REFORM IN KANSAS DOMESTIC VIOLENCE LEGISLATION

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Until recently, the problem of spouse abuse\(^1\) was largely neglected by the legal system. Although criminal assault and battery laws prohibited interspousal violence, attitudinal and structural barriers to both arrest and prosecution rendered the statutes largely ineffective. When battered women\(^2\) turned to the tort system for help, they found time-worn vestiges of the common law blocking meaningful civil relief.

In the past several years, academic commentators and political groups have condemned the failure of the criminal justice system to respond effectively to spousal assault\(^3\) and have lobbied for new civil remedies.\(^4\) Since 1976, virtually

\(^1\) For purposes of this article, "spouse abuse" includes acts or attempted acts of violence that occur between unmarried cohabitants, as well as those acts committed by the legally married upon their spouses. See United States Commission on Human Rights, Battered Women: Issues of Public Policy 3 (1978) (statement of Del Martin) [hereinafter cited as Battered Women].

To an extent not appreciated until recently, spouse abuse is a pervasive problem. As many as 50 to 60% of American families are touched by marital violence. T. Davidson, Conjugal Crime 3 (1978); R. Gelles, The Violent Home: A Study of Physical Aggression Between Husbands and Wives 48, 183-84 (1974); Battered Women, supra, at 154 (statement of Dr. Murray Straus); R. Langley & R. Levy, Wife Beating: The Silent Crisis 3 (1977) (discussing the work of Dr. Suzanne Steinmetz). Conservative estimates put the number of wives who are battered each year at close to two million. Battered Women, supra, at 153 (statement of Dr. Murray Straus); Domestic Violence, 1978: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Human Resources, 95th Cong. 2d Sess. 304 (1978) (statement of Dr. Suzanne Steinmetz) [hereinafter cited as Hearings]; R. Langley & R. Levy, supra, at 3; M. Straus, R. Gelles & S. Steinmetz, Behind Closed Doors: Violence in the American Family 34 (1980). Marital violence crosses all socioeconomic lines. Upper and middle class families, as well as lower class families, experience spouse abuse. Id. at 144, 148-49 (suggesting that lower income families have a higher rate of violence); T. Davidson, supra, at 6 (survey by Dr. Murray Straus showed that 23% of middle class wives charged physical abuse as a reason for seeking divorce); see also Comment, Wife Beating: Law and Society Confront the Castle Door, 15 Gonz. L. Rev. 171, 175 (1979) [hereinafter cited as Wife Beating: Law & Society] (suggesting that one reason for the belief that wife abuse is a phenomena of the poor is that affluent families rely on social and medical alternatives that do not require public records).

\(^2\) This Article will concentrate its attention on women who are assaulted by their husbands or lovers, since these are the cases in which the most serious violence usually occurs. Abusers will generally be denoted as male, and their victims as female. Nonetheless, both men and women abuse their spouses. One researcher has contended that "[w]hen it comes to using minor amounts of physical force, slapping, hitting, pushing, there just appears to be no real difference between men and women. One of the reasons you have the battered-wife phenomenon is not that men are more aggressive, they just seem to be physically stronger and are able to do more damage." R. Langley & R. Levy, supra note 1, at 186 (quoting Dr. Steinmetz); M. Straus, R. Gelles & S. Steinmetz, supra note 1, at 36-43.

every state in the union has enacted some form of domestic violence legislation. Kansas has participated in this development by moving on a number of fronts to remedy the long-standing inefficacy of the legal system's approach to spousal violence. In 1979, the Kansas Legislature passed the Protection From Abuse Act, a comprehensive scheme under which family members may seek injunctive relief from abuse. In 1982, the Kansas Supreme Court eliminated interspousal immunity in cases of intentional or willful torts. Local and statewide reform efforts, such as the Governor's Committee on Domestic Violence, have sought to alert police and prosecutors to the need to enforce existing criminal penalties in cases of domestic violence. Finally, in its 1983 session, the Kansas Legislature eliminated one of the last of the common law barriers to prosecution of marital violence by removing a spouse's exemption from prosecution for marital rape.

While major statutory and administrative changes have taken place, these efforts have not been assessed in detail. Serious policy questions raised by the new remedies have not been the subject of legal commentary or of appellate opinion. Instead, the application of these innovations has occurred in an unreported netherworld of misdemeanor criminal actions and preliminary civil orders.

This Article analyzes present Kansas criminal laws and civil remedies dealing with spouse abuse. It considers pertinent statutes, appellate opinions, and the results of a survey of Legal Service attorneys practicing in the field. Three major conclusions are reached. First, while police authority to arrest in cases of spouse abuse may be broadened, effective reform of the criminal process requires systemic improvements, including better training of police, adjustment of bail policy, and reevaluation of sentencing options. Second, although major improvements have already been made in Kansas civil remedies, enforcement of injunctive orders should be improved. Finally, neither the reforms adopted thus far nor those proposed here will be effective in aiding battered women unless there is a public attempt to inform potential victims of their rights.


* Governor's Committee on Domestic Violence (Report of Sept. 1982) (Office of the Governor of the State of Kansas) [hereinafter cited as Governor's Committee on Domestic Violence].

I. THE NATURE OF THE PROBLEM

Humans are violent. Sibling violence extends back in our heritage to Cain and Abel; similarly, spouse abuse has probably existed since the “first monogamous pairing relationship.” What is unique about violence between spouses is that society, rather than discouraging such behavior, has instead historically approved of it. Until recently, wife abuse was sanctioned by religion, culture, and law.

Wife beating was considered appropriate conduct throughout the Middle Ages and, as a result, its legality was recognized in English common law. British settlers carried this aspect of their legal heritage to America. After the Revolutionary War, many American states established laws that expressly sanctioned wife beating. In 1824, the Mississippi Supreme Court ruled that a husband could moderately chastise his wife without being inhibited by the court. A North Carolina court in 1874 held that a man could beat his wife so long as no enduring injury was inflicted and overwhelming violence was not used.

By the late 19th century, however, courts and legislatures began overturning the wife beating privilege. In 1871, an Alabama court issued the first American decision denying the right of a man to beat his wife. Massachusetts courts soon followed Alabama’s lead. During subsequent years state legislatures gradually prohibited spousal battery. By 1917, one commentator had concluded that wife beating was “obsolete even in those states which formerly acquiesced in the practice.”

While the turn of the century saw the end of a husband’s immunity from criminal liability for spousal battery, other vestiges of the common law remained. The criminalization of spousal battery was not accompanied by any change in the husband’s traditional exemption from rape prosecution.

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10 Genesis 4:8.
11 BATTERED WOMEN, supra note 1, at 5 (statement of Del Martin).
12 In the Middle Ages the status of women was so debased that men were exhorted to beat their wives. During the late 1400s Friar Cherubino of Siena wrote the Rules of Marriage, which stated that when a wife commits an offense a husband should “[s]cold her sharply, bully and terrify her. And if this still doesn’t work ... take up a stick and beat her soundly . . . .” T. DAVIDSON, supra note 1, at 99. Laws were established throughout Europe treating women as the property of their husbands. R. LANGLEY & R. LEVY, supra note 1, at 31, 34. See also E. GOULD DAVIS, THE FIRST SEX 252 (1972).
13 As Blackstone noted in the mid-1700s: “For as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children . . . .” 1 W. BLACKSTONE, COMMENTARIES 444. See also HEARINGS, supra note 1, at 199 (report of Sen. Wally Barnett); Comment, Wife Abuse: The Failure of Legal Remedies, J. MAR. J. PRAC. & PROC. 549, 549-50 (1978) [hereinafter cited as Wife Abuse].
14 UNITED STATES COMMISSION, supra note 3, at 2.
15 Bradley v. State, 1 Miss. (1 Walker) 156 (1824).
16 State v. Oliver, 70 N.C. 60 (1874).
17 Fulgham v. State, 46 Ala. 143 (1871).
19 UNITED STATES COMMISSION, supra note 3, at 2.
20 Note, Right of Husband to Chastize Wife, 3 VA. L. REV. 241, 246 (1917).
21 See infra notes 152-83 and accompanying text.
t al violence also remained unremediated through the tort system. The doctrine of interspousal immunity precluded a wife from recovering damages for physical harm which occurred during marriage.22 The immunity was also assumed to bar injunctive relief, such as court orders, requiring a husband to cease abuse.23 Until the 1970s, injunctive and compensatory remedies were available to abused wives only at the commencement of a divorce or separate maintenance proceeding. In effect, a wife could hope to end abuse only by taking action to end her marriage.

II. The Criminal Process

For the greater part of this century, the criminal assault and battery laws were the only remedies available to spousal abuse victims. Until recently, however, enforcement of these laws in cases of spousal violence was so limited it often amounted to de facto decriminalization. Criminal acts of spouse abuse went unreported, underprosecuted, and undeterred.24 Two major and competing factors were identified as the causes of the inefficacy of the criminal process. Law enforcement personnel and some researchers saw the reluctance of victims to bring criminal charges or to cooperate once charges were brought as the principal barrier to effective enforcement.25 Law enforcement critics, on the other hand, pointed to the failure of the police to arrest and of prosecutors to prosecute as the major causes of continued violence.26 The perception of each side that the other was reluctant produced a synergistic effect, ensuring in most cases that the criminal process would be ineffective.

Battered women have traditionally been reluctant to seek the aid of the police. Researchers agree that spouse abuse is probably the most underreported violent crime in America.27 Studies in Colorado and Kentucky have found that only one battered woman in ten calls the police.28 Powerful cultural forces deter victims of spouse abuse from either involving the police or invoking police aid. Society places a high value on successful marriages, and many women believe "that if they have failed at marriage, they've failed as women."29 Abused spouses may feel so much shame about the abuse,30

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22 See infra notes 311-38 and accompanying text.
23 See infra note 188 and accompanying text.
25 See infra notes 28-35 and accompanying text.
26 See infra notes 37-53 and accompanying text.
27 Hearings, supra note 1, at 13 (statement of Steve Y’Barra); id. at 56 (report of Beverly Monasmith).
29 R. Langley & R. Levy, supra note 1, at 117 (quoting Maria Roy). See also Hearings, supra note 1, at 306, 322 (testimony and report of Dr. Suzanne Steinmetz); Battered Women, supra note 1, at 11 (statement of Del Martin).
30 D. Martin, Battered Wives 81 (1976); R. Langley & R. Levy, supra note 1, at 112.
or even responsibility for its occurrence, that they decline to call for outside assistance when faced with violence.\textsuperscript{81} Women may also be deterred from calling for assistance because of affection for their mates\textsuperscript{82} or of hope that their mates will reform.\textsuperscript{83} The economic dependence of many women also deters them from calling the police. Many abused women are housewives with no marketable skills.\textsuperscript{84} Those in the market usually earn less than men.\textsuperscript{85} Finally, women unwilling or afraid to break away from their husbands may see reliance on the criminal process as likely to increase tension in the relationship.\textsuperscript{86}

Those women able to overcome their reluctance to call the police have found law enforcement officials reluctant to exercise their power to arrest and prosecute. Explicit or unstated policies of nonarrest and even nonintervention in spouse abuse cases have existed in many police departments throughout the nation.\textsuperscript{87} Although domestic disturbances account for a significant proportion of all calls for police assistance,\textsuperscript{88} spouse abuse calls have rarely received priority from dispatchers or swift response from police officers.\textsuperscript{89} When an officer

\textsuperscript{81} Feelings of guilt and confusion over who started the fight often prevent women from taking action against their husbands. In his studies concerning the psychology of violence, Hans Toch found that if only one person in an incident is violence prone, that person usually shapes the incident. H. TOCH, VIOLENT MEN: AN INQUIRY INTO THE PSYCHOLOGY OF VIOLENCE 133 (1969); see T. DAVIDSON, supra note 1, at 59-60. He must feel provoked. In a marriage relationship the victim may become conditioned by the abuser's reasoning. Id. at 60. Often the wife may feel that she somehow provoked the incident and her husband's acts were only logical reactions. Id. In one study nearly eighty percent of the women interviewed felt they should share the blame for disputes with their husbands. Prescott & Letho, Battered Women: A Social Psychological Perspective, in BATTERED WOMEN 82 (M. Roy ed. 1977).

\textsuperscript{82} Many abused women retain feelings of affection for their abusers even after abuse. See R. LANGLEY & R. LEVY, supra note 1, at 114-15. Abusive husbands do not batter their wives all the time, and "women who remain in a relationship with a batterer usually receive intermittent positive reinforcement." Hearings, supra note 1, at 511 (report of Mildred Pagelow) (emphasis in the original not included). See also L. WALKER, THE BATTERED WOMAN 65-70 (1979).

\textsuperscript{83} Roy, A Current Survey of 150 Cases, in BATTERED WOMEN, supra note 31, at 43 (survey showed that hope that the husband would reform was the primary reason women stayed with their husbands); L. WALKER, supra note 32, at 67-68.

\textsuperscript{84} Gelles, No Place to Go: The Social Dynamics of Marital Violence, in BATTERED WOMEN, supra note 31, at 60; Hearings, supra note 1, at 56 (report of Beverly Monaamith).

\textsuperscript{85} BATTERED WOMEN, supra note 1, at 489 (report of Dr. Murray Strauss) (women earn about 40 percent less than men).

\textsuperscript{86} See infra note 127.

\textsuperscript{87} UNITED STATES COMMISSION, supra note 3, at 14-15 (testimony of police officers at hearings before the United States Commission on Civil Rights demonstrated that nonarrest and nonintervention policies were used in many police departments).

\textsuperscript{88} Id. at 12 (citing E. Connick, J. Chytilo & A. Person, Battered Women and the New York City Criminal Justice System (June 5-8, 1980) (unpublished manuscript) (indicating that 15 to 40 percent of all calls for police assistance involve domestic disturbances); Parnas, The Police Response to Domestic Disturbance, 1965 Wis. L. REV. 914, 914 n. 2.

\textsuperscript{89} A Kentucky study found that in urban areas police officers would take from 16 to 30 minutes to respond to nearly half of their domestic violence calls. See KY. COMM'N ON WOMEN, supra note 28, at 40. Officers in rural areas would take over an hour to respond to 25 percent of their calls. Id. Police did not respond to 21 percent of the calls from urban areas and officers in rural areas did not investigate 22 percent of their spouse abuse calls. Id. In a study of 283 calls over a two month period in Vancouver, British Columbia, Canada, police were dispatched only 53.8 percent of the time for man-woman fights. "If a caller mentioned violence the probability of a car being dispatched went up to 67 percent . . . ." BATTERED WOMEN, supra note 1, at 6-7 (statement of Del
arrives at the scene of a spousal attack he will often avoid arresting the husband or even discourage a wife from bringing charges. 46 Various considerations underlie this reluctance to intervene or arrest in spouse abuse cases. Many police officers believe that spouse abuse is not a crime but is, rather, a “personal matter,” which should be settled privately without police assistance. 47 An officer may assume that the woman is merely “misusing” the criminal justice system to compel her husband to leave home or to effect reconciliation. To avoid becoming a “pawn” in her “strategy,” an officer may fail to act for the wife. 48

Police officers are also concerned that arrest in cases of domestic violence may lead to civil liability. 49 Abuse cases are volatile; the officers may become targets of misplaced anger. 50 A spouse may regret a decision to call upon the police and decide that the police, not the abuser, is at fault. Officers also hesitate to interfere in domestic violence situations because of the physical danger to themselves. 51 Federal Bureau of Investigation statistics show that one out of every five officers killed in the line of duty is killed while handling “disturbance calls.” 52

In addition to these attitudinal barriers, until recently arrest laws in almost all states have prevented police officers from arresting many abusers. These

Martin) (citing study by Donald Dutton and Bruce Levens). A Michigan University study found that it took 20 minutes to 4 hours for the police to respond to a family violence call. R. Langley & R. Levy, supra note 1, at 160. These figures tend to show that police officers have traditionally given spousal abuse calls a low priority status. See also Parnas, supra note 38, at 914 n. 2 (In past, Chicago Police Department dispatchers automatically classified family problem calls as “domestic disturbance” without determining the seriousness of the situation).

Parnas, supra note 24, at 548; Hearings, supra note 1, at 507 (report of Mildred Pagelow). In a survey of 150 cases of spouse abuse, 90 percent of those women seeking police help reported that the police avoided arrest. Roy, A Current Survey of 150 Cases, in Battered Women, supra note 31, at 35.


R. Langley & R. Levy, supra note 1, at 169-70 (“a battered wife has to do a selling job on the cop to convince him that she wants her rights”). Police officers are usually male and many identify more with the husband than the wife. D. Martin, supra note 30, at 96-97; see also Battered Women, supra note 1, at 239 (report of Marjory Fields); Goodman, Legal Solutions: Equal Protection Under the Law, in Battered Women, supra note 31, at 141.

United States Commission, supra note 3, at 18.

Battered Women, supra note 1, at 320 (report of Dr. Morton Bard); N. Loving, supra note 5, at 61; see also Lerman, Expansion of Arrest Power: A Key to Effective Intervention, 7 Vt. L. Rev. 59, 68 (1982).

United States Commission, supra note 3, at 13 (police officers at hearings continually referred to danger of domestic violence calls).

United States Department of Justice, Federal Bureau of Investigation, Crime in the United States—1977, 291 (1978). The danger to police officers in spouse abuse situations may be exaggerated. The Federal Bureau of Investigation groups interspousal assaults with other domestic disturbances in a general category entitled “responding to disturbance calls.” United States Commission, supra note 3, at 13. While one of every five officer deaths may fall in this category, the percentage of calls actually involving marital violence may be much lower. Id. Officers, however, will continue to believe that spouse abuse calls pose significant dangers until reporting procedures are established to provide accurate information on such cases. Id.
traditional arrest laws were predicated on the long-standing common law rule which allows a police officer to make a warrantless arrest if he has probable cause to believe the suspect has committed a felony,47 but prohibits a warrantless misdemeanor arrest unless the suspect has committed the crime in the officer’s presence.48 Since a great percentage of domestic violence calls involve only misdemeanor assaults and batteries,49 this type of arrest statute precludes an officer from making an immediate arrest in many spouse abuse situations.

Under the traditional law enforcement approach to domestic violence, even when arrests were made, few prosecutions followed.50 A primary reason for this lack of prosecution—and one that continues—was victim reluctance to press charges. Many spouses seek withdrawal of charges in the hope of reconciling with their mates. Some wives are reluctant to press charges because of fear of reprisal.51 A victim’s home is with her abuser; once battered, she cannot simply walk away. In most cases, an arrest of a spouse will separate the parties for only a few hours. Once a husband posts bond he will return home with a new grievance.52 The knowledge that many women withdraw abuse charges causes prosecutors and police to hesitate to bring them. Police and prosecutors have grown to view spouse abuse calls as a waste of time.58

Whatever the reasons for law enforcement reluctance to intervene, researchers believe that its effects on the victim and attacker are profound. For both personal and financial reasons, many women feel helpless in dealing with physically abusive husbands. If the legal system fails, it reinforces these feelings. When police refuse to treat spouse abuse as criminal, but instead simply try to calm the situation and leave, abused women may conclude that the legal system cannot help and that they are powerless to act against their husbands.54

47 See infra note 66 and accompanying text.
48 See infra note 71 and accompanying text.
49 See United States Commission, supra note 3, at 16 (police officers testified that misdemeanor arrest laws prevent arrest in most domestic assault cases); N. Loving, supra note 5, at 47 (misdemeanors constitute bulk of cases).
50 In Detroit, Michigan, in 1972 there were over 4,900 requests for warrants. Of this number fewer than 300 cases were prosecuted. See Parnas, Prosecutorial and Judicial Handling of Family Violence, 9 Cim. L. Bull. 733, 739-40 (1973); Battered Women, supra note 1, at 250 (report of Marjory Fields). In Washington, D.C., in 1966, 7,500 women sought warrants, but only 200 received them. Id. at 249.
51 Wives who swear out complaints do not follow through in the overwhelming majority of cases. R. Langley & R. Levy, supra note 1, at 179. See also Parnas, supra note 24, at 543.
52 R. Langley & R. Levy, supra note 1, at 206; Wife Beating: Law & Society, supra note 1, at 196 (husband on bond presents danger to wife). See infra notes 125-136 and accompanying text.
53 See United States Commission, supra note 3, at 28; Lerman, supra note 44, at 59. As a result of this belief, police may try to determine those victims who will cooperate by requiring them to go to the district attorney for a warrant. United States Commission, supra note 3, at 28. Prosecuting attorneys also test the resolve of the victim by actively discouraging her from prosecuting. Hearings, supra note 1, at 507 (report of Mildred Pagelow).

This system of testing and screening abused wives produces a vicious cycle. Women are blamed for not cooperating, but when they attempt to do so they are pressured not to prosecute. Id. at 592 (report of Mildred Pagelow). See also Battered Women, supra note 1, at 24 (statement of Marjory Fields) (because prosecutors do not charge husbands, police officers are discouraged from arresting).
54 R. Langley & R. Levy, supra note 1, at 161; Lerman, supra note 44, at 60.
The failure of the legal system to intervene may also have a profound effect on the abuser. Although the causes of spousal violence are complex, researchers agree that one significant factor is the attacker's belief that spouse abuse is normal conduct. Abusers often see violence as an integral part of family interaction and believe they have the right to physically punish their spouses. When police fail to intervene, they reinforce an abuser's belief in the propriety of his conduct and create the potential for future violence.

The prevention and punishment of violence is the very heart of society's responsibility to protect its citizens. The failure to provide remedies for domestic violence violates this basic tenet. The legal system's failure to treat spousal abuse as criminal has been decried recently in several quarters. Academic and political critics of police and prosecutorial performance agree on two essential reforms. First, police must begin treating spouse abuse as criminal by making arrests rather than calming the situation and leaving. Second, prosecutors must increase the frequency with which they pursue criminal penalties against abusers.

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55 M. STRAUS, R. GELLES & S. STEINMETZ, supra note 1, at 7; Hearings, supra note 1, at 91 (statement of Dr. Barbara Star); Battered Women, supra note 1, at 161 (statement of Leonore Walker).

56 Battered Women, supra note 1, at 9 (statement of Del Martin); Lerman, supra note 44, at 60; R. Langley & R. Levy, supra note 1, at 161.

57 Spouse abuse is not solely a husband-wife concern. A common characteristic of a wife beater is that he was raised in a home in which spouse or child abuse existed. Hearings, supra note 1, at 91 (statement of Dr. Barbara Star); id. at 13 (statement of Steve Y'Bara). R. Langley & R. Levy, supra note 1, at 50-51; M. Straus, R. Gelles & S. Steinmetz, supra note 1, at 100-01; see also Hearings, supra note 1, at 57-58 (report of Beverly Maysmith) (failure of police to arrest reinforces the use of abuse in the eyes of a child). Family violence is to some extent learned behavior, and children who view spouse abuse are conditioned to believe that marital violence is the norm. Evidence also indicates that men who abuse their spouses are likely to abuse their children. L. Walker, supra note 32, at 27-28. These abused children may grow up to abuse their own spouses and offspring. Some researchers also believe that children who live in violent homes are more likely to commit violent crimes such as rape, murder, and assault. Hearings, supra note 1, at 304-05 (statement of Dr. Suzanne Steinmetz); id. at 78 (statement of Fredrick Samuel); id. at 317, (report of Dr. Suzanne Steinmetz); See also id. at 452 (report of James Walsh) (children exposed to marital violence are prone to delinquent behavior).

Finally, spouse abuse places tremendous costs on the criminal justice and social services systems. As James Walsh explains,

Valuable time and money are spent in probation intake, probation, investigation, probation supervision, family court, criminal court, medical treatment, aid to dependent children, welfare, foster care, child protective services, legal aid, community mental health, as well as personal loss in terms of medical treatment, private legal services, time on the job and destruction of private property.

Id. at 451 (report of James Walsh). Aside from these expenditures, domestic violence consumes a significant amount of police time. See supra note 36 and accompanying text. These costs go far beyond the family unit; they touch almost every segment of society.

A. Arrest Authority

Battered women who want help from the criminal justice system usually turn to the police first. As the gatekeepers of the criminal justice system, the police officer determines whether the criminal process is commenced and may help decide whether further violence may be averted. Accordingly, the question of police response in general, and arrest policy in particular, is at the heart of efforts to reform the criminal justice system’s response to spousal violence. The failure of police to intervene in spousal disputes can be caused by the officers’ attitude toward domestic violence or by structural limitations on police power to arrest. This section will examine Kansas arrest laws to determine whether they significantly hamper the ability of the police to prevent marital violence.

In Kansas, as elsewhere, acts of violence between spouses are prohibited under assault and battery statutes. Simple assault is a misdemeanor in Kansas and is defined as an “intentional threat or attempt to do bodily harm to another coupled with apparent ability and resulting in immediate apprehension of bodily harm.” The use of a weapon in a threatening manner elevates the crime to aggravated assault, a felony. Battery is a misdemeanor in Kansas and is an “unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.” If a batterer “[i]nflicts great bodily harm,” “[c]auses any disfigurement or dismemberment,” or uses a “deadly weapon,” he is guilty of the felony of aggravated battery.

For the police to arrest for either a felony or misdemeanor, the officer must first have probable cause to believe an offense has been committed. The existence of probable cause is rarely in doubt in cases of domestic violence. A report of abuse by the victim will generally establish probable cause. But probable cause is only one of the two essential requisites to the power to arrest. The second condition is the securing of an arrest warrant or exemption from the need to do so.

Kansas follows the common-law felony arrest rule, which allows arrest without a warrant if there is probable cause that the suspect has committed a fel-

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88 See Lerman, supra note 44, at 59.
92 Id. at § 21-3412 (1981).
93 Id. at § 21-3414 (1981).
94 The fourth amendment of the United States Constitution states,
The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. Const. amend. IV; see also Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975).
95 See W. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 3.4, at 586-88, 602-03 (1978) (discussing probable cause when information has been supplied by a victim or witness to a crime).
Thus, if a husband’s abuse constitutes aggravated battery, the police may immediately arrest. If, on the other hand, the abuse constitutes only simple battery, a warrant often must be obtained.

Although the distinction seems simple, Kansas has made little effort to define the terms that distinguish a misdemeanor from a felony battery. If no deadly weapon is used, a police officer must decide whether the abuse inflicted by the husband amounts to “great bodily harm” or “disfigurement.” Officers cannot tell merely from the language of the statute how much harm is necessary for aggravated battery.

Only one Kansas Supreme Court decision hazards a definition of great bodily harm. In State v. Sanders, the court stated: “Great distinguishes the bodily harm necessary in this offense from slight, trivial, minor or moderate harm, and as such it does not include mere bruises, which are likely to be sustained in simple battery.” While this statement explains that aggravated battery requires more than “mere bruises,” it gives no additional objective guidance. In this vacuum, the line separating misdemeanor from felony battery is often difficult to discern. A woman who appears to have “merely” suffered bruises may have suffered lasting injury. Thus, officers who prefer not to arrest, or who are cautious in exercising the arrest option, are able to justify a nonarrest policy by the ambiguity of the statute and its lack of judicial treatment.

Under the common-law rule for arrest, the police cannot arrest for a misdemeanor committed outside their presence absent a warrant. The Kansas misdemeanor arrest statute broadens the common-law rule, and allows arrests when an officer has probable cause to believe a misdemeanor has occurred and has reasonable cause to believe that the suspect may injure others or damage property unless immediately arrested. This “threat of future injury” exception to the common-law rule should allow an officer to arrest in many misdemeanor spouse abuse situations when arrest would not have been permitted under the common-law rule. Spouse abuse often involves repeated conduct.

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**223 Kan. 550, 575 P.2d 533 (1978).**

**Id. at 552, 575 P.2d at 535. The defendant in Sanders argued that Kan. Stat. Ann. § 21-3414 was unconstitutionally vague and indefinite because persons of ordinary intelligence could not understand what is meant by “great bodily harm.” The court noted that the issue was being raised for the first time on appeal and, consequently, would not be considered. Id. The court, however, proceeded to discuss the issue.**

**See United States Commission, supra note 3, at 16.**

**E. FISHER, supra note 66, at 125-27; W. LAFAVE, supra note 65, at 17; Meyer, supra note 66, at 716.**

**Kan. Stat. Ann. § 22-2401(c)(2)(ii)(1981); see also Meyer, supra note 66, at 716-18 (discussing the Kansas misdemeanor arrest statute); cf. Gless, Arrest and Citation: Definition and Analysis, 59 Neb. L. Rev. 279, 314-17 (discussing the Nebraska misdemeanor arrest statute which is similar to the Kansas statute).**

The Kansas misdemeanor arrest statute is similar to the “arrest without a warrant” statute of the American Law Institute's Model Code of Pre-Arraignment Procedure § 120.1 (1975).

**See infra note 134 and accompanying text.**
reliable report of repeated abuse from the victim or an officer's own observation that events have not calmed down should furnish a reasonable basis for immediate warrantless arrest. 74

Remarkably, this exception has never been interpreted in case law or commentary in the thirteen years since its enactment. The lack of any guidance beyond the language of the statute may constitute a barrier to effective use of the misdemeanor arrest authority. Officers aware of the exception may be uncertain of its application in spouse abuse situations. Furthermore, even if the standards for applying the exception were to become more precise, a case-by-case application would remain difficult. Spouse abuse scenarios often have a Jekyll-and-Hyde-like quality, with couples appearing calm and deferential in the presence of police yet resuming the fight after officers leave.

As matters now stand, if an officer determines that an abuser does not present an immediate threat to his spouse, he cannot arrest immediately for out-of-presence misdemeanor battery. 75 Instead, custody of the batterer can be gained by filing a complaint, or having the abused spouse file a complaint, 76 and seeking an arrest warrant. 77

B. The Constitutionality of Kansas Arrest Statutes

While the focus of this section is whether arrest law should be broadened, there is an argument that even the current misdemeanor arrest statute in Kansas may violate the state constitution. In In re Kellam, 78 decided in 1895, a police officer made a warrantless arrest for a misdemeanor not committed in his presence. 79 The officer acted on authority of a state statute allowing war-

74 Police officers should also be aware of and take into consideration recent research showing a cycle theory of battering. Dr. Leonore Walker explains that this cycle has three phases. In phase one "tensions begin to rise and the woman can sense the man becoming somewhat edgy and more prone to react negatively to frustrations." Hearings, supra note 1, at 134 (report of Leonore Walker); see also L. Walker, supra note 32, at 56-59. In phase two the husband loses control over his tensions and rage and severely batters his wife. Id. at 59-65. The third phase is characterized by extremely loving and kind behavior. Id. at 65-70. The husband is sorry for what he has done and tries to make up with his wife. Id.

Dr. Walker's research indicates that minor violence between spouses may be a warning sign of extreme violence in the immediate future. Officers need to understand that when they are dealing with a nonserious case of spouse abuse, they may be witnessing a prelude to dangerous abuse by a husband. In assessing whether there is a threat of future danger to make a warrantless misdemeanor arrest, police should be allowed to consider the probability that a husband may move into a more serious phase of violence.


76 Id. at § 22-2202(6) (1981). In most jurisdictions, police officers have the authority to sign complaints even if abused women refuse to cooperate. Battered Women, supra note 1, at 243 (Report of Marjory Fields). Police, however, rarely file complaints and seek arrest warrants in spouse abuse cases, but rather advise victims to file a complaint. Lerman, supra note 44, at 64; Lever, supra note 4 at 168; Parnas, supra note 24, at 936-37. See also supra note 40 and accompanying text.


78 55 Kan. 700, 41 P. 960 (1895).

79 Id. at 700, 41 P. at 960. Kellam was charged with selling intoxicating liquors in Topeka in violation of city ordinances and state laws. Id.
rantless arrest for any crime, solely on the basis of probable cause. The Kansas Supreme Court held that the statute violated the Kansas constitutional prohibition against unreasonable searches and seizures. In explaining its decision the court stated,

The liberties of the people do not rest upon so uncertain and insecure a basis as the surmise or conjecture of an officer that some petty offense has been committed. In § 15 of the [B]ill of [R]ights it is ordained that the right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate, etc. This provision guarantees protection against unreasonable arrests, and when it was placed in the [C]onstitution, and in fact ever since that time, an arrest for a minor offense without a warrant, and not in the view of the officer, was deemed to be unreasonable and unlawful.

*Kellam* has never been explicitly overruled, and its holding would seem to preclude warrantless misdemeanor arrests unless the crime is committed in the officer's presence. A number of recent developments, however, lead to the conclusion that *Kellam* can no longer be regarded as controlling authority.

Since *Kellam*, the Kansas Supreme Court has stated that the interpretation of section 15 should be identical to that of the fourth amendment of the United States Constitution. As explained by the court in *State v. Wood*, "the command of the Fourth Amendment in the Federal Constitution to federal officers is identical to the command of section 15 of the Kansas Bill of Rights to law enforcement officers in Kansas." Thus, if the fourth amendment allows warrantless misdemeanor arrest, such arrests should also be allowable under theKansas constitution. While the United States Supreme Court has never expressly held that the fourth amendment permits warrantless arrests for out-of-presence misdemeanors, there is little doubt that such arrests are constitutional.

In *United States v. Watson*, the Supreme Court held that an officer may make a warrantless felony arrest in a public place if he has probable cause to believe that the suspect has committed the crime. The Court relied heavily

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80 Id. at 701, 41 P. at 960. The arrest statute provided: The city marshal or any policeman shall at all times have power to make or order an arrest upon view of an offense being committed, or upon reasonable suspicion that an offense has been committed, with or without process, for any offense against the laws of the state or of the ordinances of the city, and to bring the offender for trial before the proper officer of the city: Provided, that any person arrested for any offense without process shall be entitled, on demand before trial, to have filed a complaint on oath in writing; and such person shall not at that time be tried for any other offense than that for which he was arrested and for which the complaint shall be filed.

81 Id.

82 Id. at 701-02, 41 P. at 961.


84 Id. at 788, 378 P.2d at 544. See also Wilbanks v. State, 224 Kan. 66, 71, 579 P.2d 132, 136 (1978) (restating the court's holding in *Wood*); State v. McMillin, 206 Kan. 3, 5, 476 P.2d 612, 614 (1970) (holding that the "command of our federal and state constitutions is the same").


86 See id. at 412, 424.
on the virtually unanimous and unchallenged adoption of the common-law warrantless felony arrest rule by the states.87

While Watson was limited to felony cases, the Court provided no basis for distinguishing warrantless felony arrests from warrantless misdemeanor arrests. As the Watson dissent noted, the distinction between felony and misdemeanor crimes is not a matter of substance, but simply of labeling.88 States are free to label any crime, even a parking violation, a felony. A state could circumvent any “no out-of-presence misdemeanor arrest” rule by simply designating all crimes as felonies. Because the difference between felony and misdemeanor is simply one of nomenclature, the Court probably would permit warrantless misdemeanor as well as felony arrests upon probable cause. Recent court decisions considering the issue have, without exception, supported the view that warrantless misdemeanor arrests are constitutional.89 Since the contours of Section 15 of the Kansas Bill of Rights are treated coextensively with those of the fourth amendment, Kellam is almost certainly no longer good law.

C. The Need For Police Training

Statistical data on the use by Kansas police of their arrest authority in spouse abuse situations are not available. Nevertheless, anecdotal and survey evidence indicates that, until recently, the police have failed to exercise the power given to them by Kansas law in domestic abuse cases. During its initial investigation, the Governor’s Committee on Domestic Violence heard testimony of police refusals to arrest in cases of felony violence. Officers were reportedly have stated that they were unable to arrest because the dispute was “domestic,” or because the violence was a civil matter between spouses.90 In its final report, the Governor’s Committee concluded that law enforcement officers were often unsure of both their arrest authority and proper techniques for

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87 Id. at 419-23.
88 As the dissent in Watson explained:
[B]y paying no attention whatever to the substance of the offense, and considering only whether it is labeled “felony,” the Court, in the guise of “constitutionalizing” the common-law rule, actually does away with it altogether, replacing it with the rule that the police may, consistent with the Constitution, arrest on probable cause anyone who they believe has committed any sort of crime at all. Certainly this rule would follow if the legislatures redenominated all crimes as “felonies.” As a matter of substance, it would seem to follow in any event from the holding of this case, for the Court surely does not intend to accord constitutional status to a distinction that can be readily changed by legislative fiat.
Id. at 454-55 (Marshall, J., dissenting) (footnote omitted). Justice Marshall also noted that the Court’s opinion called into question the line of state cases holding unconstitutional statutes authorizing warrantless misdemeanor arrests not committed in the presence of the officer, including In re Kellam, 55 Kan. 700, 41 P. 960 (1895). Id. at 455 n.21.
90 See Governor’s Task Force on Domestic Violence, Report of Phase One (Nov. 4, 1981) (Office of the Governor of the State of Kansas). Accounts of unsympathetic police response were heard in meetings held in Wichita on September 26, 1981, and at the annual meeting of the Kansas Association for the Prevention of Domestic Violence held in Salina on October 10, 1981.
dealing with domestic violence. In a survey conducted by the authors, legal services attorneys report similar complaints.

One important method for improving police response to spouse abuse is to improve police training. Kansas officers receive only limited instruction concerning spouse abuse issues. The Law Enforcement Training Center in Hutchinson, Kansas, provides a sixteen hour program on domestic violence. Eight hours are devoted to discussion of how police officers should protect themselves in spouse abuse situations. Two hours of the program teach officers how to talk with the parties and how to document a crime if an arrest is made. The remaining six hours of the program are comprised of a two hour lecture from an official of the Domestic Violence Association in Salina, Kansas, and four hours of spouse abuse simulations in which the trainees participate. The program places little emphasis on the circumstances in which arrest is appropriate. Other training programs in Kansas follow this basic curriculum.

While Kansas' training program is better than many, it fails to provide adequate instruction in the legal problems arising in spouse abuse cases. The program barely discusses when the arrest option should be used. The difference between felony and misdemeanor battery, crucial in defining police power

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81 Governor's Committee on Domestic Violence, supra note 8, at 32.
82 In a survey completed by 23 present and former legal services attorneys, 6 lawyers rated the police as helpful "most of the time," 9 said the police helped "some of the time," and 8 attorneys stated that police intervention was "rarely" helpful. See infra note 250 and accompanying text.
83 Telephone interview with Officer Glen Booth of the Law Enforcement Training Center in Hutchinson, Kansas (Feb. 8, 1983).
84 Id. The emphasis on the danger of intervention seems to correspond with the primary focus of many training classes in the country. Wife Beating: Law and Society, supra note 1, at 185.
85 Telephone interview with Officer Glen Booth, supra note 93.
86 Id.
87 Id.
88 In an effort begun in the late 1960s, to remedy the lack of police training in domestic violence, social scientists developed a program called crisis intervention training. This program gave the police officer training in arbitration, mediation, and negotiation skills. N. Loving, supra note 5, at 33-35; Battered Women, supra note 1, at 310-11 (report of Dr. Morton Bard and Dr. Harriet Connolly). Many police departments provide crisis intervention training. Id. Unfortunately, most departments allocate only a few hours to such training and "include a wide range of disputes in the discussion, such as landlord-tenant disputes and barroom brawls." N. Loving, supra note 5, at 36. Apparently, these training programs also fail to discuss when arrest is appropriate or how to conduct an appropriate investigation. Hearings, supra note 1, at 371 (report of Jennifer Fleming). Often the material fails to emphasize that spouse abuse is a crime. Id.
89 In the past police officers receiving crisis intervention training used reconciliation techniques in most spouse abuse cases, even those involving significant physical violence. N. Loving, supra note 5, at 33 and 36. See also Lerman, supra note 44, at 69 (noting that the recent trend among states to allow warrantless misdemeanor arrests indicates a shift away from crisis intervention techniques).
90 The only material provided by the Law Enforcement Training Center on family disturbance is a three page outline of the 16-hour program. The single statement concerning arrest reads: "When there is evidence that a crime has been committed, such as battered spouse or child abuse, it is recommended that an arrest be made." Family Disturbance Crisis Intervention 3 (Law Enforcement Training Center, Hutchinson, Kansas). Officer Glen Booth stated that the Center does not discuss in detail when arrest should be made; rather, trainees are told to follow the policies of their local police departments. Officer Glen Booth, supra note 93.
to arrest, is lightly covered. The situations in which warrantless misdemeanor arrests are permitted are also not treated in any detail. The Governor's Committee on Domestic Violence recognized deficiencies in current police response to spouse abuse and recommended that the Law Enforcement Training Center develop a new educational program in conjunction with professional organizations in Kansas.

D. Expansion of Police Arrest Power

Even if the police understood and exercised their authority to arrest, situations would remain when an officer with probable cause could not effect an arrest. When a misdemeanor has been committed outside the officer's presence and probable cause to believe violence will recur is lacking, an arrest can only be made pursuant to a warrant. Because misdemeanor warrants are rarely sought by the police, law reform advocates have argued that the warrant requirement for misdemeanor arrests is an impediment to effective response to spouse abuse. In a number of jurisdictions, this pressure has resulted in legislation permitting arrest upon probable cause for any misdemeanor in domestic abuse cases. In a few states, legislatures have gone further, apparently mandating arrest in certain types of spouse abuse cases.

Several persuasive arguments have been made by the advocates of increased police power. First, the present arrest standards are so difficult to apply that.

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100 The outline provided by the Center does not indicate that the misdemeanor arrest statute is discussed in any detail. Family Disturbance Crisis Intervention, supra note 99. The Center, however, does provide a general law training program, which includes discussion of the difference between felony and misdemeanor battery and study of the Kansas misdemeanor arrest statute. Telephone interview with Officer Glen Booth of the Law Enforcement Training Center in Hutchinson, Kansas (May 17, 1983).

101 Governor's Committee on Domestic Violence, supra note 8, at 32.


102 See supra note 49 and accompanying text.

103 See, e.g., Lerman, supra note 44, at 64; A. Boylan & N. Taub, supra note 4 at 267; see also supra notes 66-72 and accompanying text.

104 Lerman, supra note 44, at 64-65. For a survey of states adopting broader arrest laws in domestic violence cases see id. at 64 n. 30; Lerman, supra note 5, at 282-83; N. Loving, supra note 5, at 134-43.

Alaska, Minnesota, and New Mexico are good examples of states that have moved to allow police officers to arrest husbands for misdemeanor assault and battery even though an officer has not witnessed the crime. Alaska allows a police officer to make an arrest if the officer has probable cause to believe that a suspect has committed an assault or other criminal action against a spouse or other household member. Alaska Stat. § 12.25.030(3)(b) (Supp. 1982). In Minnesota, if a police officer has probable cause to believe that an abuser within the preceding four hours has assaulted his spouse, the officer may arrest even though the assault did not take place in the officer's presence. Minn. Stat. § 629.341 (Supp. 1982). New Mexico allows police officers to arrest on a misdemeanor charge if the officer is at the scene of a disturbance and has cause to believe that a person has committed battery on a family member. N. Mex. Stat. § 31-1-7A (Supp. 1982).

105 See, e.g., Me. Rev. Stat. Ann. tit. 19 § 770(b) (Supp. 1982) (officer "shall" arrest for violation of protection order or consent agreement, or if aggravated assault is committed); Ore. Rev. Stat. § 133.005(2) (1981) (officer "shall" arrest upon probable cause to believe that spousal assault has occurred). See also Lerman, supra note 44, at 67.
police may fail to arrest in cases of serious abuse. In Kansas, since the crucial distinction between felony and misdemeanor is shrouded in ambiguity, the problem is particularly acute. The principal exception to the misdemeanor warrant requirement, probable cause that injury may recur, is also difficult to discern. Expansion of arrest power may, therefore, be necessary to protect women who might be subjected to further injury.

Arguably there are instances when arrest is appropriate even though future injury is not threatened and a felony has not been committed. Even if only a single battery occurs, a "mere" misdemeanor battery may involve injury and significant pain. In cases of such "minor" abuse, an arrest may help convince the abuser that his actions are criminal. When the wife wants to go to a shelter, arrest may provide her a small amount of time to arrange her affairs. Mandatory arrest policies are perceived as having the additional advantage of impressing upon police the need to treat spousal violence as criminal.

Despite these advantages, there are reasons to be cautious in enacting legislation to expand police power. A more stringent arrest policy will encourage or require the police to take the most intrusive action possible against criminal suspects. Under current Kansas law, police officers have the option of issuing a notice to appear rather than arresting, in at least those misdemeanor cases in which they may arrest. The notice, while initiating the criminal process, permits the defendant to avoid booking and posting bond. A mandatory arrest

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100 See United States Commission, supra note 3, at 16-17.
107 See supra notes 68-70 and accompanying text.
108 See supra notes 72-74 and accompanying text.
109 "[A]rrest communicates to the parties that the abuser has committed a crime, that the victim has a right not to be beaten, and the criminal justice system will act to stop the abuse." Lerman, supra note 44, at 60.
110 Battered Women, supra note 1, at 24 (statement of Marjory Fields). Police officers who are willing to arrest may give a battered wife "the courage she needs to realistically face and correct her situation." Int'l. Ass'n. of Chiefs of Police, Wife Beating, Training Key No. 245 at 4 (1976).
111 Lerman, supra note 44, at 67-68. Besides encouraging police to treat spouse abuse as a crime, mandatory arrest laws may serve as the basis of a lawsuit if police unjustifiably fail to arrest. Id. at 68.

In states without mandatory arrest laws, law reform groups have filed class action suits against police departments, alleging that non-arrest policies violated the civil rights of abuse victims. In 1978 the New York Police Department settled such a case, agreeing that officers would arrest upon finding probable cause that a husband has made a felonious assault on his wife. The department also agreed to send police officers to the scene of every spouse abuse call and to require police officers to inform women of their legal rights. Bruno v. Codd, No. 21946-76 (N.Y. Supp. June, 1978); see Woods, Litigation on Behalf of Battered Women, 5 Women's Rts. L. Rep. 7, 32-34 (1978) (setting forth consent decree). In a similar case the Oakland, California, Police Department agreed to treat all spouse abuse as alleged criminal offenses and make arrests on this basis. Scott v. Hart, No. 76-2395 (N.D. Cal. Nov. 9, 1979). See N. LOVING, supra note 5, at 36-37 (discussing Scott and Bruno).

113 Arrest can cause severe hardships for both the victim and her family. See infra notes 114-19 and accompanying text. Consequently issuing a notice to appear may, in some instances, be a superior option to arrest. See Gliss, supra note 71, at 318. Unfortunately, police have often used notices to appear in spouse abuse cases involving serious abuse. United States Commission, supra note 3, at 17. The Cleveland Police Department uses notices to appear to refer spouses to a mediation-arbitration program. The Department has issued the following guidelines for use of the notice
policy would remove this option from an entire class of cases. Arrest should not be used as a form of punishment. Other means of initiating the criminal process should be employed when there is no need to take custody of the defendant.\textsuperscript{114}

A mandatory arrest policy may also conflict with the interest of the abused wife. Many women call the police just to stop violence.\textsuperscript{116} They may not want their husbands arrested or removed from the house. In cases such as these, arrest may cause more damage to the parties and their marriage than the actual violence. Arrest, by itself, will damage the reputation of a husband.\textsuperscript{116} It may cause him to lose his job or prevent him from being employed in the future.\textsuperscript{117} If an arrested husband is incarcerated with other more “hardened” criminals he may be subjected to more physical abuse than he inflicted.\textsuperscript{118}

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to appear.

\textit{When to use the Notice to Appear:}
1. When it is a first call or no action was taken on previous calls . . .
2. When there is no complaint . . .
3. When you have determined that prosecution is not possible or appropriate.

\textit{When not to use the Notice to Appear:}
1. On a repeat call (when one Notice to Appear has already been issued) . . .
2. When you have determined that arrest or prosecution is appropriate . . .
3. When a weapon or other instrument which would inflict bodily harm has been used.
4. When children are endangered . . .

N. LOVING, supra note 5, at 77-78 (quoting Cleveland Police Department guidelines for issuing notices to appear).

\textsuperscript{114} Domestic violence literature occasionally gives the impression that police officers make frequent arrests except when confronted with spouse abuse. \textit{See, e.g.}, L. DORASH \& R. DORASH, VIOLENCE AGAINST WIVES: A CASE AGAINST PATRIARCHY 207 (1979). Police officers, however, exercise discretion not to arrest in a variety of situations. LaFave, supra note 41, at 204.

Police discretion to a large degree is a necessary and often beneficial aspect of the criminal justice system. LaFave, \textit{The Police and Nonenforcement of the Law-Part I}, 1982 Wis. L. Rev. 104, 112. Limitations on manpower and money cause many police departments to encourage their officers to issue warnings rather than arrest. Personal characteristics of individuals also influence police decisions to arrest. \textit{Id.} at 115, 120. \textit{See also} Breitel, \textit{Controls in Criminal Law Enforcement}, 27 U. Chi. L. Rev. 427 (1960). (“If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable. Living would be a sterile compliance with soul-killing rules and taboos. By comparison, a primitive tribal society would seem free, indeed.”). The crucial task in domestic violence cases is thus to regulate police discretion to ensure it is exercised in a responsible and consistent manner.

\textsuperscript{116} BATTERED WOMEN, supra note 1, at 50 (statement of Dr. Morton Bard); \textit{Hearings, supra} note 1, at 91 (statement of Dr. Barbara Star); Parnas, supra note 24, at 547.

In any criminal situation, the preference of the victim is an important consideration for the police in deciding whether to arrest. When a victim expresses a preference for nonarrest the police rarely take the suspect into custody. \textit{See} Hohenstein, \textit{Factors Influencing the Police Disposition of Juvenile Offenders, Delinquency: SELECTED STUDIES} 146 (T. Sellin \& M. Wolfgang ed. 1969). As the seriousness of physical injury increases, however, police tend to disregard the victim’s wishes concerning arrest. Hall, \textit{The Role of the Victim in the Prosecution and Disposition of a Criminal Case}, 28 Vand. L. Rev. 931, 941 (1975).

\textsuperscript{116} Gless, supra note 71, at 280; Breitel, supra note 114, at 431.

\textsuperscript{117} Gless, supra note 71, at 280; Breitel, supra note 114, at 431.

\textsuperscript{118} \textit{See, e.g.}, L. BOWKER, PRISON VICTIMIZATION 1-7 (1980) (citing statistics on homosexual rape in jails and prisons).
gal costs or bail may also place a substantial financial burden on the family.\textsuperscript{119}

The Governor's Committee on Domestic Violence recommended that the Kansas Legislature amend the arrest statute to permit warrantless misdemeanor arrests in abuse cases if the officer obtains a signed statement from the victim within four hours of the incident.\textsuperscript{120} This amendment, however, was not acted on by the Legislature in the 1983 session.\textsuperscript{121}

By allowing police to arrest on a spouse's signed statement, the proposal would provide the abuse victim with some leverage in misdemeanor assault situations. It could provide time, not otherwise available, for the abuse victim to leave the home. It would also encourage the police to arrest when they believe serious violence may have occurred, but are not certain that the violence amounted to felony battery. The proposal is sufficiently narrow, however, to avoid the dangers inherent in a blanket addition to police arrest authority.

The proposal is not without its drawbacks. While the proposal places power to force arrest in a wife's hands, it also creates the potential for pressure to be exerted upon her. An arrest may be seen as a punitive action taken by the wife, rather than a necessary start to the criminal process.\textsuperscript{122}

In any event, the proposed amendment will not be effective unless spouse abuse victims are made aware of their right to sign the statement that would initiate arrest.\textsuperscript{123} Several states have enacted legislation requiring police to inform abuse victims of their rights and available support.\textsuperscript{124} At present, Kansas imposes no such obligation on police. If the abused spouse is to be given greater control over the initiation of the criminal process, she must be fully informed of legal options.

E. Pretrial Release

If Kansas adopts a policy encouraging arrest in spouse abuse cases, serious

\textsuperscript{119} Hearings, supra note 1, at 68-69 (report of Kenneth Merritt). Because arrest has many serious consequences for an individual it is not always the most appropriate remedy in cases of spouse abuse. Lever, supra note 4, at 103. See also LaFave, supra note 114, at 120 (discussing generally the harm of arrest).

\textsuperscript{120} Governor's Committee on Domestic Violence, supra note 8, at 22.

\textsuperscript{121} The Governor's Committee's Legislative proposal was introduced in the 1983 Kansas Legislature but was tabled in committee.

\textsuperscript{122} See Lerman, supra note 44, at 67.

\textsuperscript{123} Police officers can provide valuable assistance to victims by informing them of their rights under the criminal and civil justice systems. Victims often do not understand why an officer refuses to take any action when called. See Hearings, supra note 1, at 74-75 (statement of Lina Soccio). They are usually unaware of the procedure required to file a complaint, see id., at 91 (statement of Dr. Barbara Star), or to make a citizen's arrest. Battered Women, supra note 1, at 268 (report of Marjory Fields); United States Commission, supra note 3, at 17. Women may be unaware of shelters or other agencies and the services they can provide. Police provide an important means of putting abused women in contact with these helping agencies. Berk & Loseke, supra note 114, at 318; Battered Women, supra note 1, at 248 (report of Marjory Fields). Police can also aid abused spouses by informing them of civil remedies such as protection orders.


For recent surveys of states requiring officers to inform victims of their rights see Lerman, supra note 5, at 280-84; N. Loving, supra note 5, at 134-43.
consideration must be given to the conditions for pretrial release of defendant husbands. Kansas law presently requires that a defendant be released on bail as soon as his appearance at the preliminary hearing or trial can be guaran-
teed.\textsuperscript{188} Almost all husbands arrested for spouse abuse qualify for bail. Most are released within a few hours of arrest on recognizance or small cash bonds.\textsuperscript{186} Unless a battered wife leaves her home during the time her husband is detained, he will return home to his wife upon his release.

Criminal prosecution when the victim and defendant continue cohabitation pending trial presents enormous difficulties. The husband’s return home will end whatever protection had been achieved by the arrest. In fact, arrest and release may exacerbate an abusive relationship by providing a batterer with yet another grievance.\textsuperscript{187} The husband’s presence in the home will allow him to intimidators or cajole his spouse into attempting to drop charges or changing her story at trial if charges cannot be dropped.\textsuperscript{189}

One solution to this problem is to permit the court to order the defendant away from his spouse as a condition of pretrial release. Prior to 1983, Kansas law contained no express authority for such a criminal restraining order.\textsuperscript{188} Such orders were issued, nevertheless. For example, the stated policy of the Shawnee County District Attorney’s Office, effective in 1982, was to request judges to require that abusing husbands not contact their wives as a condition of pretrial release.\textsuperscript{188} Judges in Johnson County also issued no contact orders as a condition of pretrial release. Given the absence of case law or statutory authority, generalizations about the circumstances under which such orders have been entered are difficult to draw. There is, however, no evidence that any particularized showing of danger was required by those judges willing to issue orders.

The Kansas Legislature enacted legislation in 1983 that grants courts clearer statutory authority to issue no contact orders for the protection of victims and

\textsuperscript{188} \textbf{KAN. STAT. ANN.} § 22-2801 (1981) states that the purpose of the Kansas pretrial release statutes “is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.” Section 22-2802 requires that all persons charged with a crime shall be ordered released upon the execution of an appearance bond. The magistrate may impose conditions of release to assure the appearance of the defendant at pending proceedings. \textbf{KAN. STAT. ANN.} § 22-2802(1) (1981).

\textsuperscript{188} \textit{See Hearings, supra} note 1, at 370 (report of Jennifer Fleming) (discussing how almost all state laws allow abusive husbands to be released within a short period of time); R. LANGLEY & R. LEVY, \textit{supra} note 1, at 206 (state laws allow husbands to be released within a few hours).

\textsuperscript{187} Berk & Loseke, \textit{supra} note 114, at 343 (frequent arrest may cause greater jeopardy for victims without changes in criminal justice system); \textit{Wife Beating: Law & Society, supra} note 1, at 196 (period after arrest and release can be very dangerous for the wife); \textit{The Battered Wife, supra} note 3, at 424-25.

\textsuperscript{189} Of course, any genuine reconciliation between husband and wife will also reduce the likelihood of a successful prosecution.

\textsuperscript{189} \textit{See KAN. STAT. ANN.} § 22-2802 (1981). The Kansas pretrial release statute authorizes judges to impose conditions for release for the purpose of ensuring the presence of the defendant at criminal proceedings. The statute does not state that conditions may be imposed for other purposes.

\textsuperscript{190} Policy Statement for Domestic Violence Cases, Gene Olander, District Attorney for Kansas Third Judicial District (1982).
witnesses in both criminal and civil matters. The 1983 Kansas Session Laws\(^{111}\) provide that a court, in its discretion and upon a showing of "good cause to believe that intimidation or dissuasion of any victim or witness has occurred or is reasonably likely to occur," may issue an order requiring a defendant to maintain a prescribed distance from the victim/witness and to have no communication with her.\(^{112}\) Any violation of the order is punishable by revocation of pretrial release.\(^{113}\) An abused wife comes within the coverage of the new law because she is both victim and witness of her husband’s criminal conduct.

Because the statute does not define "good cause," it remains unclear when a judge may impose a no-contact order. Cases of spouse abuse, however, may provide considerable justification for the issuance of such an order. Since arrest of a husband for spouse abuse normally occurs after a series of violent incidents,\(^{114}\) potential for future violence as well as intimidation is commonly present.

Although the new law provides some helpful guidance for the issuance of "no contact" orders, it also raises serious questions of fairness to criminal defendants in spouse abuse cases. A "no contact" order would not be terribly intrusive to a defendant accused of an assault of a neighbor. A defendant can normally avoid his neighbor without completely changing his life. A "no contact" order to a cohabiting husband, however, may have the effect of separating him from his home and depriving him of the opportunity to live with his children. Although the authority to issue these orders should be available to the court, they should not be issued casually or without sufficient procedural protections.\(^{115}\)


\(^{112}\) Id. at § 4(a) (to be codified at Kan. Stat. Ann. § 21-3834 (Supp. 1983)).

\(^{113}\) Id. at § 5 (to be codified at Kan. Stat. Ann. § 21-3835 (Supp. 1983)). Kansas courts have never explicitly considered whether no contact orders may be issued consistent with the right to bail in the Kansas constitution or with the Eighth Amendment’s prohibition of excessive bail. There is little doubt, however, that no contact orders would be held constitutional.

Although the primary purpose of bail is to assure the presence of the defendant at pending court proceedings, most courts have concluded that defendants may be detained if they are a serious threat to witnesses of their crime. Carbo v. United States, 82 S. Ct. 662, 667-68 (1962) (Douglas, Circuit J.); United States v. Bigelow, 544 F.2d 904, 907 (6th Cir. 1976) (dicta); Gavin v. MacMahon, 499 F.2d 1191, 1195 (2d Cir. 1974); United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971). Pretrial detention in such cases has been justified on the ground that courts have a right to protect their processes. United States v. Bigelow, supra, at 907-08. While Kansas courts have not ruled on the question of pretrial detention, commentators have argued that courts probably do have the right to deny bail in certain limited situations. Wilson, *New Approaches to Pre-Trial Detentions*, 59 Kan. B.A.J. 13, 58-59 (1970). If a defendant may be detained because he represents a threat to witnesses, then certainly courts may impose no contact orders as a condition of release.

\(^{114}\) Spouse abuse is rarely a one time event for a family. One study showed that "for about half the couples the pattern is that if there is one beating, there are likely to be others—at least three per year!" M. STRAUS, R. GELLES & S. STEINMETZ, *supra* note 1, at 41-42. Interviews with abused spouses indicate that many wives do not take action until after many beatings. R. LANGLEY AND R. LEVY, *supra* note 1, at 199. Many wives leave their husbands repeatedly, only to return to suffer more abuse. BATTERED WOMEN, *supra* note 1, at 503 (report of Dr. Murray Straus). See also *Wife Beating: Law & Society*, *supra* note 1, at 174-75 (Kansas City, Missouri, study showed that 90% of the city’s family homicides were preceded by at least one domestic violence call to the police).

\(^{115}\) A number of other states have established special pretrial release requirements in spouse
F. Diversion and Sentencing Options

Increased reliance on criminal law in cases of spousal abuse will necessitate attention to questions of prosecution and sentencing. An aggressive arrest and prosecution policy may bring hundreds of new offenders before Kansas courts, yet our prisons are already filled to capacity. Though incarceration may be the only sensible disposition of recidivists and the most violent offenders, alternatives must be considered for defendants capable of changing their behavior.

Many prosecutors have established diversion programs for abusers. Prosecution is deferred while the subject participates in a counseling program designed to help him alter his behavior. If the defendant successfully completes the program, the spouse abuse charge is dropped. Kansas law allows prosecutors to make diversion agreements with criminal defendants, and simi-


See Topeka Capital Journal, June 1, 1983 at 13, col. 3 (reporting formation of commission to study prison overcrowding). The increase in Kansas mirrors a nationwide increase in the number of inmates in prisons and jails. See Bureau of Justice Statistics, Jail Inmates 1982 (1983) (reporting increase in jail population of one-third; jails at 95% of operational capacity). State prison population has increased nationwide from 282,286 at the beginning of 1980 to almost 400,000 at the end of 1982. Dept. of Justice, Prisoners in 1982 (Bureau of Justice Statistics Bull., Apr. 1983).

Diversion has been described by the correction task force of the National Commission on Criminal Justice Standards and Goals as:

formally acknowledged efforts to utilize alternatives to the justice system. To qualify as diversion such efforts must be undertaken prior to adjudication and after a legally prescribed action has occurred. Diversion implies halting or suspending formal criminal proceedings against a person who has violated a statute, in favor of processing through a noncriminal disposition.

National Advisory Commission on Criminal Justice Standards and Goals, Corrections 73 (1973), “Diversion has also been defined to include probationary programs in which an assailant will be tried and found guilty, but rather than sentenced, sent to a counseling or therapy program. If the defendant completes the program successfully, his record is expunged . . . .” United States Commission, supra note 3, at 61.

Several communities have established diversion programs which require husbands to successfully complete counseling or therapy before charges are dismissed. In Milwaukee, Wisconsin, first offenders were allowed to participate in a treatment program. Battered Women, supra note 1, at 14 (statement of Del Martin).

In San Francisco, California, the district attorney may divert first time offenders into a treatment program. A report on the husband is made by the probation department and is sent to a judge who decides if the case is appropriate for diversion. United States Commission, supra note 3, at 66-67. A husband allowed to enter treatment is evaluated every six months. This evaluation is then followed by a recommendation to continue treatment or to dismiss the case. Id. at 67.

The district attorney for Santa Barbara, California, began a program in 1978, requiring defendant husbands charged with minor incidents of violence to enter counseling. Id. at 65. If a husband completed the program and went one year without further police contact, the charges were dropped. Id.
lar programs could be established for spouses charged with abuse.\textsuperscript{188}

Diversion programs designed specifically for spouse abuse defendants are not widely used in Kansas. Of the district attorney offices serving the four largest counties in the state, only one, Johnson County, has a special spouse abuse diversion program.\textsuperscript{189} District attorney offices in Shawnee and Wyandotte Counties provide general diversion programs in which some husbands charged with spouse abuse can participate.\textsuperscript{140}

The Johnson County spouse abuse diversion program was started in 1982.\textsuperscript{141} First time offenders with no history of abuse are usually allowed to participate.\textsuperscript{142} Since its inception about eighty percent of the husbands charged with spouse abuse have participated.\textsuperscript{143} Participants spend ten weeks in a group counseling program.\textsuperscript{144} So far, the results of the program are encouraging. No reports of abuse committed by husbands who completed the program have been received.

Diversion may be a particularly valuable tool when both spouses have a serious interest in preserving the marriage. The absence of a formal criminal conviction may save the husband's job and lessen potential financial burdens on the family.\textsuperscript{145} The requirement of counseling may make future arrests less likely.

Despite these advantages, reliance by courts on counseling and diversion as an answer to abuse is unjustifiable if the programs are ineffective. Thus, ongoing evaluation of the treatment received in these programs is critical. Moreover, diversion should not be used uncritically, lest it perpetuate the tendency of the criminal justice system to avoid treating spouse abuse as "truly" criminal.\textsuperscript{146}

The alternative to diversion that allows for imposition of criminal sanctions yet does not require incarceration is prosecution, conviction, and a sentence of

\textsuperscript{188} Kan. Stat. Ann. § 22-2907 (1981). As a condition for a diversion agreement prosecutors may require a defendant to participate in programs offering "social and psychological services, corrective and preventive guidance and other rehabilitative services." Id. at § 2909(1).

\textsuperscript{189} See D. Moore, Battering Male Treatment Program, (District Attorney for Tenth Judicial District of Kansas) (March 8, 1982).

\textsuperscript{190} See Gene Olander, Shawnee County Diversion Program—Policies and Guidelines, (District Attorney for Third Judicial District of Kansas) (Jan. 1, 1983).

\textsuperscript{191} D. Moore, supra note 139.

\textsuperscript{192} Telephone interview with Ken McKinney, Diversion Officer for the Tenth Judicial District of Kansas (Feb. 8, 1983).

\textsuperscript{193} Id.

\textsuperscript{194} Id.

\textsuperscript{195} See, Hearings, supra note 1, at 91 (statement of Dr. Barbara Star); see also Dellapa, Mediation and the Community Dispute Center, in Battered Women, supra note 31, at 241.

\textsuperscript{196} Many critics of diversion in spouse abuse cases argue that crimes of violence are not appropriate for diversion. United States Commission, supra note 3, at 62. Pretrial diversion excuses criminal behavior without sanction. Arguably, diversion minimizes the character of the act, Wife Abuse, supra note 13, at 567, indicating to the victim and the abuser that such conduct is not considered criminal by society. Id. at 574; United States Commission, supra note 3, at 62.

Prosecutors have often been found to divert almost all family offenses to diversion programs. Battered Women, supra note 1, at 252 (report of Marjory Fields). Other programs allow police to make referrals. These programs have not been "used in conjunction with police activity, but in lieu of a police response." Wife Abuse, supra note 13, at 574.
probation. Kansas permits judges to impose probationary sentences which can include a requirement of therapy or counseling.\textsuperscript{147} Probationers can thus receive counseling services similar to those received by defendants in diversion. Probation sentences carry with them a real potential for imprisonment, if conditions are violated, and clearly involve the stigmatizing of the offenders’ conduct as criminal. For that reason, probation has been suggested as a more appropriate disposition than diversion for more serious offenders.\textsuperscript{148} As with diversion, however, successful use of probation will require monitoring of the efficiency of counseling programs and the financial resources to develop effective treatment regimes.\textsuperscript{149,1}

III. Spousal Rape

While spousal assault and battery have been criminalized for decades, until this summer forcible rape or sodomy committed upon a woman by her husband was not even criminal. Rather, Kansas adhered to the common-law spousal exemption; a husband could not be charged or convicted for raping his wife.\textsuperscript{149} This year, after stormy debate,\textsuperscript{150} the Kansas Legislature approved a bill eliminating the spousal exemption as well as expanding in general the kinds of conduct constituting rape.\textsuperscript{151} After an historical introduction, this section will examine Kansas’ new rape statute and attempt to assess its effect on


\textsuperscript{148} See, e.g., United States Commission, supra note 3, at 96.

\textsuperscript{149} Several states, seeking to deal with spouse abuse, have enacted laws which specifically prohibit domestic violence. For recent surveys of states adopting criminal spouse abuse laws see A. Boylan & N. Taub, supra note 4, at 174-86; Lerman, supra note 5, at 280-84; N. Loving, supra note 5, at 134-43. These statutes, with only a few exceptions, do not give victims of spouse abuse greater protection than that provided under previous criminal statutes. Their purpose is to emphasize to the public, to the police and to the courts that spouse abuse and other forms of domestic violence are crimes. See A. Boylan & N. Taub, supra note 4, at 199.

Arkansas, for example, has established three degrees of wife battering, Ark. Stat. Ann. §§ 41-1653 to 1655 (Supp. 1981), and three degrees of assault on a wife. Id. §§ 41-1657 to 1659. The state has also established a separate crime of aggravated assault on a wife. Id. § 41-1656. The language used to define each of these crimes parallels the language used to define Arkansas’ three degrees of battery, Id. §§ 41-1601 to 1603 (1977), three degrees of assault, Id. §§ 41-1605 to 1608, and aggravated assault, Id. §§ 41-1604 to 1608. Compare also Ohio Rev. Code Ann. § 2919.25 (1982) (prohibiting domestic violence) and Id. § 2903.13 (prohibiting assault).

California’s spouse abuse statute does not merely rewrite the state’s assault and battery laws. Instead, the statute upgrades many spouse abuse incidents from misdemeanor assaults to felonies. California’s general felony battery provision requires the defendant to have committed “serious bodily injury.” Cal. Penal Code § 243(d) (West Supp. 1983). While “serious” injury such as loss of consciousness or disfigurement is required for felony battery, see id. at § 243(e)(5), California’s domestic violence provision permits felony punishment for “[a]ny person who willingly inflicts upon his or her spouse . . . . corporal injury resulting in a traumatic condition . . . .” Cal. Penal Code § 273d (West 1970 & Supp. 1983). A traumatic condition is an “abnormal condition of the living body produced by violence.” People v. Cameron, 53 Cal. App. 3d 786, 797, 127 Cal. Rptr. 44, 51 (1975). Consequently, felony spouse abuse may involve harm such as cuts and bruises, that would constitute not felony battery. See Truninger, Marital Violence: The Legal Solutions, 23 Hastings L.J. 259, 263 (1972).


the problem of spouse abuse.

A. Historical Background

While antecedents of the husband’s exemption from rape prosecution have been traced to the beginnings of the common law, Lord Matthew Hale’s statement is the most frequently cited support:

... the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract. 182

Relying upon Hale’s dictum, the Massachusetts Supreme Court accepted the common-law rule in 1857. 183 In succeeding years the husband’s immunity was either enacted into statute, approved by case law, or simply assumed to exist. As late as the mid-1960s, the exemption was believed to exist in every state in the nation. 184

Lord Hale’s doctrine of irrevocable consent is not surprising; in the seventeenth century, wives were little more than the property of their husbands and marriage itself was irrevocable. 185 By the turn of this century, however, changes in both the legal status of women and in laws concerning divorce had rendered Hale’s rationale completely anachronistic. Acts such as the Married Women’s Act in Kansas 186 established a wife’s separate legal existence. Divorce statutes permitted termination of marriages for extreme cruelty based on excessive sexual demands of a husband, 187 and guaranteed a woman’s rights to refuse sex for reasonable periods. 188

Although the common-law basis for the spousal rape exemption was thus eroded, legislators and commentators found a number of “policy” justifications for resisting any change of the rule. Thus, it was claimed that elimination of the exemption would disrupt marital harmony and discourage reconciliation. 189

182 Hale, History of the Pleas of the Crown 628 (1st Am. ed. 1847).
183 Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489 (1857) (dicta); see Note, The Marital Rape Exemption: Legal Sanction of Spousal Rape, 18 J. Fam. L. 565, 575 (1979-80) [hereinafter cited as Legal Sanction].
187 See Obennoskey v. Obennoskey, 215 Ark. 358, 220 S.W.2d 610 (1949); Griest v. Griest, 140 A. 590 (Md. 1928); Cimijotti v. Cimijotti, 255 Iowa 77, 121 N.W.2d 537 (1963).
188 See Dominik v. Dominik, 7 N.J. 198, 81 A.2d 147 (1951).
189 See, e.g., Model Penal Code § 213.1 at 345. (Reissued Commentary 1980) (Spousal rape would “thrust the prospect of criminal sanctions into the ongoing process of adjustment in the marital relationship”); Hilf, Marital Privacy and Spousal Rape, 16 N. Eng. L. Rev. 31, 41 (1981); Note, Michigan’s Criminal Sexual Assault Law, 8 U. Mich. J.L. Rev. 217, 233 (1974) [hereinafter cited as Michigan]; Comment, Rape and Battery Between Husband and Wife, 6 Stan. L. Rev. 719, 725 (1954) [hereinafter cited as Rape and Battery]. A related argument is that the rape statutes are superfluous since victims have other remedies available. See Freeman, supra note 155, at 20-21 (1981).
that rape charges could never be proven, and that criminalization would encourage frivolous or vindictive suits. 166 Finally, it was argued that marital rape is neither sufficiently prevalent nor a harmful enough occurrence to warrant criminal penalties. 167

In recent years, a considerable number of writers have taken issue with these arguments. 168 Commentators have countered the “marital harmony” argument by pointing out that spouses may already “disrupt” the marital relationship by charging misdemeanor felony assault or by suing in tort. 169 The “marital harmony” argument is also flawed by the assumption that a woman who has been raped by her husband and is willing to report the crime has a marital relationship left to preserve. 164 In fact, one recent sample found that of the marriages in which rape was involved, fifty-one percent ended in divorce, another nine percent in separation. 168

The argument that marital rape charges will be extremely difficult to prove has been answered by conceding that prosecutions of married individuals may not be easy, but that the difficulty of proving rape cases is an inadequate reason to refuse to enact a law prohibiting such conduct. 166 Prosecutions, in fact, are feasible and have occurred. 187

A related, although somewhat inconsistent, argument—that husbands will be periled by the possibility of false rape claims—has been countered by a number of responses: (1) in light of the stigma of being raped and appearing as a

166 See Rape and Battery, supra note 159, at 724-725.
167 Thus, the ALI Commentary states: “The gravity of the crime of forcible rape derives not merely from its violent character but also from its achievement of a particularly degrading kind of unwanted intimacy. Where the attacker stands in an ongoing relation to sexual intimacy, that evil, as distinct from the force used to compel submission, may well be thought qualitatively different. The character of the voluntary association of husband and wife, in other words, may be thought to affect the nature of the harm involved in unwanted intercourse. That, in any event, is the conclusion long endorsed by the law of rape and carried forward in the Model Code provision.” Model Penal Code § 213.1 commentary at 345 (1980).
168 Recent articles which advocate abolition of the exemption include: Geis, Rape in Marriage: Law and Law Reform in England, the United States and Sweden, 6 Ad. L. Rev. 185 (1977); Schwartz, The Spousal Exemption for Criminal Rape Prosecution, 7 Vt. L. Rev. 32 (1982); Scott, Consent in Rape: The Problem of the Marriage Contract, 3 Monash. L. Rev. 265 (1977); Mitra, For She Has No Right or Power to Refuse Her Consent, 1979 ChiL. Rev. 558; Marital Rape Exception, supra note 154, at 306; Legal Sanction, supra note 153, at 565; Freeman, supra note 155, at 1; Comment, The Common Law Does Not Support a Marital Exception for Forcible Rape, 5 Women’s Rights L. Rep. 181 (1979); Note, Marital Rape in California: For Better or Worse, 8 San. Fern. V.L. Rev. 239 (1980); Comment, The Marital Rape Exception: to Rape: Past, Present and Future, 1978 Det. C.L. Rev. 260; Note, Rape in Marriage: The Law in Texas and the Need for Reform, 32 Baylor L. Rev. 109 (1980); Comment, Spousal Exemption to Rape, 65 Marq. L. Rev. 120 (1981) [hereinafter cited as Spousal Exemption]. The single article in recent years supporting the marital exemption is Hilf, supra note 159, at 31. See also Model Penal Code § 213.1 commentary at 345-46 (1980).
169 See, e.g., Marital Rape Exemption, supra note 154, at 315 n.66.
170 See, e.g., Schwartz, supra note 162, at 47; Spousal Exemption, supra note 162, at 127; Marital Rape Exemption, supra note 154, at 315.
167 D. RUSSELL, RAPE IN MARRIAGE 180 (1982).
168 Freeman, supra note 155, at 18-19; Schwartz, supra note 162, at 48-49; Marital Rape Exemption, supra note 154, at 314.
187 See D. RUSSELL, supra note 165, at 362-74; Schwartz, supra note 162, at 48-50.
witness, rape is the last crime a woman would choose to fabricate; states that have abolished the rape exemption have experienced no flood of false complaints; assault or personal injury suits are just as attractive as vehicles for false claims; and the criminal justice system is designed to and is capable of resolving such conflicts.

Finally, recent empirical studies counter the claim that spousal rape is neither pervasive nor traumatic. For example, two recent studies of battered women found that approximately one-third of the victims reported being sexually assaulted. A recent random sample of women in the San Francisco area reported that 14 percent of the married women reported experiencing rape or attempted rape by their mates. Those studies attempting to assess the impact of spousal rape also conclude that spousal rape or sodomy has a traumatic effect on the victims, particularly when coupled with other physical abuse.

The result of this debate has varied from state to state. A few states have held fast to the exemption in all cases; a majority of the states, while adhering to the exemption in cases involving cohabiting spouses, have criminalized forcible intercourse among spouses in the process of separation or divorce.

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186 See, e.g., Marital Rape Exemption, supra note 154, at 314-315; Schwartz, supra note 162, at 52-53, Freeman, supra note 155, at 19.

187 See, Schwartz, supra note 162, at 53, wherein Schwartz reprints a letter from an Oregon District Attorney concerning prosecution under Oregon’s new rape statute:

The one thing which has not happened, and which I stressed in my testimony to [the California] Senate Judiciary Committee, is that embittered and vengeful wives are not rushing to their District Attorney to falsely claim rape in order to gain leverage on their husband in a divorce. Victims are very reluctant to report the crime.

188 Freeman, supra note 155, at 19; Schwartz, supra note 162, at 53.

189 Schwartz, supra note 162, at 53-54; Legal Sanction, supra note 153, at 571.


191 See D. Russell, supra note 165, at 61; Schwartz, supra note 162, at 43 (and sources cited therein).

192 D. Russell, supra note 165, at 67.

193 Finkelhor & Yllo, supra note 172 at 465-77; D. Russell, supra note 165, at 190-205.


Only a minority of states permit prosecution of cohabiting husbands for rape. Some of those states permit prosecutions only in limited circumstances, such as when the rape is accompanied by serious physical injury,\(^{178}\) and some states permit prosecutions for husbands under precisely the same circumstances as for strangers.\(^{179}\)

**B. The New Kansas Rape Statute**

The amendment to the Kansas rape statute eliminates the exemption by the simplest of means: it strikes the language in the rape statute that had defined rape as forcible intercourse occurring with someone other than a spouse. Prior to July 1, 1983, rape was defined in Kansas as an act of sexual intercourse committed by a man “with a woman not his wife,”\(^ {180}\) and without her consent, under a number of situations. The new Act eliminates the husband’s exemption and defines rape as sexual intercourse with a person who does not consent to the intercourse, when the victim is overcome by force or fear, when the victim is incapable of consenting because of mental disease, when the victim is unconscious or powerless to resist or when the victim cannot consent because of involuntary intoxication.\(^ {181}\) Under the current statute, “rape is rape,” whether committed by a husband or another.\(^ {182}\)

While the rape provision has been termed the most important statute to

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\(^{181}\) 1983 Kan. Sess. Laws ch. 109 (to be codified at Kan. Stat. Ann. § 21-3502). In addition to eliminating the spousal exemption, the bill makes a number of other notable changes. First, the bill is gender-neutral. Thus, it makes women, as well as men, subject to rape charges. Second, the bill eliminates the requirement that a victim’s “resistance” be overcome by force or fear in order for forcible rape to occur. The statute now requires only that the “victim” be overcome. Third, the bill expands the definition of intercourse to include rape with an object. Id. (to be codified at Kan. Stat. Ann. § 21-3501(1)). Fourth, the bill also eliminates the spousal exclusion for forcible sodomy. Id. (to be codified at Kan. Stat. Ann. § 21-3505, 3506). In sum, the act both broadens the type of conduct which may constitute rape and, at the same time, declares that the husband no longer enjoys an exemption from such conduct. Finally, while the legislature has eliminated the spousal exemptions to rape and sodomy, it has added an exemption to the newly-created crime of sexual battery. The statute defines any unlawful intentional and unconsented touching of a person who is not the spouse of the offender as a misdemeanor sexual battery if the touching is with the intent to arouse or satisfy the sexual desires of the offender or another. Aggravated sexual battery, a class D felony, is the unlawful unconsented “application of force” with the intent to arouse. Id.

\(^{182}\) While the statute is a model of simplicity, it may expand spousal liability further than realized by the legislature. Under the statute, any act of intercourse with a party “incapable of giving consent because of mental deficiency or disease” constitutes rape. Id. (to be codified at Kan. Stat. Ann. § 21-3502(1)(c)). Presumably a wife with decades of consensual sexual relations could be charged with the class B felony of rape for initiating intercourse with her senile husband. Similarly intercourse between an “aggressor” and an unconscious victim constitutes rape. Id. (to be codified at Kan. Stat. Ann. 21-3502(1)(b)). Thus, a cohabitating spouse who begins intercourse with his or her unconscious mate could in theory be liable for rape.
emerge from the recent legislative session, it would be unfortunate to overestimate its impact. As noted, recent research shows that spousal rape is a deep-seated and pervasive problem in abusive marriages. While criminalization of spousal rape is a necessary first step in reducing its occurrence, it is unrealistic to expect a significant reduction absent serious efforts to enforce the new law. Unfortunately, such efforts will encounter great difficulties.

Rape among strangers is an under-reported crime; rape among spouses will be reported even less frequently. The assaults that are reported will be difficult to prosecute. Jurors are likely to assume consent to intercourse among married couples unless strong evidence to the contrary is presented. The extremely heavy penalties for rape may also act as a deterrent to conviction. Jurors who believe spousal rape less offensive than stranger rape may be hesitant to convict under a law that imposes the same penalty for both forms of rape.

One recent commentator has attempted to minimize these problems by suggesting that criminalization of spousal rape may help deter the practice by

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184 See Topeka Capital Journal, April 10, 1983, at 6, col. 1. The rape provision went through a number of revisions before emerging in its final form.

The original draft of the bill provided an exemption from the rape statute for spouses “unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance or divorce or for relief under the protection of abuse act.” House Bill No. 2008 by Special Committee on Judiciary. The House Committee made several amendments which were incorporated in its Committee Report of February 11, 1983. Although it preserved the above exemption for spouses relative to rape as a class B felony, it created a class D felony called “rape within a marriage.” It also created a class B felony called “aggravated rape within a marriage” which it defined as rape within a marriage when the offender: (a) inflicts great bodily harm upon the victim; (b) causes any disfigurement or dismemberment to the victim; (c) during the commission of the act, displays a deadly weapon in a threatening manner or uses or threatens to use force which may inflict great bodily harm, disfigurement, dismemberment or death; or (d) is aided and abetted by one or more persons.” Kansas Journal of the House 225 (1983). On February 16, 1983, the House Committee of the Whole amended the bill further by eliminating the class D felony of rape within a marriage while retaining the class B felony, aggravated rape within a marriage. Kansas Journal of the House 240 (1983). The bill, as amended, passed the House on February 17, 1983. Kansas Journal of the House 246 (1983).


184 See, e.g., D. Russell, supra note 165, at 303; Note, Rape and Rape Laws: Sexism in Society & Law, 61 CAL. L. REV. 919, 920-22 (1973) [hereinafter cited as Rape and Rape Laws]; Note, Marital Rape Exemption, supra note 154, at 315. See also U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK ON CRIMINAL JUSTICE STATISTICS—1981, at 233 (estimating that between 42-51% of rapes are not reported to police).

184 See, e.g., Schwartz, supra note 162, at 44; D. Russell, supra note 165, at 303-04.

184 See Marital Rape Exemption, supra note 154, at 314.

187 See Rape and Rape Laws, supra note 184 at 940 (“Potentially high sentences probably serve more to deter victims from complaining and juries from convicting than they serve to deter rapists from raping.”) See also University Daily Kansan, Feb. 2, 1983, at 5 (statement of Rep. Clifford Campbell, arguing for a lesser penalty for spousal rape).
serving as an educational device. According to this view, the public is more likely to view conduct as wrong if it is criminal. Thus, criminalization by itself may convince people that spousal rape is inappropriate conduct. Criminal penalties may deter spousal rape even if few prosecutions occur. 187

While criminalization may in and of itself be a small deterrent, there are problems with regarding the legislative statement as sufficient condemnation of such conduct. Spousal battery has been illegal for generations, yet experience shows that non-enforcement of the criminal penalties allows the creation of an atmosphere in which spousal battery is tolerated and regarded by some as appropriate conduct. Absent genuine enforcement efforts, the spousal rape bill also risks becoming little more than a symbolic victory. 188

IV. INJUNCTIVE RELIEF

Even the most aggressive policies of arrest and prosecution will not eliminate the need for civil relief for spouse abuse victims. Criminal prosecutions may involve imprisonment and require a husband’s loss of employment. Abuse victims may be reluctant to subject their spouses to such sanctions and may rather desire to prevent abuse without invoking criminal punishment. Moreover, the slow-moving criminal process may not serve an abused party’s need for immediate protection.

Despite the significant need for civil relief, until recently, few civil remedies were available outside of divorce proceedings. The doctrine of interspousal tort immunity was thought to bar recovery in all civil actions between spouses. 189 Injunctive relief was untested outside of divorce.

In 1979, the civil remedies available to an abused spouse were expanded when the Kansas Legislature enacted the Protection From Abuse Act. 190 The

187 See generally Gusfield, On Legislating Morals: The Symbolic Process of Designating Deviance, 56 Calif. L. Rev. 54 (1968). Gusfield discusses those laws which criminalize various types of “victimless” crimes. He notes that many proponents of such laws have been interested in their passage primarily to reaffirm their moral values and to stigmatize as deviant those who violate the laws. For such people it is the passage of the law, rather than its enforcement, which is important. In fact, Gusfield claims that supporters of such laws will sometimes discourage enforcement in order to avoid crystallizing opposition to the acts. Id. at 57-58. While spousal rape is most assuredly not a victimless crime, some of the advocates of elimination of the spousal exclusion risk reenforcing the pattern by treating passage of the law as important because of its affirmation of a woman’s right to choose, rather than because it is a first step toward punishment, deterrence, and even rehabilitation of a group of offenders.

An example of the intrinsic symbolic value of the spousal rape exemption is provided by the actions of a Lawrence, Kansas legislator who voted against a draft of the bill which would have prohibited spousal rapes among non-cohabiting spouses or among cohabiting spouses if accompanied by physical injuries. The legislator voted against the amendment and supported the continued spousal exemption on the ground that the amendment tolerated rape in marriage if unaccompanied by serious injury. While the amendment would have permitted protection in virtually any case of rape accompanied by other physical abuse, the legislator found the symbolic fault of the bill so significant she voted against passage. See Lawrence Journal World, Feb. 18, 1983, at 8, col. 1.

188 See A. Boylan & N. Taub, supra note 4, Part II, at 10; Taub, Equitable Relief in Cases of Domestic Violence, 6 Women’s Rights L. Rep. 241, 245 (1980).

189 See infra notes 201-263 and accompanying text.
statute provides a simple procedure by which an abused party may secure a
court order to restrain abuse. This section will explore existing injunctive reme-
dies, analyze their effectiveness, and suggest methods of improving their
operation.

A. Divorce Statutes

The divorce statutes provide an important source of injunctive relief for
abused spouses. Like most states, Kansas has an array of preliminary orders
that can be issued by a court with jurisdiction over a divorce action. Upon
filing a verified petition alleging grounds for divorce, the petitioner may seek
an interlocutory order "restraining either party from molesting or interfering
with the privacy of the other," restraining the disposition of property and
"providing for the care, occupancy, management and control thereof." Orders
for temporary custody and support are also available.

A principal advantage of this interlocutory restraining order is its ability to
command the immediate cessation of abuse. This temporary relief is often
sought in an emergency situation by the abused spouse, and courts in many
jurisdictions have assumed the power to issue such orders ex parte. Until re-
cently, the statute authorizing interlocutory orders provided few guidelines for
issuing ex parte orders. A revision of the divorce laws, effective January 1,
1983, clarifies and limits the power of the court to issue ex parte orders. The
amendment specifies that orders to restrain the disposition of property, re-
strain molestation, and provide for custody may be entered after an ex parte
hearing. The amendments also provide that if the initial order is entered ex
parte, the court must grant an adversary hearing on any motion to vacate or
modify an order within ten days of the date of the motion.

The divorce statutes provide two sanctions for violations of an interlocutory
order. Violation of any preliminary order can be treated as contempt. Moreover,
if the order restrains the individual from entry to a dwelling, the violator
can be charged with criminal trespass.

In previous years, attorneys considered the divorce petition the "magic

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181 See, e.g., IND. CODE ANN. § 31-1-11.5-7 (Supp. 1982); Md. CODE ANN. CJ § 3-603(b) (1980).
182 KAN. STAT. ANN. §§ 60-1607(a)(1) and (2) (Supp. 1982). Authority to issue such orders was
change, courts had assumed the power to issue these orders, despite an absence of statutory
authority. See S. Gard, KANSAS CODE OF CIVIL PROCEDURE § 60-1607, at 19 (2d ed. 1982); Hopson,
The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level, 11 KAN. L. REV.
107, 139 (1982) [hereinafter cited as Hopson].
183 KAN. STAT. ANN. § 60-1607(a)(3) (Supp. 1982).
184 Limited guidance was given prior to 1983 on the procedures required prior to issuance of
support orders. Thus, Kansas Supreme Court Rule No. 139 relating to District Courts delineated
requirements for ex parte orders which included requests for temporary support. KAN. STAT. ANN.
§ 60-2702a. (Supp. 1982). Further, § 60-1607(c) provides detailed guidance on the use of garnish-
ment as a means of enforcing support orders.
185 See 1982 Kan. Sess. Law, ch. 152 (to be codified at KAN. STAT. ANN. § 60-1607(b)).
186 Id.
188 Id. at § 21-3721(c) (1981).
key that could unlock civil injunctive remedies for abused spouses. While the divorce petition remains an important source of injunctive relief, commentators and legislators have recognized that alternative sources of protection are needed. The divorce petition requires a decision to end the marriage. For reasons of love, loyalty, concern for children, finances, religious belief, or hope of reconciliation, an abused woman may desire protection from her mate, yet not wish to commence a divorce action. Such women now have, in the Protection From Abuse Act, a civil remedy available.

B. The Protection From Abuse Act

The Protection From Abuse Act, enacted in 1979, is a comprehensive scheme that provides civil injunctive relief for victims of domestic violence. Patterned after a Pennsylvania law since passed by other states, the Act provides an alternative source of injunctive relief. An injunction may be issued without requiring a divorce petition, annulment, or separate maintenance proceeding.

The structure of the Act is simple. Any “person” residing with an abuser may seek protection from “abuse” by filing a petition with the court. If, after a hearing, the court finds such abuse to have occurred, it may issue an order to restrain the abuse. Although initially the act did not provide protection for an unmarried cohabitant without children, by an amendment effective in 1983,

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199 Wife Beating: Law & Society, supra note 1, at 190. See also Lever, supra note 4, at 171.
200 See, e.g., Wife Beating: Law & Society, supra note 1, at 190; Lever, supra note 4, at 171.
coverage was extended to all "persons" residing in the household. Thus, as of this year, the statute covers unmarried as well as married cohabitants.

The Act defines "abuse" as any act that wantonly causes bodily injury as well as any physical threat that places another in fear of imminent bodily injury. While the definition encompasses the kinds of battery that prompted the enactment of protective legislation, the definition omits psychological harassment, such as surveillance or verbal abuse. The definition is also narrower than the crime of battery because offensive contact which is not intended to or does not cause physical injury is excluded from coverage.

To obtain protection from abuse, a victim first must file a verified petition. Within 10 days thereafter, an adversary hearing must be held, at which the plaintiff is required to prove the allegations of abuse by a preponderance of the evidence. If this standard of proof is met, the court may award a formidable array of remedies. The court may require the defendant to refrain from abuse, grant exclusive possession of the residence to the abused party, order the removal of the abuser, require support payments, and order the parties to seek counseling. While support orders expire within thirty days, other relief may extend up to one year.

Immediate relief from abuse is also available under the Act. After receipt of the verified petition, but before the final hearing, the court may grant a temporary ex parte order requiring the defendant to refrain from abuse, granting exclusive possession of the residence to the plaintiff, or evicting one of the parties. This temporary relief is available upon motion for "good cause," which includes "immediate and present danger of abuse to the plaintiff or minor children."

Emergency ex parte relief may be granted when the court is not in session. To obtain this relief, an abused party must present a verified petition and proposed order to any district judge, wherever the judge may be found. Upon a showing of "good cause" the judge may grant an "emergency order" of up to seventy-two hours duration. The emergency order expires within seventy-two hours, or when the court is available, at which time the plaintiff may seek a temporary order.

Protection or restraining orders are only effective if obeyed by the parties or,
if not obeyed, enforced by the courts. To enhance enforcement, the Act requires that a copy of any protective order be served upon the defendant as well as the city police department or county sheriff.\footnote{218} As with violation of a divorce restraining order, violation of an abuse order constitutes contempt of court\footnote{216} and may be punishable as criminal trespass.\footnote{217}

The Act contains one major limitation on its use: a party may not receive protective orders more than twice in any one-year period.\footnote{218} While use of the Act is thus restricted, parties who seek protective orders are not precluded from any other existing remedy. The Act specifically states its provisions "shall be in addition to any other available civil or criminal remedies."\footnote{219}

C. Civil Injunctive Relief under K.S.A. § 60-901

A third source of injunctive relief is an "ordinary" civil injunction. Kansas Statutes Annotated Section 60-901 empowers the district courts to issue injunctions, either as a final judgment, or as a provisional remedy.\footnote{220} Upon finding tortious conduct, courts in Kansas have issued permanent injunctions and temporary restraining orders in suits to restrain abuse among unmarried cohabitants.\footnote{221} With the abolition of interspousal tort immunity in Kansas, the right of an abused spouse, as well as an unmarried cohabitant, to seek injunctive relief is no longer in doubt.

While it is likely that the civil injunctive suit will rarely be utilized as an alternative to the Protection From Abuse Act, there may be certain situations when it is the only available source of protection.\footnote{222} For example, a victim may be subjected to acts of constant harassment or attempts to humiliate that, although tortious, fail to cause the physical injury required for an Abuse Act injunction.\footnote{223} A civil injunction may, in theory, supplement the Abuse Act

\footnote{216} Id. at § 60-3108.
\footnote{218} "If, upon hearing, the court finds a violation of any order or consent agreement, the court may find the defendant in contempt . . ." KAN. STAT. ANN. § 60-3110 (Supp. 1982). See generally id. at §§ 20-1201 to 1206 (1981).
\footnote{217} "Criminal trespass is entering or remaining upon or in any land, structure . . . by a person who knows he or she is not authorized or privileged to do so, and: . . . (c) such person enters or remains therein in defiance of a restraining order issued pursuant to KAN. STAT. ANN. § 60-1607, 60-3105, 60-3106, or 60-3107, and any amendment to said statutory actions and the restraining order has been personally served upon the person so restrained." Id. at § 21-3721 (1981).
\footnote{219} Id. at § 60-3111 (Supp. 1982). The limitation on relief does not apply in the case of abuse of a minor.
\footnote{220} Id. at § 60-3109.
\footnote{222} Id. at § 60-901 (1976).
\footnote{223} Interview with Larry Rute, Director, Legal Aid Society of Topeka (Apr. 4, 1983).
\footnote{224} See supra note 188 and accompanying text.
\footnote{225} The Protection From Abuse Act defines "abuse" as one or more of the following acts between persons who reside together "(a) Willfully attempting to cause bodily injury, or willfully or wantonly causing bodily injury. (b) Willfully placing, by physical threat, another in fear of imminent bodily injury. (c) Engaging in any of the following acts with a minor under sixteen (16) years of age who is not the spouse of the offender: (1) The act of sexual intercourse. (2) Any lewd fondling or touching of the person of either the minor or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the minor or the offender or both." 1983 Kan. Sess. Laws ch. 201 (to be codified at KAN. STAT. ANN. § 60-3102).
when relief has already been sought twice under that Act. Finally, prior to 1983, the civil injunctive suit was the only equitable relief for unmarried and childless cohabitants because they were not covered by the Abuse Act.

There are no reported cases in Kansas that explore the propriety of civil injunctive relief in domestic abuse actions. Nevertheless, traditional equitable principles provide a framework for analysis. In all probability, the most critical of the traditional hurdles for the Kansas domestic abuse injunctive action is a showing that the action is brought to restrain a threatened or existing harm.

The requirement of threatened or existing harm is forward-looking. Injunction will not issue to restrain behavior which has already ceased. On the other hand, when the harm alleged is recurring or continuous, or when there is a genuine probability of its reoccurrence, this requirement is satisfied. Spousal abuse frequently involves recurring behavior. Research demonstrates that battering often proceeds in escalating stages. Thus, assuming all other requirements are met, the court should be willing to issue an injunction in any case except one alleging a single act of violence, unaccompanied by any threatening behavior.

Another requirement of injunctive relief in Kansas is the absence of an adequate remedy at law. In a spousal violence suit, the plaintiff must demonstrate the inadequacy of two potential remedies, damage actions and criminal prosecutions. The weakness of a damage remedy is apparent. Damages do not prevent physical harm; they merely compensate. Moreover, a damage action cannot provide compensation if the abuser is indigent. The inadequacy of criminal prosecution should also not be difficult to demonstrate. While there is authority that equity should not intervene to restrain a future crime, spouse abuse presents a situation in which the threat of criminal enforcement has

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*Footnotes*


225. See, e.g., Clawson v. Garrison, 3 Kan. App. 2d 188, 195-96, 592 P.2d 117, 124 (1979) ("Injunctive relief is not used to prevent prospective injury unless it appears there is a reasonable probability of injury and an action at law will not afford an adequate remedy. Mere apprehension or a possibility of wrong and injury ordinarily is not enough to warrant granting of an injunction.") (citations omitted); Freeman v. Scherer, 97 Kan. 184, 188-89, 154 P. 1019, 1021 (1916); Whittington v. Brown, 80 Kan. 297, 300, 102 P. 783, 784 (1909). See generally Taub, supra note 188, at 241; Note, Imminent Irreparable Injury: A Need for Reform, 45 S. Cal. L. Rev. 1025 (1972).


228. See supra notes 74, 134, and accompanying text.


230. See, e.g., Mendenhall v. School District No. 83, 76 Kan. 173, 177, 90 P. 773, 775 (1907) ("If, however, the trespassor is insolvent, or for any other reason an action at law would be inadequate, an injunction will be granted to restrain even a naked trespass."); Note, Development in the Law—Injunctions, 78 Harv. L. Rev. 994, 1002 (1965) [hereinafter cited as Development in the Law—Injunctions].

been shown to be inadequate. Criminal prosecution is inadequate when a spouse has previously sought criminal enforcement and no prosecution has resulted. Moreover, even if the criminal law was adequate in theory, until recently, criminal sanctions have seldom been imposed. Indeed, it is arguable that criminal remedies need never be sought. Criminal assault and battery statutes do not serve the same purpose as civil relief. Their function is to punish, whereas the need in spouse abuse cases is to separate the parties.

With the extension of the abuse act to unmarried cohabitants, the existence of civil injunctive relief should become relatively unimportant. Nevertheless, it remains an adjunct to other remedies. Because there is no clear precedent for issuing injunctions in cases of domestic violence, attorneys in Kansas should draft their arguments to demonstrate the existence of the elements traditionally required for injunctive relief.

D. Assessment of Injunctive Remedies

1. Issuance of Restraining Orders

Despite the availability of injunctive remedies, little is actually known about their efficacy. Preliminary orders in abuse cases are rarely appealed and seldom commented upon. For example, although the Protection From Abuse Act became law four years ago, it has not been cited in a single reported opinion. Because the state reporters cannot provide a guide to whether and how the Act has been utilized, the authors sought information on injunctive remedies through a survey of Kansas legal services attorneys. Responses were received from twenty-three present and former legal services attorneys from all areas of the state. Most of these attorneys regularly represent clients with domestic relations concerns. While the attorneys were questioned about divorce and civil injunctions, most of the questions and responses were directed toward practice under the Protection From Abuse Act.

The responses of the attorneys confirm that in most parts of Kansas, use of the Abuse Act is routine and that the courts are willing to issue restraining orders. Most of the problems reported with obtaining orders were predictable logistical difficulties. For example, one attorney cited as the most significant hurdle to ex parte relief “tracking down a judge to procure his signa-

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233 See supra notes 24-59 and accompanying text.
234 In Topeka, attorneys for the Legal Aid Society have required clients desiring injunctive relief to have sought criminal prosecution. Interview with Larry Rute, Director, Legal Aid Society of Topeka (April 4, 1983).
235 See supra notes 24-59 and accompanying text. As one commentator has noted, “If the plaintiff is a private individual, he has no control over the initiation of a criminal action; the public prosecutor may decline to start proceedings for a variety of reasons. . . . It is not surprising that injunctions will issue at the request of private plaintiffs who allege little more by way of the inadequacy of the criminal remedy than a reluctance on the part of public prosecutor to start the appropriate criminal proceeding.” Developments In the Law—Injunctions, supra note 230, at 1016.
236 See Taub, supra note 188, at 255.
237 Copies of the responses are on file with the Kansas Law Review.
238 Only one of the respondents reported a specific incident of an apparently unreasonable refusal to issue an order. Response No. 4.
Another reported that the major problem was finding and serving the defendant. A few attorneys noted disparities in the willingness of judges to issue ex parte orders. For example, one attorney stated that, despite the specific statutory language authorizing temporary ex parte orders, rural courts were reluctant to issue these orders. The survey results indicate that some judges are even more hesitant to offer emergency ex parte relief and invariably require a hearing before issuing an ex parte order.

2. Enforcement of orders

The purpose of the Abuse Act, like that of analogous sections of the divorce statute, is to provide prospective protection. The Act provides no monetary recompense, nor does it punish. Its success must be measured by its ability to aid in protecting abused parties from injury; success can only occur if court orders are obeyed, or if disobeyed, are enforced. The reports from legal services attorneys, as well as social workers, suggest that while most restraining orders are obeyed, the legal system has been slow to react to those spouses who disobey court orders. Although the divorce statutes and Abuse Act provide two sanctions for violating a restraining order—contempt or criminal trespass—lawyers in the field report significant problems with both remedies.

While contempt has often been regarded as a powerful tool to assure compliance with court orders, attorneys report a number of drawbacks in using it to resolve a protective order violation. Most significantly, it is time-consuming. The abused party is required to file a motion and affidavits setting forth the violation and to request an order to show cause why the abuser should not be held in contempt. If an order to appear is granted, it must then be served upon the abuser. Following a hearing, the court administers "such punishment as the court shall direct." By the time a hearing is held, however, significant damage may already have occurred. As one attorney noted, "when one is being physically abused... going to court after the fact can be of little or no value."
If contempt is to be an effective sanction, the court must be able to act quickly upon presentation of an allegation of a restraining order violation. Such power in fact exists when the court is presented with an alleged violation of a divorce restraining order. Section 20-1204a provides that when the alleged contempt involves physical abuse in violation of a restraining order granted upon filing of a divorce petition, the court may issue a bench warrant commanding the appearance of the abuser to answer for contempt.\(^{386}\) For reasons that are unclear, however, this section has not been amended to permit the court to issue a bench warrant for an Abuse Act violation. Such an amendment would increase the effectiveness of the contempt sanction under the Abuse Act.

Because contempt is an ineffective sanction against imminent threats of restraining order violation, the police inevitably receive calls requesting assistance. In the past, the police often have expressed doubt of their power to enforce a civil order which restrains an abuser from entering the home.\(^{387}\) Officers have stated that a restraining order violation is a civil rather than a criminal matter. Some officers have attempted to “mediate” by cajoling the violator to leave the premises; others have not even attempted resolution.\(^{388}\)

Police power to intervene is no longer in doubt. Kansas Statutes Annotated section 21-3721 specifically provides that a person remaining on property in defiance of a restraining order issued in divorce or Abuse Act cases is guilty of criminal trespass—a misdemeanor offense—if the restraining order has been personally served.\(^{389}\) The trespass sanction, at least in theory, should provide an immediate deterrent to abuse. If the police respond to a call, arrive while the abuser is in the house, and can verify service of the order, the officers will have witnessed the offense and will be able to arrest and remove the restraining order violator.\(^{390}\) Even if the violator has left, he may be arrested without a warrant if further violence or violation of the order is imminent.\(^{391}\)

While the criminal trespass statutes provide an immediate remedy for enforcement of restraining orders, legal services attorneys and social workers report that many police officers are either unaware of their power to enforce or unwilling to exercise this power. As one attorney stated, “Law enforcement in general is extremely reluctant to get involved. The typical reaction is ‘get private counsel.’”\(^{392}\) Another reported that the police generally ignore court orders or claim they are unable to enforce them.\(^{393}\) Still another attorney reported that police often will not arrest unless they “catch them actually

\(^{387}\) Wichita Bar Association position paper. 510.00 Civil Matter, 1982. See generally, A. Boylan & N. Taub, supra note 4, at Part I, 156-174.
\(^{388}\) See Response Nos. 1, 3, 7, 8, 9, 11, 12, 15, 17, 18, 22.
\(^{390}\) Under Kan. Stat. Ann. § 22-2401(d) (1981), a police officer may arrest a person without a warrant when a crime is being committed by such person in the officer's presence. See also supra notes 66, 71 and accompanying text.
\(^{391}\) Kan. Stat. Ann. § 22-2401(c) (1981) provides that an officer may arrest a person when the officer has probable cause to believe that the person committed a misdemeanor and that he may cause injury to others unless immediately arrested. See also supra notes 72-74 and accompanying text.
\(^{392}\) Response No. 8, 12, 22.
\(^{393}\) Response No. 18.
beating up the spouse—some not even then.”

The police have not exercised their enforcement powers for several reasons. Some officers are simply unaware that a restraining order violator is guilty of criminal trespass. Others refuse to arrest because of a claimed ignorance of the validity of the orders, even though copies of Abuse Act orders are filed with the police.

Refusal to enforce a protective order is probably the worst example of police nonintervention. Unless abuse has already occurred, no protective order can issue. Thus, the abuser already has committed a criminal act involving bodily injury and the abused party already has sought the protection of the legal system. The failure of the police to enforce violation of the order is a strong message to the abused party that she is helpless to stop the abuse. The message to the abuser, of equal strength, is that the legal system will do nothing to stop him.

A number of localities in Kansas have taken action to remedy the problem of police response. For example, the Wichita Bar Association has drafted a detailed statement of procedures that should be followed by the police when restraining orders are violated. The procedures state that every violation of a protective order should be prosecuted. In addition, the statement suggests that an arrest should occur when the abuser is on the premises and has refused to leave.

Other jurisdictions have responded to the problem of enforcement by legislation. Violation of a protective order in itself can be made a criminal offense. Some jurisdictions have tied criminalization with an expansion of police arrest power to permit warrantless arrests in all cases where there is probable cause that a restraining order has been violated. A few states have gone even further and seemingly mandate arrest in cases of protective order violations.

Because the police are just beginning to enforce existing remedies, it is difficult to judge how much more power must be granted to them to ensure an efficacious response. The Governor’s task force failed to recommend further criminalization of protective order violation or any expansion of arrest power, evidently believing that training efforts by professionals could improve police

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80 Response No. 17.
81 See, e.g., Response Nos. 7, 18.
82 Response No. 1.
84 Statement of Wichita Bar Assn., supra note 253.
85 In North Dakota, willful disobedience of a protective order that has been served on the violator is a misdemeanor and is also criminal contempt. N.D. Cent. Code § 14-07.1-06 (1981). Washington provides that willful violation of a criminal court pretrial order prohibiting any contact with the victim is a misdemeanor. Wash. Rev. Code Ann. § 10.99.040 (1980).
response. If this judgment proves overly optimistic, the Kansas Legislature should consider a change in the law.

3. The Problem of Unmarried Cohabitants

With the possible exception of enforcement, the weakness in the Abuse Act most frequently commented upon by legal services attorneys was the former exclusion of unmarried cohabitants from relief. Prior to July 1, 1983, the Abuse Act might be invoked only by spouses, children and others legally related by consanguinity or affinity, including common-law spouses. An unmarried individual living in a residence with an abuser had no right to protection unless the couple had children.

The deliberate exclusion of unmarried cohabitants from the coverage of the Abuse Act was inexcusable. While evidence on abuse of "lovers" is not extensive, all available evidence demonstrates that unmarried cohabitants are subject to the same problems of domestic violence as the legally married and have the same need for protection. Like victims of spousal violence, unmarried victims are known to their victimizers. The tensions and jealousies which prompt spousal violence and the intimacy which allows it to continue also exist for unmarried couples. Moreover, the police are often unresponsive to domestic violence between unmarried cohabitants. They often treat them as though they were married and urge the victim to seek protective or restraining orders.

The Final Report of the Governor's Committee on Domestic Violence recommended that unmarried cohabitants be covered by the Abuse Act, and in the 1983 session, the Legislature responded to the recommendation by amending the Abuse Act to provide coverage to any "persons who reside together," irrespective of formal marital status. The amended statute provides, however, that if the parties are unmarried, and only one party owns the dwelling, the court may not issue an order granting exclusive possession to the non-owning party.

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867 Under the Act prior to the 1983 amendment, unmarried couples were able to secure protection through their children. The Act defined family members as spouses, parents and children, or other persons related by consanguinity or affinity. Kan. Stat. Ann. § 60-3102(c) (Supp. 1982) (amended and repealed, 1983 Kan. Sess. Laws ch. 201). Thus, if an unmarried couple had children of that relationship, they would appear to constitute covered family members since they were "parents," and as such related by consanguinity to a child. In the survey, legal services attorneys reported, without significant exception, that unmarried couples with children of their relationship were granted protective orders under the Act.

868 Once regular sexual activity becomes part of the relationship, the domestic violence rate of unmarried couples parallels that of married couples. M. Straus, R. Gelles & S. Steinmetz, supra note 1, at 468; Battered Women, supra note 1, at 468 (report of Dr. Murray Straus).

869 Testimony to this effect was received by the initial stages of the Governor's Committee on Domestic Violence.

870 Governor's Committee on Domestic Violence, supra note 8, at 17.


872 Id. (to be codified at Kan. Stat. Ann. § 60-3107(c)).
E. Due Process and Ex Parte Orders

Although Acts similar to Kansas' Protection From Abuse Act have received almost no attention from courts, commentators have identified one potential source of appellate litigation—the validity of ex parte eviction order procedures. As in Kansas, many states have Abuse Acts that authorize ex parte orders excluding an abuser from his house. Thus, an individual accused of abuse may be served with a court order to vacate his premises without having a prior opportunity to contest the order.

While authority to issue ex parte orders has long been assumed in divorce actions, commentators have nonetheless discussed the propriety of this relief in Abuse Act litigation. Two lines of Supreme Court cases—its decisions in private-party replevin/garnishment proceedings and its decisions in government benefit termination cases—have been used to analyze the Abuse Act provisions. This section will comment on these cases and explore their application to ex parte abuse provisions.

In Fuentes v. Shevin, the Supreme Court considered the validity of the Florida and Pennsylvania summary replevin statutes. Both state statutes permitted an applicant to obtain an ex parte order granting the right to seize the disputed goods. The applicant was required to file an affidavit that alleged, in conclusory terms, the right to seize the property. Both statutes also provided that such orders could be issued by the court clerk without participation by a judge.

The Supreme Court held that the statutes ran afoul of the due process clause. Justice Stewart, writing for the Court, asserted that post-deprivation hearings would not negate the damage caused by an initial wrongful taking. Asserting the general presumption that due process requires a hearing before a taking of property, the Court stated that in only the following "extraordinary situations" should a hearing be postponed:

First, in each case, the seizure has been directly necessary to secure important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control

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777 See supra note 100.


781 Id.

782 Id. at 74-77.

783 Id. at 82.
over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in a particular instance.\footnote{Id. at 91.}

The validity of the \textit{Fuentes} formula was placed in doubt only two years later by \textit{Mitchell v. W.T. Grant.}\footnote{416 U.S. 600 (1974).} In that case, the Court upheld the constitutionality of a Louisiana statute that permitted sequestration of an item purchased under a conditional sales contract. The statute did not require notice to the defendant or opportunity for a pre-deprivation hearing.\footnote{Id. at 606-07.}

The Court's opinion is notable for its failure to apply the \textit{Fuentes} language and its substitution of a different ad hoc analysis. Justice White began his discussion by noting that the seller as well as the buyer possessed an interest in the property under Louisiana law and asserted that the due process analysis must, therefore, consider the importance of the seller's interest.\footnote{Id. at 604.} Tracing the common-law origins of the writ of sequestration, the Court found that an ex parte decision was needed to counter the risk that the property would deteriorate in value or that the buyer might transfer possession.\footnote{Id. at 609-10.}

In analyzing the procedures provided by the statute, Justice White found a number of significant differences between the Louisiana statutes and those in \textit{Fuentes}. For example, the Louisiana statute required the plaintiff to submit a detailed factual affidavit, mandated that only a judge issue an order, and provided a prompt post-seizure hearing.\footnote{Id. at 616-19.} Although acknowledging that the debtor had an interest in an immediate hearing, the Court found it insufficient to override "the ability to make the creditor whole," the risk of destruction, and the low risk of a wrongful determination.\footnote{Id. at 610. Justice Stewart dissented on the grounds that the Louisiana sequestration procedure violated due process and that the statute should be struck down on the basis of the \textit{Fuentes} standard. Stewart noted that "the Court today has unmistakably overruled a considered decision of this Court [\textit{Fuentes}] that is barely two years old." Id. at 635 (Stewart, J., dissenting).}

Only one year later, the issue was clouded even further. In \textit{North Georgia Finishing, Inc. v. Di-Chem Inc.},\footnote{419 U.S. 601 (1975).} the Court struck down the Georgia ex parte garnishment statutes. Unlike the statute in \textit{Mitchell}, Georgia law permitted the issuance of an order by a clerk upon conclusory affidavits and failed to require a post-deprivation hearing. Emphasizing again that temporary deprivation of property can violate due process, the Court found the Georgia procedures inadequate.\footnote{Id. at 607-08. Justice Stewart's concurring opinion states that "[M]y report [in his \textit{Mitchell} dissent] of the demise of \textit{Fuentes v. Shevin} . . . seems to have been greatly exaggerated." Id. at 608 (Stewart, J., concurring).}

The series of garnishment cases has left a "legacy of ambiguity"\footnote{\textit{Due Process and Vermont's Statute}, supra note 275, at 197.} about the appropriate analysis in private party seizure cases. While \textit{Fuentes} was thought
to have been virtually overruled by Mitchell, commentators have argued that it was resuscitated in North Georgia. On the other hand, neither North Georgia nor Mitchell utilizes the three-part test set forth in Fuentes to measure the "extraordinary" situations when a pre-deprivation hearing is required. Rather, both cases seem to utilize an ad hoc analysis, focusing on the likely reliability of the ex parte process, the plaintiff's need for ex parte relief, and the likelihood of substantial harm to the defendant's interest. In Mitchell, the Court concluded that the ex parte process was more reliable than that provided by the Fuentes-type statutes because the process required detailed affidavits and judicial issuance of orders. The Mitchell Court also found the plaintiff's interest significant because of the potential for deterioration or transfer of the property and the defendant's interest sufficiently protected by a prompt post-deprivation hearing. In North Georgia, the ex parte provisions did not have the "saving characteristics" of the Louisiana statute, and the defendant had no means to dissolve the garnishment of a substantial bank account by an immediate post-deprivation hearing.

The balancing approach used in North Georgia and Mitchell is roughly analogous to the standards set forth by Mr. Justice Powell for judging the validity of due process protections in the context of a benefit termination sought by the government. The Court's decision in Matheus v. Eldridge that an evidentiary hearing was not constitutionally required before social security disability benefits could be provisionally terminated set forth three factors to be considered in determining the process due a particular litigant:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Matheus test has been used consistently in subsequent decisions involving governmental action alleged to violate procedural due process. If the three-part Matheus standard is the appropriate test for judging the validity of the ex parte abuse statute, the Kansas abuse provision should easily pass constitutional muster. Turning to the first of the Matheus criteria, the interest of the abuser, there is no doubt that the defendant has a substantial interest affected by the ex parte proceeding. An order which precludes an individual from his dwelling may implicate an interest in property; such an order, if it

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94 Id. at 196.
95 See 416 U.S. at 616.
96 Id.
97 419 U.S. at 607.
99 Id. at 335.
101 The Supreme Court has recognized that the due process issues can be implicated in a case where tenants are subject to state-enforced eviction procedures. Lindsey v. Normet, 405 U.S. 56,
precludes visitation, may also affect a significant liberty interest. However, this deprivation, while substantial, is short-lived. Ex parte orders under the Act are limited to a ten day maximum, following which adversary hearings must occur.

The second Mathews consideration, the risk of erroneous deprivation, requires examination of the ex parte procedure itself. It is important to note that the Abuse Act procedures provide for greater protection than those held adequate in Mitchell. Conclusory affidavits will not suffice. A stringent standard of proof—"immediate and present danger of abuse"—is set forth as a definition for the "good cause" necessary to issue an order.

Finally, the interest of the public in the ex parte proceedings is great. Ex parte exclusion orders in abuse cases can only issue upon a showing that such an order is "necessary to protect the plaintiff . . . from abuse." Protection from violence has been regarded as a state responsibility of the highest magnitude. While the stake for the abuser is the sanctity of his dwelling, the stake for the victim is greater.

Analysis under the Fuentes test, if it remains viable, should produce the same result. The requirement that the order be issued to restrain physical violence satisfies the proviso that orders be issued to secure an important public interest. The situations in which such orders may be obtained are limited to emergencies—a clear danger of physical abuse. Nor are other arrangements to protect the spouse, such as shelters, so universally available in this state that they could be regarded as an adequate alternative to effective ex parte relief.

Finally, the government has retained control over use of its power because only a judge may issue orders.

V. Financial Compensation

Financial dependence on a spouse is one of the primary factors that force women to remain in abusive relationships. Although the stereotypical, male-headed, single-paycheck family is no longer as dominant a family pattern as it was in years past, many women continue to work as homemakers, and those in

64-68 (1972).


KAN. STAT. ANN. § 60-3106(a) (Supp. 1982).

Id., § 60-3106(b).

Id.

In a recent decision, the Missouri Supreme Court held that the State's ex parte abuse order procedures comport with procedural due process. State v. Marsh, 626 S.W.2d 223 (Mo. 1982). In arriving at its conclusion, the court analyzed the statute under both the Mathews balancing test and the Fuentes test. Id. at 230-232.

But cf. Due Process and Vermont's Statute, supra note 275, at 202-03 where the author argues that "Protection of the interests of the battered spouse does not rise to the level of extraordinary circumstances as articulated in the historical due process cases" because, among other things, the battered spouse has an alternative to relief obtainable under the emergency relief provision: she may seek relief at a shelter for battered wives. In fact, shelters are not always a reasonable alternative because they are not always available to battered spouses. But even if shelters were available, it is unfair to require the abused party to choose between leaving a home in which she may have an interest and staying with her tormentor.

the marketplace continue to earn less than men.\textsuperscript{500} Moreover, when serious abuse has occurred, a spouse's financial dependence may be compounded by the cost of medical expenses. Unless compensation for injuries is available, a battered spouse may have nowhere to turn but to her mate. Thus, battering may have the perverse effect of making a spouse more dependent upon her abuser.

Until recently, the doctrine of interspousal tort immunity completely barred a spouse from the most direct means of recovering for bodily injury—a tort suit for damages. One year ago, the Kansas Supreme Court modified the doctrine to permit an abused spouse to sue the abusing spouse for intentional infliction of harm.\textsuperscript{510} This section will discuss the development of the doctrine of interspousal immunity and its recent modification, and then examine other means of securing compensation for injury.

A. Interspousal Tort Immunity

The doctrine of interspousal tort immunity originated in the common-law belief in marital unity: upon marriage, the legal existence of the woman was incorporated into the man's, and the two became one legal entity.\textsuperscript{511} The doctrine prevented a wife from contracting with third parties; it also prevented her from suing without joinder of her husband.\textsuperscript{512} Marital unity made interspousal suits impossible, because a suit brought by a wife against her husband was in essence a suit by a husband against himself.

The adoption of married women's property acts, which granted women legal identity and provided for separate ownership of property,\textsuperscript{513} ended the mandated legal inferiority of married women and removed the common-law rationale for interspousal tort immunity. Adherence to the doctrine continued, however, because of public policy considerations. The specific reason most often given was that interspousal immunity helped preserve "domestic tranquility."\textsuperscript{514}

In 1952, the Kansas Supreme Court joined what was then the majority view\textsuperscript{515} and announced in Sink v. Sink,\textsuperscript{516} its adherence to interspousal tort immunity. The plaintiff in Sink brought a negligence suit against her husband

\textsuperscript{500} See supra, notes 34-35 and accompanying text.
\textsuperscript{510} See infra, notes 324-335 and accompanying text.
\textsuperscript{512} McCurdy, supra note 311, at 305; Interspousal Immunity, supra note 311, at 492; Karell, supra note 311, at 252; Torts, supra note 311, at 613.
\textsuperscript{514} See, e.g., Varholla v. Varholla, 383 N.E.2d 888, 889 (Ohio 1978); Ritter v. Ritter, 31 Pa. 396, 398 (1858).
\textsuperscript{515} When the Kansas Supreme Court first recognized interspousal immunity, only a small minority of jurisdictions had completely abrogated the doctrine. At present, a wide majority of states have abandoned the doctrine. See Torts, supra note 311, at 611 n.3.
\textsuperscript{516} 172 Kan. 217, 239 P.2d 933 (1952).
for injuries suffered in an auto accident. The court rejected the plaintiff's claim that the married women's property acts and the constitutional protection of the rights of women should permit such a suit. In a decision almost devoid of analysis, the court stated that abandonment of the doctrine would violate public policy and "tend to disrupt the marital relation."817

Thirteen years later, the court extended the doctrine of interspousal tort immunity to a suit alleging a calculated act of domestic violence committed on the eve of divorce. In Fisher v. Toler,818 the husband, Mr. Toler, had filed for divorce. During the pendency of divorce proceedings and after issuance of a protective order, he drove his car into his wife's car in an unsuccessful attempt to kill her. Following the divorce, Mrs. Fisher filed suit against her former husband. The Kansas Supreme Court held that the interspousal immunity doctrine barred the suit. Although the court conceded that the facts in Fisher were different than those in Sink, the court found neither the pendency of a divorce nor the intentional character of the act to require the "application of a different principle of law."819

In 1981, the Kansas Supreme Court reexamined the interspousal immunity doctrine in Guffy v. Guffy,820 once again in the context of a negligence suit. After its most extensive discussion of the doctrine, the Supreme Court decided to continue application of immunity. In addition to stare decisis, the principal justification for the adherence of interspousal immunity was, again, the preservation of marital harmony.831 According to the court, the existence of liability insurance would not remove the possibility of domestic discord arising out of a tort suit brought by an injured spouse. The court noted that, in Kansas, insurers were granted the right to exclude family members from liability insurance coverage. With such an exclusion, a negligence suit between spouses would not necessarily be a suit by one spouse against the insurance company.832 In approving interspousal immunity for negligence actions, the court hinted that it was ready to reconsider the application of the doctrine to intentional torts and thus to domestic violence cases.833

In Stevens v. Stevens,834 the court accepted the invitation it extended in Guffy to reconsider the application of interspousal immunity to intentional tort suits. The action in Stevens was brought by two of the Stevens' children against their stepmother. The children sought damages for the wrongful death

817 Id. at 219, 239 P.2d at 934. In O'Grady v. Potta, 193 Kan. 644, 396 P.2d 285 (1964), the Supreme Court held that the doctrine of interspousal immunity could not bar a negligence suit between spouses when the tort had occurred prior to the marriage. The court found the pre-nuptial tort a chose in action and, accordingly, the personal property of the spouse. Relying on the married women's property act, which provides that property owned at the time of marriage remains separate property, the court concluded that the plaintiff could not be prevented from protecting her interest in such property. 193 Kan. at 649, 396 P.2d at 290. Why this result was less disruptive of marital harmony than a suit occurring after marriage the court did not say.
819 Id. at 1014.
831 Id. at 94-95, 631 P.2d at 649-50.
832 Id. at 93-94, 631 P.2d at 649.
833 Id. at 97, 631 P.2d at 651.
of their father and claimed, among other things, that Mrs. Stevens had intentionally killed their father.\textsuperscript{388}

Mrs. Stevens argued that the stepchildren had no right to recover, because the Kansas wrongful death statute allows an action by the survivors of the decedent only if the decedent might have maintained an action had he survived.\textsuperscript{389} Mrs. Stevens claimed that the doctrine of interspousal immunity, as interpreted in \textit{Fisher}, would have barred her husband from suing had he survived and that, consequently, the children were barred as well.

Recognizing that adherence to \textit{Fisher} would preclude the children from recovery, the court overruled the case and created an exception to the interspousal immunity doctrine for willful and intentional torts. The court stated that the principal justification in Kansas for the rule of immunity was the preservation of marital harmony.\textsuperscript{390} The court concluded, however, that "[w]hen a spouse inflicts intentional harm upon the person of the other spouse, peace and harmony in that home has been so damaged that there is little danger that it will be further impaired by maintenance of an action for damages."\textsuperscript{391}

Less than six months later, the Supreme Court was asked to reconsider the exception it created in \textit{Stevens}. In \textit{Ebert v. Ebert},\textsuperscript{390} the court declined to limit \textit{Stevens} to wrongful death actions and upheld the exception.

The allegations in \textit{Ebert} describe a paradigm of an abusive relationship. Mr. and Mrs. Ebert were wed on December 22, 1980. According to Mrs. Ebert, within a week Mr. Ebert threw his wife against a pole, breaking her toe. Some weeks later, in another violent outburst, Mr. Ebert broke his wife's ribs and still later, he injured her eye. Other incidents of abuse in the six-month relationship included Mr. Ebert’s pouring gasoline over his wife. As a result of this abuse, Mrs. Ebert endured pain and medical treatment and was forced to leave a series of jobs.\textsuperscript{390}

Six months after the wedding, Mrs. Ebert filed for divorce and included with her petition a damage claim for battery. When further abuse occurred during her separation, Mrs. Ebert filed a second tort claim.\textsuperscript{391} The court rejected both claims, and Mrs. Ebert appealed. The Kansas Supreme Court reversed.

The court first answered Mr. Ebert’s claim that any changes in interspousal immunity should emanate from the legislature by noting that the doctrine of interspousal immunity was the creation of the judiciary, and that it was therefore appropriate for the judiciary to modify it.\textsuperscript{392} The court also rejected Mr. Ebert’s claim that \textit{Stevens} should be limited to its facts—wrongful death actions. Mr. Ebert argued that the marital harmony rationale need not be applied in those cases, because there is no marriage left to preserve. The court

\textsuperscript{388} \textit{Id.} at 726, 647 P.2d at 1347.
\textsuperscript{389} \textit{Id.} at 726, 647 P.2d at 1347; \textit{see also} Kan. Stat. Ann. § 60-1901 (1976).
\textsuperscript{390} 231 Kan. at 728, 647 P.2d at 1348.
\textsuperscript{391} \textit{Id.}
\textsuperscript{392} 232 Kan. 502, 656 P.2d 766 (1982).
\textsuperscript{393} Brief of Amicus Curiae at 2, Kansas Civil Liberties Union, Ebert v. Ebert, 232 Kan. 502 (1983).
\textsuperscript{394} \textit{Id.; see} 232 Kan. at 502, 504, 656 P.2d at 767.
\textsuperscript{395} \textit{Id.} at 503, 656 P.2d at 767.
repeated the observation it made in Stevens that when a party inflicts intentional harm on the other spouse, peace and harmony have been sufficiently disrupted that there is little danger of them being further impaired by the damage suit. The court stated: “We fail to see the logic in subjecting a person to civil liability for intentional injury to his or her spouse only if the spouse dies from the injury.”

Finally, the court rejected Mr. Ebert’s argument that the Stevens case be limited to prospective application. The court noted that when Mr. Ebert beat his wife he could not have believed his actions were appropriate, since they were, in fact, criminal batteries. Accordingly there would be no unfairness in adding civil liability for Mr. Ebert’s wrongful act.

The court is undoubtedly correct in its decision to eliminate interspousal immunity in intentional tort actions. Whatever logical relevance the policy favoring the preservation of domestic tranquility may have to immunity in cases involving negligence, the argument has a hollow ring in intentional abuse actions. Any marital unity which might be disturbed by a tort suit would have been already damaged by available criminal prosecution for battery, an order of eviction under the Abuse Act, or an action for divorce based upon the beating. More fundamentally, if research on domestic violence has demonstrated anything, it is that marital disunity and social harm are caused by the violence of the abuser, not a subsequent legal suit for damages. The facts in Fisher demonstrate the futility of reliance on a bar to suit as a means of preserving “tranquility.” One can only imagine how Mrs. Toler must have reacted upon being informed that she could not recover against her former husband—who had first filed for divorce and then rammed his car into her—because of the need to preserve marital harmony.

Although the partial abolition of interspousal immunity is not a panacea, it should at least minimize the possibility that spouses will be become more dependent upon an abuser after suffering physical injury. The receipt of financial compensation, particularly if coupled with punitive damages, may provide a significant source of support for spouses who must extricate themselves from abusive relationships. The Kansas Supreme Court’s judgment, if not an immediate deterrent, at least may eventually help educate the public on the unacceptability of spouse abuse. As one legal services attorney noted, the decision is a significant “public statement in support of married individuals who have been battered.”

The creation of an exception to interspousal tort immunity also should clarify the court’s authority to issue a protective or restraining order in spousal abuse cases pursuant to its long-standing power to enjoin tortious conduct. Acts of abuse by spouses now clearly render them liable for assault, battery,

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88 Id. at 503-04, 656 P.2d at 767-68.
88a Id. at 504, 656 P.2d at 768.
88b Id. at 505, 656 P.2d at 768.
88d See supra notes 1, 57 and accompanying text.
88e Response No. 12.
intentional infliction of emotional distress, or other torts. If the traditional requisites for injunctive relief can be shown, courts may issue orders restraining a party from such conduct.\textsuperscript{339}

B. The Crime Victims Reparation Act

A second method by which an abused spouse may be compensated for injury is through the Crime Victims Reparation Act.\textsuperscript{340} This Act allows payment from a special state fund to victims who are physically injured as the result of criminally injurious conduct. Those desiring compensation must petition the compensation board,\textsuperscript{341} which has considerable discretion in awarding settlement.

While compensation has been awarded to spouse abuse victims, the Act contains this significant restriction which must be overcome to receive funds:

"Unless the Board determines that the interests of justice otherwise require in a particular case, reparations may not be awarded to the spouse of or a person living in the same household with the offender or the offender's accomplice or to the parent, child, brother or sister of the offender or the offender's accomplice."\textsuperscript{342}

While the compensation board has the discretion to award spouses reparation if the interests of justice require,\textsuperscript{343} the language appears to otherwise prohibit recovery by any spouse legally married to the offender at the time of the award, irrespective of whether the couple is still cohabitating. The language is less harsh for unmarried cohabitants, allowing compensation upon a move to a different household.\textsuperscript{344}

In addition to the spousal exclusion, the Act contains another hurdle for abuse victims: reparations may be awarded only if the board finds that without reparations the victim "will suffer financial stress as the result of economic loss otherwise reparable."\textsuperscript{345} For abused spouses who do not leave the marital home, the board could deny recovery on the theory that the financial stress is lessened by the presence of the supporting spouse.

While spouses seeking recovery under the Reparations Act face an uphill battle, a review of the annual reports of the Crime Victims Reparations Board from 1979 through 1981 reveals that payments are in fact made in domestic violence cases. Thus, in 1980, recovery was allowed for a victim of aggravated assault who was shot by her estranged husband.\textsuperscript{346} Recovery was allowed in a similar claim in which the victim was shot by her ex-boyfriend.\textsuperscript{347} In summary, the Board appears willing to issue awards, irrespective of whether the couple is legally married, as long as the victim is not living with her abuser at the time of the claim.

\textsuperscript{339} See supra notes 220-35 and accompanying text.
\textsuperscript{341} Id., § 74-7305(a) (Supp. 1982).
\textsuperscript{343} Id.
\textsuperscript{344} See id.
\textsuperscript{345} Id. § 74-7305(d)(1).
\textsuperscript{347} Id.
C. Compensation Through Divorce: Division of Property and Maintenance

Prior to the Crime Victims Reparations Act and the partial abolition of interspousal tort immunity, the legal system provided compensation only through the divorce statutes. Ironically, while the ability to receive compensation through tort and administrative relief has increased, recent amendments to the Divorce Act render the divorce action a less promising means for extracting a financial penalty from an abusive spouse.

On January 1, 1983, Kansas’ divorce law moved closer to a “no fault” system. Incompatibility is now virtually the only ground for divorce. The move toward a “no fault” system makes it likely that property settlements and maintenance awards will be determined almost exclusively by the financial needs of the parties rather than by questions of fault.

Before the 1983 changes, the trial court considered eight factors before making a property award:

(1) the ages of the parties, (2) the duration of the marriage, (3) the property owned by the parties, (4) their present and future earning capacities, (5) the time, source, and manner of acquisition of the property, (6) family ties and obligations, (7) the question of fault, and (8) the allowance of alimony or lack thereof.

In the 1983 divorce statute, all of these factors were codified in section 60-1610(b)(1) except that of fault.

The Act does include a catch-all provision granting the court discretion to consider “such other factors as the court considers necessary to make a just and reasonable division of property.” This residuum of discretion will allow the court to consider the issue of fault. Nevertheless, the deliberate omission of fault as a factor indicates the legislature’s intention to reduce its importance in property division.

The new divorce statute permits the award of maintenance “in an amount

849 KAN. STAT. ANN. §§ 60-1601 (Supp. 1982). The other two grounds under the new statute are failure to perform a marital marital duty or obligation, and incompatibility by reason of mental illness or mental incapacity of one or both spouses. Under the old statute the seven grounds were: (1) abandonment for one year; (2) adultery; (3) extreme cruelty; (4) habitual drunkenness; (5) gross neglect of duty; (6) the conviction of a felony and imprisonment therefor subsequent to the marriage; (7) confinement in an institution by reason of mental illness and, 8) incompatibility. See KAN. STAT. ANN. § 60-1601 (1976) (amended & repealed Jan. 1, 1982).

The amendments were designed to reduce the adversary nature of the divorce process and ease the ability of proving grounds for divorce. Incompatibility, the basic standard, can now be shown, according to one commentator, “on account of any of the previously expressed stated grounds or on any other conceivable condition.” S. Gard, supra note 192, § 60-1601, commentary at 13 (Supp. 1982). Moreover, under the previous statute, the district court possessed the discretion to grant or deny a divorce if sufficient grounds were shown. See KAN. STAT. ANN. § 60-1601 (1976) (amended & repealed Jan. 1, 1983). The current statute mandates that a divorce “shall” be granted upon sufficient proof. KAN. STAT. ANN. § 60-1601 (Supp. 1982).
850 LaRue v. LaRue, 216 Kan. 242, 250, 216 P.2d 84, 91 (1975).
852 Id.
the court finds to be fair, just and equitable under all of the circumstances."\textsuperscript{384}

While no cases have yet interpreted this provision in relation to fault, logic dictates that in a no fault system, there is little reason to award maintenance—an allowance for future support—disproportionately because of the fault of one of the spouses.\textsuperscript{385}

VI. Conclusion

The Kansas experience with spouse abuse legislation illustrates a difficulty of law reform: it is far easier to pass a statute outlawing conduct than it is to attempt to have the statute obeyed. A substantive statute may become merely a symbolic statement unless efforts are also made to insure that law enforcement and other agencies have the will and ability to enforce it.

Experience with criminal assault and battery laws illustrates the problem. While the prohibitions against assault and battery existed for generations, until recently enforcement efforts have been fitful. Although efforts to encourage more vigorous enforcement have begun, their success is as yet unknown.

Effective reform will have to surmount both attitudinal and structural barriers. While vigorous enforcement of spousal battery may require laws broadening policy power to arrest for misdemeanor offenses, such expanded power will be wasted without improvements in police training. Moreover, attention must be paid to the effect of a pro-arrest policy on those aspects of the criminal justice system "downstream" from the police. Effective prosecution may require use of non-contact orders during pretrial release. Moreover, courts and prosecutors must carefully examine the propriety of diversion and other sentencing options for these offenders.

While Kansas has made significant improvement in civil remedies available for abuse victims, there are doubts as well about the efficacy of these reforms. The Protection From Abuse Act provides a simple means of civil injunctive relief for women whose only remedy was formerly to be found in the divorce statutes. Attorneys in the state are becoming familiar with the Act, and in the 1983 session, the legislature eliminated a significant defect in the Act by extending its protection to unmarried cohabitants. Despite these improvements, the relief provided by the Act is imperiled by inconsistent enforcement of protection orders. Police must be educated concerning their powers to arrest a restraining order violator. If current training efforts prove inadequate, the legislature will be required to consider expansion of police arrest authority.

Finally, now that the Task Forces have disbanded and the reform statutes have been enacted, it is particularly crucial that opinion leaders not forget the problem of spouse abuse. Neither the problem nor the legal system's difficulty


in addressing it grew up overnight. Reform in the statutes and in public attitudes will take time. It will be necessary to monitor the efficacy of current statutes and to educate victims, law enforcement officials, and the public about current reforms.