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ARTHUR W. SCHMUTZ is now in distribution.
consideration of major substantive matters
currently addressed by business and the
corporate bar.

The Section approaches the forthcoming
Association Year with enthusiasm and ex-
pectation. In particular, the Section antic-
ipates purposeful opportunities to continue

GEORGE W. COOMBE, JR.
Chairman

REPORT NO. 1 OF THE SECTION OF CRIMINAL JUSTICE

RECOMMENDATION*

Be It Resolved, That the American Bar Association, in implemen-
tation of the policy adopted in February, 1978, supporting efforts to
combat family violence, recommends the following:

1. That shelters or other secure temporary residential facilities, to-
gether with counseling and other support services, be established for
the victims of domestic violence.
2. That law enforcement officers who respond to domestic violence
calls, after insuring that the victims of domestic assaults and their
dependents have been removed to safe places as provided in #1,
investigate the incidents, prepare written reports, and, in the event they
conclude no criminal charges are appropriate, file written statements of
the reasons for the decisions.
3. That prosecutors who decline to file criminal charges in domestic
assault cases referred to them by the policy, state in writing the reasons
for their decision not to prosecute, and provide the complainant with
information as to alternative procedures.
4. That specific data related to the frequency, seriousness, and other
characteristics of spousal assault, including disposition of complaints
and the stated reasons for the particular disposition, as well as data on
existing programs designed to respond to such assaults, be collected
and analyzed by appropriate government agencies.
5. That the courts, in the determination of pretrial release, sentenc-
ing or imposition or revocation of probation or parole, not treat the
relationship between the parties as the primary factor.
6. That the state create a mechanism for responding to intrafamilial
violence by establishing diversion programs and by providing counsel-
ing and other support services.
7. That statutes providing for arrest for violation of protective orders
(civil or criminal restraining orders) be enacted and enforced without
regard to the relationship between the parties.
8. That the victims of domestic violence not be excluded from cover-
age under victim compensation legislation where they demonstrate the
requisite quantum of injury and where they actually live separate and
apart from assaulting spouses.

*The recommendation was approved. See page 608.

REPORT

Background

In February, 1978, the American Bar Association House of Delegates went on record supporting "federal, state and local efforts to combat the incidence, causes and effects of family violence," and "the implementation of programs to protect the victims of family violence."¹ The Section of Criminal Justice encourages ABA adoption of its recommendations as a means of making the prior House of Delegates action meaningful and of insuring its implementation through change in the criminal justice system itself. If the ABA is to play an effective role in helping to combat family violence, it must provide leadership in bringing reform to the criminal justice system which, in the past, has too often ignored or sidestepped the problem. The Criminal Justice Section is well aware, from its ten-year program to implement the ABA Criminal Justice Standards, that procedures for modernization and change offered by the legal profession can have a significant impact in achieving true reform.

Domestic assaults constitute a widespread and often hidden crime.² Measures are needed to insure that the criminal justice system responds to domestic violence as both a serious social and criminal problem. Going beyond the general statement of principle adopted by the ABA in February, the Section urges backing for specific reforms which recognize the duality of the problem.

The Criminal Justice Section Council adopted these recommendations at its spring meeting in Dallas, Texas, in April, 1978. The report and recommendations were developed by its Committee on Women and Criminal Justice, chaired by Ruth Nordendrook, a prosecutor in Seattle, Washington. The Section's Committee on Victims and the

¹Report No. 101, February, 1978, Midyear Meeting. Report of Individual Rights and Responsibilities Section.

²Good data on the extent of domestic violence nationally is scarce. Research by sociologist Richard J. Gelles, reported in *The Violent Home: A Study of Physical Aggression Between Husbands and Wives* (Sage Publications, 1974) found that in one group of 80 lower and middle-class families, more than half reported incidents of marital violence; 26 per cent participated in regular assaults.

Committee on the Police Function also studied the report and contributed suggestions to refine the final product.

Domestic Violence: Need for Data

Domestic assaults³ are acts perpetrated by one spouse upon another. For the most part, domestic assaults are not distinguished from other types of assaults by the statisticians of crime, the law, law enforcement officers, lawyers or the courts. Domestic assaults are, in fact, not considered criminal—or even wrong—by a significant proportion of Americans.⁴ Separate statistics on domestic assault are seldom kept and, since some observers contend that domestic assaults are the single most unreported crime in the country,⁵ it is clear that it will be some time after such statistics have begun to be collected before there can be a clear picture of the nature and extent of the problem.

There is also reason to believe that incidents of assault stemming from domestic quarrels are underreported in victimization surveys because some victims do not consider such acts to be crimes.⁶

The limited amount of data available underscores the fact that domestic violence is an extremely serious social and criminal problem. According to the Federal Bureau of Investigation, in 1974 murder within the family made up approximately one quarter of all murder offenses. Further, over one half of these family killings involved one spouse killing the other.⁷ In its report on assaults on law enforcement officers the same year, the FBI reported that a large number of these incidents stemmed from

³For purposes of this report, "domestic assault" covers assaults by one party in marital or quasi-marital partnership on the other, whether or not legally married.

⁴See comments of Mayor Bobbie Stern, Cincinnati, quoting Harris Poll statistics, in Proceedings, National Conference on Women in Crime, National League of Cities/U.S. Conference of Mayors, Feb. 26, 1976, p. 61 (Hereinafter cited as Proceedings.)

⁵*Criminal Victimization Surveys in the Nation's Five Largest Cities*, U.S. Dept. of Justice, Law Enforcement Assistance Administration, April, 1975, at p. 7.

⁶*Uniform Crime Reports 1974* (Washington, DC: Federal Bureau of Investigation, 1974),

situations in which the officer was responding to a domestic disturbance call. "Any officer who has answered disturbance calls remembers the situation when he became a substitute target in a husband and wife quarrel. . . ." the Uniform Crime Reports noted.⁸

A 1971 report on homicides in the State of California found that 3 percent of female homicide victims were murdered by their husbands.⁹ The figure for San Francisco in 1974 was 74 percent.¹⁰

It is thus apparent that a very significant percentage of homicides in this nation are the result of domestic altercations. Interestingly, there is some indication that when the process of escalation of domestic violence finally culminates in a homicidal eruption, it is very often the husband who is left dead.¹¹ The experience of one city, Kansas City, suggests that homicides stemming from domestic altercations are not totally unpredictable occurrences, committed suddenly and without warning. In fact, in Kansas City, police records indicate that "in a fourth of the homicides and a little over a third of the aggravated assaults, one of the participants, either the victim or the perpetrator of the homicide or assault, had been arrested for disturbance in the two years prior to the event. . . . In the two years prior to the assault or homicide, the police had been at the address of the incident for disturbance calls at least once in 85.4% of the cases and in 55% of the cases, they had been there five or more times."¹²

Another investigator, Commander James Bannon of the Detroit Police Department, has reported that "It's clear from our research that in virtually every case of homicide of the social conflict variety there has been a long history of violence. . . . It is possible to predict a homicide if only we recorded the violence. However, it's not possible to predict who will be the perpetrator and who the deceased. Because in the

final resolution of the conflict situation it is frequently the former victim of all those assaults who finally resolves the problem society has ignored and kills her tormentor. Thus, she again validates the use of violence to resolve her problem. One that society is unable or unwilling to ever recognize as a public issue, [let] alone redress."¹³

Without differentiated data such as that kept in Kansas City, the magnitude of the problem of domestic violence and resulting homicides will likely remain undiscovered. In addition, without such data, households likely to become the sites of violent tragedy cannot be identified. The Section recommends detailed and differentiated recordkeeping, recording such information as number of complaints; names, address of parties; nature of the assault (including characteristics such as presence of a weapon); the character of the response by police; the number of arrests made; number of cases referred for prosecution; rate of release on bond after arrest; response of prosecutors; number of prosecutors; number of pleas and trial; and number of convictions. (See Recommendation #4.) Data on reasons for declining prosecution should also be collected. Until good data is available, the extent of the problem will remain unknown—and the system cannot be held accountable for its response.

Criminal Justice System Response to Domestic Violence

The criminal justice system has historically responded inadequately to domestic assault complaints. The Section's recommendations thus focus on what the Section believes to be appropriate action by law enforcement officers (Recommendation #2), prosecutors (Recommendation #3) and courts (Recommendation #5).

The traditional response of the police has been summarized by one law enforcement officer, Commander Bannon: "It has been said often. . . . that violence is as 'American as apple pie'. . . . Taken together with the view of women as property, we virtually guarantee the widespread existence of a phenomenon now being dubbed the 'battered wife syndrome.' Those of us in law enforcement, who are the first official rep-

⁸*Id.*

⁹California Subcommittee on Nutritional Needs, Senate Health & Welfare Committee, Hearings on Marital & Family Violence, 7/21/75. Comments, Chairman George Moscone.

¹⁰*Id.*, Testimony of Del Martin, San Francisco Mayors Criminal Justice Council, at 101.

¹¹See Remarks of Congressmen Newton Steers & Lindy Boggs on H.R. 7927, *Congressional Record*, 6/21/77.

¹²Remarks of Sgt. Darrel Stephens of Kansas City Police Department, Proceedings, at 64.

¹³"Law Enforcement Problems with Intra-Family Violence," presentation at ABA Annual Meeting, Aug. 12, 1975, by Commander James Bannon, Ph.D., Detroit Police Department (hereinafter cited as Bannon Report), at p. 4.

representatives of government to respond to violence in the home, are socialized in precisely the same manner as the citizens we are expected to protect. . . . we are socialized into the conscious perceptions of masculine-feminine roles. In our society this process translates into dominance-submission terms, the man is boss, the female, the subordinate. . . . Taken together with other views on the sanctity of the home, the above social factors guarantee that police will be less than enthusiastic in becoming involved in family disputes.¹⁴

Despite the high correlation between spousal assaults and homicide, police departments across the country too often place a low priority on reports of domestic violence. Women are told to come into the police station and file a citizen's complaint at a later time. Some police departments have informal "stitch rules." As one writer has noted, "They will arrest a husband only if the wound he has inflicted is severe enough to require a specific—and considerable—number of stitches."¹⁵ Some police training manuals have, in fact, downplayed the significance of domestic assaults as criminal conduct, declaring that family disputes are "personal matters requiring no direct action," and counselling the officer that "once inside the home, the officer's sole purpose is to preserve the peace. . . . attempt to soothe the feelings, pacify parties. . . . the power of arrest should be exercised as a last resort."¹⁶

The Section's Recommendation #2 is aimed at helping insure that police officers respond to incidents of violent behavior in the home by more than just cooling things down. If serious criminal injury has occurred, the mechanisms of the criminal justice system should be invoked. In line with Recommendation #1, the officer would first insure the safety of the victim and any dependents, and would thereafter investigate the incident and prepare a written report. If the officer concludes that no criminal charge is appropriate, a written statement of the reasons for that decision must be filed, thus insuring accountability for the action taken. Once the police officer judges the incident serious enough to warrant further official action, however, there is no guarantee that the

¹⁴*Id.*, at 1-2.

¹⁵Judith Gingold, "One of These Days—POW, Right in the Kisses," *Ms.*, August, 1976, p. 54 (Hereinafter cited as POW).

¹⁶Quotes from International Assn. of Chiefs of Police training bulletin cited by Ms. Gingold, *Id.*

prosecutor will be willing to file a case. The prosecutor may have doubts as to the victim's enunciated willingness to proceed and as to a sufficient assurance of future cooperation. Too frequently, as one observer has written, the prosecutor bases that decision on his or her own general perception of such cases—rather than on the specifics of the case before him or her: "Prosecutors have been observed to reject cases not because of perceived witness noncooperation in those cases but in anticipation of noncooperation. For example, observations of prosecutors' practices during case screening indicate that attorneys occasionally make judgments about the likelihood of continued cooperation by those witnesses related to, or otherwise acquainted with, the defendant. There is a tendency for prosecutors, based on prior experience, to predict that those witnesses will become noncooperators notwithstanding the witness's current behavior to the contrary."¹⁷

The Section's Recommendation #3 is an attempt to counter the prosecutor's inclination to treat some criminal conduct as inconsequential because of the relationship of the parties. Prosecutors who declined to file criminal charges in such cases would have to state in writing their reasons for deciding not to prosecute. This is a workable proposal, for many district attorney offices around the country already routinely require statement of reasons for declination of prosecution in any case. This practice protects the prosecutors, as well. If a prosecutor legitimately doubts the complaining witness' commitment to cooperate in the future—and can articulate those reasons—prosecution can be declined. In such cases, however, the complainant should be provided with information on alternative procedures.

The Section recognizes that many police and prosecutors have had multiple experiences with the spouse who complains of a beating, insists on arrest, perhaps even files a complaint, and then decides not to proceed, or—more dramatically—renews and gives testimony exonerating her husband. This can be frustrating, but it is not an excuse for inaction by the system. The spouse who is intent on breaking the cycle of violence by invoking the criminal justice system's assistance should not be sacrificed to official peevishness engendered by "bad" experiences with past beating victims. Some understanding and sensitivity to the origins

¹⁷Carnavale, Jr., Frank J., *Witness Cooperation*, Institute for Law & Social Research, p. 23 (William D. Falcon, Editor), 1976.

of the battered wife syndrome is mandatory for those coming into official contact with such victims. A negative official response may reinforce and encourage the victim's belief not only that violence is an appropriate response to disagreements which arise in the course of marriage, but that it is the *only* response.

The courts, too, have historically ignored the seriousness of domestic assault cases, solely focusing on the fact of the spousal relationship. Illustrative of the frustration felt by battered women before the courts was a case in New York City two years ago. Twelve women filed an action against the administrative arm of the city's Family Court, as well as against the New York Police Department. The suit, through a 102-page complaint, sought simply to have the police and the court follow existing law.¹⁸ Lawyers who handle the cases of battered women find themselves frustrated by the system's failure to respond. As Judith Gingold quoted in her article on battered women: "A judge isn't going to put a guy who makes a living in jail and his wife on welfare," says Washington, D.C. attorney Carol Murray. "In terms of the respective values of our society, his earning money outweighs her possible physical injury." From the cops to the courts the criminal justice system operates to reinforce the husband's belief that he has committed no crime and to intensify his wife's feeling of helplessness. "The assaulted wife is in a Catch-22 situation," lawyers Eisenberg and Micklow conclude. "She is caught in a vacuum of nonresponse."¹⁹

In a monograph²⁰ by a lawyer who deals regularly with the problems of battered women, the author methodically summarizes the frustrating and emotionally brutalizing path which the domestic assault victim is forced to follow: "The police . . . ignore the victim's need for protection and medical assistance. They usually make the situation worse by announcing. . . . that there is legally nothing the police can do when the victim and the offender are married. Prosecutors impose extraordinary conditions on a woman complaining of assaults or harassment. . . . After she passes these tests . . . pleas to minor infractions are accepted and

suspended sentences, or adjournments in contemplation of dismissal, recommended to the court. Judges impose light or suspended sentences, even without the prosecutor's suggestion. Thus, the injured wife who persists does not receive the protection of having her assaultive husband jailed.

"Civil and family court judges do not treat the beaten wife any better. They frequently ask what the wife did to provoke her husband's attack. This vindicates the husband, and renders a restraining order or injunction without moral effect."²¹

One attorney has even drawn the conclusion, in pointing out the inadequacy of civil remedies to the problem of battering, that some men are immunized from the normal legal process by virtue of their marriage to the victim.²²

Solutions

While there are no instant solutions to the deep-seated problems of domestic violence, there are significant changes which can be made in the way the criminal justice system responds.

The Section's eight-part package includes recommendations for changes at a number of key points in the criminal justice system. Domestic violence must be viewed as a public, rather than a private, issue. The most urgent need is for the criminal justice system to treat serious domestic assaults as crimes, and to respond accordingly. The police, for example, should reconsider the decision not to arrest when the assault is committed in the officer's presence, when there have been prior assaults by the same suspect, when the victim strongly desires an arrest, when a weapon is present, or when a restraining order has been violated. The Section's Recommendation #2 would require the police officer to justify—and think through—a decision not to arrest. Looking at the problem of restraining orders, it should be noted that police officers may not arrest for violation of such orders *per se* without enabling legislation. The Section's Recommendation #7 addresses that problem. Models for progressive legislation along this line do exist—as in the State of Washington.²³ It must be recog-

²¹*Id.*

²²Richard Chamberlain, Managing Attorney, Domestic Relations Dept., San Francisco Neighborhood Legal Assistance Foundation, Hearings at p. 71.

²³See Revised Code of Washington State, 26.09.300, cited in California hearings (see fn. 9).

nized, however, that unless police officers have an understanding of and commitment to the principle which such a statute embodies, that the law will remain an empty promise. (The New York lawsuit, for example, was necessary despite the existence of apparently adequate legislation.)

More responsive law enforcement is not enough, however. More must be done than simply punishing abusive husbands. As one writer has observed, "Increasingly, concerned community groups are turning their attention to the needs of women trapped in violent marriages. Their most urgent requirement is simply a place to go—a place where they can marshal their determination to improve their lives."²⁴ Shelters for battered women and their children are beginning to grow in this country and in Great Britain. This has recently been the subject of greatly increased Congressional interest, where legislation to provide federal funding for community programs and neighborhood shelters has gained increasing support.²⁵ The Section's Recommendation #1 calls for ABA support for creation of such temporary residential facilities.

Since many domestic altercations do not result in acts which are felonious, formal procedures short of arrest, trial and conviction should also be created. Recommendation #6 calls for creation of mechanisms for responding to intrafamilial violence by establishing diversion programs and providing counselling and other support services. Just as diversion programs have been set up for alcohol-related driving offenses—motivated by a recognition that drunk drivers are dangerous but that jail does not resolve the problem—so should such programs be set up for assaultive husbands. One attorney working in this area believes that diversion programs for assaultive spouses may constitute a means of interrupting a pattern of domestic violence before it culminates in death or maiming.²⁶

Persons engaging in violent or threatening misdemeanors could be brought into court by means of a special citation. Such persons could also be given the option of engaging in a program of counselling which, if com-

²⁴POW, at 94.

²⁵See, for example, comments of Congressman John Brademas during May 23, 1978 debate on H.R. 12299 (Domestic Violence Assistance Act), *Congressional Record*, at H.4425.

²⁶Comments of Kay Frank, Coordinator of Battered Women's Project at Seattle, Washington Legal Services to Ruth Nordenbrook.

pleted, would trigger the dismissal of the complaint and which—more importantly—might break the habit of abuse. If this alternative were unacceptable to the person complained against, or if he failed to complete the program, or if he disputed his liability or criminal culpability, the complaint would be referred to a prosecutor for formal action. (This necessitates, however, the prosecutor and court's following through by prosecuting dropouts.)

Victims of interspousal assaults are also now excluded from the provisions of most state crime compensation laws (where such statutes exist) because of legislators' fears of collusion and fraudulent claims. Women are thus thrown back on their one source of support—their husbands—and it is small wonder that they renege on their commitment to prosecute the source of the bread and butter. Unfortunately, in the family where domestic violence is the rule, the quid pro quo for the bread and butter is often blood. The Section's Recommendation #8 is aimed at insuring that domestic violence victims are not excluded from existing victim compensation legislation—when they can demonstrate the requisite quantum of injury and when they actually live separate and apart from the assaulting spouse.

Since the ABA has previously gone on record in support of crime victim compensation legislation, Recommendation #8 is a logical extension of the existing policy.²⁷

Conclusion

To make meaningful the general statement adopted in February encouraging steps to combat family violence, the ABA should go on record favoring specific reforms in the criminal justice system to handle domestic assaults. The system's response has too often been a nonresponse. Concrete proposals are needed. The eight recommendations proposed herein would go a long way towards correcting past problems. Yet it should be stressed that *all* these measures are needed; a piecemeal response will fail to break the pattern of domestic violence. The ABA's recognition of the plight of crime victims has already been demonstrated by its support for crime victim compensation legislation, and the Criminal Justice Section's active initiatives through its Committee on

Victims. This resolution would carry that work forward. respond effectively to the problem of domestic violence.

The legal profession can play a significant role in helping the criminal justice system

B. James George, Jr.
Chairperson

²⁷In 1967, the ABA supported pending federal crime victim compensation legislation in principle, and in 1973 supported the Uniform Crime Victims Reparations Act.