

A COMPARATIVE STUDY OF THE LEGAL RESPONSES TO DOMESTIC
VIOLENCE IN THE UNITED STATES AND HUNGARY

by

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(Under the Direction of Paul M. Kurtz)

ABSTRACT

This thesis focuses on the legal responses to domestic violence in Hungary and in the United States. It analyses the main features of domestic violence as a special form of behavior and seeks an answer to the question whether this behavior merits special attention from the criminal law. After answering this question in the affirmative, it seeks to compare in detail the legal approaches to the elimination of domestic violence in Hungary and in the United States. Finally, this thesis points out why the American model is superior to the Hungarian one even if that model justifiably draws criticism as well.

INDEX WORDS: Statistical Data, Legal Background in Hungary, Case Study, Police Response, Development of the Issue in the USA, American Models, Specialized Domestic Violence, Courts, Evidentiary Issues, Federal Involvement.

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DEDICATION

To my family for all the support and care I received. Special thanks to them for carrying the financial burden of my studies despite their own financial concerns.

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	vi
I. INTRODUCTION.....	1
II. BACKGROUND.....	4
A. STATISTICAL DATA.....	4
III. DETAILED ANALYSIS OF THE LEGAL RESPONSES TO DOMESTIC VIOLENCE IN HUNGARY AND IN THE USA.....	10
A. PROBLEMS IN RESPONSE TO DOMESTIC VIOLENCE IN HUNGARY.....	10
B. LEGAL RESPONSE TO DOMESTIC VIOLENCE IN THE USA.....	20
IV. CONCLUSION.....	58
BIBLIOGRAPHY.....	60

I. INTRODUCTION

Following the political changes in Hungary, more emphasis has been placed on the economic legislation. In addition to the economic changes, the young Hungarian democracy has had to face other challenges as well. Soon after the democratic changes, the tide had turned to the sphere of criminality. There has been a constant increase in the number of crimes, which became public knowledge from the 1980's. Paralleling this tendency, but in a somewhat smaller proportion, the number of offenders, which became public knowledge has also increased. The increase of violent crimes against property was the most significant change in the structure of criminality. The number of serial crimes, internationally organized crimes and criminal activity involving international drug trade has also increased. Moreover, new types of criminal activity have appeared involving violent urban crimes, economic crimes, corporate crimes and computer crimes. More importantly, the percentage of recidivists among offenders has been increasing which reflects the inefficiency of earlier convictions.

Analysis of recent legal responses to domestic violence in Hungary is to be conducted against this backdrop. Failure of the Parliament and Ombudsman to deal with this issue, the practice of the courts and the attitude of Hungarian citizens perfectly demonstrate the widely held misconception that domestic violence is an insignificant problem of a marginal minority. The fate of the victims of domestic violence in Hungary can best be exemplified by the description of the book "Terror in the Family" authored by Morvai Krisztina:

Among those who invited us to an interview, there are many who still live in terror. Others were able to escape. Some of them could establish a new life, happiness and good luck. Many escaped first to a mother- or homeless shelter or other safe place. A good deal of them

are still living there or are forced to hide somewhere across the country. A few could escape only by committing a crime and are now behind bars. They are now protected by wardens whom they are not or only a little bit afraid of. Their previous “wardens” were economists, soldiers, workers, etc. of whom they were terrified. We met people too to whom we had arrived inexcusably and irreversibly late. We can become acquainted with their lives through court documents about their killing through striking, choking or stabbing.¹

Despite several attempts, there is no effective law on domestic violence in Hungary at the present. This thesis undertakes to introduce domestic violence as a phenomenon, having a harmful impact not only on a family level but on society, economy, and public morality. To fully understand the importance of this issue in Hungary, recent Hungarian sentencing practice shall be included as well. The sentencing practice and the attitude of Hungarian administrative authorities and other institutions have been widely criticized both by domestic and international experts. It is worthwhile to look behind these critiques and examine the basis of this criticism as well as to what extent it realistically addresses the issue of domestic violence in Hungary. The gist of the analysis focuses on the federal and state responses to domestic violence in the United States including the reasons that necessitated their creation. There are fundamental differences among countries with civil law system and those having Anglo-Saxon traditions. In addition to the natural appeal of different approaches, I chose to analyze legal responses to domestic violence in the USA since I was extremely interested in how much different is the treatment of an issue in a country in which courts traditionally have had a much wider leeway in deciding cases and applying general constitutional requirements such as due process and equal protection of the 14th Amendment to reach a fair and just decision.

¹ Morvai Krisztina, *Terror in the Family* 7 (2nd ed. 2003)

Before engaging in analysis of the subject matter, it is necessary to define domestic violence. While domestic violence can be defined to embrace violence against men, women and children living in the same household, this thesis seeks to focus primarily on the issue of violence against women with the term domestic violence being defined by the United Nations² which defines domestic violence as every form of violence against women which is directed against them because of their sex which embraces every violent act which causes or may cause physical or mental harm to them including the threat with such acts, duress and arbitrary deprivation of freedom either in public or private sphere. Domestic violence extends to verbal, mental, physical, sexual and economic violence.³

² Declaration on the Abolishment of Violence Against Women, 1993, See *also*, <http://www.nane.hu/eroszak/index.html>

³ *Id.*

II. BACKGROUND

In order to be able to fully appreciate the importance of this issue, analysis of the results of statistical surveys is necessary. While it is fairly easy to find pertinent American sources which provide comprehensive data on the impact of domestic violence in general, Hungarian sources providing the same type of data are fairly sporadic. As the statistical data show, domestic violence is pervasive both in the USA and in Hungary.

A. STATISTICAL DATA:

A Comparison between the USA and Hungary

i. U.S.A.

As the statistical data amply exemplify, society incurs huge costs due to domestic violence. Domestic violence affects a substantial portion of the population, resulting in absenteeism, lower productivity in the workplace and a greater burden on the health care system.

The Corporate Cost of Domestic Violence⁴

Employers lose between 3 and 5 billion dollars every year in absenteeism, lower productivity, higher turnover and health and safety costs associated with battered workers. Businesses lose an additional 100,000,000 in lost wages, sick leave and absenteeism. Over 1,750,000 workdays are lost each year due to domestic violence. Domestic violence in the U.S.A costs an estimated 67 billion annually.⁵

Statistical data also show that corporate supervisors are personally well aware of the great impact of domestic violence on employees, they suspect which employees are affected by domestic violence and would expect benefits from resolving this issue.

⁴ American Institute on Domestic Violence, <http://www.aidv-usa.com/statistics.htm>

⁵ *Id.*

Corporate Peers⁶

Sixty-six percent of senior executives surveyed agreed that their company's financial performance would benefit from addressing the issue of domestic violence among its employees. Ninety-four percent of corporate security directors rank domestic violence as a high security risk. Seventy-eight percent of Human Resource Directors identify domestic violence as a substantial employee problem. Forty percent of corporate leaders are personally aware of specific employees who are affected by domestic violence. Forty-nine percent of senior executives said that domestic violence had a harmful effect on their company's productivity. Forty-seven percent admit partner violence negatively impacts employee attendance.

Statistical data clearly point out that domestic violence is an issue of substantial importance in the United States, and has an impact on almost every family. In addition, domestic violence represents a more formidable danger to personal safety than other crimes committed by strangers.

The Human Factor⁷

Every 9 seconds a woman reportedly is beaten in the U.S.A. Between 3 and 4 million women reportedly are battered each year.⁸ Eighty-five to ninety-five percent of all reported domestic violence victims are female.⁹ Women between the ages of 20 and 34 endure the highest rates of domestic violence. Domestic violence is the leading cause of injury to women.¹⁰ Women are more likely to be attacked by someone they know rather than by a stranger.¹¹

Domestic Violence in the Workplace¹²

Homicide is the leading cause of death to women in the workplace. Partners and boyfriends commit 13,000 acts of violence against women in the workplace every year.

As the above statistics well demonstrate, batterers harass victims even at their place of employment, resulting in many cases in sick leave or job loss by the

⁶ See *supra*, p. 4, n. 4

⁷ *Id.*, See also, Peter N. Swisher ET AL., *Family Law: Cases, Materials and Problems* 421 (2d ed. 1998) ("Domestic violence has been identified as the single largest cause of injury to women in the USA, more significant than auto accidents, rapes and muggings combined.")

⁸ *Id.* Swisher at 420 ("Partner violence occurs in at least one out of every six American couples.")

⁹ *Id.* at 421 ("90% of heterosexual partner violence reported to law enforcement authorities is perpetrated by men against women.")

¹⁰ *Id.* (Caroline W. Harlow, *U.S. Department of Justice, Female Victims of Violent Crimes 1*, "Crime statistics also indicate that women are six times more likely than men to be victimized by a spouse, ex-spouse, boyfriend or girlfriend."), ("According to some estimates, at least half of all American Women will experience domestic violence at some point in their adult lives.")

¹¹ *Id.* ("Women are also much more likely than men to be murdered by an intimate partner.")

¹² See *supra*, p.4, n.4

victims.¹³ In some cases, victims are forced to quit their jobs due to the shame attached to them as being victims of violence, while in other cases employers themselves view domestic violence victims as troublesome employees who cannot or are perceived as not being able to perform to workplace standards¹⁴. As a study performed in New York points out, victims of domestic violence among welfare recipients has been constantly growing.¹⁵

CHILDREN AS A SPECIAL CLASS OF DOMESTIC VIOLENCE VICTIMS

The impact of domestic violence on children is twofold. First, they themselves may easily become subjects of domestic violence, and second, fiery arguments, assault and brutality may cause developmental harm to them as well. It is abundantly documented that violence of every kind has a significant negative impact on children of every age.¹⁶ Although this negative impact decreases with age, it still remains meaningful.¹⁷ Children observing family violence feel themselves vulnerable.¹⁸ Studies show that this perception is exacerbated by both the knowledge of the victim and the proximity of the event.¹⁹ Some authors emphasize that the trauma experienced by a child to repeated spousal abuse is second only to witnessing the murder of one parent by the other.²⁰ Such a trauma leaves a lifelong mark on children affected.²¹ The most significant negative effects of family violence on children include inability to cope with every-day problems especially at school, violent behavior, sleep disturbances, emotional instability and diminished mental and

¹³ See *infra*, p.7, n. 29 at 822

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Joan Zorza, *Violence Against Women* 4-10, 11 (Volume II.) (2004)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

physical performance.²² Removing children from a family replete with violence further increases their vulnerability.²³ The only viable alternative seems to be to provide safe shelter for the non-violent parent and her/his children, thereby offering the possibility of salving the damaged parent-child relationship.²⁴ Moreover, as a study of the American Bar Association points out children who observe family violence have a much greater chance of becoming abusive adults, partners and/or parents themselves, or to consider abuse in those relationships normal.²⁵ "In fact, in 14 of 16 studies, witnessing violence between one's parents or caretakers is a more consistent predictor of future violence than being the victim of abuse"²⁶ Studies also demonstrate that abused male children tend to abuse their partners as adults at a percentage 10 times higher than male children grown up in non-violent families.²⁷

DOMESTIC VIOLENCE AMONG HOMOSEXUAL COUPLES

Domestic violence is not exclusively a characteristic of heterosexual relationships, but it occurs in homosexual and lesbian partnerships as well. Its frequency is even more difficult to determine than that in heterosexual relationships since members of gay and lesbian communities are more hesitant to come forward than heterosexual victims. Several studies indicate that domestic violence is even more frequent among homosexual couples.²⁸ These studies estimate its occurrence at somewhere between 25 and 35%.²⁹ Recent studies dispel the illusion that violence is an exclusively male characteristic.

²² *Id.*

²³ *Id.* ("The child is most at risk when neither parent is emotionally available to respond to the child's fear or perception of danger")

²⁴ *Id.*

²⁵ See *supra* Switscher at p. 5, n.7 at 422

²⁶ See *infra* at p.7, n.29 at 343

²⁷ *Id.*

²⁸ See *supra*, p.5, n.7 at 421, Machaela M. Hochtör, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643, 690 (1997) ("Twenty-five to thirty percent of all lesbians and gay men in intimate relationships are victims of domestic violence")

²⁹ Nancy K. D. Lemon, *Domestic Violence Law*, (2001) 205

Same-sex violence among gay and lesbian couples can be "just as debilitating as opposite sex domestic violence and just as deadly."³⁰

ii. HUNGARY³¹

One woman every week and one child every month die as a consequence of domestic violence. Approximately 2,600 women have died due to domestic violence in the last 50 years³².

Every tenth woman is supposedly affected by domestic violence in Hungary.³³

According to the statistics of the Department of Justice, in 77 percent of the domestic violence cases ending in homicide, the husband had a previously consistent history of spousal battery.³⁴

In 57 percent of the cases, the homicide was committed unarmed, that is to say that the husband beat his wife to death.³⁵

Approximately 11 percent of the perpetrators are females; however, their percentage as victims is 41 percent.³⁶

More than 50 percent of persons who have died as a consequence of a violent crime are victims of a family member (54 percent).³⁷

Approximately 60 percent of women having died as a consequence of a violent crime were victims of their spouse, ex-spouse, boyfriend, or ex-boyfriend.³⁸

Women are 8 times more likely to be killed by their spouses or boyfriends than to be the victim of a stranger.³⁹

³⁰ *Id.*

³¹ *See supra*, p.2, n.1 at 108-111 (2nd ed. 2003)

³² Hungary has 10 million inhabitants.

³³ *See supra*, p.8, n.31

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Approximately 13 percent of males die as a consequence of domestic violence in their home, killed by their wives or girlfriends.⁴⁰ The percentage of women killed by their male partners under similar circumstances is 60 percent.⁴¹

⁴⁰ *Id.*

⁴¹ *Id.*

III. DETAILED ANALYSIS OF THE LEGAL RESPONSES TO DOMESTIC VIOLENCE IN HUNGARY AND IN THE USA

A. PROBLEMS IN THE RESPONSE TO DOMESTIC VIOLENCE IN HUNGARY

i. LEGAL BACKGROUND IN HUNGARY:

Until the 1990s, the issue of domestic violence had not been addressed in Hungary. At the same time, the socialist system strongly favored women who enjoyed a number of special privileges. After the democratic transformation, many of these privileges, such as female widow's pension, early retirement were found to be violative of the Hungarian Constitution as a form of overprotection of their constitutional rights or as a discrimination against males and gradually had been superseded⁴². Laws regarding domestic violence did not previously exist in Hungary. Offenders were traditionally punished according to the results of their acts (as a simple assault, aggravated assault, homicide, etc.). The only opportunity for the survivors to address their grievances has been to appeal to an international judicial forum based on a treaty to which Hungary is a party. Although lacking effective executive authority, the most important organizations in this field are definitely the ones set up by CEDAW and the European Court of Justice.

ii. CASE STUDY

In order to effectively convey the attitudes of judges in Hungary regarding domestic violence, five cases involving domestic violence issues will be introduced. The following cases occurred well after the democratic changes in Hungary and although the institutions of a democratic country were set up, they were unable to offer effective assistance for the victims of domestic violence.

⁴² See *infra*, p.17, n.56

The cases, outlined bellow, are highly characteristic of the present Hungarian sentencing practice in this field.

CASE I.:⁴³

MALE BATTERER-FEMALE VICTIM

Offenders in cases in this category are treated very leniently by courts. As the punishment in the following case clearly demonstrates, courts tend to impose suspended imprisonment and place great emphasis on searching for mitigating circumstances. The summary of a typical case is as follows:

The husband and the victim were spouses. They married in 1993 and their relationship had deteriorated within a year. The family departed on December 18, 1994 for Debrecen but their car broke down. Since they were not able to start the car, they returned on foot on the icy road. The wife slipped over on the icy street and broke her wrist. The wife, although experiencing great pain, didn't think of a fracture and the necessity to see a doctor. After a time, her wrist began to swell and hurt more and more. She asked her husband who was at that time severely intoxicated to drive her to the doctor with their repaired car that he refused. Then, the wife traveled to Debrecen to appear at her place of work for her family allowance.

The wife came home at 3.00 PM and found her husband in the kitchen with several bottles of wine. When the husband saw his wife entering the kitchen, he became violent and he smashed the television, the radio, the dishes and tore the curtains from the windows. The wife was extremely frightened and decided not to fight back. Then, the husband threatened his wife with a gas pistol and a knife. Finally, the husband beat up his wife and forced her to drive him to the wife's father to kill him since he was very old. For this purpose, he carried along a 5-gallon petrol

⁴³ See *supra*, p. 2, n. 1 at 31-32

can to set fire to his house. On the way to the wife's father's place, the husband demanded several times that his wife stop the car because he needed to urinate. She complied numerous times before finally driving off and leaving him on the side of the road. While making her way home, the wife began to feel very ill and asked someone to call the ambulance. The ambulance drove the wife to the neighboring hospital.

The wife suffered a life-threatening injury and her death was prevented only by quick medical care. The victim recovered in 8 weeks.

Some general facts about the criminal proceeding:

During the criminal proceeding, the defendant spent only 3 days in custody, since the court held further custody unwarranted by the facts. As a consequence, the defendant and his wife lived in the same apartment during the trial. The district court delivered its judgment in 1.5 years having sentenced the accused to a suspended term of imprisonment and imposed a fine. Finally, the court emphasized as a mitigating factor that the husband apologized to the injured for his behavior.

CASE II:

FEMALE ACCUSED-MALE VICTIM⁴⁴

BATTERED SPOUSE SYNDROM

Unlike cases in the previous category, courts tend to impose harsher punishments on female offenders in domestic violence cases. The next cases are excellent examples of this category.

The wife was a 35-year-old college educated person and mother of three children. The husband of the wife repeatedly assaulted her and their three children.

⁴⁴ *Id.* at 193

These assaults resulted in serious bodily injury to both the wife and the children. After having tried every possible solution that was at her disposal, the wife shot the victim (her husband). The wife declared the followings:

Shall I turn back the clock and decide whether or not I would shoot my husband? I try to do that. I say no. I wouldn't shoot him. Instead, I would go to the authorities that had found me guilty. I would take my children as well and tell them that I will not go away unless they tell me what to do, where to go to and how to escape.⁴⁵

The trial court, having emphasized the inadequacy of the response of the wife to the attacks leveled against her, sentenced the wife to six-years of imprisonment.

CASE III.-IV.

SELF-DEFENSE

Courts are hesitant to recognize self-defense in domestic violence cases where the attack can be averted only by application of deadly force. As courts often emphasize, self-defense must be strictly proportional.⁴⁶ The holding of the following decision well exemplifies insensitivity of the Supreme Court towards the plight of battered women and its practice of mechanically applying relating law.

CASE III.⁴⁷

Holdings of the Court:

I. Defining the aversion of an attack through the killing of the husband whose act was directly threatening the corporal integrity of a pregnant woman as being above self-defense is not contrary to the statutory regulations in the criminal code.

II. The appeal is without any merit to the extent it refers to the excessiveness of the punishment since the trial court imposed the punishment within the statutory limitations.

⁴⁵ *Id.*

⁴⁶ BH 2003/225, see also BH 2003/50 (published decisions defining excessive force in self-defense situations)

⁴⁷ BH 1994/170

The District Court and Court of Appeals found the wife guilty of homicide and sentenced her to 3 years of imprisonment. The facts were as follows:

The wife married the victim in 1984. They have 2 children. The relationship had been deteriorating due to the alcoholism of the victim. The victim often acted aggressively and assaulted the accused. On the day of the murder, the victim arrived home in the evening extremely intoxicated. A heated dispute ensued between the wife and the victim. During this dispute, the victim beat up the wife, who escaped into the kitchen. The victim then threw a chair after her and followed her to the kitchen. Finally, the wife grabbed a knife and stabbed the threatening victim who died at the scene. Subsequently, the wife called the police and her family. The wife was pregnant.

The Supreme Court upheld the decision of the Court of Appeals holding that the wife was in an emergency and lawfully applied force. Since the heavily drunken victim threatened her bodily integrity, she adhered to her duty to retreat and later to protect her corporal integrity by using a knife that was at hand. However, the Court of Appeals correctly held that the wife was not entitled to use deadly force since the attack was directed against her and her child's bodily integrity and not their lives. Consequently, the act of the wife was clearly beyond the necessary measure regarding self-defense. The counsel of the defense was not entitled to file an appeal to the Supreme Court based on the fact that the Court of Appeals did not apply the lightest punishment possible in its final judgment nor did it find a suspended punishment warranted. In this respect, namely no appeal could be filed.

CASE IV.⁴⁸

The most famous Hungarian case which also reached the European Human Rights Court in 2003 also belongs in this category too.

The husband had been assaulting and threatening his wife and two daughters with death. The wife was not allowed to go out alone and had to do strenuous, health damaging physical work. Over the years, the wife and two daughters developed serious health conditions. Moreover, they were restricted in the use their own home and often were forced to leave it. Despite multiple petitions, authorities refused to take any measure. However, the Public Guardianship Authority sought to take the children into state custody, referring to the mother's poor state of health, the poor living conditions and the dangerous family background. Once while severely intoxicated, the husband attacked his older, ill daughter and his wife, who came to her daughter's protection. The husband tried to choke his daughter, an action that could only be prevented by a violent act of intervention on the part of the mother. The husband suffered bodily injury, and consequently, the wife was prosecuted.

The District Court found both the wife and her daughter, as an accomplice, guilty of assault.

The Court of Appeals recognized that the wife was in a lawful self-defense situation, but held that the applied force was much beyond the necessary measure. The court sentenced the wife to 4 months imprisonment.

Further, the court recognized that the older daughter bore signs of choking, but held that the husband had no specific intent to kill. Moreover the court ruled that, the act of the husband must have been motivated by the strained relationship with his wife.

⁴⁸ <http://habeascorpus.hu/jogsegely/esetek/strasbourg.osszefogl.2003.02.06.htm>

The Supreme Court dismissed the appeal and pointed out that the husband did not choke his wife. It found the appeal to be without any merit.

The husband then filed a suit against his wife demanding compensation for the assault. Although the Court of Appeals held in the previous proceeding that the husband was "practically a liar", the court obliged the wife to pay 700.000,- forints (3.500 dollars) damages to the husband. The husband has continued to harass the family since that time.

The wife filed a suit against Hungarian state with the European Court of Human Rights in Strasbourg. She was assisted by the Habeas Corpus Working Group and NANE (Women for Women against Domestic Violence)
The court decided the above case as follows:

The court held that Hungary violated the European Human Rights Treaty on several points. Authorities offered no kind of protection for the wife, whereby they violated her right to personal security. Further, authorities discriminated against her gender and violated the equality between men and women by not examining the act of the husband. Finally, Hungary violated the victim's right to a fair proceeding.

OTHER CASES

In some cases, courts determine mitigating circumstances with surprising reasoning and illogical inference. In such a case, the court took into account as mitigating circumstances the admission of the husband and the provocation of the wife. As the court held in one case⁴⁹, it was beyond dispute that the injured had acted provocatively and unacceptably that had deservedly aroused anger, however,

⁴⁹ See *supra*, p.2, n.1, at 102

this provocative behavior did not entitle the husband to assault his wife so severely as to cause her death.⁵⁰

In another case⁵¹, the wife and the husband had been life partners since 1974 and had three children. The husband frequently slapped his wife's face when they had an argument.⁵² According to the court, *their relationship could be characterized as a fairly average one.*

Finally, courts often refer to the following as mitigating circumstances: the offender was an exemplary father⁵³; the crime was motivated by the deteriorated relationship between the parties⁵⁴ and the killing of someone barehanded rarely reveals a specific intent to kill.⁵⁵

iii. SENTENCING PRACTICE OF THE CONSTITUTIONAL COURT REGARDING DOMESTIC VIOLENCE CASES

A submission⁵⁶ of Habeas Corpus Working Group (hereinafter referred to as HCWG) to CEDAW sheds much light on the sentencing practice of the Constitutional Court. While the submission recognized the role of the Court in developing human rights in the early 1990s, it addressed sharp criticism to its sentencing practice as of 1994-95. As the HCWG pointed out, the last advanced decision of the Constitutional Court was made in 1995.

⁵⁰ *Id.*

⁵¹ *See supra*, p.2, n.1, at 98

⁵² *Id.*

⁵³ *See infra*, p.17, n.56

⁵⁴ *See supra*, p.13, n.47.

⁵⁵ *See supra*, p.2, n.1 at 113.

⁵⁶ The joint report of the Women Against Violence Association (NANE) and the Habeas Corpus Working Group (HCWG) on the Realization of the Convention on the Elimination of All Forms of Discrimination Against Women in Hungary Incorporated with the Critical Examination of the Report of the Hungarian Government Presented at the 2002 August Session of the CEDAW Committee of the UN, <http://www.habeascorpus.hu/en/index.htm>

This decision was the first of its kind in declaring it unconstitutional not to recognize the common law partnership of homosexual couples.⁵⁷ Mainly those who have suffered from the court's later decisions are, according to HCWG, women and sexual minorities.

Twenty-eight Constitutional Court decisions have touched upon the equality of men and women, but none of them abolished a discriminatory regulation that puts women at a disadvantage in comparison to men, or found that some legislative body caused, through its neglect, a situation of unconstitutional discrimination against women. Never, not even in its initial phase of developing fundamental rights has the Constitutional Court made a decision that indicates thorough knowledge of issues connected to gender equality, gender roles, women's rights or sexuality. On the contrary, the decisions of the Constitutional Court pertaining to the equality of men and women are superficial, prejudiced, severely burdened with logical mistakes and operate with a rather uneducated notion of gender roles. In our opinion, the standard of the ideas about gender roles discernible from the decisions of the Constitutional Court is low, they indicate that the Constitutional Court is not sufficiently committed to women's equality and studying the issues of equality. Since its foundation, the Constitutional Court has not made a single decision that extended women's rights. Without exception, the decisions that point towards the equality of women and men have extended the rights of men.⁵⁸

iv. POLICE RESPONSE TO DOMESTIC VIOLENCE

Police still treat domestic violence as a family affair and seek not to interfere in this realm. This attitude naturally leads to tragedy in numerous cases. Court records are often replete with concise descriptions showing this indifference as the following instances demonstrate.

Family conflicts made police assistance necessary on several occasions. On such occasions, police issued a warning.⁵⁹ The accused assaulted the injured who suffered minor injuries several times. During such assaults, the injured called the police three to four times. The police arrived at the scene on every occasion, but no definitive action was ever taken.⁶⁰

⁵⁷ *Id.*, (Referring to the Constitutional Court's Decision Nr. 14/1995. (III.13.)

⁵⁸ *Id.*

⁵⁹ See *supra*, p.2, n.1 at 233-35

⁶⁰ *Id.*

In another case, the wife instituted proceedings against her husband for assault. During the proceedings, the accused was not taken into custody.⁶¹ On the day of the trial, the accused strangled his wife, put her into a wardrobe, locked the door to it and left the city.⁶² The dead body was later detected by the son of the victim. Other cases demonstrate how the authorities and courts are often equally insensitive towards the plight of battered children. As the Supreme Court pointed out in a case, simple assault of a minor is not a crime since statutory provisions do not punish lesser mistakes during child rearing⁶³.

The attitude of *Zsaru* (Cop) Magazine provides an excellent example of the perception of authorities regarding domestic violence.⁶⁴ This magazine can fairly be considered as the official magazine of the National Police Headquarters, which is quite popular among both policemen and the wider public.⁶⁵ It regularly publishes statistical data on domestic violence and comments on the individual cases.⁶⁶ Its articles generally characterize domestic violence as family disputes.⁶⁷ In addition, these articles are often illustrated by degrading photographs as well as comments such as saying that a female partners just got what they deserved.⁶⁸

The situation is similar in cases of sexual abuse perpetrated within the family. The *Zsaru Magazine*, which again, is the magazine of the national organization of the Department of Interior, calls an 11-year incest victim a prostitute on its front cover and page 54 of issue 2002/15. The author only states about the father that “However he had so much *honesty* left in him, that it was not him who initiated the little girl, but trusted that task to a friend.” (emphasis added).⁶⁹

⁶¹ *Id.*

⁶² *Id.*

⁶³ BH 1992.623

⁶⁴ *See supra*, p.17, n.56

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

B. LEGAL RESPONSE TO DOMESTIC VIOLENCE IN THE USA

i. DEVELOPMENT OF THE ISSUE IN THE USA

Although American colonies proscribed wife abuse which was thought to cause instability and a threat to settlements, these laws were not strictly enforced.⁷⁰ As early as the 1820s, courts began to recognize the doctrine of chastisement⁷¹ and became increasingly hesitant to expose family affairs to public scrutiny.⁷² This attitude is reflected by the Rhodes⁷³ case, which was a case involving domestic battery. As the Supreme Court of North Carolina stated "the laws of this State do not recognize *the right of the husband to whip his wife*, but our Courts will not interfere to punish him for moderate correction of her, even if there had been no provocation for it."⁷⁴ The court further held that although the conduct of the husband certainly met all required elements of a battery, common sense and policy considerations militated against state interference when the victim was the wife of the batterer.⁷⁵ The state's highest court compared the husband-wife relationship to a parent-child relationship, and concluded that public exposure of any conflict results in more harm than benefit.⁷⁶ The court held that the power of a husband over his wife was not unbridled and recognized one exception when excessive, permanent or malicious injury was inflicted or threatened or when it led to an intolerable condition of the victim.⁷⁷ Finally, the court referred to several authorities and pointed out that this traditional power of the husband over his wife had been in steady decline.⁷⁸

⁷⁰ See *supra* p.7, n.29 at 6-7

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *supra*, p.5., n.7 at 424 (**State v. Rhodes**, 61 NC 453 (1868))

⁷⁴ 1868 WL 1278, *1 (N.C.)

⁷⁵ *Id.* at 1-2.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* at 2.

⁷⁸ *Id.* at 2. (Blackstone says "that the husband, by the old law, might give the wife moderate correction, for as he was to answer for her misbehaviour, he ought to have the power to control her; but that in the polite reign of Charles the Second, this power of correction began to be doubted.") (Wharton says, that by the ancient

As of the 1850s, substantial structural changes occurred in the American family, followed by changes in conceptions about authority and hierarchy in family.⁷⁹ Women's movements began to evolve, demanding changes in the status and rights of women.⁸⁰ Until the 1970s, domestic violence was continued to be considered a private family affair with little to no place for state interference.⁸¹

By the late 1970s, the change in attitude regarding family affairs, hierarchy in the family and the status of women in general, combined with human rights movement, raised the issue of domestic/family violence to the level of the legislature and caused this issue to become a national issue as well.⁸² These changes run concurrently with and were bolstered by international legal movements to fight domestic violence and to provide women with equal legal status in society.⁸³ More and more battered women successfully challenged the failure of police departments to intervene on their behalf and sought compensation for the inaction.⁸⁴

In *Bruno* twelve wives filed a suit against the clerks of the Family Court of New York City and the New York City Police Department, seeking declaratory and injunctive relief based on the alleged pattern and practice of discrimination by not enforcing statutory provisions protecting battered wives. Their complaint stated that

probation and Family Court non-judicial personnel, with the knowledge and either the tacit consent or express approval of their supervisors, engage in a pattern of conduct calculated (1) to deter battered wives from filing petitions for orders of protection against their offending husbands, (2) to block them from meaningful access to Family Court Judges empowered to issue temporary orders of protection, and (3) by failing to advise the wives that the defendant's proffer of counseling is

common law the husband possessed the power to chastise his wife; but that the tendency of criminal courts in the present day, is to regard the marital relation as no defence to a battery.)

⁷⁹ See *supra* p.20, n.70

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Peter N. Swisher ET AL., *Family Law: Cases, Materials and Problems* 426 (2d ed. 1998) (authors point out two cases which are **Thurman v. City of Torrington**, 595 F.Supp 1521 (D.Conn.1984) and **Bruno v. Codd**, 393 N.E.2d 976 (N.Y.1979)

voluntary, to dissuade complainants from pursuing their legal remedies.⁸⁵

While the Court of Appeals recognized most of the allegations, it stated that declaratory and injunctive relief might not always be in the interest of justice.⁸⁶ In this case, the plaintiff obtained a consent judgment requiring the police department to act quickly and arrest husbands if there was a reasonable cause to believe that a felony had occurred or a protection order had been violated.⁸⁷ Moreover, there was no evidence that those who were responsible for the administration of the Family Court had any knowledge of the practice complained of.⁸⁸ Finally, the Family Court Act has been modified to prevent public officials from discouraging or hindering any person to file a petition.⁸⁹

In *Thurman*⁹⁰, a wife and her son brought an action against the city and its police officers, alleging non-performance of their official duties with respect to the complaints regarding threats and assault by the husband. As the court pointed out the role and status of women changed dramatically.⁹¹

Today, however, any notion of a husband's prerogative to physically discipline his wife is an "increasingly outdated misconception." *Craig v. Boren*, 429 U.S. at 198-99, 97 S.Ct. at 457-58. As such it must join other "archaic and overbroad" premises which have been rejected as unconstitutional. *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir.1976) (rejecting the notion that pregnancy renders servicewomen unfit and requires discharge); *Stanton v. Stanton*, 421 U.S. 7, 14-15, 95 S.Ct. 1373, 1377-1378, 43 L.Ed.2d 688 (1975) (rejecting "old notion" that the female is destined solely for the home and the rearing of the family and the male only for the marketplace and the world of ideas). A man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and may not "automatically decline to make an arrest simply because the assaulter and his victim

⁸⁵ 393 N.E.2d 976, 977 (N.Y.1979)

⁸⁶ 393 N.E.2d 976 (N.Y.1979)

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Thurman v. City of Torrington*, 595 F.Supp. 1521(D.Conn.1984)

⁹¹ *Id.* at 1528

are married to each other." *Bruno v. Codd*, 90 Misc.2d 1047, 1049, 396 N.Y.S.2d 974, 976 (1976), *rev'd on other grounds*, 64 App.Div.2d 502, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 419 N.Y.S.2d 901, 393 N.E.2d 976 (1979). Such inaction on the part of the officer is a denial of the equal protection of the laws.⁹²

The federal Supreme Court has also dealt with this question in several cases. Although **DeShaney v. Winnebago County Department of Social Services**⁹³ involved a child abuse situation, the case has had a huge impact on domestic violence litigations of battered women as well.⁹⁴ The DeShaney case was brought as a section 1983 civil rights action⁹⁵ by the mother in her own name and on behalf of her son (Joshua) against the Winnebago County Department of Social Services (DSS) and several of its social workers.⁹⁶ "The mother alleged that DSS's failure to act denied her son of his liberty rights in violation of the due process clause of the Fourteenth Amendment."⁹⁷ After the divorce of Joshua's parents, the court granted custody to his father.⁹⁸ Although the second wife informed the police about the child abuse, DSS – in addition to interviewing the father - took no further actions.⁹⁹ DSS employees visited Joshua's home more than twenty times and had knowledge of the medical treatments the child had received as a consequence of his being beaten, nonetheless, DSS did not consider any special protection necessary.¹⁰⁰ As a result, the child was battered so severely that he had become permanently brain

⁹² *Id.*

⁹³ 489 U.S. 189 (1989)

⁹⁴ *See supra*, p.7, n.29 at 549-552.

⁹⁵ *Id.* ("Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or the Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

damaged.¹⁰¹ The mother alleged that DSS was put on notice several times that the child, who was also treated on various occasions in the emergency room¹⁰², was in serious danger¹⁰³. The Supreme Court held that the mother was not entitled to seek damages under the due process clause of the Fourteenth Amendment to the US Constitution because the purpose of that clause is to protect people from the state and not from each other, even if the state was fully informed of the danger.¹⁰⁴ Further, the court pointed out that it was the father and not the state who assumed liability for the child, and thus no special relationship between the state and the child had been created or assumed.¹⁰⁵ Since the state returned Joshua to his father "it placed him in no worse situation he would have been in, had the state not acted at all."¹⁰⁶ Before *DeShaney*, battered women could sue individual police or municipal officers, claiming that their substantive due process rights had been violated when the officers failed to protect them, although they would have had the duty to do so and were placed on notice that such protection was necessary.¹⁰⁷ After *DeShaney*, battered women can no longer rely on their substantive due process rights against the police for failure to intervene, unless the case fits into one of the narrowly tailored exceptions to the rule.¹⁰⁸ The Court held that victims in custodial relationships¹⁰⁹, those whom the state actor puts in increased danger¹¹⁰ and those

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (489 U.S. 189, 209 (1989) ("I just knew the phone would ring some day and Joshua would be dead."))

¹⁰⁴ *Id.* at 189-90

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See supra*, p.7, n.29. at 553-562

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, **Duong v. County of Arapahoe**, 837 P.2d. 1241 (9th Cir. 1988) (No exception applies when the wife's estranged husband killed the wife outside the courtroom despite her compelled attendance and a state promise to protect her when she appears), **Doe v. Taylor Independent School District**, 975 F.2d. 137 (C.A.5, 1993) (Compulsory school attendance created a special relationship between the school officials and students which gives rise to an affirmative duty to protect children from known danger under the due process clause of the Fourteenth Amendment to the US. Constitution) but see

who are injured as a result of inadequate police training¹¹¹ still enjoy substantive due process rights.¹¹² Finally, battered women can sue under state law in tort and under state constitutional provisions, and they may claim a procedural due process violation if the state has created a legitimate expectation of entitlement and it had denied her that entitlement without adequate procedural benefits.¹¹³

Moreover, battered women may claim a denial of equal protection if they can prove discrimination based on gender or minority status or a discriminatory administrative classification.¹¹⁴

As a result of the above changes, legal approaches to domestic violence have changed considerably.¹¹⁵ Legal reforms have occurred in the majority of states, with Pennsylvania being the first state to enact a domestic restraining law in 1976¹¹⁶, which has led to the adoption of mandatory arrest statutes, no-drop policies of the prosecution, civil protection orders and "coordinated legal and social service strategies".¹¹⁷ "To effectively intervene in domestic violence, treatment coupled with sanctions, constraints, and conditions matching the seriousness of the crime are needed to deter further violence and restore victim independence."¹¹⁸

D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d. 1364 (C.A.3, 1992) (Compulsory school attendance laws do not create special relationship.)

¹¹⁰ *Id.*, **Wood v. Ostrander**, 879 F.Supp. 1343 (9th Cir. 1989) (A state trooper placed the rape victim in an increased danger when he left her in a high-crime area alone at 2.30AM after arresting the driver and seizing the car.), **Freeman v. Ferguson**, 911 F.2d 52 (8th Cir. 1990) (the police chief place the victim in greater danger by instructing other officers not to stop her husband – who was his close friend - from abusing his wife.)

¹¹¹ *Id.*, **City of Canton v. Harris**, 109 S.Ct. 1197 (1989) (The city was found liable for the failure to train police officer to recognize when someone in custody needs medical assistance)

¹¹² *Id.*

¹¹³ *Id.*, **Goldberg v. Kelly**, 397 U.S. 254 (1970) ("A pro-arrest domestic violence statute probably does not create such an entitlement but a mandatory arrest domestic violence statute does if the conditions triggering the mandatory arrest are present.")

¹¹⁴ *Id.* at 559-60

¹¹⁵ See *supra*, p.21, n.84 at 427, 431, 435

¹¹⁶ See *supra*, p.21, n.84 at 426-31

¹¹⁷ *Id.* at 427

¹¹⁸ See *infra*, p. 29, n. 150

1. MANDATORY ARREST

Mandatory arrest statutes require police to make an arrest if there is probable cause to believe that domestic violence occurred.¹¹⁹ These statutes aim to remove the offender from the family, which on the one hand has a general deterrent effect, and give protection and time for the victim to consider her situation on the other.¹²⁰ By removing discretion from the police, it is hoped that discriminatory adjudication of domestic violence claims will be prevented.¹²¹ Some states have adopted presumptive arrest policies, which provide a leeway for police officers to tailor their actions to the needs of an individual case.¹²²

The mandatory arrest policy was tested by the Minneapolis Police Department and the National Institute of Justice in 1978.¹²³ To best analyze repeat violence, offenders were divided into three different groups.¹²⁴ In the first group, offenders had been arrested for at least one night¹²⁵, in the second group, offenders had been removed from the scene and were subject to arrest only if they did not comply with the removal instructions¹²⁶, and in the third group, violators were given advises and/or were included in some form of mediation.¹²⁷ Arrest proved to be superior to all alternatives employed by the police.¹²⁸ The Minneapolis study was later followed by six other studies that provided similar results and suggested a more sophisticated picture regarding the effectiveness of mandatory arrest policies.¹²⁹ The

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See supra p.7, n. 29 at 503-508

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 538-43.

first lesson to be drawn was that the higher the stakes the better the result.¹³⁰ This was the reason why similar policies failed to yield any results in ghettos or among unemployed individuals.¹³¹ Second, effective enforcement of mandatory arrest policies resulted in a decrease in the number of victims as far as mandatorily arrested individuals and their future victims were concerned.¹³² Finally, issuance of citations proved to be equally effective, due to the long period of uncertainty during which an arrest could be made.¹³³ Although results of this experiment spread quickly among professionals, the impact of jury verdicts awarding compensations for the victims of family violence proved to be the best incentive in implementing mandatory arrest policies.¹³⁴ One of the most famous cases was a 2.5 million dollar jury verdict against the Torrington, Connecticut Police Department for its failure to arrest an abusive husband who ultimately severely injured his wife.¹³⁵ Oregon was the first state which adopted a mandatory arrest statute in 1977.¹³⁶ This statute was tested in **Nearing v. Weaver**¹³⁷ by the Oregon Supreme Court, which imposed liability on the police for failure to enforce a restraining order.¹³⁸

Police officers who knowingly fail to enforce a judicial order under the "Abuse Prevention Act" are potentially liable for resulting harm to the psychic and physical health of the intended beneficiaries of the order; such officers do not perform a "discretionary function or duty" so as to be immune from liability; and those officers may not claim immunity under statute providing immunity for making good-faith arrests, not for failing to do so.¹³⁹

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 537

¹³⁷ 295 Or 702 (1983)

¹³⁸ *Id.*

¹³⁹ *Id.*

As a result, police departments were practically forced to adopt mandatory arrest policies.¹⁴⁰ By the end of the 1980s, mandatory arrest statutes had been adopted by the majority of states.¹⁴¹ Mandatory arrest policies drew criticism as well. Several authors have criticized mandatory arrest statutes for failing to implement rules to avoid dual arrests, which is the result of the arrest of the victim, who acted in self-defense, and her batterer, who was the first aggressor at the same time.¹⁴²

2. NO-DROP POLICY

Several states and localities adopted a so-called no-drop policy which requires prosecution of domestic violence with or without the co-operation of the victim. This policy is predicated on a long experience (see the analysis of Kristin Littel) with respect to domestic violence victims.

Domestic violence is not confined to any one segment of the population; it crosses race, social class, gender, and vocational lines. However, no matter how heinous the assault, the great majority of domestic violence victims have one characteristic in common: after making the initial report, they have neither the will nor the courage to assist prosecutors in holding the abusers criminally responsible.¹⁴³

Domestic violence differs substantially from other crimes for two main reasons: violence is between intimates and generally progressive in nature.¹⁴⁴ Victims often fear with good reason that court involvement will generate additional violence by the batterer, and therefore, they are often hesitant to seek legal assistance.¹⁴⁵

The most important characteristic of a no-drop policy is to send a clear message that domestic violence is a serious crime, a huge danger to society and

¹⁴⁰ See *supra* p. 7, n.29 at 537-38

¹⁴¹ *Id.*

¹⁴² See Switcher *supra*, p.21, n.84

¹⁴³ See *supra*, p.7, n.29 at 581

¹⁴⁴ See *infra*, p.29, n.150

¹⁴⁵ *Id.*

once committed, it will be prosecuted whether or not the victim is willing to press a charge.¹⁴⁶ The underlying reason is that prosecutors represent the state in general and society in particular, thus, there is no need for the victim to co-operate.¹⁴⁷

One of the most important means of fighting domestic violence is the **civil protection order**. "A protection order (OFP) is a civil order issued by a court upon the request of the petitioner which restrains the respondent from committing certain acts, such as having contact with or assaulting the petitioner."¹⁴⁸ These orders are known also as protective orders or restraining orders.¹⁴⁹ As Kristin Littel defines it, "such an order directs the abuser to refrain from assaulting or even contacting the victim or engaging in specific acts (for example, going to the victim's place of work or their children's school)¹⁵⁰. Protection order petitions and violation hearings usually represent the bulk of domestic violence caseloads."¹⁵¹

3. COORDINATED LEGAL AND SOCIAL SERVICE STRATEGIES

Finally, no statutory scheme would be complete and effective without "coordinated legal and social service strategies"¹⁵². These strategies include specialized domestic violence courts and domestic violence prosecutors, a witness assistance system, mandatory participation in counseling and treatment (commonly known as batterer intervention program) and extensive support for domestic violence victims before, during and after the proceeding.¹⁵³

¹⁴⁶ See *supra*, p.7, n.29 at 583-84

¹⁴⁷ *Id.*

¹⁴⁸ See *infra*, p.35, n.208

¹⁴⁹ *Id.*

¹⁵⁰ Kristin Little, Specialized Courts and Domestic Violence, <http://usinfo.state.gov/journals/itdhr/0503/ijde/littel.htm>

¹⁵¹ *Id.*

¹⁵² See *supra*, p. 21, n. 84

¹⁵³ *Id.*

ii. CHANGED LEGAL RESPONSE TO DOMESTIC VIOLENCE IN PRACTICE (American Models)

1. THE DULUTH MODEL

One of the best known domestic violence projects in the United States is the Duluth model established by Ellen Pence in Duluth, Minnesota.¹⁵⁴

The primary purposes of this model are to aggressively respond to domestic violence and to offer comprehensive support for victims.¹⁵⁵ In the scope of the program, in order to effect tangible results, courts, police and probation officers have implemented changes in their policies regarding the punishment of offenders, as well as more effective means of securing a safer environment for victims in order to send a clear message to abusive partners.¹⁵⁶ For these purposes, Duluth applied for and received federal support in the amount of 200.000 dollar.¹⁵⁷ Among the first changes in legal rules was the implementation of no-drop and mandatory arrest policies.¹⁵⁸ Victims were no longer required to press charges because every case was prosecuted, even if a victim was unwilling to assist the authorities.¹⁵⁹ In addition, the Domestic Abuse Intervention Project was allowed to monitor police actions on a daily basis and follow how the police responded to individual phone calls.¹⁶⁰ As Ellen Pence recalled, the number of arrests had skyrocketed, and by 1994, one in every nineteen men had gone through the new system.¹⁶¹ To avoid escalation of violence over visitation issues, a new center had been established to provide opportunity for

¹⁵⁴ Maureen Boyle, Duluth Project changed attitudes toward abuse victims and batterers, <http://www.s-t.com/projects/DomVio/duluthproject.html>

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

the abusers and their children to meet.¹⁶² As a result, the safety of battered women improved considerably with the severity of assaults clearly decreasing and victims feeling less uncomfortable about asking for help from professionals.¹⁶³

Unfortunately, the frequency of domestic assaults has not changed since the inception of this project.¹⁶⁴ As Ellen Pence pointed out "We have not seen it as a prevention program."¹⁶⁵ There are just as many cases as there were 13 years ago. We still have more work to do"¹⁶⁶.

2. THE SAN DIEGO MODEL

In 1990, a new domestic violence treatment model has been introduced in San Diego.¹⁶⁷ Before the new policies took effect, the number of domestic violence related murders had been increasing, domestic assaults had often not been prosecuted and assistance for domestic violence victims was rarely provided in an effective manner.¹⁶⁸ In order to effect changes, close cooperation of the court, prosecutors, hospital and social workers became necessary.¹⁶⁹ There was also a need to change the attitudes of police officers, who were sometimes hesitant to enforce a new policy.¹⁷⁰ As Sgt. O'Dell pointed out, a harder approach had become necessary during training, emphasizing that under-enforcement of a policy may result in punitive damages.¹⁷¹ San Diego adopted the presumptive arrest policy, which did not make an arrest mandatory but strongly encouraged and the city implemented a no-drop policy, which emphasized that the officer was the person

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Maureen Boyle, San Diego program has reduced domestic slayings by half, <http://www.s-t.com/projects/DomVio/sandiegoprogram.html>

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

who pressed charges rather than the victim.¹⁷² San Diego spent 800.000 for establishing a specialized unit. Arrested offenders are now sent to the specialized domestic violence unit for booking and an interview.¹⁷³ Injured victims are brought to a hospital, where in addition to receiving medical care, trained doctors and nurses take notes, conduct short questioning sessions and take photograph.¹⁷⁴ Finally, victims are provided assistance by victim/witness advocates and social workers who also help them through the intricate legal process.¹⁷⁵

3. THE MASSACHUSETTS MODEL

Massachusetts boasts some of the best legal protection for domestic violence victims in the USA.¹⁷⁶ In 1978, Massachusetts created the restraining order process, which allows police to remove an abuser if he is a potential threat to the victim.¹⁷⁷ Violation of a restraining order is a misdemeanor punishable by a maximum sentence of two years in jail.¹⁷⁸ In 1990, the legislature extended coverage of restraining orders to those in substantive dating relationships and required police to adopt a written domestic violence policy.¹⁷⁹ Restraining orders have been issued in the scope of civil proceedings while their violation constitutes a criminal act.¹⁸⁰ The crime of stalking was created in 1992 as a felony punishable by a mandatory one-year jail sentence.¹⁸¹ Recent statutory provisions contain a mandatory arrest provision, legally known as 209A orders (M.G.L.A. 209A), if police have probable cause to believe that domestic violence has occurred and victims are provided with

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Reggie Sheffield, State law offers help for battered women, <http://www.s-t.com/projects/DomVio/statelaw.html>

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

24-hour access to restraining orders (emergency protective orders when courts are closed).¹⁸²

Moreover, the Supreme Court of Massachusetts extended the definition of abuse to include return visits "made by a husband who has been ordered out of his home".¹⁸³

In the last decade, several professionals have heavily criticized emergency restraining orders.¹⁸⁴ Elaine Epstein, former president of the Massachusetts Bar Association, pointed out that judges, prosecutors and the police have developed a 'better safe than accurate' rule, which means that they immediately take actions without first assessing an individual's petition to shield themselves from possible responsibility.¹⁸⁵ Judges have operated as a rubber stamp and there has almost been a "presumption to grant the order".¹⁸⁶ This tendency is further strengthened by the fact that the media seizes on cases where an order was not issued.¹⁸⁷ As Richard Kelleher, a Wareham District Court judge stated, he never discouraged anyone from filing for a 209A petition, nor did he look to see if any prior orders have been issued.¹⁸⁸ This attitude has naturally offered an opportunity for abuse¹⁸⁹ such as the example of a woman who was able to obtain a restraining order to avoid eviction by her landlord.¹⁹⁰ In another example, a police officer obtained a restraining order against his ex-girlfriend who was harassing him at work.¹⁹¹

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Preston P. Forman, Restraining orders can be abused by angry spouses, http://www.s-t.com/projects/DomVio/restraining_orders.html

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

His ex-girlfriend then retaliated by obtaining a restraining order against him.¹⁹² As a consequence, the police officer was put on administrative leave, and his weapons were seized.¹⁹³ In addition, police showed up at his parents' home to perform a further search for guns.¹⁹⁴ Although both of these cases finally resulted in dismissals, the parties involved suffered uncompensable harm.¹⁹⁵ The chance of an abuse is even higher if petitioner is involved in divorce or custody proceedings.¹⁹⁶ The numbers of emergency restraining orders have skyrocketed in these last two decades.¹⁹⁷ While there were only 384 orders issued in 1985, this number exceeded 14,800 by 1994.¹⁹⁸ Mr. Shine, a defense attorney in Plymouth County, finds it even more troubling that restraining orders are often utilized by parents as a means to control a child.¹⁹⁹ Even if the petition gets dismissed this fact may surface when the child applies for a job.²⁰⁰

4. THE LAWRENCE MODEL

Greater Lawrence, Kansas established its own family violence program, which places emphasis on treatment provided by the Greater Lawrence Mental Health Center.²⁰¹ Experience shows that batterers are unwilling to attend treatment programs of their own volition so court ordered attendance and/or a threat of a jail time have both been used as motivating factors for these individuals.²⁰²

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Maureen Boyle, Batterers in Lawrence pay – time or money, <http://www.s-t.com/projects/DomVio/lawrence.html>

²⁰² *Id.*

In this model, batterers have to pay a sliding fee, or if they cannot afford that, they are allowed to pay with their time through community service.²⁰³

5. THE QUINCY MODEL

Adoption of a domestic violence program was primarily motivated by the alarming rise in domestic violence killings.²⁰⁴ This model provides support for the victims and deal with the batterer as well.²⁰⁵ The courts, the police and attorneys for the prosecution has established domestic violence units and has closely cooperated with each other and with different counseling services in order to provide more effective support for victims of domestic abuse.²⁰⁶ The result was the same as that experienced by the Duluth model and reflected primarily in the homicide statistics.²⁰⁷

iii. SPECIALIZED DOMESTIC VIOLENCE COURTS

According to the survey of the National Center for State Courts, some 200 courts responded that they have some kind of specialized procedure for domestic violence cases in 1998²⁰⁸. "By 2000, over 300 judicial systems nationwide had specialized structure, processes and practices to handle domestic violence cases. These structures, processes and practices are commonly referred to as `domestic violence courts` "²⁰⁹ Specialization offers several advantages for handling this issue.²¹⁰ First, specialized forums are much easier to be identified and accessible for the victims.²¹¹ Second, specialization allows judges and court personnel to obtain comprehensive knowledge about domestic violence and to provide better

²⁰³ *Id.*

²⁰⁴ Maureen Boyle, 17-year-old Quincy program marked change in approach, <http://www.s-t.com/projects/DomVio/quincyprogram.html>

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Julie A Helling, Specialized Criminal Domestic Violence Courts, <http://www.vaw.umn.edu/documents/helling/helling.html>

²⁰⁹ *See supra*, p.29, n.150

²¹⁰ *See supra*, p.35, n.208

²¹¹ *Id.*

information as to victim resources.²¹² Such cases require specialized knowledge of the relating laws, prompt, informed and adequate decisions and special precautions before, during and after the trial.²¹³ Courts are able to prevent abusers from recounting different version of their stories to different judges by providing judges who hear domestic violence cases.²¹⁴ This makes possible a more consistent sentencing practice, which means increased penalties for increased and/or additional violence.²¹⁵ Conflict between protection orders (commonly known as OFPs) and criminal no-contact orders can also be avoided through area specialization, especially when the court has both civil and criminal jurisdiction.²¹⁶ Further, specialization provides for a timely response to the offense.²¹⁷ As a matter of fact, the more quickly the penalty follows the criminal act, the greater its deterrent effect.²¹⁸ This in turn benefits the victims who can often become more hesitant to pursue a case as time passes.²¹⁹ Finally, it sends a clear message to the community that domestic violence is no longer a private family matter but a serious crime, and society will hold abusers accountable.²²⁰

One disadvantage of specialization is perceived bias, which means that judges appear to be advocates of women instead of impartial adjudicators of cases.²²¹ Another disadvantage is, if the specialized court is not working well, victims have no other forums to turn to for help. Domestic violence cases are very time-consuming,²²² and such cases require additional care regarding sentencing and

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

release conditions and increased application of supervised probation. Numerous court appearances are required to "monitor the defendant's progress in batterer intervention program" where the presence of the prosecutor, defense attorney and probation officers may become necessary. All of this additional involvement on the part of legal and correction officials often results in a higher burnout rate for these professions.²²³

SPECIALIZATION MODELS

Julie A. Helling distinguishes four basic models of specialization.

MODEL I.: PRETRIAL CONFERENCES ONLY²²⁴

Municipal DV Pretrial Court, Seattle, Washington²²⁵

Misdemeanor (90 days in jail and/or 1000\$) and gross misdemeanor (one year in jail and/or 5000\$ fine) domestic violence cases involving adult offenders are provided a special pretrial conference calendar that is separate from other misdemeanor offenses.²²⁶ "Civil orders for protection are heard in District Court and felony offenses are heard in Superior Court".²²⁷ Three judges are assigned to the domestic violence pretrial calendars.²²⁸ This specialization extends only to pretrial conferences.²²⁹ "If a domestic violence case is set for trial, it will go to the Master Calendar, and may be assigned to any judge on the bench for trial"²³⁰. "A pretrial conference is a court appearance where the prosecutor and defense attorney (or defendant) attempt to plea-bargain a case before setting it for trial."²³¹ Domestic violence cases are very time-consuming especially at this early stage of the

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

proceeding.²³² Consideration shall be given to the victim's concerns, batterer intervention programs, firearm possession, substance abuse programs, and the possible consequences of a conviction on immigration status.²³³ In addition to the prosecutor and defense attorney, the presence of probation officers, witnesses and/or victim assistants and security personnel is often necessary.²³⁴ Pretrial conferences can be scheduled to a fixed period of time.²³⁵

The Seattle City Attorney's Office also has a special domestic violence unit which handles misdemeanor and gross misdemeanor cases²³⁶, while the King County Prosecutor's Office is in charge of felony domestic violence cases, which also has a separate domestic violence unit.²³⁷ This unit decides whether to press charges and gives sentencing and bail recommendations.²³⁸ If possible, cases are handled by the same attorneys throughout the entire procedure.²³⁹

Witness assistants play an especially important role in this system.²⁴⁰ Unlike witness assistants in general, witness assistants in the Seattle model are closely connected to the prosecution.²⁴¹ Their duty is to contact victims before and after the trial, to relay information to the prosecutors, and to make sentencing and bail recommendations.²⁴² Witness assistants are present at the pretrial conferences, may argue against the lifting of a no-contact order or emphasize particular aspects of the crime when the victim is reluctant to do so herself.²⁴³ However, witness assistants cannot provide confidentiality, since they are employed by the

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

prosecution.²⁴⁴ This is the reason why they cannot assist women charged with crimes.²⁴⁵

MODEL II.: ALL NON-EVIDENCIARY APPEARANCES²⁴⁶

Domestic Violence Home Court, Sacramento, California²⁴⁷

This court hears all misdemeanor and felony domestic violence cases if there is no need for a witness to testify.²⁴⁸ This includes determination of bail and custody status, pretrial conferences, where the defense attorney and the prosecutor attempt to plea bargain the case before setting it for trial, taking of a guilty plea and sentencing and mandatory status reviews of defendant's participation in batterer intervention programs.²⁴⁹ Preliminary hearings and trials are not heard by the Domestic Violence Home Court.²⁵⁰ Since such courts hear only non-evidentiary proceedings, hearings are much easier to schedule at a fixed period of time.²⁵¹ Two judges are assigned to the court, one primary judge and one backup judge.²⁵² In addition, the prosecutor's office has a similarly specialized domestic violence unit.²⁵³ If possible, the same attorney handles the case from the preliminary hearing through the trial.²⁵⁴ The prosecutor's office employs several witness assistants²⁵⁵, whose primary duty is to help victims through the process of filing for restraining orders, making "victim-impact" statements and providing general support.²⁵⁶ In addition, they acquire information from the victim regarding the history of abuse, her medical

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

condition and any involvement of substance abuse, which may be relevant in adjudicating the case.²⁵⁷

MODEL III.: ALL APPEARANCES IN SPECIALIZED COURTS²⁵⁸

Clark County District Court, Vancouver, WA²⁵⁹

Some specialized courts handle every court appearance from arraignment to sentencing.²⁶⁰ The advantage of this specialization is that the court's personnel from the judge to the clerks and probation officers possess considerable expertise in handling domestic violence cases in general and have some knowledge regarding some of the victims and batterers, their compliance with court orders and the history of abuse.²⁶¹ This type of specialization is the one which best promotes consistency in disposition of cases.²⁶²

MODEL IV: COMBINED CRIMINAL AND CIVIL JURISDICTION²⁶³

Clark County District Court, Vancouver, WA (see above)²⁶⁴

A domestic battery may result in both civil and criminal proceedings. While family courts deal with orders for protections (OFP), child custody and divorce they generally do not have jurisdiction over relating criminal charges.²⁶⁵ As a result, the family court and the criminal court may issue conflicting orders (issuance of a no-contact order and mandatory participation in a program for batterers to ensure family reunification at the same time).²⁶⁶ This problem is resolved by the courts having combined criminal and civil jurisdiction.²⁶⁷ Similarly to the third model, judges and

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

other court personnel are often familiar with the persons involved in family violence cases, have extensive knowledge of their personal backgrounds and their willingness to comply with courts rules.²⁶⁸ The Clark County District Court hears petitions for protection orders, has jurisdiction over misdemeanor criminal domestic violence cases and conducts felony preliminary hearings.²⁶⁹ The county employs one witness assistant, whose primary job is to ensure that the witness appears to testify but who in turn does not provide any information to the court.²⁷⁰ The City of Vancouver has a contract with an independent agency for protection order and release recommendations and provides general support for victims.²⁷¹

Combined jurisdiction may raise some legal problems as well.²⁷² While defendants in a criminal procedure have a Fifth Amendment right to remain silent and a Sixth Amendment right to be represented by counsel, there are no such rights in a civil proceeding.²⁷³ Further, there is a possibility that an OFP (Order for Protection) testimony will be used against the declarant in a criminal proceeding.²⁷⁴ Since the prosecutor represents the state and not the victim, additional problem may arise when the unrepresented victim is being cross-examined at the OFP hearing, which in turn may provide material to impeach her/him in the following criminal trial.²⁷⁵ This is the reason why some states prohibit using an OFP testimony in the succeeding criminal trial.²⁷⁶

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

iv. EVIDENCIARY ISSUES

1. USE OF CHARACTER EVIDENCE

In most domestic violence cases, assault is preceded by previous charged on uncharged assaults.²⁷⁷ Rule 404(a) of the Federal Rules of Evidence and its state counterparts prohibit introduction of character evidence for the purpose of proving action in conformity therewith on a particular occasion. The underlying rationale is to prevent the jury from drawing the illegal inference that because someone committed a certain act in the past, he or she must also have committed the charged crime in question consistently with his/her character²⁷⁸. There are also some exceptions to this rule. Evidence of other wrongs or acts can be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"²⁷⁹. Professor Myrna Raeder points out that the past acts of the batterer, especially in domestic violence homicide cases, can be analyzed in the scope of the common scheme or plan exception if one characterizes previous acts as continuous control until death occurs.²⁸⁰ Batterers do not necessarily hate their wives; they simply wish to keep them under control. In her opinion, murder is the one final act of control.

Most domestic violence evidence fits within traditional plan theory. The evidence forms a linked acts or chain plan in which each crime is a means to the overarching end – links in a chain ultimately leading to the accomplishment of the overall objective. Therefore, intimidation, stalking and assault and property crimes are all integral to the grand design. In practice, this use of control as evidence of a plan appears to have relevance to identity as well as to the existence of a criminal act. In murder cases, while the ultimate goal is control, it is the failure of control to halt the victim's rebellion, culminating in her severing the relationship that triggers the murder as the final act of control. Thus, it

²⁷⁷ See *supra*, p. 29, n. 150

²⁷⁸ George Fisher, *Federal Rules of Evidence, Statutory and Case Supplement*, (2004) p.49

²⁷⁹ Federal Rules of Evidence (FRE), Rule 404(b)

²⁸⁰ George Fisher, *Evidence*, p.192 (2002, 4th ed.) (citing Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. Cal. L.Rev 1463, 1495 (1996))

is the flaw in the original plan, rather than the plan itself, which connects the prior acts to the murder.²⁸¹

2. USE OF HEARSAY EVIDENCE

Hearsay is generally inadmissible at trial due to reliability concerns.²⁸² Since domestic violence victims are often unwilling or hesitant to appear in court, and because jurors have an inherent bias against those parties who do not testify personally at court, the prosecutors are almost always in need of other pieces of evidence. Evidence which favors the prosecution is thus often hearsay evidence, that is, an out of court statement offered for the truth of the matter asserted.²⁸³ Law enforcement agents and witnesses are able to obtain useful information at the scene of the crime from the victim and other witnesses, whose statements could possibly qualify as excited utterances, which are exceptions to the hearsay rule.²⁸⁴ Similarly, 911 calls may qualify under the same exception or as residual exceptions having a strong guarantee of reliability.²⁸⁵ Statements elicited from the batterer by the police may also be useful because such statements in turn are admissible under the statement of a party opponent exception.²⁸⁶ Any confrontation concern was dispelled by the US Supreme Court in *White v. Illinois*²⁸⁷, a case in which the court held that the confrontation clause²⁸⁸ does not require the prosecution to produce the victim at trial nor does it require unavailability of the victim in order for her out-of-court statement to be admissible.²⁸⁹ "A statement that has been offered in a moment of excitement – without the opportunity to reflect on the consequences of one's

²⁸¹ *Id.*

²⁸² *See supra*, p.42, n.280 at 337

²⁸³ FRE 801 (c)

²⁸⁴ *See supra*, p.7, n.29 at 596-98

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ 502 US 346 (1992) (Called into doubt by *Crawford v. Washington*, 541 U.S. 36)

²⁸⁸ U.S.Const. amend VI.

²⁸⁹ *See supra*, p.7, n.29 at 596-98

exclamation - may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom."²⁹⁰ Photographs taken at the crime scene might provide help in introducing the jury to the injuries of the victim, the batterer, and the crime scene itself.²⁹¹ Statements made for the purpose of medical diagnosis may be accepted into evidence as well if the purpose was to seek medical help, even if the individual statement was not made to a physician.²⁹² Finally, witness assistants can testify as experts on the demeanor of the victim and the battered women syndrome.²⁹³

3. SELF-DEFENSE AND THE BATTERED WOMAN SYNDROME

Battered women who kill their abuser often assert self-defense. In order to assert self defense, a defendant has to show a danger of imminent death or great bodily harm caused by an unlawful aggressor which could be prevented only by deadly force.²⁹⁴ It can be used as a last resort as an inherent right to self-preservation.²⁹⁵ In 75% of the cases, battered women kill their abuser under the threat of imminent death or immediate serious physical injury (commonly know as confrontational homicide).²⁹⁶ In other instances, the homicide occurs when the abuser is asleep or "during some other lull in the violence" (commonly known as non-confrontational homicides).²⁹⁷ In extreme cases, battered women hire a third party to kill the abuser (boyfriend, son, mother, etc).²⁹⁸ Assertion of self-defense is generally available only in confrontational homicide cases. As the Supreme Court of North Carolina stated allowing assertion of self-defense in non-confrontational

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁴ Joshua Dressler, *Cases and Materials on Criminal Law*, p.522 (State v. Norman) (2003, 3d ed.)

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 525

²⁹⁷ *Id.*

²⁹⁸ *Id.*

homicide cases would make possible the "opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the possibility of future felonious assault by their husbands."²⁹⁹ Those who support the availability of the battered woman syndrome in non-confrontational homicide cases point out that killing while suffering from this syndrome qualifies as psychological self-defense.³⁰⁰ Battered woman syndrome is a condition that develops from repeated cycles of violence.³⁰¹ Through a process of repeated, constant abuse battered women acquire a learned helplessness.³⁰² Moreover, they perceive an inability to withdraw from the hostile situation.³⁰³ This is why the only outcome in their minds is to kill the abuser at a time when he is unable to protect himself and not waiting until a deadly attack occurs.³⁰⁴ Courts are divided on how to deal with an assertion of self-defense in non-violent homicide cases.³⁰⁵

Proof of battered women syndrome needs expert testimony. Due to the fact that it is a relatively new theory, some courts, applying a three part test, hold expert testimony on this issue to be inadmissible because it does not fulfill some of the following requirements (mostly the third prong which is commonly known as the novel scientific evidence prong):

²⁹⁹ **State v. Norman**, 324 N.C. 253, 265 (1989)

³⁰⁰ See supra, p.44, n.294, (Charles Patrick Ewing, *Psychological Self-Defense*, 14 Law & Hum.Behav. 579, 587 (1990))

³⁰¹ 89 N.C.App. 384 at 392

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See supra, p.44, n.294 at 532 (Court which reject any assertion of self-defense in non-confrontational homicide cases include: **State v. Norman**, 324 N.C. 253 (1989) (stretching the law of self-defense to the killing a sleeping husband would require changing the imminent death or great bodily harm requirement), **Commonwealth v. Grove**, 363 Pa.Super. 328 (1987) (abused wife who killed her sleeping husband not entitled to self-defense instruction as no immediate threat was posed by the decedent), but see **State v. Gallegos**, 104 N.M. 247 (1986)(abused wife could claim self-defense where she walked into bedroom with gun and killed husband who was awake but lying on the bed), **State v. Leidholm**, 334 N.W. 2d 811(1983) (Battered woman syndrome is not itself a defense to homicide charge, the evidence must still be considered in the context of self-defense. A subjective standard is applicable in assessing reasonableness of accused belief)

(1) the subject matter `must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of an average laymen`, (2) `the witness must have sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his research for truth`, and (3) expert testimony is inadmissible if the `state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert`. ³⁰⁶

As exemplified by the *Dyas* decision, some courts require the proposed area of expertise to have received general acceptance in the particular field to which it belongs.³⁰⁷ Other courts permit an expert to testify on a theory which has yet not received general scientific approval "if the testimony both rests on a reliable foundation and is relevant to the task at hand".³⁰⁸

Finally, some other courts have specifically emphasized that juries simply need help in fulfilling their duty regarding some specific situations when common sense experiences of the individual jurors naturally misleads and sways them in judging a situation.³⁰⁹ Such special situations include inferences from eyewitness identification (especially cross-racial identification) and the battered women syndrome.³¹⁰ In the latter case, namely, battered women do not respond to the situation in a way as an ordinary woman would do that.³¹¹

It follows from the above that the outcome of the trial mostly depends on how broadly courts view the imminency requirement and how willing they are to admit novel scientific evidence.³¹²

Battered woman syndrome also surfaces in child abuse cases. In **Graham v. State**³¹³, parents of minors were convicted of performing sexual acts in front of and

³⁰⁶ *Id.*, (*Dyas v. United States*, 376 A.2d 827 (1977) quoting McCormick on Evidence § 13),

³⁰⁷ *Id.*, *People v. Leahy*, 8 Cal.4th 587 (1994)

³⁰⁸ *Id.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

³⁰⁹ See *supra*, p.42, n.280 at 615 (quoting *United States v. Hines*, 65 F.Supp. 2d 62, D. Mass. 1999) ("Common sense inferences may well be way off the mark.")

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² See *supra*, p. 44, n. 294 at 526-32

with their children. The wife did not deny the charges, but she stated that her acts were justified since she had been threatened and beaten by her husband which had led to the incident. The Court of Appeals of Georgia rejected her claim holding that "where the criminal acts were directed towards `non-aggressor victims`, self-defense was not an issue and the battered person defense was not available"³¹⁴

In **Commonwealth v. Conaghan**³¹⁵, the Massachusetts Court of Appeals struggled with the question of whether the battered woman syndrome was available for a mother who murdered her five-year-old son.³¹⁶ Although the mother assumed liability for her act after the murder had occurred, she later sought to withdraw her guilty plea and requested psychiatric examination alleging that her boyfriend was the person who applied deadly force.³¹⁷ She further emphasized that even if she had contributed to the death of her child, she had suffered from battered woman syndrome, which negates the state of mind necessary for her conviction.³¹⁸ The court found insufficient evidence to support her claim and held that "she offered no evidence to show that battered woman syndrome is a mental disease or defect that could have prevented her from being held criminally responsible for her son's death."³¹⁹

4. 911 CALLS

The most common way for domestic violence victims to ask for help has been to dial 911. Although the communication between the victim and the operator is hearsay since it is an out-of-court statement offered for the truth of the matter asserted, it may be admissible as an exception to the hearsay rule as an excited

³¹³ 521 S.E.2d 249 (Ga.Ct.App.1999)

³¹⁴ See *supra*, p. 6, n.16 at 8-5

³¹⁵ 720 N.E.2d 48 (Mass.App.Ct.1999)

³¹⁶ See *supra*, p.6, n.16 at 8-6

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

utterance.³²⁰ The underlying theory for this exception is that conditions which surround the event (stress, excitement, spontaneity, personal knowledge) eliminate the possibility of fabrication and therefore such statements are deemed reliable.³²¹ However, the constitutional right of the accused to confront witnesses against him may prevent such pieces of evidence from being admitted.³²² The Supreme Court in **Ohio v. Roberts**³²³ resolved this issue by holding that if a hearsay statement is admissible under a firmly rooted hearsay exception, the admission of that statement does not raise any confrontation concern.

In 2004, the Supreme Court overruled Roberts by establishing a new test in **Crawford v. Washington**³²⁴. In order to be admitted into evidence without offending any confrontation rights of the accused, a hearsay statement cannot be testimonial.³²⁵ Admission of testimonial statements is namely barred by the new interpretation of the Sixth Amendment, unless the declarant is unavailable and the accused had an opportunity to cross-examine the declarant³²⁶. This change in law raises serious concerns regarding the admission of 911 calls. In most domestic violence cases, victims refuse to testify at trial. If they do so, they strip the accused of his constitutional right to cross-examine a witness against him, thus rendering any previous statement inadmissible. The key question, whether or not a 911 call is testimonial has remained open. Some authors define 911 calls as testimonial statement since by definition there is anticipation that the statement might be used at

³²⁰ Rule 803(3), Federal Rules of Evidence ("A statement relating to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition")

³²¹ George Fisher, *Federal Rules of Evidence Statutory and Case Supplement (2004-05)*, p.220 (Advisory Committee's note)

³²² U.S. Const. amend. VI.

³²³ 448 U.S. 56 (1980)

³²⁴ 124 S.Ct. 1354 (2004)

³²⁵ *Id.*

³²⁶ *Id.*

trial.³²⁷ While Crawford has left this issue open, there are some hints in the decision that Justice Scalia and Justice Thomas would extend the definition of non-testimonial statements to 911 calls as well.³²⁸

Although the Washington Supreme Court dealt with this issue in **State v. Davis**³²⁹ last year, it was unable to give a definite answer.

For purposes of analyzing whether admission of hearsay statements contained in a 911 call is barred by the confrontation clause under *Crawford v. Washington*, which held that out-of-court statements that are testimonial in nature must be excluded under the confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant, each 911 call should be analyzed on a case-by-case basis; in most cases, one who calls 911 for emergency help is not "bearing witness," and thus the call will not be the equivalent of a "testimonial statement," but a 911 call to the police to report a crime may be the functional equivalent of testimony to a government agent, and thus testimonial in nature.³³⁰

Emergency 911 calls may contain both testimonial and nontestimonial statements under *Crawford v. Washington* which held that out-of-court "testimonial statements" must be excluded under the confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant.³³¹

Other courts reached similar results by stating that the purpose of 911 calls is to save life, and therefore, they are generally not testimonial in nature.³³²

v. FEDERAL INVOLVEMENT IN THE TREATMENT OF DOMESTIC VIOLENCE

1. VAWA

In 1994, Congress passed the Violence Against Women Act (VAWA)³³³ which provided criminal and civil right remedies for victims of domestic violence.³³⁴

Passage of this Act signals a major change in attitude towards domestic violence at

³²⁷ See supra, p.42, n.278 at 436 (*Richard D. Friedman, The Conundrum of Children, Confrontation and Hearsay*, 65 L. & Contemp. Probs. 243, 250 (2002)

³²⁸ *Id.*

³²⁹ 154 Wash. 2d 291 (2005).

³³⁰ *Id.*

³³¹ *Id.*

³³² See supra, p. 42, n. 278 at 438

³³³ 42 U.S.C.A. Chapter 136, Subchapter III.

³³⁴ See supra, p.7, n.29 at 722-23

the federal level.³³⁵ The statute recognizes the importance of this issue emphasizing that states themselves are unable to effectively deal with it.³³⁶ The scope of VAWA is very broad. In addition to providing civil and criminal remedies for victims of domestic violence, the statute sets out detailed provisions regarding relief for those victims involved in immigration proceedings.³³⁷ The statute incorporates general experiences regarding domestic violence.³³⁸ First, it recognizes that violence does not necessarily end with the termination of the relationship.³³⁹ It created the term of intimate partner, which covers a spouse, a former spouse, a person who shares a child in common with the victim, or a person who cohabits or has cohabited with the victim.³⁴⁰ Second, VAWA provides victims with resources and possibilities (safe environment and remedies) to be able to negotiate with the batterer as equal parties.³⁴¹ Third, the statute recognizes the heightened plight of battered women of color (race, ethnicity, gender) and contains provisions which are specifically applicable for them.³⁴² These provisions include special grants for prosecution and law enforcement, support in education, and in research projects.³⁴³ Further, the law provides for data collection to reveal the impact of domestic violence on women of color.³⁴⁴ Fourth, VAWA extends the scope of federal criminal law to domestic violence by establishing domestic violence as a federal crime and declaring all federal domestic violence crimes felonies.³⁴⁵ It is a federal crime to cross state lines and physically injure an intimate partner, to stalk or harass or to stalk or harass

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*, see also INA 216, 237, 240A

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ Federal Domestic Violence Laws,

<http://www.justice.gov/usao/tnw/brochures/federaldomesticviolencelaws.html>

³⁴¹ See *supra*, p.7, n.29 at 722-23

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ See *supra*, p.50, n. 340

within the maritime or territorial lands of the United States, and to cross the state lines and violate a qualifying protection order.³⁴⁶

Under 42 U.S.C. Section 10606 (b), victims of federal domestic violence have the following rights:³⁴⁷

1. The right to be treated with fairness and with respect for the victim's dignity and privacy,
2. The right to be reasonably protected from the accused offender,
3. The right to be notified of court proceedings,
4. The right to be present at all public court proceeding related to the offense, unless the court determines that the testimony of the victim would be materially effected if the victim heard other testimonies at trial,
5. The right to confer with the attorney for the government in the case,
6. The right to restitution,
7. The right to information about the conviction, sentencing, and imprisonment.³⁴⁸

Any victim shall have the right to be present and address the court at the bail hearing and sentencing and point out to the judge the possible danger of the release of the defendant.³⁴⁹ The court must order restitution which equals the full amount of the loss incurred by the victim as a result of domestic violence including the cost of medical care, psychological care, physical therapy, loss of income, attorney's cost, costs of temporary housing, child care and transportation and the loss of income.³⁵⁰

Finally, other key provisions of VAWA include those requiring enforcement of protection orders issued by other states, permitting federal sentencing of repeat offenders to be doubled and barring admission of the victim's past sexual behavior or alleged sexual predisposition in civil or criminal proceeding involving sexual misconduct.³⁵¹ Most importantly, it earmarks 800 million dollars in grants for state

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ Key provisions of federal law, <http://www.s-t.com/projects/DomVio/keyprovisions.html>

and local governments to improve law enforcement, prosecution and victim assistance in domestic violence cases.³⁵²

2. THE GUN CONTROL ACT

The other far-reaching statute adopted by Congress in 1994 and 1996 was the federal Gun Control Act³⁵³. While 18 U.S.C. 922 (g)(8) makes it a federal crime for domestic violence abusers to possess a firearm and/or ammunition while subject to a qualifying protection order, or after conviction of a qualifying misdemeanor crime of domestic violence³⁵⁴, section 922 (d)(8) prohibits knowing transfer or sale of a firearm to those who are subject to a qualifying protection order.³⁵⁵ Under Section 922 (g)(9), "misdemeanor will 'qualify' if the conviction was for a crime committed by an intimate partner, parent or guardian of the victim that required the use or attempted use of physical force or a threatened use of a deadly weapon".³⁵⁶ There is an interplay between VAWA and the Gun Control Act for which the best example is VAWA's full faith and credit provision which requires states to honor and enforce other state's restrictions on relinquishment of weapons for three years even if state law would require a shorter period of time.³⁵⁷ It is a state as well as federal crime to possess a weapon in any state while being subject to a protection order.³⁵⁸ Like under VAWA, the court may order restitution.³⁵⁹ In 1996, Congress amended the federal Gun Control Act (commonly known as the Lautenberg amendment) which further strengthened statutory provisions regarding those who committed a misdemeanor domestic violence. First, the amendment imposes a constant ban on

³⁵² *Id.*

³⁵³ 18 U.S.C.A. 922

³⁵⁴ *Id.*

³⁵⁵ *See supra*, p.7, n.29 at 755-59

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 757

³⁵⁸ *Id.*

³⁵⁹ *See supra*, p.50, n. 340

gun possession on those persons convicted of misdemeanor domestic violence, regardless of when the conviction occurred.³⁶⁰ Most importantly, there is no need for the issuance of a civil protective order underlying the criminal conviction.³⁶¹ This statute is especially important since most of domestic violence-related murders are committed with firearms.³⁶² "In 1992, 62% of all murder victims killed by their partners or ex-partners were shot to death."³⁶³ While female offenders primarily use handguns to get rid of abusive partners, their male counterparts do that to prevent escape from an abusive relationship.³⁶⁴

In 1995, the Supreme Court decided **United States v. Lopez**³⁶⁵, in which it held the Gun-Free School Zone act unconstitutional since Congress clearly exceeded its power under the Commerce Clause of the Constitution.³⁶⁶ The Court pointed out that the subject matter of the statute is not a federal concern.³⁶⁷ If it would be otherwise, one would hardly be able to identify any issue which would not be a federal issue in some broad sense.³⁶⁸

After Lopez, the constitutionality of VAWA became seriously disputed. In **Seaton v. Seaton**³⁶⁹ the federal district court held VAWA to be constitutional concluding that since the states did not offer adequate protection from gender-based crimes, Congress was hardly unreasonable in creating a civil right remedy³⁷⁰ to correct such deficiencies but also noted that the scope of VAWA seemed to be

³⁶⁰ See supra, p.7, n.29 at 578-79

³⁶¹ *Id.*

³⁶² *Id.* at 753-54

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ 514 U.S. 549 (1995)

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ 971 F.Supp.1188, 1194 (E.D. Tenn. 1997)

³⁷⁰ 42 U.S.C 13981

overbroad and that there was a split among courts with respect to its constitutionality.³⁷¹

This dispute was resolved by the Supreme Court in **United States v. Morrison**³⁷². First, the Court held domestic violence not to be in any sense an economic activity.³⁷³ Second, despite the detailed congressional findings, there is no link between the regulated activity and interstate commerce.³⁷⁴ Criminal law has always been the prime subject of the state's police power.³⁷⁵

A contrary result, as the Court pointed out, would result in the possibility of federal regulation regarding any crimes since it is really difficult to find such crimes the aggregate affect of which would not effect interstate commerce in any way.³⁷⁶ Since deciding Morrison, constitutionality of the federal Gun Control Act has raised serious questions. To avoid constitutional concerns, Congress modified the statute after Lopez to include jurisdictional nexus between gun possession and interstate commerce.³⁷⁷ No defendant has successfully challenged his conviction since then.³⁷⁸

3. VAWA AND IMMIGRATION

VAWA significantly changed the immigration laws of the USA regarding battered women. The most important changes are as follows:

³⁷¹ **Brzonkala v. Virginia Polytechnic & State University**, 1996 WL 431097 (W.D.Va. 1996) (gender based violence does not substantially affect interstate commerce, a different ruling would grant an unrestricted power to federal government), but see **Doe v. Doe**, 929 F.Supp. 608 (D.Conn 1996) (Passage of VAWA was preceded by an extensive four-year research providing substantial documentation for the effect of domestic violence on interstate commerce)

³⁷² 529 U.S.598 (2000)

³⁷³ *Id.* at 599

³⁷⁴ *Id.* (Clearly, just because Congress says that an activity affects interstate commerce does not make it so.)

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ Kathleen M. Sullivan, Gerald Gunther, *Constitutional Law*, p.167 (15th ed., 2004)

³⁷⁸ *Id.*

CONDITIONAL PERMANENT RESIDENT STATUS

According to Section 216 of the Immigration and Nationality Act, an alien spouse or alien son or daughter obtains permanent resident status on a conditional basis.³⁷⁹ In order for this conditional status to be removed, the alien spouse and the petitioning spouse must jointly file a petition³⁸⁰ to the Attorney General during the 90-day period before the second anniversary of the alien's obtaining the permanent resident status on a conditional basis, which then requests removal of such conditional basis. They next have to appear for a personal interview before the immigration service.³⁸¹ The Attorney General shall terminate the permanent resident status of such an alien who did not meet above conditions.³⁸² Notwithstanding the above provision, the Attorney General possesses discretionary power to remove the conditional basis of the permanent resident status of an alien spouse or child even if they are unable to meet the relating statutory requirements if the alien demonstrates that the removal would result in extreme hardship, the qualifying marriage was entered into in good faith by the alien spouse, but it has been terminated, and the alien was not at fault in failing to meet the statutory requirements, or the alien spouse or child was battered or was the subject of extreme cruelty committed by his or her spouse or citizen or permanent resident parent during the marriage.³⁸³ The possibility of self-petitioning prevents abusive spouses from using the immigration laws as a means of control or abuse.³⁸⁴

³⁷⁹ INA 216 (a)(1)

³⁸⁰ INA 216 (c)(1)

³⁸¹ INA 216 (c) (3)

³⁸² INA 216(c)(2)

³⁸³ INA 216 (c) (4)

³⁸⁴ See *supra*, p.7, n.29 at p.846

DEPORTATION³⁸⁵

By enacting INA 237 (2)(E), Congress decided to make aliens deportable who at any time after admission are convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.³⁸⁶ Moreover, violators of protective orders are also subject to deportation.³⁸⁷ Congress also decided to provide a waiver for domestic violence victims upon the discretion of the Attorney General if he determines that the alien was acting in self-defense, was found to have violated a protection order designed to protect the alien, the alien committed, was arrested for, was convicted of or pled guilty to committing a crime that did not result in serious bodily injury and where battery or more extreme cruelty played a role in committing that crime.³⁸⁸ More importantly, the Attorney General may consider any credible evidence in adjudicating the petition.³⁸⁹

CANCELLATION OF REMOVAL³⁹⁰

The Attorney General may at his discretion "cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable".³⁹¹ The alien must demonstrate that she/he was battered or subjected to extreme cruelty by a US citizen or permanent resident spouse or parent, has been physically present in the USA for three years preceding the date of such application, has been of good moral character and that the removal would result in an extreme hardship to the alien and the alien's child or parent.³⁹²

³⁸⁵ INA 237

³⁸⁶ INA 237 (2)(E)(i)

³⁸⁷ INA 237 (2)(E)(ii)

³⁸⁸ INA 237(7)

³⁸⁹ INA 237(7)(B)

³⁹⁰ INA 240A(b)(2)

³⁹¹ INA 240A(b)(2)(A)

³⁹² *Id.*

WORK AUTHORIZATION

Work authorization is of primary importance for women who are escaping an abusive relationship but are unable to support themselves.³⁹³ If the battered spouse is married to a US citizen, she can file for an adjustment of status of that of a permanent resident and obtain work authorization as an immediate relative without any waiting time.³⁹⁴ Spouses of permanent residents do not have such a possibility since there is a cap on the number of immigrant visas issued every year in the family sponsored second preference category.³⁹⁵ Consequently, they are forced to wait until their priority date becomes current, which can take several years.

³⁹³ See *supra*, p.7, .29 at 847-48

³⁹⁴ INA 201 (b)(2)(A)(i)

³⁹⁵ INA203(a)(2)

IV. CONCLUSION

After the rise of human rights in Hungary in the early 1990s, a distinct decline is now being observed. Courts hesitate to decide cases for women regarding those cases, which do not strictly follow earlier precedents. In addition, the Constitutional Court avoids taking a stand on far-reaching issues. The transition period seems to have been too short to establish an attitude viewing human rights as rights of vital importance. Moreover, the position of women's rights is even more unstable. Failing clear traditions, democratic institutions have been unable to draw the line between equal rights and unjustified endorsement of gays, women and other minorities in society. Consequently, decisions are conflicting, unclear and uncertain.

Against this backdrop, Hungarian legislation shall firmly take up the rights of women, adopt more stringent statutory provisions which are effectively able to protect them and thereby sending a clear message to both judicature and society. The present situation calls for immediate legal response and demands more engaged legislation and judicature.

The reasons for change are pressing. First, subordination of women causes serious monetary damage to economy through absenteeism, lost wages, sick leave and reduced work productivity; second, a democratic state cannot let itself be compromised by its insensibility towards inequalities in society by not vigorously fighting these conditions but rather sanctioning them through its legal system; third, it is a primary obligation of a democratic state to protect the safety of its citizens and secure an environment, which provides them with all necessary conditions indispensable to their physical and psychological development. Finally, we should

never forget about children who are not only victims of domestic violence, but are those who form the future of the country. We are responsible for their ideals about family, society and the state, ideals which will necessarily be reflected in the future legal system of Hungary.

As American experiences show, no legal response will ever be able to eradicate domestic violence. However, an effective statutory scheme can substantially decrease the number of deaths and the severity of injuries as a consequence of domestic violence, which in turn will result in a net economic profit. An effective statutory scheme requires comprehensive changes in legal rules covering substantive and procedural civil and criminal law, immigration law and strict compliance with the norms set out by the human rights treaties. A distinct change in attitude of the legislature would strongly encourage courts to apply the existing and the new statutory provisions without hesitation and to be fully aware of the importance of the issue at hand. In addition, it sends a clear message that society does neither consider family violence a private affair, nor views it as an excuse for such serious crimes.

The above changes are indispensably necessary to give substance to Section 54 and 55 of the Hungarian Constitution which says that "in the Hungarian Republic, every individual has an inherent right to life and human dignity of which no one can arbitrarily be stripped. No one can be subjected to cruel or inhumane treatment or punishment"

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