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# HOW SHOULD THE POLICE RESPOND TO DOMESTIC VIOLENCE: A THERAPEUTIC JURISPRUDENCE ANALYSIS OF MANDATORY ARREST

Dennis P. Saccuzzo\*

## I. INTRODUCTION

This article examines the controversies surrounding mandatory arrest. First, the article introduces the scope of the problem by illustrating the way in which police officers typically deal with domestic violence. Second, the article provides a detailed explanation of the concept of "therapeutic jurisprudence." The analysis will then begin with a discussion of empirical studies pertaining to the effectiveness of mandatory arrest. With the controversy and debate over equivocal and conflicting results as a springboard, the discussion then turns to what is perhaps a more fundamental issue. Namely, what should be the goals of any police policy? Finally, the article proposes that through the effective use of therapeutic jurisprudence, the process of re-education of the batterer and the healing of the battered person can begin at the moment of police contact and continue through the entire judicial process.

### A. *Scope of the Problem*

The enormity and extent of the problem of domestic vio-

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lence is well documented.<sup>1</sup> Furthermore, without societal intervention, domestic violence will not only continue, but a "significant" percentage of incidents will escalate to very serious proportions.<sup>2</sup> Among the societal responses to domestic violence, perhaps none are more critical than those of the police.<sup>3</sup> Unfortunately, the police response to pleas from battered women has been far less than adequate when viewed from a historical perspective.<sup>4</sup>

### 1. *A Case in Point*

Consider the outrageous police indifference in the case of *Thurman v. City of Torrington*.<sup>5</sup> For more than eight months, Tracey Thurman, along with her friends and relatives, made innumerable calls to the police in the town of Torrington, Connecticut.<sup>6</sup> She and others notified the police of repeated and brutal threats upon her life and the life of her child by her estranged husband, Charles J. Thurman.<sup>7</sup> The police ignored or rejected Tracey's cries for help and Charles' threats to kill or maim her, with tragic consequences.<sup>8</sup>

As chronicled by the U.S. District Court, Charles Thurman attacked Tracey Thurman at the home of a friend in October of 1982 and, a few days later, returned and used physical force to remove Charles J. Thurman, Jr. from the premises. Despite formal complaints, the police did nothing.<sup>9</sup>

The police indifference continued as Charles Thurman screamed threats at Tracey Thurman in the presence of police officers, kicked in her windshield, and made repeated threats of violence.<sup>10</sup> Finally, Charles was placed on proba-

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1. See, e.g., EVE S. BUZAWA & CARL G. BUZAWA, *Extent of the Problem, in DO ARRESTS AND RESTRAINING ORDERS WORK* 1-13 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) [hereinafter BUZAWA & BUZAWA, *Extent of the Problem*] (citing the National Criminal Victimization Survey (NCVS) estimated figure between 1987 and 1991 that on average more than 572,000 violent acts were committed against women by an intimate).

2. See *id.* at 4 (citing empirical evidence conducted since the 1970s).

3. See *id.*

4. See Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrest for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992).

5. 595 F. Supp. 1521 (D. Conn. 1984).

6. *Thurman v. City of Torrington*, 595 F. Supp. 1524 (D. Conn. 1984).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1525.

tion. However, when Charles threatened to kill Tracey, the police refused to take the complaint.<sup>11</sup> When Tracey asked for a restraining order on a Friday, the police told her she would have to wait until after the Memorial holiday weekend.<sup>12</sup> Complaints by Tracey's brother-in-law also fell on deaf ears.<sup>13</sup> The police advised Tracey's brother-in-law that Charles would be arrested; yet there was no arrest.<sup>14</sup>

Finally, the inevitable happened. On June 10, 1983, Charles went to Tracey's home.<sup>15</sup> While Tracey was trying to persuade him not to hurt Charles Jr., Charles Thurman began his violent and brutal attack.<sup>16</sup> He stabbed Tracey in her neck, her throat, and her chest.<sup>17</sup> The police arrived and watched while Charles kicked Tracey, who was on the ground and bleeding, in the head.<sup>18</sup> They stood by even after he dropped Charles Jr. on her.<sup>19</sup> Tracey ultimately became paralyzed below the neck and suffered permanent disfigurement.<sup>20</sup>

## 2. *Tradition of Inadequate Police Response*

Graphic stories of the consequences of an inadequate police response to domestic violence are all too common. As Eve S. Buzawa and Carl G. Buzawa note, the classic response of the police to domestic violence can be summed by three characteristics: "(a) relatively few of the potential universe of domestic violence cases were ever formally addressed by the police, the majority being screened out, (b) the police did not desire to intervene in family disputes, and (c) there was a strong, sometimes overwhelming bias against making arrests."<sup>21</sup>

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11. *Id.* at 1521.

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

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

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

19. *Id.* at 1526.

20. See EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 102 (2d. ed. 1996) [hereinafter BUZAWA & BUZAWA, DOMESTIC VIOLENCE].

21. *Id.* at 37.

### 3. *Movement Toward Mandatory Arrest*

As a result of bad publicity, fears of liability, and empirical studies,<sup>22</sup> the problem of an inadequate police response to domestic violence was finally addressed in a number of statutes beginning in the late 1970s.<sup>23</sup> Among the most controversial of the new laws are those that require mandatory arrest in the fight against domestic violence.<sup>24</sup>

Central to the analysis is an examination of mandatory arrest in terms of the messages conveyed by any given police action.<sup>25</sup> According to a therapeutic jurisprudence analysis, decisions pertaining to arrest and prosecution have mental health as well as societal implications for both the battered person and the batterer.<sup>26</sup> Therapeutic jurisprudence provides an analytical framework that goes beyond the barren numbness of statistics and experimental design flaws.<sup>27</sup> Thus, the police response to domestic violence can be guided by a therapeutic jurisprudence analysis.

## II. BACKGROUND

### A. *The Concept of Therapeutic Jurisprudence*

Therapeutic jurisprudence examines how the response of the legal system advances or impedes therapeutic goals.<sup>28</sup> It is the process by which the actions of the legal system have therapeutic consequences. In therapeutic jurisprudence, the goal is to make decisions that affect behavior in a positive way, such as to begin the healing process for victims of domestic violence or the rehabilitation process for batterers. Mandatory arrest, for example, provides a strong and important message that violence against women is serious and will not be tolerated. When the batterer is taken into custody,

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22. See discussion *infra* Part II.B.1.

23. See BUZAWA & BUZAWA, *DOMESTIC VIOLENCE*, *supra* note 20, at 121.

24. See Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?* U. ILL. L. REV. 533 (1996).

25. See discussion *infra* Part III.C.1.

26. See Leonore M. J. Simon, *The Legal Processing of Domestic Violence Cases*, in *LAW, MENTAL HEALTH & MENTAL DISORDER* 440-63 (Bruce D. Sales & Daniel W. Shuman eds., 1996).

27. See Simon, *supra* note 26.

28. See Michael L. Perlin, *What is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 6223 (1993).

law enforcement officials communicate to him,<sup>29</sup> as well as the battered woman, that battering is a criminal act for which the batterer is responsible.<sup>30</sup>

### 1. *Cognitive Approach*

Modern approaches to therapeutic jurisprudence are based on a theory of human behavior known as the cognitive approach.<sup>31</sup> The focus of the cognitive approach is on thinking patterns, such as beliefs and expectations.<sup>32</sup> In cognitive therapy, the goal is to improve personal functioning and mental health by altering self-defeating thought patterns and providing new ways of evaluating internal and external events.<sup>33</sup>

The cognitive approach holds that conscious thought processes play a major role in mediating human behavioral and emotional responses.<sup>34</sup> Therapeutic approaches to mentally or emotionally disturbed persons focus on automatic thought patterns that are exaggerated, distorted, mistaken, or unrealistic.<sup>35</sup> Cognitive approaches to treatment attempt to modify a persons cognitions such as thoughts, beliefs, and expectations.<sup>36</sup> In an approach known as rational emotive therapy,<sup>37</sup> for example, it is assumed that problem behaviors

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29. While men are sometimes victims of domestic violence by women, and in lesbian encounters the batterer is a woman, by far the vast majority of battering occurs in male assault of women.

30. See Simon, *supra* note 26, at 447 (citations omitted).

31. See *id.* at 443-44.

32. For an overview of the basic psychological theories of human functioning, see DENNIS P. SACCUZZO, *PSYCHOLOGY: FROM RESEARCH TO APPLICATION* (1987). Briefly, there are four basic approaches. *Id.* The psychodynamic focuses on the role of thought processes of which the individual is unaware. *Id.* The behavioral approach examines observable behavior. *Id.* The humanistic approach emphasizes the role of present personal experience, the individual's phenomenological perspective. *Id.* The cognitive approach, which is the most recent theory to emerge, stresses the role of cognitions, thoughts, beliefs, expectations on behavior. *Id.*

33. See Steven D. Hollon & Aaron T. Beck, *Cognitive and Cognitive-Behavioral Therapies*, in *HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE* 428-66 (Allen E. Bergin & Sol L. Garfield eds., 1994).

34. See *id.* at 429.

35. See Simon, *supra* note 26, at 444 (citing W. E. Craighead et al., *Unipolar Depression*, in *CLINICAL BEHAVIOR THERAPY* 99-116 (S. M. Turner, et al., eds., 2d ed. 1992).

36. See SACCUZZO *supra* note 32, at 551.

37. See ALBERT ELLIS, *REASON AND EMOTION IN PSYCHOTHERAPY* 3 (1962).

stem from irrational beliefs.<sup>38</sup> An example of an irrational belief is the belief that to be worthwhile, a person must be thoroughly competent, adequate, and achieving in all possible respects.<sup>39</sup> In using cognitive therapy, the therapist would challenge this idea, thus reframing a situation. In another approach to cognitive therapy, known as Beck's Cognitive therapy,<sup>40</sup> the therapist attempts to alter negative self-beliefs.<sup>41</sup> One such belief is the belief that "nobody cares."<sup>42</sup> A cognitive therapist would attempt to challenge such a belief by, for example, pointing out contrary evidence in an effort to modify the client's thinking.<sup>43</sup>

## 2. *The Cognitive Approach Applied to Domestic Violence*

The Cognitive approach to therapeutic jurisprudence analysis is helpful in the analysis of thought patterns of domestic violence batterers, victims, and society at large. The Cognitive approach attempts to discern how any response to domestic violence, including a police response, might encourage or discourage faulty thinking patterns in batterers, victims and society. Leonore M. J. Simon, for example, has identified four types of cognitive distortions that can be attributed to the criminal justice response to domestic violence: "(1) cognitive distortions that morally justify or euphemistically label the violence; (2) cognitive distortions that disavow responsibility; (3) cognitive distortions that minimize the effects of violence; and (4) cognitive distortions that dehumanize or blame the victim."<sup>44</sup>

A typical cognitive distortion is the idea that the woman deserved to be beaten, or that there is nothing wrong with beating one's wife.<sup>45</sup> In blaming the woman, the batterer justifies his violence; in finding nothing wrong, the batterer denies responsibility for his behavior. Before analyzing how concepts of cognitive therapy can be used to evaluate the police response to domestic violence, it is useful to examine the present controversy over mandatory arrest and other possible

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38. See SACCUZZO, *supra* note 32, at 551.

39. See SACCUZZO, *supra* note 32, at 554.

40. AARON T. BECK, *DEPRESSION: CAUSES AND TREATMENT* (1967).

41. See SACCUZZO, *supra* note 32, at 555.

42. *Id.*

43. See *id.*

44. Simon, *supra* note 26, at 444.

45. See Simon, *supra* note 26, at 445.

police responses. At the core of this debate are a host of conflicting empirical findings.

### B. *Empirical Data*

Shortly after 1983, there was a dramatic shift in the police response to domestic violence.<sup>46</sup> Instead of ignoring the pleas of victims, as in Tracey Thurman's tragic story, police departments across the nation adopted new policies of mandatory arrest for cases of domestic violence.<sup>47</sup> While publicity over cases such as Tracey Thurman's and the threat of liability for police departments played an important role in this turnabout, perhaps the most important factor in this almost overnight change can be found in the publication of an empirical study of the effects of mandatory arrest.<sup>48</sup>

#### 1. *The Minneapolis Domestic Violence Experiment*

The Minneapolis Domestic Violence Experiment<sup>49</sup> was hailed as one of the most rigorous studies of its kind.<sup>50</sup> Funded by the National Institute for Justice and conducted by the Police Foundation,<sup>51</sup> the study involved a random assignment design.<sup>52</sup> For two precincts in Minneapolis, violent family offenders were randomly assigned to one of three experimental conditions.<sup>53</sup> Batterers in the arrest condition were subjected to mandatory arrest.<sup>54</sup> In the second condition the police attempted to provide advice and mediate the dispute.<sup>55</sup> In the third condition the parties were temporarily

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46. See Richard J. Gelles, *Constraints Against Family Violence: How Well Do They Work?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 30-42 (Eve S. Buzawa & Carl Buzawa eds., 1996).

47. See *id.*

48. See *id.* at 31-32.

49. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 *AM. SOC. REV.* 261 (1984).

50. See Delbert S. Elliott, *Criminal Justice Procedures in Family Violence Crimes*, in *FAMILY VIOLENCE: 11 CRIME & JUST.* 458 (Lloyd Oblin & Michael Tonry eds., 1989).

51. See Gelles, *supra* note 46, at 32.

52. Through randomization, experimenters can rule out the effects of potentially confounding variables so that group comparisons can be attributable to treatment effects rather than to variables beyond the control of the experimenter. See SACCUZZO, *supra* note 32.

53. See *id.*

54. See *id.*

55. See *id.*



separated.<sup>56</sup> To increase the rigor of the study, only cases in which both parties were present when the police arrived and in which the offense could be classified as a misdemeanor assault were included.<sup>57</sup>

Results were striking. A six-month follow-up treatment revealed the lowest rate of recidivism in the mandatory arrest condition (ten percent).<sup>58</sup> The highest rate of recidivism was found in parties who were merely separated (twenty-four percent).<sup>59</sup> The results of the study were published on April 5, 1983, in the *New York Times*, even before the methodology was subjected to the rigors of scientific peer review.<sup>60</sup> Just ten days later, the New York Police Commissioner issued orders that required mandatory arrest in domestic violence cases, and by January of 1987, 176 cities across the United States followed suit.<sup>61</sup>

## 2. Critiques and Follow-Up Studies

Given the striking findings and dramatic impact of the Minneapolis Domestic Violence Experiment, it is not surprising that the study was soon subjected to scrutiny. To their credit, the original authors of the study were quick to point to flaws in the study.<sup>62</sup> For example, given the unclear distinctions between misdemeanor, felony, and non-misdemeanor, the police may have violated the assumption of random assignment, either by avoiding a domestic disturbance or by classifying it as felony or non-misdemeanor.<sup>63</sup> There were also problems with missing data, and the data were further limited in that only a few police officers were actually involved.<sup>64</sup> The National Institute of Justice soon funded a number of replication studies.

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56. *See id.*

57. *See id.*

58. *See Sherman & Berk, supra note 49.*

59. *See id.*

60. *See Gelles, supra note 46, at 31.*

61. *See id.*

62. *See Richard A. Berk & Lawrence W. Sherman, Police Responses to Family Violence Incidents: An Analysis of an Experimental Design with Incomplete Randomization*, 83 J. AM. STAT. ASS'N. 70 (1988).

63. *See id.* at 73-76.

64. *See id.*

### 3. *Failure to Replicate and Inconsistent Findings*

The first attempt to replicate the Minneapolis findings failed, creating confusion in the literature.<sup>65</sup> Contrary to the positive findings in Minneapolis, an experiment in Omaha, Nebraska found no evidence that arrest deters batterers. As the experimenters noted:

The failure to replicate the Minneapolis findings will undoubtedly cast some doubt on the deterrent power of a mandatory or even a presumptive arrest policy for cases of misdemeanor domestic assault. At this point, researchers and policy makers are in the awkward position of having conflicting results from two experiments and no clear, unambiguous direction from the researchers on this issue.<sup>66</sup>

Commentators claimed that the movement to arrest batterers may have been "doing more harm than good."<sup>67</sup> By the early 1990s, results from some six replication studies had been reported.<sup>68</sup> The results were a hodgepodge of often conflicting results.<sup>69</sup> The overall conclusion seemed to be that sometimes arrest works; sometimes it does not. Or, while mandatory arrest may reduce violence for white victims, it actually increases violence against poor, minority women from the ghetto.<sup>70</sup> Other attempts to make sense of apparently disparate statistical outcomes argued that while arrest may have some deterrent effect over the short-term, over the long-term it actually increased violence.<sup>71</sup> As Janell D. Schmidt and Lawrence W. Sherman noted:

In short, the new experiments reported both deterrent and backfiring effects of arrest. Arrest cured some abusers but made others worse; arrest eased the pain for victims of employed abusers but increased it for those intimate with unemployed partners; arrest assisted white and Hispanic victims but fell short of deterring further violence among

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65. See F. W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990).

66. *Id.* at 204.

67. Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 43-53 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

black victims.<sup>72</sup>

Much ado was made about statistical significance.<sup>73</sup> While many of the studies found differences between the various treatments, most did not find results at the .05 level of significance.<sup>74</sup> Given that empirical findings are unclear or contradictory and hinge on probabilities, on what basis can we evaluate mandatory arrest? According to Lawrence Sherman, the author of the original Minneapolis experiment, given the current state of the data we should now move as quickly to repeal mandatory arrest laws as we embraced them following the initial positive findings.<sup>75</sup> Is this prudent? Would not the elimination of mandatory arrest simply re-establish the original and unsatisfactory status quo? And should we rely on cold numbers to decide on our police policies? A conclusion based on the therapeutic jurisprudence approach would provide a negative response to all of these questions.

### III. ANALYSIS

A therapeutic jurisprudence approach examines the effect of any given criminal justice response from the standpoint of its effect on the batterer, the battered person, and

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72. Schmidt & Sherman, *supra* note 67, at 46.

73. For a brief overview of the concept of statistical significance and the basic underlying statistics, see SACCUZZO, *supra* note 32, at 572-585. Briefly, social scientists consider results to be statistically significant when the probability of finding a particular result, such as a difference in the mean value of two samples, is less than 5 out of 100. Such a finding is considered significant at the .05 level and is designated ( $p < .05$ ), which literally means the probability of obtaining the result in question are less than 5/100. Because this is a low probability, researchers are willing to accept such findings as not being due to chance, but rather as due to real differences between sample groups. See *id.* at 582.

74. See Schmidt & Sherman, *supra* note 67, at 54-80. To determine what is rare, scientists have established a general rule. If the odds of getting a particular result by chance alone are less than 5 out of 100, the result is considered statistically significant, or due to something other than chance. In the experimental literature, a significant result is indicated by the statement  $p < .05$ , a short way of saying, "The probability ( $p$ ) of obtaining the result by chance is less than (<) five out of 100." This statement tells the psychologist that the results of the study are dependable. If the experiment were repeated, similar results would most likely be found. SACCUZZO, *supra* note 32 at 582.

75. Lawrence Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992).

society.<sup>76</sup> The real question then becomes one of evaluating what message mandatory arrest sends. If the message serves to empower the battered person, pin responsibility on the batterer, and send a message to society that domestic violence will not be tolerated, then mandatory arrest should be embraced regardless of statistical studies. As J. David Hirschel and Ira W. Hutchison and their colleagues noted in their final report to the National Institute of Justice,

[e]ven though arrest has not been shown to have particular deterrent value, and even if arrest may not have much punitive value, it may still constitute a more conscionable choice than non-arrest. Not to arrest may *communicate* to men that abuse is not serious and to women that they are on their own. It may *communicate* to children, who very often witness abuse of their mothers, that the abuse of women is tolerated, if not legitimated. It may *communicate* to the public at large that a level of violence which is unacceptable when inflicted by a stranger is acceptable when inflicted by an intimate.<sup>77</sup>

#### A. Arguments in Favor of Mandatory Arrest

Let's assume that mandatory arrest of domestic violence offenders actually does little to deter recidivism and can, in some cases, even have negative effects such as increasing violence. What valid or rational reason would there be for such policy?<sup>78</sup>

##### 1. Five Reasons in Favor of Mandatory Arrest

Assuming no deterrence effect, Evan Stark<sup>79</sup> provides five

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76. See Simon, *supra* note 26.

77. See J. DAVID HIRSCHSEL ET AL., CHARLOTTE SPOUSE ASSAULT REPLICATION PROJECT: FINAL REPORT (National Institute of Justice, 1991).

78. According to Michael Steinman,

Arrest imposes the most costs and no formal action imposes the fewest. The costs imposed by arrest include a brief time in jail or the chance of it and the possibility of being prosecuted and suffering court-mandated penalties like a fine or a jail term. Arrest may also trigger indirect costs for offenders such as humiliation, divorce or separation from their partners, and loss of job.

MICHAEL STEINMAN, COORDINATED CRIMINAL JUSTICE INTERVENTIONS AND RECIDIVISM AMONG BATTERERS IN WOMAN BATTERING: POLICY RESPONSES, 221-22 (1991).

79. Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, in DO ARREST AND RESTRAINING ORDERS WORK? 115-49 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

important reasons to support mandatory arrest for batterers.<sup>80</sup> First, mandatory arrest serves to control police behavior.<sup>81</sup> As Stark noted, "the absence of a standard for police practice increased women's sense of powerlessness and thus posed a major obstacle to their empowerment."<sup>82</sup> Thus, mandatory arrest serves to empower women.

Second, mandatory arrest provides protection from immediate violence.<sup>83</sup> When the police stop short of arrest, a battered woman remains vulnerable to further abuse and violence.<sup>84</sup> Mandatory arrest not only removes this immediate threat, but also gives the battered person time to consider her options and, if necessary, take evasive action.<sup>85</sup>

A third factor to consider in support of mandatory arrest is its generally deterring effect.<sup>86</sup> Statistical studies have focused on the role of specific deterrence, that is, deterring future violence in the arrested batterer.<sup>87</sup> What these studies fail to address is how a policy of mandatory arrest might deter would be batterers in the general population. Thus, the general-specific deterrence distinction reveals the limits of statistical studies of specific deterrence.<sup>88</sup>

A fourth reason for mandatory arrest can be found in the message it conveys to society. As Stark notes, "Making battering the only crime in which police discretion is removed acknowledges a special social interest in redressing the legacy of discriminatory treatment of women by law enforcement."<sup>89</sup> Thus, mandatory arrest communicates to the society at large as well as to the batterer and battered person that battering is a serious crime that will not be tolerated.

Finally, mandatory arrest serves a "redistributive" function in that police resources are redistributed to women on a more equal basis.<sup>90</sup> The message is that the police are a re-

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80. *Id.* at 127-29.

81. *See id.*

82. *Id.* at 127.

83. *See id.* at 128.

84. *See id.*

85. *See Stark, supra* note 79.

86. *See id.*

87. For a more in-depth analysis of general versus specific deterrence, see Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse*, 43 DEPAUL L. REV. 1133 (1994).

88. *See id.*

89. Stark, *supra* note 79, at 129.

90. *See id.*

source and that battered women have just as much right to that resource as any other segment of society.

## 2. *Is There a Weakness in the Argument for Mandatory Arrest?*

Fundamental to the argument in favor of mandatory arrest is that it sends an important message to the batterer, victim, and society.<sup>91</sup> Given the power of this argument, critics have looked for a weakness, arguing that mandatory arrest actually sends the wrong message.<sup>92</sup> For example, critics have argued that mandatory arrest strips the battered person of her autonomy.<sup>93</sup> According to Carol Wright, mandatory arrest laws take away decision making power from battered persons and may even force them to prosecute against their wishes.<sup>94</sup>

It is noteworthy that the arguments against mandatory arrest focus heavily on individual cases. Gelles, for example, presents anecdotal evidence in which a woman was forced to "sneak" her husband into her home due to a mandatory arrest law.<sup>95</sup> Neighbors, not the battered woman, had called the police after hearing "loud fights." Apparently neither the woman nor the man wanted the arrest, so the wife had "smuggled" her husband into the apartment out of fear that if the police found the two together, he might be arrested.<sup>96</sup>

Marion Wanless explains that in a mandatory arrest regime, some women may be reluctant to call the police out of fear that their husbands might lose their jobs or stop supporting the family.<sup>97</sup> Wanless further notes, however, that women really do not need to choose between abuse and economic support, given the availability of battered women's services and the welfare system.<sup>98</sup>

There is little doubt that mandatory arrest will some-

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91. See Welch, *supra* note 87, at 1159.

92. See *id.*

93. See Carol Wright, *Immediate Arrest in Domestic Violence Situations: Mandate or Alternative*, 14 CAP U. L. REV. 243 (1985).

94. *Id.* at 260.

95. Gelles, *supra* note 46, at 39.

96. See *id.*

97. Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?* U. ILL. L. REV. 533, 549 (1996).

98. *Id.* Unfortunately, given recent efforts to reduce or restrict welfare, this argument may have less force in today's environment.

times have negative or unintended consequences. In order to have a rational basis for evaluating mandatory arrest, it is necessary to examine more carefully some of the counter-arguments.

### B. *Specific Arguments Against Mandatory Arrest*

Among the most severe critics of mandatory arrest are Eve S. Buzawa and Carl G. Buzawa, noted experts in the field of the criminal justice response to domestic violence.<sup>99</sup> Their arguments center on two issues: 1) the costs of mandatory arrest and 2) whether mandatory arrest disempowers women.<sup>100</sup>

#### 1. *Are the Costs of Mandatory Arrest Too High?*

According to Buzawa and Buzawa, mandatory arrest is not justified, especially for misdemeanors.<sup>101</sup> These authors list five costs of mandatory arrest.<sup>102</sup>

First, these authors argue that mandatory arrest would increase cost to public agencies because arrest costs are high and it takes three to four hours to process each arrest.<sup>103</sup> Second, Buzawa and Buzawa maintain that mandatory arrest entails a number of unintended adverse consequences, such as police frustration (due to their lack of discretion) and repressive call screening, which would actually reduce the police response to calls of domestic violence.<sup>104</sup>

Third, Buzawa and Buzawa argue that mandatory arrest fails to consider victims' preferences. They state, "A mandatory arrest policy may make victims and assailants pawns to larger policy goals formulated by administrators and well-meaning victim advocates whose ultimate goals may not even be shared by that of the victim."<sup>105</sup> The ultimate cost, they argue, is that women lose control.<sup>106</sup> With a loss of control, women may actually be deterred from calling the police.<sup>107</sup>

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99. BUZAWA & BUZAWA, *supra* note 20.

100. *Id.*

101. *Id.* at 161.

102. *Id.*

103. *Id.* at 161.

104. *Id.* at 162.

105. BUZAWA & BUZAWA, *supra* note 20, at 162.

106. This is the customary argument. See *supra* text accompanying notes 95-97.

107. See Eve Buzawa, *Police Officer Response to Domestic Violence Legisla-*

Fourth, Buzawa and Buzawa contend that mandatory arrest may "perversely lessen the inclination of judges to seriously treat domestic violence calls, because of the possibility of ridiculous arrests."<sup>108</sup>

Finally, they argue that mandatory arrest may place too much power in the hands of the police.<sup>109</sup> As these authors note, the police have "historically been unsympathetic to the needs and goals of abused women."<sup>110</sup> Therefore, the possibility exists that police may "deter victims by not too subtly hinting that both parties will be arrested if the situation does not immediately calm down."<sup>111</sup>

While it is important to remain cognizant of both sides of the issue, Buzawa's and Buzawa's arguments fall short on a number of grounds. First, the extra cost to process violent crimes should not be a deterrent to arrest. Possible police frustration or an occasional judge's irritation is not a good reason to turn our backs on unchecked aggression and violence. Finally, it is debatable whether mandatory arrest gives police more power. In her argument against mandatory arrest, Donna Welch emphasizes that loss of discretion actually reduces police power, and that the reduction in power is a major problem with mandatory arrest.<sup>112</sup> Arguments based on cost, frustration, and police power ring hollow compared to the physical, emotional, and economic costs of battering to the victims and their families, so there must be a better argument if we are to take seriously the critics of mandatory arrest.

## 2. Does Mandatory Arrest Disempower Women?

Thus far we have seen arguments that mandatory arrest empowers women.<sup>113</sup> Critics of mandatory arrest have argued to the contrary.<sup>114</sup> According to Eve Buzawa and her colleagues, mandatory arrest deprives women of control over

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tion in Michigan, 10 J. POLICE SCI. & ADMIN. 415 (1982).

108. BUZAWA & BUZAWA, *supra* note 20, at 163-64.

109. *Id.* at 164.

110. *Id.*

111. *Id.*

112. Welch, *supra* note 87.

113. See *supra* notes 76-89 and accompanying text.

114. See Eve Buzawa et al., *The Role Of Arrest In Domestic Versus Stranger Assault: Is There a Difference*, in DO ARRESTS AND RESTRAINING ORDERS WORK? (Eve S. Buzawa & Carl G. Buzawa eds., 1996).



their own destinies, which then reinforces a feeling of powerlessness.<sup>115</sup> Whether or not Buzawa's argument has validity, it falls short for at least three subgroups of women: (1) those women for whom entrapment prevents them from expressing a preference, (2) women whose cultural norms make an expression of preference for arrest a betrayal, and (3) women who do not fully understand the risks they face.<sup>116</sup>

### C. *Analysis from a Therapeutic Jurisprudence Perspective*

A therapeutic jurisprudence analysis can help bring some order to the debate over mandatory arrest. Assuming that we want to (1) enhance and empower battered persons, (2) restrain and deter batterers, and (3) send a message throughout society that battering is a crime that will not be tolerated, how might these goals best be achieved? A therapeutic jurisprudence approach would examine how various police responses affect cognitive processes—to confront the batterer's faulty thinking patterns and promote adaptive cognitions in batterers as well as battered persons.<sup>117</sup>

#### 1. *What Does Mandatory Arrest Say to the Battered Person?*

Research on battered persons has failed to reveal a particular personality type associated with being a victim of battering. Victims cannot be distinguished from non-victims in terms of psychological profile or make-up.<sup>118</sup> This means that there is no single profile of a battered woman. Any woman can be a victim. The problem is not restricted to a small subgroup of women who exhibit a particular set of personality characteristics or mental disorder. Thus, mental health problems of battered women are the result of domestic violence rather than predisposing factors.<sup>119</sup>

From a cognitive perspective, battered persons develop a number of dysfunctional thoughts in which they blame them-

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115. *Id.*

116. See Stark, *supra* note 79, at 143.

117. See Simon, *supra* note 26, at 444.

118. See J. Fagan & A. Brown, *Violence Between Spouses and Intimates*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 115-292 (A. J. Reiss & A. J. Roth eds., 1994).

119. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 75-85 (1984).

selves, deny or minimize the abuse, and excuse the batterer's behavior.<sup>120</sup> The battered person's cognitive distortion<sup>121</sup> may include maladaptive beliefs such as, "if I don't remain in this relationship, I'm never going to be in another one,"<sup>122</sup> "any cost is worth paying for a relationship,"<sup>123</sup> or, "it's better to have an abusive relationship than no relationship at all."<sup>124</sup> The woman may also be thinking thoughts like, "I really am to blame for this because I knew he was in a bad mood and I should have kept my mouth shut."<sup>125</sup> Other maladaptive thoughts may include such notions as, "He's really not to blame for this."<sup>126</sup> Such dysfunctional thoughts not only serve to keep the battered person from taking steps to change her situation, but they may also impair her judgment.<sup>127</sup> For example, she may ignore signs of danger, or fail to respond in a way to maximize her safety.<sup>128</sup>

To deal with these dysfunctional thoughts, a cognitive approach would utilize techniques such as cognitive restructuring.<sup>129</sup> In cognitive restructuring, an effort is made to challenge such thoughts and replace them with more effective ones.<sup>130</sup> The goal is to assist the individual in ferreting out dysfunctional thoughts and to replace them with more realistic and rational beliefs through a process known as disconfirmation.<sup>131</sup> The battered person is taught to treat her beliefs as hypotheses that can be tested.<sup>132</sup> Self-blame can be countered by reattributing responsibility for the violence to the batterer; feelings of helplessness can be countered by helping the battered person to become aware of her resources

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120. See MARY ANN DUTTON, *EMPOWERING AND HEALING THE BATTERED WOMAN* 97-98 (1992).

121. Cognitive distortions are misbeliefs that the person acts upon as though they were true.

122. DUTTON, *supra* note 120, at 98.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. See DUTTON, *supra* note 120.

128. See *id.*

129. See JACQUELINE B. PERSONS, *COGNITIVE THERAPY IN PRACTICE: A CASE FORMULATION APPROACH* (1989).

130. See *id.*

131. See Simon, *supra* note 26, at 446.

132. See David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993).

and choices.<sup>133</sup>

Within the cognitive context, mandatory arrest can play an important role in restructuring the battered person's cognition. It demonstrates that it is the batterer, not she, who is at fault. It tells her that resources are available, and that she has choices. Further, it demonstrates that she is not alone in her plight. As Leonore M. J. Simon has noted, "[t]reating each act of domestic violence as a criminal act against the state rather than as merely a family matter is essential in challenging the fear and ambivalence many victims feel."<sup>134</sup>

## 2. *What Does Mandatory Arrest Say to the Batterer?*

The police response to domestic violence also affects the cognitive response of the batterer. When the police fail to respond adequately or minimize the severity of their violence, batterers may develop cognitive distortions.<sup>135</sup> They may see an ineffective police response as justification for their conduct.<sup>136</sup> Alternatively, an ineffective police response may reinforce the batterer's failure to assume responsibility for his actions.<sup>137</sup> An inadequate police response may also lead to distortions that either minimize, in the mind of the batterer, the effect of violence, or dehumanize or blame the victim.<sup>138</sup> As Eva Jefferson Paterson stated, when police fail to arrest:

men . . . get the message from police officers that women battering is not a crime and that the sanctions of the criminal justice system—sanctions which presumably exist to deter and punish those who have the inclination to behave in antisocial ways—are routinely not invoked by police officers and that therefore they have nothing to fear if they beat the woman with whom they are, or were, involved.<sup>139</sup>

From a cognitive and therapeutic jurisprudence perspective, when police respond ineffectively, slowly, or not at all, offenders are reinforced to deny their behavior while the bat-

133. *See id.*

134. Simon, *supra* note 26, at 446.

135. *See Fagan & Brown, supra* note 119.

136. *See id.*

137. *See id.*

138. *See id.*

139. Eva Jefferson Patterson, *How the Legal System Responds to Battered Women*, in *BATTERED WOMEN* 79, 82-83 (Donna M. Moore ed., 1979).

tered person continues to feel a sense of helplessness.<sup>140</sup> Through mandatory arrest, police can help challenge and disconfirm entrenched and ingrained dysfunctional thoughts, such as "There is nothing wrong with what I'm doing."<sup>141</sup> Moreover, when the police take the offender into custody, they give a clear message to the batterer, as well as to the battered person, that he has committed a criminal act for which he is responsible.<sup>142</sup> By contrast, failure to arrest would facilitate offender denial,<sup>143</sup> as well as encourage the battered person's feelings of helplessness and self-blame.<sup>144</sup>

Another advantage of mandatory arrest, from a therapeutic jurisprudence perspective, is that it can validate the battered person's right to be free from personal violence.<sup>145</sup> In short, when the police fail to respond adequately, the effect is anti-therapeutic; whereas mandatory arrest has many positive effects in terms of discouraging the maladaptive cognitions that led to battering.

### 3. *What Does Mandatory Arrest Say to Society?*

Mandatory arrest sends a message to society that domestic violence is a crime that will not be tolerated and that society does not blame the victim for her predicament.<sup>146</sup> As Marion Wanless noted, "The continuing failure to consistently make arrests signifies that society still considers domestic abuse a permissible act rather than a crime. . . . Mandatory arrest signals that domestic violence is a crime with attendant consequences."<sup>147</sup>

Present societal organization and traditional stereotypic views of women support domestic violence.<sup>148</sup> The fact is, domestic violence is a crime of violence. As such, it victimizes all of society, because everyone is less secure when violence

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140. See David A. Ford, *Wife Battery and Criminal Justice: A Study of Victim Decision-Making*, 32 FAM. REL. 463 (1983).

141. Simon, *supra* note 26, at 447.

142. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

143. See David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL AND PHYSICAL DISABILITY L. REPORTER 225 (1992).

144. See DUTTON, *supra* note 120, at 77-79.

145. See Simon, *supra* note 26, at 447.

146. See Welch, *supra* note 87, at 1152.

147. Wanless, *supra* note 97, at 553-54.

148. See *id.*

reigns unchecked. Messages consistent with a therapeutic jurisprudence approach, such as that conveyed by a mandatory arrest policy, can help to change the climate that supports domestic violence.

#### IV. PROPOSAL

While mandatory arrest is not a "panacea,"<sup>149</sup> has certain drawbacks,<sup>150</sup> and has not been conclusively shown to have a deterring effect on recidivism,<sup>151</sup> it has major advantages from a therapeutic jurisprudence perspective.<sup>152</sup> Measures short of mandatory arrest risk sending the wrong messages. Mandatory arrest, by contrast, signals positive and constructive messages to the offender, battered person, and society. These messages can lay the groundwork for breaking the cycle of battering, help the battered person overcome maladaptive thoughts, and clear the way for a societal response that it will no longer tolerate this crime. Thus, from a therapeutic jurisprudence perspective, mandatory arrest should be adopted.

Critics have argued that police officers must have some discretion due to the uniqueness and variations of cases involving domestic violence.<sup>153</sup> The response to this criticism is that mandatory arrest "ensures a consistent police response on which victims can rely."<sup>154</sup> Moreover, the police do maintain some discretion, since they must ascertain that there is probable cause to make an arrest.<sup>155</sup> Thus under mandatory arrest, police still have sufficient flexibility to prevent abuses such as use of the law for revenge or retaliation by women who would make false claims.<sup>156</sup>

Again, it is important to emphasize that mandatory arrest will not solve all problems and will, of course, create some of its own.<sup>157</sup> Therefore, we must continuously strive for a comprehensive solution to domestic violence. One such so-

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149. *See id.* at 568.

150. *See supra* notes 99-108 and accompanying text.

151. *See supra* notes 66-71 and accompanying text.

152. *See supra* text accompanying notes 135-141.

153. Welch, *supra* note 87.

154. Wanless, *supra* note 97, at 568.

155. *See* Nancy James, *Domestic Violence: A History of Arrest Policies and a Survey of Modern Laws*, 28 FAM. L. Q. 509 (1994).

156. *See* Wanless, *supra* note 97, at 568.

157. *See* text accompanying notes 109-112.

lution is that mandatory arrest should be coupled with a coordinated program.<sup>158</sup> Such a program should involve a high level of community awareness, police training, and the application of therapeutic jurisprudence to other aspects of the criminal justice system, such as the prosecutorial response to domestic violence.

#### A. *Police Training and Awareness*

It is widely known that police tend to treat batterers less severely than comparable perpetrators of violence against strangers.<sup>159</sup> As Joan Zorza has noted, police have traditionally been taught that domestic violence is a private matter.<sup>160</sup> Even where there has been reform, inconsistencies exist in how police react to the batterer or battered person.<sup>161</sup> Thus, there is a continuing need for police training and awareness programs.

The way police respond to a battered person can be detrimental as well as therapeutic. Where police blame or disparage a battered person, they may reinforce her feelings of low self-esteem and isolation.<sup>162</sup> Police must be made aware of the significance of the manner in which they respond to the battered person and must learn more effective responses. As Leonore M. J. Simon has noted, "Police training could make officers more sensitive and helpful to victims. Training could address general aspects of the dynamics of domestic violence, the potential lethality of these cases, services available for battered women and their children, and the legal obligation to provide protection."<sup>163</sup>

An important issue in police training concerns the threshold for arrest. Marion Wanless offers a good suggestion for a brightline rule.<sup>164</sup> Wanless recommends that police

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158. See Welch, *supra* note 87, at 1164.

159. See James, *supra* note 155 (citing Joan Zorza, *The Criminal Law of Misdemeanor Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992)). As Zorza notes, police are generally "indifferent" to domestic violence.

160. Joan Zorza, *Mandatory Arrest for Domestic Violence*, 10 CRIM. JUST. 2 (1992).

161. See Timothy J. Moroney, *Domestic Violence—Protective Orders and Arrest Policies*, 27 PAC. L.J. 790 (1985).

162. See K. Ferraro, *Police Woman Battering*, 36 SOC. PROBS. 61 (1989).

163. Simon, *supra* note 26, at 448 (citing EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* vii-xii (1992)).

164. Wanless, *supra* note 97, at 569.

be trained to arrest whenever the batterer physically injures the victim.<sup>165</sup> Wanless further argues that physical injury should be defined broadly, to include even minimal redness or swelling.<sup>166</sup>

A second important issue concerns discerning the primary aggressor. The primary aggressor is the person who caused the incident, even if both parties are injured.<sup>167</sup> Identifying the primary abuser is especially important from a therapeutic jurisprudence perspective when considering the message of mutual arrest. By labeling both parties as abusers, mutual arrest sends the message that both parties are to blame. Such a message allows continued cognitive distortion on the part of the batterer because he now has a good reason to deny responsibility for his acts. Perhaps worse, the message to the battered person can only serve to confuse and humiliate her.

Police training, while an important step, is perhaps best thought as only one of many steps that can be taken from a therapeutic jurisprudence perspective. Reform in this area should extend training and awareness throughout the criminal justice system.

### B. *Applications Beyond the Police Response: The Prosecution*

The prosecutorial response to domestic violence can also have positive or negative therapeutic implications. Prosecutors have considerable discretion in the exercise of their powers.<sup>168</sup> Lenient treatment conveys the message that the violence is trivial.<sup>169</sup> The batterer can, therefore, continue with his cognitive distortions and denial of responsibility. Equally damaging is the message to the battered person that her plight is of little importance and will not be taken seriously. Consequently, she will continue to harbor feelings of self-blame and hopelessness.<sup>170</sup> Further, a weak prosecutorial response may foster the batterer's distorted perception that

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165. *Id.*

166. *Id.* at 570.

167. *See id.* Wanless offers four factors that police would consider in determining who to arrest: (1) comparative severity of injury, (2) history of violence between the parties, (3) did either party act in self-defense, and (4) the likelihood of future injury. *Id.*

168. *See e.g.*, *Bordenkirscher v. Hayes*, 434 U.S. 352 (1978).

169. *See Simon, supra* note 26.

170. *See id.*

there is nothing wrong with his behavior, and thus encourage him to maintain his destructive behavioral pattern.<sup>171</sup> With a better understanding of therapeutic jurisprudence, prosecutors may vigorously prosecute batterers. Such a response can help the batterer take more responsibility for his conduct.<sup>172</sup>

As with the police, prosecutors can benefit from training and awareness programs.<sup>173</sup> A strong, consistent prosecutorial response can help empower women by modifying their faulty belief that they are responsible for the violence directed toward them.<sup>174</sup> When prosecutors request a tough sentence, they educate the batterer as well as the victim and society about the seriousness of their crime.<sup>175</sup>

#### V. CONCLUSION

In sum, treatment for the batterer and battered person does not begin in a psychotherapy clinic. It begins on the scene, with the police, and continues throughout the processing of the batterer in the criminal justice system. By making effective use of concepts of therapeutic jurisprudence it may be possible not only to begin the process of reeducation of the batterer and healing of the battered person at the moment of police contact, but also to set the right tone for change in the twenty-first century.

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171. *Id.*

172. STEPHEN B. HERRELL & M. HOFFORD, FAMILY VIOLENCE: IMPROVING COURT PRACTICE (1990).

173. Simon, *supra* note 26, at 452. See also Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POLY & L. 193 (1995)

174. *See id.*

175. *See id.*



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