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Criminal Law of Misdemeanor Domestic Violence, 1970-1990

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CRIMINAL LAW

THE CRIMINAL LAW OF MISDEMEANOR DOMESTIC VIOLENCE, 1970-1990

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I. BACKGROUND

Domestic disturbance incidents constitute the largest category of calls received by police each year.[1] This is not surprising given the number of women who are abused by their intimate partners. Half of all married women will be beaten at least once by their husbands.[2] Many of these women are beaten as frequently as once a month, once a week, or even daily.[3] The U.S. Surgeon General found that battering of women by husbands, ex-husbands or lovers "is the single largest cause of injury to women in the United States," accounting for one-fifth of all hospital emergency room cases.[4] The injuries women sustain in these attacks are at least as serious as those suffered in violent felony crimes.[5] Weapons are used in thirty percent of all domestic violence incidents.[6] Thirty-one percent of all women murdered in America are killed by their husbands, ex-husbands, or lovers.[7]

Woman abuse profoundly affects children living in the home. It imperils children psychologically even when they themselves are

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1 CLARE P. CORNELL & ROGER LANGLEY, INTIMATE VIOLENCE IN FAMILIES 131 (1985).

2 RICHARD LANGLEY & RICHARD LEVY, WIFE BEATING, THE SILENT CRISIS 12 (1977).

3 ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, WOMEN ABUSE: FREQUENT AND SEVERE, (Springfield, IL 1983).

4 Nikki R. Van Hightower & Susan A. McManus, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (1989).

5 PATSY CLAUS & MICHAEL RANEL, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FAMILY VIOLENCE (1984).

6 *Id.*

7 K. ROSE & J. GOSS, BUREAU OF JUSTICE STATISTICS, DOMESTIC VIOLENCE STATISTICS (National Criminal Justice Reference Service 1989).

never beaten.[8] Frequently children are also victims of abuse. Between fifty-three and seventy percent of men who abuse women also beat their children,[9] and a significant number sexually abuse the children, especially daughters.[10] Many children also suffer serious injuries as a result of the reckless conduct of their fathers' while beating their mothers.[11] In families where the mother is beaten, sixty-two percent of sons over the age of fourteen are injured trying to protect their mothers.[12] A son who sees his father beat his mother is more likely to become a delinquent or a batterer himself than if his father beat him instead.[13]

In most communities police officers may be the only meaningful contact citizens have with "the law." The evidence suggests, however, that police are largely indifferent to domestic violence, and that they attach to it a very low priority.[14] Throughout the 1970s and early 1980s, officers believed and were taught that domestic violence was a private matter, ill suited to public intervention.[15] Police depatments also consider domestic violence calls unglamorous, nonprestigious, and unrewarding.[16] Until recently, police frequently ignored domestic violence calls[17] or purposefully delayed responding for several hours.[18] Even when they eventually arrived on the scene, police rarely did anything about domestic violence,[19] and some actually responded by laughing in the woman's face.[20] Other officers talked to the abuser, possibly removing the batterer

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8 JUDITH S. WALLERSTEIN & SANDRA BLACKSLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 121 (1989).

9 Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse in* FEMINIST PERSPECTIVES ON WIFE ABUSE 164 (Kersti Yllo & Michele Bograd eds. 1988).

10 LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 51-54 (1984); LEE ANN HOFF, BATTERED WOMEN AS SURVIVORS 240 (1990); MARIA ROY, CHILDREN IN THE CROSSFIRE 57 (1988).

11 ROY, *supra* note 10, at 92-93; PETER JAFFE ET AL., CHILDREN OF BATTERED WOMEN 27 (1990).

12 ROY, *supra* note 10, at 92.

13 Testimony of David Adams, Director of EMERGE, before Massachusetts Gender Bias Committee (1989).

14 GAIL A. GOOKLASIAN, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES, ISSUES AND PRACTICE IN CRIMINAL JUSTICE 29 (National Institute of Justice, May 1986); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW 136 (1989); DEL MARTIN, BATTERED WIVES 92 (1981).

15 EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL RESPONSE 31 (1990).

16 MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 232 (1980).

17 *Id.*

18 MARTIN, *supra* note 14, at 92.

19 *Id.*

20 HOFF, *supra* note 10, at 102.

from the home temporarily to cool off.[21] Some police officers removed the abused woman from "his" home.[22] Yet, in conformity to traditional practice, police virtually never arrested the abuser.[23] In rural areas, police who frequently know both parties or at least the abuser, were even more reluctant to respond in a manner that would protect the victim.[24]

Indeed, those police departments that had policies on handling domestic calls in the 1970s had a clear non-arrest policy. The Oakland Police Department's *1975 Training Bulletin on Techniques of Dispute Intervention* explicitly described

> [t]he police role in a dispute situation [as] more often that of a mediator and peacemaker than enforcer of the law. . . . [T]he possibility that . . . arrest will only aggravate the dispute or create a serious danger for the arresting officers due to possible efforts to resist arrest . . . is most likely when a husband or father is arrested in his home . . . . Normally, officers should adhere to the policy that arrests shall be avoided . . . but when one of the parties demands arrest, you should attempt to explain the ramifications of such action (e.g., loss of wages, bail procedures, court appearances) and encourage the parties to reason with each other.[25]

Detroit Police Commander James Bannon, in his address to the 1975 American Bar Association convention, described the manner in which his police officers respond to domestic violence calls. According to Bannen, the dispatcher would screen calls from battered women to respond only to those women who appeared in the most imminent danger. If the woman had only minor injuries when they arrived, the police became angry and would not respond quickly the next time.[26] Women often learned to report that a stranger was attacking them or that their abuser had a gun. While such a desperate ploy might have worked once for a woman, police simply declared her not credible if they found no serious injuries. Lacking credibility, she was deemed unworthy of police protection if she called again. Police treated poor women and women of color with less concern than they did middle class and white women, even when they were severely injured.[27]

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21 STRAUS, *supra* note 16, at 233.

22 *Id.*

23 *Id.* at 232-33.

24 Shirley J. Kuhle, *Domestic Violence in Rural America: Problems and Possible Solutions*, NEBRASKA POLICE OFFICER 44 (1982).

25 MARTIN, *supra* note 14, at 93-94.

26 LENORE E. WALKER, THE BATTERED WOMAN 208 (1979).

27 SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 25 (1982).

Michigan's policy, as taught in its Police Training Academy, directed officers to:

a. Avoid arrest if possible. Appeal to their [complaintant's] vanity.
b. Explain the procedure of obtaining a warrant.
   (1) Complainant must sign complaint.
   (2) Must appear in court.
   (3) Consider loss of time.
   (4) Cost of court.
c. State that your only interest is to prevent a breach of the peace.
d. Explain that attitudes usually change by court time.
e. Recommend a postponement.
   (1) Court not in session.
   (2) No judge available.
f. Don't be too harsh or critical.[28]

Michigan's policy also failed to provide for sufficient education. While almost half of all Michigan police calls are for domestic disturbances, only three to five out of the 240 hours of police recruit training are devoted to the manner in which police should answer these calls.[29] Training in other police departments has been similarly inadequate. Prior to 1980, when police academies were still uncommon,[30] those who received on-the-job training were generally assigned to those experienced officers who were seen as most successful. Unfortunately, these officers were precisely those least likely to have challenged the standard practices for responding to domestic violence incidents.[31] Rookies looked up to their experienced partners and were rewarded for imitating them.

With the advent of police academies, new recruits were trained by men generally "chosen" as instructors, not because of their academic ability or interest in teaching, but because of their advancing age or temporary disability, or because they were on leave or special duty restriction pending departmental investigation.[32] New officers were often trained first and foremost as men, and the ethic of masculinity was seen as being of the utmost importance.[33] Seeing anything from a woman's perspective was, if not almost taboo, at least so completely foreign that it did not happen.

In this light, it is hardly surprising that the police who did respond to domestic violence calls almost always took the man's

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28 MARTIN, *supra* note 14, at 93 (emphasis in original).
29 SCHECHTER, *supra* note 27, at 161.
30 *Id.* at 33.
31 *Id.* at 32.
32 *Id.* at 33.
33 R. N. HARRIS, THE POLICE ACADEMY: AN INSIDE VIEW 291 (1973).

side.[34] And because abusers, when they did not or could not deny their abuse, tried to shift the blame onto others, especially their victims,[35] the police frequently joined in blaming the victim.[36] The responding officer often admonished the woman to be a better wife or asked, or at least wondered, why she did not leave.[37] Some officers concluded that she must enjoy the beatings, or at least not mind them.[38] These officers conveniently ignored the fact that their failure to protect the woman, her lack of money, and the far greater risk of being beaten or killed if she tried to separate herself from her abuser[39] all combined to make her decision logical. Women's fears of retaliation for leaving are rational; divorced and separated women, who comprise only ten percent of all women, account for fully seventy-five percent of all battered women, and they report being battered fourteen times more often than do women still living with their partners.[40]

Battered women who reported assaults have typically represented a small portion of the total number of victims.[41] One 1970s study of 109 battered women revealed that of every 32,000 assaults, only 517, or less than two percent of the total, were actually reported.[42] Victims sadly learned that reporting spouse abuse was futile.[43]

In 1970, American law did not recognize marital rape as a crime.[44] Though twelve percent of married women are raped by their husbands, and from thirty-four to fifty-nine percent of battered women report that their male partner rapes them,[45] laws in most states continued to define rape as intercourse with a woman other than the rapist's wife.[46] Marital rape is one of the strongest

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[34] SCHECHTER, *supra* note 27, at 25, 158.

[35] David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, BOSTON B. J., 23, 24 (July-Aug. 1989).

[36] SCHECHTER, *supra* note 27, at 25.

[37] *Id.* at 58.

[38] *Id.*; Ruth Grundle, *Civil Liability for Police Failure to Arrest:* Neering v. Weaver, 9 WOMEN'S RTS. L. REP. 259, 260 (1986).

[39] MILDRED D. PAGELOW, FAMILY VIOLENCE 43 (1984).

[40] CAROLINE W. HARLOW, FEMALE VICTIMS OF VIOLENT CRIME 5 (Bureau of Justice Statistics Jan. 1991).

[41] RICHARD J. GELLES & CLAIRE P. CORNELL, INTIMATE VIOLENCE IN FAMILIES 21 (1985).

[42] R. EMERSON DOBASH & RUSSEL DOBASH, VIOLENCE AGAINST WIVES 164 (1979).

[43] SCHECHTER, *supra* note 27, at 26.

[44] MARTIN, *supra* note 14, at 89.

[45] WALKER, *supra* note 10, at 48-49; ANGELA BROWNE, WHEN BATTERED WOMEN KILL 95-96 (1987).

[46] SUSAN ESTRICH, REAL RAPE 73 (1987).

predictors of whether one of the spouses will kill the other.[47] The injuries that wives receive from marital rape are more severe than those received from rape at the hands of a stranger,[48] yet if a wife was raped by her husband before 1970, the strongest charges she could bring were assault charges or a divorce on cruelty grounds. In states like New York, where adultery was the only ground for divorce until 1966,[49] the wife could not get a divorce regardless of how many times or how brutally her husband had raped her. Following the law, police throughout the United States largely ignored marital rape.

In 1981, the supreme courts of Massachusetts[50] and New Jersey[51] declared that a husband could be criminally liable for raping his wife. Several years later, New York,[52] Florida,[53] and Georgia[54] followed suit. As of January 1985, twenty states permitted a wife to prosecute her husband for rape, although most of these states limited the situations in which she could do so.[55] Even as recently as July 1991, only nineteen states had completely abolished the marital rape exemption.[56] In those states where marital rape was not a crime, however, it was usually grounds for divorce.[57] Furthermore, at least twenty-eight states currently specifically allow sexual abuse of a spouse as grounds for the issuance of an order for protection.[58] These changes in the law have made police more able and willing to intervene in situations involving marital rape.

Police frequently rationalized their refusal to intervene in domestic violence cases on the ground that domestic violence work was highly dangerous.[59] Restoring peace while maintaining control

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47 BROWNE, *supra* note 45, at 95-96; DIANE E. H. RUSSELL, RAPE IN MARRIAGE xxviii (1990).

48 RUSSELL, *supra* note 47, at 190-205.

49 MARTIN, *supra* note 14, at 166.

50 Commonwealth v. Chretien, 383 Mass. 123, 417 N.E.2d 1203 (1981).

51 State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981).

52 People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567 (1984), *cert. denied*, 105 S. Ct. 2029 (1985).

53 State v. Rider. 449 So. 2d 903 (Fla. App. 1984).

54 Warren v. State, 336 S.E.2d 221 (Ga. 1985).

55 DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 140 (1985).

56 NATIONAL CENTER ON WOMEN AND FAMILY LAW, MARTIAL RAPE PACKET (799 Broadway, Room 402, New York, NY 10003, 1991).

57 For example, Massachusetts and New York before their courts held that marital rape was a crime.

58 PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT 12-13 (March 1990).

59 BUZAWA & BUZAWA, *supra* note 15, at 32.

was seen as the best way to minimize the risk to the responding officer with an emphasis on maintaining control.

> Arrests were actively discouraged as a waste of time except when disrespect or threats by an offender or victim indicated that the officer might lose control of the situation. Arrest is therefore [the] assertion of authority rather than a response to the demands of the situation.[60]

The reality, however, is that domestic disturbance incidents, which account for thirty percent of police calls, account for only 5.7% of police deaths, making domestic disturbances one of the least dangerous of all police activities.[61] In addition, training police to better handle domestic violence incidents can reduce assaults against officers.[62] Nevertheless, the myth that domestic violence work is dangerous is still used to justify police discrimination against battered women.[63]

Another factor makes police education and training difficult. Beyond dismissing woman battering as a real crime, far too many police officers either engage in it themselves[64] or tolerate it within their ranks.[65] Like the general population, policemen are often socialized to regard women as inferior and subordinate.[66] Even now, advocates of battered women know that a policeman's battered wife is their most difficult case since most other officers will fail to protect her or enforce any protective order that she may have obtained, and many will help trace her to any shelter where she has sought refuge.[67]

In addition to police indifference, battered women faced a harsh body of civil law. Prior to 1972, the only civil remedy which a battered woman had was an injunction against her abuser pursuant to a divorce or a legal separation.[68] These injunctions were quite limited. First, in order to even file such an action, a battered woman had to be married to her abuser.[69] Second, the injunctions were

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60 *Id.* at 33.

61 Joel Gardner & Elizabeth Clemmer, *Danger to Police in Domestic Disturbances—A New Look*, RESEARCH IN BRIEF, 5 (National Institute of Justice, Nov. 1986).

62 BUZAWA & BUZAWA, *supra* note 15, at 108.

63 The author has personal experience interviewing women at shelters in Boston and New York City from 1976 to the present.

64 WALKER, *supra* note 10, at 207.

65 GILLESPIE, *supra* note 14, at 13, 15.

66 James Bannon, Law Enforcement Problems With Intra-Family Violence, a study presented to the A.B.A. Convention (Aug. 12, 1974) (available from Americah Friends Service Committee, Women's Issues Program, Cambridge, MA).

67 Interview with Judith Armatta, General Counsel, Oregon Coalition Against Domestic and Sexual Violence (Dec. 3, 1991).

68 FINN & COLSON, *supra* note note 58, at 2; SCHECHTER, *supra* note 27, at 162; Lisa G. Lerman, *State Legislation on Domestic Violence*, 3 RESPONSE No.12, 2 (Aug./Sept. 1980).

69 Lerman, *supra* note 68, at 2.

available in only some states.[70] Third, most injunctions expired automatically by law within a fairly short time or when the court concluded the case.[71] Finally, there was no criminal penalty for violating such an injunction.[72] The woman had to resort to filing a contempt action against her husband to bring criminal enforcement.[73] Such actions usually required a new petition and another filing fee, with another order for her husband to appear in court and further costs to have him served.[74] Even then, the woman had little hope that the man would get more than an admonishment from the judge.[75] There was also always the chance that the contempt hearing would be turned against her, and the judge would examine her behavior to see what she had done to upset the husband, or what new court order would make him feel less aggrieved and therefore less likely to abuse her in the future.[76] One thing, however, was certain; police were seen as having no role in enforcing these injunctions since the injunctions were purely civil matters.

II. COURT CHALLENGES

In the 1970s, Americans gradually became aware that millions of women were being brutally abused by their husbands. A few women had started organizing around the issue of battered women. Some opened their homes to victims or started shelters. Others proposed legislation to assist battered women. It was clear, however, that neither of these approaches would have much effect if the police did not enforce the new laws. As women increasing frustrated by the failure of police to arrest even husbands who committed even felony assaults, it became clear that they needed to concentrate their efforts on forcing the police to enforce the few laws that did exist to help battered women.[77]

In 1972, the executor of Ruth Bunnell's estate filed a wrongful death action against the San Jose Police Department.[78] Mrs. Bunnell had called the police at least twenty times in the year before her

70 As of 1980, these were still the only type of protection in the states of Georgia, Idaho, Indiana, Michigan, New Jersey, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Virginia, Washington, and Wyoming. *Id.*

71 *Id.*

72 FINN & COLSON, *supra* note 58, at 2.

73 LISA LERMAN, CENTER FOR WOMEN POLICY STUDIES, COURT DECISIONS ON WIFE ABUSE LAWS: RECENT DEVELOPMENTS 1 (1982).

74 MARTIN, *supra* note 14, at 58.

75 LERMAN, *supra* note 73, at 1.

76 *See, e.g.*, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS 52 (1989).

77 SCHECHTER, *supra* note 27, at 159.

78 Hartzler v. City of San Jose, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (1975).

death to complain that her husband was abusing both her and her two daughters.[79] Only once did they arrest her husband.[80] In September of 1972, she called the police for help, telling them that her husband was on his way to the house to kill her.[81] They told her to wait until he arrived.[82] By the time police came in response to a neighbor's call, her husband had stabbed her to death.[83] The California Court of Appeals upheld the trial court's dismissal of the case, reasoning that the police had never "induced decedent's reliance on a promise, express or implied, that they would provide her with protection."[84]

Legal aid and legal service lawyers, who had always known that the vast majority of their female divorce clients were being violently abused by their husbands,[85] were experiencing the same frustrations. Fearing that another tort action for damages against the police would probably meet with little sucess, two groups of legal services lawyers on opposite shores of the country decided to adopt a different approach. They filed for declaratory and injunctive relief against the police in order to force them to do what the law empowered them to do to protect battered women.

The first to file suit was a group of five attorneys in the Legal Aid Society of Alameda County in Oakland.[86] They filed a complaint in October of 1976 in the Northern District of California.[87] The suit which was captioned *Scott v. Hart*, was in the form of a class action against George T. Hart, Chief of the Oakland Police Department.[88] They filed on behalf of "women in general and black women in particular who are victims of domestic violence."[89] All five of the named plaintiffs were black women who had repeatedly called the Oakland police for protection when they were beaten up by their husbands, ex-husbands or boyfriends.[90] The officers had either failed to respond or had responded in an ineffectual[91] or, in one

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79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*; MARTIN, *supra* note 14, at 99.

85 SCHECHTER, *supra* note 27, at 122, 167.

86 These attorneys were Jefferson Patterson, Les A. Hausrath, Miriam Steinbock, Evelyn R. Sinailco, and Clifford Sweet.

87 Scott v. Hart, No. C-76-2395 (N.D. Cal., filed Oct. 28, 1976).

88 *Id.*

89 Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus 1 (copy on file with author).

90 *Id.* at ¶¶ 6, 10-14.

91 *Id.* at ¶¶ 1, 3, 6-7, 10-14.

case, a threatening manner.[92] By bringing their suit on behalf of black victims of domestic violence who were getting less adequate police responses than were white victims, the legal aid lawyers were able to allege a denial of the equal protection mandated by the Fourteenth Amendment.[93] They also claimed that the police had breached their duty to arrest the abusers "when a felony [had] been committed such as felony wife beating"[94] and that a "police policy that de-emphasizes and discourages arresting assailants . . . is arbitrary, capricious, discriminatory, and deprives plaintiffs and the plaintiff class of the right to equal protection of the laws."[95] The complaint asked the court to: (1) permanently enjoin the police from refusing to respond adequately to battered women's calls; (2) affirmatively order the police to respond adequately; (3) order the police "to arrest when they know that a felony has been committed or when the woman requests the arrest of the assailant"; (4) order the police to "advise women of their right to make citizens' arrests and [of the fact] that the police [will] effectuate those arrests by taking the assailant into custody"; (5) order the police to "take assailants to a mental facility for 72-hour observation" when appropriate; (6) order the police to train officers in "how to best handle these incidents"; (7) order the police to start a batterer treatment program; (8) order the city to establish a shelter for women; and 9) force defendants to pay plaintiffs' "court costs, expenditures and reasonable attorneys fees."[96]

The first hurdle which plaintiffs needed to overcome was posed by the Supreme Court's ruling in *Rizzo v. Goode*.[97] In that case, the Court held that supervisory officials must have actual knowledge of and responsibility for promulgating discriminatory polices before an aggrieved party could get injunctive relief in federal court.[98] This hurdle, however, proved to be not much of an obstacle in *Scott*. The existance within the Oakland Police Department of a clear arrest-avoidance policy which was known to the watch commanders and other supervisors persuaded the court to allow the case to survive a motion to dismiss.[99] Not until November 14, 1979, however, more

92 *Id.* at ¶¶ 16-17.

93 *Id.* at ¶¶ 10-14.

94 *Id.* at ¶ 15; *See* CAL. PENAL CODE § 273(d) (West 1990).

95 First Amended Complaint for Declaratory and Injunctive Relief and Petition for a Writ of Mandamus ¶¶ 25 (copy on file with author).

96 *Id.* at 9-10.

97 Rizzo v. Goode, 423 U.S. 364 (1976)

98 *Id.* at 377.

99 *Id.*; *see* Brief of Defendants in Support of Motion for Summary Judgment and Judgment Dismissal, Scott v. Hart, No. 6-76-2395 (N.D. Cal. filed Aug. 23, 1977) *passim*.

than three years after the class had filled its complaint, did the parties agree to a settlement.[100] The settlement granted most of the plaintiff's requested relief: the police agreed to a new policy in which they would respond quickly to domestic violence calls. The police also agreed to make an arrest whenever an officer had probable cause to believe that a felonious assault had occurred or that a misdemeanor had been committed in his presence.[101] This new policy required the police to make their arrest decisions without looking to factors traditionally used to justify inaction.[102] The police also agreed not to use the threat of adverse financial consequences for the couple to justify inaction or to urge the victim not to pursue the case. The settlement also required police to inform each battered woman that she had a right to make a citizen's arrest, and required police to help her to do so.[103] Officers would thereafter refer victims to supportive agencies for counseling and other assistance.[104] Furthermore, the department acknowledged that it had an affirmative duty to enforce civil restraining and "kick out" orders.[105] While Oakland was not required to provide a shelter and counseling for victims (or assailants), the city agreed to apply for federal funding for any support services available to battered women, and to pay the plaintiffs' attorney fees and court costs.[106]

The *Scott* settlement decree could be modified by agreement of the parties, or by a showing by either party that modification was necessary "to avoid irreparable injury to a party, or to accommodate unforeseen or changed circumstances."[107] The police department agreed to continue to give the plaintiffs crime and assignment reports and anything else they possessed regarding their response to domestic violence situations.[108] The court retained jurisdiction of the case to ensure compliance, and neither party was allowed to apply to the court for dismissal of the case until at least three years had passed and further supervision of the case was no longer necessary.[109]

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100 Scott v. Hart, No. C-76-2395 (N.D. Cal., filed Oct. 28, 1976).

101 *Id.* at ¶¶ 2-8.

102 Those factors included whether or not the victim was married to the alleged assailant, lived with the assailant, had a protective order, had previously sought police help or was hesitant or unwilling to prosecute, or whether the assailant promised to stop his abusive behavior. *Id.* at ¶ 3d.

103 *Id.* at ¶ 7.

104 *Id.* at ¶ 9b.

105 *Id.* at ¶ 10.

106 *Id.* at ¶ 13, 15.

107 *Id.* at ¶ 16.

108 *Id.* at ¶ 14.

109 *Id.* at ¶ 16.

In December 1976, approximately six weeks after the *Scott* case was filed, three New York legal services programs and the Center for Constitutional Rights filed a similar class action suit on behalf of married battered women against the New York City Police Department and the New York Family Court. In their complaint, captioned *Bruno v. Codd*,[110] twelve named plaintiffs alleged that the police failed to arrest husbands who battered their wives and that New York Family Court personnel denied battered wives access to the court.[111] The complaint, filed in the Supreme Court of the State of New York, named the New York City Police Department, the Family Court, the Probation Department, and sixteen others as defendants.[112] They claimed thirteen causes of action on behalf of battered wives who had repeatedly been denied police protection or given endless runarounds.[113] During the pendency of the case, affidavits from forty-eight more women were received, supporting all of the charges.[114]

Thirteen months before the complaint was filed, two New York lawyers had decided to "institute a lawsuit challenging the legal system's treatment of battered wives" there.[115] They interviewed numerous battered wives and collected information about the policies of the New York City Police Department.[116] The affidavits that they collected showed a blatant disregard for women's welfare.[117] The affidavits also showed that the women were desperate to stop the abuse, had tried numerous times to do so, and had failed due only to the system's faults.[118] The women explained in their affidavits the economic and societal pressures that kept them from leaving their husbands.[119] They outlined the obstacles each encountered, such as a lack of day care, shelter beds or housing, and increased violence from their husbands, which, along with the absence of police protection, combined to prevent them from leaving their husbands.[120] They described how, even when women managed to

110 Complaint, Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977) *passim*.

111 *Id.*

112 *Id.* at ¶¶ 1-3, 5-12D.

113 *Id.* at ¶¶ 15-31.

114 Affidavits on file with *Bruno v. Codd* case (copy on file with author).

115 Laurie Woods, *Litigation on Behalf of Battered Women* 5 WOMEN'S RTS. L. REP. 7, 15 (1978).

116 *Id.* at 15, 16.

117 Complaint, *supra* note 110, at ¶¶ 57-59, 342-43, 512.

118 *Id.* at ¶¶ 32-576.

119 *Id.* at ¶¶ 203-05, 361, 409, 455.

120 *Id.*

obtain orders of protection, the police refused to enforce them.[121]

The Administrative Judge of the Family Court stated to the *Bruno* court that he was unaware of the problems described in the plaintiffs' complaint, and that the Family Court had a right to address the changes which the plaintiffs' sought.[122] The Director of the New York City Probation Department issued an order setting forth procedures for processing oral or written complaints against any probation employee who failed to advise women of their right to reject offers of mediation and instead appear immediately before a judge on a petition for an order of protection.[123] In addition, the legislature amended of the Family Court Act to prohibit officials from discouraging or preventing anyone wishing to file for a protective order from having access to the courts for such purposes.[124] Accordingly, the New York Court of Appeals dismissed the causes of action against the Family Court and Probation Department.[125] Even in dismissing the causes of action against the Family Court, however, New York's highest court praised "the welcome efforts of plaintiff's counsel" to alert and sensitize the courts to their responsibility to respond to the brutality inflict upon battered women.[126]

After the Court of Appeals dismissed the counts against the Family Court and the Probation Department, several counts against the Police Department remained pending in the trial court. Judge Gellinoff, the trial judge, was troubled by the allegations supporting these counts.[127] "For too long," he wrote in denying a motion to dismiss,

> Anglo-American laws treated a man's physical abuse of his wife as different from any other assault and, indeed as an acceptable practice. If the allegations of the instant complaint — buttressed by hundreds of pages of affidavits — are true, only the written law has changed; in reality, wife beating is still condoned, if not approved, by some of those charged with protecting its victims.[128]

The police department, concerned that the ruling on the motion to dismiss was a precursor of things to come, entered into a consent judgment with the plaintiffs. The judgment provided that the police would thenceforth have a duty to respond and would re-

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121 *Id.* at ¶¶ 497-516.

122 *See* Affidavit of Joseph B. Williams 10-11 (copies of *Bruno v. Codd* affidavits on file with author).

123 N.Y. General Order 5-77.

124 N.Y. FAM. CT. ACT. § 812(3) (1990).

125 Bruno v. Codd, 47 N.Y.2d 582, 419 N.Y.S.2d 901 (1979).

126 *Id.*

127 Complaint, *supra* note 110, at ¶¶ 32-576.

128 Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977) (citations omitted).

spond to every woman's request for protection against someone she alleged to be her husband if she said he was beating her or had violated an order of protection.[129] If the officer has reasonable cause "to believe that a husband has committed a misdemeanor against his wife or has committed a violation against his wife in the officer's presence, the officer shall not refrain from making an officer arrest of the husband without justification."[130] When the officer has reasonable cause to believe that a husband committed a felony against his wife or violated an order of protection, the officer must arrest him and should not attempt to reconcile the parties or mediate.[131] When a husband who allegedly committed a crime against her is not present when the police arrive and the wife wants him arrested or to make a civilian arrest, the officer must locate the husband just as with any other crime.[132] Officers must hereafter assist the wife in obtaining any needed medical assistance, and inform her of her right to get a protective order from the family court.[133] The police department must promulgate new policies and training materials in conformance with the decree, and a supervising officer must promptly investigate any allegation that a provision of the consent decree was violated and, if it was, cause it to be immediately complied with as soon as possible.[134] The court retained jurisdiction of the police action and allowed either party to apply for further relief as may be necessary or appropriate.[135]

The Oakland and New York City lawsuits made clear to police departments throughout the United States that they were vulnerable to being sued if they failed to protect the rights of battered women. Battered women's advocates soon learned how many police chiefs knew that both of the departments had "lost." As a result, police departments in many towns and cities agreed to revamp their policies and practices without any suit having to be filed.[136] The possibility that the town or city might be liable for attorney fees and even for damages in a case by injured women became a persuasive bargaining chip to many battered women's lawyers and advocates.[137]

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129 Consent Judgement 4-5 (copy on file with author).

130 *Id.* at 5.

131 *Id.* at 6.

132 *Id.* at 8.

133 *Id.* at 7.

134 *Id.* at 8.

135 *Id.* at 10.

136 BUZAWA & BUZAWA, *supra* note 15, at 75. Examples include New Haven, Conn., Chicago, Ill., and Atlanta Ga.

137 *See, e.g.* Lewis v. Dallas, No. CA3-85-0606-T, Slip op. (N.D. Tex. 1985); Czachorowski v. Degenhart, No. 07961188 (N.Y. Sup. Ct. 1988); SCHECHNER, *supra* note 27, at 160.

The caselaw took one more important step forward in *Thurman v. City of Torrington, Conn.*,[138] where a federal jury awarded Tracey Thurman and her son $2.3 million because the police were negligent in failing to protect her from her abusive husband.[139] The court found that the Torrington's policy of indifference amounted to sex discrimination.[140]

The effect of the case was dramatic. As one commentator observed,

> The Thurman case was widely reported in the popular press and in academic journals. It graphically confirmed the extreme financial penalty that could be imposed on police departments when they abjectly fail to perform their duties. In addition, it confirmed that in appropriate cases, these massive liability awards would be upheld.[141]

Many police departments that did not get the message from *Scott* and *Bruno* were forced by *Thurman*'s threat of huge liability to change their policies.[142]

III. INCREASING ARREST POWERS

A. ENFORCING PROTECTIVE ORDERS

Although prosecutors, the judiciary, and probation offices must all play a role in protecting women from abusive partners, it is the role of the police, who are the first to respond, that usually determines whether victims ever get to a courthouse.[143] Police are the actors who must decide whether to arrest the abuser or to tell the victim about her rights. Without police help, few victims will even realize what their options are.

Women who have civil protection orders fully believe that the orders will be enforced.[144] The order frequently contains a warning printed on its face indicating that it is a criminal offense to violate the order.[145] Court personnel lead victims to believe that the order will be enforced by the police.[146] The police themselves, by urging victims to get civil orders, and by explaining that they cannot do

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138 595 F.Supp. 1521 (Dist. Conn. 1984).

139 BUZAWA & BUZAWA, *supra* note 15, at 75.

140 *Id.* at 74-75.

141 *Id.* at 75.

142 Dallas, Texas is an example.

143 FINN & COLSON, *supra* note 58, at 58, 60.

144 The author has personal experience interviewing women at shelters in Boston and New York City from 1976 to the present.

145 For example, the Massachusetts statutes states "Each abuse prevention order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE." MASS. GEN. LAWS ch. 209A § 7, ¶ 3 (1992).

146 *See, e.g.*, FINN & COLSON, *supra* note 58, at 52-53.

anything without such orders, also lead victims to believe that the orders will be enforced.[147]

Failure to enforce a protective order "increases the victim's danger by creating a false sense of security. Offenders may routinely violate orders, if they believe there is no real risk of being arrested."[148] Ultimately, without arrest, domestic violence laws could be violated with impunity. Yet even a police force willing to enforce a law is limited by the arrest powers which they have.

B. WARRANTLESS MISDEMEANOR ARREST

Realizing that the Oakland and New York City suits were time-consuming and that judgments were difficult to enforce, battered women's advocates soon turned to other approaches to changing police handling of woman abuse cases. One approach included efforts to get each police department to develop an effective domestic violence policy. Another centered on getting state legislatures to change the laws to enable police to arrest woman abusers when responding to domestic incidents.

At the same time, police organizations, following the success of the *Scott* and *Bruno* cases, were rethinking their policies. In 1980, the Police Executive Research Forum published *Responding to Spouse Abuse and Wife Beating: A Guide for Police*, which informed police that other police agencies were already "reevaluating their policies, procedures and training programs in order to improve" how they "handle spouse abuse and wife beating," and which proposed models for police in making effective changes.[149]

Inadequate policies still were in place in most departments. While officers could arrest when they had probable cause to believe that a felony offense had been committed,[150] in most, but not all, jurisdictions police could not make an arrest for a misdemeanor assault unless the assault occured in the police officer's presence.[151] Because most police charge domestic violence offenses only as misdemeanors, the law, in order to enable an officer to arrest the abuser when the offense was not committed in the officer's presence, has to permit the arrest without a warrant. Changes must be made.

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147 *Id.* at 60.

148 *Id.* at 49.

149 NANCY LOVING, RESPONDING TO SPOUSE ABUSE AND WIFE BEATING: A GUIDE FOR POLICE 51 (1980).

150 Lisa Lerman & Franci Livingston, *State Legislation on Domestic Violence*, 6 RESPONSE, No. 5, 4 (Sept./Oct. 1983) (available from Center for Women Policy Studies, Wash., D.C.).

151 Loving notes that "This requirement is changing in many jurisdictions as a result of new domestic violence statutes." LOVING, *supra* note 149, at 100.

Empirical research on police response to domestic abuse was beginning to be available. By 1984, the Minneapolis police domestic violence experiment was widely cited as proof that arrests had a deterrent effect on men who beat their wives.[152] The movement to expand police arrest powers was already well established by 1984, however, and it was generally unopposed by police who established department policies. While many law enforcement officers still did not want to arrest batterers, they certainly had no objection to being given the discretion to make warrantless misdemeanor arrests upon probable cause. Many police chiefs and policymakers who knew that their departments would be vulnerable to police suits like the ones in Oakland and New York City sought these changes or instituted mandatory arrest policies.[153]

Legislative action began somewhat earlier. The enactment of domestic violence legislation had actually begun in the 1970s. By 1976, the District of Columbia[154] and Pennsylvania[155] had each enacted such legislation.[156] In 1978, Pennsylvania amended its domestic violence act to permit warrantless arrests if the officer had probable cause to believe that a protection order had been violated.[157] In the eighties, progress continued. By October of 1981, thirty-six states and the District of Columbia had enacted domestic violence acts.[158] By 1983, forty-three states and the District of Columbia had passed such legislation.[159] Indeed, the only states without domestic violence statutes in September of 1983 were Arkansas, Idaho, Michigan, New Mexico, South Carolina, Virginia and Washington.[160] According to two commentators, by that time,

> [t]hirty-three states ha[d] expanded police power to arrest in domestic abuse cases. In twenty-eight states, arrest without a warrant [wa]s permitted where a police officer ha[d] probable cause to believe that an abuser ha[d] committed a misdemeanor. In nineteen states, police may arrest without a warrant if they ha[d] probable cause to believe that an abuser ha[d] violated a protection order. (Fourteen states allow[ed] probable cause arrest in both cases.)[161]

Furthermore, almost half of the states have now imposed duties on

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152 Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Violence Experiment*, 1 POLICE FOUND. REP. 1, 8 (1984).

153 Rye, New York and Newport News, Virginia are examples.

154 D.C. CODE ANN. §§ 16-1001-1006 (1991).

155 PA. CONS. STAT. ANN. §§ 10181-10190 (1990).

156 LOVING, *supra* note 149, at 134-43.

157 *Id.* at 141; 35 PA. CONS. STAT. ANN. § 10190(c) (1990).

158 Lerman & Livingston, *supra* note 150, at 1.

159 *Id.*

160 *Id.*

161 *Id.* at 4.

responding officers to, *inter alia*, remain with the victim until the danger passes, transport the victim to a hospital or shelter, or inform the victim about her legal rights.[162]

In the mid-eighties, the Victim Services Agency, as part of an effort to encourage police chiefs to adopt effective domestic violence policies, ran workshops around the country. In September 1988, the agency published a compilation of each state's arrest law as interpreted by the state's Attorney General.[163] The report showed that all but two states, Alabama and West Virginia, allowed misdemeanor arrest.[164] These remain the only states where misdemeanor arrest is not allowed for offenses committed outside the officer's presence.

C. MANDATORY ARREST

The Oregon Coalition Against Domestic and Sexual Violence (hereinafter "OCADSV") took a different approach. It proposed a bill imposing a mandatory duty on the police.[165] The bill required police officers to arrest anyone in a domestic violence incident whom the officer had probable cause to believe had committed an assault or had placed a victim with an order of protection in fear of imminent serious physical injury. This bill was enacted in 1977,[166] making Oregon the first state to require police to arrest.[167] A provision in the Abuse Prevention Act[168] which allowed police not to arrest when the victim objected[169] was eliminated in 1981[170] because police were using it to circumvent the law.[171]

Although the OCADSV sent every police department a detailed explanation of the new law before it took effect, two years later the Oregon Governor's Commission on Women found that one third of all law enforcement agencies had not changed their policies to comport with the requirements of the law.[172] One commentator reported that "[o]fficers continued to think of their responsibilities in domestic disturbance situations as that of mediation and reconcilia-

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162 *Id.*

163 *See* VICTIM SERVICES AGENCY, THE LAW ENFORCEMENT RESPONSE TO FAMILY VIOLENCE: A STATE BY STATE GUIDE TO FAMILY VIOLENCE LEGISLATION (1988).

164 *Id.*

165 Oregon bill 1977 c. 845.

166 OR. REV. STAT. § 133.055(2) & § 133.310(3) (1989).

167 LERMAN, *supra* note 73, at 21; Grundle, *supra* note 38, at 265.

168 Oregon bill 1977 c.845.

169 Oregon bill 1981 c. 818 § 2.

170 Oregon bill 1981 c.780.

171 Grundle, *supra* note 38, at 262 n.23.

172 *Id.*

tion. Police training had not changed. The police were still instructed to respond in terms of 'crisis intervention' rather than 'crime intervention.' "[173]

In response to police inaction, Henrietta Nearing filed a tort suit in Oregon State Court against the police in the fall of 1980.[174] The trial court granted summary judgment to the defendant police,[175] and the Oregon Court of Appeals affirmed.[176] The Oregon Supreme Court, however, reversed, holding in *Nearing v. Weaver*[177] that the police may be held liable for harm resulting from their failure to enforce a restraining order.[178] The court ruled that police did not have discretion in enforcing restraining orders issued pursuant to the Abuse Prevention Act.[179] The *Nearing* decision virtually required every police department in Oregon to adopt a mandatory arrest policy.[180]

Similar developments occurred elsewhere. By the middle of 1982, the domestic abuse laws of five states mandated that police arrest batterers upon probable cause to believe that a crime had been committed or a restraining order violated.[181] Currently, fifteen states require the police to arrest for a domestic violence incident.[182] In addition, nineteen states require police to arrest if the batterer has violated a protection order.[183] Because some police de-

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173 *Id.* at 262.

174 *Id.* at 263.

175 Nearing v. Weaver, 61 Or. App. 297, 656 P.2d 965, *rev'd*, 295 Or. 702, 704, 670 P.2d 137, 139 (1983).

176 *Id.*

177 295 Or. 702, 670 P.2d 137 (1983).

178 *Id.* at 714, 670 P.2d at 142.

179 *Id.* at 710, 670 P.2d at 142.

180 Grundle, *supra* note 38, at 265.

181 LERMAN, *supra* note 73, at 21.

182 ARIZ. REV. STAT. ANN. § 13-3601B (1991); CONN. GEN STAT. ANN. § 46B-38b(a) (West 1990); D.C. CODE ANN. § 16-1031(a) (1991); HAWAII REV. STAT. § 709-906(4) (1991); IOWA CODE ANN. § 236.2 (West 1989); ME. REV STAT. ANN. tit. 19, § 770 (West 1991); MO. REV. STAT. § 455.085 (1990); NEV. REV. STAT. § 171.137 (1991); N.J. REV. STAT. § 2C:25-5a (1991); OR. REV. STAT. § 133.055 (1989); R.I. GEN. LAWS § 12-29-3(B) (1991); S.D. CODIFIED LAWS ANN. § 23A-3-21 (1991); UTAH CODE ANN. § 30-6-8(2) (1991); WASH. REV. CODE ANN. § 10.31.100(2) (West 1990); WIS. STAT. ANN. § 968.075(2) (West 1990).

183 NATIONAL CENTER ON WOMEN AND FAMILY LAW, MANDATORY ARREST PACKET (available from 799 Broaday, Room 402, New York, NY 10003, 1991). *See* DEL. CODE ANN tit. 13, § 1510 (1991); ME. REV. STAT. ANN. tit. 19, § 770 (West 1991); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1992); MINN. STAT. ANN. § 518B.01(14) (West 1991); MO. REV. STAT. § 455.085(2) (1990); NEB. REV. STAT. § 42-928 (1990); NEV. REV. STAT. § 33.070 (1991); N.H. REV. STAT. ANN. § 173-B:8 I(a) (1990); N.J. REV. STAT. § 2C:25-15-1 (1991); N.M. STAT. ANN. § 40-13-6(c) (Michie 1991); N.C. GEN. STAT. § 50B-4 (1991); OR. REV. STAT. § 133.310 (1989); R.I. GEN. LAWS § 12-29-3(B) (1991); S.D. CODIFIED LAWS ANN. § 23A-3-2.1 (1991); TENN. CODE ANN. § 36-3-611(a) (1991); TEX. CRIM.

partments have punitively arrested both parties in an attempt to circumvent the intent of mandatory arrest laws,[184] eight states have enacted language directing the police to arrest only the primary physical aggressor or the party not responding in self-defense.[185] Finally, one state, Louisiana, has a statute that appears to mandate arrest when a domestic violence offense has been committed, but it is not being so interpreted.[186]

IV. Questions Raised About the Police Arrest Experiments

Advocates of battered women have generally presumed that, until the entire system takes woman abuse seriously, men will go on abusing women with impunity.[187] Advocates were encouraged by the suggestion of the original arrest experiment in Minneapolis[188] that mandatory arrest alone had a significant deterrent effect on batterers. As more police departments adopted mandatory arrest policies, however, advocates were struck by the number of departments that failed to implement the policies.[189] Even when the policies were implemented, others in the system continued to undermine the message that domestic violence is a crime not to be tolerated. Prosecutors who chose not to prosecute, judges who threw the cases out of court or refused to impose more than token punishment, or probation officers who never bothered to ensure compliance with probationary terms all left the batterer with the last laugh. This left the abuser free to flout to his victim the reality that society allowed him to beat her, or at least would do nothing effective to intervene.

Six studies were later funded to see whether arrest alone would have the deterrent affect it had in Minneapolis.[190] The results of

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Proc. Code Ann. § 14.03(b) (West 1991); Utah Code Ann., § 30-6-8 (1) (1991); Wash. Rev. Code Ann. § 10.31.100(2)(B) (West 1990); Wis. Stat. Ann. § 813.122(10) (West 1990).

184 *See, e.g.* Steven B. Epstein, the Problem of Dual Arrest in Family Violence Cases, (Connecticut Coalition Against Domestic Violence Oct. 21, 1987) [unpublished, on file with author].

185 National Center on Women and Family Law, *supra* note 183. *See* Ariz. Rev. Stat. Ann. § 13-3601B (1991); Iowa Leg. Serv., 73rd Gen. Assembly, Regular Session, House File 2160, § 3A (West 1989); Mo. Rev. Stat. § 455.085(3) (1990); Nev. Rev. Stat. § 171.137(2) (1991); R.I. Gen. Laws § 12-29-3(C) (1991); S.D. Codified Laws Ann. § 23A-3-2.2 (1991); Wash. Rev. Code Ann. § 10.31.100(2)(B) (West 1990); Wis. Stat. Ann. § 968.075(3)(a) (West 1990).

186 La. Rev. Stat. Ann. 46 § 2140 (1991).

187 Advocates include the author, Lisa Lerman, Nancy Lemon, and Lisa Frisch.

188 *See* Sherman & Berk, *supra* note 152.

189 *See e.g.* Donald D. Dutton, The Domestic Assault on Women: Psychological and Criminal Justice Perspectives 139, 143-44 (1988); Buzawa & Buzawa, *supra* note 15, at 44.

190 *See* Sherman & Berk, *supra* note 152.

three of those studies, conducted in Omaha,[191] Charlotte,[192] and Milwaukee,[193] indicated that arrest alone did not deter abusers.[194] While these three newer studies cast some doubt on whether arrest alone is an effective deterrent with all abusers, there are a number of points to consider.

First and most important, even if arrest may not deter unemployed abusers in ghetto neighborhoods,[195] arrest still deters the vast majority of abusers.[196] That a few hours under arrest fails to deter the abusers who are generally considered to be society's failures is hardly surprising. In some subcultures of ghettoized people, where imprisonment is all too common, a few hours in jail may be seen as only minor irritation, or even a right of passage.[197] We do not consider eliminating arrest for other crimes (e.g., robbery), however, because it may not deter a particular individual or class of individuals. The studies may suggest that to deter more batterers, the stakes may need to be higher, not lower or nonexistant.

Second, when police arrested the offender, far fewer victims were beaten at their first subsequent encounter with their abuser.[198] This was true even among those least likely to be deterred in the long run: in Milwaukee two percent of arrested batterers reassaulted as opposed to seven percent of those who received a warning.[199]

Third, the Charlotte experiment found that informing both parties that an arrest warrant would be issued for the abuser was no less effective than an immediate arrest.[200] Since only 0.9% of those who were arrested or for whom citations were issued served prison time after sentencing, the long period of uncertainty awaiting arrest may have reinforced the message that abuse is wrong.[201]

Fourth, the Milwaukee, Omaha and Charlotte studies did not take into account how the female victims' responses to the various

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191 *See* Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: the Omaha Police Experiment*, 28 CRIMINOLGY 183 (1990).

192 J. DAVID HIRSCHEL ET AL. CHARLOTTE SPOUSE ASSAULT REPLICATION PROJECT: FINAL REPORT (Jan. 1991).

193 Lawrence W. Sherman et al., *From Initial Deterence to Long-Term Escalation: Short Custody Arrest for Poverty Ghetto Domestic Violence*, 29 CRIMINOLOGY 821 (1991).

194 The Omaha study is difficult to analyze because of its lack of explanation as to the actual police responses.

195 Sherman et al., *supra* note 193.

196 *Id.* at 842.

197 HIRSCHEL ET AL., *supra* note 192.

198 Sherman et al., *supra* note 193, at 844.

199 *Id.* at 834.

200 HIRSCHEL ET AL. , *supra* note 192, at 133.

201 *Id.* at 33, 147.

police actions may have affected the overall results. In contrast, other recent research into the effectiveness of batterer treatment programs has found that fifty-three percent of women plan to reconcile with a batterer-in-treatment but that only nineteen percent of abused victims plan to do so if the batterer is not in treatment.[202] Although completing batterer treatment made no difference in stopping future violence or in the seriousness of future attacks by the abuser, women whose partners were sent to court-ordered treatment were more likely to call police and bring new charges if they were subsequently assaulted.[203] While sending batterers to treatment has no deterrent effect on the batterer[204] and may actually deceive many victims into reconciling with their abuser on the assumption that treatment must be effective, the victim is more likely to use that system in the future, knowing that the criminal justice system acted once in the past to support her.[205] Clearly, victims' response can greatly affect how often police are called back or new charges are brought. The police studies replicating the Minneapolis experiment, however, like the original experiment itself, are flawed by their failure to take victim response into account.

Also marring these police studies is the amalgamation of numerous cases that may have far different dynamics that were lumped together. Although women victimized by male partners comprise ninety-four percent of domestic violence victims,[206] the Milwaukee police study included all cases of domestic violence.[207] While in no way minimizing the seriousness of violence committed by a woman against a man or by one homosexual or lesbian partner against the other, we know so little about the dynamics of such cases that they should have been either excluded or examined separately.[208] Similarly, the minority of cases where women battered men should have been excluded or examined separately. As David Adams, the director of the country's first batterer's treatment program, testified before the Gender Bias Study of the Court System in Massachusetts, virtually every woman who was ever referred to his program was in fact a victim wrongly accused by the batterer of being the aggres-

202 EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN, SELF DEFENSE AND THE LAW 85 (1988).

203 Adele Harrell, *Evaluation of Court Ordered Treatment for Domestic Violence Offenders: Final Report* 80, 92 (State Justice Institute, The Urban Institute, Oct. 1991).

204 *Id.* at 94.

205 GONDOLF & FISHER, *supra* note 202, at 85.

206 BROWNE, *supra* note 45, at 8.

207 The Milwaukee study also included cases where the woman was seen as the aggressor against a man or where the aggressor assaulted a partner of the same sex.

208 These cases were all eliminated in the Charlotte study.

sor.[209] The accused women who are actually victims should have been excluded. Since we do not know whether the same factors motivate and deter those few women who are abusers, the female abusers were also inappropriately included with the male batterers in the Milwaukee study.

Furthermore, the experiments to replicate the Milwaukee police data introduced some aspects that were almost certain to influence the results by discouraging women from recontacting the police. The Minneapolis experiment compared the effect of three police responses to domestic violence: arrest, advice, and sending the abuser from the home for eight hours.[210] The advice given by the police officer was entirely left to the officer's discretion.[211] In Charlotte and Omaha the police actually asked the victim to leave the home in forty percent and thirty-two percent of the cases respectively when separation was the goal.[212]

In Milwaukee, the three responses studied included arresting abusers for the "usual" average of 11.1 hours (full arrest), arresting abusers for only a short average of 2.8 hours (short arrest), and giving only a warning to the abuser.[213] Each group was chosen at random and heard a statement made by the officer.[214] The officers for both arrest groups were instructed to state the following:

1. You are under arrest for battery.
2. Battery is a crime against the state.
3. We are pressing charges against you, not the victim (cuff suspect before conveyance).

Only for those in the short arrest group were officers instructed to add:

4. If you cooperate, you may be released in a few hours.[215]

Thus, some of the difference between the two groups might depend upon the apparent empowerment given to offenders who were promised a reward for cooperative behavior. In contrast, the warning was written so that both abusers and victims would receive the same lecture:

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209 *See* Sherman et al., *supra* note 193.

210 *See* Sherman & Berk, *supra* note 152, at 3.

211 *Id.*

212 HIRSCHEL ET AL., *supra* note 192, at 65; FRANKLYN W. DUNFORD ET AL., NATIONAL INSTITUTE OF JUSTICE, THE OMAHA DOMESTIC VIOLENCE POLICE EXPERIMENT: FINAL REPORT (1989). The Charlotte study eliminated all victims who wanted their abuser arrested, and thus studied only cases involving women who were either ambivalent or opposed to their partners being arrested.

213 Sherman et al., *supra* note 193, at 829.

214 *Id.* at 828.

215 *Id.* at 829 n.3.

1. We're not going to arrest anyone here tonight.
2. If we have to return, someone will go to jail.
3. This is a list of people who can help you, both of you, with your problem.
4. The D.A.'s office is on that list and you can contact them if you want to press charges.[216]

The warning, by failing to differentiate the abuser and the victim, or by failing to indicate that the police saw through the apparent equal treatment, could have only a chilling effect on any victim. This makes it far less likely that the women would ever call the police again or bring charges. Although the warning does clearly convey that the police see the situation as serious and will arrest at least one of the parties if they have to return, the neutral tone almost surely made many victims fear that they might be arrested. Likewise, the invitation to the abuser to file charges against the victim may have deterred many victims from either calling the police again or bringing charges against the abuser. Even the statement that they both have a problem and need help tended to disempower the victim and make the victim feel more shame, blame and possibly guilt. Of course, we do not know how the script was delivered. If the officer looked sternly at the abuser while stating that one of the parties would go to jail next time, the message could have been perceived very differently from the way it would be perceived if the officer said the same thing while looking sternly at the victim. Nonetheless, that such a dangerously inadequate message should have formed the basis of the control group renders the results entirely suspect.

Another weakness of these later studies was the experiment design. In some of the cities, the studies apparently called for subsequent police encounters to be treated as first encounters, with new random assignment to one of the three groups.[217] That some abusers, who were told to expect arrest the next time the police were called, received only the same warning surely conveyed the message that the warning was empty rhetoric. That some abusers who were once arrested received only a warning a subsequent time (or possibly a short-term arrest) makes it almost impossible to track the reasons for their subsequent behavior. Victim response is again the key.

Another troubling aspect was the large number of calls excluded from the Charlotte experiment. Only 686 of 591,664 calls for domestic disturbance help were ultimately included, amounting

216 *Id.* at 829 n.3.
217 *Id.* at 828.

to only .116% of the calls received (or .128% of the calls where an officer was dispatched).[218] All cases where the women requested that the abuser be arrested were inexplicably excluded.[219] Thus, the only cases studied were those few ones in which the woman was either ambivalent about or opposed to having her abuser arrested.

An equally disturbing feature of the Charlotte study was the assumption that women victims who were not interviewed were assumed not to have been victims of subsequent crimes.[220] This assumption is especially suspect given the large discrepancy in uncompleted follow-ups in victim interviews between cases where an arrest was made or a citation issued and cases where advice and separation were used.[221] In most of the cases that lacked follow-up interviews, the women could not be located.[222] In a few, they were afraid to cooperate.[223] In cases where their abusers were given citations or arrested on the spot, only 13.3% and 13.6% of the women, respectively, failed to complete the six-month follow-up interview.[224] Yet 20.4% of the women (150% more than in the other groups) whose cases were mediated and who were temporarily separated from their abusers did not complete the six-month interview.[225]

We also need to know how many victims and abusers heard about other police responses to domestic disturbances. The twenty-four percent of abusers and nineteen percent of victims who knew about Milwaukee's mandatory arrest policy[226] should have been excluded from the study, particularly if no arrest was made. Others who learned of other possible police responses also should have been excluded. An inherent weakness in this experiment was the assumption that abusers would expect police to respond in the same way the next time.

It would be helpful to know in all of these studies whether and for how long the parties separated and whether and where any of them moved. Did the victim's behavior vary with the police response? If one or both of the parties (and especially the victim) moved out of the city, the abuser would be less likely to show up again in the city's police and court records, at least as repeating his

218 HIRSCHEL ET AL., *supra* note 192, at 28.
219 *Id.* at 26.
220 *Id.* at 120.
221 *Id.*
222 *Id.* at 92.
223 *Id.* at 83.
224 *Id.* at 84.
225 *Id.* at 82-92.
226 Sherman et al., *supra* note 193, at 845.

violence against the same victim. Rather than asking abusers if they knew that the city had a mandatory arrest policy, it would have been more helpful to ask what policy they thought the police had. If it included arrest, then on what basis? Learning what the abuser believed to be the outcome of his actions might better explain his motivations in the first place. Someone who believes that arrest is an unlikely possibility will probably assess that risk very differently from someone who believes that arrest is a certainty.

That the prosecution outcome was not seriously monitored or examined in the replication experiments is also distressing. Battered women's advocates expect that an arrest, followed by a speedy trial with a real sentence whose terms are enforced, sends the strongest message. The message communicated when a person is arrested, but never prosecuted (as happened to ninety-five percent of those arrested in the Milwaukee experiment)[227] might so weaken any long-term deterrent effect of the arrest as to explain the results. The same could be true of a low conviction rate (only one percent were convicted in Milwaukee[228]) and lenient or unenforced sentences (only 0.9% in Charlotte spent time in prison after sentencing)[229] or enforced.

We also need to explore the manner in which different arrest, prosecution and sentencing policies affect the children in homes where there is domestic violence. Even if it turned out that an arrest policy has no effect on either the offender or the victim, if it has a deterrent effect on the sons, the policy might still be worthwhile, because they are at danger of growing up to be abusers themselves.[230] Similarly, if fewer daughters who grow up in homes where they see their abused mothers stay in abusive relationships as adults, the deterrence would be a success. Yet, society is unlikely to know any of this for many years.

We should not forget the results of the Duluth experiment,[231] which studied different police policies. That study revealed that minority males comprised thirty-three percent of those arrested when arrest was encouraged but left completely to officers' discretion, thirteen percent of those arrested when officers were encouraged to arrest and required to submit written reports explaining failures to do so, but only 8.5% of those arrested under a policy mandating

227 *Id.* at 822.

228 *Id.*

229 HIRSCHEL ET AL., *supra* note 192, at 147.

230 WALLERSTEIN & BLACKSLEE, *supra* note 8, at 121.

231 Caroline Forell, *Stopping the Violence: Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women*, 6 BERKELEY WOMEN'S L. J. 215, 221 (1991).

arrest.[232] Thus, the more discretion officers had, the more they arrested individuals whom the Milwaukee experiment found were less likely to be deterred.[233] Importantly, when police officers are given wide discretion, they frequently use that discretion to not arrest those abusers who would most likely be deterred by arrest.[234]

It should also be remembered that advocates of battered women should be involved in designing any domestic violence experiments. That family counseling and mediation, both of which are known to increase domestic violence and thus to be contraindicated in cases of domestic violence,[235] were included in the police replication experiments flaws the results. The same is true for the Milwaukee warnings suggesting that the victim risked being arrested.[236] Likewise, the victim-blaming tactic that presumptively assumed that the victim should leave the home could only have increased some victims' guilt and self-blame, making them less likely to call the police in the future. Just because a police tactic successfully deters future calls to police does not mean that it did so by successfully deterring future criminal behavior.

At any rate, it seems problematic to single out domestic violence as the focus of a study whether arrest has any deterrent effect on offenders, since domestic violence crimes have been trivialized, if not ignored, for so long. Although advocates of battered women welcome the opportunity to learn what stops criminal behavior, we remain somewhat skeptical when so much of the research seems intent on returning to the old do-nothing or even blame-the-victim practices.

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232 *Id.*

233 Sherman et al., *supra* note 193, at 835; BUZAWA & BUZAWA, *supra* note 15, at 45-46.

234 *Id.*

235 J. W. TAYLOR, STRUCTURED COJOINT THERAPY FOR SPOUSE ABUSE CASES, SOCIAL CASE WORK 1965 (1984); MYRA SUN & LAURIE WOODS, A MEDIATOR'S GUIDE TO DOMESTIC ABUSE (1989); Harrell, *supra* note 203, at Recommendation II(13); MARY PAT TREUTHART & LAURIE WOODS, MEDIATION: A GUIDE FOR ADVOCATES AND ATTORNEYS REPRESENTING BATTERED WOMEN (1990).

236 Sherman et al., *supra* note 193, at 829 n.3.