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# Domestic Relations: Legal Responses to Wife Beating: Theory and Practice in Ohio

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**DOMESTIC RELATIONS:  
LEGAL RESPONSES TO WIFE BEATING:  
THEORY AND PRACTICE IN OHIO**

INTRODUCTION

**W**IFE BEATING AND other forms of family violence are as old as the patriarchal family.<sup>1</sup> Traditionally, such behavior has been justified as necessary to promote discipline within the family unit, has been considered a “personal” matter of no concern to others in the social community, or has been minimized in its extent and severity.<sup>2</sup> However, in the past decade there has been a surge of interest in woman abuse as a social problem. Shelters and other services for victims have been established in many communities. In the past five years, most states have enacted laws which provide special legal remedies for victims of mate abuse or other family violence.<sup>3</sup>

In Ohio, the Attorney General’s Task Force on Domestic Violence issued a report in 1977 which contained extensive recommendations for police departments and social services, as well as statutory relief to more effectively combat mate abuse, child abuse and parent abuse.<sup>4</sup> The Domestic Violence Act, House Bill 835, was enacted the following year and went into effect March 27, 1979.<sup>5</sup> Amendments intended to clarify several provisions were added with the passage of House Bill 920 in early 1981.<sup>6</sup>

The Act contained a comprehensive program to enhance the availability of legal relief for domestic violence victims.<sup>7</sup> A “civil protection order” was created,<sup>8</sup> similar to the traditional domestic relations temporary restraining order, but with significant differences.<sup>9</sup> The Act also created the crime of domestic

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<sup>1</sup>Dobash & Dobash, *Wives: The ‘Appropriate’ Victims of Marital Violence*, 2 VICTIMOLOGY 426, 427-32 (1978).

<sup>2</sup>Martin, *Overview — Scope of the Problem*, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 205, 208-09 (United States Commission of Civil Rights 1978).

<sup>3</sup>Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN’S RIGHTS L. REP. 271 (1980) [hereinafter cited as Lerman, *Survey*].

<sup>4</sup>THE REPORT FROM THE ATTORNEY GENERAL’S TASK FORCE ON DOMESTIC VIOLENCE (1977) [hereinafter cited as *Task Force*].

<sup>5</sup>Am. Sub. H.B. 835, 1978 Ohio Laws 137, (codified in scattered sections of OHIO REV. CODE ANN.) [hereinafter cited as H.B. 835].

<sup>6</sup>Am. Sub. H.B. 920, 1981 Ohio Laws 138, (codified in OHIO REV. CODE ANN. §§ 299.25, 2929.26, 2945.42, 3113.31, 3113.33 (Page 1981 and Supp. 1982) [hereinafter cited as H.B. 920].

<sup>7</sup>A separate bill (H.B. 736 eff. Oct. 6, 1980), not the subject of this comment, established a fund to promote shelters for victims of domestic violence. OHIO REV. CODE ANN. §§ 3113.33-3113.39 (Page 1980 and Supp. 1982) (as amended by H.B. 920).

<sup>8</sup>OHIO REV. CODE ANN. § 3113.31 (Page Supp. 1982).

<sup>9</sup>OHIO R. CIV. P. 75(H) (Page 1982).

violence,<sup>10</sup> similar to assault but with the unique feature of a temporary protection order to protect the victim while the case is pending.<sup>11</sup> Law enforcement officers were given special authority to arrest without a warrant when the victim signs a statement which alleges that the offense of domestic violence has been committed.<sup>12</sup> Officers must provide information to the victim about both kinds of protection orders available under the Act.<sup>13</sup> And all law enforcement agencies must keep separate records of domestic disputes, which are to be compiled in an annual report by the Bureau of Criminal Identification and Investigation.<sup>14</sup> In addition, the Act requires all new law officers to receive at least fifteen hours of training in the handling of domestic disputes.<sup>15</sup>

Legislation, like Ohio's Domestic Violence Act, has been heralded by battered women's advocates. Much discussion about the limitations of traditional remedies and institutional obstacles preceded the passage of such statutes; but it takes more than words in a statute to effect change. Statutory language can be interpreted in various ways and must withstand constitutional scrutiny.<sup>16</sup> Every aspect of institutional involvement can promote or hinder the purposes of the Act. This comment examines Ohio's Domestic Violence Act in light of actual practice and interpretations. It is hoped that an analysis of the legal operation of the Act as well as extra-legal factors will enable practitioners to use the Domestic Violence Act, and similar statutes in other states, to more effectively protect victims and society from domestic violence.

The particular focus of this comment is the application of the Domestic Violence Act to cases of woman abuse. Although the statute applies to violence against any household member, the greatest concern of its proponents is female mate abuse, and this is where the vast majority of its use has been.<sup>17</sup> Moreover, the interpersonal and societal dynamics of parent abuse and child abuse are different from wife abuse. Although there are similar institutional and legal concerns, these forms of domestic violence are beyond the scope of this comment.

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<sup>10</sup>OHIO REV. CODE ANN. § 2919.25 (Page 1982).

<sup>11</sup>*Id.* § 2919.26.

<sup>12</sup>*Id.* § 2935.03(B).

<sup>13</sup>OHIO REV. CODE ANN. § 3113.31(J) (Page Supp. 1982).

<sup>14</sup>OHIO REV. CODE ANN. § 3113.32 (Page 1980).

<sup>15</sup>OHIO REV. CODE ANN. §§ 109.73(A)(4)(5)(6), 109.77(B) (Page Supp. 1982).

<sup>16</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>17</sup>*See* TASK FORCE, *supra* note 4, at IV; responses to questionnaires from judges, prosecutors and law officers. Much of the information in this article was obtained from inquiries to law enforcement agencies, prosecutors, courts of common pleas and battered women's services in 30 counties. Replies were received in February and March, 1982, from seven sheriff's departments, four large city police departments, nine county prosecutors, one city prosecutor, one municipal court judge, nine courts of common pleas and 12 battered women's projects. Inquiries were in the form of letter-questionnaires and interviews; the results are not statistically accurate. The sample was small and many questions were deliberately open-ended. Rather, the responses reveal the nature and variety of policies in local implementation of the Domestic Violence Act. Particular respondents are noted where appropriate. Some respondents, primarily the battered women's projects, wished to remain anonymous. The respondents are listed at the end of this comment, *infra*, at Appendix. All replies, responses, and interviews have been verified by the Board of Editors of the AKRON LAW REVIEW.

## I. SCOPE OF THE ACT

All provisions of the Domestic Violence Act apply to “domestic violence” between “family or household members.” For both civil and criminal provisions, H. B. 835 defined “family or household member” as “a spouse, person living as a spouse, parent, child, or other person related by consanguinity or affinity, who is residing or has resided with the offender.”<sup>18</sup>

The terms “spouse” and “person living as spouse” were subjected to a variety of interpretations by officials involved with the Act. Some limited “persons living as spouses” to persons in a common law marriage.<sup>19</sup> That is, they must hold themselves out to the community as husband and wife.<sup>20</sup> Without requiring a common law marriage, one court decided a minimum time of cohabitation was needed before an unmarried party would be extended the protection of the Act.<sup>21</sup> Some authorities imposed a maximum time limit on how long an ex-spouse or other former cohabitant had been gone from the shared residence.<sup>22</sup> Others simply ignored the phrase “or have resided together,” and required that the parties be living together at the time of the civil petition or criminal complaint.<sup>23</sup> Former spouses were also excluded on the rationale that once a divorce had been finalized, the parties were no longer “spouses.”<sup>24</sup>

Other officials and courts construed the statutes broadly. For instance, the Tuscarawas County Court of Appeals found that the complainant was a “person living as a spouse” where she and the defendant were the natural parents of a three year old son; the defendant had a key to her house and had lived with her intermittently for three years, shared her bedroom and purchased food, clothing and furniture for the household.<sup>25</sup> In another case, the Court of Appeals of Ross County applied the criminal statute where the defendant and the complainant had been divorced for two years.<sup>26</sup> The court may have been influenced by the fact that the couple had moved back together a year

<sup>18</sup>Enacted as OHIO REV. CODE ANN. § 2919.25(D) (Page Supp. 1980); *Id.* 3113.31(A) (Page supp. 1980).

<sup>19</sup>*E.g.*, Dayton Police Department, Gen. Ord. 2.01-21 (issued April 1979) (officers were advised to determine that a common law marriage exists; “mere living together is no justification in itself of a common law marriage”). *Id.* at 1; *but cf.* letter from John Madigan, Chief Prosecutor of the City of Toledo (Feb. 23, 1982) [hereinafter cited as Toledo Prosecutor] (“As long as the parties are living together *as man and wife* their actual marital status is not relevant.”) (Emphasis added).

<sup>20</sup>Common law marriage is recognized in Ohio when there is an agreement to marry, cohabitation, and a repute in the community as being husband and wife. *Markley v. Hudson*, 143 Ohio St. 163, 54 N.E.2d 304 (1944).

<sup>21</sup>In *Brooke v. Pozna*, No. 81-10-3870 (Summit County C.P. Oct. 7, 1981), the court dismissed a petition for a CPO on Oct. 27, 1981, because the petitioner had been living with the offender for only three weeks.

<sup>22</sup>Opinion No. 79-20, Paul R. Donaldson, Law Director of Shaker Heights (April 5, 1979) (thirty days).

<sup>23</sup>*E.g.*, Toledo Prosecutor, *supra* note 19; letter from Gregory G. Brown, Assistant Prosecutor, Ashtabula County (Feb. 12, 1982) [hereinafter cited as Ashtabula Co. Prosecutor].

<sup>24</sup>*State v. Scudder*, No. C-810205 (Hamilton County Ct. App. Jan. 20, 1982) (available in Ohio App. Dec. on Fiche, 82-7-1d); Akron Police Dept., Supp. to P-79-011 (June 4, 1980).

<sup>25</sup>*State v. Harris*, No. 1384 (Tuscarawas County Ct. App. Nov. 29, 1979).

<sup>26</sup>*Chillicothe v. Copp*, No. 834 (Ross County Ct. App. 1981) (available in Ohio Dec. on Fiche 81-15-4d).

after the divorce and had separated again two months before the incident. If so, the court impliedly considered the co-habiting ex-wife to be a “person living as spouse” without discussion of the requirements of common law marriage.

In practice, police, prosecutors and trial courts showed varying degrees of liberality in extending the coverage of the Domestic Violence Act to unmarried couples and couples who were no longer living together at the time of the incident.<sup>27</sup> The narrower interpretations are inconsistent with the intent or actual language of the Act. The principal sponsor of the Act, Representative David Hartley, has stated that the Act was intended to cover any disputes which occur “as a result of living together.”<sup>28</sup>

To limit “persons living as spouses” to common law marriage is inconsistent with the plain language of the Act. Persons married by operation of common law are not merely living together as spouses — they are spouses.<sup>29</sup> “Persons living as spouses” can have an independent meaning only if it applies to couples other than those in a legal marriage, be it statutory or common law.

Refusals to extend the Act to ex-spouses were inconsistent with the legislature’s intent in adding the phrase “or have resided together.” Earlier versions of the bill were limited to current cohabitants,<sup>30</sup> or, in criminal matters, included specific time periods after which the Domestic Violence Act would not apply;<sup>31</sup> but, as Representative Hartley explained:

[The committee] had considerable testimony on the high incidence of domestic violence following the dissolution of a domestic relationship, especially where children and visitation rights are involved. The new language was specifically intended to deal with domestic violence which might occur following a break up of a domestic relationship, be it marriage or otherwise.<sup>32</sup>

In some cases, disputes arising from that relationship went on for several years, and the Act was intended to cover such situations.<sup>33</sup> In the Ross County case of *Chillicothe v. Copp*, the court suggested that an ex-spouse could be

<sup>27</sup>Responses to questionnaires from the Licking County Prosecutor, Pike County Prosecutor, Sandusky County Prosecutor, Stark County Prosecutor, Crawford County Mun. Ct., Cleveland Police Dept., Columbus Police Dept., Youngstown Police Dept., Ashtabula County Sheriff’s Office, Athens County Sheriff’s Office, Ross County Sheriff’s Office, Sandusky County Sheriff’s Office, Stark County Sheriff’s Office, Trumbull County Sheriff’s Office, Wayne County Sheriff’s Office, Franklin County Dom. Rel. Ct., Lucas County Dom. Rel. Ct., Mahoning County Dom. Rel. Ct., various shelters, *see infra*, at Appendix.

<sup>28</sup>Interview with David Hartley (Feb. 23, 1982).

<sup>29</sup>In *Re Estate of Partlow*, 105 Ohio App. 189, 146 N.E.2d 147 (Cuyahoga County 1957).

<sup>30</sup>Sub. H.B. 835 at 6 (as introduced in the Judiciary Comm.), 112th Gen. Ass. Reg. Sess. 1977-1978; S.B. 514 at 3, 112th Gen. Ass. Reg. Sess. 1977-1978 (to be enacted as OHIO REV. CODE ANN. §§ 3113.31(A)(1); 3119.01(B) respectively).

<sup>31</sup>Sub. H.B. 835 at 6 (six months); S.B. 514 at 3 (two years) (to be enacted as OHIO REV. CODE ANN. §§ 2903.13(C); 2919.24(C) respectively).

<sup>32</sup>Letter from David Hartley (Sept. 12, 1979).

<sup>33</sup>*Id.*

excluded from the scope of “family or household member” if the clause “who is residing or has resided with the offender” were construed to modify only “other person related by consanguinity or affinity.” The court rejected this interpretation because it “ignores the evil which the legislature sought to remedy.”<sup>34</sup>

In response to these narrow interpretations, House Bill 920 (effective April 9, 1981) amended these sections to provide explicitly that “family or household members” includes “a former spouse” and that a “[p]erson living as a spouse” means a person who is living with another in a common law marital relationship or otherwise cohabiting with another.”<sup>35</sup> This amendment has led some jurisdictions to change their procedures,<sup>36</sup> but ten months after the amendment was enacted, official policy statements of some jurisdictions indicated no change in their interpretation.<sup>37</sup> H. B. 920 did not explicitly respond to the imposition of time limits on the phrase “reside or have resided together,” so these interpretations continue.

An unusual twist was considered by the Lake County Court of Appeals in *State v. Peine*.<sup>38</sup> The complaining witness was an adult woman who lived with her mother and was assaulted by a man who cohabited with her mother. The court held that the criminal provisions of The Domestic Violence Act did not apply: the complainant was not a “child, or other person related by consanguinity or affinity who is residing . . . with the offender.” “Consanguinity” imports relationship through a common ancestor. “Affinity” is a relationship by marriage. Because the complainant had no blood relationship with the offender, she would qualify only if her mother were married to him. In dicta, the court said that the amended language defining “person living as spouse” to include one “who is otherwise cohabiting with another” would not affect the result in this case because it did not alter the meaning of the word affinity to include a relationship by one who was cohabiting with another. However, this technical interpretation conflicts with the policy shown by the legislative history and clarifying amendments that “family or household member” be broadly construed.

Turning to what conduct the Act covers, “domestic violence” is defined

<sup>34</sup>*Chillicothe v. Copp*, No. 834 (Ross County Ct. App. 1981) (available in Ohio Dec. on Fiche 81-5-4d).

<sup>35</sup>OHIO REV. CODE ANN. § 2919.25(D) (Page 1982) (emphasis added); see also OHIO REV. CODE ANN. § 3113.31(A) (Page Supp. 1982). Although Scudder asserts that this amendment was a substantive change which was not retroactive, the legislative history shows that the amendment was intended merely to clarify the meaning intended by the original enactment. *Accord, Copp*, Slip. Op. at 6, n.1.

<sup>36</sup>Dayton Police Dept. Gen. Order 2.01-2 (revised June 1982) (domestic disputes include “boyfriend/girlfriend type relationships, spouses, living as spouses,” etc.); responses from several battered women’s projects, *infra*, at Appendix.

<sup>37</sup>*E.g.*, Akron Police Dept., letter enclosed with Supp. 79-011; Toledo Prosecutor, *supra* note 20.

<sup>38</sup>*State v. Peine*, No. 8-202 (Lake County Ct. App. March 1, 1982) (available in Ohio Dec. on Fiche, 82-4-11d). (The situation was unusual because where the complaining witness is a juvenile, child abuse statutes would probably be invoked in preference to the Domestic Violence Act.)

differently in the civil and criminal provisions of the Act. For the civil protection order:

“Domestic violence” means the occurrence of one or more of the following acts between family or household members who reside together or have resided together:

- (a) Attempting to cause or recklessly causing bodily injury;
- (b) Placing another person by the threat of force in fear of imminent serious physical harm;
- (c) Committing any act with respect to a child that would result in the child being an abused child, as defined in § 2151.031 of the Revised Code.<sup>39</sup>

Conduct subject to criminal sanctions is more narrowly defined:

- (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.
- (B) No person shall recklessly cause serious physical harm to a family or household member.<sup>40</sup>

Thus, both sections are applicable where physical harm is knowingly caused or attempted. Where there is the less culpable mental state of recklessness, the criminal sanctions apply only with “serious physical harm, whereas the civil protection order applies when any injury results. A mere threat of force is sufficient to invoke the civil order but not to sustain a criminal charge.

Neither section includes psychological abuse, although many victims of domestic violence report that the psychological abuse is more devastating than the physical harm.<sup>41</sup> Likewise, neither section includes sexual abuse, although this is a common form of wife abuse.<sup>42</sup>

## II. CIVIL PROTECTION ORDER

### A. Statutory Provisions

Section 3113.31 provides for a protection order or consent agreement available through a court of common pleas (domestic relations division, in counties which have one). A person may seek this relief on her own behalf, or any adult household member may petition on behalf of another household member.<sup>43</sup> The Act explicitly provides that a “petitioner’s right to relief under this section is not affected by [her] leaving the residence or household to avoid fur-

<sup>39</sup>OHIO REV. CODE ANN. § 3113.31(A)(1) (Page Supp. 1982).

<sup>40</sup>OHIO REV. CODE ANN. § 2919.25 (Page 1982).

<sup>41</sup>L. WALKER, *THE BATTERED WOMAN* 66 (1979); See A. BOYLAND & N. TAUB, *ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL LEGISLATIVE AND EQUITABLE ISSUES* 31 (1981).

<sup>42</sup>L. WALKER, *supra* note 41, at 95-112. *But see* MASS. GEN. LAWS ANN. ch. 209A § 1(c) (West Supp. 1982). Ohio’s sex offense statutes exempt acts perpetrated against the spouse of the offender unless there is a written separation agreement, a pending action for annulment, divorce, dissolution or alimony, or a judgment for alimony. OHIO REV. CODE ANN. §§ 2907.07.01(L) - 2907.06 (Page 1982).

<sup>43</sup>OHIO REV. CODE ANN. §§ 3113.31(C) (Page Supp. 1982).

ther domestic violence.”<sup>44</sup> Also, choice of this remedy does not preclude any other available civil or criminal remedy.<sup>45</sup>

An order may be issued *ex parte* on the same day that the petition is filed, upon a finding of “[i]mmediate and present danger of domestic violence.” The necessary finding “includes, but is not limited to, situations in which the respondent has threatened the family or household member with bodily harm, or in which the respondent has previously engaged in domestic violence against the family or household member.”<sup>46</sup> Where an *ex parte* order excludes the respondent from the shared residence, a full hearing must be scheduled within seven days.<sup>47</sup> With any other *ex parte* order, a full hearing must be held within ten days. If there is no *ex parte* order, then a full hearing should be scheduled as in any other civil action. The respondent is to be given notice of and an opportunity to be heard at the full hearing.<sup>48</sup>

The court may grant any protection order or approve any consent agreement “to bring about a cessation of domestic violence.”<sup>49</sup> The order or agreement may:

- direct the respondent to refrain from abuse;
- order the respondent to vacate the shared residence<sup>50</sup> or provide alternate housing;
- award temporary custody of children or establish temporary visitation rights;
- require the respondent to maintain support which he has customarily provided or which he has a legal duty to provide;
- require the respondent, petitioner, victim of domestic violence, or any combination of those persons, to seek counseling;
- require the respondent to refrain from entering the residence, school, business, or place of employment of the victim;
- direct the respondent to permit the use of a motor vehicle by the petitioner or other family or household member;
- direct the apportionment of household personal property; and
- grant other equitable and fair relief.<sup>51</sup>

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<sup>44</sup>*Id.* § 3113.31(B).

<sup>45</sup>*Id.* § 3113.31(G).

<sup>46</sup>*Id.* § 3113.31(D).

<sup>47</sup>*Id.*; H.B. 835 provided for three days, but H.B. 920 as codified, expanded the time to seven days. *Id.*

<sup>48</sup>OHIO REV. CODE ANN. § 3113.31(D) (Page Supp. 1982).

<sup>49</sup>*Id.* § 3113.31(E)(1).

<sup>50</sup>H.B. 835 failed to explicitly authorize an order to vacate when the residence is jointly owned or leased by the parties, Am. Sub. H.B. 835 at 12 (eff. March 27, 1979), and at least one court held that it was powerless to do so. Legislative Service Commission, Am. Sub. H.B. 920 (as reported by S. Judiciary) at 6 (n.d.). H.B. 920 filled this gap. The amending bill also substituted “order to vacate” for inappropriate language about “evicting” a respondent who is sole owner or lessee, since eviction is removal of person from property wrongfully held. *Id.*

<sup>51</sup>OHIO REV. CODE ANN. § 3113.31(E) (Page Supp. 1982).



However, “[n]o order or agreement under this section shall in any manner affect title to any real property.”<sup>52</sup> If there has been a prior civil protection order involving the same parties, the new order may include “a prohibition against the respondent returning to the residence or household and a prohibition against the petitioner inviting or admitting the respondent to the residence or household while the order is in effect.”<sup>53</sup>

An order or consent agreement can be for a fixed period of time, up to one year. However, if either party files an action for divorce, dissolution or separate maintenance, then any order of temporary custody, visitation or support under the Domestic Violence Act must end within sixty days.<sup>54</sup> Copies of the order or agreement are to be issued to the petitioner, respondent, and all law enforcement agencies with jurisdiction to enforce it, and a copy should be delivered to the respondent on the same day the order is entered.<sup>55</sup> The statute further provides that “[a]ny officer of a law enforcement agency shall enforce a protection order or consent agreement in accordance with [its] provisions . . . including removing the respondent from the premises, where appropriate.”<sup>56</sup> A violator may also be held in contempt of court and sentenced to up to ten days in jail.<sup>57</sup>

### B. Comparison with Temporary Restraining Order

The domestic violence civil protection order (CPO) is similar to the temporary restraining order (TRO) and temporary orders of alimony, child support and custody which may be issued in an action for divorce, annulment or “alimony only” (separate maintenance),<sup>58</sup> but there are important differences. First, the CPO is available to a broader class of plaintiffs. In addition to spouses, it may apply to other family or household members, including unmarried cohabitants and former spouses. In contrast to divorce, there is no residency requirement,<sup>59</sup> and, it is an independent action. Although a married person could get a restraining order against a spouse without the Domestic Violence Act, that action for *immediate* protection must be tied to a *long-term* decision about the relationship.<sup>60</sup> Thus, a battered wife has been forced to file a

<sup>52</sup>*Id.* § 3113.31(E)(4).

<sup>53</sup>*Id.* § 3113.31(E)(2).

<sup>54</sup>*Id.* § 3113.31(E)(3).

<sup>55</sup>*Id.* § 3113.31(F)(1).

<sup>56</sup>*Id.* § 3113.31(F)(3).

<sup>57</sup>*Id.* § 3113.31(H), and OHIO REV. CODE ANN. § 2705.05 (Page 1981).

<sup>58</sup>OHIO R. CIV. P. 75(H) and (M) (Page 1982).

<sup>59</sup>The plaintiff in an action for divorce or annulment must have been a resident of Ohio for six months, OHIO REV. CODE ANN. § 3105.03 (Page 1980), and of the county in which the action is filed for ninety days. OHIO R. CIV. P. 3(B)(9) (Page 1982).

<sup>60</sup>An alimony action, with a TRO, may be used for a trial separation, but it is designed to effect a permanent legal separation without technically ending the marriage. The final order is a permanent order. Theoretically, Civil Rule 65, which governs non-domestic restraining orders, could be invoked when there is no divorce, annulment or alimony action. But the procedure is more cumbersome and, unlike Rule 75 restraining orders, the plaintiff must post bond. OHIO R. CIV. P. 65, 75 (Page 1982).

divorce or alimony action which she would later drop, since a temporary separation can lead to reconciliation as well as to permanent separation.<sup>61</sup> Also, a TRO may remain in force only "during the pendency" of the underlying action.<sup>62</sup> If the threat of abuse continues after the divorce, annulment, or alimony action is concluded, the CPO may provide relief which is otherwise unavailable.

In addition to the fact that the domestic violence civil protection order applies to more situations than the traditional TRO, there are other differences in the types of relief available. Civil Rule 75 provides that a TRO can prevent a party from disposing of or encumbering property, or from causing physical abuse or annoyance to the other party or a child.<sup>63</sup> This potentially provides for the relief authorized by a domestic violence order, but courts may be more willing to exercise their broad equity powers under the authority of the explicit provisions of the Domestic Violence Act. Furthermore, it is doubtful that Rule 75 authorizes an order requiring counseling, nor can it authorize an order of support based on actual dependence where there is no independent legal duty. This relief is explicitly authorized by the Domestic Violence Act.<sup>64</sup>

In some counties, a domestic violence protection order can be obtained more quickly than a TRO. Although the rules allow restraining orders and temporary orders to be issued *ex parte*, some courts will not issue these orders without notice to the other party. In contrast to Rule 75, the Domestic Violence Act requires that an *ex parte* hearing be held the same day it is requested.<sup>65</sup>

The CPO is also potentially more effectively enforceable. A traditional TRO can be enforced only through the general contempt powers of the court, which require a separate hearing and finding of contempt and may involve a delay of several days. Although a domestic violence order is enforceable in the same way<sup>66</sup> the Act also provides that law officers shall enforce the order or agreement in accordance with its provisions, "including removing the respondent from the premises, where appropriate."<sup>67</sup> In a few jurisdictions the authority of police is made still clearer by a local ordinance which makes the violation of a civil or criminal domestic violence order a misdemeanor.<sup>68</sup> Where police have demonstrated their willingness to give automatic enforcement to domestic violence orders, attorneys have obtained better results under the

<sup>61</sup>*Accord*, Galvin, *Ohio's New Civil Remedies for Victims of Domestic Violence*, 8 OHIO NORTHERN L. REV. 248, 260 (1981) (noting that seventy-five percent of those who filed domestic violence petitions in Lucas County in 1979 had not terminated their marriages, nor filed actions to do so, as of March, 1981).

<sup>62</sup>OHIO R. CIV. P. 75(H) (Page 1982).

<sup>63</sup>*Id.*

<sup>64</sup>OHIO REV. CODE ANN. § 3113.31(E)(1)(e) and (f) (Page Supp. 1982).

<sup>65</sup>*Compare* OHIO R. CIV. P. 75(H) ("[a] temporary restraining order may be issued without notice . . .") (emphasis added) with OHIO REV. CODE ANN. § 3113.31(D) (Page Supp. 1982) ("[t]he court shall hold an *ex parte* hearing on the same day that the petition is filed.") (emphasis added).

<sup>66</sup>OHIO REV. CODE ANN. § 3113.31(H) (Page Supp. 1982).

<sup>67</sup>*Id.* § 3113.31(F)(3).

<sup>68</sup>*See infra* note 94.

## Domestic Violence Act.<sup>69</sup>

Although the domestic violence civil protection order or consent agreement is similar to the traditional domestic relations restraining order, the domestic violence order has substantive and procedural features which may make it preferable even where the traditional orders would be available. For cases involving abuse by someone other than a spouse, or for a married person who does not seek to end the relationship, the domestic violence order provides unique relief.<sup>70</sup>

### C. Relief Available

The relief authorized by this statute is well tailored to the needs of abused women. In nearly all cases, the basic order to refrain from abuse would be ineffective unless combined with an order to stay away, both of which are authorized.<sup>71</sup> The statutory preference that the abuser bear the burden of finding alternate housing is appropriate, especially when the alternative is putting this burden on a woman accompanied by children.

The availability of an *ex parte* order is often critical. Any delay during which the parties continue to share a residence entails a substantial risk of harm to the petitioner. When an *ex parte* hearing is requested, the statute requires that it be held on the same day.<sup>72</sup> However, there is no provision for obtaining a civil protection order at night or on weekends.<sup>73</sup> In an emergency, a battered woman's options are to call the police and invoke the criminal law or to flee.

While nonabuse, exclusion from the home and stay away orders are crucial ingredients of a basic protection order, other terms may also be important to provide adequate and realistic relief. Ohio's statute explicitly authorizes several types of relief. An award of temporary child custody<sup>74</sup> may be critical if there is a danger of child-snatching. In the absence of a court determination of custody, both parents have equal rights to physical custody of the child, and there is no recourse against a parent who absconds with his or her child.<sup>75</sup>

Financial dependency is often a significant pressure which prevents a woman from taking steps which might protect her from abuse.<sup>76</sup> A protection order or consent agreement may require the respondent to maintain support if he has a legal duty to do so, or if he has customarily provided or contributed

<sup>69</sup>Galvin, *supra* note 61, at 261.

<sup>70</sup>OHIO REV. CODE ANN. § 3113.31(E)(1) (Page Supp. 1982).

<sup>71</sup>*Id.* § 3113.31(E)(1)(b) and (c).

<sup>72</sup>*Id.* § 3113.31(D)

<sup>73</sup>Nine states provide for emergency protection orders to be issued at times when regular courts are not in session. Lerman, *Survey, supra* note 3, at 273.

<sup>74</sup>OHIO REV. CODE ANN. § 3113.31(E)(1)(d) (Page Supp. 1982).

<sup>75</sup>OHIO REV. CODE ANN. § 2111.08 (Page 1976).

<sup>76</sup>Martin, *supra* note 2, at 215.

to such support.<sup>77</sup> Under Ohio law, a man has a duty to support his wife and children.<sup>78</sup> The Act would also allow a support order in other cases, such as where a man has been supporting a woman with whom he has been cohabiting or children who are not legally or biologically his. In addition, related provisions were added in 1981, allowing an order to provide for the apportionment of household personal property and to require the respondent to permit the use of a motor vehicle by the petitioner or other household member.<sup>79</sup>

The Act also authorizes an order or agreement to require any or all of the household members to seek counseling.<sup>80</sup> This is in accord with the wishes of many victims and may be a way to deal with the problem beyond what a mere protective order could accomplish. Many abused women would prefer, at least as a first step, to work to improve their relationship.<sup>81</sup> However, the abusive mate typically denies that his behavior is any part of the problem,<sup>82</sup> and the constant threat of abuse creates a coercive environment which makes mutual give-and-take unlikely. The CPO or consent agreement may provide an environment conducive to reconciliation by enforcing a trial separation while one or all of the parties participate in an appropriate counseling program. While therapists generally believe that counseling is ineffective when the client's participation is not voluntary, the experience of some programs suggests that court-ordered counseling of men who batter their mates may be effective.<sup>83</sup> Offenders characteristically deny responsibility for their behavior, they are often externally motivated and would more readily take steps which are required of them than they would on their own.<sup>84</sup> Traditional family counseling, which emphasizes group process, may reinforce the tendency of both abuser and abused to blame the victim, but there has been some success with therapy that focuses on individual responsibility for the violence.<sup>85</sup> The value of this sort of order may hinge upon the availability of appropriate counseling services, but it is clearly an option which many women would like to try.

The Act also contains a curious provision, added in the Senate Judiciary Committee, which states that where there has been a previous civil protection order involving the same parties, the court may prohibit the respondent from returning *and* prohibit the petitioner from inviting the respondent to the residence or household while the order is in effect.<sup>86</sup> In substance, this adds little to orders

<sup>77</sup>OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Page Supp. 1982).

<sup>78</sup>OHIO REV. CODE ANN. § 3103.03 (Page 1980).

<sup>79</sup>OHIO REV. CODE ANN. § 3113.31(E)(1)(h) (Page Supp. 1982).

<sup>80</sup>*Id.* § 3113.31(E)(1)(f).

<sup>81</sup>See L. WALKER, *supra* note 41, at 149, 212.

<sup>82</sup>*Id.* at 30.

<sup>83</sup>Lerman, *Criminal Prosecution of Wife Beaters*, 4 RESPONSE TO VIOLENCE IN THE FAMILY 1, 11, 12 (1980) [hereinafter cited as Lerman, *Prosecution*].

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* at 12; L. WALKER, *supra* note 41, at 216-219.

<sup>86</sup>OHIO REV. CODE ANN. § 3113.31(E)(2) (Page Supp. 1982).

to vacate the residence and refrain from entering. Presumably, the point of the additional prohibition on the petitioner would be to emphasize to both parties that the court considers this more than a private agreement. If the abusive party attempts to sweet-talk his way back into the household, the petitioner can bolster her resistance by pointing to the prohibition directed to her. This seems condescending, but perhaps it could be significant. In the cycle of abuse, a burst of violence is typically followed by remorse and sweetness.<sup>87</sup> Victims are often aware that this is part of a cycle, but their concern for the individual, and hope for the relationship, makes the calm periods difficult to resist.<sup>88</sup>

In addition to the terms specifically enumerated, the Act authorizes the court to “[g]rant other relief that the court considers equitable and fair. . . .”<sup>89</sup> This would allow terms tailored to particular situations, perhaps including terms specifically authorized in other domestic violence statutes, such as attorneys fees, court costs, or compensation for losses due to abuse.<sup>90</sup>

#### D. Enforcement

Ultimately, the value of a protection order turns upon the likelihood that it will be obeyed or enforced. The Act provides for two ways of treating a violation of a protection order: immediate removal of the violator and contempt proceedings.<sup>91</sup> A finding of contempt of court could result in imprisonment of up to ten days or a fine of up to \$500.00, as some courts warn in bold type on their orders.<sup>92</sup> But the contempt procedure, which is also the remedy for the traditional domestic relations restraining order, does not provide immediate protection to the victim. Law officers generally have no authority under the order of a civil court until there is a contempt warrant or other enforcement order following a contempt hearing. Thus, the victim’s remedy is to summon the offender to a hearing which may be held several days later. If she calls the police, they may come to the residence, they may ask the offender to leave, and they may even threaten to arrest him. But if he calls their bluff, police have no authority to remove him unless he commits a criminal act.

The Domestic Violence Act, however, includes language intended to allow immediate enforcement: “[a]ny officer of a law enforcement agency shall enforce a protection order or consent agreement in accordance with the provisions of the order or agreement, including removing the respondent from the premises, where appropriate.”<sup>93</sup> This provision is reinforced by requirements

<sup>87</sup>L. WALKER, *supra* note 41, at 49-61.

<sup>88</sup>Of the common pleas courts which responded to the author’s inquiries, none had ever used this provision except Montgomery County (Dayton), which routinely includes it in all “stay-away” orders. Galvin suggests that such a provision is close to being in restraint of marriage. Galvin, *supra* note 61, at 260.

<sup>89</sup>OHIO REV. CODE ANN. § 3113.31(E)(1)(h) (Page Supp. 1982) (as amended by H.B. 920).

<sup>90</sup>See A. BOYLAND & N. TAUB, *supra* note 41, at 70.

<sup>91</sup>OHIO REV. CODE ANN. § 3113.31(F)(3) and (H) (Page Supp. 1982).

<sup>92</sup>OHIO REV. CODE ANN. § 2705.05 (Page 1981). This warning is printed on the forms used by the domestic relations courts of Lucas and Mahoning Counties. Response to questionnaires, *infra*, at Appendix.

<sup>93</sup>OHIO REV. CODE ANN. § 3113.31(E)(3) (Page Supp. 1982). Cf. OHIO REV. CODE ANN. § 737.11 (Page Supp. 12

that a copy of any order or agreement be issued "to all law enforcement agencies that have jurisdiction to enforce [it], . . ." and that all law enforcement agencies maintain an index of such orders.<sup>94</sup> This should allow prompt verification of an order when the victim is not able to produce a copy.

Still, the extent of authority under this provision is unclear. The statute does not authorize a law officer to arrest the violator based merely upon his presence on the premises in violation of a domestic violence order. Removing the man from the doorstep to the sidewalk may be scant protection when the police leave. In a growing number of Ohio cities, this problem has been resolved by local ordinances which state that a violation of a civil or criminal protection order is a misdemeanor of the fourth degree.<sup>95</sup> By making a violation a crime in itself, law officers are given clear authority under their arrest powers to take into custody anyone who commits a violation in their presence.<sup>96</sup> The sponsors attempted to incorporate a similar provision into the Domestic Violence Act but were unsuccessful.<sup>97</sup>

### E. Constitutional Issues

Due process questions are raised by an *ex parte* order that removes a person from his or her home. The respondent may be deprived of interests in property (his home) and liberty (contact with his children) without notice or an opportunity to be heard.

This issue was considered by the legislature.<sup>98</sup> The extent of the property deprivation was expressly limited by a proviso stating that "[n]o order or agree-

1982) (requiring municipal police to enforce all domestic violence orders, civil and criminal).

<sup>94</sup>*Id.* § 3113.31(F)(1); (2) (the index requirement was added by H.B. 920).

<sup>95</sup>*E.g.*, COLUMBUS GEN. OFFENSES § 2321.07 (1979): Temporary protection order.

(A) No person shall knowingly violate any terms of a Temporary Protection Order issued pursuant to Section 2919.26 R.C. or Section 3113.31 R.C.

(B) No person shall recklessly enter or remain on the land or premises which is the subject of a Temporary Protection Order issued pursuant to Section 2919.26 R.C. or Section 3113.31 R.C., when such protection order excludes the person from the land or the premises.

(C) No person, being on the land or the premises subject to a Temporary Protection Order issued pursuant to Section 2919.26 R.C. or Section 3113.31 R.C. shall negligently fail to refuse to leave such premises upon being notified that the Protection Order excludes such person from that land or premises.

(D) Whoever violates this section is guilty of violation of a Temporary Protection Order, a misdemeanor of the fourth degree.

(E) As used in this section "land or premises" includes any land, real property, building, structure, home, or apartment, and any separate enclosure or room, or portion thereof. (Ord. 1147-79).

The future of such ordinances is uncertain since this Ordinance was recently invalidated by the Tenth District Court of Appeals in *Columbus v. Patterson*, No. 82-AP-47 (Franklin County Ct. App. Dec. 9, 1982).

<sup>96</sup>A law enforcement officer "shall arrest and detain . . . a person found violating . . . a law of this state or an ordinance of municipal corporation." OHIO REV. CODE ANN. § 2935.03(A) (Page 1982).

<sup>97</sup>Sub. H.B. 835, introduced in the House Judiciary Committee, would have made violation of a civil protection order a felony of the fourth degree, 112th Gen. Ass. Reg. Sess. at 9. H.B. 920, as introduced, would have made violation of a civil or criminal protection order a fourth degree misdemeanor, 112th Gen. Ass. Reg. Sess. at 5.

<sup>98</sup>*E.g.*, *Women in Crisis: Testimony Before House Judiciary Comm. on Legal Questions Raised by Sub. H.B. 835* (n.d.).

ment under this section shall in any manner affect title to any real property.’”<sup>99</sup> A further limitation in the provision is that no order can last for more than one year.<sup>100</sup> Furthermore, the statute was carefully drawn to meet the procedural requirements set out by the United States Supreme Court in cases involving *ex parte* orders. These requirements are: (1) The plaintiff must state facts rather than conclusory allegations, by affidavit or testimony; (2) A judge must participate in the decision; (3) There must be a provision for a prompt post-seizure hearing where the plaintiff must present proof and the defendant may present a defense.<sup>101</sup> For Ohio’s civil protection order: (1) The petition must allege “that the respondent engaged in domestic violence against a family or household member, . . . including a description of the nature and extent of the domestic violence”;<sup>102</sup> (2) Good cause, defined as “immediate and present danger” of domestic violence, must be shown at an *ex parte* hearing before a judge;<sup>103</sup> (3) A full hearing, with notice to the respondent and an opportunity to be heard, must be held within seven court days after an *ex parte* hearing.<sup>104</sup>

Similar statutes have been upheld by the Supreme Court of Missouri<sup>105</sup> and by a Pennsylvania trial court.<sup>106</sup> These courts noted that the procedure affected significant private interests which are protected by the Fourteenth Amendment but that these interests had to be balanced against the government’s interest in aiding victims of domestic violence.<sup>107</sup> The *ex parte* restrictions on the respondent’s use of property and contact with his children were found to be a legitimate use of the police power because they were necessary to protect victims and prevent further abuse; the procedures for *ex parte* orders, with a later hearing, were held to be sufficiently protective of the respondent’s constitutional rights.<sup>108</sup>

The Missouri case also upheld a provision that made a violation of a protection order a misdemeanor, similar to the ordinances passed in several Ohio

<sup>99</sup>OHIO REV. CODE ANN. § 3113.31(E)(4) (Page Supp. 1982).

<sup>100</sup>*Id.* § 3113.31(E)(3).

<sup>101</sup>*Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

<sup>102</sup>OHIO REV. CODE ANN. § 3113.31(C)(1) (Page Supp. 1982).

<sup>103</sup>*Id.* § 3113.31(D).

<sup>104</sup>*Id.* As originally enacted, the statute required a full hearing within three days. OHIO REV. CODE ANN. § 3113.31(D) (Page 1980) (as enacted by H.B. 835). Practical difficulties in obtaining service prompted an amendment in H.B. 920, enlarging the time to seven days. Interview with David Hartley, *supra* note 28; Galvin, *supra* note 61, at 255.

<sup>105</sup>State ex rel. *Williams v. March*, 626 S.W. 2d 223, 229-32 (Mo. banc 1982).

<sup>106</sup>*Boyle v. Boy*, 5 FAM. L. REP. 2916 (Allegheny County C.P. 1979).

<sup>107</sup>626 S.W. 2d at 230.

<sup>108</sup>*Id.* at 232; *accord*, Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95 (1980). Taub concludes that *ex parte* evictions of alleged domestic abusers would survive constitutional attack under either the standard of “presumptive constitutionality” which she discerns in recent Supreme Court cases involving provisional deprivation of protected interests, or under a stricter standard of “presumptive unconstitutionality,” which shows more sensitivity to due process values. In fact, she contends, these procedures “represent an important mechanism for promoting those values.” *Id.* at 128.

cities. The state supreme court rejected the lower court's conclusion that this provision was void for vagueness.<sup>109</sup> The court held that sufficient standards to prevent arbitrary or discriminatory application by judges were contained in the requirement that a protection order may be issued only upon a finding of "immediate and present danger of abuse to the petitioner"<sup>110</sup> coupled with a precise statutory definition of abuse<sup>111</sup> (the provisions in the Missouri statute are substantially similar to the provisions in the Ohio statute<sup>112</sup>). Secondly, adequate notice to the potential offender of what conduct is proscribed is guaranteed by the terms of the Missouri statute: the misdemeanor status attaches only to an order of which the respondent has notice.<sup>113</sup>

In Ohio, however, the Columbus ordinance was recently ruled invalid by the Tenth District Court of Appeals in an unreported opinion, based on a section of the Ohio Constitution which provides that municipalities may adopt and enforce local police regulations so long as they "are not in conflict with general laws."<sup>114</sup> The court held that the city has overstepped this limitation by criminalizing an act which the legislature had classified as noncriminal. Whether this reasoning will be adopted by other courts of appeals or by the Ohio Supreme Court remains to be seen. Even if piecemeal local enactment of protection order-misdemeanor ordinances is forestalled,<sup>115</sup> this rationale would of course be irrelevant to a statewide statute having the same effect.

#### F. *Under-Usage*

The civil protection order has been the cornerstone of domestic violence laws in many states because it provides the victim with an enforceable legal right and avoids many of the personal and institutional difficulties and limitations of a criminal remedy.<sup>116</sup> Yet, this remedy has had very little use in Ohio. In some counties, there have been no domestic violence petitions filed in the court of common pleas since the law went into effect in March, 1979, and even populous Franklin County, which includes the city of Columbus, reported only

<sup>109</sup>626 S.W. 2d at 232-34.

<sup>110</sup>*Id.* at 233; see MO. ANN. STAT. § 455.035 (Vernon Supp. 1982).

<sup>111</sup>Abuse is defined as "inflicting, other than by accidental means, or attempting to inflict physical injury on an adult, or purposely placing another adult in apprehension of immediate physical injury." MO. ANN. STAT. § 455.010(1) (Vernon Supp. 1982).

<sup>112</sup>*Cf.* OHIO REV. CODE ANN. § 3113.31(A)(1); (D) (Page Supp. 1982).

<sup>113</sup>626 S.W.2d at 233; MO. ANN. STAT. § 455.085(3) (Vernon Supp. 1982) states: "[v]iolation of the terms and conditions of an *ex parte* order of protection, of which the respondent has notice, shall be a class C misdemeanor. Violation of the terms and conditions of a full order of protection shall be a class C misdemeanor." *Id.*

<sup>114</sup>*Columbus v. Patterson*, No. 82 AP-47 (Franklin County Ct. App. Dec. 12, 1982); see OHIO CONST. art. XVIII, § 3.

<sup>115</sup>*E.g.*, Letter from Michael R. Merz, presiding judge of the Dayton Municipal Court, to Nancy Grigsby of the Dayton Battered Woman Project (Feb. 9, 1973) (declining to support a Columbus-type ordinance in Dayton in light of *Patterson*, since one judge from the Montgomery County Court of Appeals had participated (by designation) in the Franklin County decision).

<sup>116</sup>Lerman, *Survey*, *supra* note 3 at 272.



forty-three cases in nearly three years.<sup>117</sup> Lucas County (Toledo) is an exception, with 300 cases per year.<sup>118</sup>

The limited use of this remedy throughout most of the state is not because there is little need for it or because the statute is not suited to its purposes. Rather, court procedures, indifference or ignorance of attorneys and court personnel, and enforcement problems frustrate the ability of victims to obtain the relief intended for them. Lucas County has shown that the protection order will be used when attorneys and judges try to understand the needs of battered women and to remove institutional obstacles.

Indeed, some features of the statute would seem to promote broad use of the civil protection order. The class of people eligible to use it is broadly defined, in contrast to previously available domestic relations orders and to domestic violence legislation in other states.<sup>119</sup> Also, the statute explicitly guarantees that an order must not be denied to anyone because she takes the immediate self-help measure of leaving the residence or because she pursues other civil or criminal remedies.<sup>120</sup>

There are several factors which explain its limited use. A major reason is that few attorneys are aware of the domestic violence civil protection order, and fewer still appreciate its usefulness.<sup>121</sup> Perhaps lawyers believe that the domestic violence protection order has no advantage over the familiar TRO. Superficially there is some force to this argument. In many situations, both remedies might be available. However, as discussed above, there are important differences between the CPO and the TRO which may make the domestic violence order more appropriate in many cases where a Rule 75 restraining order is also an option.<sup>122</sup>

A similar view compares the *ex parte* civil protection order to the criminal temporary protection order. One judge opined:

It is my estimation that most emergency situations result in utilization of the misdemeanor provision of the law. Once a temporary protective

<sup>117</sup>Letter from John W. Hill, J., Div. of Dom. Rel., Franklin County (Feb. 8, 1982); "less than 20," letter from Div. of Dom. Rel., Mahoning County (Feb. 4, 1982); "several . . . during the first year . . . and virtually none since . . .," letter from H. F. Inderlied, Jr., J., Ct. of C.P. Geauga County (Feb. 5, 1982); "four", letter from Delphine Crowe, Bailiff, Ct. of C.P., Greene County (Feb. 8, 1982); none, letters from Joseph P. Malone, J., Ct. of C.P., Ashtabula County (Feb. 4, 1982) and Nelfred G. Kimerline, J., Ct. of C.P., Crawford County (Feb. 10, 1982). Montgomery County reported increasing use each year, with 21 filings in 1979, 30 in 1980, 54 in 1981, and 22 in first quarter of 1982. Letter from Lillian M. Kern, J., Div. of Dom. Rel., Montgomery County (March 25, 1982).

<sup>118</sup>Letter from June R. Galvin, J., Div. of Dom. Rel. (Feb. 10, 1982); Galvin, *supra* note 61, at 263 n.33.

<sup>119</sup>See Lerman, *Survey*, *supra* note 3 at 276-77 and 280-81.

<sup>120</sup>OHIO REV. CODE ANN. § 3113.31(B), (G) (Page Supp. 1982). See A. BOYLAND & N. TAUB, *supra* note 41, at 120 (discussing the law of various states as to election of remedies).

<sup>121</sup>Letter from Susan Weaver, Director of Legal Dept., Div. of Dom. Rel., Cuyahoga County Ct. of C.P. (Mar. 4, 1982); letter from Div. of Dom. Rel., Mahoning County, *supra* note 117.

<sup>122</sup>See *supra* notes 58-67 and accompanying text.

order of that statute is in effect little need seems to exist for a civil protection order under this one. Subsequently, there is reconciliation or proceedings to terminate the marriage. In either case, a civil protection order seems inapposite.<sup>123</sup>

This view ignores an important purpose of the civil protection order: to provide an immediate remedy without criminal prosecution. Indeed, this view encourages people to make criminal complaints with no intention of carrying through with prosecution, just to get a temporary protection order.

Another hindrance to use of the CPO is the cost of hiring a lawyer and the difficulty of following court procedures without one. Often a battered woman has no money at her disposal, even where there is a substantial family income.<sup>124</sup> To require her to retain a lawyer at a cost of several hundred dollars may be equivalent to an outright denial of relief. Even the relatively small cost of a typical filing fee<sup>125</sup> is prohibitive to someone with no money on hand, particularly if she also has children to feed.

The court in Lucas County has addressed these procedural and financial problems. Judge June Galvin explained, “[a] consensus decision was reached by the professional staff and judges that the legislature, in mandating that court hold a same-day hearing, also intended that the petition be filed at the option of the petitioner solely without the delay of counsel preparing pleadings, arranging appointments, etc.”<sup>126</sup> A domestic violence kit was prepared, including a petition form that can be completed without the aid of an attorney. There is no filing fee.<sup>127</sup> This procedure has been so effective that lawyers commonly refer their clients to the court to file domestic violence actions.<sup>128</sup>

Another important factor in whether women seek protection orders is the willingness of courts to grant the relief needed to protect victims from further violence. For instance, the Court of Common Pleas of Greene County, which reported that it would not issue CPO’s *ex parte*, had only four cases from 1979 through 1981.<sup>129</sup>

Finally, even a very broad order has little value if everyone believes that the order will not be enforced. As discussed above, the Domestic Violence Act explicitly authorizes law officers to enforce a protection order or consent agreement, including removing the violator from the premises.<sup>130</sup> Some law enforce-

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<sup>123</sup>Letter from H. F. Inderlied, Jr., *supra* note 117.

<sup>124</sup>D. Martin, *supra* note 2, at 215.

<sup>125</sup>Seven courts as listed *supra* note 117, reported filing fees ranging from \$0 to \$75 for a domestic violence petition. Telephone interviews (Feb. 19, 1982).

<sup>126</sup>Galvin, *supra* note 61, at 254.

<sup>127</sup>Court staff provide intake service. *Id.* Court costs must be paid before the case is dismissed. *Id.* at 262.

<sup>128</sup>Letter from J. Galvin, *supra* note 118.

<sup>129</sup>*Supra* note 117.

<sup>130</sup>OHIO REV. CODE ANN. § 3113.31(F)(3) (Page Supp. 1982) and text accompanying note 93, *supra*.

ment agencies nevertheless take the same “hands off” position in regard to domestic violence orders as to traditional TROs.<sup>131</sup>

Other agencies treat a CPO more seriously, recognizing the fact that this order was issued means that violence has occurred previously, and will remove the offender.<sup>132</sup> In some jurisdictions, the department protocol permits arrest for criminal trespass or disorderly conduct.<sup>133</sup> Some law enforcement agencies prefer to have the orders include provisions which expressly authorize the sheriff or police department to remove the offender.<sup>134</sup> Enforcement might be enhanced in other jurisdictions if courts would adopt the practice of including explicit enforcement directions on orders when they are issued. This would clearly bring any violation within the Act’s mandate that “any officer . . . shall enforce . . . in accordance with the provision.”<sup>135</sup> Courts and attorneys should also make sure that copies of the order are issued “to all law enforcement agencies that have jurisdiction to enforce [it],”<sup>136</sup> as well as the places where the petitioner lives, works, and goes to school.

At best, however, the authority to remove remains somewhat uncertain under the statute. As one shelter worker reports: “[r]emove yes — but to where? The corner?”<sup>137</sup> The surest enforcement is available in those cities which have enacted ordinances making violation of a domestic violence protection order an arrestable offense.<sup>138</sup> An amendment to the statute is needed to extend this provision to all parts of the state. But even the existing law allows a great deal more protective action by law officers than is recognized in many jurisdictions.

### III. CRIMINAL PROVISIONS OF THE ACT

Probably what is best known about Ohio’s Domestic Violence Act is that it created a criminal offense known as “domestic violence.” Actually, there

<sup>131</sup>*E.g.*, Letter from Mahoning County Ct. of C.P., *supra* note 117; letter from Lt. James L. Mustacchio, Stark County Sheriff’s Office (Feb. 23, 1982) (offender is removed only after the court issues a contempt warrant).

<sup>132</sup>*E.g.*, Letter from R. Twining, Cross Roads Crisis Center, Inc., Lima (Feb. 19, 1982); see Trumbull County Sheriff’s Dept. Inter-Office Communication, Domestic Violence Law (Aug. 14, 1981); Dayton Police Dep’t Gen. Order 2.01-2. VII (revised June 1982); *cf.* Dayton Police Dep’t Admin. Memo. No. 0005 (Jan. 17, 1983) (responding to reports that officers were not enforcing Domestic Violence Protection Orders, the memorandum emphasizes that enforcement, including removal of the suspect when that is provided in the order, is mandatory).

<sup>133</sup>Trumbull County Sheriff’s Dept. Inter-Office Communication, *supra* note 132 (“if the protection order prohibits entrance onto the property, the officer may file a charge of Criminal Trespassing.” *Id.*); Dayton Police Dept., *supra* note 132 (while the policy emphasizes that “police officers are not to arrest based only on a violation of a court order,” an overt act of resistance may result in arrest for obstructing official business. Furthermore, officers are instructed to advise the suspect that his return onto the property will result in his arrest for disorderly conduct or criminal trespass. *Id.*).

<sup>134</sup>Letter from Ross County Sheriff’s Dept. (Feb. 20, 1982); *cf.* Dayton Police Dept., *supra* note 132 at VII C. (Police officers are instructed to remove the suspect from the property “when the . . . terms of a Court Order include removal of the suspect from the complainant’s property.” *Id.*).

<sup>135</sup>Letter from Sgt. Jeff Perrin, Sandusky County Sheriff’s Dept. (Feb. 8, 1982).

<sup>136</sup>OHIO REV. CODE ANN. § 3113.31(F)(3) (Page Supp. 1982) (emphasis added); *accord*, Ohio Attorney General Information Opinion to Ohio Assn. of Police Chiefs, at 4 (May 8, 1982).

<sup>137</sup>OHIO REV. CODE ANN. § 3113.31(F)(1) (Page Supp. 1982).

<sup>138</sup>Letter from Somersplein Safe, Inc., Warren (Feb. 23, 1982).

is little new about the substantive offense described in Section 2919.25. The elements are identical to the elements of simple assault, also a first degree misdemeanor,<sup>139</sup> except that the crime of domestic violence is limited to assaults between “family or household members.”

There is one substantive addition — that a second offense of domestic violence is a fourth degree felony.<sup>140</sup> But the main reason that the legislature specifically defined a crime of domestic violence was to provide a vehicle for provisions regarding warrantless arrests and temporary protection orders in domestic disputes.<sup>141</sup> Related provisions mandate that certain information be provided by law officers on all domestic calls,<sup>142</sup> and that training in handling domestic disputes be given all new officers.<sup>143</sup>

## A. Police Response

### 1. Arrest

A frequent complaint by battered women has been the reluctance of police to arrest the batterer. Previously, Ohio law required law officers to arrest immediately when they observed a crime being committed,<sup>144</sup> but wife batterers commonly stop their assault when police arrive.<sup>145</sup> Officers were authorized to arrest without a warrant when there were reasonable grounds to believe that an offense of violence had been committed outside their presence,<sup>146</sup> but police had been unwilling to use this authority in domestic situations. Probable cause is difficult to determine because there are often no uninvolved witnesses, bruises may not appear immediately, and injuries may be in places which the victim is reluctant to display.<sup>147</sup> Officers have feared liability for false arrest if the complaining witness decides not to carry through with prosecution.<sup>148</sup> The Domestic Violence Act protects arresting officers by providing that reasonable ground to believe that a person committed domestic violence exists when the victim executes a written statement alleging that offense.<sup>149</sup>

<sup>139</sup>See *supra* notes 91-97 and accompanying text.

<sup>140</sup>OHIO REV. CODE ANN. § 2903.13 (Page 1982). Early versions of the Act in the Senate also included a lesser offense of Domestic Menacing, essentially the offense of menacing, when it occurred between family or household members. Sub. H.B. 835 as introduced in S. Judiciary Comm. at 8. Regardless of the Act, menacing, as well as felony assault offenses, remain applicable to domestic situations as well as between strangers.

<sup>141</sup>OHIO REV. CODE ANN. § 2919.25(C) (Page 1982). An assault upon a stranger is deemed a felony only if the substantive elements are more severe. *Id.* § 2903.12 (aggravated assault), and § 2903.11 (felonious assault).

<sup>142</sup>Hartley interview, *supra* note 8.

<sup>143</sup>OHIO REV. CODE ANN. § 3113.31(J) (Page Supp. 1982).

<sup>144</sup>OHIO REV. CODE ANN. § 109.73; 109.77 (Page Supp. 1982).

<sup>145</sup>OHIO REV. CODE ANN. § 2935.03(A) (Page 1982).

<sup>146</sup>See Gelles, *No Place to God*, in BATTERED WOMEN 46, 55-56 (M ROY ed. 1977).

<sup>147</sup>OHIO REV. CODE ANN. § 2935.03(B) (Page 1982) (prior to amendment by H. B. 835).

<sup>148</sup>G. Avery, Law Director, Univ. Heights, Ohio, Legal Opinion for the University Heights Police (Mar. 5, 1979).

<sup>149</sup>TASK FORCE, *supra* note 4, at 17.

Use of the victim statement probably has increased the willingness to arrest in some jurisdictions. Several agencies indicated that if the responding officer determines that the offense of domestic violence has occurred, an arrest will be made upon execution of a victim statement.<sup>150</sup> In form, this is a limitation not imposed with other offenses. If an officer independently determines that there is probable cause to believe any violent offense was committed, that in itself is enough for an arrest. However, use of the victim statement probably results in some arrests which previously would not have been made.

On the other hand, some victim advocates report that, despite this statute, law officers seem particularly reluctant to arrest in cases of domestic violence.<sup>151</sup> Some victim advocates observe that police will arrest a wife beater only if the batterer continues the abuse in an officer's presence or is belligerent to the officer.<sup>152</sup> (In many of these cases there is a crime committed in the officer's presence, which triggers a duty to arrest under Ohio's arrest-power statute, regardless of the amendment enacted by the Domestic Violence Act.) Some law officers seem especially reluctant to arrest when there have been repeated calls to the same household, although studies show that repeated episodes of domestic violence are likely to become increasingly severe.<sup>153</sup>

Some jurisdictions apparently take the victim statement procedure as an invitation to handle domestic violence cases as individual complaints, rather than complaints which are filed by the police once probable cause is established.<sup>154</sup> This puts an onus on the victim which is not so readily imposed on victims of other crimes. Sometimes a deposit of \$15 or \$20 is required for these complaints, which can be prohibitive to many victims in an emergency situation.<sup>155</sup> Instead of immediate arrest, some departments routinely advise

<sup>150</sup>OHIO REV. CODE ANN. § 2935.03(A) (Page 1982). Senate sponsors proposed a stronger provision which would impose a duty to arrest when probable cause is established by a signed victim statement, but this was dropped on the Senate floor. S.B. 514 at 2; Sub. H. B. 835 introduced in Senate Judiciary Comm. at 9. Cf. Lerman, *Survey*, *supra* note 4 at 274 (five states impose a duty to arrest upon probable cause of spouse or family abuse).

<sup>151</sup>*E.g.*, Letter from Jeff Perrin, Sandusky County Sheriff's Dept., *supra* note 135; Lake County Sheriff's Dept., *Guidelines for Domestic Violence Complaints* 1, 2 (Mar. 1979).

<sup>152</sup>Battered women shelters, *infra* at Appendix; cf. Dayton Police Dept. Gen. Order, 2.01-1 (rev. June 1982); "[i]n general, it is advisable to avoid arrest; however, there are situations when arrest is the only reasonable alternative for police officers; a. Felonies . . . ; b. Misdemeanors occurring in the officer's presence; c. Misdemeanor, Domestic Violence, and the complainant has visible signs of injury." *Id.* at III B. 4.

<sup>153</sup>Police Foundation, *Domestic Violence and the Police: Studies in Detroit and Kansas City* (1977), cited in TASK FORCE, *supra* note 4, at 13.

<sup>154</sup>Several law enforcement agencies implied that a domestic violence arrest would be made only with a signed victim statement. Some even require the victim to sign a waiver if she chooses not to insist upon arrest. Lake County Sheriff's Dept., *supra* note 151, at 2. *But cf.* Ross County Sheriff, *supra* note 134: "we file the criminal complaint in most cases, as opposed to private complaints." *Id.*

<sup>155</sup>Letters from Youngstown Police Dept. (Feb. 10, 1982) and Athens County Sheriff's Dept. (Feb. 12, 1982); cf. interview with I. Meltzer, WomanShelter, Inc., Ravenna (April 30, 1982) (in 1981, two police departments in Portage County required a \$15 deposit for domestic violence complaints, but other departments in the county said that this policy, applicable to other misdemeanors, did not apply to domestic violence).

domestic violence complainants to go to the prosecutor's office the next weekday morning to file charges, or issue a "summons in lieu of arrest," which merely directs the alleged abuser to appear at the next court session.<sup>156</sup>

Reluctance to arrest at the scene can be a serious problem because it leaves the victim exposed to the possibility of further abuse after the police leave and indicates to the offender that his conduct is not a serious matter. In fact, a recent study of police tactics concludes that arrest is the most effective way for police to prevent repeated acts of violence in the home.<sup>157</sup>

From the viewpoint of the police, the difficulty may be partly due to a lack of fit between the goal of immediate protection from abuse and their role as enforcers of the law. When the victim later asks to have a charge dismissed, arrest can be seen as an abuse of process and a clog in the court system; yet the coercive power of police may be the only way to stop the violence and remove the offender from the household. This perceived incongruity would be alleviated if the victim had a civil protection order which allows police to remove the violator from the premises and if police recognize their authority to do so.<sup>158</sup> But civil protection orders are not available on an emergency basis,<sup>159</sup> and many law enforcement agencies do not exercise their authority to directly enforce them.<sup>160</sup> Moreover, it is overly narrow to limit law officers to situations likely to result in successful prosecution. In fact, police response in most contexts is influenced by various factors other than the potential for prosecution.<sup>161</sup> The basic function of law officers is to protect the public. When there is probable cause to arrest, officers have a responsibility to act without regard to whether they believe the victim will later cooperate with prosecution.

## 2. Duty to Inform Victims

Whether or not an arrest is appropriate or desired by the victim, the Domestic Violence Act mandates that "[a]ny law enforcement agency that investigates a domestic dispute shall provide information to the family or household members involved" regarding the civil domestic violence protection order as well as the temporary protection order which is available when a

<sup>156</sup>Letter from Sgt. Jackie Evans, Columbus Police Dept. (Feb. 12, 1982) ("[o]ur prosecutors prefer that we refer the parties to them. If an officer deems it necessary, a probable cause arrest is made."); *accord*, Battered women shelters, *infra*, at Appendix; *cf.* Akron Police Dept. Dom. Violence Procedure P-79-011 (March 22, 1989) (a "summons in lieu of arrest" directs the alleged offender to appear at the next court session. *Id.* at 3).

<sup>157</sup>Akron Beacon Journal, April 8, 1983, at B1, col. 1, reporting on a study by the Police Foundation in which Minneapolis police officers used three tactics selected at random to handle "moderate" domestic violence cases, defined as simple assaults that did not cause severe or life threatening injuries. The tactics were arrest, advice or mediation, and ordering the suspect to leave for eight hours. The suspects were then followed through police reports for six months to see if the violence was repeated. Only ten percent of those arrested generated a new official report of domestic violence, compared with sixteen percent of those given advice or mediation and twenty-two percent of those ordered out of the house for eight hours.

<sup>158</sup>See *supra* notes 91-97, 129-139 and accompanying text.

<sup>159</sup>See *supra* note 73 and accompanying text.

<sup>160</sup>See *supra* note 131 and accompanying text.

criminal complaint is filed.<sup>162</sup> This should put victims in a better position to determine whether they want an arrest, with the knowledge that there is a civil alternative as well as the knowledge that if they press charges they can get some protection from retaliation while the charge is pending. Even when arrest is not an option because the facts of the incident do not amount to domestic violence under the criminal statute, the facts may be sufficient to invoke the civil remedy.<sup>163</sup>

The statute does not prescribe any form to be used in fulfilling the duty to inform victims. Many law enforcement agencies have adopted fliers or cards to be handed to the victim.<sup>164</sup> In some cases this information is printed at the top of the form used for the victim's statement.<sup>165</sup> The problem with the latter format is that victims who do not make a formal complaint may not be given the information, while victims who do make a statement may not have a copy of the information to refer to later, since the victim statement is retained by the police. Many law enforcement agencies have no written explanation, relying on their officers to give adequate verbal explanations.<sup>166</sup> Although this is all that the statute requires, the purposes of the statute are better served where the information is given in writing as well as verbally. A person is not likely to remember clearly what was said to her in a stressful situation. While a clear verbal explanation is probably most helpful for the immediate decision, she should also be given a written card or leaflet which she can review later, under more calm circumstances.

Some departments encourage officers to provide information beyond the minimum required by the statute. Officers may be directed to explain the procedure for an immediate arrest, the option of a "cooling off" period in which the abusive person voluntarily leaves the residence for the night, and the right of the victim to go to the prosecutor later to make a complaint.<sup>167</sup> They may

<sup>162</sup>OHIO REV. CODE ANN. § 3113.31(J) (Page Supp. 1982).

<sup>163</sup>See *supra* notes 43-57 and accompanying text.

<sup>164</sup>*E.g.*, Akron Police Dept. Form P.D.-182; Columbus Police Dept. Form U-10.128; Dayton Police Dept. Form F-657 (Iss. April 1979); Toledo Police Dept. Form 38.7; letter from Ross County Sheriff's Dept., *supra* note 134; Stark County Sheriff's Dept., *Domestic Violence Remedies* (victim is asked to sign an acknowledgement that she has read and understands the information).

<sup>165</sup>*E.g.*, Ashtabula County Sheriff's Dept. form beginning, "[t]here are two means available . . ."; *but cf.* Stark County Sheriff's Dept. (two-page form: information sheet is page one, complaint form is on page two); the Akron Police Dept. prints information about protection orders at the top of the complaint form, PD-183, as well as on a handout Victim Referral Form PD-182.

<sup>166</sup>Letters from Harold Laubenthal, Dep. Chief of Cleveland Police Dept. (Mar. 4, 1982); Youngstown Police Dept., *supra* note 155; William Johnston, Ashtabula County Sheriff (Feb. 22, 1982); Athens County Sheriff's Dept., *supra* note 155; Lake County Sheriff's Dept., *Guidelines*, *supra* note 151; Sandusky County Sheriff's Dept., *supra* note 135; Trumbull County Sheriff's Dept., *supra* note 132; *but cf.* letter from Lorain Alexander, Wayne County Sheriff (Feb. 8, 1982) ("[w]e provide a small card with information pertaining to compensation for victims of crime"). Compensation information may be helpful, but it is not the information required by the Domestic Violence Act.

<sup>167</sup>*E.g.*, Letters from Stark County Sheriff's Dept., *supra* note 131; Trumbull County Sheriff's Dept., *supra* note 132.

also refer family and household members to social services such as marriage or alcoholism counselors, or shelters for victims of domestic violence.<sup>168</sup>

On the other hand, some law enforcement agencies apparently have not recognized that their statutory duty to inform domestic violence victims about both civil and criminal protection orders extends to victims who do not choose to press charges.<sup>169</sup> Whatever the official position, victim advocates report that compliance is spotty.<sup>170</sup>

Problems can result from noncompliance or misuse of the information requirement. When the information is simply not provided, victims are denied the opportunity to make an informed decision. In some cases, the information mandate is misused to discourage action by victims: police offer to take complaints from both parties and threaten to take the children to the county home.<sup>171</sup> Although it may often be true that both parties have engaged in violence which comes within the definition of the criminal offense, self-defense is a complete defense to a criminal charge.<sup>172</sup> When one spouse is clearly the aggressor police should exercise their discretion not to arrest a spouse who fights back. On the other hand, the inquiry should not end with a determination of who struck the first blow. In a case where the wife was the first to physically strike the other, a husband who responded with more force than was reasonably necessary to defend himself was not without blame under the law.<sup>173</sup> There may be cases when both parties are equally abusive, but law officers should be careful to avoid turning a statute which was intended to put social sanctions on domestic violence and to provide relief for victims into another tool to discourage victims from seeking help.

A judge complained shortly after the Act went into effect that the mandate to inform persons about legal options under the Act in all domestic disputes had resulted "in reports being read and signed on the scene oftentimes in haste."<sup>174</sup> It does seem likely that more complaints would be filed when more victims are told that they have that option. The fact that arrest is the only way to forcefully remove the offender may result in requests for arrest in cases where the victim does not want to follow through with criminal prosecution. But in-

<sup>168</sup>Ashtabula County Sheriff, *supra* note 166; Stark County Sheriff's Dept., *supra* note 131; Akron Police Dept. Procedure P-79-011 at 2-3 (March 22, 1979); Dayton Police Dept. Gen. Order 2.01-2. at III B.2. (rev. June 1982).

<sup>169</sup>See Dayton Police Dept. Gen. Order, *supra* note 168, at IV and V (use of information).

<sup>170</sup>Letters from battered women's shelters, *infra*, at Appendix.

<sup>171</sup>*Id.*

<sup>172</sup>State v. Melchior, 56 Ohio St. 2d 15, 20-21, 381 N.E.2d 195, 199-200 (1978).

<sup>173</sup>State v. Coy, No. 58-CA-80, Slip. Op. at 5 (Fairfield County Ct. App. Feb. 23, 1981) (available in Ohio Dec. on Fiche 81-5-5d).

<sup>174</sup>Crane, *The Domestic Violence Act — Amended Sub. House Bill #835*, 2 CUYAHOGA COUNTY BAR ASSOC. NEWSLETTER 1, 4 (July 1979).



formation about the alternative of a civil protection order ought to mitigate the number of such requests, at least when civil orders are easily obtained and readily enforced, and the offender agrees to a separation until the order can be obtained.

### 3. Officer Training

The Attorney General's Task Force on Domestic Violence emphasized that effective police response is a crucial part of a social policy on domestic violence. "Police officers are frequently the first persons called to intervene in a mate abuse situation . . . [h]owever, it is generally recognized that present police responses are ineffectual."<sup>175</sup> The Task Force cited studies which indicate that effective law officer response to relatively minor domestic disturbances could prevent later incidents of aggravated assault and homicide.<sup>176</sup> The Task Force also noted that domestic calls are a major source of officer injury and homicide, but that officers can enhance their own safety by the manner in which they handle a disturbance.<sup>177</sup>

In response to this concern, the Domestic Violence Act provides that fifteen hours of training in the handling of domestic disputes must be included in the training provided to all new law officers. Advanced in-service training is encouraged but not required.<sup>178</sup>

The practical effect of these provisions hinges upon two factors: how many officers actually receive specialized training in handling domestic disputes, and the nature of the training. Since the training is mandated only for new officers, the extent of the training depends in part on how many new officers have been appointed since the Domestic Violence Act went into effect in March, 1979. Reports in early 1982 varied from between about one-fifth new officers in Columbus and Cleveland to nearly the entire force in some small sheriff's departments. The amount of in-service training provided to experienced officers ranged from none in some departments to extensive training for all officers in others.<sup>179</sup>

The nature of the training varies since each training school may develop its own program, but many use the training program developed by the Ohio Peace Officer Training Academy (OPOTA).<sup>180</sup> This program emphasizes crisis

<sup>175</sup>TASK FORCE, *supra* note 4, at 13.

<sup>176</sup>*Id.*

<sup>177</sup>*Id.*

<sup>178</sup>OHIO REV. CODE ANN. § 109.73(A)(4); (5); (6) (Page Supp. 1982).

<sup>179</sup>Letters from Cleveland Police Dept., Columbus Police Dept., Youngstown Police Dept., *supra* notes 155, 156, 164; Ashtabula County Sheriff's Dept., Athens County Sheriff's Dept., Ross County Sheriff's Dept., Trumbull County Sheriff's Dept., Wayne County Sheriff's Dept., *supra* notes 132, 134, 154, 155, 164, 165, 166.

<sup>180</sup>Interview with Ronald Black, instructor, Ohio Peace Officer Training Academy (Feb. 18, 1982); see Ohio Peace Officer Training Academy, DOMESTIC VIOLENCE TRAINING PROGRAM, "Course Outline" and "Lesson Plan" (1979) [hereinafter cited as OPOTA].

intervention skills. The lesson plan stresses that a major part of police work involves "helping the public . . . , not policing criminal activity,"<sup>181</sup> and emphasizes the use of mediation and referral for domestic disputes. This appears to be helpful in expanding the range of skills available to officers and in counteracting the view that there is nothing a law officer can do unless a formal complaint is filed.<sup>182</sup>

However, the OPOTA lesson plan also perpetuates misconceptions which can prevent effective handling of woman abuse. The material on mediation does not discuss the limitations of this technique where one party wields coercive power over the other.<sup>183</sup> The guidelines for dealing with spouse abuse comment, "both persons are usually to blame."<sup>184</sup> This attitude fails to recognize the difference between a mere quarrel and the use of violence or intimidation, or to distinguish between the apparent source of disagreement and the nature of the conduct.<sup>185</sup> It reinforces the tendency of both aggressor and victim to blame the victim for domestic violence.<sup>186</sup> Although arrest may be inappropriate in many domestic disputes to which police are called, the OPOTA program goes too far in stressing that arrest is a last resort: "when all else fails . . . to restore order," or only "if one party insists on filing a complaint."<sup>187</sup> There is no recognition that where violence or intimidation has occurred, a crime has been committed, or any discussion of why arrest and prosecution may in some cases be appropriate.<sup>188</sup>

This emphasis on mediation is typical of police departments throughout the United States which have responded to criticism of official neglect of wife abuse by training officers in conflict management. However, the psychologists who developed the pioneer program for police crisis intervention training never intended this to be the exclusive response. They "assumed that situations involving violence and assault exceeded the limits of 'crisis intervention' and that the police powers of force and arrest would be invoked. Unfortunately, this was not to happen."<sup>189</sup> While mediation skills seem to be an important addition to police training, the training should also address the appropriateness of traditional police powers in domestic conflicts involving violence.<sup>190</sup>

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<sup>181</sup>OPOTA, *supra* note 180, at L.P.-3.

<sup>182</sup>*E.g.*, Cleveland Police Dept., *supra* note 166.

<sup>183</sup>See *infra* notes 245-246 and accompanying text.

<sup>184</sup>OPOTA, *supra* note 180 at outline-5.

<sup>185</sup>L. WALKER observes, "[w]hen batterers describe acute battering incidents, they concentrate on justifying their behavior. Often they recite a great many petty annoyances. . . . The trigger for moving into phase two [the acute battering incident] is rarely the battered woman's behavior; rather, it is usually an external event or the internal state of the man." L. WALKER, *supra* note 41, at 53.

<sup>186</sup>See Lerman, *Prosecution*, *supra* note 83, at 16.

<sup>187</sup>OPOTA, *supra* note 180, at L.P.-9.

<sup>188</sup>See *infra* notes 228-253 and accompanying text, and *supra* note 157.

<sup>189</sup>N. Loving, *Responding to Spouse Abuse & Wife Beating: A Guide for Police*, 35-36 (Police Executive Research Forum, 1909 K Street N.W., Suite 400, Washington, D.C. 20006) (1980).

## B. Temporary Protection Order

### 1. Statutory Provisions

When a complaint of domestic violence is filed, Section 2919.26 provides for a temporary protection order (TPO) “designed to ensure the safety and protection of the complainant or family or household members. . . .”<sup>191</sup> Although pretrial conditions on release are authorized in some cases by Criminal Rule 46, this statutory TPO is unique to this criminal charge. It was provided because of the special need for interim protection of a victim of domestic violence.<sup>192</sup>

The statute prescribes a form for a Motion for Temporary Protection Order which may be filed by the complainant or by the arresting officer in an emergency when the complainant is unable to file.<sup>193</sup> A hearing is to be held as soon as possible but not later than twenty-four hours after the motion is filed.<sup>194</sup> The person who requested the TPO must appear at the hearing.<sup>195</sup> As an alternative, the court may issue a TPO “upon its own motion,” when a complaint is filed. When this is done, a hearing must be held within twenty-four hours to review the order.<sup>196</sup>

In either case, the order is to be based upon a finding “that the safety and protection of the complainant or the family or household member . . . may be impaired by the continued presence of the alleged offender.” The order should contain terms designed to ensure the safety of the family or household member, “including a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment of the complainant or family or household member.” No other terms are explicitly authorized.<sup>197</sup>

This TPO is “a pretrial condition of release” in addition to bail.<sup>198</sup> A 1981 amendment makes it clear that the TPO procedure does not override the bail guidelines set out in Criminal Rule 46. A defendant may not be held in custody pending a hearing on a motion for a temporary protection order if he meets the criteria in the rule and executes any bail or bond required.<sup>199</sup> However,

<sup>191</sup>OHIO REV. CODE ANN. § 2919.26(B) (Page 1982).

<sup>192</sup>TASK FORCE, *supra* note 4, at 17; Hartley interview, *supra* note 28.

<sup>193</sup>OHIO REV. CODE ANN. § 2919.26(A); (B) (Page 1982). H.B. 920 amended this section to make it clear that officers are not obligated to file the motion themselves, nor to provide the forms, which are to be provided by the clerk of court.

<sup>194</sup>*Id.* § 2919.26(C). This has not required courts to open on weekends because Criminal Rule 45(A) provides that Saturdays, Sundays and holidays are excluded in computing time periods of less than seven days. OHIO R. CRIM. P. 45(A) (Page 1982). *See*, Attorney General, *supra* note 136, at 2.

<sup>195</sup>OHIO REV. CODE ANN. § 2919.26(C) (Page 1982).

<sup>196</sup>*Id.* § 2919.26(D). Jurisdiction to issue and enforce temporary protection orders under § 2919.26 is expressly granted to municipal and county courts. OHIO REV. CODE ANN. §§ 1901.18(I), 1901.19(G); 1902.02(I) (Page 1982).

<sup>197</sup>OHIO REV. CODE ANN. § 2919.26(C); (D)(3) (Page 1982).

<sup>198</sup>*Id.* § 2919.26(E)(1).

<sup>199</sup>*Id.* § 2919.26(F).

it should be noted that the rule itself permits a defendant to be held without bail until a hearing before a judge if there is evidence that his release may pose a danger to others.<sup>200</sup>

The TPO is effective only until the criminal proceeding is disposed of or until a civil protection order or consent agreement is issued based upon the same incident.<sup>201</sup> It is not admissible as evidence that the defendant committed the alleged offense.<sup>202</sup>

## 2. Legal Issues

This aspect of the Domestic Violence Act was greeted with protests from judges and lawyers concerned about the apparent grant of equity powers to the municipal or county court and about possible infringement of defendants' rights.

Many lawyers, judges and prosecutors contended that the effect of this section would be to require municipal and county courts to adjudicate household disputes, an unnecessary and inappropriate duplication of the jurisdiction of the court of common pleas.<sup>203</sup> However, in contrast to the broad scope of the civil protection order provided in Section 3113.31, the criminal temporary protection order is narrowly tailored to promote criminal prosecution by protecting the complaining witness while the case is pending. Section 2919.26 reflects a recognition by the legislature that when the victim and alleged offender are members of the same household, the continued presence of the alleged offender while the case is pending is likely to be a threat to the safety of the victim as well as a significant pressure against prosecution. While the civil protection order may invoke broad equity powers "to bring about a cessation of violence,"<sup>204</sup> the criminal protection order is more narrowly directed "to ensure the safety and protection of the complainant or family or household member."<sup>205</sup> The only term expressly authorized by Section 2919.26 is an order to stay away. The municipal court is given no new power by this section. Criminal Rule 46 already allowed the court to "[p]lace restrictions on the travel, association or place of abode of the person during the period of release."<sup>206</sup> As one court noted, a domestic violence TPO differs from a pretrial condition of release

<sup>200</sup>OHIO R. CRIM. P. 46(D)(3) (Page 1982); see Attorney General, *supra* note 136.

<sup>201</sup>OHIO REV. CODE ANN. § 2919.26(E)(2) (Page 1982).

<sup>202</sup>*Id.* § 2919.26(E)(3).

<sup>203</sup>Crane, *supra* note 174, at 3; letter from Nicholas J. Luca, prosecutor for Newton Falls Mun. Ct., to Sheriff Richard A. Jakmas of Trumbul County (Oct. 16, 1980).

<sup>204</sup>OHIO REV. CODE ANN. § 3113.31(E)(1) (Page Supp. 1982).

<sup>205</sup>OHIO REV. CODE ANN. § 2919.26(C) (Page 1982).

<sup>206</sup>OHIO R. CRIM. P. 46(C)(2); (D)(3); *accord*, State v. Heyl, No. C79 CRB 7120 (Hamilton County Mun. Ct. 1979), discussed in Woods, *Challenges to Legislation Enacted on Behalf of Battered Women*, 14 CLEARINGHOUSE REV. 426, 427 (1980) (pleadings available from National Clearinghouse for Legal Services, Inc., 500 N. Michigan, Suite 1940, Chicago, Ill. 60611).

pursuant to Rule 46 only in purpose.<sup>207</sup> To deal with such issues as family support or visitation, a person must petition the court of common pleas. A criminal protection order yield to a subsequent civil protection order arising out of the same activities.<sup>208</sup>

A further objection was that the TPO amounted to a denial of the right to bail under Criminal Rule 46 and the state constitution.<sup>209</sup> This concern was especially acute in many jurisdictions where the initial interpretation of the statute was that domestic violence defendants must be held without bond until the hearing on the motion for a temporary protection order, contrary to the usual procedure for misdemeanor defendants under Rule 46, which allows pre-arraignment release by the clerk of court upon execution of an unsecured bond specified in a schedule determined by the court.<sup>210</sup> This interpretation was precluded by the language added in 1981,<sup>211</sup> but the argument remains that the right to bail is infringed upon by the imposition of other conditions of pretrial release. This issue was argued in *State v. Heyl*, an unreported case in Hamilton County.<sup>212</sup> In that case, the prosecutor and *amicus curiae* argued that the right to bail did not preclude reasonable conditions of release. Criminal Rule 46(D)(3) allows the clerk to refuse pre-arraignment release if the defendant's "physical, mental or emotional condition appears to be such that he may pose a danger to himself or others if released immediately." At a subsequent hearing, the judge must determine conditions of release under Rule 46(C), which may include "restrictions on the travel, association or place of abode of the person during the period of release."<sup>213</sup> The TPO procedure is within these guidelines.

The defendant in *Heyl* also argued that the temporary protection order amounted to an imposition of criminal penalties without requiring proof beyond a reasonable doubt. The prosecution and *amicus curiae* responded that this standard of proof was required only for a trial on the ultimate issue of guilt, and noted that the fact that a TPO was issued was not admissible in a trial on the merits.<sup>214</sup> The defendant also contended that exclusion from his residence

<sup>207</sup>*State v. Dawson*, No. 79 AP-565 (Franklin County Ct. App. Oct. 18, 1979) (holding that a TPO is not a final appealable order). This is not contradicted by another court's characterization of § 2919.26 as "basically civil in nature," because the latter involved a comparison of § 2919.26 with § 2919.25, finding that a TPO did not constitute a ruling on the merits of the criminal charge. *State v. Roberts*, No.'s 875 and 881 (Medina County Ct. App. July 25, 1979).

<sup>208</sup>OHIO REV. CODE ANN. § 2919.26(E)(2) (Page 1982).

<sup>209</sup>OHIO CONST. art. I, § 9.

<sup>210</sup>*E.g.*, The Franklin County Public Defender, *Memo Re: Application of the Domestic Violence Law in the Franklin County Municipal Court* (July 27, 1979); this argument was raised and rejected in *Roberts*. Without discussion, the court held that even if bail was denied during the weekend incarceration, the defendant was not entitled to dismissal. *State v. Roberts*, No.'s 875 and 881 (Medina County Ct. App. July 25, 1979).

<sup>211</sup>OHIO REV. CODE ANN. § 2919.26(F) (Page 1982).

<sup>212</sup>*State v. Heyl*, No. C79 CRB 7120 (Hamilton County Mun. Ct. 1979).

<sup>213</sup>OHIO R. CRIM. P. 46 (Page 1982).

<sup>214</sup>OHIO REV. CODE ANN. § 2919.26(E)(3) (Page 1982). *Cf.* *United States v. Edwards*, 430 A.2d 1321 (D.C. App. en banc 1981) (upholding a statute authorizing preventive detention prior to trial).

was a deprivation of property without due process. The procedure, however, meets the standards set out by the United States Supreme Court for pre-judgment limitation on property.<sup>215</sup> The court rejected these challenges and ruled in favor of the prosecution.

### 3. Practice

Issuance of a temporary protection order is discretionary, and the practice varies from county to county. Some courts rarely issue TPO's<sup>216</sup> while others do so in almost every case.<sup>217</sup> Although the statute allows the court to issue a protection order "upon its own motion" at the time a complaint is filed,<sup>218</sup> the usual practice is to hold a TPO hearing along with the arraignment, usually the morning after the arrest.<sup>219</sup>

Initially, many jurisdictions understood the statute to require that a domestic violence defendant be held in custody until the protection order hearing.<sup>220</sup> This would enforce a cooling-off period and ensure the safety of the household until a protection order could be issued. An amendment added with the enactment of H.B. 920 in 1981 makes it clear that a domestic violence defendant cannot be held if he meets the criteria for bail under Criminal Rule 46 and posts the bond required.<sup>221</sup> However, many jurisdictions are able to hold most domestic violence defendants overnight by setting the bond schedule for domestic violence at the highest permissible level.<sup>222</sup> Furthermore, even defendants who are able to post bond may be held pursuant to Rule 46(D), which allows the clerk to refuse to release a defendant whose "physical, mental or emotional condition appears to be such that he may pose a danger to himself or others if released immediately."<sup>223</sup> It is reasonable to expect that such a danger would be present in most domestic violence cases, where going home after booking means returning to the scene of the conflict. Law officers should alert the clerk to this danger.<sup>224</sup>

<sup>215</sup>Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

<sup>216</sup>E.g., Letters, from Stark County Prosecutor (Feb. 8, 1982); and several battered women's projects, *infra*, at Appendix.

<sup>217</sup>E.g., Letters from Toledo Prosecutor, *supra* note 19, Sandusky County Prosecutor (Feb. 5, 1982), and battered women's shelters, *infra*, at Appendix.

<sup>218</sup>OHIO REV. CODE ANN. § 2919.26(D) (Page 1982).

<sup>219</sup>E.g., Letters from Toledo Prosecutor, *supra* note 19, Sandusky County Prosecutor, *supra* note 217, John Bender, J., Crawford County Mun. Ct. (March 11, 1982), several battered women's shelters, *infra*, at Appendix.

<sup>220</sup>E.g., Franklin County Public Defender, *supra* note 209.

<sup>221</sup>OHIO REV. CODE ANN. § 2919.26(F) (Page 1982).

<sup>222</sup>E.g., Bender, J., *supra* note 219 (bond schedule of \$500.00 cash or surety usually results in offender remaining in custody until next business day).

<sup>223</sup>OHIO R. CRIM. P. 46 (D)(3) (Page 1982).

<sup>224</sup>Accord, Lake County Sheriff, *Guidelines*, *supra* note 151, at 2; Sandusky County Sheriff, *supra* note 135.

An alternative, to provide some protection to the family when the defendant is to be released prior to the arraignment and protection order hearing, is for a judge to issue a temporary protection order *ex parte*, as permitted by Section 2919.26(D), at the same time the clerk determines what bond applies.<sup>225</sup> After court hours, the clerk could obtain the order by phoning the administrative judge, which is similar to the practice of many clerks for setting bond in felony cases. The order would be reviewed at the arraignment, as required by the statute.<sup>226</sup> The *ex parte* procedure can also be used to obtain a temporary protection order immediately when a charge is filed at the prosecutor's office after the incident.<sup>227</sup>

A protection order has little value if it is not effectively enforced. The statutory provisions for enforcement of the criminal protection order are identical to those for the civil protection order,<sup>228</sup> and the practical and legal problems are the same.<sup>229</sup>

### C. Prosecution

Prosecuting attorneys play a central role in effectuating the policy embodied in Section 2919.25, a policy which states that wife beating is a matter of community concern and deserves criminal sanctions. Many prosecutors are reluctant to go forward with domestic violence cases because of a high rate of non-cooperation by complaining witnesses. However, a study of spouse abuse prosecution programs by Lisa Lerman of the Center for Women Policy Studies found that both victim cooperation and conviction rates can be significantly increased when prosecutors adopt appropriate practices.<sup>230</sup> Lerman found that two principles underlie successful spouse abuse prosecution: first, it should be made clear that domestic violence is a crime against the state, and that the prosecutor, not the victim, is responsible for enforcing the law; second, the prosecutor should be aware of the concerns of the victim and set goals for prosecution which correspond to these concerns.

It might appear obvious that the state, rather than the victim, is primarily responsible for the prosecution of domestic violence. This is the basic difference between a criminal case and a civil dispute. Many prosecutors, however, do not acknowledge this in practice. At the extreme is one Ohio prosecutor who simply denies that domestic violence is a criminal offense. He stated that he would not handle these cases because the municipal court "does not have domestic relations jurisdiction."<sup>231</sup> Prosecutors in other jurisdictions use practices

<sup>225</sup>E.g., Franklin County Public Defender, *supra* note 210, at 4.

<sup>226</sup>OHIO REV. CODE ANN. § 2919.26(D)(2) (Page 1982).

<sup>227</sup>Some battered women's shelters reported this practice, *infra*, Appendix.

<sup>228</sup>OHIO REV. CODE ANN. § 2919.26(G) (Page 1982). Language expressly permitting immediate enforcement by removal was omitted from § 2919.26 in H.B. 835, but was inserted by H.B. 920.

<sup>229</sup>See *supra* notes 130-38 and accompanying text.

<sup>230</sup>Lerman, *Prosecution*, *supra* note 83, at 5.

<sup>231</sup>N. Luca, *supra* note 203.

which may reinforce a feeling that the complaining victim is personally responsible for the criminal prosecution. Many jurisdictions treat all domestic violence cases as individual complaints, requiring that the victim rather than the law officer or prosecutor sign the complaint, creating the impression that it is up to the victim to decide whether the case will proceed.<sup>232</sup> Not only do such practices encourage the view that wife beating is a personal matter — not a public concern like “real” crimes — they also reinforce the pressure on the victim to seek a dismissal.

In contrast, some Ohio prosecutors take a firm position that the state is the plaintiff in a criminal prosecution of domestic violence, as evidenced by their refusal to drop the charge merely at the request of the complaining witness.<sup>233</sup> The Court of Appeals of Montgomery County affirmed this view in *Dayton v. Thomas*,<sup>234</sup> finding that the trial court had no discretion to dismiss a case at the insistence of the complaining witness over the objection of the prosecuting attorney: the court would not deny the state its day in court. Some prosecutors will even compel the victim to appear in court.<sup>235</sup> The Perrysburg Municipal Court jailed a wife for contempt of court when she refused to testify at trial on a domestic violence charge that she had initiated against her husband. The charge was upheld on appeal.<sup>236</sup> A further practice followed with success by one of the programs studied by Lerman was to proceed with prosecution even if the victim fails to appear.<sup>237</sup> On the other hand, the prosecutor should take the concerns of the victim into consideration. This is not to say that prosecutors should become family counselors and domestic relations lawyers, but some awareness of the pressures on battered women, and attention to the reasons why they bring criminal charges, is important to encourage victim cooperation.

Prosecutors around the United States have found that protection orders are crucial to safeguard complainants from retaliation and further abuse while the charge is pending.<sup>238</sup> Ohio prosecutors are fortunate that specific authorization for such orders is present in the Domestic Violence Act. They should encourage their courts to exercise this authority, not merely as a service to vic-

<sup>232</sup>*E.g.*, Bender, J., Crawford County Mun. Ct., *supra* note 219 (if complainant who signed the victim statement under § 2935.03(A) later refuses to sign the actual complaint, neither the law officer nor prosecutor will file the charge in some cases); *see supra* note 154.

<sup>233</sup>*E.g.*, Stark County Prosecutor, *supra* note 216.

<sup>234</sup>17 OHIO OP. 3d 255 (Montgomery County Ct. App. 1980).

<sup>235</sup>*E.g.*, Stark County Prosecutor, *supra* note 216.

<sup>236</sup>*State v. Karnes*, No. WD-81-24 (Wood County Ct. App. Aug. 7, 1981) (available on Ohio App. on Fiche 81-8-6d).

<sup>237</sup>Lerman, *Prosecution*, *supra* note 83, at 7. “In 45 percent of the domestic cases charged by the Seattle [Washington] City Attorney during a two-year period from 1978 to 1980, the victim did not appear in court on the date of the trial. Rather than requesting dismissal, the prosecution proceeded without her. In 143 out of 420 cases (34 percent) in which this approach was taken during the two-year period, convictions were obtained based on the testimony of a police officer, another eyewitness, or on photographs of injuries inflicted.” *Id.*

<sup>238</sup>*Id.* at 8.



tims or a way to bypass domestic relations court but as an essential part of a policy to encourage witness cooperation.

A lack of information about the criminal process is a significant factor in discouraging victim participation.<sup>239</sup> Often, the complaining witness does not even see a prosecutor until the pretrial, which may be several weeks after the arrest and arraignment. Prosecutors should endeavor to keep victims informed at each step of the procedure. On the other hand, victim advocates observe that some prosecutors use this informational role to discourage prosecution by stressing that the criminal process entails great difficulties and minimal results.<sup>240</sup> Prosecutors need to recognize that prosecution can be worthwhile to the victim, as well as to deter domestic violence.

Both victims and prosecutors benefit when prosecutors try to understand what battered women want from the criminal justice system, and adjust their strategies accordingly.<sup>241</sup> A battered woman with young children and no means of support may be reluctant to proceed with prosecution if she believes that it will result in a stiff fine or incarceration. A woman who wants to continue to have a relationship with the defendant, but to end the abuse, may want to impress upon the defendant that his conduct is criminal and could result in a stiff penalty. Probably many potential dismissals could be turned into convictions if complainants were informed about possible sentencing treatments.<sup>242</sup>

The prosecutors studied by Lerman often seek mandatory counseling in lieu of a fine or incarceration.<sup>243</sup> Ohio's Domestic Violence Act specifically provides that upon conviction of domestic violence, "[t]he court may suspend execution of the sentence and place the offender on probation conditioned upon the participation of the offender, to the satisfaction of the court, in a program of clinically appropriate psychiatric or psychological treatment."<sup>244</sup> This disposition would meet the concerns of complainants who want their abusive partners to work to improve their behavior. It should also promote the social goal of reducing future violence — if prosecutors and courts enforce participation and see that the type of counseling ordered is appropriate to the situation.<sup>245</sup>

<sup>239</sup>*Id.* at 8; communications from victim advocates. Letters from battered women's shelters, *infra*, at Appendix.

<sup>240</sup>Communications from victim advocates. Letters from battered women's shelters, *infra*, at Appendix.

<sup>241</sup>Lerman, *Prosecution*, *supra* note 83, at 7.

<sup>242</sup>Communications from most victim advocates and prosecutors show that a typical disposition for a first conviction of domestic violence is a fine of \$50.00 to \$100.00 and 30 days in jail, with most or all jail time suspended, in contrast to the maximum sentence of \$1000.00 and six months imprisonment. OHIO REV. CODE ANN. § 2929.21 (Page 1982). Prosecutors state that domestic violence sentences are equivalent to sentences for assault, the comparable crime between strangers. Letters from prosecutors in Ashtabula County, Sandusky County, Stark County and Toledo, *supra* notes 19, 23, 216, and 217.

<sup>243</sup>Lerman, *Prosecution*, *supra* note 83, at 11-12.

<sup>244</sup>OHIO REV. CODE ANN. § 2933.16 (Page 1982).

<sup>245</sup>See *supra* note 83 and accompanying text; Lerman, *Prosecution*, *supra* note 83, at 11-12.

However, this option is seldom used in Ohio courts, and when imposed, there is often no follow-up to ensure the participation of the offender.<sup>246</sup>

It is also helpful for prosecutors to recognize the needs of battered women which go beyond the results available through criminal prosecution. In addition to informing complainants about what can and what cannot be accomplished through the criminal process, prosecutors should provide information about civil remedies and social services. Again, this is not only a service to the victim; such referrals may be critical to deal with problems which can interfere with her ability or willingness to cooperate with prosecutor.<sup>247</sup> Prosecutors should avoid making a practice of using referral to social services and civil remedies as a way to divert battered women from prosecution. Referral may be appropriate in some cases, as when there is insufficient evidence to prosecute. However, many cases may be diverted from prosecution where, from the victim's point of view, the authoritative disapproval expressed by a conviction could be an important complement to civil remedies or counseling.<sup>248</sup> From the viewpoint of the community, consistent diversion of domestic violence cases to social services and to private remedies communicates the message that domestic violence is a private matter, not a serious crime. A similar issue arises in cities where many domestic violence cases are diverted to mediation programs.<sup>249</sup> While mediation may be appropriate for neighborhood disputes, in cases of wife abuse, mediation may reinforce the tendency of both abuser and abused to blame the victim for the violence and fail to tell the abuser that he is committing a crime.<sup>250</sup> Again, mediation may be an appropriate alternative in some cases, but these programs should not be used merely as a device to reduce the caseload of "minor disputes" without regard to the needs of battered women, the offenders, and society's interest in the censure of domestic violence.

Still, a well-planned program of diversion to counseling, with prosecution deferred, may be effective. The threat of prosecution motivates the offender to participate in the counseling. Counseling can be initiated immediately after a battering incident when offenders are most susceptible to treatment. A model diversion program in Miami, Florida allows offenders to participate if there has been no prior arrest for a violent crime if both offender and victim agree

<sup>246</sup>E.g., Letters from battered women's shelters, *infra*, at Appendix.

<sup>247</sup>Lerman, *Prosecution*, *supra* note 83, at 8.

<sup>248</sup>One victim advocate has observed prosecutors tell women who had begun divorce proceedings, as well as women who plan to continue the relationship because their partners have agreed to participate in counseling, that they may as well drop the charges. It is unclear when under this view, prosecution would be appropriate. Meltzer *supra* note 155.

<sup>249</sup>This includes Cleveland, Columbus, Dayton and Toledo. Letters from battered women's shelters, *infra*, at Appendix.

<sup>250</sup>Lerman, *Prosecution*, *supra* note 83, at 16-17. A 1980 evaluation of mediation programs funded by the Law Enforcement Assistance Administration shows that their handling of family violence cases was largely ineffective. *Id.*, citing R. COOKE, et al., NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT (1980).

to the offender's participation and if the counselor is confident that the offender is motivated to change.<sup>251</sup> It is critical that batterers be carefully supervised and that prosecution be resumed if a batterer fails to appear for counseling or violates any other terms of his diversion agreement. Such a program could be implemented in Ohio under the diversion statute.<sup>252</sup>

Another variable of prosecution is the willingness of the prosecutor to accept repeat complaints. It is easy to understand that prosecutors would be impatient with complaints from people who have previously requested dismissal of similar charges against the same persons. However, there are circumstances characteristic of battering relationships which suggest that prosecuting attorneys should be receptive to repeat complaints. Low self-esteem, belief in the traditional view of the family, and economic dependence are significant factors that make it difficult for a battered woman to seek help and to persevere in the face of procedural obstacles.<sup>253</sup> In addition, the burst of violence is typically followed by kindness and contrition.<sup>254</sup> But the cycle recurs, and the severity of the battering incidents typically increases.<sup>255</sup> Thus, it is important for prosecutors to understand that, on one hand, the pressures on a battered woman to withdraw from prosecution are particularly strong, and on the other hand, a later complaint is likely to involve a more severe incident. Refusal to prosecute a repeat complaint reinforces the battered woman's belief that she is responsible for her own suffering and that no one else will help her. This belief may result in severe injury or death to the woman or her abuser. Nevertheless, some Ohio prosecutors and courts discourage repeat complaints.<sup>256</sup> Others, more in keeping with the policy of the Domestic Violence Act and the principles of prosecution discussed above, will accept such complaints, sometimes with a firm statement that this time the charge will not be dropped.<sup>257</sup>

#### D. Repeat Offense as Felony

Where a previous charge has been carried through to a conviction, the Domestic Violence Act provides that a new complaint involving the same parties should be treated as a felony of the fourth degree.<sup>258</sup> In contrast to the ordinary assault statutes, under which the degree of the charge is based upon the severity of the physical harm,<sup>259</sup> the Domestic Violence Act evidences a legislative

<sup>251</sup>Lerman, *Prosecution*, *supra* note 83, at 11-15.

<sup>252</sup>OHIO REV. CODE ANN. § 2935.56 (Page 1982).

<sup>253</sup>L. WALKER, *supra* note 41, at 26; *Battered Women*, *supra* note 146, at 43.

<sup>254</sup>L. WALKER, *supra* note 41, at 49-61.

<sup>255</sup>TASK FORCE, *supra* note 4, at 13.

<sup>256</sup>Letters from Licking County Prosecutor, (Feb. 8, 1982), Wm. Wray Bevins, Pike County Prosecutor, (Feb. 11, 1982) and Toledo Prosecutor, *supra* note 19.

<sup>257</sup>Sandusky County Prosecutor, *supra* note 217.

<sup>258</sup>OHIO REV. CODE ANN. § 2919.25(C) (Page 1982). Potential penalties are six months to five years imprisonment and up to \$2500.00 in fines. *Id.* § 2929.11.

<sup>259</sup>*Id.* § 2903.11 (felonious assault); § 2903.12 (aggravated assault); § 2903.13 (assault); § 2903.14 (negligent assault).

intent that not only is it wrong to beat one's wife, it is more culpable to do the same thing again. However, this provision is seldom used. This is partly due to lack of opportunity because of the low rate of convictions in the first place.<sup>260</sup> But there is also some direct resistance by judges and prosecutors to treating the same substantive conduct as a more severe offense simply because there is a prior conviction.<sup>261</sup> However, nearly thirty other criminal statutes require enhanced charges for repeat offenses.<sup>262</sup>

Indeed, the refusal to support more severe charges appears to comport with the suggestion of successful family violence prosecution programs that victims are more willing to cooperate when stiff penalties are not stressed. On the other hand, that experience may not be applicable to second-time prosecution. The sheriff of Ross County, where felony domestic violence charges have been successfully prosecuted, found that the second-offense-felony provision is a useful deterrent; "[it] adds a bigger more compelling reason for the perpetrator to resist the use of violence and seek help."<sup>263</sup>

### E. Comparison of Civil and Criminal Actions

A temporary protection order, or a civil protection order are nearly equivalent alternatives for victims of domestic violence who wish to prosecute. They are similar in that a protective order is available through both processes, but fundamental differences should be recognized. Criminal prosecution infers that the offender's conduct is socially unacceptable and amounts to a crime against the state. The provision for a temporary protection order is not an importation of domestic relations law into the criminal court but a measure to prevent intimidation of a complaining witness. The TPO is tailored to this end — its terms are limited to basic protection and it is effective only while the case is pending. In contrast, with a civil protection order, there is no onus of criminal responsibility. The civil proceeding is tailored to address private disputes. It is available for a broader range of behavior, and can order a broad range of relief, including financial support, child custody and counseling, as well as basic protection. The two types of proceedings under the Domestic

<sup>260</sup>Toledo Prosecutor, *supra* note 19.

<sup>261</sup>*E.g.*, Pike County Prosecutor, *supra* note 226 (whether a second offense is prosecuted as a felony depends "upon the severity of the offense." *Id.*).

<sup>262</sup>OHIO REV. CODE ANN. § 2907.32 (pandering obscenity); § 2907.321 (Pandering); § 2913.02 (theft); § 2913.11 (passing bad checks); § 2913.21 (misuse of credit cards); § 2913.41 (defrauding a livery or hostelry); § 2913.51 (receiving stolen property); § 2915.02 (gambling); § 2915.03 (operating a gambling house); § 2915.05 (public gaming); § 2915.05 (cheating); § 2915.06 (corrupting sports); § 2917.21 (telephone harassment); § 2919.12 (consensual abortion); § 2919.22 (endangering children); § 2923.12 (carrying concealed weapons); § 2925.03 (trafficking in drugs); § 2925.11 (drug abuse); § 2925.12 (possessing drug abuse instruments); § 2925.13 (permitting drug abuse); § 2925.21 (theft of drugs); § 2925.22 (deception to obtain a dangerous drug); § 2925.23 (illegal processing of drug documents); § 2925.31 (abusing harmful intoxicants); § 2925.36 (illegal dispensing of drug samples) (Page 1982). *See also*, Am. Sub. S. Bill 199 (eff. Jan. 5, 1983) (reclassifying several felonies as aggravated felonies and requiring longer minimum prison terms for repeat convictions).

<sup>263</sup>Letter from Ross County Sheriff, *supra* note 134.

Violence Act are complementary options. Used alternatively or together, they can be significant tools to reduce domestic violence.

#### IV. STATISTICAL REPORTING

Another concern of the Attorney General's Task Force on Domestic Violence was the lack of any reporting system which would show the incidence of domestic violence. These cases are usually not "index crimes" which appear in the Ohio Uniform Crime Report. Local law enforcement departments might note "domestic" calls without specifying the crime, or record the crime charged without specifying the domestic context.<sup>264</sup> In response, the Domestic Violence Act requires every local law enforcement agency to "keep a separate record of domestic dispute and domestic violence problems" on a form prepared by the Bureau of Criminal Identification and Investigation (BCI).<sup>265</sup> The form is to include the number of domestic problems reported, the relationship of all persons involved, the action taken by the law enforcement officers, and any other information that the superintendent of BCI believes is relevant.<sup>266</sup> Local reports are to be submitted to BCI each month, and BCI is to prepare an annual statistical report. A sunset provision automatically repeals the reporting provisions in March, 1983 unless specifically reenacted.<sup>267</sup>

After some experimentation in 1979, a form was adopted which records the total number of domestic calls, action taken by a law officer (including arrest for domestic violence, arrest for other crimes, referral and no action), relationship of the victim and complainant to offender in cases where complaints are filed, and also, where there is a complaint, the degree of apparent injury to the victim (fatal, non-fatal, or none).<sup>268</sup> The statistics are limited, of course, to calls or situations which become known to the police. They do not include situations that do not enter the criminal justice system, nor do they include follow-up information such as the number of victims who filed charges at a later time through the prosecutor.

Although statistically accurate analysis is beyond the scope of this comment, the state-wide totals for 1980 and 1981 reveal some interesting results: Of all reported victims, about seventy percent were "wives" (which includes all female "persons living as spouses.")<sup>269</sup> Homicide victims were about equally

<sup>264</sup>TASK FORCE, *supra* note 4, at 15, 52-54.

<sup>265</sup>OHIO REV. CODE ANN. § 3113.32 (Page 1980). This duty is imposed upon county, township, city and village law enforcement agencies. *Id.*

<sup>266</sup>The original proposal introduced into the House Judiciary Committee included the number of vehicles and police officers dispatched and the date and time of each domestic dispute handled by police. Sub. H.B. 835.

<sup>267</sup>H.B. 835, § 3, Staff Notes to OHIO REV. CODE ANN. § 3113.32 (Page 1980).

<sup>268</sup>Attorney General William J. Brown, *The Ohio Report on Domestic Violence 1980*, at 12 [hereinafter cited as *1980 Report*] and Attorney General William J. Brown, *The Ohio Report on Domestic Violence 1981* at 12 [hereinafter cited as *1981 Report*].

<sup>269</sup>*1980 Report*, *supra* note 268, at 17 and *1981 Report* at 17.

divided between husbands and wives.<sup>270</sup> The numbers of domestic calls were lowest during the month of February, rose steadily to a peak in June or July, and declined as the weather cooled.<sup>271</sup>

In both 1980 and 1981, the proportion of reported calls throughout the state resulting in arrest averaged thirteen percent.<sup>272</sup> Seventy-three percent of these arrests were made under the Domestic Violence Act.<sup>273</sup> Referral to other agencies was reported for fifteen percent of the calls in 1980, while "no action" was reported in seventy-one percent of the calls.<sup>274</sup> More calls in 1981 (nineteen percent) involved referral.<sup>275</sup>

These statistics must be viewed with some reservations. Although the statute makes the reporting mandatory, there is no penalty for noncompliance. A few law enforcement agencies have not participated in the Domestic Dispute Domestic Violence Reporting Program, and some have reported statistics for less than twelve months of the year.<sup>276</sup>

Moreover, it is apparent that many other law enforcement agencies have not complied with the intent of the law. The *1980 Report* found that of the nine major cities in Ohio, only Dayton was fully complying with the intent of the reporting requirements. "Some cities are reporting only those calls that result in an arrest or referral to another agency . . . [while] [o]ther cities are listing domestic dispute calls as disturbances, assaults and other terminology and not reporting these into the program."<sup>277</sup>

Dayton reported a total of 11,041 domestic calls in 1980. The next highest number reported was 2,044 calls (Toledo). Dayton's report indicates 550 domestic calls for every 10,000 inhabitants, compared to four calls per 10,000 residents in Parma and 75 calls per 10,000 residents in Columbus.<sup>278</sup>

Cleveland reported 924 domestic calls in 1980 and 1272 in 1981. Yet in 1979 a week-long tally of calls received by Cleveland dispatchers projected 20,000 family violence calls in the city per year.<sup>279</sup> The reports show only 426 calls

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<sup>270</sup>*Id.* at 51.

<sup>271</sup>*Id.* at 19.

<sup>272</sup>*Id.*

<sup>273</sup>*Id.* at 20.

<sup>274</sup>*Id.*

<sup>275</sup>*1981 Report, supra* note 268, at 20.

<sup>276</sup>In 1980, statistics were contributed by seventy-eight of the eighty-eight sheriff's offices and 567 of an unknown number of police departments. *1980 Report, supra* note 268, at 9. In 1981, eighty-one sheriff's offices and 576 police departments contributed domestic reports. *1981 Report, supra* note 268, at 9.

<sup>277</sup>*1980 Report, supra* note 268, at 52.

<sup>278</sup>*Id.* at 53.

<sup>279</sup>G. Kilbane, *Ohio's Domestic Violence Law: An Analysis*, 5 (Cleveland Victim/Witness Service Center, Dec. 1979).

in Columbus in 1980 and 2174 in 1981, although a computer printout for a single quarter of 1977 showed 22,352 cars dispatched for domestic disputes, or about 89,000 runs in a year.<sup>280</sup> Furthermore, Columbus reported no injuries in domestic disputes even though fifty arrests were made in 1980 and 211 arrests were made in 1981.<sup>281</sup>

If domestic dispute reports were made faithfully, the statistics could provide useful insight into the nature and extent of domestic violence in Ohio. Even if the incidence of domestic violence is vastly underreported, the reports should aid in the comparison of law enforcement agency responses. Obviously the reporting program puts an additional burden on law enforcement agencies, but Dayton's performance shows that it is feasible. It is hoped that the Domestic Dispute/Domestic Violence Reporting Program will be continued.<sup>282</sup>

### CONCLUSION

Ohio's Domestic Violence Act is among the most comprehensive recent legislation to combat family violence. However, while in some parts of the state the options available to victims of domestic abuse have improved significantly, in many places the intended benefits have been largely unrealized. The aims of the Act could be greatly advanced by local officials committed to a policy of reducing domestic violence.

Several considerations could enhance the value of the civil domestic violence protection order. Attorneys should become familiar with this remedy and its unique features. Courts should make this remedy available to victims with limited resources by adopting petition forms which could be filled out by a lay person, and by not charging a filing fee. Costs could be assessed later at the full hearing when the resources and equities of the parties can be examined. The feasibility of making civil protection orders available on an emergency basis, outside normal court hours, should be considered. This could reduce the use of the criminal process by victims who do not intend to pursue prosecution. At least, courts should hold *ex parte* hearings on the same day they are requested, as required by the Act. Judges should be willing to exclude the offender from the shared residence as well as to grant other terms necessary for the well-being of the petitioner. Civil orders and consent agreements should include provisions expressly authorizing law officers to remove the respondent from the premises as provided by the statute. Better yet, enforceability could be made clear by a uniform state law making the violation of either civil or criminal domestic violence protection orders a misdemeanor. Courts and attorneys should make sure that copies of the orders are issued to the applicable law enforcement agencies, the place of the petitioner's residence, school and job.

<sup>280</sup>*Statistics: Police Involvement in Domestic Disputes*, testimony by Ohio Legal Services Victim/Witness Service Center, Dec. 1979.

<sup>281</sup>1980 Report, *supra* note 268, at 32-33 and 1981 Report at 32-33.

<sup>282</sup>As of the date that this comment went to print, BCI has indicated that it will be continuing the program. Telephone interview with Cliff Titus, program director, April 25, 1983.

Domestic violence training should be given to all law officers, not just new ones as required by the Act. The training should emphasize an understanding of the personal dynamics and social pressures of wife abuse as well as crisis intervention skills. Officers should be able to respond to a domestic dispute with crisis intervention techniques when appropriate, but they should also be willing to arrest where a criminal offense has occurred. When there is a protection order, law officers should be willing to enforce the order, including removal of the offender from the premises.

To ensure that victims are informed of their options, all law enforcement agencies should adopt a statement to be read and handed out which explains the relief available through a civil protection order or through arrest and a temporary protection order, and how to obtain either remedy. The statement may also include key referrals, such as battered women's shelters, legal aid offices, and the prosecutor. This form should be used on all domestic dispute runs, not just when a complaint is filed.

After an arrest, a domestic violence defendant should be denied pre-arraignment release, as permitted by Criminal Rule 46(D), when there are indications that his immediate release may pose a danger to the family or household member. If he is released, an *ex parte* temporary protection order should be issued at the same time. In general, municipal courts should be willing to grant temporary protection orders as a way to prevent intimidation of complaining witnesses. As with civil orders, there should be explicit provisions describing the power of police to enforce the order by removing the offender from the premises. Preferably, state or local laws should provide for arrest upon violation of such orders.

Prosecutors should recognize domestic violence as a crime against the state and should adopt practices which can promote victim cooperation with prosecution. In addition to supporting issuance and enforcement of temporary protection orders, they should provide referrals to fulfill other victim needs, including civil remedies and social services, and keep victims informed about the criminal process. They should avoid making the victim take personal responsibility for prosecution by making it clear to both victim and defendant that it is the prosecuting attorney who is responsible for the decision to go forward. They should endeavor to tailor penalties to victim goals, which may mean seeking deferred prosecution or probation conditioned on participation in counseling.

Both municipal courts and domestic relations courts should work with social service agencies to develop programs for court-ordered counseling. This should include appropriate treatment as well as effective follow-up.

All law enforcement agencies should participate conscientiously in the Domestic Dispute/Domestic Violence Reporting Program to allow accurate statistics on reported domestic disputes and police response. The reporting program should not be allowed to expire without an opportunity to assess its value



with reasonable compliance by enforcement agencies.

The Domestic Violence Act is a thorough piece of legislation whose aims are often frustrated in practice. But if local officials are willing to commit themselves to reducing domestic violence and improving the options for victims, the benefits for victims as well as for the community would be great.

NANCY E. GRIM

#### APPENDIX

Much of the information in this article was obtained from inquiries to law enforcement agencies, prosecutors, courts of common pleas and battered women's services in thirty counties. Responses often took the form of direct responses to a letter-questionnaire sent by the author, but also included copies of official policy statements and interviews. Listed below are all organizations which contributed information in this way. The particular sources are also cited individually throughout the comment, when appropriate. *See supra* note 17. All responses and interviews have been verified by the Board of Editors of the AKRON LAW REVIEW.

#### *Battered Women Shelters*

Battered Women's Advisory Committee (Newark, Licking County)  
 Choices for Victims of Domestic Violence (Columbus, Franklin County)  
 Community Interfaith Service (Winterville, Jefferson County)  
 CrossRoads Crisis Center (Lima, Allen County)  
 Domestic Violence Project (Canton, Stark County)  
 Genesis House (Lorain, Lorain County)  
 Homesafe (Ashtabula, Ashtabula County)  
 My Sister's Place (Athens, Athens County)  
 Someplace Safe, Inc. (Warren, Trumbull County)  
 WomanShelter, Inc. (Ravenna, Portage County)  
 Women Helping Women (Cincinnati, Hamilton County)  
 YWCA Battered Woman Project (Dayton, Montgomery County)

#### *Courts of Common Pleas, Domestic Relations Division*

Ashtabula County  
 Crawford County  
 Cuyahoga County  
 Franklin County  
 Geauga County  
 Greene County  
 Lucas County  
 Mahoning County

*Law Enforcement Agencies*

Akron Police Department  
Cleveland Police Department  
Columbus Police Department  
Dayton Police Department  
Youngstown Police Department  
Ashtabula County Sheriff's Office  
Athens County Sheriff's Office  
Lake County Sheriff's Office  
Ross County Sheriff's Office  
Sandusky County Sheriff's Office  
Stark County Sheriff's Office  
Trumbull County Sheriff's Office  
Wayne County Sheriff's Office

*Prosecutors*

City of Toledo  
Ashtabula County  
Licking County  
Pike County  
Sandusky County  
Stark County

*Other*

Bureau of Criminal Identification and Investigation  
Cleveland Victim/Witness Service Center  
Council on Family Violence of Lucas County  
Crawford County Municipal Court  
State Representative David Hartley

