6. 4 W. BLACKSTONE, COMMENTARIES *204-05; R. PERKINS, CRIMINAL LAW 10 (2d ed. 1969); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 500 (2d ed. 1898). The allegiance of a wife to her husband was a lesser form of a subject's allegiance to the king. PERKINS, *supra*, at 9-10 (citing 1 HALE P.C. *377). Petit treason was abolished by statute in 1828. *Id.*

7. As the court commented in *Fulgham v. The State*, 46 Ala. 143, 147 (1871): "[T]he common law of 'wife whipping' among 'the lower rank of people' in Great Britain, has never been the common law of this State. It is, at best, but a low and barbarous custom, and never was a law." There was apparently no statutory support for the custom. However, in a review of the common law governing interspousal assault in America, Wharton referred to the husband's right of chastisement, and the bar against prosecuting him for battery unless he was guilty of malignant cruelty or inflicted permanent injury on his wife:

Nor is this view modified by the fact that the two have agreed to live apart. But the better opinion is that while a husband has no right to inflict corporal punishment on his wife, he may defend himself against her, and restrain her from acts of violence toward himself or others.

1 F. WHARTON'S CRIMINAL LAW 1120 (12th ed. 1932).

8. 61 N.C. 453 (1868).

9. *Id.* at 457.

alleged that the probation officer had stated: "A man's home is his castle. He had every right to do whatever he wanted in his apartment."¹⁰

If the battering spouse in fact has a legal prerogative of privacy that defeats the victim's right to invoke the assault law, then domestic violence becomes solely a social problem to be dealt with on a voluntary basis—or ignored—by friends, relatives, and charitable agencies. However, the concept of privacy has enjoyed considerable judicial attention in the past few decades, and its modern contours provide no shelter for an assailant.

Justice Brandeis' celebrated dissent in *Olmstead v. United States*¹¹ is the seminal opinion on the privacy doctrine: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone"¹² The Framers' concern with the pursuit of happiness and the sanctity of beliefs and feelings does not evoke a vision of a spouse being kicked, stabbed, or beaten while the assailant asks to be let alone. In its most comprehensive effort to dissect the right of privacy, the Supreme Court recently held in *Whalen v. Roe*¹³ that the right attaches to an "individual interest in avoiding disclosure of personal matters."¹⁴ Yet victims in interspousal assault cases seek legal intervention, the antithesis of privacy. Effective intervention necessarily mandates disclosure of the misconduct that has occurred.

The assailant's counterargument may be presented in two ways: (1) I am the head of the household and claim the right of privacy for all its members, regardless of their wishes. (2) There are competing interests here, and my right to privacy is superior to my spouse's request for protection.

10. Affidavit of Virginia Rivera-Sanchez, social worker, at 9, *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

The New Hampshire Commission on the Status of Women rejected a proposal to assist battered women, finding itself immobilized by the right of privacy. One commissioner explained that wife-beating was the product of the rise of feminism. "Those women libbers irritate the hell out of their husbands." Straus, *Wife Beating*, *supra* note 1, at 444 (quoting from the Portsmouth Herald, Sept. 13, 1977). It may be noted that this belief is contradictory both to the ancient lineage of the crime, and to the evidence that "submissive" wives are injured more often than those who retaliate verbally or physically. See note 66 *infra*.

11. 277 U.S. 438 (1928).

12. *Id.* at 478 (Brandeis, J., dissenting).

13. 429 U.S. 589 (1977) (upholding the constitutionality of a New York statute that mandated maintenance of computerized records of prescriptions for certain dangerous but lawful drugs, although such records included the patient's identity).

14. *Id.* at 599.

Either formulation contains a disqualifying concession. Both the assailant's prerogative to continue his intrafamily activities and his request for secrecy have been asserted over the objection of the spouse. Protected conduct, however, must be mutually acceptable rather than accomplished by force. The courts have unequivocally ruled that the right of privacy shields acts between two individuals only when both consent¹⁵ and when such acts do not impair any person's safety and health.¹⁶

A partial retreat, salvaging some of the underlying presumptions of the privacy claim, is that an attack on a spouse is at most a private wrong with a civil rather than a criminal flavor.¹⁷ The "none of your business" motif is replaced by a more diplomatic contention that such an assault is not a matter of public concern, since it injures only someone with a special relationship to the attacker.¹⁸ Such containment is the antithesis of the violence of a terrorist, which is of maximum concern because it could affect any one of us.

This approach requires a certain myopia about the facts. Intrafamily battery is widespread; indeed, for female victims, domestic attacks—even those that do not eventually escalate into homicide—

15. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 946 (1978). See, e.g., *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968); *Towler v. Peyton*, 303 F. Supp. 581, 582 (W.D. Va. 1969); *Harris v. State*, 457 P.2d 638, 648 (Alaska 1969); *Allan v. State*, 91 Nev. 650, 541 P.2d 656, 658 (1975). Consent to marriage is not consent to crime. See also notes 47-48 and accompanying text *infra*.

16. *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

17. In a speech delivered to an American Bar Association convention, Commander James Bannon of the Detroit Police Department (now Executive Deputy Chief of the Department) said: In my view the police attitude, which seems to say that what happens between man and wife in their own home is beyond the authority or ability of the police to control, is a 'cop out.' The real reason that police avoid domestic violence situations to the greatest extent possible is because we do not know how to cope with them. And besides we share societies [sic] view that domestic violence is an individual problem and not a public issue. J. Bannon, *Law Enforcement Problems with Intra-Family Violence*, 2-3 (Aug. 12, 1975).

This view may also subsume attacks by children on their parents. Researchers at the University of Maryland Medical School's Institute of Psychiatry and Human Behavior noted that an almost universal element in families with violent children is a parental denial that the child's or teenager's aggressive behavior is serious, even if it involves pushing a parent down the stairs, kicking in the face, or stabbing in the chest. When the researchers asked one set of parents whether they considered their son's violent actions right or wrong, both replied, "It was neither right nor wrong." Although their lives were in danger, parents did not always call the police, and when questioned later they often lied, "Confronting the aberrant behavior of the child implies an admission of failure . . .," noted the scientists. Hardin & Madden, *Battered Parents: A New Syndrome*, 136 AM. J. PSYCH. 1288, 1289-90 (1979). Grandparents have also been victims of assault, as indicated by a federally financed study of the elderly. N.Y. Times, Dec. 3, 1979, at D11, col. 2. See also Steinmetz, *Battered Parents*, 15 Soc. 54 (1978).

18. While some domestic assailants have been viewed as law-abiding in other contexts, see, e.g., MICHIGAN WOMEN'S COMM'N DOMESTIC ASSAULT 32-34 (Case V) (1977) [hereinafter cited as MICHIGAN HEARINGS], there is also evidence to the contrary, see text accompanying note 54 *infra*; Faulk, *Men Who Assault their Wives*, in BATTERED WOMEN 119, 123, 125 (M. Roy ed. 1977).

cause more serious injuries and occur more frequently than street violence.¹⁹ Moreover, the legislature, which makes the initial categorization of unlawful conduct as criminal or civil,²⁰ has rejected any suggestion that assault is trivial or should be relegated to private resolution.

Both civil and criminal statutes have a moral element; that is, they seek to encourage conduct that is beneficial to society. You may sue Jones for colliding with your car or for refusing to deliver the widgets for which you both contracted; you may have Jones arrested if he tries to burn down your store. We disapprove of Jones in each context. However, the two branches of the law are distinguished by a crucial difference in character. Torts, the civil area most closely related to the law of crimes, requires a showing of damage but involves a minor emphasis on immorality. It is designed to compensate the individual and is controlled (except for the outcome of the suit) by him. Criminal law, in contrast, is controlled by the state; it stresses moral culpability and need not involve any actual damage. If Jones shoots at you while you are sleeping but the gun fails to fire, there can be no civil suit.²¹ Yet this conduct is considered sufficiently reprehensible and dangerous to constitute a crime.

Not a single jurisdiction has chosen to exempt domestic assaults from the ambit of the criminal law.²² A variety of options remain

19. See D. MARTIN, BATTERED WIVES 12 (1976); M. STRAUS, R. GELLES & S. STEINMETZ, BEHIND CLOSED DOORS 4 (1980); Dobash & Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY 426, 437 (1977-78) [hereinafter cited as Dobash & Dobash]; Police Foundation, Background Memorandum on Disputes or Disturbances 2 (1972). One study, extrapolating from its sample, estimated that "in any one year, approximately 1.8 million wives are beaten by their husbands." Straus, *Wife Beating*, *supra* note 1, at 445.

The seriousness of injuries inflicted by domestic assailants is discussed at notes 52-53 and accompanying text *infra*. See note 54 and accompanying text *infra* as to homicides committed by chronic batterers. It should be noted that interspousal violence commonly occurs in households with four to six children, note 55 *infra*, and that the long term adverse effects on such children are significant, notes 55-56 and accompanying text *infra*.

20. After the American Revolution the original thirteen states continued to apply English common law, except where it was unsuited to local conditions. W. LAFAVE & A. SCOTT, *supra* note 4, at 60. See generally Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910). However, the criminal law terrain was soon altered by the appearance of comprehensive criminal codes, which included most of the common law crimes as well as new ones that were not of traditional origin. Some of these statutes expressly stated that crimes not appearing in the code (or some other enactment) were abolished. The courts also buttressed the primacy of legislative authority by holding that the enactment of broadly inclusive criminal codes nullified common law offenses by implication. W. LAFAVE & A. SCOTT, *supra* note 4, at 60.

21. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 38-39 (4th ed. 1971).

22. Some states have provided a combined criminal and civil approach. *E.g.*, N.Y. FAM. CT. ACT (29A) §§ 811-847 (McKinney 1975 & Supp. 1980-81) (discussed at notes 106-07 and accompanying text *infra*). Jail sentences may be imposed under the Act, note 126 *infra*.

A few states have imposed additional punishment for domestic violence. *E.g.*, CAL. PENAL CODE § 273.5 (West Supp. 1981), making an assault on a spouse "resulting in a traumatic condi-

available to the sentencing judge as a basis for individual dispositions.²³ However, neither the privacy argument nor the attempt to trivialize domestic assaults can overcome the legislative identification of violence as a public wrong qualitatively different from contract violations and accidents.

B. Constitutional Implications of Nonenforcement

If the Constitution bars legislators from enacting an assault law that excludes conjugal victims, would the refusal of executive or judicial officers to apply legal sanctions to interspousal disputes be a less candid but equally forbidden course? Both the question of legislative incapacity and the implications of nonenforcement will be considered below in the context of the due process and equal protection clauses of the fourteenth amendment. After concluding that equal protection guarantees apply to battered spouses seeking law enforcement, this Article will develop in detail a method by which these guarantees may be invoked. Within the parameters of the Constitution, however, legislatures may create civil provisions that add to rather than subtract from the remedies available in conjugal cases.

1. Due Process of Law

"Law is something more than mere will exerted as an act of

tion" a felony punishable with a maximum of one year in jail; *cf. id.* § 241 (simple assault statute that carries a maximum six months imprisonment). *Cf. ARK. STAT. ANN.* §§ 41-1653 to 41-1659 (Supp. 1981) (assaults and batteries on *wives* only classified as felonies or misdemeanors, depending on seriousness of injury); *OHIO REV. CODE ANN.* § 2919.25 (Page Supp. 1981) (first offense of domestic violence is misdemeanor; second is felony in fourth degree); *R.I. GEN. LAWS* § 11-5-9 (Supp. 1980) (although classified as a separate misdemeanor, domestic violence is punished like simple assault, *id.* § 11-5-3); *WASH. REV. CODE ANN.* § 10.99 (1980) (making general criminal code sections specifically applicable to domestic violence). The Washington statute expressly acknowledges the criminality of conjugal attacks:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated.

Id. § 10.99.010.

A state-by-state summary entitled *State Legislation on Domestic Violence*, appears in Center for Women Policy Studies, Washington, D.C., Response to Violence in the Family, Sept.-Oct. 1981 [hereinafter cited as Response].

23. See note 57 and accompanying text *infra*.

power. . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude."²⁴ This Supreme Court formulation of due process has branched into two separate doctrines, one procedural and the other substantive. Procedural due process delineates the contours of the "right to be heard before being condemned to suffer grievous loss of any kind"²⁵ as a consequence of governmental decisions. Questions of what kind of hearing is due and when it is due are determined by assessing the weight of the life, liberty, or property interests at stake and the risk of error in governmental disarrangement of these rights.²⁶

Readily identifiable life and liberty interests are involved when a victim is subjected to repeated beatings. Can it be argued that the government has contributed to the victim's risk and degree of injury by rejecting requests to bring the attacker to trial, and has therefore deprived the victim of liberty without first according a constitutionally mandated hearing? The argument lacks a vital connective tissue.

The historic function of procedural due process is to secure the opportunity to challenge the state's imposition of a penalty or withdrawal of a benefit. The attacker's trial, however, only decides his guilt or innocence. It does not determine whether the government may lawfully withdraw prosecutorial or judicial services. The trial would provide an answer, but to the wrong question. The occurrence or nonoccurrence of the trial is therefore irrelevant to the victim's procedural due process rights.

While procedural due process refers to the method by which a challenged governmental choice is carried out, substantive due process relates to the nature and reasonableness of the choice itself. The term "liberty" embedded in the fourteenth amendment unquestionably guarantees freedom from bodily restraint,²⁷ but the protection accorded is against state rather than private intrusion. Congress may utilize its enforcement powers under section five of the fourteenth amendment to enact legislation affirmatively prohibiting certain private conduct,²⁸ but

24. *Hurtado v. California*, 110 U.S. 516, 535-36 (1884).

25. *Joint Anti-Fascists Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

26. *Matthews v. Eldridge*, 424 U.S. 319, 333, 335 (1976). The burden placed on the government by procedural safeguards is also taken into account. *Id.* at 335.

27. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (indicating that a penumbra of more subtle restraints is also protected under the due process clause).

28. *See United States v. Guest*, 383 U.S. 745, 762, 782 (1966) (holding that Congress possesses section five authority to punish "all conspiracies to interfere with the exercise of fourteenth amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy").

unless and until it has done so, "state action" is necessary to trigger the constitutional promise.

Presume that a pattern of conjugal assault persists in a particular household and the victim's attempts to secure legal redress are rebuffed. Elaborating on the chain of causation considered above in the context of the procedural due process argument, the following two-step premise for finding unlawful "state action" might be proffered: (1) withholding the benefit of police protection is a governmental choice; (2) the choice is unreasonable because it permits future injury to the complainant and therefore facilitates an infringement of the victim's liberty.

The fact that the state has merely failed to act, rather than inflicted an affirmative injury, poses no fatal doctrinal difficulty. The fourteenth amendment may implicate both acts and omissions.²⁹ However, the attempt to cast the deprivation in substantive due process terms runs counter to a persistent (though often subterranean) judicial stance. The Supreme Court's "allergy to substantive due process"³⁰ reflects a disinclination to imply that judicial relief is appropriate in every instance where the needs of citizens are unmet.³¹

The standard that must be satisfied by the state has been characterized as the "narrow" and "constricted" one of "minimal rationality."³² With specific reference to police protection, it has been noted that "[i]f courts were required to consider whether the . . . protection afforded a particular property owner was 'adequate,' they would be required to make judgments which are best left to officials directly responsible to the electorate."³³ While the Court's concern was with a single occasion of police failure and with compensation for property damage only, the respect accorded to police discretion in utilizing a

29. L. TRIBE, *supra* note 15, at 502.

30. Robinson v. California, 370 U.S. 660, 689 (1962) (White, J., dissenting). See also Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 66 (1968).

31. See L. TRIBE, *supra* note 15, at 919. It should be noted that affirmative duties are generally expressed through provision of various procedural safeguards before withdrawal of services or benefits.

State law often similarly reflects the principle that a duty owing to the public as a whole does not run to individuals unless explicitly provided by statute. *E.g.*, Steitz v. City of Beacon, 295 N.Y. 51, 54, 64 N.E.2d 704, 705-06 (1945); accord, RESTATEMENT (SECOND) OF TORTS § 288 (1965) (neglect in the performance of such requirements creates no civil liability to individuals); see Henkin, *supra* note 30, at 72-76.

32. Snell v. Wyman, 281 F. Supp. 853, 863, 862 n.19 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 323 (1969). Stricter standards requiring special scrutiny are applicable in cases involving "fundamental" interests. See notes 35, 41-44 and accompanying text *infra*.

33. YMCA v. United States, 395 U.S. 85, 95 (1969) (Harlan, J., concurring). The prosecutor's generally unreviewable discretion is even broader. See notes 182-84 and accompanying text *infra*.

scarce resource suggests limits to the application of due process to police inaction.

However, as will be seen below, a wholly different choir of considerations has sounded where the governmental choice at stake unreasonably excludes one class of persons from benefits or services.

2. *Equal Protection*

a. *The Validity of the Classification Itself*

"A person is guilty of assault when with intent to cause serious physical injury to a person other than his spouse, he causes such injury." If such a statute were proposed to a legislature, it would be met with instinctive rejection. Without the filter of a "Rule of Thumb"³⁴ or a solemn invocation of privacy, it is a politically unsalable denigration of the family. This hypothetical provision must be the centerpiece of our equal protection inquiry, however, for if the classification on which it rests does not offend the Constitution, then questions concerning selective enforcement of existing assault laws need not be reached.

The Supreme Court has developed a varied panoply of standards against which a challenged classification may be measured, each containing its own discomfort index for the state. Access to police protection has not yet been characterized by the Supreme Court as a "fundamental" right triggering a "strict scrutiny" standard whenever there is a departure from equality in its availability.³⁵ One suspects that this fact is historical rather than doctrinal; the cases considering police inaction have involved particular failures to provide protection,³⁶ rather than denial of police services on the basis of a broad classification.³⁷ And although a right to equal court access has been recognized in civil cases where a judicial proceeding is the only effec-

34. This legendary English rule, a symbol of the right of "moderate correction," purportedly allowed a husband to beat his wife so long as the stick was "no thicker than his thumb." W. PROSSER, *supra* note 21, at 136.

35. The right to vote, for example, has been held to be fundamental. *See Sailors v. Board of Educ.*, 387 U.S. 105 (1967) and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966), which, read together, indicate that although the states are not required to hold elections for any particular office, the equal protection clause applies once the franchise is granted. Police protection is not a "preferred" right, another category requiring strict scrutiny. Preferred rights have been found in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (law that requires Amish children to attend high school is invalid because enforcement would endanger the free exercise of the Amish religious way of life), *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment benefits may not be conditioned upon recipient's willingness to violate religious principles by requiring Seventh-Day Adventist to work on Saturday), and *Near v. Minnesota*, 283 U.S. 697 (1931) (statute authorizing county attorney to obtain an injunction against publication of a newspaper that was malicious, scandalous, and defamatory held unconstitutional as an infringement of freedom of the press).

36. *See, e.g., YMCA v. United States*, 395 U.S. 85 (1969).

37. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973), where the challenged deprivation involved educational services, the Court indicated that if the facts had

tive method of resolving the dispute,³⁸ its application to the criminal law has thus far been limited to insuring that basic trial and appellate procedures do not discriminate against certain types of defendants.³⁹

Yet, it is anomalous to conclude that governmental services vital to our physical security should be put into the same category as granting a driver's license. Blackstone's classic analysis of the rights of individuals gave the highest priority to protection from murder or mutilation and "security from the corporal insults of menaces, assaults, beating and wounding."⁴⁰

If the right to nondiscriminatory police protection is fundamental, withdrawal of such services must be justified by a compelling state interest.⁴¹ However, a classification based on the victim's marital or cohabiting status,⁴² rather than on the assailant's intent and the victim's

shown "an absolute denial of educational opportunities . . .," there might have been an interference with fundamental rights [emphasis added].

38. See *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971) (holding unconstitutional a state law that conditioned a judicial decree of divorce on claimant's ability to pay court costs and fees).

39. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (striking down a provision that would disadvantage an indigent defendant). See also text accompanying notes 158-59 *infra*.

40. 1 W. BLACKSTONE, COMMENTARIES *134. Next in importance after personal security, Blackstone ranked personal liberty and personal property. *Id.* at *129.

41. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state law demanding one year's residency for welfare applicants struck down as it infringed the fundamental right to travel). But cf. *Sosna v. Iowa*, 419 U.S. 393 (1975) (one year residency requirement in divorce actions sustained by compelling state interests in protecting marriage and the family).

42. Since it can be statistically demonstrated that most victims of domestic assault are women, Straus, *Wife Beating*, *supra* note 1, at 449, it may also be argued that the effect of such a classification is to discriminate on the basis of sex. The historical antecedents of a conjugal exclusion from the assault laws are explicitly sex-based. See text accompanying notes 5-6 *supra*. Moreover, recent studies provide disquieting support for the conclusion that contemporary society continues to some degree to categorize women as more child-like and less deserving of autonomy than men. Straus, *Sexual Inequality, Cultural Norms, and Wife-Beating*, 1 VICTIMOLOGY 54, 65 (1976). Many witnesses who failed to assist or call for help during the Kitty Genovese murder stated that they had inferred that she was being attacked by her husband. A.M. ROSENTHAL, THIRTY-EIGHT WITNESSES 41 (1964). Apparently, this was sufficient reason to ignore her screams. A Michigan State University study that staged a series of fights to be witnessed by unsuspecting passers-by found that "male witnesses rushed to the aid of men being assaulted by either women or men, and that men helped women being hit by other women. But not one male bystander interfered when a male actor apparently beat up a woman." Pogrebin, *Do Women Make Men Violent?* MS., Nov. 1974, at 49, 55.

Several Supreme Court Justices have indicated that sex discrimination constitutes a "suspect classification" requiring the state to meet a higher standard of justification. E.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973). This view has not yet been endorsed by a majority of the Court, but recently, the Court adopted a "judicial standard of review based on intermediate scrutiny . . ." L. TRIBE, *supra* note 15, at 1066. In *Craig v. Boren*, 429 U.S. 190, 197 (1976), the Court declared that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. See B. SCHWARTZ, CONSTITUTIONAL LAW 373-74 & nn.18-24 (2d ed. 1979).

Application of this Supreme Court standard to conjugal cases is problematical, however. A claim that officials who refuse to intervene in domestic assaults are deliberately and consciously discriminating against women would be countered by arguments that privacy concerns were the

resulting injuries, would founder even under the "rational relation" test. This test, which is much more deferential to the state than the "compelling interest" requirement, has been described as imposing on the courts the duty to decide if a challenged classification is "reasonable in light of its purpose."⁴³

In interpreting this duty, the Court often considers whether some state of facts "reasonably can be conceived"⁴⁴ to justify the legislative measure. The analysis below will therefore include the relation of a marital violence exemption to the purpose of the assault laws, and the factual justifications that have been offered to sustain this exemption.

i. Claims of affirmative benefit resulting from the classification. Even if the universal prohibition against assault were merely designed to deter a breach of the peace, an exclusion for conjugal attacks would not be consonant with that goal. While most domestic violence occurs in the home, with no spectators except the children, neighbors are frequently disturbed by the sounds and cries that accompany the beating.⁴⁵ Moreover, the major purpose of the prohibition is to preserve personal security, not the public peace.⁴⁶ That objective is indisputably

dominant motive. See notes 8 & 17 and accompanying text *supra*. The Supreme Court has rejected claims of sex-based discrimination where the challenged provisions adversely affected men as well as women, even where the negative effect on women was disproportionate. *Personnel Adm'r. v. Feeney*, 442 U.S. 256 (1979). Although women have more frequently been victims, any marital exemption is equally objectionable when it operates to deprive battered husbands of police or prosecutorial protection.

43. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). More must be shown under this standard than the mere congruence of the provision and the legislative intent. If, for example, the goal of a law were to prevent persons over 65 from driving a car, a provision precluding this group from obtaining or retaining motor vehicle licenses would accomplish this end—but this tautology would be of no assistance in assessing the validity of the law under the equal protection clause. Substantive evaluation of the legislative goal is necessary to determine whether the state's objective is based on a legitimate conception or societal value. See the seminal work of Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

44. *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 530 (1959). From the 1930's to the 1960's, the Supreme Court rarely employed the rationality requirement as a basis for striking down legislation. Some commentators, however, continue to view rationality as a requirement capable of voiding legislation as unconstitutional. See Bennett, "Mere" Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979). Others have attempted to articulate alternate guidelines for review. See Tribe, *The Supreme Court, 1972 Term - Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

45. Neighbors may "turn up the TV to block out the shouting and sobbing next door so that they can no longer hear it." E. PIZZHEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* 30 (1977).

46. See generally 1 W. BLACKSTONE, *COMMENTARIES* *122-40 in which he identifies three primary rights that Englishmen enjoy: the right of personal security, the right of personal liberty, and the right of private property. "[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights . . ." *Id.* at *124. See also J. Bannan, *supra* note 17, at 2:

As it turns out we [the police] reject the rule of law which makes it a crime to assault another person regardless of our relationship to them or degree of injury. . . . Most frequently the factor which will cause police intervention is a family fight which disrupts

disserved by the exclusion.

Is the desire to maintain the family unit a competing value that may be fostered by refusing to extend governmental' protection to spouses? The Supreme Court has recognized that the right to a "private realm of family life" is fundamental, but in the same decision made clear that this right gives no family member the authority of a tyrant over the others.⁴⁷ A husband may not prevent his wife from obtaining a legal abortion.⁴⁸ Nor can the state deny court access on discriminatory grounds to a spouse who seeks to dissolve the marriage,⁴⁹ whether the other spouse contests that decision or not.

The argument that the state cannot protect a domestic assault victim because of the sanctity of marriage is uncomfortably reminiscent of the plea of the patricide that he should be exempt from prosecution because he is an orphan. It is the violence, not the cessation of violence, which threatens the family.⁵⁰ The Supreme Court, although upholding legislative discretion to preclude tort actions between husband and wife, emphasized that the victim of a domestic assault had a right of access to the criminal courts, which would "inflict punishment commensurate with the offense committed."⁵¹

the peace and tranquility of the neighborhood. . . . [This is] of course irrelevant to the substantive charge of assault.

47. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that a guardian may not direct her niece to distribute religious literature in violation of a state law forbidding child labor).

48. *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-71 (1976); *cf. Maher v. Roe*, 432 U.S. 464 (1977) (holding that the equal protection clause does not require a state to pay expenses incident to nontherapeutic abortions for indigent women merely because it has made a policy choice to pay for expenses incident to childbirth, and that such a policy does not impinge on a woman's fundamental right to privacy).

49. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

50. The New York Legislature has given appropriate recognition to this point by redefining the purpose of a family court proceeding. A previous reference to "keeping the family unit intact" was amended to emphasize that the purpose is "attempting to stop the violence, end the family disruption, and obtain protection." Marjorie D. Fields, co-chairman of the Governor's Task Force on Domestic Violence, commented: "We take the view that by ending disruptive violence with orders of protection and by having the court mandate an educational program for the abuser you have an atmosphere more conducive to preserving the family." *N.Y. Times*, Aug. 10, 1981, § B, at 4, col. 2-5.

51. *Thompson v. Thompson*, 218 U.S. 611, 619 (1910). Presumably this right flowed from the State's general assault and battery statutes. Although a diminishing number of jurisdictions have retained interspousal immunity, Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 157 (1977) [hereinafter cited as *Case for Legal Remedies*], the trend is towards abandonment of the doctrine, particularly where the infliction of intentional harm destroys the "harmony" of the home and reduces the risk of collusion between the parties at the expense of the insurance company, *see, e.g., Mosier v. Carney*, 375 Mich. 532, 566-73, 138 N.W.2d 343, 355-58 (1965); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (1973); *Goode v. Martinis*, 58 Wash. 2d 229, 361 P.2d 941 (1961); Annot., 43 A.L.R.2d 632 (1955 & Supp.); Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MARR. PRAC. & PROC. 549, 570-73 (1978).

Professor Prosser has pointed out the irony of retaining the immunity in some cases but abrogating it in others:

An assault is not a mere family quarrel. A comparison of assaults by spouses with other kinds of attacks demonstrates that domestic victims are much more likely to be seriously injured, to require medical attention and hospitalization, and to be incapacitated from working for longer periods.⁵² One quarter of the victims are pregnant at the time of the attack.⁵³ It is also significant that twenty-five percent of all homicide offenders have a prior history of serious assaults, particularly against spouses.⁵⁴ This statistic underlines the necessity for dealing with the offender at the outset.

Children in the household who witness the attacks or become additional targets themselves frequently develop psychosomatic illnesses, depression and suicidal behavior, or patterns of stealing and truancy.⁵⁵ Families reported for abuse account for a disproportionate number of delinquent children, as a pattern of uncontrolled and violent conduct is imitated in the next generational cycle or emerges as a result of the trauma of the beatings.⁵⁶

A corollary of the "family unit" argument is the suggestion that if the husband is the assailant, the problem should be ignored because the family breadwinner might be jailed. This rather nearsighted view fails to focus on several salient factors. The criminal law provides more than a choice of either jail or benign neglect. Its dispositional flexibility has been repeatedly demonstrated in such approaches as preconviction probation, referral to treatment agencies, or dismissal after a period of supervised "good behavior."⁵⁷ The critical point is that the disposition

[Interspousal immunity in personal torts is based] on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property . . .

W. PROSSER, *supra* note 21, at 863 (footnotes omitted).

52. Gaquin, *Spouse Abuse: Data from the National Crime Survey*, 2 VICTIMOLOGY 632, 640-41 (1978). The decline of the "extended family" in which relatives living in close proximity could help each other, has contributed to the danger. E. PIZZEY, *supra* note 45, at 30.

53. M. STRAUS, R. GELLES, & S. STEINMETZ, BEHIND CLOSED DOORS 187 (1980). Attacking a pregnant wife may be a husband's attempt to terminate the pregnancy and relieve himself of the impending stress of yet another child. R. GELLES, FAMILY VIOLENCE 116 (1979).

54. Field & Field, *Marital Violence and the Criminal Process: Neither Justice nor Peace*, 47 SOC. SERV. REV. 221, 223 (1973).

55. Hilberman, *Overview: The "Wife-Beater's Wife" Reconsidered*, 137 AM. J. PSYCH. 1336, 1340 (1980); Roy, *A Current Survey of 150 Cases*, in BATTERED WOMEN 25, 33 (M. Roy ed. 1977). Interspousal violence is most common among young families with four to six small children. M. STRAUS, R. GELLES, & S. STEINMETZ, BEHIND CLOSED DOORS 119 (1980).

56. Elliot, *The Neurology of Explosive Rage: The Dyscontrol Syndrome*, in BATTERED WOMEN 98, 101 (M. Roy ed. 1977); N.Y. State Assembly Select Committee on Child Abuse, Summary Report on the Relationship Between Child Abuse and Neglect and Later Socially Deviant Behavior 7, 11, 16 (Mar. 1978).

57. A recent study of the Criminal Court in New York City found that only 30% of the

be tailored to the individual defendant and provide sufficient restraint or deterrence to prevent future assaults. As a report of the United States Commission on Civil Rights concluded:

The benevolent nonarrest policy might be satisfactory in some instances if the husband/assailant responded to leniency and kindness by resolving never to resort to violence again. Unfortunately, the man is more apt to see this leniency as reinforcement for his abusive behavior. He quickly learns that lesser injuries, like a broken nose, are tolerated by the system and the probability of his being taken into custody is remote.⁵⁸

Moreover, concern for family finances should not cause the victim's views to be paternalistically discounted. The wife who seeks police and prosecutorial aid has opted for health and safety regardless of the economic risk involved. Burglars and batterers may not use diminution of their family's income as a basis for immunity if their victims are strangers; it would be a curious paradox if economic protection of the wife were invoked only where her own loss of physical security is at stake.⁵⁹

Another affirmative goal, unrelated to the purpose of the assault laws but sometimes cited to support an exclusion for domestic violence is protection of police officers from injury. Requests for aid in dealing with threatened or present violence in the home represent a substantial portion of the police docket in most localities, sometimes ranging as

convicted defendants were given jail terms. The remainder were conditionally discharged, placed on probation, or fined. Vera Institute of Justice, Preliminary Evaluation of the 43rd Precinct Felony Case Preparation Project 43 (1980). See generally R. NIMMER, *DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION* (1974). In New York, a successful approach has been to sentence an offender to serve his jail term on evenings and weekends, so that he can continue in his employment. Lt. George Rosko of the San Francisco Police Department has suggested that a first-time wife-beater should be remanded to a counseling center, but warned explicitly that if he ever assaults his wife again he will be sent to jail; if judges took that position and adhered to it, the problem of wife battering might be solved. Statement of Lt. Rosko as cited in Eisenberg, *An Overview of Legal Remedies for Battered Women*, 15 TRIAL 28, 29 (Aug. 1979). An Oregon district attorney handles misdemeanor domestic assault by requesting that the defendant be placed on supervised probation for 18-24 months, conditional on spending 2-15 days in jail and entering a program of alcohol and family counseling. This is coupled with a recommendation to the court that if the defendant is employed, he should be allowed to serve his jail sentence at a time when it will not cause the loss of his job. Response, *supra* note 22, July-Aug. 1981, at 9 [hereinafter cited as Response]. See notes 100-25 and accompanying text *infra* for discussion of civil adjuncts to the assault laws.

58. Martin, *Overview—Scope of the Problem*, in U.S. COMMISSION ON CIVIL RIGHTS, *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 3, 9 (1978). Indeed, the policy of leaving the problem unchecked may cause a permanent dissolution of the family, through the lawful means of divorce or, in extreme cases, the unlawful means of homicide. See Part II *infra*.

59. See Note, *The Hall of Mirrors: Wife Abuse and the Law in an Era of Social Change*, 1 W. NEW ENG. L. REV. 565 (1979) [hereinafter cited as *Hall of Mirrors*]. In addition, further constitutional problems would be apparent if the exclusion were fragmented into categories such as husband-assailant or wife-assailant, breadwinner, sole-breadwinner, or joint-breadwinner.

high as sixty percent.⁶⁰ The total calls in this category is greater than for all other violent felonies combined.⁶¹ It is therefore not surprising that the number of officers injured in responding to domestic violence calls is significant, though the majority of such injuries occur in other situations.⁶²

While reduction of risk to police personnel must be a continuing governmental objective, it cannot be accomplished merely by writing off one group of victims as too undeserving to warrant such a risk.⁶³ Rather, the state should provide well-designed training programs to assist officers in utilizing crisis prevention techniques⁶⁴ and distinguishing

60. Guthrie, *The Battered Wife: A Victim of Most Under-Reported Crime*, Clev. Press, Nov. 3, 1976, § C, at 4, col. 3, cited in *Case for Legal Remedies*, *supra* note 51, at 136; Fields, *Wife-Beating: The Hidden Offense*, N.Y.L.J., April 29, 1976, at 1, col. 1, cited in *Case for Legal Remedies*, *supra* note 51, at 137.

61. Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914, 914 n.2 [hereinafter cited as *Police Response*].

62. FBI figures indicate that 30% of the assaults on police officers occur when they respond to disturbance calls. It should be noted, however, that the FBI includes in the "disturbance" category "man with gun" calls and bar fights, as well as family disturbances. In 1978, 10 of 93 officers killed in the line of duty died after responding to disturbance calls. However, a higher number (15 out of 93) were killed enforcing traffic violations. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 301, 307 (1979). See *Police Response*, *supra* note 61, at 920 n.25.

63. Violence against organized crime figures is apparently investigated and prosecuted with the same diligence as crime directed against storekeepers, farmers, or civil servants. For example, after the murder of Carmine Galante, a reputed leader of an organized crime family, the Brooklyn, N.Y., district attorney established a task force of 20 investigators from his office, the Police Department's 14th Homicide Zone, the Police Intelligence Division, and the Organized Crime Control Bureau to track down the killers. N.Y. Times, Jul. 17, 1979, § B, at 5, col. 2.

64. An excellent step-by-step blueprint on the handling of such crises has been issued. See POLICE EXECUTIVE RESEARCH FORUM, RESPONDING TO SPOUSE ABUSE & WIFE BEATING (1980), especially at 83-109 [hereinafter cited as POLICE FORUM]. The Police Executive Research Forum is a national membership organization composed of chief executives from municipal, county, and state law enforcement agencies.

There is evidence that some police officers feel unequipped to deal with the emotionally charged atmosphere that accompanies family conflicts. D. MARTIN, *supra* note 19, at 97. Family crisis intervention programs have been instituted in several major cities; they do not only train officers in psychological and mediation techniques, but also emphasize knowledge of existing social services and safety precautions. See *Police Response*, *supra* note 61, at 949-59; Bard, *Family Intervention: Police Teams as a Community Health Resource*, 60 J. CRIM. L.C. & P.S. 247 (1969); Bard & Zacker, *How to Handle Explosive Squabbles*, PSYCH. TODAY, Nov., 1976, at 73-75; Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW & CONTEMP. PROB. 539, 549-58 (1971). *Hearing on Marital and Family Violence Before the Cal. Sen. Subcomm. on Nutrition & Welfare Comm.* 47-50 (July 21, 1975) (statement of M.S. Ashley) [hereinafter cited as *Cal. Hearings*]. Although a shortage of funds has led to the curtailment of many of these programs, *id.*, they have apparently reduced the number of police injuries and homicides. M. BARD, FAMILY CRISIS INTERVENTION: FROM CONCEPT TO IMPLEMENTATION 5 (1973), cited in *Case for Legal Remedies*, *supra* note 51, at 148 n.90. The Federal Bureau of Investigation has also established a training program on police handling of domestic violence, which is given at the FBI national academy. Local police officers who participated in the program noted that new procedures instituted as a result of their training will reduce the incidence of police injury and of domestic assaults. *Response*, *supra* note 22, at 6.

between those cases necessitating only mediation and those requiring investigation and arrest. A recent change in the International Association of Chiefs of Police Training Key notes:

A critical difference exists between the police response to family disturbances where no physical violence has occurred and a wifebeating Although the application of crisis intervention skills are required in both cases, the primary purpose of mediation is to prevent violence and therefore make arrest unnecessary. Where an attack has already taken place, however, the police officer must be prepared to conduct an assault investigation 'Family disturbances' and 'wife beatings' should not be viewed synonymously; nor should wife abuse be considered a victimless crime A wife beating is [first and] foremost an assault⁶⁵

ii. *Claims of consent.* In addition to affirmative objectives such as fostering family unity and minimizing police risks, negative factors have been cited as justifications for a conjugal violence exemption to the assault laws. One is the presumption that since the abused spouse who stays in the situation must like it or deserve it,⁶⁶ there is no need to expend government resources to stop the attacks. The other is the prediction that the victim would be too passive or fearful to press charges and that arrest and commencement of prosecution would therefore be administratively unwarranted.

Is the victim courting or at least consenting to the attacks, and could such consent immunize the assailant from legal intervention? It must first be noted that many battered spouses do *not* remain with their attackers, but the assaults continue despite requests for police protec-

65. International Association of Chiefs of Police, *Training Key #245*, in BATTERED WOMEN 144, 149 (M. Roy ed. 1977) [hereinafter cited as *Training Key #245*]. See POLICE FORUM, *supra* note 64, at xiii. For contrasting police responses, see notes 69-70, 134-37 and accompanying text *infra*. The argument that "family disturbances" should be kept off the crowded criminal calendars can be met by alternatively excluding from the docket actual victimless and nonviolent crimes such as gambling. See the recommendation of a special committee of New York City law enforcement officials that enforcement of laws prohibiting victimless crimes be de-emphasized, N.Y. Times, Jan. 19, 1979, § B, at 3, col. 1.

66. This claim parallels a similar assumption about rape victims. Interspousal rape, which involves a somewhat different constellation of considerations than nonsexual assault, is beyond the scope of this Article. For a powerful and persuasive analysis of the law of rape, see Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977).

Empirical studies do not support the view that if women became more meek and therefore ceased to "irritate" their spouses, domestic violence would be abated without legal intervention. Star, *Comparing Battered and Non-Battered Women*, 3 VICTIMOLOGY 32, 42 (1978). Moreover, blaming the victim and overlooking the law-breaker has other infirmities. The available evidence indicates that most domestic assaults are unexpected, occurring without a significant triggering incident. Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RIGHTS L. REP. 138, 144 (1977); D. MARTIN, *supra* note 19, at 49. Mediation that focuses on the wife's "failings" has been ineffective in reducing domestic violence. See note 120 and accompanying text *infra*.

tion. It is from these metals that the links to conjugal homicide are forged, as the victim is transformed into the defendant.⁶⁷

The terror of those who stay has been described as immobilizing: "Very few people understand this kind of fear In the mind of . . . [a wife] who has been badly beaten, this fear blots out all reason. The man seems to be omnipotent."⁶⁸

Affidavits filed in an omnibus lawsuit seeking effective enforcement of the New York Family Offenses Law illustrate the point:

[A]t about 11:00 P.M., my husband came home from visiting his mother. As soon as he walked into the house, he began to hit me with his fists [H]e had hit me in the head so many times that it made me sleepy. As my eyes closed, my husband said, 'don't close your eyes or you are not going to open them tomorrow morning.' I finally fell off to sleep. I awakened at about 10:30 A.M. . . . He started slapping and punching me all over in my stomach, face, and head. He pulled out a chunk of hair from my head. He went into the kitchen and took out two big carving knives and a set of steak knives. He made me sit in the corner of the bedroom on a chair. He sat in bed with knives which he put under the covers. He said, 'I'll have to kill you, and then I will have to kill myself.' Then the telephone rang. It was my mother. I told her in Italian, which my husband does not understand, to call the cops because my husband had the knives and was going to kill me.⁶⁹

The wife's parents arrived; the police merely told the husband to go for a walk. As soon as the officers left, the husband forced his way into the apartment, knocked out four of the wife's teeth, and stabbed her mother in the arm. As the police returned after being summoned by neighbors, the husband pushed her father (who was much smaller in stature) against the police car and began hitting him. The husband was arrested and received a sixty-day sentence for stabbing his wife's mother, but continued to threaten his wife. The affidavit states that when she attempted to get a protective order from the Family Court, an information desk attendant handed her a copy of the Police Department Rules and said:

67. See, e.g., *State v. Guido*, 40 N.J. 191, 191 A.2d 45 (1963); *People v. Eleuterio*, 47 A.D.2d 803, 365 N.Y.S.2d 94 (1975); Part II *infra*.

68. E. PIZZEY, *supra* note 45, at 39. The police cannot provide a constant escort, and the victim may be unaware of any effective legal remedies or dubious of their availability. See Affidavit of Marguerite Scott at 13-14, *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979). In a study of battered women conducted by Dr. Elaine Hilberman of the University of North Carolina's School of Medicine, one of the findings was that "these women were a study in paralyzing terror that was reminiscent of the rape trauma syndrome" except that the traumatic events continue. Hilberman, *supra* note 55, at 1341.

69. Affidavit of Tina Candiano Mandola at 163-64, *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

'[T]his is all you are getting.' He said, 'I don't care who sent you here. If you don't want this paper then go home.' I said, what am I supposed to do wait until he kills me to get an order of protection. The man answered 'yes.'⁷⁰

The belief that a battered spouse must derive pleasure from being beaten apparently emanates from psychoanalytical theorizing about wealthy European women in the early 1900's.⁷¹ Extensive recent studies rebut this supposition⁷² and identify certain consistent elements in the battered women syndrome that can be empirically validated. The victim initially believes that the assaultive spouse will change.⁷³ Subsequently, a major factor is "learned helplessness,"⁷⁴ chronic depression

70. *Id.* at 166.

71. Affidavit of Dr. Clara Mayo in Support of Motion to Vacate Judgment at 3, *People v. Powell*, No. 78-63 (Tompkins County Ct., N.Y., filed Oct. 2, 1979). Dr. Mayo is a professor of psychology at Boston University and a former president of the New England Psychological Association. The motion was denied without a hearing. The conviction of Mrs. Powell for killing her husband was therefore left undisturbed. *People v. Powell*, No. 78-63, at 18 (Tompkins County Ct., N.Y., Jan. 15, 1980).

72. *E.g.*, Hilberman, *supra* note 55, at 1339; D. MARTIN, *supra* note 19, at 79; L. WALKER, *THE BATTERED WOMAN* 45-47 (1979); Rounsaville, *Theories in Marital Violence: Evidence from a Study of Battered Women*, 3 *VICTIMOLOGY* 11, 16, 28 (1978). Dr. Bruce Rounsaville, Professor of Psychiatry at Yale University, interviewed 37% of a group of battered women identified at the Yale New Haven Hospital emergency room and the Connecticut Mental Health Center. There has been judicial recognition of these studies. *See Ibn-Tamas v. United States*, No. 12614 (D.C. Oct. 15, 1979). *But cf.* H. DEUTSCH, *THE PSYCHOLOGY OF WOMEN* 245-85 (1944) (arguments supporting the position that women have a physiological need for punishment); S. FREUD, *Analysis Terminable and Interminable*, in 23 *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 209 (J. Strachey ed. 1964).

73. D. MARTIN, *supra* note 19, at 79; Eisenberg & Seymour, *The Self-Defense Plea and Battered Women*, 14 *TRIAL* 34, 36 (July, 1978). One commentator has described the general phenomenon of ambivalence in terms of Dr. B.F. Skinner's theory of random reinforcement:

In the face of a low but random payoff, the individual now and then receives some reward, so that he is never quite willing to abandon the enterprise entirely. In any intimate relationship, even one that has become corrosive and hateful in many respects, the habitual patterns of interaction do yield from one day to the next a few rewards—a memory of fun shared together once, a quick understanding when some outsider makes a foolish statement, a casual pat on the shoulder. These do not outweigh the hurt and the sense of injustice, but they continue to give some type of hope that things might be improved. Few intimates can be so totally bent on constantly hurting the other that they will not stop from time to time to support the continuance of the relationship for yet a while.

Goode, *Violence Among Intimates*, in 13 *CRIMES OF VIOLENCE: STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* 941, 959 (1969). A more elfin explanation of why women stay with abusive husbands is that women "believe that the love of a good woman can save any man, that the ugly frog will turn into a prince once the princess takes him into her bed and kisses him." E. PIZZET, *supra* note 45, at 41. Significant economic reasons are also a factor in the wives' decision to remain. *See* note 84 *infra*.

74. This is a condition first described by Dr. Martin Seligman in relation to his research with dogs who were confined in cages and electrically shocked on an arbitrary and random basis. They were taught that no matter what responses they made, the shocks could not be avoided. They eventually stopped trying to escape; even when the cages were finally opened, they did not go out. Recent research has linked the same principle to human subjects who are chronically depressed. Weissman & Klerman, *Sex Differences and the Epidemiology of Depression*, 34 *ARCHIVES OF GEN-*

resulting from the inability to avert repetition of traumatic events. Other victims of past violence show a similar pattern, except that in this context the stress is "unending and the threat of assault ever present."⁷⁵ In particular, observation of hundreds of battered women demonstrated that when their attempts to avoid their husbands' violent and irrational behavior proved useless (and outside help sporadic or altogether unavailable), they eventually gave up the effort to control the situation.⁷⁶ The vast majority of such women had no history of depression prior to being abused by their partners and had not repeatedly been drawn to physical or mental abuse as a life pattern.⁷⁷

One element in this passivity, accompanying the belief in the batterer's omnipotence, may be a negative self-image—I shouldn't expect any better, perhaps I don't deserve any better, I must put up with it.⁷⁸ This is not the equivalent of seeking out trauma or desiring it. Another element, or omen, is the complete repression of the victim's own rage.⁷⁹

While the large-scale studies of interspousal assaults have concentrated primarily on the female victim, there are male victims as well. The percentage of battered husbands is smaller, and they are injured less severely and frequently than battered wives.⁸⁰ This appears to be a

ERAL PSYCHIATRY 98-111 (1977). See also L. WALKER, *supra* note 72, at 45-47; Prescott & Letko, *Battered Women: A Social Psychological Perspective*, in BATTERED WOMEN 72, 84 (M. Roy ed. 1977).

75. Hilberman, *supra* note 55, at 1341. See Gil, *A Conceptual Model of Child Abuse and its Implications for Social Policy*, in BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 205 (S. Steinmetz & M. Straus eds. 1974); Rounsaville, *supra* note 72, at 18; Weissman & Klerman, *supra* note 74.

76. L. WALKER, *supra* note 72, at 47-51; Hilberman, *supra* note 55, at 1341. A large number of victims have commented that the severity of the beating increased in proportion to the amount of physical resistance shown. See Eisenberg & Micklow, *supra* note 66, at 145.

77. Rounsaville, *supra* note 72, at 16, 18. Dr. Lenore Walker has isolated three stages in the cycle of battery that help explain why some women remain in the situation. The first stage is the tension-building period that leads up to a major incident. In the second phase, the acute battering occurs. After this, the batterer may be aware that he went too far and fear that his wife may leave him. He becomes charming and exaggerated in his affection. It is this stage, not the abuse, which the victim enjoys and hopes will remain predominant. L. WALKER, *supra* note 72, at 55-70.

78. See Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 260 (1971).

79. Hilberman, *supra* note 55, at 1342. Dr. Hilberman concluded:

Like rape victims, battered women rarely experienced their anger directly. . . . It is probable that the constellation of passivity, guilt, intense fear of the unexpected, and violent nightmares reflected not only fear of another assault but a constant struggle with the self to contain and control aggressive impulses. The violent encounter with another person's loss of control of aggression precipitates great anxiety about one's own control. . . . Passivity and denial of anger do not imply that the battered woman is adjusted to or likes her situation. These are the last desperate defenses against homicidal rage.

Id.

80. The Attorney General cites us to statistics from the Staff Report submitted to the National Commission on the Causes and Prevention of Violence (Vol. 2, p. 301) which indicate that [conjugal] assaults committed by husbands upon wives as opposed to assaults committed by wives upon husbands approach the ratio of 15 to one (93.3% to 6.7%).

consequence of the generally greater size, weight, and muscle development of men rather than any male-female differential in attitude towards the use of violence.⁸¹

There are, however, additional factors that weigh more heavily on women seeking to extricate themselves from violent marriages than on their male counterparts. These include the prevalent belief that it is appropriate to permit husbands to prove masculinity by dominating other family members,⁸² early socialization of women concerning dependence, the social pressure on wives to "make the marriage work,"

People v. Cameron, 53 Cal. App. 3d 786, 796, 126 Cal. Rptr. 44, 50 (5th Dist. 1975). *But see* Straus, *Wife Beating*, *supra* note 1, at 446-49 (sample showed only a "slightly higher" incidence of violent acts for husbands than for wives). One study supplies a graphic example of a battered husband, a wealthy banker whose age and frailty made him the victim of a wife 31 years his junior. The husband bore constant scars and bruises, his ear had once been shredded by his wife's teeth, and one eye had been seriously injured. He obtained a divorce after 14 years. Steinmetz, *Wifebeating, Husbandbeating—A Comparison of the Use of Physical Violence Between Spouses to Resolve Marital Fights*, in *BATTERED WOMEN* 63, 69-70 (M. Roy ed. 1977).

Data on female violence indicate a higher rate for acts not dependent on superior physical strength, such as throwing objects. The data do not show, however, what proportion of the violent acts by wives were in response to blows initiated by the husband. Straus, *Wife Beating*, *supra* note 1, at 449 (citing Wolfgang, *Victim-Precipitated Criminal Homicide*, 48 J. CRIM. L.C. & P.S. 1-11 (1957), *reprinted in* *STUDIES IN HOMICIDE* 72-87 (M. Wolfgang ed. 1967)).

81. "National statistics show that the average adult male is 28 pounds heavier and five inches taller than the average adult female." People v. Cameron, 53 Cal. App. 3d 786, 791, 126 Cal. Rptr. 44, 47 (5th Dist. 1975).

Men can strike harder, pound for pound, than women can. They are far more skilled in the use of all tools, have had far more training in combat and body contact sports from their early childhood. More of them can shoot accurately and even own guns. Any attack by a woman is much less likely to issue in a court case, even when her emotions are as extreme, her urge to destroy as intense, simply because what she does is futile or ineffective.

Goode, *supra* note 73, at 963. *See* comments of Straus cited in note 80 *supra*.

82. Participants in the National Conference for Family Violence Researchers noted that a principal cause of family violence of all types is the abuse of power, the effort of a physically stronger member to control the weaker ones. Dr. Murray A. Straus pointed out that "[i]t is easier to control than to negotiate because to negotiate takes skills. If the dominant figure says this is the way it is going to be, there is nothing his wife or child can say about it. All he has to do is back it up with force." N.Y. Times, July 26, 1981, at 43, col. 4.

Abuse of power occurs because

[f]amily statuses and roles are, to a very considerable extent, assigned on the basis of . . . biological characteristics rather than on the basis of interest and competence. . . . [T]he conflict potential is high because it is inevitable that not all husbands have the competence needed to fulfill the culturally prescribed leadership role

Straus, *Wife Beating*, *supra* note 1, at 452. *See* Allen & Straus, *Resources, Power, and Husband-Wife Violence* (1975) (paper presented at the National Council on Family Relations 1975 Annual Meeting), *reprinted in* M. STRAUS & G. HOTALING, *THE SOCIAL CAUSES OF HUSBAND AND WIFE VIOLENCE* (1980); Kolb & Straus, *Marital Power and Marital Happiness in Relation to Problem-Solving Ability*, 36 J. MARR. & FAM. 756, 761 (1974). However, the "ultimate resource" of physical force is available to maintain a superior position. Straus, *Sexual Inequality, Cultural Norms, and Wife Beating*, 1 VICTIMOLOGY 54, 63 (1976) [hereinafter cited as Straus, *Sexual Inequality*], *reprinted in* VICTIMS AND SOCIETY (E. Viano ed. 1976) and in *WOMEN INTO WIVES* (J. Chapman & M. Gates eds. 1977). *See* Dobash & Dobash, *supra* note 19, at 434; Goode, *Force and Violence in the Family*, 33 J. MARR. & FAM. 624 (1971); Straus, *Cultural and Social Organizational Influ-*

and the wife's primary child-caring role.⁸³ The economic barriers may also be formidable. The present statistical reality is that women have fewer marketable job skills than men; that even if employed, they earn only fifty-seven cents for every dollar earned by men for the same work; and that women with children have particular difficulty in finding day-care facilities and supporting themselves as single parents.⁸⁴ And without effective protection from a husband who is physically stronger and seeks retaliation, this economic deprivation would not be offset by the subordinating benefit of safety.

Even assuming, however, that spouses who do not leave have thereby consented to being assaulted—an assumption that seems somewhat tortured in light of the fact that most victims attempt to get protection very soon after the pattern of attacks begins⁸⁵—consent would not immunize the attacker from prosecution. Just as there can be no privilege to kill even on demand, there is no legally valid permission to inflict serious physical injury on a consenting victim.⁸⁶ The fact that a

ences on Violence Between Family Members, in CONFIGURATIONS 53 (R. Prince & D. Barrier eds. 1974).

The presumption of male leadership is also embedded in legal principles. Husbands are considered the head of the household and the wife's domicile follows theirs. See Straus, *A Sociological Perspective on the Prevention and Treatment of Wifebeating*, in BATTERED WOMEN 194, 209 (M. Roy ed. 1977) [hereinafter cited as Straus, *Sociological Perspective*].

83. D. MARTIN, *supra* note 19, at 45; L. WALKER, *supra* note 72, at 35; Dobash & Dobash, *supra* note 19, at 426-32; Straus, *Sexual Inequality*, *supra* note 82, at 62-66; Straus, *Societal Morphogenesis and Intra-Family Violence in Cross-Cultural Perspective*, 285 ANNALS N.Y. ACAD. SCI. 719, 720-24 (1977); Straus, *Sociological Perspective*, *supra* note 82, at 208-19; Straus, *Wife Beating*, *supra* note 1, at 450.

84. Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RIGHTS L. REP. 7, 16 (1978). "We found that women who were unemployed, had not completed high school, . . . and had younger children, were less likely to seek a divorce or outside assistance after being beaten." Gelles, *No Place to Go: The Social Dynamics of Marital Violence*, in BATTERED WOMEN 46, 60 (M. Roy ed. 1977). See U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN'S BUREAU, THE EARNINGS GAP BETWEEN MEN AND WOMEN 1 (1976); *Case for Legal Remedies*, *supra* note 51, at 139-40.

A witness at public hearings on the problems of domestic violence in Michigan testified: "It's not that easy to get out when you have kids and no job, no car, no money, and nowhere to go. . . . You're changing your whole life. It's not that easy." MICHIGAN HEARINGS, *supra* note 18, at 123.

The demand for space in the shelters for battered women which provide temporary housing, protection and counseling far exceeds the supply. Roy, *A Current Survey of 150 Cases*, in BATTERED WOMEN 25, 32 (M. Roy ed. 1977); Woods, *supra*, at 32. In New York City the three shelters for battered women and their children served a total of approximately 1,300 families in 1978. COMMUNITY COUNCIL OF GREATER NEW YORK, TRENDS AND FORECASTS: A REPORT ON HUMAN SERVICES IN NEW YORK CITY 2 (1979).

85. Roy, *A Current Survey of 150 Cases*, in BATTERED WOMEN 25, 32 (M. Roy ed. 1977).

86. R. PERKINS, *supra* note 6, at 962. Cf. *Breaker v. State*, 103 Ohio St. 670, 671-72, 134 N.E. 479, 480 (1967), stating:

A statutory crime is not a private wrong, but a public wrong. . . . It is the state that is prosecuting the violation of its statute, on its own behalf and not on behalf of the victim A father would naturally not be inclined to prosecute his own son . . . but it would be none the less a crime, and the state's obligation would be none the less to prosecute.

masochist has acquiesced in receiving a severe beating by a sadist is no defense to an assault charge.⁸⁷ A defendant who cut off the hand of a "lustie rogue" to enable him to be a more appealing beggar was guilty of mayhem despite the rogue's request.⁸⁸ Participants engaging in an angry fist fight by mutual consent, exchanging blows intended or likely to cause serious bodily injury, are both guilty of assault and battery.⁸⁹ The only exceptions to this rule are actions that, though injurious, are carried out for a valid purpose, such as a surgical amputation or a boxing match played in accordance with the rules governing the game.⁹⁰ Thus, the presumption of consent on the part of a domestic violence victim cannot serve to legitimate a marital exclusion from the assault law.

Tributary to the consent theory is the contention that since the victim will reconcile with the assailant before the time comes to testify, violence in the home need not be treated as an assault. This argument has both factual and legal deficiencies. It is evident that victims of crimes are more likely to testify against a stranger than against someone they know.⁹¹ However, that fact alone does not authenticate the further presumption that spouses are reluctant because a reconciliation has taken place. In domestic violence cases, prosecutors may establish a gauntlet of procedures that discourage spouses from pressing for prosecution. The "Catch 22" explanation for this is that since victims will not follow through on the case, they must be diverted into nonen-

See note 17 *supra* with respect to the incidence of teenage children injuring their parents, and intrafamilial injuries to the elderly.

Unreported crimes may never be uncovered by the state, but this is a fact rather than a legal prerogative of the victim. Although the crime of assault is conveniently classified as an offense "against the person," this is merely a convenient shorthand for "an offense against the State in the form of injury to the person." Therefore, a private individual generally has no authority to settle or condone such a public wrong, even if he is the victim of it. R. PERKINS, *supra* note 6, at 975. Exceptions to this principle must be specifically provided for by statute, as, for example, California's enactment permitting the compromise of a misdemeanor for which the injured person has a civil action. CAL. PENAL CODE §§ 1377-1379 (West 1970 & Supp. 1980) (note that § 1377 precludes compromise of most violations of an order of protection). See VA. CODE § 19.2-151 (1975). Even these provisions bar condonation where there are aggravated circumstances.

87. *People v. Samuels*, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1st Dist. 1967); *Commonwealth v. Farrell*, 322 Mass. 606, 621, 78 N.E.2d 697, 705 (1948), quoted with approval from *The King v. Donovan*, [1934] 2 K.B. 498, 507, that such an assault was prohibited if it caused any injury which would interfere with the victim's health or comfort, and that the injury need not be permanent but must be more than merely transient or trifling.

88. *Wright's Case*, Co. Litt. 127a (1604).

89. *State v. Newland*, 27 Kan. 764 (1882); *Commonwealth v. Collberg*, 119 Mass. 350 (1876); *The King v. Donovan*, [1934] 2 K.B. 498; *Regina v. Coney*, 8 Q.B.D. 534 (1882).

90. *People v. Fitzsimmons*, 34 N.Y.S. 1102, 1108-09 (Onondaga County Court of Sessions 1895). See 81 HARV. L. REV. 1339, 1339 (1968) (differentiating surgery and sporting events from conduct "with no apparent social utility").

91. F. CANNAVALE & W. FALCON, WITNESS COOPERATION 71 (1976); Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* 31 (1977).

forcement channels.⁹² Furthermore, the claim that the victim has willingly withdrawn from the action is scarcely persuasive if the dormant state of the prosecution leaves the assailant free to threaten retaliation for proceeding.⁹³ By contrast, in some of the jurisdictions where prosecutors have treated interspousal attacks as crimes against the state and were firm in pursuing them, the complaining witnesses cooperated in more than ninety percent of the cases where charges were filed.⁹⁴

Regardless of the reasons for the inaction of some spouses, a classification that exempts all domestic assaults cannot be justified by a conclusive presumption that no spouse will testify in such a case. In a series of decisions spanning many substantive areas, the Supreme Court has required that those faced with a deprivation of government services be given an opportunity to demonstrate that their motives and capabilities entitle them to be treated like other potential recipients.⁹⁵ Consideration of whether Jones will testify in a particular prosecution is appropriate; an irrebuttable presumption that Smith will withdraw because Jones did is not.

The consent argument fails because it seeks to distinguish assaults

92. R. LANGLEY & R. LEVY, *WIFE BEATING: THE SILENT CRISIS* 179-80 (1977). See Comment, *Wife Beating: Law and Society Confront the Castle Door*, 15 GONZ. L. REV. 171 (1979) [hereinafter cited as *Castle Door*]; *Case for Legal Remedies*, *supra* note 51, at 149 & n.99; *Hall of Mirrors*, *supra* note 59, at 582. Preliminary referrals to bureaus within the prosecutor's office for hearings, or to outside agencies for counseling are among these devices. Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733, 735-47 (1973); *Case for Legal Remedies*, *supra* note 51, at 149-50. Yet, as noted in the recently revised *Training Key #245*, *supra* note 65, at 150, some prosecutions can proceed without testimony from the victim or from witnesses present during the assault itself: "Felony cases . . . can be pursued if there exists strong circumstantial and physical evidence."

93. Prosecutors have become increasingly aware of the victim's vulnerability to intimidation and to the discouraging effects of trial delays and adjournments. New York law now explicitly permits courts to keep the location of a witness secret as a protective measure. N.Y. Times, Aug. 7, 1981, § B, at 2, col. 5. The National District Attorneys Association has recommended that cases which involve serious threat of future harm be expedited, and that a victim-support or advocate program be instituted in prosecutors' offices to inform victims about the criminal process and to refer them to necessary support services. Fromson, *The Prosecutor's Responsibilities in Spouse Abuse Cases*, in NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *THE VICTIM ADVOCATE* (Orange Cover) 11 (1978). In addition to fear of reprisal, witnesses sometimes fail to appear because too much time would be lost from work for repeated court appearances or because child care would have to be arranged for such appearances. Response, *supra* note 22, Jan.-Feb. 1981, at 3. Acceleration of the proceeding would meet these problems.

94. For a detailed exposition of the procedures utilized by such prosecutors, see Response, *supra* note 22, Jan.-Feb. 1981, at 5-9. Conviction rates have been high; in Westchester County, for example, 119 batterers were convicted during the first six months of 1980. Only three were acquitted. *Id.* at 5.

95. *E.g.*, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (public employment); *United States Dep't of Agriculture v. Murry*, 413 U.S. 508 (1973) (food stamps); *Vlandis v. Kline*, 412 U.S. 441 (1973) (reduced tuition fees for state residents); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (state workmen's compensation benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits).

that are permitted or forgiven from all others, and because it seeks to characterize all domestic attacks as permitted or forgiven. As we have seen, consent to a beating has no legal significance, nor can a priori assertions of forgiveness preclude an entire class of citizens from access to the criminal justice apparatus.

Refusal to arrest and prosecute conjugal assailants is justified neither by claims that family sanctity will be enhanced nor by claims of consent. While equal protection demands no "mathematical nicety,"⁹⁶ the equation of a spouse's broken arm with that of any other victim hardly requires fastidious precision. Since the two kinds of victims are graphically similar in their situation, any classification penalizing only nonfamilial assault is underinclusive.⁹⁷ The fourteenth amendment may be viewed as guaranteeing the right to equal treatment,⁹⁸ including access to municipal and judicial services. Or it may be interpreted as encompassing the right to treatment as an equal—governmental decisions must accord a spouse the same regard as a person that is accorded nonspouses.⁹⁹ Under either formulation, exemption of domestic violence from the assault laws would be prohibited.

b. Civil Adjuncts to Assault Statutes

Does equal protection permit any variants in approaching conjugal attacks? May such violence be dealt with by levying more severe criminal penalties than for nonfamilial assaults or by provision of concurrent civil remedies?

A few jurisdictions¹⁰⁰ have made spouse battery a separate felony,

96. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

97. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949).

98. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("all qualified voters have a constitutionally protected right to vote"). With reference to equal access to municipal services, see *Hawkins v. Town of Shaw, Miss.*, 437 F.2d 1286 (5th Cir. 1971) which reversed the district court's dismissal of a class action suit by black residents of the town for an injunction restraining town officials from discriminating because of race in providing inhabitants with municipal services.

99. See *L. TRIBE*, *supra* note 15, at 992-93; *Reed v. Reed*, 404 U.S. 71 (1971) (striking down a mandatory provision of Idaho's Probate Code which gave preference to men over women as administrators of estates). "[W]hatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." *Id.* at 76-77.

100. E.g., CAL. PENAL CODE § 273.5 (West Supp. 1980), which reads as follows:

(a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, corporal 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 2, 3, or 4 years, or in the county jail for not more than one year.

(b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

From 1945, when this law was first enacted, until its amendment in 1977, it referred not to "any

engendering challenges under the eighth amendment based on the "cruel and unusual" length of sentence, and under the fourteenth amendment because of more favorable treatment for nonspouse assailants. In *People v. Cameron*¹⁰¹ the California Supreme Court persuasively justified the differential between spouses and nonspouses by citing deficiencies in the assault law's application to domestic violence. Unlike most assaults, the court held, interspousal attacks are

usually accomplished with fists and kicking as in this case.¹⁰² The severity of the injuries are therefore not always capable of instant diagnosis [A]n officer responding to a wifebeating case would ordinarily, in the exercise of caution and to avoid a charge of false arrest, only arrest the husband under the provisions of . . . [the assault law] in extreme cases. Even the infliction upon a wife of considerable traumatic injury would tend to be treated by the arresting officer as a misdemeanor which would produce the consequences of the wife's being left in the home to face possible further aggression.¹⁰³ But an officer given the alternative of arresting for a felony under the . . . [spouse abuse law] may do so when he observes traumatic injury.¹⁰⁴

While there appears to be little impetus towards passage of more specialized criminal statutes,¹⁰⁵ a substantial number of jurisdictions have created civil adjuncts to the existing laws, or provided that the

person," but to "any husband" inflicting injury "on his wife." Additionally, until a 1976 amendment, it provided for a maximum of ten years in prison. See other statutes listed in note 22 *supra*.

101. 53 Cal. App. 3d 786, 126 Cal. Rptr. 44 (5th Dist. 1975). Defendant based his appeal primarily on the grounds that the spouse abuse statute under which he was convicted was unconstitutional because it denied him equal protection of the law in that it applied only to husbands and not to wives. See note 100 *supra*.

102. The facts in *Cameron* were that the wife, Joyce, was asleep and was awakened by her husband who had seized her by a breast and was twisting it. Jack [her husband] told Joyce that he intended to hurt her and thereupon slapped and kicked her and threw her off the bed. He told Joyce that he had once knocked a woman's teeth out because she talked too much and since she (Joyce) did not listen he was going to have to 'fix' her ears so she would never hear again. Defendant continued to strike and shake Joyce and kicked her after he had jerked her off the bed onto the floor. In the course of the melce Joyce's nose was broken, her left ear was cut requiring considerable surgical intervention. Her face and body bore marks of trauma.

The affray concluded by defendant's forcibly dragging his wife into the bathroom and placing her under the shower after having torn off her nightgown.

Joyce's eleven-year-old daughter, who had been awakened by the commotion, ran next door to get help for her mother. The authorities were called and defendant was arrested.

Id. at 788, 126 Cal. Rptr. at 45.

103. The officer would not be empowered to make an arrest unless the misdemeanor were committed in his presence, and a citizen's arrest by the wife was considered "unlikely." The wife may be unable to leave her children, or have no other refuge. *Id.* at 792, 126 Cal. Rptr. at 47-48.

104. *Id.* at 793, 126 Cal. Rptr. at 48.

105. A Maryland proposal making spouse abuse a separate crime punishable by imprisonment and fines was defeated in the House. Md. H. 1775, 1976 Sess. In Georgia, a specific wife beating statute was repealed, with the intent that the area be covered by the general law. GA. CODE ANN. § 26-1305, Commentary at 101 (1972), cited in Note, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MARR. PRAC. & PROC. 549, 551 n.11 (1978).

family court and the criminal courts shall have concurrent jurisdiction over assaults between spouses.¹⁰⁶ If these enactments precluded the possibility of imposing the same criminal penalties for breaking a spouse's hip as for breaking a stranger's, they could not survive the fourteenth amendment's mandate. However, the civil alternatives presently in existence do not appear to effect such a preclusion, although some require the complainant to elect either a criminal or civil approach, or require the prosecutor to do so after careful evaluation of the individual facts in the case.¹⁰⁷ Rather, these additional provisions have two purposes: 1) to shore up defects in the application of the assault statutes to the unique aspect of domestic violence—continuing attacks in jointly occupied premises, and 2) to provide greater flexibility in the range and nature of available penalties.¹⁰⁸

The most significant feature of the adjunct statutes is their concentration on effective orders of protection. Pennsylvania's Protection From Abuse Act, for example, establishes a civil procedure which "shall be in addition to any other available civil or criminal remedies."¹⁰⁹ After a hearing, which must be held within ten days after the filing of a petition by an abused spouse, the court may direct the defendant to refrain from attacking the plaintiff, grant temporary possession of the residence to plaintiff (or by consent decree allow defendant to provide suitable alternative housing), and award temporary custody of minor children.¹¹⁰ Temporary ex parte orders of protection may be granted upon a showing of immediate and present danger of abuse,¹¹¹ and if court is not in session, a district justice is empowered to grant such relief.¹¹²

106. *E.g.*, N.Y. FAM. CT. ACT (29A) § 812 (McKinney Supp. 1980-81).

107. *E.g.*, N.Y. FAM. CT. ACT (29A) § 812(2)(e) (McKinney Supp. 1980-81); D.C. CODE ENCYCL. § 16-1002 (West Bound Supp. 1970). The New York Court hearing the civil case may transfer the matter to criminal court even after such an election, on consent of the victim. N.Y. FAM. CT. ACT (29A) § 813 (McKinney Supp. 1980-81), and the D.C. Family Division may dismiss prior to the taking of evidence and refer the matter back to the United States attorney for possible action. D.C. CODE ENCYCL. § 16-1006 (West Bound Supp. 1970). A subsequent offense is not, of course, bound by the prior election.

108. These approaches have been extensively chronicled. *See, e.g.*, Woods, *supra* note 84; *Hall of Mirrors*, *supra* note 59; *Castle Door*, *supra* note 92.

109. PA. STAT. ANN. tit. 35, § 10189 (Purdon 1977 & Supp. 1980).

110. *Id.* §§ 10185(a), 10186. As amended, § 10186(a)(5) authorizes the court to direct defendant to pay temporary support and child care. A Massachusetts statute includes similar relief provisions with the addition of "monetary compensation for losses suffered as a direct result of the abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses and reasonable attorney fees." MASS. GEN. LAWS ANN. ch. 209A, § 3(e) (West Supp. 1980).

111. For a discussion of the constitutional implications of such orders, see Taub, *Ex parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95 (1980).

112. PA. STAT. ANN. tit. 35, §§ 10185(b), 10188(a) (Purdon 1977 & Supp. 1980). Legislative

Thus, civil provisions may not only supply essential synapses in the existing assault laws but also, as the court in *Montalvo v. Montalvo*¹¹³ noted in relation to the New York statute, create "a constructive middle way, short of either criminally prosecuting or ignoring the violation of law." This middle road "might be helpful to the family in the sense that the husband's presence in the community under an order of protection and his continuance in his employment without a criminal record might be important to his children."¹¹⁴ This is a valuable alternative; indeed, as previously indicated, the criminal law similarly offers dispositional flexibility—based on case-by-case analysis—which may avoid interruption of employment or stigmatization as a misdemeanor or felon.¹¹⁵

The limitations of a civil or "treatment" model should be recognized, however. Resources for diagnostic, curative, and follow-up services to violent spouses are presently inadequate,¹¹⁶ and there is little evidence that taxpayers or private donors will be disposed to expand them. Moreover, this approach cannot reach uncooperative assailants who interpret a referral to a social agency or expert as an indication that society does not view attacks against a spouse as serious.¹¹⁷

consideration has also been given to making such orders operative. Pennsylvania requires that copies be served on the plaintiff, the defendant, and the local police department. *Id.* § 10187. Special notification requirements of this nature are particularly appropriate because unlike most assaults, domestic violence occurs repeatedly between the same parties, and this prior history must dictate the arresting officer's course of conduct. The Protection from Abuse Act authorizes a police officer to arrest without a warrant if he has probable cause to believe that a person has violated an order of protection, whether or not the violation is committed in his presence. *Id.* § 10190.

113. 55 Misc. 2d 699, 704, 286 N.Y.S.2d 605, 611 (Fam. Ct. 1968).

114. *Id.* at 702-03, 286 N.Y.S.2d at 610.

115. See note 57 and accompanying text *supra*. A sound decision depends upon the judge having complete information on the nature of the injury inflicted and the past history of injuries.

116. The Law Enforcement Assistance Administration's Family Violence Program is being phased out in fiscal year 1981 due to a severe cutback in the agency's funding, and local financing is scarce.

Some of the Family Violence Program grantees are still looking for funds to stay in operation when their LEAA money runs out. Many project staffs report that because state and local governments have cut human services budgets this year, they are unable to support the services battered women need. As one project director put it, 'There's not a whole lot of money out there—everyone's grasping at straws. And there's very intense competition for the funds that do exist.'

Response, *supra* note 22, Nov.-Dec. 1980, at 4. See J. FLEMING, STOPPING WIFE ABUSE 296 (1979); Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585, 591 (1970); *Case for Legal Remedies*, *supra* note 51, at 148 n.90. Existing therapy programs are described in Fleming's work at 296-309. See Dullea, *A Center Where Wife Beaters Receive Counseling Man to Man*, N.Y. Times, Sept. 16, 1980, § 1, at 24, col. 1. Dr. Hilberman notes that a violent spouse is more likely to seek help when he no longer has access to the victim. Hilberman, *supra* note 55, at 1345.

117. See text accompanying note 58 *supra*; POLICE FORUM, *supra* note 64, at 61. A study of battering men involved in a pilot treatment program at American Lake Veterans Hospital in Tacoma, Washington, found:

One characteristic that seems common in most men who batter is a pattern of minimiz-

Domestic assault cannot be fully analyzed by focusing on treatment of individuals or couples, nor is it necessarily indicative of mental illness. There is considerable evidence that social conditioning is an important factor in the increase or decrease of violence.¹¹⁸ "Acceptable" levels of such violence, even for those who claim to have lost control of themselves, are often culturally determined.¹¹⁹ The penalty accorded is part of this determination.

The law must have teeth as well as tongue.¹²⁰ Assaults have been punishable as crimes throughout our history not only because a gross violation of personal security has been perceived as a threat second only to homicide, but also because persuasion and supervision are insufficient without the ultimate sanction of incarceration.¹²¹ Professor

ing and denying. They tend to minimize the seriousness of their violent behavior to themselves as well as to others. Although at one time they may answer in detail specific questions about their severe beatings, they may then turn around and say "it wasn't that bad." Even in a treatment program they will alternate between full recognition of their violence to a denial that they have any problem with it.

A. Ganley & L. Harris, *Domestic Violence: Issues in Designing and Implementing Programs for Male Batterers* (1978), cited in *POLICE FORUM*, *supra* note 64, at 22.

118. Rounsaville, *supra* note 72, at 18.

119. See Straus, *Sexual Inequality*, *supra* note 82, at 58. See also M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS* 237 (1980); Goode, *supra* note 73, at 951; Straus, *Cultural and Social Organizational Influences on Violence Between Family Members*, in *CONFIGURATIONS* 53, 53 (R. Prince & D. Barrier eds. 1974).

120. Mediation, which often involves only one session with a third person who has no authority over either party, appears to be the least effective method of reducing violence. A 1980 evaluation of the Neighborhood Justice Centers, a group of government-funded mediation projects, concluded that this approach had generally been unsuccessful in family battery cases. Relegation of such cases to mediation trivializes the physical injuries involved and permits a battering husband to focus on the victim's failure to please him. For example, mediation agreements often include the wife's commitment to "have dinner ready on time, . . . clean the house more thoroughly, and not . . . nag her mate about his drinking problem." In contrast, prosecution tells the abuser that he is committing a crime and he faces incarceration if he does not stop—a critical message because domestic assailants tend to rely on external controls to provide limits on what is permissible. Response, *supra* note 22, Jan.-Feb. 1981, at 16-17. See also notes 117-19 and accompanying text *supra* and note 124 *infra*. Mediators have no power to enforce agreements or jail assailants.

121. See text accompanying note 123 *infra*. This is not to suggest that the social phenomenon of spouse battering should be countered only through legislation or litigation. While long term sociological approaches are beyond the scope of this Article, a number of commentators have supplied valuable hypotheses as to the causes of family violence: (1) "compulsive masculinity," the complex of traits popularly known as "machismo," Bacon, Child & Barry, *A Cross-Cultural Study of Correlates of Crime*, 66 J. ABNORMAL & SOC. PSYCH. 291, 293, 298 (1963); Straus, *Sexual Inequality*, *supra* note 82, at 63; Straus, *Societal Morphogenesis and Intrafamily Violence in Cross-Cultural Perspective*, 285 ANNALS N.Y. ACAD. SCI. 719, 722 (1977); Toby, *Violence and the Masculine Ideal: Some Qualitative Data*, 364 ANNALS AM. ACAD. POL. SCI. & SOC. SCI. 19, 20-21 (1966), reprinted in S. STEINMETZ & M. STRAUS, *VIOLENCE IN THE FAMILY* 58 (1974); see note 82 *supra*; (2) the level of violence in society, Straus, *A Sociological Perspective*, *supra* note 82, at 199-202; (3) stress created by low income and a low status occupation, Straus, *Social Stress and Marital Violence in a National Sample of American Families*, 347 ANNALS N.Y. ACAD. SCI. 247 (1980); (4) generational imitation, Steinmetz, *Wifebeating, Husbandbeating—A Comparison of the Use of Physical Violence Between Spouses to Resolve Marital Fights*, in *BATTERED WOMEN* 63, 70 (M.

H.L.A. Hart has observed that many theories for justifying punishment "are in spite of their protestations disguised forms of Utilitarianism."¹²² The notion that penalties must achieve a practical result is of ancient origin. Seneca taught that the criminal law aims at three ends: "Either that it may correct him whom it punishes, or that his punishment may render other men better, or that, by bad men being put out of the way, the rest may live without fear."¹²³

Certainty of punishment is critical to its impact.¹²⁴ Some defendants may be deterred by an immediate arrest, a judicial warning that jail will be the next step if the attack is repeated, and issuance of an order of protection—without the wink or yawn that has accompanied such measures in the past.¹²⁵ For others, even a brief prison term

Roy ed. 1977); (5) economics, O'Brien, *Violence in Divorce Prone Families*, J. MARR. & FAM. 692, 695-96 (1971); and (6) alcoholism, Roy, *A Current Survey of 150 Cases in BATTERED WOMEN* 25, 42 (M. Roy ed. 1977); Goode, *supra* note 73, at 954; SAN DIEGO POLICE DEPT., POLICE TACTICS IN HAZARDOUS SITUATIONS 194-95 (1976).

122. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9 (1968).

123. L. SENECA, *On Mercy* I xxii, 1, in MORAL ESSAYS.

124. The prime penological goal of deterrence is premised on such certainty. Smith refrains from committing an unlawful act because he believes it is probable that if he does it, he will be caught and imprisoned. With respect to most crimes, the threshold difficulty lies in detection and capture. A bank robber's comment is typical: "They didn't catch me, they're not aware that I'm working on it, and everything goes smoothly . . ." Another robber noted: "I think this is everybody's feeling—that they'll never get caught." C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 82 (1978). In domestic assault cases, identification of Smith is easy. It is Smith's arrest, prosecution, and sentencing that is improbable.

Evidence of a correlation between certainty and deterrence is circumstantial but rather dramatic. The number of felonious assaults declined almost 30% in one New York City precinct where police personnel were doubled for a four-month period. Sellin, *The Law and Some Aspects of Criminal Conduct*, in AIMS AND METHODS OF LEGAL RESEARCH 113, 119-20 (Conard ed. 1955). Nationally, scientific advances in detecting poisons were followed by a decrease in the incidence of poisonings. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 962 (1966). At the other end of the spectrum, immobilization of the police force during the historic crises in Europe was accompanied by widespread increases in crime. *Id.* at 961-62.

With specific reference to spouse battering, counsel in *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979), have been advised that some assailants had stopped attacking their spouses as a consequence of being arrested or of reading about the new arrest policy of the New York City Police Department arrived at by consent decree. See Woods, *supra* note 84, at 31. A New York Post headline, *Wife-Beaters Beware, Arrests on Way*, June 27, 1978, at 4, was one source of information as to the policy.

125. See suggestion of Lt. Rosko discussed in note 57 *supra*. In spouse abuse cases there has never been certainty of punishment or full enforcement of the assault laws. See notes 58, 69-70 and accompanying text *supra*.

Few batterers voluntarily participate in counseling. However, some jurisdictions have instituted court-ordered diversion programs in which an assailant faced with criminal prosecution elects to enter long term group therapy with other batterers. Diversion is utilized only if the defendant is sincerely attempting to change rather than manipulate the system. Data emerging from such programs indicates that behavioral improvement is more likely when the following factors are present: (1) defendant has had no prior arrest for a violent crime; (2) treatment commences within 24 hours of a battering incident, so that defendant finds it difficult to deny his

meted out under civil provisions¹²⁶ fails to prevent recidivism, and the longer period of restraint authorized by the assault law is the only effective shield against further crimes.¹²⁷

c. Nonenforcement as a Violation of Equal Protection

i. The pattern of executive and judicial action. It is a familiar abstraction that "[i]n our tripartite system of government, the three branches are co-equal, and the Constitution is superior to each branch. The supremacy of the Constitution, the supremacy of the consent of the governed, requires that each branch adhere to constitutional principles in the exercise of its powers."¹²⁸ One might therefore construct the following progression. A legislative enactment punishing only an assailant who seriously injures "a person other than his spouse" would create an irrational classification. The executive and judicial branches, fettered by a parallel incapacity under the equal protection clause, may not create such a classification. Furthermore, nonenforcement of the assault laws against domestic violators is constitutionally indistinguishable from affirmative promulgation of an unlawful category.

The third step in the syllogism can neither be summarily rejected, nor accepted without exploration of its ramifications. Can discrimination be inferred from a pattern of nonenforcement? Can such discrimination be adjudicated by the victim of a third party's unlawful conduct? Does equal protection require enforcement of the criminal laws against every violator?

As to the first of these questions, consider the vintage case of *Yick Wo v. Hopkins*.¹²⁹ The Supreme Court there reversed a conviction under a municipal ordinance "fair on its face and impartial in appearance"¹³⁰ that prohibited the construction of wooden laundries without a license. All but one of the eighty non-Chinese applicants had received licenses, while all two hundred Chinese applicants had been re-

recent conduct; and (3) defendant is aware that prosecution will recommence and that he risks incarceration if he commits another assault or drops out of the diversion program. Response, *supra* note 22, Jan.-Feb. 1981, at 11-14.

126. The New York Family Court Act, for example, authorizes a sentence of up to six months for one who willfully disobeys a court-imposed order of protection. N.Y. FAM. CT. ACT (29A) § 846-a (McKinney Supp. 1980-81).

127. See notes 117, 120, & 124 *supra*. As the court noted in *Montalvo v. Montalvo*, 55 Misc. 2d 699, 704, 286 N.Y.S.2d 605, 611 (Fam. Ct. 1968): "This court must be mindful of the value of criminal prosecution as a deterrent to violence in the community, and of the retributive function of the criminal law in cases of willful serious injuries."

128. *United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978) (conviction for failure to file income tax return upheld because defendant did not establish *prima facie* that he was singled out for prosecution because of his prominence in tax protest movement and that others similarly situated were not generally prosecuted).

129. 118 U.S. 356 (1886).

130. *Id.* at 373.

jected by discretionary decision of the licensors. The Court concluded on the basis of these undisputed facts that the municipality had based its determinations on an impermissible category. Subsequent cases interpreted *Yick Wo* as having established that the fourteenth amendment "covers the unequal enforcement of valid laws, as well as any enforcement of invalid laws."¹³¹ These decisions have generally focused on the invalidity of enforcing the prohibition against group *A* but not group *B*, rather than the impropriety of denying enforcement as to *B*.

There is extensive legislative history, however, demonstrating that the fourteenth amendment and its implementation in the 1871 Civil Rights Act¹³² were grounded upon concern over police refusal to enforce facially nondiscriminatory criminal statutes so as to protect black victims as a class against Ku Klux Klan assaults. The congressional authority for passage of the act stemmed from the fourteenth amendment's prohibition against "systematic failure to make arrests, to put on trial, to convict, or to punish" "for the protection of some class of persons" when such enforcement is accorded to another class.¹³³

Discriminatory enforcement policies as to conjugal violence can be found in official statements as well as individual cases.¹³⁴ The Michi-

131. *East Coast Lumber Terminal v. Town of Babylon*, 174 F.2d 106, 112 (2d Cir. 1949) (where state affords adequate remedy against unjust application of its laws by its officials, aggrieved person must exhaust those remedies before invoking fourteenth amendment); *Great Am. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 271-72 (1979) (veteran preference in civil service positions not a violation of equal protection).

132. Section 1 of the Act, originally called the Ku Klux Act, 17 Stat. 13 (1871), is now at 42 U.S.C. § 1983 (1976). In arguing for passage of the act, Congressman Perry of Ohio eloquently described the reasons for its necessity:

Sheriffs having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection.

CONG. GLOBE, 42d Cong., 1st Sess. at App. 78.

133. *Id.* at 459, 334. See also *id.* at 416, 482, 505-06, 606-08, 697, App. 251-52, App. 315. It is interesting to note that, in the view of the 42nd Congress, "denial" of rights—the phrase used in the equal protection clause—could be effected by omission, while "deprivation"—the term in the due process clause—required affirmative action. Thus, the scope of the enforcement power under the equal protection clause was interpreted as broader than under other parts of the fourteenth amendment. *Id.* at 459, 482, 505-06, 514, 607-08, 697, App. 251, App. 315.

134. A victim testified at a Michigan hearing:

The first time I called the sheriff, my husband . . . threw me out the back door and down the steps, and told me he was going to bash the baby's head in. He had a monkey wrench in his hand, and he said if I came near the house again, he would kill the baby. So I went across to the neighbor's, called the sheriff, and in turn was told, "We cannot help you."

MICHIGAN HEARINGS, *supra* note 18, at 45. An attorney stated that his client called me from the emergency room of the hospital. She was so severely battered that she was one bruise from head to toe, and she said her husband was outside harassing her.

gan Police Training Academy procedure, for example, differentiates domestic assaults from others and directs officers to try to avoid arresting the attacker. Victims are told that courts are not in session and that no judge is available.¹³⁵ These directions, which are similar to procedures in other jurisdictions,¹³⁶ are remarkable for their failure to predicate arrest on relevant criteria such as seriousness of the injury, use of weapons, acts of violence committed in the officer's presence, or outstanding orders of protection indicating repeated prior attacks.¹³⁷

I called the police department. They would do nothing about it. I called the sheriff's department and learned that an officer was at the hospital on another case. I called him there and read him the terms of a prior protective order. He hung up on me.

Id. at 77. See also *Sorichetti v. City of New York*, 95 Misc. 2d 451 (Sup. Ct. 1978); *Bruno v. Codd*, 90 Misc. 2d 1047, 1048-50, 396 N.Y.S.2d 974, 975-77 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

Domestic violence calls are assigned a low priority status regardless of the possible severity of the injuries. *Case for Legal Remedies*, *supra* note 51, at 144. Some requests for help are simply "screened out" by police personnel, and neither responded to nor officially recorded. J. Bannon, *supra* note 17, at 6. A recent federally funded report has recommended substantial changes in police operators' handling of such calls. Police are to gather as much information as possible about the case to relay to the responding officers, including when the assault occurred, whether a weapon was used, the whereabouts of the victim and assailant, the seriousness of any injuries, whether children are present, and if either party has been drinking alcohol. POLICE FORUM, *supra* note 64, at 83.

135. Officers are also to advise the defendant and the victim as follows: "State that your only interest is to prevent a breach of the peace." *Case for Legal Remedies*, *supra* note 51, at 145. James Bannon, Executive Deputy Chief of the Detroit Police Department, has noted that some police share society's view of females in general as secondary. J. Bannon, *supra* note 17, at 4. "The man is the boss, the owner, the female the subordinate." *Id.* at 2. It has also been found that since officers are "trained, socialized, and rewarded" for apprehending and arresting nondomestic felons, "they often resent the victim for distracting them from their preferred crime-fighting activities." POLICE FORUM, *supra* note 64, at 4. In addition, these law enforcement decisions are influenced by the unwillingness of district attorneys and judges to prosecute and sentence domestic assailants. *Id.* at 47.

136. *E.g.*, City of Oakland, Calif., Police Services, Techniques of Dispute Intervention 2-3 (1975), *cited in* Martin, *Battered Women: Society's Problem*, in THE VICTIMIZATION OF WOMEN 116 (J. Chapin & M. Gates eds. 1978) (recently modified, see POLICE FORUM, *supra* note 64, at 77 n.16); International Association of Chiefs of Police, Disorderly Conduct and Domestic Complaints, Handling Domestic Complaints, POLICE REFERENCE NOTEBOOK Unit 4A5 (2d ed. 1969), *cited in* Woods, *supra* note 84 at 9 nn.15 & 16; New York City Police Department, Police Patrol Guide §§ 110-1 to -38 (Oct. 1, 1972), *cited in* Woods, *supra* note 84; New York City Police Department, Police Response to Family Disputes i-ii (Procedural Supp. No. 1, Sept. 1969), *cited in* Woods, *supra* note 84, in effect prior to the lawsuit in *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

137. Nor do such procedures generally provide for assisting the victim in getting medical aid or in making a citizen's arrest in the event of a misdemeanor assault committed before the officer's arrival. The common law, modified in some states by statute, allows any person to make a warrantless arrest of another person who has committed a misdemeanor or felony in the arrestee's presence. The arrestee must take the arrested person to a magistrate or to a police officer as quickly as possible after making the arrest. The procedure then follows the same channel as if a police officer had made the arrest. 5 AM. JUR. 2d *Arrest* § 34 (1962); see, *e.g.*, CAL. PENAL CODE §§ 834, 837, 847, 849 (West 1970 & Supp. 1980); ILL. ANN. STAT. ch. 38, §§ 107-3, 109-1 (Smith-

Prosecutors have required extra elements before proceeding with domestic assault prosecutions, including witnesses other than the victim and children, a record of prior attacks, a police report already on file, and serious visible injuries.¹³⁸ Even when the victim is ready to testify¹³⁹ and the additional criteria are met, such cases may be rejected automatically on the theory that securing a conviction is more difficult than in nonfamilial cases.¹⁴⁰

Hurd 1980); MICH. COMP. LAWS ANN. §§ 764.14, 764.16 (West 1968); N.Y. CRIM. PROC. LAW §§ 140.30, 140.35, 140.40 (McKinney 1971 & Supp. 1979-80). Accurate reports that would permit monitoring of particular households are generally not required. Trent, *Wife Beating: A Psycho-Legal Analysis*, 84 CASE & COMMENT 14, 20 (Nov.-Dec. 1979), reprinted from 65 WOMEN L.J. 9 (Spring 1979).

There is no effort to clarify the proper role of mediation, which is largely ineffective where attacks rather than verbal disputes are at issue. See note 120 *supra*. The officer warns the victim that the attacker may retaliate if arrested, rather than warning the attacker that such retaliation would lead to swift penalty. See generally Trent, *supra*, at 23. In contrast, the consent decree in Bruuo v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part*, appeal dismissed in part, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979), requires that an arrest must be made where there is reasonable cause to believe that a felony has been committed, or that the assailant has violated a prior order of protection; that victims be advised of their legal rights; that the officer remain at the scene temporarily to prevent further attack; and that if the assailant has left the house and the victim requests an arrest, the same procedures be used to locate the assailant as in any nonfamilial assault case.

138. Trent, *supra* note 137, at 20; D. MARTIN, *supra* note 19, at 109-10 (referring particularly to the San Francisco district attorney's office). Proof of such injuries is complicated by the fact that "the experienced wife-beater . . . goes for places that don't show, like the scalp, the stomach, especially during pregnancy, and the lower spine." Cal. Hearings, *supra* note 64, at 18. Medical records may not be available if the victim is too ashamed to seek assistance directly after the attacks. Truninger, *supra* note 78, at 264. This requirement also discounts the fact that the latest injury may be one of a series and cannot be considered in isolation.

139. Legal Aid counsel described a woman whose husband had inflicted knife cuts all over her arms. She sought counsel after being told by the prosecutor's office that no charges would be pressed. MICHIGAN HEARINGS, *supra* note 18, at 73. Another wife, who had gone to the prosecutor's office to request that he issue a warrant after a series of attacks, testified that her husband's boss remained in the room during the conversation. "I objected . . . and said that if I had known he would be there, I would have brought my boss. . . . The assistant prosecutor then accused me of being an argumentative woman and said . . . that he had talked to my husband and his employer, . . . that my husband was a very sincere man, . . . and that my husband had probable cause to beat me." *Id.* at 34.

140. Trent, *supra* note 137, at 22; D. MARTIN, *supra* note 19, at 100. This theory is refuted by high rates of conviction in jurisdictions where prosecutors have firmly pursued domestic assaults as crimes against the state. See note 94 and accompanying text *supra*. Moreover, this policy overlooks the deterrent effect that enduring a trial may have on the defendant and other potential violators.

The societal attitudes that affect refusals to convict are not beyond alteration. In the analogous area of rape, one commentator has pointed out dramatic changes:

[P]olice are actively investigating and arresting suspects in rape cases; district attorneys are taking rape cases to court and winning; judges are imposing harsh sentences for men convicted of rape. It is important that society give the criminal justice system the same type of clear message that battering women is not acceptable in order that it might begin changing the manner in which it deals with the plight of battered women.

Patterson, *How the Legal System Responds*, in BATTERED WOMEN 79, 94 (D. Moore ed. 1979). See note 124 *supra*.

Studies conducted in several jurisdictions indicate that judges may refuse to accord hearings mandated under state law,¹⁴¹ or may blame the victim¹⁴² and utilize paper sanctions that accomplish little in the reduction of recidivism.¹⁴³ Some apply a "divorce" test before granting legal relief to a battered spouse.¹⁴⁴ Moreover, while several states have provided family court options for abused spouses, the statutory mechanisms that would permit the victim to obtain direct judicial access without counsel may be blocked by probation employees or petition clerks.¹⁴⁵

141. TEX. CRIM. PRO. CODE ANN. arts. 7.01-.17 (Vernon 1977) requires that whenever a magistrate is informed that an offense is about to be committed against a person, he issue an arrest warrant and hold a hearing as to whether to issue a peace bond. A mandamus action against a justice of the peace who refused to apply the law to a marital assault culminated in the defendant's agreement to conform to the statute. *Rodriguez v. Garza*, No. C-1765-78-A (92d Dist. Ct., Hidalgo County 1978), cited in Woods, *supra* note 84, at 14 nn.51-53.

142. When Sylvia Weaver, an Ohio complainant, appeared in court to testify about her husband's attacks on her, the judge instructed her to study the Bible, attend the local fundamentalist church, and learn to be a good wife. Telling her that he did not want to see her in court again, he dismissed the charges against her husband. Jensen, *Battered Women and the Law*, 2 VICTIMOLOGY 585, 589 (1977-78).

143. D. MARTIN, *supra* note 19, at 109-14; Fields, *Wife Beating: Government Intervention Policies and Practices*, in U.S. COMM'N ON CIVIL RIGHTS, *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 257-59 (1978); Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733, 747-49 (1973). Such sanctions are usually in the form of a "peace bond"—a sum of money to be posted by the defendant that can be revoked for later misconduct. Professor Raymond Parnas observes that these peace bonds are often "unfilled-out, unsecured, unrecorded, but threateningly imposed. . . . All of the magistrates interviewed [in Chicago's Court of Domestic Relations] acknowledged the 'sham,' extralegal nature of the peace bond but, nonetheless, were unanimous as to its effectiveness." *Id.* at 748. As these cases are routinely marked "discharged for want of prosecution" in the official docket and there is no further contact between the defendants and the court, *id.*, it is difficult to understand how the magistrates could be so certain as to the effectiveness of the peace bonds. It must be remembered that these cases are the most serious ones, which have survived the prosecutor's initial screening and diversions. *Id.* at 735-47. Civil remedies such as restraining and protective orders have been characterized by police officers as ineffective. POLICE FORUM, *supra* note 64, at xiii.

A Washington, D.C. attorney, Carol Murray, has offered this explanation of judicial reluctance to imprison violent husbands: "A judge isn't going to put a guy who makes a living in jail and his wife on welfare. . . . In terms of the respective values of our society, his earning money outweighs her possible physical injury." Gingold, *The Truth About Battered Wives*, MS., Aug. 1976, at 94.

144. The judge will remain unconvinced of the wife's right to redress unless she is in the process of obtaining a divorce or is divorced. R. LANGLEY & R. LEVY, *WIFE BEATING: THE SILENT CRISIS* 176 (1975). A woman may not desire a divorce, for religious or social reasons; it may be too expensive or take too much time. In addition, the divorce requirement is inapplicable to those women who are not legally married to their batterers. *Case for Legal Remedies*, *supra* note 51, at 152-53. *Cf.* WASH. REV. CODE ANN. § 10.99.040(1)(a)-(b) (West 1980) (mandating that the court "[s]hall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings; [and] [s]hall not require proof that either party is seeking a dissolution of marriage prior to instigation of criminal proceedings").

145. New York provides that a victim may either choose to receive conciliation counseling or to file a court petition. N.Y. FAM. CT. ACT (29A) § 821(b) (McKinney 1975). Petition clerks must type the petition and schedule a court appearance if an immediate temporary order of protection

ii. *Compelling enforcement through invocation of the Civil Rights Act.* One of the most crowded gateways to the federal courts is provided by section 1983 of the Civil Rights Act, supplemented by its jurisdictional coordinates.¹⁴⁶ Since section 1983 applies directly to equal protection violations by states and emanates from the 1871 statute enacted to remedy refusals to enforce criminal laws,¹⁴⁷ it can be invoked to compel nondiscriminatory application of assault statutes to domestic violence. Perhaps because of the time and resources required for a broad-gauged federal lawsuit in which sophisticated constitutional, statutory, and common law defenses are available, it has seldom been invoked.¹⁴⁸ Nor have the courts thus far rendered a definitive decision on the merits in such a suit.

Commencement of an omnibus action presents a number of strategic choices as to which parties and claims should be joined.¹⁴⁹ Although the inclusion of several categories of defendants in the same lawsuit compounds the complexity of the counterarguments, it has the advantage of providing the court with an overview of how each component in the criminal justice system may contribute to the challenged nonenforcement.¹⁵⁰ Possible defendants in a suit for declaratory and

is requested. *Id.* § 823(b). However, affidavits filed in *Bruno v. Codd* state that probation employees do not tell victims that they have a right to file a petition at the outset and to request an immediate protective order, but instead assign the case to a conference weeks or months later. Petition clerks have told women that "nothing can be done [sooner]" and when the women have insisted on requesting immediate temporary orders of protection, they have been brushed off with the comment, "Don't hassle me." Affidavit of Gloria Mercado at 23, *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

146. See 28 U.S.C. §§ 1331, 1343(3) & 1343(4) (1976 & Supp. 1981). Section 1983 prohibits "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . . [from] subject[ing], or caus[ing] to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" 42 U.S.C. § 1983 (1976).

147. See notes 132-33 and accompanying text *supra*.

148. Two major lawsuits in addition to the *Bruno* case are *Scott v. Hart*, No. C76-2395 (N.D. Cal., filed Oct. 28, 1976) and *Raguz v. Chandler*, No. C74-1064 (N.D. Ohio, filed Feb. 4, 1974). The *Raguz* plaintiffs cited the due process clause and the first amendment right to petition for redress of grievances as well as the equal protection clause.

While the equal protection claim has both analytical and historical validity, reliance on due process arguments is, as previously indicated, more tenuous. See Part I, Section B(1) *supra*. The right to petition the government for redress of grievances might apply in suits against court employees who block access to the judiciary, see note 145 and accompanying text *supra*, but would not be relevant to suits against other categories of defendants; the first amendment protects the right to ask, but does not guarantee any governmental response. *Smith v. Arkansas Highway Employees Local 1315*, 441 U.S. 463 (1979).

149. For comprehensive and well-conceived suggestions on how to prepare and conduct such suits, see Woods, *supra* note 84, at 16-22.

150. In a § 1983 case, there is no duty to exhaust state judicial remedies prior to suit in a federal court. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). But see *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (petitioners for habeas corpus relief must exhaust state remedies despite § 1983 claim

injunctive relief would include named police officers who have refused to assist or make arrests in marital assault cases, and their supervisors at middle and high levels;¹⁵¹ prosecutors who automatically decline to proceed where domestic attacks are involved, rather than consider each case on its own merits and according to the same criteria as nonspousal cases;¹⁵² and court personnel who refuse victims access to judges and misinform or mislead them as to available court procedures.¹⁵³

The federal courts are not necessarily the most advantageous forum for plaintiffs. Where state law or regulation explicitly creates mandatory duties on the part of executive officials, an action in the state courts seeking enforcement of statutory rights neatly avoids defenses involving official discretion. As the New York Court of Appeals has noted: "[J]usticiability can hardly be denied when what is at stake is not the righting of social injustices, deeply disturbing though they may be, but the enforcement of clear, nondiscretionary and easily definable statutes and rules adopted for the governance of a judicial en-

when only more speedy release is sought). Courts are divided as to whether exhaustion of state administrative remedies is required. Compare *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969) (exhaustion of state administrative remedies required) with *McNeese v. Board of Educ.*, 373 U.S. 668, 671-76 (1963) (exhaustion of state administrative remedies not required where such remedy is inadequate) and *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (exhaustion of state administrative remedies not required where it would be futile). The requirement of showing a live controversy between the parties, e.g., *Poe v. Ullman*, 367 U.S. 497, 502-03 (1961), may necessitate advising defendants and their supervisors of the problems being encountered and asking for prompt remedial action.

151. See *Scott v. Hart*, No. C76-2395 (N.D. Cal., filed Oct. 28, 1976). Plaintiffs, battered women who had unsuccessfully sought police aid, sued the chief of police, the watch commander, the supervisor of the radio room, the officer in charge of handling complaints, and the Oakland City Council, which has ultimate responsibility for police actions, alleging that defendants had a policy and practice of discouraging arrests in domestic violence cases. Although state claims were included in the complaint, the emphasis was on federal claims.

The suit ended in an out-of-court settlement in which the police department agreed to treat domestic assaults as it would other criminal conduct, including making arrests where appropriate. It also agreed to develop new training materials and issue new implementing orders. As a part of these orders, police officers are to distribute a resource brochure for battered women. Settlement Decree, *Scott v. Hart*, No. C76-2395 (N.D. Cal., filed Nov. 9, 1979).

152. See *Raguz v. Chandler*, No. C74-1064 (N.D. Ohio, filed Feb. 4, 1974), in which defendant prosecutors entered into a consent decree agreeing *inter alia* to advise police that domestic assaults would be prosecuted, to permit the victim to request review of the prosecutor's determination not to prosecute, and to advise the victim of the right to such review.

153. See *Bruno v. Codd*, 90 Misc.2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (court personnel were sued in the New York state courts). It may be noted that New York now gives victims seeking orders of protection in the Family Court the right to a court-appointed lawyer. N.Y. Times, Aug. 10, 1981, § B, at 4, cols. 2-5. Apparently no suit against the judges themselves has been filed in such an omnibus action because of the historic reluctance of the federal courts to supervise their state counterparts. See, e.g., *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (dismissing a complaint by blacks seeking to enjoin state court judges from discriminating on racial grounds in imposing sentences and setting bail, citing lack of ripeness as well as the problem of continuous oversight).

tity."¹⁵⁴ The court unfortunately did not go on to adjudicate the issues, but instead preferred to declare the action moot on the basis of official assurances that the laws invoked would be enforced.¹⁵⁵

(a) *Standing*. Absent a legislative basis for a claim that ministerial official duties are being withheld, plaintiffs in an enforcement action must surmount doctrinal obstacles such as standing, comity, and discretion. Presume that a class¹⁵⁶ of plaintiffs who have been victims of domestic violence commences a federal district court action alleging that defendant officials¹⁵⁷ have denied them equality of treatment with nonfamilial assault victims, in violation of the fourteenth amendment. Defendants might respond that the suit is barred at the outset by the Supreme Court's holding in *Linda R.S. v. Richard D.*¹⁵⁸ that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

154. *Bruno v. Codd*, 47 N.Y.2d 582, 588, 393 N.E.2d 976, 979, 419 N.Y.S.2d 901, 904 (1979). There were multiple categories of named defendants in *Bruno*: the police commissioners, the state and city directors of probation, and the chief clerk of the Family Court. Woods, *supra* note 84, at 17. Plaintiffs only raised state law claims, expressly reserving all federal claims, so that if the state court determined that the case was a class action and then ruled in favor of the defendants on the merits, future plaintiffs in a federal action would not be precluded by res judicata or collateral estoppel. *Id.* at 21. The state law claims were based *inter alia* on police failure to respond to calls for help despite statutory direction to do so. City law makes it the duty of the police to protect the safety of the public and enforce the law. 1 N.Y.C. CHARTER & CODE § 435(a) (1976). In addition, state law authorizes that an arrest be made where there is probable cause to believe that a crime has been committed, N.Y. CRIM. PROC. LAW §§ 140.10 & 140.15 (McKinney 1971), and requires that citizens be assisted in making a civilian arrest. *Id.* §§ 140.30(1) & 140.40(1) (McKinney 1971 & Supp. 1980-81). The complaint also alleged that family court clerks and probation department employees had denied battered wives access to the court. N.Y. FAM. CT. ACT (29A) §§ 811, 821, 823(b), 828 (McKinney 1975 & Supp. 1980-81). See Woods, *supra* note 84, at 21-25.

In the consent decree, the New York City Police Department agreed to make changes in written training materials and training programs. The department acknowledged its duty to respond to requests for assistance or protection from battered women and to arrest the husband rather than attempt to reconcile the parties where reasonable cause exists to believe that the husband has committed a crime or a violation of an order of protection. The police department also agreed to advise women of all their rights under the Family Court Act and to assist them in obtaining medical care when requested. *Id.* at 31-33.

155. Plaintiffs had not only supplied extensive documentation of past refusals and failures to enforce existing statutes, but had also brought to the court's attention evidence that such practices continued even after suit was filed. Woods, *supra* note 84, at 25.

156. A suit on behalf of a class is the usual vehicle for establishing the parameters of a constitutional right because it obviates the need for multiple lawsuits. However, an adverse decision may preclude a subsequent suit predicated on the same grounds. State law may also inhibit use of the class device in suits against government officials, citing the presumption that defendants will voluntarily apply a court directive to all similarly situated persons. See Woods, *supra* note 84, at 25 n.124.

157. We will presume further that all three categories of defendants—police, prosecutors, and court employees—are included. Inclusion of the latter could be based on a pendent state claim that such employees have breached statutory duties.

158. 410 U.S. 614, 619 (1973).

This contention would have no application to cases against police officers and court employees where nonarrest and denial of court access rather than prosecutorial policies are challenged. Moreover, full analysis of the basis and context of *Linda R.S.* demonstrates that the holding is inapposite to our model suit. The decision concerned a Texas statute providing that any parent who willfully deserted or refused to support minor children would be guilty of a misdemeanor. This provision had been consistently interpreted to refer only to parents of legitimate children; plaintiff was the mother of an illegitimate child seeking application of the statute to the child's father.

The Court's dissatisfaction with plaintiff's standing was grounded upon the core defect of lack of injury:

Here, appellant has made no showing that her failure to secure support payments results from the nonenforcement The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the "direct" relationship between the alleged injury and the claim sought to be adjudicated . . . is absent in this case.¹⁵⁹

By contrast, such a direct relationship is highly visible in a suit by assault victims for enforcement. In addition to the deterrent effect of prosecution,¹⁶⁰ the dangerous defendant can be restrained by incarceration from continuing a pattern of assaults on a spouse. As the Second Circuit held in *Inmates of Attica Correctional Facility v. Rockefeller*:¹⁶¹

[T]he present case is in some respects distinguishable from *Linda R.S.* Unlike the mother there the inmates might be said to have sustained or be immediately in danger of sustaining direct personal injury as a result of nonenforcement of the criminal laws against the accused state officers. . . . Where a successful prosecution . . . would serve to deter the accused from harming the complainant rather than merely supply a penal inducement to perform a duty to provide assistance, the complaining person does show a more direct nexus between his personal interest in protection from harm and the prosecution.¹⁶²

(b) *Comity and discretion.* Once the standing objection is met, and plaintiffs have made the factual showing¹⁶³ that links defendants'

159. *Id.* at 618.

160. *See* note 124 *supra*.

161. 477 F.2d 375 (2d Cir. 1973). Inmates sought to compel investigation and prosecution of alleged criminal violations against them by state officers during and following an uprising at the prison.

162. *Id.* at 378.

163. This showing would include the specific acts perpetrated by named defendants in violation of plaintiffs' constitutional rights, the facts supporting the existence of a policy or pattern of conduct violative of the Constitution, and the relation of this policy or practice to misconduct by unnamed defendants. If there is evidence that defendants' conduct was based upon "archaic and overbroad" assumptions about a husband's right to "punish" his wife (*cf.* *Weinberger v. Wiesen-*

policy or practice to plaintiffs' injury, the problem of the relief requested becomes critical. The obstacles to such relief will relate to the type of official being sued.

(1) *Police*. A key element of an injunction against police defendants would generally be the mandate that where there is reasonable cause to believe that an assailant has committed a felony or violated an order of protection, an immediate arrest will be made. Further, where a misdemeanor is involved, the officer will not refuse to arrest merely because the parties are married, or because no order of protection has been previously obtained, or because the officer prefers to "mediate" even though the victim requests an arrest.¹⁶⁴

Police defendants may characterize this request as an unwarranted intrusion into the authority vested in them by state and local law. This contention has two intertwined branches—the doctrine of comity, which cautions the federal judiciary against upsetting the delicate relationship between the national and state governments, and the concept of manageability, which cautions against undertaking continuous surveillance over discretionary duties.¹⁶⁵

Comity is a judge-made rather than a statutory creation which recedes in proportion to the imminence of the controversy between the parties and the nature of plaintiffs' injury. Where that injury is great, immediate, and irreparable, the judiciary may not decline to remedy the constitutional violation even on the grounds of courtesy towards another sovereign.¹⁶⁶ Proof that plaintiffs will be physically beaten unless the assault laws are enforced would certainly reach the required magnitude.

feld, 420 U.S. 636, 643 (1975) (striking down a provision of the Social Security Act that gave survivor benefits to the widow and children of a deceased male worker, but only to the children of a deceased female worker, a provision resting on "archaic and overbroad" assumptions and violative of the equal protection secured by the due process clause of the fifth amendment)), such facts can supplement the proof of unlawful discrimination between familial and nonfamilial assault victims.

164. See note 137 *supra* as to the officer's authority to arrest or to facilitate a citizen's arrest in misdemeanor cases. Other injunctive provisions obtained in the *Bruno v. Codd* consent decree are summarized at note 154 *supra*.

165. Comity has been described as:

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . [T]he concept . . . represent[s] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). See discussion of manageability in *O'Shea v. Littleton*, 414 U.S. 488, 500-02 (1974).

166. See, e.g., *O'Shea v. Littleton*, 414 U.S. 488 (1974).

The manageability concept contains both policy and practical components.¹⁶⁷ The judiciary has historically been wary of encroaching on the territory committed by the Constitution to other branches of government, and understandably reluctant to issue broad symbolic orders that are too rigid for day-to-day application. In *Rizzo v. Goode*,¹⁶⁸ for example, two classes of plaintiffs—minority citizens and “all Philadelphia residents in general”¹⁶⁹—sued the mayor, the city managing director, the police commissioner, and other Philadelphia officials, charging a pervasive pattern of mistreatment by police officers. The five-man Supreme Court majority, quoting with approval from *O’Shea v. Littleton*,¹⁷⁰ held that “[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects.”¹⁷¹ It also found no “adoption and enforcement of deliberate policies” that defendants would continue to apply “against the members of this discrete group.”¹⁷²

A policy of refusing to arrest in domestic assault cases despite injuries that would have led to arrest in nonfamilial attacks involves precisely the elements missing in *Rizzo*. The victim of the violence is living with the assailant or is being pursued because of a past relationship, and the withholding of police protection therefore has present adverse consequences. This is not the random possibility that a particular plaintiff might become a victim, but rather the unadorned fact that the class members are continuing targets.

Nor does formulation of a remedy present an insoluble difficulty. As the trial court noted in *Bruno v. Codd*:¹⁷³

Plaintiffs do not seek to abolish the traditional discretionary powers of the police; they merely seek to compel the police to exercise their discretion in each “particular situation,” and not to automatically de-

167. It may be noted that although the doctrine of comity evolved from fear of federal-state friction, *see note 165 supra*, and is therefore peculiarly applicable to suits commenced in the federal court, the concept of manageability is relevant to state court suits as well. As was pointed out by the New York Court of Appeals in *Bruno v. Codd*, 47 N.Y.2d 582, 588, 393 N.E.2d 976, 979, 419 N.Y.S.2d 901, 904 (1979), for example, “the judicial process may not be designed to assume the management and operation of an executive enterprise or to correct broad legislative and administrative policy, which ultimately may be dependent on the political process.” However, such separation of powers concerns may be overcome by the state courts’ responsibility to enforce the United States Constitution, which corresponds to that of the federal judiciary. U.S. CONST. art. VI.

168. 423 U.S. 362 (1976).

169. *Id.* at 366-67.

170. 414 U.S. 488, 495-96 (1974).

171. 423 U.S. at 372.

172. *Id.* at 374.

173. 90 Misc.2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev’d in part, appeal dismissed in part*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff’d*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979). The police defendants did not pursue an appeal from the trial court’s decision.

cline to make an arrest solely because the assaulter and his victim are married to each other.¹⁷⁴

Such declinations may be interpreted as either an abuse of discretion or an unlawful refusal to exercise that discretion.¹⁷⁵

The Police Executive Research Forum has pointed out that "professional policing . . . [mandates that] managers . . . designate cases in which a particular method of disposition is required and . . . define the acceptable range of actions officers may take in each of these cases."¹⁷⁶ Within these parameters, officers exercise discretion in assessing each individual situation and placing it in its proper category. An arrest should be made where there are serious injuries, use of a deadly weapon, or violation of a prior restraining order.¹⁷⁷ Misdemeanor assaults allow a broader range of law enforcement remedies including arrest, issuance of a summons, referral to social agencies, and assisting the complainant in making a citizen's arrest.¹⁷⁸ The Police Forum report notes further that officers often request "more specific guidance from top brass" on how to handle conjugal violence.¹⁷⁹

The Supreme Court has recognized that where "a right and a violation have been shown, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies."¹⁸⁰ Once the federal trial court has fashioned a standard prohibiting refusal to arrest where there is reasonable cause to believe that a felony has occurred and addressing other specific illegalities in the local pattern, the police department may itself evolve rules to implement the decree.¹⁸¹

174. *Id.* at 1049, 396 N.Y.S.2d at 976.

175. See K. DAVIS, 1970 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 982-83, 986 (1970); *Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F.2d 715, 719 (2d Cir. 1966); *DeVito v. Shultz*, 300 F. Supp. 381 (D.D.C. 1969); *Manjares v. Newton*, 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966); *In re Veterans' Indus., Inc.*, 8 Cal. App. 3d 902, 88 Cal. Rptr. 303 (2d Dist. 1970).

176. POLICE FORUM, *supra* note 64, at iv. See note 64 *supra* for a description of the Forum and of the study that led to the report.

177. POLICE FORUM, *supra* note 64, at iii, 61. See *Baker v. City of New York*, 25 A.D.2d 770, 771, 269 N.Y.S.2d 515, 517 (1966); *Sorichetti v. City of New York*, 95 Misc. 2d 451, 408 N.Y.S.2d 219 (Sup. Ct. 1978), *aff'd*, 70 A.D.2d 573, 417 N.Y.S.2d 202 (1979).

178. See, e.g., N.Y. CRIM. PROC. LAW § 140.40 (McKinney Supp. 1980-81); *People v. Foster*, 10 N.Y.2d 99, 176 N.E.2d 397, 217 N.Y.S.2d 596 (1961). Cf. WASH. REV. CODE ANN. § 10.99.030(3)(a) (West 1980) (directing a peace officer to "notify the victim of the victim's right to initiate a criminal proceeding in all cases where the officer has not exercised arrest powers or decided to initiate criminal proceedings by citation or otherwise").

179. POLICE FORUM, *supra* note 64, at 82. Patrol officers did not regard specific procedures negatively, but instead seemed to welcome advice and guidance. Some officers reported that they felt ill-equipped with only "seat of the pants" skills and were eager to receive any available materials on how to handle domestic violence calls. *Id.*

180. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

181. Professor Kenneth Culp Davis, for example, has suggested that elimination of arbitrary police discretion should be effectuated by judicially required rulemaking "formulated by the po-

(2) *Prosecutors*. Suits against prosecutors who decline to proceed where attacks are interspousal must meet formidable defenses. Since the 1868 decision in *Confiscation Cases*,¹⁸² it has been the conventional wisdom that prosecutors have unreviewable discretion. In the context of federal prosecutions, some courts have opined that "as an incident of the constitutional separation of powers" the judiciary cannot interfere with any discretionary prosecutorial act,¹⁸³ while others have declared that "[f]ew subjects are less adapted to judicial review . . . [W]hile this discretion is subject to abuse or misuse just as is judicial discretion, deviations from [the United States Attorney's] duty as an agent of the Executive are to be dealt with by his superiors."¹⁸⁴

Separation of powers barriers would affect the federal judiciary vis-a-vis federal rather than state executive officials.¹⁸⁵ The manageability claim is based on a consciousness of the many complex variables that figure in a prosecutor's decisions. Yet, as Professor Davis notes, the tradition of unreviewability "became settled before . . . the twentieth-century discovery that the courts can interfere with executive action to protect against abuses but at the same time can avoid taking over the executive function."¹⁸⁶

One trigger for such a limited review would be a pattern of prosecutorial decisions that admittedly treat members of a particular group differently from others affected by a penal statute.¹⁸⁷ The Supreme Court stated in *Oyler v. Boles*¹⁸⁸ that "[t]he conscious exercise

lice, and continually reworked by the police on the basis of experience" Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 712 (1974). See also Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972). Such rules could provide a mechanism for supervisory control over the practices of subordinate officers. See note 167 *supra*. The court would therefore not be involved in day-to-day monitoring of the decree.

182. 74 U.S. (7 Wall.) 454 (1869).

183. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

184. These are the words of Judge (now Chief Justice) Burger in *Newman v. United States*, 382 F.2d 479, 480, 482 (D.C. Cir. 1967). State prosecutors may have no coordinate "superior."

185. See L. TRIBE, *supra* note 15, at 17.

186. K. DAVIS, *supra* note 175, at 988. Judicial review, where undertaken, has not proved unfeasible. The State of Michigan provides that any decision not to prosecute after investigation must be followed by a written statement of the reasons "in fact and in law," and that if the court is dissatisfied with the statement, it may order that the case be prosecuted. MICH. COMP. LAWS ANN. § 767.41 (West Supp. 1980).

Some European jurisdictions, for example West Germany, have permitted judicial supervision. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 191-93 (1969). Section 152(2) of Germany's Code of Criminal Procedure requires the public prosecutor to "take action against all judicially punishable . . . acts, to the extent that there is a sufficient factual basis." GERMAN CRIM. PROC. CODE § 152(2), reprinted in Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443 (1974).

187. *Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F.2d 715, 719 (2d Cir. 1966); K. DAVIS, *supra* note 175, at 985.

188. 368 U.S. 448 (1962).

of some selectivity in enforcement is not in itself a federal constitutional violation," but went on to contrast such instances with unlawful selection "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification."¹⁸⁹ A differentiation based upon first amendment activities is another species of arbitrary prosecutorial classification.¹⁹⁰ It is interesting to note that, *inter alia* because of the congressional mandate in section 1983, there has been less hesitance in scrutinizing discriminatory standards where the defendant is a state rather than a federal prosecutor.¹⁹¹

Given these constitutional restrictions on prosecutors, can an automatic refusal to accord equal treatment to domestic and nondomestic attacks be insulated from judicial inquiry? Let us posit a conjugal case of probable criminal liability, with sufficient evidence to meet the district attorney's criteria in prosecuting crimes between strangers. There is a credible witness to the crime¹⁹² or other persuasive proof of the defendant's culpability.¹⁹³ A bald invocation of a domestic exclusion, such as a Michigan prosecutor's assertion that "the sanctity of the marriage is more sacred than the criminal law and the one-punch fight . . . [and] overrides the criminal code,"¹⁹⁴ should be subject to review.

The district attorney may proffer a more sophisticated plea for discretion, however. The office is understaffed and overburdened, and lacks the resources to prosecute every crime even where the evidence is available. Therefore he must concentrate on the cases which, in his judgment, are the most important.¹⁹⁵

This "scarce resources" argument has encountered equal protection challenges even when applied to nonviolent crimes such as selling goods on Sunday.¹⁹⁶ Splitting off "unimportant" assault cases, rather

189. *Id.* at 456. See *People v. Harris*, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960).

190. *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). See *Cox v. Louisiana*, 379 U.S. 536 (1965); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972).

191. See, e.g., *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970) where the Sixth Circuit cited a separation of powers rationale and the lack of an appropriate statutory base in declining to review the discretion of a United States attorney and the Attorney General who had allegedly failed to prosecute civil rights violators. In the same decision, the court assessed the actions of the state prosecutors to determine whether they were "arbitrary or discriminatory." *Id.* at 578.

192. For a discussion of the specific problems of victim cooperation and their successful resolution, see at notes 91-94 and accompanying text *supra*.

193. Such proof can be either physical or circumstantial. See note 92 *supra*.

194. Statement of William Delhey, Chief Prosecutor of Washtenaw County, Michigan, cited in *R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS* 157-58 (1977).

195. The district attorney may state by way of analogy that in barroom brawls where two equally matched combatants eagerly entered the fray, inflicted minor bruises on each other, and are unlikely to meet again, he declines to prosecute because of the nature of the injuries.

196. For example, in the Philadelphia area, a policy of prosecuting only large violators of the Sunday Blue Laws was held unconstitutional by a trial court. *Bargain City U.S.A., Inc. v.*

than for example gambling matters, would be a curious inversion of priorities,¹⁹⁷ particularly where recidivistic assailants are involved.¹⁹⁸ When the split is based on the marital status of the victim rather than on the nature of the injuries inflicted and the danger of continuing attacks, the defect rises to constitutional dimension.

What kind of decree could be formulated to require rather than to prohibit prosecution of a class of cases?¹⁹⁹ The central mandate would be to consider each case on its own merits, a provision no more general than National Labor Relations Board orders compelling management and labor to bargain in good faith.²⁰⁰ This would establish a policy of nondiscrimination in marital cases; its execution would be left to the prosecutor as an officer of the court. Other possible components, which have recently been recommended or consented to by prosecutors, could be the requirement that nonfrivolous complaints be investigated even if no arrest has been made, that police be advised of the policy of prosecuting domestic assaults, and that cases be expedited to reduce the danger of witness intimidation.²⁰¹

It has been noted that the power to initiate and discontinue a pro-

Dilworth, 29 U.S.L.W. 2002 (Pa. Ct. Com. Pls., June 10, 1960), *aff'd without reaching this question*, Bargain City U.S.A., Inc. v. Dilworth, 407 Pa. 129, 179 A.2d 439 (1962).

197. It should be noted that less drastic methods of supplementing resources may be available. Some jurisdictions permit the district attorney to appoint special prosecutors, which are generally drawn from a panel of attorneys serving on a rotating basis. *See, e.g.*, *People v. Van Sickles*, 13 N.Y.2d 61, 192 N.E.2d 9, 242 N.Y.S.2d 34 (1963); N.Y. COUNTY LAW § 701 (McKinney 1972). A private organization may also appear as an *amicus curiae* to assist the district attorney, and with the court's consent may argue as well as merely file briefs. *People v. Mandel*, 61 A.D.2d 563, 403 N.Y.S.2d 63 (1978); Blumberg & Bohmer, *The Rape Victim and Due Process*, 80 CASE & COMMENT 3, 16 (Nov.-Dec. 1975); Note, *Amicus Curiae Participation—At the Court's Discretion*, 55 KY. L.J. 864 (1967).

198. Interspousal battery is generally a pattern of behavior, rather than an isolated incident. Straus, *Wife Beating*, *supra* note 1, at 445-46.

199. *Cf. Dunlop v. Bachowski*, 421 U.S. 560 (1975) (holding reviewable a decision not to bring a civil prosecution under the Labor-Management Reporting and Disclosure Act of 1959).

200. Comment, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1310 (1965). *See* Labor-Management Relations Act §§ 8(a)(5), 8(d) & 9(a) (codified at 29 U.S.C. §§ 158(a), 158(d), & 159(a) (1976)); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *Brooks v. NLRB*, 348 U.S. 96 (1954); *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). Such orders do not require supervision of each step in the proceeding, or day-to-day monitoring. *Cf. Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967) (voicing concerns that the court would have to become involved in such monitoring); *Boyne v. Ryan*, 100 Cal. 265, 34 P. 707, 708 (1893) (same).

201. The first two measures were consented to by the defendants in *Raguz v. Chandler*, No. C74-1064 (N.D. Ohio, filed Feb. 4, 1974). *See* note 152 *supra*. The latter provision was recommended at a 1978 conference of the National District Attorneys Association. Fromson, *The Prosecutor's Responsibilities in Spouse Abuse Cases*, in NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *THE VICTIM ADVOCATE* (Orange Cover) 11 (1978). Other proposals set forth at the conference included retention of jurisdiction for one year in cases where counseling of the defendant is attempted, so that prosecution would follow if the violence has continued. *Id.* at 21-22. *See also* recommendations (which have been adopted in some jurisdictions) that prosecutors should sign complaints filed against batterers, send subpoenas to victims prior to trial, and refuse to drop

ceeding gives a prosecutor "more control over an individual's liberty and reputation than any other public official."²⁰² This power is a unique feature of American criminal justice. Despite the common law underpinnings of our jurisprudence, American law differs from the English model as to the locus of control over criminal proceedings. In England,²⁰³ prosecutions are regarded as private in character, with official proceedings limited to a relatively small number of cases brought by the director of public prosecutions. Cases initiated on police complaints are in theory brought by a private citizen, though in uniform. Under the prevailing system, "private citizens not in uniform can (and do) prosecute even cases of serious crime."²⁰⁴

This option is not available to an American conjugal assault victim. The state determines the rules and holds all the cards, denominating those to be included in the game and choosing the suits to be favored. The constitutional infirmity is not that a private actor has caused physical harm to a citizen without governmental interference. Rather, equal protection is infringed because governmental fiat has created a monopoly over the criminal process while designating a class of citizens as ineligible for protection.²⁰⁵ Ironically, this deprivation exists side by side with intricately structured requirements and penalties that provide the maximum deterrence to vigilante activity or self-help.²⁰⁶

II

THE LAW OF HOMICIDE

The denial of legal protection to assault victims has a critical ini-

charges after filing unless there are exceptional circumstances. Response, *supra* note 22, Jan.-Feb. 1981, at 19 & *passim*.

202. Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1057 (1955) (footnote omitted).

203. Wales and Ulster have also retained the private model. P. DEVLIN, CRIMINAL PROSECUTION IN ENGLAND 19-27 (1960). It has been suggested that the prosecutor's traditional protection from review emanated from his restricted common law role, and was fortuitously grafted onto the exclusive American approach. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1126 (3d ed. 1975).

204. Langbein, *supra* note 186, at 441 (footnote omitted). See also *id.* at 440-43. In France, the state controls "l'action publique," but the action may also be initiated by the victim in order to establish a basis for a private damage claim. *Id.* at 441-42; C. PRO. PEN. art. 1, 85, reprinted in Langbein, *supra* note 186, at 441 n.5. While the American model of centralizing prosecutorial power may provide the benefit of a more orderly procedure, it also facilitates class discrimination that should be subject to judicial correction.

205. Officials who withhold such benefits while functioning in their official capacity are deemed to be acting under color of state law and subject to constitutional strictures even where their conduct is unauthorized by the legislature. See *Monroe v. Pape*, 365 U.S. 167 (1961); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913).

206. The requirements for justifying a homicide are discussed in Part II, Section A *infra*. The hiring of a private security guard to assist in temporarily subduing an assailant would restrict protection to the rich, while still failing to meet the problem of prosecutorial rejection.

pact not only on the rate of intrafamily killings,²⁰⁷ but also on the continued viability of the rationales underlying traditional homicide doctrines. The consequences of homicide have been ranked along a sliding scale: full penalty because no valid defense was demonstrated; reduced sanction because of mitigating circumstances; no punishment because the defendant was justified or insane. Cautious definition of what constitutes justification for killing an assailant is predicated on the assumption that police aid may be substituted for private retaliation.

However, there are signals of a new doctrinal development. It has been asserted that "[d]efinitions of self-defense and victim provocation are being expanded to provide the basis for acquittal . . . when husband murders are committed by wives who have been the victims of years of wife beating."²⁰⁸ While there have been no studies that provide a systematic comparison between the outcome in such domestic homicide prosecutions and self-defense cases in other contexts,²⁰⁹ a number of well-publicized acquittals indicate a de facto attenuation of legal strictures.²¹⁰

At the other end of the spectrum, cases involving unexpectedly harsh sentences imposed despite the presence of traditional mitigating or justifying factors²¹¹ are further indication of judicial confusion as to

207. In one city it has been shown that in 85% of the cases, when a homicide occurred in the course of domestic violence, the police had been summoned at least once before the killing occurred, and in 50% of the cases the police were called five or more times before the actual murder.

Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RIGHTS L. REP. 149, 152 n.39 (1978) (citing DOMESTIC VIOLENCE AND THE POLICE: STUDIES IN DETROIT AND KANSAS CITY (1977)).

208. Fields, *Wife Beating: Government Intervention Policies and Practices*, in U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 228, 264 (1978).

209. But see notes 307-09 and accompanying text *infra*.

210. Among these published reports is the case of Jeannette Smith who had gone to her husband's house to discuss separation arrangements. She found her 66-year-old husband with his 17-year-old pregnant housekeeper-secretary, both of whom started to beat her. Mrs. Smith summoned the police to remove the younger woman and, as they were doing so, Mr. Smith stumbled onto the porch with a knife in his back. Mrs. Smith was acquitted of the stabbing on the grounds of self-defense after testifying that her husband had come after her threatening to kill her. N.Y. Times, Apr. 15, 1979, § 1, at 28, col. 1.

Other cases involved acquittal by reason of insanity. For example, Francine Hughes, who poured gasoline under the bed of her sleeping ex-husband and set it on fire, was found not guilty by reason of temporary insanity. Two weeks later state doctors found her to be sane and released her from the mental hospital. NEWSWEEK, Nov. 14, 1977, at 45, col. 3; Detroit Free Press, Nov. 22, 1977, § C, at 5; Detroit Free Press, Dec. 18, 1977, (Detroit Magazine) at 20-21, 25. Another case that received wide media coverage was that of Roxanne Gay, because the victim was professional football player Blenda Gay. She was also acquitted on the ground of insanity for fatally stabbing her husband while he was asleep. N.Y. Times, Mar. 11, 1978, § A, at 27, col. 3. See Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705, 1716-19 (1978).

211. See, e.g., *People v. Jones*, 191 Cal. App. 2d 478, 12 Cal. Rptr. 777 (2d Dist. 1961); *State v. Guido*, 40 N.J. 191, 191 A.2d 45, 47 (1963); *People v. Eleuterio*, 47 A.D.2d 803, 365 N.Y.S.2d 94 (1975), discussed at notes 328-32 and accompanying text *infra*; *State v. Thomas*, 66 Ohio St. 2d

which legal standards should be utilized when the domestic worm turns.

Conceptual analysis of self-defense, insanity, and provocation as set out in Part II demonstrates that no separate legal enclave for conjugal hostilities is warranted. To the extent that the erratic case law unduly penalizes defendants, it reflects a curable misapplication of key elements in all three defenses. Armed self-help against an unarmed attacker is not invariably precluded; evidence of a disturbed mental state falling short of insanity may require acquittal where it is probative of lack of *mens rea*, and a cumulative series of assaults can constitute a mitigating provocation even if the latest battery was less serious.

Judicial failure to issue proper jury instructions on these elements may result either in an erroneous conviction and sentence or in jury nullification of the court's charge. The occurrence of such nullification leading to acquittal, however, has not been limited to prosecutions where the law was misrepresented to the jurors.²¹² Thus, a correct analysis of self-defense and insanity pleas is only a partial solution to the problem of runaway verdicts. Such verdicts will continue to issue in conjugal cases as long as recourse to law and order is blocked at the prehomicide phase.

A. *Self-Defense*

When we speak of justifying a homicide, we are describing the unblemished moral position of the slayer as well as the culmination of any legal action flowing from the killing.²¹³ Each requirement of the self-defense plea constitutes a separate assurance that the homicide was unavoidable: the defendant did not use excessive force, ignore a requirement to retreat, or act before a crisis of appropriate magnitude was imminent.

1. *The Proportionality of Self-Help*

The regulations governing legalized boxing (no horse-shoes in the glove, no hitting below the belt) have some parallel in the rules applicable to repelling unlawful force. Overreaction is out of bounds. The right to kill in self-defense requires that the victim reasonably believe that an attacker will inflict fatal or serious physical injury and that only

518, 423 N.E.2d 137 (1981) (defendant received sentence of 15 years to life despite undisputed testimony that deceased was shot when he threatened to beat or kill defendant and that deceased had beaten defendant on prior occasions).

212. See notes 310-18 and accompanying text *infra*.

213. A justified homicide results in dismissal of charges or acquittal. R. PERKINS, *supra* note 6, at 1012.

deadly force will repel this attack.²¹⁴ Does this requirement, in the light of the applicable definitions, unduly burden a battered spouse facing a renewal of the danger?

As to minor assaults, the unadorned description of some commentators is that "one must submit to an ordinary battery and have his remedy in court rather than endanger the life of his assailant."²¹⁵ The formula would not preclude defense by nondeadly means—*A* hits *B*, *B* hits back—but in a combat between spouses of unequal size and strength rather than matched boxers, this right may have as little practical significance as the assumption that "a remedy in court" will be forthcoming.²¹⁶

Homicide is justifiable only in repelling "deadly force." The image evoked is that of a man waving a gun, but neither the historical nor the statutory base for the term is so restrictive.²¹⁷ The phrase generally includes force that could cause protracted impairment of health or serious disfigurement.²¹⁸ A broken jaw, limb, or rib, or an injury that affects the victim's hearing over an extended period of time are examples. Some assailants would undoubtedly be capable of meting out this kind of injury without any weapon, and therefore a homicidal response to such an assailant may be permissible.

Misinterpretation of this standard has led to bizarre inequities. In *People v. Jones*,²¹⁹ defendant was charged with murdering her husband. She introduced testimony that during their married life, he had assaulted her on numerous occasions. On the night of the homicide, the deceased had apparently been drinking. He threatened to beat defendant when the children went to bed, and later picked up a table knife and said that he would kill her. As he advanced upon her with the knife, she turned towards the buffet, picked up a gun purchased a few weeks earlier, and fired a warning shot into the ceiling. He continued to come towards her; she testified that "I was afraid he was going to jump on me or kill me or beat me or something; and I just couldn't

214. W. LAFAYE & A. SCOTT, *supra* note 4, at 393. In assessing the defendant's fear, the assailant's entire past history of violence is a critical factor. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 193 (1972); *Response of Juanita Kidd Stout*, in U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 288, 296-97 (1978). Judicial failure to recognize this factor in the domestic context is discussed at note 301 *infra*.

215. R. PERKINS, *supra* note 6, at 1013 (citing 1 J. BISHOP, NEW CRIMINAL LAW § 840 (8th ed. 1892)).

216. See notes 141-45 and accompanying text *supra*.

217. Blackstone comments: "[A] man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him." 4 W. BLACKSTONE, COMMENTARIES *184. See also R. PERKINS, *supra* note 6, at 997-1004.

218. *E.g.*, N.Y. PENAL LAW §§ 10.00(11), 10.00(10) (McKinney 1975).

219. 191 Cal. App. 2d 478, 12 Cal. Rptr. 777 (2d Dist. 1961).

take no more beating."²²⁰ She then shot and killed him. The jury found defendant guilty of manslaughter.

In seeking reversal, defendant contended that the court erred in instructing the jury. The appellate court sustained the instruction on justifiable homicide, which was that a person may lawfully defend himself "when he has reasonable ground to apprehend that he is in danger of death or great bodily injury"²²¹ There is some indication, however, that the judge's answers to the jury's questions (including the crucial "Please define for us the term in the instructions 'great bodily harm' ")²²² were confusing and imprecise.

This kind of contretemps does not necessitate a change in standards, merely greater care in explaining the nexus between the definitions and the situation at hand. Presume that a homicide has taken place and that the facts are identical to those in *Jones* except that the husband *H* approached his wife *W* without a knife. How is the reasonableness of *W*'s fear to be determined—reasonable if the juror considering the evidence would have felt threatened by *H*'s acts, or reasonable from her perspective? Is it necessary to label the test "objective" or "subjective," and to abide the vastly different consequences that could flow from the label? General guidelines are available:

If the . . . [defenders], at the time of the alleged assault upon them, as reasonably and ordinarily cautious and prudent men, honestly believed they were in danger of great bodily harm, they would have the right to resort to self-defense, and their conduct is to be judged by the condition appearing to them at the time, not by the condition as it might appear to the jury in the light of testimony before it.²²³

Both subjective and objective elements figure here.²²⁴ *W* must behave prudently; she cannot react to a "threat" that is frivolous. However, her actions are not to be judged by hindsight, nor by discounting her perspective and prior experiences with *H*.²²⁵

Recitation of general rules on the assessment of danger does not

220. *Id.* at 479, 12 Cal. Rptr. at 778. A self-defense plea is not available to an aggressor who began the fray by inflicting an unlawful blow, or entered into a brawl by mutual agreement, or who caused someone to fear an immediate peril to life. *See* R. PERKINS, *supra* note 6, at 1005. Here, however, the deceased's threats caused defendant to experience precisely that fear, so that she was responding to the physical confrontation rather than initiating it. Mere taunts or insults would not have been sufficient for a violent response. *See* WHARTON'S CRIMINAL LAW § 125, at 129 (14th ed. C. Torcia 1979).

221. 191 Cal. App. 2d at 480, 12 Cal. Rptr. at 779.

222. *Id.* at 482, 12 Cal. Rptr. at 781.

223. *State v. Miller*, 141 Wash. 104, 105, 250 P. 645, 645 (1926). *See also* note 214 *supra*.

224. "The test of self-defense is not what the jury thinks a reasonable man would believe but rather what the defendant, as a reasonable man, believed." *People v. Johnson*, 2 Ill. 2d 165, 172, 117 N.E.2d 91, 95 (1954). *See also* *Marts v. State*, 26 Ohio St. 162 (1875); *Nelson v. State*, 42 Ohio App. 252, 181 N.E. 448 (1932).

225. *See* note 214 *supra*.

insure jury comprehension. The court should issue an instruction that refers to and explains the significance of individual factors concerning the parties. Disparity in strength between *H* and *W*, for example, is a critical factor.²²⁶ The jury should be asked to consider whether someone with *W*'s particular characteristics could have fought off *H*'s attack without the use of a gun. In *State v. Wanrow*,²²⁷ an analogous nonfamilial case, an appellate court in reversing defendant's conviction graphically depicted the consequences of imprecision in a trial judge's charge: "The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense" was a misstatement of the law which was underlined by "the persistent use of the masculine gender leav[ing] the jury with the impression [that] the objective standard . . . is that applicable to an altercation between two men."²²⁸

Judicial notice has been taken of the fact that women in American society are not generally given the kind of physical training that could make them readily capable of repelling a male assailant.²²⁹ Prize fight images must be replaced by scrutiny of *H* and *W*'s relative height, weight, and skills. Standards based on hypothetical combatants supply only first-stage guidelines for the critical issue of whether to convict.

2. *The Duty to Retreat*

The "no retreat" position permits the use of deadly defensive force by a victim who has not attempted to flee from his assailant.²³⁰ Should this rule be uniformly applied to all homicides, including those between spouses?

226. See note 81 *supra*.

227. 88 Wash. 2d 221, 559 P.2d 548 (1977). Deceased, a large man who was visibly intoxicated and was allegedly a former mental patient, entered a home where eight young children and three mothers were present and declined to leave when he was ordered out. He had allegedly molested defendant's child and other neighborhood children on prior occasions. A young child awoke crying, the deceased approached him, there was screaming, and defendant went to the front door to shout for help. Turning around, she suddenly found the deceased standing directly behind her. She was frightened and shot the deceased in a kind of reflex action. Deceased was unarmed at the time. Defendant was convicted of second-degree murder and her conviction was reversed and remanded on appeal. *Id.* at 226, 559 P.2d at 551.

228. *Id.* at 240, 559 P.2d at 558.

229. *Id.* at 239, 559 P.2d at 558. For an original and provocative article on the effect of sex-based stereotypes on jury assessments of reasonableness, and how to counter such stereotypes, see Schneider & Jordan, *supra* note 207. The authors point out that women are "socialized to be less active physically, not to display aggression, and to be more afraid of physical pain than men." *Id.* at 157. See Bardwick & Douvan, *Ambivalence: The Socialization of Women*, in READINGS ON THE PSYCHOLOGY OF WOMEN 52-58 (J. Bardwick ed. 1972).

230. The common law required those pleading self-defense to retreat from any setting other than the home in preference to using deadly force. R. PERKINS, *supra* note 6, at 1009.

The right to remain even when withdrawal would be safe has generally been buttressed by the rationale that liberty itself is imperiled if a law-abiding citizen can be compelled to leave a place where he has the right to be.²³¹ The emphasis is not on the victim's loss of face, but rather on placing his personal freedom above the expediency of permitting an assailant to drive him away.²³²

The issue of personal freedom assumes its greatest significance, and the "no retreat" position appears in its most becoming colors, when the victim is at home at the time of the attack.²³³ The doctrine that no flight from one's "castle" could ever be required was given the broadest possible scope at common law,²³⁴ and has been universally adopted in American jurisdictions.²³⁵ This doctrine is perhaps the clearest point of collision between the societal aim of preferring the rights of the victim to protection of the attacker and the more general goal of preventing all unnecessary killings.

In the conjugal context, however, both the assailant and the defender are in their own dwelling. A few states have concluded that parties sharing a home are not using the domicile as a refuge from each other. "Rights of a householder against a violent intruder have no relevancy," noted the Pennsylvania Supreme Court.²³⁶ More often, however, this contention has been rejected on the grounds that retreat would merely be a temporary respite. "Whither shall he flee, and how far, and when may he be permitted to return?"²³⁷

231. *State v. Bartlett*, 170 Mo. 658, 669, 71 S.W. 148, 151 (1902); R. PERKINS, *supra* note 6, at 1005.

232. Other rationales have worn a somewhat apologetic air. The major common law privilege of crime prevention appears most appropriate where retreat by the defender would leave a third person still in peril; however, English jurists did not distinguish this situation from one where departure of the only victim might, at least temporarily, end the encounter. R. PERKINS, *supra* note 6, at 1004. Another basis was the preservation of honor, which precludes the defender from manifesting cowardice by retreating; critics of this theory have characterized it as permitting a "remedy . . . [that is] worse than the disease." Beale, *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567, 581 (1903).

233. W. LAFAVE & A. SCOTT, *supra* note 4, at 396; R. PERKINS, *supra* note 6, at 998.

234. The "castle" doctrine applied even to a willing participant in a brawl whose antagonist had aggravated the conflict by initiating the use of deadly force. R. PERKINS, *supra* note 6, at 1010.

235. This is true even in states that generally require retreat. R. PERKINS, *supra* note 6, at 1010. Indeed, the concept of home is being broadened to encompass places of employment. *E.g.*, PA. STAT. ANN., tit. 18, § 505 (Purdon 1973). In a few jurisdictions, expansion to cover any place where the citizen has a right to be has brought the retreat rule full circle into the "no retreat" camp. R. PERKINS, *supra*, at 1011; Note, *Limits on the Use of Defensive Force to Prevent Intramural Assaults*, 10 RUT.-CAM. L.J. 643, 654 (1979) [hereinafter cited as *Limits of Force*].

236. *Commonwealth v. Johnson*, 213 Pa. 432, 434, 62 A. 1064, 1064-65 (1906), quoted in *Limits of Force*, *supra* note 235, at 655 n.72.

237. *Jones v. State*, 76 Ala. 8, 16 (1884), quoted in *Limits of Force*, *supra* note 235, at 655 n.70. See Eisenberg & Seymour, *supra* note 73, at 42. One jurisdiction has attempted a case-by-case approach which provides little guidance or deterrence to potential defendants. Massachusetts pro-

These antipodes raise issues on several levels. Should the legislature base its approach on long term considerations: will the conflict recur, and must the victim be ousted from home whenever the assailant pleases? Repeated flight or permanent ejection at the attacker's option would directly breach the values of personal liberty underlying the "castle" doctrine.²³⁸ Should the focus be on the short term situation: can the victim get out safely now? Even the question of immediate safety cannot be analyzed solely by considering whether the battered spouse can reach the front door. As a recent California decision noted:

The wife's options are not very satisfactory. . . . [H]er opportunities to flee are usually severely limited. The husband may have the car; there may be children in the home to be considered; and the unaccompanied female at night is greeted with suspicion if not refusal of admission by hotel and motel clerks who fear not only her possible profession but if convinced of her true plight are fearful of her being followed by a vengeful husband who would create a scene.²³⁹

Moreover, an erroneous prediction as to the feasibility of flight may merely export the conflict into the street. While this increases the possibility of aid, it also creates new and further risks. Third parties who have neither the weapons nor the training of police officers may be injured as bystanders²⁴⁰ or intervenors.

Thus, practicality as well as the historic preference for victim freedom over protection of the attacker supports the consistent application of the "castle" doctrine to all homicides. Refusal to permit self-defense in the home because the assailant is a cotenant would have an unwarranted and disproportionate impact on interspousal cases.

3. *The Immediacy of the Threat*

A critical element in a successful self-defense plea is the belief that an attack is imminent and can only be staved off with deadly force.²⁴¹ The belief must be reasonable, but not necessarily correct; as Justice Holmes' frequently quoted aphorism puts it, "detached reflection can-

vides that deadly force is unlawful if retreat in the particular situation is "reasonable." It has been noted that the Massachusetts courts appear to have required retreat whenever such a course was *physically* possible, even where a woman would be compelled to leave her children in order to escape—hardly an appropriate application of a rule of reason. *Commonwealth v. Shaffer*, 367 Mass. 508, 511, 326 N.E.2d 880, 883 (1975).

238. The economic and social obstacles to flight are discussed at notes 83-84 and accompanying text *supra*.

239. *People v. Cameron*, 53 Cal. App. 3d 786, 792, 126 Cal. Rptr. 44, 48 (5th Dist. 1975).

240. See discussion of *Parrish v. State*, 97 So. 2d 356 (Fla. Dist. Ct. App. 1957) in S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 251 (3d ed. 1975).

241. W. LAFAYE & A. SCOTT, *supra* note 4, at 394; R. PERKINS, *supra* note 6, at 994; N.Y. PENAL LAW § 35.15 (McKinney 1975).

not be demanded in the presence of an uplifted knife."²⁴²

Dissatisfaction with the imminence standard in the domestic assault context has centered on the general theme of inflexibility. It may be certain that a deadly attack will occur on the present occasion. If the assailant is not yet ready to commence but is summoning reinforcement that will make him invincible, the imminent harm requirement could compel the defender to wait until the "sole opportunity" to take protective action has passed.²⁴³

This argument assumes that the attacker could not overcome the victim without first increasing his fighting capabilities and that the defender must therefore act quickly before a Goliath makes his appearance. Such a hypothetical is somewhat incongruous in application to interspousal battery. The combatants are generally not equally matched,²⁴⁴ and the assailant does not need (or wish) to request the aid of a friend in carrying out the attack.

Yet there is a more troubling aspect of the immediacy requirement that directly affects conjugal slayings. Consider the fundamental purpose to be served by restricting the availability of self-defense pleas. Limitation of the plea assures that homicide, the most irrevocable of all crimes, will be punished unless its commission was essential for self-protection. In view of this noncontroversial mission, can resort to deadly defensive force be justified if the danger to be countered is not occurring now?

The historical response has been in the negative, for two generally sound reasons: the assailant might change his mind, or he might be legally prevented from carrying out his intentions.²⁴⁵ The first prong of the rationale goes to the uncertainty of the threat; the argument is more easily applicable to chance encounters leading to a quarrel, than to ongoing relationships between spouses where a recidivistic pattern of violence has already been established. Blackstone has elaborated on the second prong:

This right of natural defense does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot, therefore, legally exercise this right of preventive defense, but in sudden

242. *Brown v. United States*, 256 U.S. 335, 343 (1921).

243. See *Limits of Force*, *supra* note 235, at 652. The drafters of the Model Penal Code have raised this question as to all defensive homicides, and suggest that a legislative change is advisable to insure that where the injury will occur on the present occasion and protective action is immediately necessary, no liability attach. MODEL PENAL CODE § 3.04, Comment at 17 (Tent. Draft No. 8, 1958); MODEL PENAL CODE § 3.04(1) (Proposed Off. Draft 1962).

244. See note 81 *supra*.

245. Assistance could also come from private citizens, but in intrafamily violence there are seldom witnesses and neighbors generally avoid involvement. See note 45 *supra*.

and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law.²⁴⁶

This rationale does not encompass the situation in which severe injury is virtually certain, but the "assistance of the law" is withheld. The argument that the imminence requirement be replaced by a standard of demonstrable harm in the future merits further analysis. The dangers of such a standard and the role of the jury in its absence will be considered in detail in the final section of this Article.

B. Evidence of Defendant's Mental State: Two Possible Acquittal Routes

In the spectrum of consequences incident to a domestic killing, we have at one extreme a murder accompanied by maximum penalties and at the other a justified act of self-defense. Operating in theory on a parallel track is a homicide caused by an insane defendant—a mental health hazard, rather than a penal problem. If a strangler believes he is merely squeezing a lemon, he is neither justified nor culpable.²⁴⁷

Although insanity provides a complete defense, this plea has become increasingly distasteful to counsel for battered spouses who kill.²⁴⁸ Lack of justification means stigma, though the brand has a different configuration than criminality. Lack of culpability protects the defendant from penal incarceration, but not necessarily from compul-

246. 4 W. BLACKSTONE, COMMENTARIES *184. While the statement was made in the context of a "chance medley" or accidental encounter, the rationale is equally applicable to interspousal violence.

247. A few preliminary observations will put the insanity defense into perspective. Contrary to popular assumptions, insanity is raised only in a very small percentage of cases, which does not fully reflect the incidence of mental aberrations among defendants.

Overwhelmingly, criminal matters are disposed of by pleas of guilty and by bench trials. Only the exceptional case goes to trial by jury. And of these exceptional cases, in only two of every hundred is this [insanity] defense raised. Does anyone believe that this percentage measures the actual significance of gross psychopathology to crime? Let him visit the nearest criminal court or penitentiary if he does. Clearly this defense is a sop to our conscience, a comfort for our failure to address the difficult arena of psychopathology and crime.

Morris, *Psychiatry and the Dangerous Criminal*, 41 SO. CAL. L. REV. 514, 519 (1968).

It should be noted that the spirited legal and political dispute over the insanity defense has centered on the optimal time for its introduction, not its relevance to disposition of criminal cases. Even the draconian earlier drafts of S. 1, the proposed U.S. Criminal Justice Reform Act, would have permitted the lemon-squeezer to introduce the insanity issue at trial, and other defendants to proffer it on the question of treatment or sentence. Wales, *An Analysis of the Proposal to 'Abolish' the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687 (1976). Thus, despite the revolutionary connotation of the "abolish the insanity defense" slogan, such a defense would not perish. It would merely be taken away from consideration by the jury (who would make only the determination of whether the defendant committed the crime) and given to the sentencing judge or to a mental health agency. See R. PERKINS, *supra* note 6, at 885-88.

248. *E.g.*, Schneider & Jordan, *supra* note 207, at 159-60. See also N.Y. Times, May 7, 1979, § A, at 1, col. 1.

sory hospitalization.²⁴⁹ The plea has therefore been characterized as a "last resort" to be employed when self-defense claims are precluded.²⁵⁰

Nevertheless, proof of insanity in some cases provides the most accurate explanation for a domestic homicide not triggered by imminent danger to the defendant. A unique aspect of intrafamily battery is that a class of victims is terrorized and repeatedly injured over a long period of time, with psychological as well as physical trauma resulting.²⁵¹

Moreover, evidence of defendant's mental state may be relevant not only to acquittals "on the grounds of insanity" but also to an unnumbered acquittal because of a defect in the state's case. The effectiveness of such evidence has been unduly curtailed by imprecise analysis of the prosecutor's duty to prove all the mental elements of the crime.

1. *Definitional Contours*

*M'Naghten's Case*²⁵² was a comprehensive attempt to grapple with the protean nature of the term "insanity." An English jury acquitted the defendant of murder on the basis of medical evidence that he was suffering from delusions. In answer to questions posed by the House of Lords after the acquittal, the *M'Naghten* judges stated that in order to maintain a defense of insanity

it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.²⁵³

This cognitive test (with many variations in emphasis) has been adopted in the majority of American states.²⁵⁴ Although a finding of legal insanity would constitute an excuse²⁵⁵ and therefore shield a bat-

249. See notes 255-56 and accompanying text *infra*. In those instances where the wife is the defendant, counsel have been concerned that valid self-defense pleas may be discounted because of a stereotyped view of violent women as insane (whereas violent men are assessed on a case-by-case basis). Schneider & Jordan, *supra* note 207, at 150.

250. Schneider & Jordan, *supra* note 207, at 160.

251. See notes 74-79 and accompanying text *supra*.

252. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

253. *Id.* at 210, 8 Eng. Rep. at 722. The responses of the judges were subsequently printed together with the report of the case. Note that knowledge that the act was wrong refers not to defendant's personal moral code, but his ability to understand that his crime is one condemned by society.

254. R. PERKINS, *supra* note 6, at 863 n.70. The cognitive approach centers on what defendant knew or understood, rather than on the ability to control behavior.

255. *Id.* at 33, distinguishes justifiable from excusable homicide: "Homicide is justifiable if it is either commanded or authorized by law Homicide which is neither commanded nor authorized by law is excusable if committed under circumstances not involving criminal guilt."

tered spouse who commits a conjugal homicide against criminal responsibility and punishment, defendant would remain subject to civil commitment in a mental hospital.²⁵⁶ However, such a finding is not the sole basis on which a spouse who suffered from a disordered mental state at the time of the slaying may obtain an acquittal.

Let us posit a state in which the prosecution is under a duty to prove intent to kill in first degree murder cases, and the accused is required to show by a preponderance of the evidence that he did not "know the nature and quality of the act he was doing." Does the defendant who is too disoriented to be aware of his actions intend to kill? Once some proof of this mental state is produced, what is required of the prosecutor? The Supreme Court has recognized the possible collision of burdens and at vastly different points in its history has performed both regulation and bypass surgery to meet it.

In *Davis v. United States*²⁵⁷ the nineteenth-century Court focused on the general principle that conviction of a serious crime required proof beyond a reasonable doubt of mens rea, or a culpable mentality.²⁵⁸ The burden therefore rested on the prosecution to demonstrate that a defendant accused of murder was sane enough to distinguish between right and wrong.

A "guilty mind" continues to be a requirement for conviction in homicide cases, but the concept has lost its amorphous character. Legislatures have developed narrowly defined mental elements such as intentionally, knowingly, recklessly, negligently.²⁵⁹ Within this modern framework, what constitutional standard governs prosecutors who must counter evidence of a disturbed mental state falling short of insanity but nevertheless probative of defendant's lack of mens rea?

The question was rather casually dispatched by the Supreme

256. In twelve states and in the District of Columbia, commitment for treatment is mandatory after an acquittal on grounds of insanity; in all other jurisdictions, commitment is discretionary. W. LAFAVE & A. SCOTT, *supra* note 4, at 317; MODEL PENAL CODE, § 4.08(1) (Tent. Draft No. 8, 1958); Comment, *Compulsory Commitment Following a Successful Insanity Defense*, 56 NW. U.L. REV. 400, 411 n.8 (1961); Note, *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stages*, 112 U. PA. L. REV. 733, 735 n.11 (1964).

257. 160 U.S. 469 (1895).

258. *Id.* at 484. See also *Morrisette v. United States*, 342 U.S. 246 (1952), which held that criminal liability without a showing of mens rea was improper where the defendant was charged with one of the "infamous, common-law crimes." *Id.* at 252. In contrast, the Court discussed offenses that were "not in the nature of positive aggressions or invasions, with which the common-law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." The Court remarked that "legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element." *Id.* at 255-56. See Henkin, *supra* note 30, at 68, 70.

259. E.g., N.Y. PENAL LAW § 125.25(1)-25(2) (McKinney 1975); PA. STAT. ANN., tit. 18, § 2501 (Purdon 1973).

Court in *Leland v. Oregon*,²⁶⁰ where a challenge under the due process clause was levied at a state rule requiring that the defense of insanity must be proven by the accused beyond a reasonable doubt.²⁶¹ The prior *Davis* holding, which would have required the prosecutor to demonstrate defendant's sanity, was dismissed as establishing "no constitutional doctrine."²⁶² However, the Court affirmed a more sophisticated constitutional demand: the state must prove beyond a reasonable doubt every statutorily created element of the offense charged.²⁶³ The Oregon scheme survived under this standard because the burden of showing that the accused acted "purposely" and "with premeditated malice" remained on the prosecution.²⁶⁴

In its operational analysis, the Court assumed that the prosecutor and the defendant could each have a burden in relation to the same facts. The accused must introduce evidence of his disturbed mental state at the time of the crime;²⁶⁵ the prosecutor must show that despite this evidence, the required mens rea was present. As the trial judge had instructed the jury, the proof of defendant's insanity must be weighed in regard to defendant's ability to premeditate, deliberate, or form a

260. 343 U.S. 790 (1952). *Davis* remains the law for federal prosecutions, while *Leland* governs state cases.

261. *Leland* had been sentenced to death after a jury found him guilty of first degree murder. Oregon law required a defendant to prove his insanity beyond a reasonable doubt and made "morbid propensity" no defense. The Supreme Court noted that approximately twenty states still required that the accused establish his insanity by a preponderance of the evidence or an equivalent measure of persuasion; Oregon was unique in utilizing an even more stringent standard. 343 U.S. at 798. Two possible rationales for placing this burden on defendant have been proposed: (1) where evidence of insanity is relevant to the determination of guilt, the state is entitled to continue to rely on the presumption of sanity after introduction of defendant's evidence because otherwise the prosecution would be required to prove a negative; and (2) where evidence of insanity is irrelevant to the determination of guilt, and the prosecution need not prove sanity to establish guilt, defendant's evidence of insanity is admissible only to assess the severity of punishment or course of treatment. Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U. L. REV. 499, 503 (1976).

262. 343 U.S. at 797. *Davis* was characterized as a mere procedural rule for the federal courts. *Id.* at 798.

263. *Id.* at 799.

264. *Id.* at 794. For first degree murder, the state had to prove beyond a reasonable doubt premeditation, deliberation, malice, and intent. Second degree murder required a showing of malice and intent, but without deliberation and premeditation. Manslaughter was defined as a killing without malice or deliberation, but upon a sudden heat of passion caused by a provocation sufficient to make the impulse irresistible. *Id.* at 793-94.

265. The prosecutor commences each case with the convenience of a presumption that the defendant is sane. H. WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 214 (1954); Orfield, *Burden of Proof and Presumptions in Federal Criminal Cases*, 31 U. KAN. CITY L. REV. 30, 46 (1963). The burden rests on the accused "to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity." Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1300 n.3 (1977). Once he produces such evidence, however, there is a contested issue and the loss falls on whichever party has the burden of persuasion. See W. LAFAVE & A. SCOTT, *supra* note 4, at 313.

purpose; if he lacked such an ability he must be acquitted of the correlative charge even if he was not found to be insane.²⁶⁶

2. Implementation of the Constitutional Demand

A crucial portion of the *Leland* decision has been amputated by misinterpretation. Trial and appellate courts have tended to focus solely on the permission to retain statutes placing the burden of proving insanity on defendants. The direction as to the prosecutor's duty to prove each statutorily defined mental element beyond a reasonable doubt has either been ignored entirely²⁶⁷ or given a vapid mention that failed to compare the particular manifestation of insanity that was claimed to the particular mens rea that was required.²⁶⁸

Presume that a conjugal homicide has been committed by a battered spouse in New Jersey, where the homicide law requires *inter alia* proof that the killing was committed purposely or knowingly.²⁶⁹ The state's insanity test includes both the "right-wrong" and the "nature and quality" aspects of *M'Naghten*.²⁷⁰ The defendant introduces evidence of disturbed mental state at the time of the slaying. The outcome of the prosecution may depend not only on the cogency of defendant's insanity claim but on its theme.

If the facts coincide with *State v. Guido*,²⁷¹ for example, defense

266. 343 U.S. at 794-95.

267. See, e.g., *State v. Mytych*, 292 Minn. 248, 194 N.W.2d 276 (1972); *Phillips v. State*, 86 Nev. 720, 475 P.2d 671 (1970), cert. denied, 403 U.S. 940 (1971); *Nilsson v. State*, 477 S.W.2d 592 (Tex. 1972).

268. See, e.g., *Hill v. Lockhart*, 516 F.2d 910, 911 (8th Cir. 1975), in which the court held: so long as the trial court charged the jury that it was the state's burden to prove beyond a reasonable doubt every element necessary to constitute the crime of first degree murder, there would be no constitutional violation of due process of law even though the appellant was required to maintain the burden on the issue of his insanity defense. See also *Phillips v. Hocker*, 473 F.2d 395 (9th Cir. 1973); *Rivera v. State*, 351 A.2d 561 (Del. Super. Ct. 1976).

269. New Jersey's present statute defining murder reads in part:

a. [C]riminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or
(2) The actor knowingly causes death or serious bodily injury resulting in death; . . .

b. Murder is a crime of the first degree. . . .

N.J. STAT. ANN. § 2C:11-3 (West 1981).

270. N.J. STAT. ANN. § 2C:4-1 (West 1981). See, e.g., *State v. Lucas*, 30 N.J. 37, 68, 152 A.2d 50, 66 (1959).

271. 40 N.J. 191, 191 A.2d 45 (1963). The Supreme Court of New Jersey reversed defendant's conviction of murder in the second degree and 24-year minimum sentence, primarily on the grounds that the trial judge had improperly intervened in the prosecution in a manner that could have prejudiced the jury's approach to the factual issues. For example, the judge had allowed the state to present its thesis that defendant had killed her husband to prevent his finding out that she was pregnant by another man, despite a lack of any evidence that she even knew she was pregnant at the time or that she had ever had an extra-marital liaison. The court asked unnecessary questions that aided the state's case; restated portions of defendant's testimony that placed her in an unfavorable light; and sustained the prosecutor's berating of defense counsel and witnesses. *Id.* at

counsel may effectively invoke the *Leland* directive to prosecutors. Defendant Adele Guido was married to a professional fighter who had left her after the birth of their daughter and was living with another woman. While he refused to support his wife or their child, he resented her efforts to divorce him. His pursuit of her, and his continuing attacks and threats, led to a final confrontation in which he insisted that she go with him to Florida. Later in the course of the evening, defendant shot and killed him. Her plea centered on lack of capacity to understand the nature of her acts. It was not that she believed the homicide was morally right; rather, she was unaware that she was killing at all. Even if she were unable to prove that she was insane, her disorientation would counter the prosecution's claim that she acted purposely or knowingly.²⁷²

Contrast this to the facts in *State v. DePaolo*,²⁷³ where defendant testified that he had killed his former girlfriend because he heard God's voice commanding his deed.²⁷⁴ Defense psychiatrists testified that he suffered from schizophrenia. This evidence indicates that although defendant was unable to comprehend that his act was wrong, he was aware that he was slaying the victim and intended to do so.²⁷⁵ This kind of insanity plea, in which defendant concedes the intent to kill, does not conflict with the mental elements that the prosecutor must prove.

Thus, the trial court's threshold step in implementing *Leland* is to determine whether or not the insanity evidence adduced bears a "necessary relationship"²⁷⁶ to the existence of the mental state described in New Jersey's homicide law. If such a relationship is demonstrated, de-

197-203, 208 & n.2, 191 A.2d at 49-51, 54 & n.2. The New Jersey Supreme Court did not address the question of prosecutorial burden, but it is unclear whether this was the result of defense counsel's failure to raise the issue or the court's preoccupation with other trial errors.

272. At the time the case was tried, the conviction for murder in the second degree required proof of intent, while first degree murder required proof of premeditation. *State v. Anderson*, 35 N.J. 472, 497, 173 A.2d 377, 389 (1961).

273. 34 N.J. 279, 168 A.2d 401 (1961).

274. His victim was a former girl friend, and he believed that since they had engaged in illicit relations, their sin could be expiated only if both were destroyed.

275. New Jersey's former murder law included any kind of "willful, deliberate and premeditated killing." N.J. STAT. ANN. § 2A:113-2 (West 1969). Cf. the present law set out in part in note 269 *supra*, which uses the words "purposely" and "knowingly."

276. *Mullaney v. Wilbur*, 421 U.S. 684, 705-06 (1975) (Rehnquist, J., concurring). In *Mullaney*, absence of provocation was found to be part of the state's definition of murder, and therefore due process was offended by a rule requiring the defendant to prove that the killing had occurred on sudden provocation. The state scheme was constitutionally defective because a mental element in the homicide law was wholly identical with the affirmative defense burdening the accused. *Id.* at 691-92, 703-04. The concurring opinion noted in distinguishing *Leland* that while "evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Id.* at 705-06. See also

fense counsel should request that the prosecutor's burden be explained to the jury in concrete terms. Even the well-intentioned charge by the trial judge in *Leland* was aptly described by the dissent as a "farrago of generalities" that the jurors could not follow.²⁷⁷

Using the *Guido* facts as a base, a charge could be formulated as follows:

In order for you to find the defendant guilty of murder in the second degree, the people must have established to your satisfaction from all the evidence in the case that the defendant, when she shot and killed the deceased, acted purposely or knowingly. The defendant and deceased's own daughter by a former marriage have testified that he injured defendant on several occasions and that police aid was requested. Defendant's employer has stated that the deceased repeatedly threatened defendant. Now, the defendant has testified that on the day that the shooting occurred, the deceased took a weapon from his traveling bag and said that he would use it on their child if defendant refused to leave the baby and go to Florida with him. He then fell asleep in the livingroom. Defendant states that she took the gun into another room with the intention of committing suicide. Abandoning this idea, she returned to the livingroom to put the weapon back into the suitcase but seeing the deceased, she shot him several times. Psychiatrists appointed by this Court to examine defendant later testified on her behalf that at the time of the shooting she was suffering from a disease of the mind not amounting to a psychosis, but which rendered her unable to understand the nature and consequences of her actions. The People's psychiatrists disagreed with this conclusion, and testified that defendant had reached a severe disorganizing state of anxiety but that her reason was not impaired. The burden of proving beyond a reasonable doubt that defendant acted purposely or knowingly remains at all times on the State. In determining this question, it is your duty to take into consideration defendant's mental condition and all factors relating thereto, whether or not you find her legally insane.

Guido is an appropriate model precisely because the evidence concerning defendant's mental state may not have met her burden of demonstrating insanity. Yet the proof may have been sufficient to create a

Patterson v. New York, 432 U.S. 197, 201 (1977); Rivera v. Delaware, 429 U.S. 877, 879-80 (1976) (Brennan, J., dissenting).

277. 343 U.S. at 806 (Frankfurter, J., dissenting). The judge had stated to the jury:

I instruct you that the evidence adduced during this trial to prove defendant's insanity shall be considered and weighed by you, with all other evidence, whether or not you find defendant insane, in regard to the ability of the defendant to premeditate, form a purpose, to deliberate, act wilfully, and act maliciously; and if you find the defendant lacking in such ability, the defendant cannot have committed the crime of murder in the first degree.

I instruct you that should you find the defendant's mental condition to be so affected or diseased to the end that the defendant could formulate no plan, design, or intent to kill in cool blood, the defendant has not committed the crime of murder in the first degree.

Id. at 794-95.

fatal weakness in the state's case: a reasonable doubt as to her mens rea.²⁷⁸ Under such circumstances, superficial treatment of the *Leland* mandate may have substantial consequences.

The location and weight of burdens of proof in a criminal case directly affect the likelihood of acquittal.²⁷⁹ On the question of establishing insanity, the risk of nonpersuasion may be placed on defendant Guido; she loses that avenue of acquittal if the jury is not convinced by her claim.²⁸⁰ On the question of intent or "purpose," however, she would have only the relatively lighter burden of bringing forward the mental state evidence;²⁸¹ it is the prosecutor who bears the risk of nonpersuasion and loses all avenues of conviction if the jury has a reasonable doubt as to his version of such evidence.²⁸²

Since the prosecutorial responsibility stems from the Constitution, it would apply even in a jurisdiction that repeals the insanity defense and precludes any partial defense of "diminished capacity."²⁸³ A constitutional mandate is neither the product of state largesse nor subject to state contraction.²⁸⁴

C. *Manslaughter: The Imperfect Defense*

If neither self-defense nor evidence of a disoriented mental state dictates acquittal, what weight should be given to the deceased's prior conduct when a previously battered spouse commits homicide? There is a superficial symmetry in the response that a charge of manslaughter is a midpoint between discounting all sanction and exacting the full

278. Acquittal following the prosecution's failure to prove guilt beyond a reasonable doubt would never require mandatory hospitalization. Although it would be within the state's discretion to commence a civil commitment proceeding, this would be less likely where there has been no insanity finding by a jury, particularly if defendant is no longer dangerous. See note 256 and accompanying text *supra*.

279. *In re Winship*, 397 U.S. 358, 363 (1970) (the Court emphasized that the reasonable doubt standard that must be met by the prosecution is "a prime instrument for reducing the risk of [factually erroneous] convictions. . . . The standard provides concrete substance for the presumption of innocence . . . whose 'enforcement lies at the foundation of . . . our criminal law' "). Innocence encompasses not only alibi defenses but also instances where psychiatric evidence shows that defendants lacked the explicit mental components established by the legislature to define culpability.

280. N.J. STAT. ANN. §2C:4-1 (West 1981); R. PERKINS, *supra* note 6, at 883 n.89.

281. The presumption of sanity could arguably include the presumption that defendant was not disoriented; proof of disorientation should therefore be introduced by the defense. See note 265 *supra*.

282. As the Supreme Court held in *In re Winship*, 397 U.S. 358, 364 (1970), the state must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [defendant] is charged." See cases cited note 276 *supra*.

283. See note 247 *supra* and note 292 *infra* for discussions of the insanity defense and diminished capacity. Even without those defenses, psychiatric evidence would remain admissible because of its relevance to the intent question.

284. U.S. CONST. art. VI., cl. 2.

penalty.²⁸⁵ Acceptance of an imperfect defense creates no "open season" on spouses, but nevertheless demonstrates that this defendant is not as bad as one who kills for the insurance money. Closer scrutiny indicates that the symmetry is somewhat askew.

Manslaughter is peculiarly applicable to killings that are provoked by external events. *A*, driven into a passion by the sudden discovery of his wife's adultery with *B*, shoots *B* as he is fleeing from the house. *A* is regarded as an appropriate candidate for mitigation because the circumstances would tend to deprive a reasonable man of self-control (even though the reasonable man would not resort to homicide).²⁸⁶

Physical persecution is the ultimate provocation. If Jones beats Smith not once but several times and makes it clear that he will continue to do so whenever he pleases, we advise Smith thus: If you act out your fear and rage by killing when you are not in imminent danger, perhaps you should not be regarded as a murderer. We will certainly charge you with manslaughter, however, because you could have been protected by legal rather than illegal means.

If the victim of the attacks is Mrs. Jones, however, this advice misses the mark. A dual burden may rest on Jones' wife—fear that past beatings will repeat themselves and increase in severity²⁸⁷ and the tacit exemption of domestic violence from the reach of the assault statutes.

In cases of homicide by a battered spouse, judges and juries are therefore combining ingredients that do not coalesce into a serviceable recipe. Killing must be deterred (penalty required); human frailties must be given some recognition (mitigation appropriate); self-help was the only help (acquittal not permitted, conviction not palatable). Instances of jury nullification of a judge's manslaughter charges reflect the legal system's uneasy effort to accommodate the purposes, rather than solely the letter, of the homicide laws.

285. "[M]anslaughter is an intermediate crime, which lies half-way between the more serious crime of murder, at the one extreme, and, at the other extreme, justifiable or excusable homicide, which is not criminal at all." W. LAFAYE & A. SCOTT, *supra* note 4, at 571.

The legislative range of homicide grades generally encompasses (in descending order of sentence length) first and second degree murder, and voluntary and involuntary manslaughter. First degree murder may include some or all of these types: premeditated intent-to-kill, killing by a reckless act evincing a depraved indifference to human life, killing in the course of certain dangerous felonies. Second degree murder often involves unpremeditated murder, or death resulting from the intent to commit serious bodily harm. *Id.* at 562, 568. Particularly relevant in the context of domestic killings is the category of voluntary manslaughter: an intentional homicide committed under circumstances that mitigate, but fall short of justifying, the crime. *See, e.g.*, N.Y. PENAL LAW § 125.20 (McKINNEY 1975).

286. R. PERKINS, *supra* note 6, at 55; *State v. Watkins*, 147 Iowa 566, 569-70, 126 N.W. 691, 692 (1910); *State v. Fiske*, 58 Nev. 65, 75, 70 P.2d 1113, 1116 (1937).

287. *See* notes 68-70 and accompanying text *supra*.

1. *The Significance of Provocation*

Homicide is far from unique in grading its component crimes in accordance with the blameworthiness of the offender. However, the degrees established within such offenses as arson or larceny generally correspond with statutorily listed aggravating factors—the potential danger posed by the conduct and the degree of injury actually resulting. Thus arson is punished more seriously when the defendant intentionally starts a fire at a time when he knows that a nonparticipant in the crime is in the building;²⁸⁸ the dividing line between grand and petit larceny depends upon the amount the thief stole.²⁸⁹ The defendant's emotional state is not a statutory concern.²⁹⁰ The fact that the victim of the arsonist or thief may have enraged the defendant by undeniably provocative conduct, is irrelevant to the grading system.

By contrast, the issue of provocation is often central to the assessment of a homicide. Since most statutory schemes incorporate mitigation by abstract reference,²⁹¹ the judiciary's task has been to identify the circumstances that will qualify as extenuating. While mere stupidity, irascibility or timidity are not valid as mitigators, more complex variations of these states have been recognized in manslaughter cases. Leniency may be extended if defendant's capacity to perceive reality is substantially limited²⁹² or if the killing is triggered by a serious and recognizable provocation.²⁹³

288. *E.g.*, N.Y. PENAL LAW §§ 150.10-15 (McKinney Supp. 1980-81).

289. *E.g.*, N.Y. PENAL LAW §§ 155.25-30 (McKinney 1975).

290. The creation of the voluntary manslaughter category, without a "voluntary larceny" analogue, reflects a historical difference between the mandatory death sentence imposed for murder under English common law and the flexibility left to the courts in non-homicide cases, where the punishment could be mitigated if there were extenuating circumstances. The creation of a different grade of homicide—manslaughter—which was detached from capital punishment, provided a midpoint between acquittal and death. ROYAL COMM'N ON CAPITAL PUNISHMENT, 1949-53 REPORT 52-53 (1953).

291. *E.g.*, CONN. GEN. STAT. ANN. § 53a-54a (West Supp. 1981); N.Y. PENAL LAW § 125.25 (McKinney 1975). Both sections permit mitigation from second degree murder to manslaughter on the basis of extreme emotional disturbance, but do not list examples of what might constitute such a disturbance.

292. "Diminished capacity" must be distinguished, in concept and consequences, from the insanity defense. As indicated at notes 252-53 and accompanying text *supra*, the insane defendant is not generally held responsible for any crime if he fails to understand the nature and quality of his act or that it was wrong. One who manifests an abnormal mental condition short of insanity (or who is voluntarily intoxicated) may still be charged with a lower grade of homicide. Homicide committed by a voluntarily intoxicated defendant may be treated as second degree murder or as manslaughter. W. LAFAVE & A. SCOTT, *supra* note 4, at 345. The status of the diminished capacity defense is entirely within the discretion of the legislature. Some jurisdictions permit it as a complete defense; others preclude it. *Recent Developments: Diminished Capacity—Recent Decisions and an Analytical Approach*, 30 VAND. L. REV. 213, 215-20, 222-24 (1977).

293. The defendant must demonstrate the severity of the provocation, the lack of a reasonable opportunity for the passion to cool, and the proportionality of the retaliation. W. LAFAVE & A. SCOTT, *supra* note 4, at 572, 573; R. PERKINS, *supra* note 6, at 54.

2. *A Prior Pattern of Conduct as Provocation but not Justification*

Blackstone characterized beating and wounding as second only to murder and mayhem in the hierarchy of human disasters;²⁹⁴ at common law a violent, painful blow, with fist or weapon, was a "legally sufficient" provocation for homicide.²⁹⁵ Since a single assault occurring shortly before the homicide is adequate as a mitigator if it inflicts substantial pain or injury, a series of such assaults is all the more likely to vitiate the self-control that blocks an impulse to kill.²⁹⁶ Even if the latest battery in the series was not severe, a well-grounded fear that the latest will not be the last clearly merits consideration as a basis for reducing murder charges to manslaughter. Yet trial courts have not been noticeably alert to this implication of the common law view.

Jury instructions in battered spouse cases have tended to treat the evidence as though only the moments before the slaying were relevant. A boilerplate charge that "the provocation must be of such character and so close upon the act of killing that for the moment the defendant could not be considered the master of her own understanding" scarcely enlightens the jury as to how repeated infliction of trauma on the defendant is to be assessed.²⁹⁷

294. See text accompanying note 40 *supra*.

295. W. LAFAVE & A. SCOTT, *supra* note 4, at 574. Another permissible basis for mitigation would be a scuffle commenced by A that results in B's use of excessive and deadly retaliation. If A resorts to deadly force in response, self-defense is inapplicable because A was not free from fault in bringing on the struggle. However, B's escalation is grounds for reducing the charge to manslaughter if A kills him. *Id.* at 574, nn.14-17.

296. W. LAFAVE & A. SCOTT, *supra* note 4, at 574; R. PERKINS, *supra* note 6, at 60, 66; *Cf.* *People v. Borchers*, 50 Cal. 2d 321, 325 P.2d 97 (1958) (a history of provocatory behavior provided evidence that defendant acted in heat of passion in killing victim); *Commonwealth v. Colandro*, 231 Pa. 343, 80 A. 571 (1911) (a series of threats by the victim against the defendant was evidence that defendant's fear may have caused him to kill the victim).

297. *State v. Lamb*, 71 N.J. 545, 550, 366 A.2d 981, 984 (1976). See also *People v. Welborn*, 242 Cal. App. 2d 668, 676, 51 Cal. Rptr. 644, 649 (3d Dist. 1966); *State v. Guido*, 40 N.J. 191, 209, 191 A.2d 45, 55 (1963).

Decisions on provocation as a series of acts, outside the context of repeated assaults, have been mixed. One of the most notorious, but least celebrated, examples is *State v. Gounagias*, 88 Wash. 304, 153 P. 9 (1915), where defendant was the helpless victim of an act of sodomy by the deceased. Thereafter, defendant was continually tormented by the words and gestures of those to whom the deceased had related the incident in detail. The cumulative reminders of the original trauma finally enraged the defendant to such an extent that he rushed to deceased's house and killed him. It was held that no mitigation was appropriate because there had been no new acts of provocation by the deceased himself; thus defendant was no longer in a heat of passion, as there had been an adequate "cooling off" period after the sodomy. The court did not credit the fact that the continuing taunts would not have occurred but for deceased's relating the facts to others despite defendant's pleas to tell no one. *Accord, In re Fraley*, 3 Okla. Crim. 719, 109 P. 295 (1910) (defendant unsuccessfully argued that the sudden sight of deceased, who had killed defendant's son a few months earlier, had produced a new passion based on the old wrong). Other courts have concluded that repeated acts of provocation may finally cause an emotional explosion, and that the cooling time should begin to run from the "last straw," not from the earlier and perhaps more serious acts. R. PERKINS, *supra* note 6, at 67.

Appellate courts have begun to correct such charges,²⁹⁸ as well as to reverse trial courts that refuse to submit the manslaughter question to the jury despite proof of prior attacks by the deceased. *State v. Guido*²⁹⁹ exemplifies such a reversal. Commenting on defendant's second degree murder conviction and twenty-four-year minimum sentence, the Supreme Court of New Jersey held:

[A] course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation. In taking this view, we merely acknowledge the undoubted capacity of events to accumulate a detonating force, no different from that of a single blow or injury.³⁰⁰

Recognition of this "detonating force" as a basis for reducing the period of imprisonment has not led the judiciary to discount the distinction between provocation and self-defense. Even if the essence of the provocation plea is fear, the higher standard set in self-defense cases requires the belief of immediate danger to be reasonable as well as honest.³⁰¹ The assumption underlying the reasonableness requirement is that if Mrs. Jones (of our prior hypothetical) shoots her husband while he is asleep, this would be at worst a calculated killing of an undeserving person. At best, it would reflect an erroneous conclusion that homicide was the only way of extricating herself from continuing persecution. Despite the comfortable logic and venerable lineage of this distinction between provocation and justification, however, juries representing the community conscience³⁰² have failed to adhere to the

298. Reversal followed the inadequate charge in *State v. Lamb*, 71 N.J. 545, 366 A.2d 981 (1976).

299. 40 N.J. 191, 191 A.2d 45 (1963).

300. *Id.* at 211, 191 A.2d at 56.

301. W. LAFAVE & A. SCOTT, *supra* note 4, at 583; see text accompanying notes 241-42 *supra*. Trial courts have sometimes displayed unwarranted obtuseness in rejecting proof that a deceased's vicious pattern of conduct, taken as a totality, justified resort to self-defense. An example is *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977). Deceased was described as a "mean drunk" who was often violent towards his wife. Just prior to the killing, deceased had sexually abused and severely beaten defendant and was threatening to kill her and her babies. The Supreme Court of Kansas reversed defendant's second degree murder conviction on the grounds that the trial court had erred in not including a charge of involuntary manslaughter in its jury instructions. Although the appellate court mentioned defendant's self-defense claim (which would have been a complete defense), its opinion concentrated largely on elements of provocation, mitigation, and voluntary and involuntary manslaughter. Contrast these facts with a case where provocation rather than self-defense could properly be found. In *People v. Berry*, 18 Cal. 3d 509, 556 P.2d 777, 134 Cal. Rptr. 415 (1976), the deceased, a 20-year-old woman less than half her husband's age, had taunted defendant for weeks with stories of her affair with another man, demands for a divorce, and alternate demands and refusals to have sexual relations with him. The California Supreme Court reversed defendant's conviction of murder in the first degree because the trial court had refused to instruct the jury on voluntary manslaughter, based upon a sudden quarrel or heat of passion resulting from deceased's long course of provocatory conduct.

302. *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

expected formula in some conjugal homicides.

3. *The Doctrine of Jury Nullification*

Jury deviation from judicial instruction in interspousal cases raises critical issues concerning the feasibility and propriety of control over verdicts. Should the deviation be deterred, for example, by establishing sanctions against "erring" jurors?³⁰³ Is the phenomenon of jury independence a regrettable example of lawlessness or a legitimate corrective for the prior refusal to enforce assault statutes against domestic violators?

a. *Juror Freedom to Acquit*

As Judge Learned Hand has observed:

The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no . . . [defendant] is likely to suffer of whose conduct they do not morally disapprove; and this introduces . . . into the enforcement of law . . . the mollifying influence of current ethical [considerations].³⁰⁴

This lack of accountability, which includes the prerogative of reporting a final decision without giving reasons for it, was a slow and far from coincidental development in Anglo-American legal history. Consider the early forms of control over English jurors. A party who lost a case could convene a larger jury to review the facts *de novo*; if the second jury disagreed with the first, the members of the original jury could be attainted—a most unpleasant form of reversal:

All of the first jury shall be committed to the King's prison, their goods shall be confiscated, their possessions seized into the King's hands. Their habitations and houses shall be pulled down, their woodland shall be felled, their meadows shall be plowed up and they themselves forever thenceforward be esteemed in the eye of the law infamous.³⁰⁵

303. An "incorrect" acquittal may not, of course, be remedied by retrying the defendant. U.S. CONST. amend. V.

304. *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775-76 (2d Cir. 1942).

305. J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE*, ch. 26 (c. 1468) (S.B. Chrimes trans. & ed.), quoted in T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 131 (5th ed. 1956). The rationale for this severity was that as originally conceived, the jury arrived at its decision on the basis of facts personally known to its members rather than after sifting the testimony of witnesses. Thus an incorrect verdict was regarded as perjury. *Id.* Although attainder was rarely used in criminal cases and fell into disfavor by the fifteenth century, other techniques for controlling

Although an acquittal is not only a conclusive finding on the facts but also a conclusive application of the law to the particular case at bar, controls over acquittals came to be recognized as more pernicious than the possibility of a "wrong" verdict. While improper conviction could constitute creation of a new rule of law operating as an *ex post facto* penalty, no parallel consequence flows from giving a verdict of not guilty its full effect.³⁰⁶

What are the practical consequences of this power in prosecutions of battered spouses who kill their assailants? To what extent do laymen arrive at dispositions that differ from those of a professional judiciary? Comprehensive empirical evidence in conjugal and other cases, matching a massive sample of jury verdicts with a report from the trial judge in each case as to the disposition he would have made on the same facts, indicates a rather significant range of disagreement.³⁰⁷ Overall verdict figures for manslaughter and for murder prosecutions show that the jury was more lenient in twenty-nine percent of the trials.³⁰⁸ Inter-spousal homicide dispositions exhibit the same general trend,³⁰⁹ although no percentage comparisons with nonfamilial prosecutions are available.

The divergence between judge and jury indicates that the court's charge to the jurors has either 1) provided sufficient latitude for the

juries were developed and the judiciary assumed the power of punishing jurors for rendering incorrect as well as corrupt verdicts. M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 45, 46 (1973) (citing W. FORSYTH, *HISTORY OF TRIAL BY JURY* 192-214, 259-98 (n.p. 1852) and P. DEVLIN, *TRIAL BY JURY* (1956)). If an acquittal of a criminal defendant was regarded as manifestly against the evidence, jurors could be called into the Star Chamber, imprisoned until they confessed their error, fined, or otherwise humiliated. See T. PLUCKNETT, *supra*, at 133 (referring to jurors "made to wear papers in Westminster Hall" (quoting R. CROMPTON, *AUTHORITIE ET JURISDICTION DES COURTS DE LA MAJESTIE DE LA ROYNE*, f. 32b (n.p. 1594))).

The celebrated Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670), terminated this control over acquittals. The members of the jury, who had refused to give a verdict against William Penn and William Mead for preaching to an unlawful assembly, persisted in their refusal despite being locked up without food for two days and fined. M. KADISH & S. KADISH, *supra*, at 46. Indeed, four of the jurors spent months in prison. Schefflin, *Jury Nullification: The Right to Say No*, 45 SO. CAL. L. REV. 168, 168 (1972). On habeas corpus review, it was held that the jury was not required to follow the direction of the court. T. PLUCKNETT, *supra*, at 134.

306. As Lord Devlin has commented: "Whenever there is a trial by jury, the condemnation must be by a judgment which is both lawful and the judgment of the country. If his countrymen condemn a man and they exceed the law, he shall go free: if the law condemns him and nevertheless his countrymen acquit, he shall go free." P. DEVLIN, *TRIAL BY JURY* 90-91 (1956), quoted in M. KADISH & S. KADISH, *supra* note 305, at 47. Convictions can be set aside, as can the verdicts of civil juries. *Id.* at 46.

307. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

308. Juries were more lenient in 35% of the cases, judges in 6%. The authors of the study subtracted the cases in which the judges were more lenient for a "net jury leniency" of 29%. *Id.* at 69. The study reached no conclusion as to whether or not the judge's disposition would have been more appropriate.

309. *Id.* at 202-03, 231-36.

variance, or 2) unsuccessfully exhorted application of the pertinent law to the salient facts.³¹⁰ Where the case is not a close one from the evidentiary standpoint, acquittal is likely to stem from resistance to the limitations imposed by the court's statement of the law.³¹¹

This hypothesis of resistance is applicable to acquittals in the domestic violence context, which involve jury handling of self-defense and provocation pleas.³¹² About one-third of the judge-jury disagreements in crimes of violence turn on the self-defense issue.³¹³ Particularly significant is the class of cases in which one component of the self-defense requisites is missing:

The victim has been a[n] . . . aggressor, has threatened serious harm, and the defendant's violence is in response to violence initiated by the victim. What causes the judge and jury to disagree is that in each of these cases, at the time the defendant acts, the threat of violence is no longer immediate enough to satisfy the legal rule.³¹⁴

Compassion for a wife protecting herself against an assaultive husband is explicitly noted as a factor in acquittals,³¹⁵ as is a general finding that juries are reluctant to convict where the defendant was "punished enough" by being beaten or suffering other misfortunes.³¹⁶ Thus, the jury's disagreement³¹⁷ is often influenced by a normative judgment about the circumstances that warrant violent self-help and the appropriate legal limitations on self-defense.³¹⁸

b. Justifying the Jury's Power

How can an uncontrolled exercise of the prerogative to determine both law and fact be upheld? Enter the doctrine of jury nullification, a phoenix that has survived a series of fiery executions. This doctrine would grant jurors the power to acquit on the basis of their own consciences, regardless of the judge's instructions on the law.³¹⁹ John Ad-

310. In 34% of the cases, divergence occurred because of factual disputes, in 42% because of disputes over values and facts, and in 24% because of values alone. *See id.* at 163-65. The trial judge is, of course, precluded from directing a verdict of guilty. M. KADISH & S. KADISH, *supra* note 305, at 52.

311. H. KALVEN & H. ZEISEL, *supra* note 307, at 164 n.2.

312. *See* N.Y. Times, May 7, 1979, § A, at 1, col. 1. It should be noted that although several recent acquittals in domestic homicides were based on acceptance of insanity pleas, *see* note 210 *supra*, disagreement in insanity cases is rare, H. KALVEN & H. ZEISEL, *supra* note 307, at 330.

313. H. KALVEN & H. ZEISEL, *supra* note 307, at 221. This group of cases comprises five percent of the total sample of judge-jury disagreements.

314. *Id.* at 223.

315. *Id.* at 202-03.

316. *Id.* at 106.

317. It should be noted that in most cases, the jury's rejection of the law is not necessarily a conscious or explicit choice. *Id.* at 165.

318. *Id.* at 221 n.1, 223.

319. Trials for seditious libel were the genesis of nullification debates both in England and the

ams noted in his Diary for February 12, 1771, that "the common people . . . should have as complete a control, as decisive a negative, in every judgment of a court of judicature" as in other governmental decisions.³²⁰

By the end of the nineteenth century, however, the United States Supreme Court had held that because of the paramount value of uniformity and predictability in the law, the jury does not have the right, even if it possesses the power, to discount the court's instruction:

Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. . . . [T]he result would be that the enforcement of the law against criminals. . . would depend entirely upon juries uncontrolled by any settled, fixed, legal principles.³²¹

Despite the coup de grâce from the judiciary,³²² the question of whether jury nullification serves a permissible or even indispensable function in the criminal justice system has continued to be disputed. Dean Roscoe Pound has termed "jury lawlessness" an essential "corrective" in legal administration.³²³ Wigmore reached substantially the same conclusion without invocation of controversial phraseology:

Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are

colonies. See, e.g., *The King v. Shipley*, 99 Eng. Rep. 774 (K.B. 1784); Libel Act of 1792, 32 Geo. 3, c. 60, § 1; Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 583-88 (1939). At the 1735 prosecution of John Peter Zenger, a New York printer of a newspaper whose content was not approved by the British mayor, the jurors were advised by prominent counsel Andrew Hamilton that they had "the right beyond all dispute to determine both the law and the facts." They were exhorted to "see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects." J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 78, 93 (S. Katz ed. 1963). While this concept was repudiated in England, Howe, *supra*, at 583-84, the right of juries in criminal cases to nullify court instructions on the law was widely accepted in America during the pre-Revolutionary era and indeed for forty years after the adoption of the United States Constitution. M. KADISH & S. KADISH, *supra* note 305, at 48; Schefflin, *supra* note 305, at 174.

320. 2 LIFE AND WORKS OF JOHN ADAMS 225 (C.F. Adams ed. 1856). Another factor supporting nullification was the minute differential in legal training and experience between judges and juries of the period. U.S. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE No. 8, at 27 (1931).

321. *Sparf & Hansen v. United States*, 156 U.S. 51, 101-02 (1895). See also *United States v. Battiste*, 24 F. Cas. 1042 (D. Mass. 1835). It has also been held that since the jury has no right to nullify, it must not be instructed as to its power to do so because such an instruction would increase the instances where such power is exercised. *United States v. Moylan*, 417 F.2d 1002, 1006 (1969). See H. KALVEN & H. ZEISEL, *supra* note 307, at 498.

322. For a summary of contemporary federal and state rulings on jury nullification, see Schefflin, *supra* note 305, at 201-23.

323. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910).

general exceptions); while Justice is the fairness of this precise case under *all* its circumstances. . . .

Everybody knows this and can supply instances. But the trouble is the *law cannot concede it*. . . .

Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. . . .

And that flexibility could never be given by judge trial.³²⁴

Other commentators have suggested that nullification is appropriate in particular categories of cases where normal prophylactic devices such as prosecutorial discretion and leniency in sentencing will not be utilized.³²⁵

c. *Nullification as a Corrective*

Are conjugal homicides a category in which the correctives normally inherent in the criminal justice system have failed to operate? Prosecutorial discretion is seldom used when a killing falls outside the meticulous imperatives of self-defense,³²⁶ and on occasion is not exercised even where these imperatives seem to have been satisfied.³²⁷ However, truncation of a homicide inquiry at the initial stage may be the least appropriate adjustment mechanism available. In contrast, leniency by the sentencing judge may be the most appropriate measure countenanced by the rules of the system, where the sentence accorded is based on a record showing the deceased's prior assaults on the defendant.

Yet, such clemency by trial judges has been conspicuously rare. In *People v. Eleuterio*,³²⁸ for example, no jury trial took place because the

324. Wigmore, *A Program for the Trial of a Jury*, 12 AM. JUD. SOC. 166, 170 (1929).

325. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481, 483, 488, 493 (1968). This article focuses upon prosecutions involving passive resistance to unjust laws, i.e., challenge to the traditional authority of government officials. The government may have implicated itself so deeply in an unwise policy that popular repudiation in a forum "more immediately available . . . than the ballot box" is necessary. *Id.* at 494. Old examples, such as the fugitive slave laws, are added to the modern one of draft resistance. *Id.* at 483-93. See also Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969).

326. See note 210 *supra*.

327. A recent example is the case of Pattie Schaeffer, who stabbed her husband as he was choking her and attempting to push her out of a fifth-story window. The Bronx District attorney presented the case to a grand jury, even though he believed "[t]here is a strong possibility that this is a case of self-defense." The grand jury refused to indict. N.Y. Post, Aug. 21, 1980, at 13, col.1.

328. 47 A.D.2d 803, 365 N.Y.S.2d 94 (1975). See also *People v. Jones*, 191 Cal. App. 2d 478, 12 Cal. Rptr. 777 (2d Dist. 1961); *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977); *State v. Lamb*, 71 N.J. 545, 366 A.2d 981 (1976); *State v. Guido*, 40 N.J. 191, 191 A.2d 45 (1963); *State v. Thomas*, 64 Ohio App. 2d 141, 411 N.E.2d 840 (1979); *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977), discussed at note 227 and accompanying text *supra*.

defendant pleaded guilty to manslaughter,³²⁹ but an extensive presentence hearing was held before a judge. The appellate court summarized the facts as follows:

[A]ppellant was the child of divorced parents and . . . her father was an alcoholic who was chronically unemployed. At the time of this killing she was 25 years of age, had an above average I.Q. and had attended college. She had been married to the decedent for five years and has two infant daughters. . . . [T]he decedent worked only irregularly and the support of the family was left largely to appellant. . . . [Her husband] had physically assaulted her frequently. She tried on several occasions to leave him but he refused to permit it. Shortly before the killing she left decedent, moved to Watertown and instituted divorce proceedings. Decedent followed her and insisted that she terminate the divorce action. Fearing injury to herself and her children she allowed him to move in with the family again. . . . On the night of the killing decedent and appellant argued again about separating. Decedent refused to do so, verbally abused her and struck her in the face. He then got his .22 caliber pistol, cleaned it and placed it on his pillow next to him before going to sleep. During the night appellant awoke and using her husband's gun fired two shots into his head. She then drove to the police station with the gun and turned herself in.³³⁰

The trial court imposed an indeterminate sentence of up to twelve years, despite medical testimony that appellant needed psychiatric treatment on an outpatient basis rather than institutionalization.³³¹ Such a sentence is unusually long in light of the presence of commonly accepted mitigating factors such as protection of the family and extreme provocation, and the absence of such aggravating factors as prior criminal activity or killing for "kicks."³³²

Neither prosecutorial nor sentencing discretion aided Eleuterio. If

329. Defendant had preliminarily entered a plea of not guilty to second degree murder, but had changed her plea to guilty of the lesser charge of manslaughter in the first degree upon the advice of her counsel. Record at 1, *People v. Eleuterio*, 47 A.D.2d 803, 365 N.Y.S.2d 94 (1975). She was represented by the same counsel who had defended her husband against an assault charge stemming from a particularly severe beating she had received. When the judge pointed out this anomaly and asked defendant whether she wished to proceed, counsel answered the question affirmatively for her. *Id.* at 22-23.

330. 47 A.D.2d 803, 365 N.Y.S.2d 94 (1975).

331. Record at 54, 62, 91, *People v. Eleuterio*, 47 A.D.2d 803, 365 N.Y.S.2d 94 (1975).

332. Eleuterio's sentence was reduced to a four-year maximum on appeal. 47 A.D.2d 803, 365 N.Y.S.2d 94, 95 (1975). The Uniform Law Commissioners' Model Sentencing and Corrections Act lists the following as aggravating factors:

If appropriate for the offense, aggravating factors, if not themselves necessary elements of the offense, may include:

- (1) the defendant has a recent history of convictions or criminal behavior;
- (2) the defendant was a leader of the criminal activity;
- (3) the offense involved more than one victim;
- (4) a victim was particularly vulnerable;
- (5) a victim was treated with cruelty during the perpetration of the offense;
- (6) the harm inflicted on a victim was particularly great;

she had chosen a jury trial and the court had given a standard self-defense charge, would acquittal have been an appropriate substitute for governmental clemency?³³³ Professors Mortimer Kadish and Sanford Kadish suggest that while the judge's instructions are obligatory upon the jurors, that obligation is not absolute; the jury "considers whether literal adherence to the judge's instructions will advance or impede the goals of criminal justice as well as the institutional and background ends of the society more generally."³³⁴ Analysis of these societal purposes could focus on whether Eleuterio is a "bad" person who should be punished, deterred from future crimes, or restrained by being incarcerated. Or, even in the absence of any need for treating or restraining this defendant, would conviction be essential as general deterrence to other potential wrongdoers.

The jury may of course answer these questions without differentiating this case from a nondomestic slaying.³³⁵ The victim provoked the homicide by his prior unlawful conduct; the defendant is a sympathetic one who has never committed a prior crime and is unlikely to commit a future one. Yet the judge's instructions would preclude acquittal because the shooting occurred while the victim was asleep; a valid self-defense plea requires a demonstration of imminent danger. If the jury disregards the charge it may arguably be satisfying the system's goal of

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- (7) the offense was committed to gratify the defendant's desire for pleasure or excitement;
 - (8) the defendant has a recent history of unwillingness to comply with the conditions of a sentence involving supervision in the community; and
 - (9) any other factor consistent with the purpose of this Article and the principles of sentencing.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT § 3-109 (Approved Draft 1978), *quoted in* Perlman & Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175, 1275 (1979).

333. Unencumbered freedom to acquit is preferable to Argus-eyed surveillance of jury conduct. See note 305 and accompanying text *supra*. Nevertheless, the fact that the power to render such a verdict is lodged in the jury tells us very little about whether a particular exercise of that power is justified. It should be noted that there are practical consequences flowing from the might-right distinction in this context. See note 321 and accompanying text *supra*, discussing the judicial rationale for refusing to instruct jurors that they have the power to nullify.

334. M. KADISH & S. KADISH, *supra* note 305, at 60-61. This remarkable work, which well repays a complete reading, concludes that the jury's function is neither clerklike nor discretionary. The jurors have a recourse role and may consider that role's "entire structure of means and ends before making a judgment on which end or ends shall prevail and which yield." *Id.* at 61-62. Recourse roles "enable their agents to take action in situations where the role's prescribed ends conflict with its prescribed means, including grants of discretion, broad or narrow. Recourse roles . . . establish[] conditions under which agents may be justified in undertaking actions that depart from role requirements." *Id.* at 35.

335. *Cf.* Commonwealth v. Colandro, 231 Pa. 343, 80 A. 571 (1911) (deceased had been threatening to kill defendant for a period of several months and defendant shot him first on the appointed day).

justice to this defendant, but endangering the principle of general deterrence to others who have been similarly provoked.

However, a unique additional factor must be considered in conjugal homicides—a factor anticipated in the prior discussion of the presumptions underlying self-defense standards.³³⁶ How are acquittals to be assessed if defendants have been deprived as a class of legal protection against decedents' prior assaults?

Wharton, one of the foremost authorities on the common law, sets forth the circumstances under which the immediate danger criterion normally required for self-defense may be irrelevant:

Of course the rule just stated, that an attack cannot be anticipated by a private person who could have recourse to the law for this purpose, presupposes that the law gives machinery by which, if my life is threatened, I can cause the arrest of my expected assailant. Suppose, however, the law gives no such machinery?³³⁷

The question is answered thus:

It has sometimes been said that if A's life be made wretched by the reckless and desperate enmity of B, . . . whom no other process can be used to check, then A is excused in taking this violent but only possible way of saving his own life, by sacrificing that of B. But it is otherwise where there is opportunity to invoke the interposition of the law.³³⁸

The common law distinction set forth by Wharton is clear-cut. The rule that A must wait till the expected attack occurs is dependent upon the availability of legal redress. If there is no such redress, "A is not obliged, breaking his usual employments, to hide from B," but may arm and take action in advance of B's next assault.³³⁹

Contemporary law precludes self-help against anticipated domestic violence even where police and judicial assistance is withheld. When this impasse is broken by a battered spouse who kills, does acquittal supply the court relief envisioned by Wharton's analysis?

It might be argued that in light of this common law authority judges in domestic homicide cases should provide a modified instruction on self-defense, replacing the imminent danger requirement with the certainty of harm in the future³⁴⁰ and that if such modification is not made, jury nullification is justified.

336. See Part II, Section A *supra*.

337. F. WHARTON, A TREATISE ON CRIMINAL LAW 460, § 487a (9th ed. 1885) (1st ed. Philadelphia 1846).

338. *Id.* at 458-59, § 487.

339. Cf. 4 W. BLACKSTONE, COMMENTARIES *184 (presuming that legal assistance is always available). See also note 246 and accompanying text *supra*.

340. See notes 141-44, 241-46 and accompanying text *supra*. In contrast, the Model Penal Code suggests that certainty of harm on the present occasion should be a permissible basis for self-defense. See note 243 *supra*.

This approach is too indiscriminate to deal with a wide range of potential variables. These variables may be introduced in the following dialogue between two speakers, Alpha (the proponent of the theory) and Beta.

Alpha: "Assume I am an abused spouse. If the police will not arrest my assailant and the unlawful attacks are increasing in severity, can't I act on Wharton's rationale?"

Beta: "Why not take action when the next attack actually occurs? Aren't you just suggesting that it's proper to kill to obtain peace of mind?"³⁴¹

Alpha: "Let me add a few more facts, then. I can only ward off my assailant successfully if I am armed and aware that he is about to attack."

Beta: "The law permits you to arm in advance when an assault is reasonably anticipated."³⁴²

Alpha: "Suppose the attacks have always commenced while I was asleep. Or suppose instead that I have left my spouse, but I know that he will pursue me³⁴³ and perpetrate an ambush attack? The ambush situation may be just what Wharton had in mind."

Beta: "Have you been persistent in seeking police aid?³⁴⁴ If your spouse were in jail, you would be protected without any necessity for self-help."

Alpha: "This is one of the numerous cases where they didn't respond.³⁴⁵ Or let's say that they did, but no court action was ever initiated, or that the judge refused to impose any jail sentence despite the

341. Cf. *People v. Lombard*, 17 Cal. 316 (1861) (fear of danger at some future time insufficient to sustain self-defense plea); *State v. Schroeder*, 103 Kan. 770, 176 P. 659 (1918) (same); R. PERKINS, *supra* note 6, at 994.

342. R. PERKINS, *supra* note 6, at 58. Such preparation is permitted if unaccompanied by an intention to provoke a confrontation. Defense counsel should be aware, however, that a prosecutor might argue that this conduct constituted "lying in wait"—which is prohibited. See Eisenberg & Seymour, *supra* note 73, at 42.

343. "In the most extreme cases husbands have kept their wives and children prisoners, or have tracked their fleeing wives across the country to continue their assaults, or have made threats against the lives of their wives' parents or the children should the wives attempt to escape." Fields, *Wife Beating: Government Intervention Policies and Practices*, in U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 228, 265 (1978). See *State v. Guido* 40 N.J. 191, 191 A.2d 45 (1963), discussed at note 271-72 and accompanying text *supra*; *People v. Eleuterio*, 47 A.D.2d 803, 365 N.Y.S.2d 94 (1975), discussed at notes 328-32 and accompanying text *supra*. See also McNULTY, *THE BURNING BED: THE TRUE STORY OF FRANCINE HUGHES—A BEATEN WIFE WHO REBELLED* (1980) ("I'll find you wherever you go and when I do it won't be pretty. I'll kill you inch by inch." (quoting the threats made to Francine Hughes (see note 210 *supra*) when she sought escape from a battering husband)).

344. Cf. *People v. Eleuterio*, 47 A.D.2d 803, 803, 365 N.Y.S.2d 94, 95 (1975) (police were called, and restrained decedent as he was whipping defendant with the buckle end of a large leather belt).

345. See Part I, Section B *supra*. Pattie Schaeffer, who killed her husband as he was pushing her out of a fifth-story window, see note 327 *supra*, had called the police on scores of occasions in

history of prior injuries."³⁴⁶

The dialogue illustrates that any self-defense modification purporting to envelop all such homicides would be functionally deficient. Even exceptions to basic principles must have general applicability,³⁴⁷ and conjugal cases are points along a continuum rather than a monolithic category. Two distinct and impermissible results would therefore follow if the trial judge's charge dispensed with the imminent danger requirement in these prosecutions but retained it for all others. Fragmentation of the self-defense standard would undermine the deterrent inherent in the proscription against homicide. It would also raise significant equal protection problems, since certain killings included in the "forgiven" range would be indistinguishable in all material respects from nonfamilial provocation cases.³⁴⁸

If the judge cannot alter the standard, can the jury ameliorate its application? Acquittal in anticipatory slayings cannot be justified merely because of defendant's status as a battered spouse. Perhaps an instance where each of the Alpha variables are satisfied might present a discrete basis for nullification, at least as the lesser of two evils. Ultimately, both the spirit and the letter of the criminal law require that the jury be removed from this dilemma. Nullification is an undesirable counterbalancing device, which occurs after a slaying that might have been prevented. As long as domestic assault victims are excluded from legal redress and resort instead to homicide, the juror in the subsequent prosecution will find himself in the reluctant position of Charon ferrying the defendant from a private Hades to one provided by the state.

CONCLUSION

Since the passing of frontier justice, restraint and punishment of assaults has been a state rather than an individual function. If the government abdicates this role as to one class of victim, several consequences follow. Equal protection strictures are violated by failure to vindicate the interspousal exception. Such vindication does not flow

the six months preceeding the stabbing, urging them to enforce a court order barring him from entering her Bronx apartment. In a newspaper interview she stated:

I've been taking beatings from my husband for months because the police don't help me. . . . I've called the police over and over again, but they'd never arrest him. They told me if they locked him up, he'd just be out in an hour. I have to blame the police; if only they'd have locked him up, this wouldn't have happened.

N.Y. Daily News, Aug. 22, 1980, at 20, col. 1. Lt. Andrew Rosenzweig, speaking for the local precinct, said that "it would be the duty of an officer to make an arrest in any case in which a court protection order is violated. 'It might be possible that the situation would be resolved without an arrest on one occasion,' he said. 'But on several different occasions? No way.'" *Id.* at col. 4.

346. See notes 57, 141-44 and accompanying text *supra*.

347. See text accompanying note 324 *supra*.

348. See Part I, Section B(2) *supra*.

from an assailant's right of domestic privacy, which would encompass only consensual activities that are not injurious to physical safety. When victims fail to secure protection by negotiating with police and prosecutors, they may commence an omnibus lawsuit seeking enforcement of constitutional and statutory rights. Defendants in some of these suits have entered into a detailed settlement agreement creating an administratively feasible remedy. If no agreement is reached, an effective judicial decree is preferable to a finding of mootness based merely on official assurances that the past policy will be discontinued. At best, such assurances will be conscientiously implemented by the administration that has agreed to them; at worse, plaintiffs—with no binding court order to invoke—will recommence the process with new affidavits or will resort to unlawful self-help.

Where government refusal to enforce the law results in homicidal retaliation against a recidivist assailant, the phenomenon of jury nullification makes its entrance. Although unduly restrictive interpretation of self-defense and insanity pleas may be corrected by the analysis suggested in this Article, the facts in some conjugal cases will sustain only the mitigating defense of provocation. Yet the jury in such a case, receiving an instruction from the trial court that virtually precludes acquittal, may discount that instruction where a defendant has been the object of an unremedied persecution and is not presently dangerous.

Thus, the criminal justice fabric is unravelled at both ends. Police protection and judicial services are unlawfully withheld from one category of assault victims. When the victim is transmuted into the slayer, the jury steps out of bounds to compensate for the original deprivation. Both erosions have regrettable implications for the critical criminal law goal of deterrence. The compensatory mechanism, however, would not be called into play if the legislature's designation of assault as a crime were recognized by the executive and the judiciary:

When the court will not insist that legal rights be implemented by normal legal remedies, or when the executive will not back up the courts in the normal way, I think the typical citizen hardly feels he is dealing with the 'law' at all. He cannot show respect for a law that does not respect itself . . .³⁴⁹

349. C. BLACK, JR., *THE OCCASIONS OF JUSTICE* 151 (1963). This comment by Professor Charles Black was made in the context of Southern resistance to desegregation.