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# MANDATORY ARREST OF DOMESTIC ABUSERS: PANACEA OR PERPETUATION OF THE PROBLEM OF ABUSE?

Drive down any street in America. More than one household in six has been the scene of a spouse striking his or her partner . . . .<sup>1</sup>

## INTRODUCTION

Domestic violence has been recognized as the number one health issue facing women.<sup>2</sup> For purposes of this Comment, domestic violence is defined as the “‘severe, deliberate and repeated demonstrable physical violence’ inflicted on a woman by a man with whom she has or has had an intimate relationship.”<sup>3</sup> Although the author recognizes that there are instances where women abuse men, this Comment focuses on women as victims in light of the fact that over 95 percent of all domestic violence incidents involve men abusing women.<sup>4</sup> It is also important to recognize that domestic violence is not limited to spousal relationships, but also extends to women who date or live with abusers.

Despite the prevalence of battering in today’s society,<sup>5</sup> current solutions to the problem have proven to be ineffective. Proponents of mandatory arrest laws<sup>6</sup> suggest that domestic violence can be curtailed by ensuring the arrest of offenders. This Comment addresses the purported effectiveness of mandatory arrest laws as well as the desirability and feasibility of mandatory arrest legislation in urban areas such as Chicago, Illinois. It begins by highlighting the severity

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1. MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 3 (1980).

2. Jan Hoffman, *When Men Hit Women*, N.Y. TIMES, Feb. 16, 1992, § 6 (Magazine), at 23, 25.

3. Janice C. Humphreys & William O. Humphreys, *Mandatory Arrest: A Means of Primary and Secondary Prevention of Abuse of Female Partners*, 10 VICTIMOLOGY 267, 268 (1985) (citation omitted).

4. *Id.*

5. See *infra* notes 7-13 and accompanying text (discussing the problem of domestic violence and its widespread effects).

6. Mandatory arrest statutes typically provide that the police must arrest the offender in a domestic violence incident. For examples of typical mandatory arrest statutes, see *infra* note 162.

of the problem of domestic violence, providing a typical profile of the batterer, and describing why he batters. Next, this Comment documents society's responses to battering and the varied legislative changes which have resulted. To this end, this Comment considers the genesis of mandatory arrest as a method of deterring abuse and specifically discusses existing empirical data regarding the success of mandatory arrest statutes. It further attempts to analyze the deterrent value of mandatory arrest laws, because unless such laws serve to deter the batterer, they will ultimately prove ineffective at best, and detrimental at worst. Finally, this Comment concludes that mandatory arrest laws are neither feasible nor desirable in Chicago.

## I. THE PROBLEM OF DOMESTIC VIOLENCE

Domestic violence remains a leading cause of death and injury among women.<sup>7</sup> In 1992, for example, injuries from domestic violence exceeded the combined number of injuries to women caused by auto accidents, rapes, and muggings during the year.<sup>8</sup> Current estimates suggest that as many as six million women are the victims of domestic violence each year.<sup>9</sup> These sobering statistics highlight a disturbing truth — a woman today has more to fear from the man she is intimate with than from a total stranger.<sup>10</sup>

Moreover, due to the phenomenon of underreporting, the reality is

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7. Abigail Trafford, *The Divorce-Violence Link*, WASH. POST, June 21, 1994, § Z, at 6; Martha Shirk, *Domestic Violence is a Leading Hazard for Women*, ST. LOUIS POST DISPATCH, May 6, 1992, at 10A; see also Angelo Bruscas, *Athletes Cross the Line: Simpson Not Only One With Record of Domestic Violence*, SEATTLE POST-INTELLIGENCE, June 23, 1994, at A1 (noting that domestic violence is the number one cause of death in women).

8. *Recent Developments: Restrictions on Release of Individuals Arrested for Domestic Violence*, 1992 UTAH L. REV. 336, 366-67 (1992) [hereinafter *Recent Developments*]; see also Hoffman, *supra* note 2, at 25 ("C. Everett Koop, the former Surgeon General, has identified domestic violence as the No. 1 health problem for American women, causing more injuries than automobile accidents, muggings and rapes combined.").

9. Nicole M. Montalto, Note, *Mandatory Arrest: The District of Columbia's Prevention of Domestic Violence Amendment Act of 1990*, 8 J. CONTEMP. HEALTH L. & POL'Y 337, 337 (1992) (estimating "that between 1.8 and 6 million women are physically abused each year by the men with whom they have been intimately involved"); *Recent Developments, supra* note 8, at 366 (paren).

10. Data also suggests that the injuries sustained by victims of domestic violence are far more severe than those sustained by victims of assaults by strangers. Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 J. HUM. RTS. 149, 149 (1990). Domestic abuse also often involves weapons and extreme violence or death. *E.g.*, *People v. Gray*, 370 N.E.2d 797 (Ill. 1977) (noting that a husband struck and shot his wife with a gun); *Commonwealth v. Ulatoski*, 371 A.2d 186 (Pa. 1977) (convicting a husband for shooting and killing his wife).

graver than the statistics suggest. According to admittedly conservative FBI estimates, only one in ten incidents of domestic violence is actually reported.<sup>11</sup> The National Coalition Against Domestic Violence believes that underreporting is even more dramatic, claiming that battered women report only one in one hundred incidents of domestic violence.<sup>12</sup>

The sheer breadth of the problem underscores the importance of analyzing the legal and policy responses to battering. In order to assess the potential effectiveness of efforts to deter battering, it is first crucial to understand what type of individual batters and why he does it.<sup>13</sup>

#### A. Who Batters?

Domestic violence cuts across socioeconomic lines.<sup>14</sup> In his seminal work, *Behind Closed Doors: Violence in the American Family*, Murray Straus noted that "[w]ife-beating is found in every class, at every income level."<sup>15</sup> Straus explained, however, that certain demographic factors, such as age, income, and employment status, are strongly correlated to the presence of domestic violence.<sup>16</sup> Age constitutes one of the factors linked to a higher incidence of battering.<sup>17</sup> Data indicates that violence is considerably more common among younger couples.<sup>18</sup> This is due, in part, to the fact that younger people have more physical energy and are undergoing more social,

11. Sari Horwitz, *D.C. Police to Make Arrests in Domestic Violence Disputes: Cases to be Treated as Criminal Offenses*, WASH. POST, June 3, 1987, at A1, A7.

12. *Calling Police Protects Abused Wives, Report Says*, N.Y. TIMES, Aug. 18, 1986, at A9. In comparison, the National Coalition Against Domestic Violence claims that one out of every ten rape victims reports the crime. *Id.*

13. Renata Vaselle-Augenstein & Annette Ehrlich, *Male Batterers: Evidence for Psychopathology*, in *INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* 139, 139-40 (Emilio C. Viano ed., 1992).

14. STRAUS ET AL., *supra* note 1, at 31.

15. *Id.*; see also Carolyn M. Sampselle et al., *Violence Against Women: The Scope and Significance of the Problem*, in *VIOLENCE AGAINST WOMEN: NURSING RESEARCH, EDUCATION, AND PRACTICE ISSUES* 3, 8 (Carolyn M. Sampselle ed., 1992) (stating that domestic violence affects all economic classes).

16. STRAUS ET AL., *supra* note 1, at 151; see also Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 708 (1989) (noting that age, poverty, race, and social isolation are related to domestic abuse).

17. STRAUS ET AL., *supra* note 1, at 140-44.

18. *Id.* Strauss defines younger couples as those under the age of thirty. *Id.* at 141. For further discussion of the relationship between age and battering, see JAN E. STETS, *DOMESTIC VIOLENCE AND CONTROL* 4-5 (1988); Holden, Comment, *supra* note 16, at 708.

physical, and psychological changes.<sup>19</sup> The early years of a marriage are filled with major stress and adjustment, and are often accompanied by other major life changes — such as the birth of a child — which contribute to increased stress and volatility.<sup>20</sup>

Family income is also closely related to violence between couples. It is estimated that impoverished women face a substantially greater chance of being beaten by a spouse or boyfriend.<sup>21</sup> Unquestionably, poverty causes stress. Men in lower income brackets lack economic choices, which in turn increases their frustration and tendency toward violence.<sup>22</sup> These men often feel force is the only alternative in facing intrafamilial conflict. As one writer noted:

Lower-class people have less prestige, money, and power, and consequently they suffer greater frustration and bitterness. They can make fewer decisions that do not depend upon their friends or spouses. They generally command fewer resources with which to achieve their aims . . . . Receiving less respect during the day from their experiences outside the home, they have less ability to withstand hurt and frustration in the home.<sup>23</sup>

While battering is not exclusively a lower-income phenomenon, extreme physical violence is much more common among poorer segments of the population.<sup>24</sup> Similarly, unemployment of the batterer often precipitates domestic violence.<sup>25</sup> Specifically, unemployed men are more likely to beat their wives.<sup>26</sup> Unemployment and its commensurate financial burdens contribute to stress and thus increase the threat of violence.<sup>27</sup>

Certain environmental factors are also predictive of battering. The adage “violence begets violence” can, in some cases, help explain the cause of domestic violence.<sup>28</sup> Straus concluded that children *learn* patterns of violence in the home, either by witnessing violence between their parents or by being the victims of physical

19. STRAUS ET AL., *supra* note 1, at 143.

20. *Id.*

21. *Id.* at 148; Holden, Comment, *supra* note 16, at 708.

22. STRAUS ET AL., *supra* note 1, at 207.

23. William J. Goode, *Force and Violence in the Family*, 33 J. MARRIAGE & FAM. 624, 633 (1971).

24. STRAUS ET AL., *supra* note 1, at 148.

25. *Id.* at 150.

26. *Id.*

27. *Id.* at 150-51.

28. *Id.* at 121-22; Robert Geffner & Alan Rosenbaum, *Characteristics and Treatment of Batterers*, 8 BEHAV. SCI. & L. 131, 132 (1990); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 63 (1984).

violence themselves.<sup>29</sup> Those children who are unfortunate enough to end up on both the witnessing *and* the receiving end of violence often grow up to be the most violent offenders.<sup>30</sup>

About one out of every four people who grew up in these most violent households use at least some physical force on their spouses in any one year. . . . [O]ne out of ten of the husbands who grew up in violent families are wife beaters in the sense of serious assault. This is over three times the rate for husbands who did not grow up in such violent homes.<sup>31</sup>

The following real example is illustrative:

Craig doesn't remember now why he did it. He only knows he hit Patsy with the cane, the cane he had just bought. . . . He stood over her in a bedroom of her mother's house in the Bronx, raised the cane over his head and let it come down on her arms and hands.<sup>32</sup>

While in treatment, Craig admitted:

I was a product of seeing my mother being beaten up. I also was beaten up, whipped with a belt. I thought once that maybe my mother died to get out of that relationship with my father. I mean, I know she died of cancer, but . . . . That's the ironic part: I remember wanting to dial the police when they were arguing to protect her, and yet it's funny how I did the same thing as my father.<sup>33</sup>

Clinical and empirical research also suggests that male batterers share common personality traits.<sup>34</sup> Such findings are important in discussing the treatment of batterers<sup>35</sup> and in assessing the effectiveness of legislation. Although the bulk of data available is clinical in nature (and thus does not provide hard statistics), it consistently supports the presence of certain personality traits in batterers, and is generally validated by existing empirical research.<sup>36</sup>

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29. STRAUS ET AL., *supra* note 1, at 122; Lerman, *supra* note 28, at 63; Holden, Comment, *supra* note 16, at 707.

30. STRAUS ET AL., *supra* note 1, at 122.

31. *Id.*

32. *Id.* at 97 (citation omitted).

33. *Id.* at 98 (citation omitted).

34. Vaselle-Augenstein & Ehrlich, *supra* note 13, at 139. For a general description of spouse abusers, see BARBARA STAR, *HELPING THE ABUSER: INTERVENING EFFECTIVELY IN FAMILY VIOLENCE* 34-35 (1983).

35. Vaselle-Augenstein & Ehrlich, *supra* note 13, at 139-40.

36. *Id.* at 139. A number of empirical studies have been documented. See, e.g., Margaret Elbow, *Theoretical Considerations of Violent Marriages*, 58 *SOCIAL CASEWORK* 515-26 (1977) (noting four personality patterns commonly found in abusers); Laura Wetzel & Mary Anne Ross, *Psychological and Social Ramifications of Battering: Observations Leading to a Counseling Methodology for Victims of Domestic Violence*, 61 *PERSONNEL & GUIDANCE J.* 423, 424-25 (1983) (noting 11 traits commonly observed in men who batter).

Typically, men who batter exhibit extreme dependence on their wives or girlfriends, often resorting to threats and abuse in order to forestall being abandoned.<sup>37</sup> A fear of intimacy is also commonly found among batterers; the batterer is often afraid of getting close to people and experiences difficulty expressing affection.<sup>38</sup> Moreover, empirical results based on administration of the Minnesota Multiphasic Personality Inventory test show that batterers score significantly higher than nonbatterers on the "paranoia" scale, indicating that they are highly suspicious of their partners.<sup>39</sup> Clinical reports are corroborative, suggesting that batterers exhibit higher-than-normal levels of possessiveness and jealousy.<sup>40</sup>

Clinicians typically describe batterers as men who have "an excessive need to be in control. They do not allow their wives to make any independent decisions, and they want to know everything that their wives do."<sup>41</sup> Batterers are also consistently described as having low self-esteem, as feeling powerless to control their lives, and as being atypically anxious and depressed.<sup>42</sup> Common among men who batter is a history of aggression towards women; between 44 to 67 percent of the men in treatment programs each year have abused a partner in a prior relationship.<sup>43</sup> Moreover, "Whether batterers feel remorse — or even are capable of doing so — is doubtful."<sup>44</sup> Rather, the "honeymoon" period which often follows an episode of abuse<sup>45</sup> more likely results from the man's fear of losing his partner

37. Vaselle-Augenstein & Ehrlich, *supra* note 13, at 140.

38. *Id.* at 141.

39. *Id.*

40. *Id.*

41. *Id.* at 142. Furthermore, data suggests that the victim's challenge to the man's authority often provides the catalyst for an attack. *Id.*

42. *Id.* at 143.

43. *Id.* at 144.

44. *Id.* at 145.

45. Michael Steinman outlined the three phases typically seen in an incident of domestic violence:

The first or tension-building phase may include assaults but is marked chiefly by angry threats and insults. Victims typically react to it by trying to calm or avoid offenders. Such efforts may work initially but become less effective with time. Early successes often mislead victims into thinking they can defuse men's anger.

Unchecked tension grows and finally bursts into a phase of uncontrolled verbal and physical abuse that stuns and confuses victims. Injuries, when they occur, are usually inflicted at this time. The last phase [the "honeymoon period"] is one of contrition.

Expressing surprise at their own behavior, offenders apologize, express their love, and try to convince victims they will stop being violent.

Michael Steinman, *Lowering Recidivism Among Men Who Batter Women*, 17 J. POLICE SCI. & ADMIN. 124, 124 (1990).

than from a genuine sense of guilt or contrition.<sup>46</sup>

The batterer's suspicion and possessiveness often result in the victim's isolation from society.<sup>47</sup> The abuser develops power and control over the victim by isolating her from friends, family, and community — the woman's traditional support network.<sup>48</sup> As a result, the victim feels she *cannot* leave because she has nowhere to go and no one to turn to.<sup>49</sup> As one commentator explains, batterers "attempt to isolate the woman in the home, cut her off from friends or family. Jealousy colors their thoughts and fills their minds with suspicions of what she is doing when he is not at home."<sup>50</sup> In addition to providing the batterer with control over the victim, this isolation also serves to cut the victim off from people who would reinforce for her that such violence is inappropriate.<sup>51</sup>

In light of the panoply of personality traits accompanying battering, it seems curious that some batterers are described as "nice, humorous, charming, and sensitive."<sup>52</sup> Clinicians note, however, that a Jekyll and Hyde phenomenon often characterizes these men.<sup>53</sup> Although abusive in his intimate relationships, the batterer may interact (at least seemingly) normally in more superficial relationships.<sup>54</sup>

These characteristics, both demographic and psychological, begin to sketch a picture of who the batterer is and why he resorts to physical violence.

### B. *Why Batter?*

Economists have long argued that most, if not all, human behavior is rational.<sup>55</sup> They contend that people commit crimes because they believe that the benefits of the crime outweigh the threat of punishment.<sup>56</sup>

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46. Vassel-Augenstein & Ehrlich, *supra* note 13, at 145.

47. Steinman, *supra* note 45, at 124.

48. Joyce McCarl Nielson et al., *Social Isolation and Wife Abuse: A Research Report*, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 49, 58 (Emilio C. Viano ed., 1992).

49. Steinman, *supra* note 45, at 124.

50. STAR, *supra* note 34, at 34.

51. Nielson et al., *supra* note 48, at 58.

52. Vassel-Augenstein & Ehrlich, *supra* note 13, at 146.

53. *Id.*

54. *Id.*

55. Alan Wertheimer, *Criminal Justice and Public Policy: Statistical Lives and Prisoners' Dilemmas*, 33 RUTGERS L. REV. 730, 736 (1981).

56. *Id.* Economists also argue that if the costs of crime are increased, the demand (commission) will decrease commensurately. This is based on a model of price elasticity. *Id.* at 737.



Social scientists tend to agree with this cost/benefit analysis, leading to the conclusion that men beat women because they can.<sup>57</sup> This sociological theory, termed the "Exchange Theory," holds that social interaction is shaped by "the pursuit of rewards and the avoidance of punishment and costs."<sup>58</sup> It posits that "people abuse other people because the costs of doing so do not outweigh the rewards."<sup>59</sup> More specifically, in the context of domestic violence, abuse occurs because the consequences of beating a wife or girlfriend are not high enough to offset the rewards. Richard Gelles suggests that: (1) men are more likely to use violence in the home when they expect that the costs associated with their behavior will be less than the rewards; (2) that the absence of effective social controls decrease the costs of domestic violence; and (3) that typically male-dominated social and family structures reduce social control in male/female relationships and lessen the cost of violence by men against women.<sup>60</sup> Proponents of the Exchange Theory contend that spouse abuse occurs because victims cannot — and society does not — punish the offenders.<sup>61</sup>

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57. See, e.g., Richard J. Gelles, *An Exchange/Social Control Theory*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 151-57 (David Finkelhor et al. eds., 1983) (noting that the notion that "people hit and abuse other family members because they can" is central to the exchange theory). The commission of a crime does not always appear to be rational. When intense emotions lead to the commission of a crime, it could be argued that the emotional release provides a great enough "benefit" that the threat of recrimination is not enough to provoke a more rational response.

58. *Id.*; see also F. Ivan Nye, *Choice, Exchange, and the Family*, in 2 *CONTEMPORARY THEORIES ABOUT THE FAMILY: GENERAL THEORIES/THEORETICAL ORIENTATIONS* 1 (Wesley R. Burr et al. eds., 1979) (discussing the application of the Exchange Theory to family dynamics); F. Ivan Nye, *Is Choice and Exchange Theory the Key?*, 40 *J. MARRIAGE & FAM.* 219 (1978) (explaining and describing the Exchange Theory); Steinman, *supra* note 45, at 125 (noting that the Exchange Theory is useful in explaining domestic violence).

59. Humphreys & Humphreys, *supra* note 3, at 271.

60. Gelles, *supra* note 57, at 158.

61. Steinman, *supra* note 45, at 125. A number of other theories have been advanced to further explain why domestic violence occurs. The "Resource Theory" asserts that because men hold higher-paying and more prestigious positions in society, they have more control in marital relationships. Emilio C. Viano, *Violence Among Intimates: Major Issues and Approaches*, in *INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* 3, 8-10 (Emilio C. Viano ed., 1992). As a consequence, women are left in subordinate and vulnerable positions. *Id.* at 8. The "Social Learning Theory" maintains that violence is learned by children, and it stresses the intergenerational transmission of family violence, when children who have been witnesses to or victims of abuse become abusers in their adult relationships. *Id.* The "General Systems Theory" maintains that family violence is the outcome of a social system propelled by positive feedback, and stresses the implicit legitimization of violence between intimates. *Id.* at 10.

C. *Deterrence — Is it Attainable?*

Two competing schools of thought have developed regarding the effectiveness of punishment on subsequent behavior. The deterrence theory suggests that punishment deters people from repeating the crimes for which they were punished.<sup>62</sup> Theorists contend that a number of factors are requisites for effective deterrence.<sup>63</sup> First, they argue that the certainty and severity of punishment maximizes deterrence.<sup>64</sup> Although the probability or certainty of punishment is important,<sup>65</sup> it is generally agreed that the effectiveness of deterrence “depends more on the perception of certainty than on the objective reality of certainty.”<sup>66</sup> The severity of punishment is also important, but works in tandem with certainty; that is, certainty must be high enough to make the severity factor salient.<sup>67</sup> Finally, they believe that to achieve effective deterrence, society’s threatened punishment must be both credible and communicated.<sup>68</sup> The target offenders must be convinced that society can *and will* exact punishment.<sup>69</sup> Moreover, communication of the rationale behind punishment can improve deterrence, even if certainty and severity are lower than desired, by alerting the offenders that their behavior is considered wrong and is therefore being targeted.<sup>70</sup>

Criminal deterrence theorists rely on the premise of the economic and Exchange Theory models: that most human behavior is rational.<sup>71</sup> Deterrence theory further suggests that punishment serves two functions: general deterrence and specific deterrence.<sup>72</sup> General deterrence is accomplished by sending a message to all of society that it is wrong to behave in certain ways, and that punishment will

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

63. Kevin C. Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 2 (1983).

64. Kennedy, *supra* note 63, at 4.

65. *Id.* at 5; see also GRAEME NEWMAN, *THE PUNISHMENT RESPONSE* 242 (1978) (documenting the inverse relationship between deterrence and certainty of punishment); David F. Fisher, Note, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WASHBURN L.J. 57 (1975) (discussing the importance of certainty of punishment).

66. Kennedy, *supra* note 63, at 5.

67. *Id.* at 4-5.

68. *Id.* at 5-6.

69. *Id.*

70. *Id.*

71. *Id.* at 2.

72. *Id.* at 1; Albert J. Reiss, Jr., *Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion*, 47 LAW & CONTEMP. PROBS. 83, 93 (1984).

result if a person behaves in one of those ways.<sup>73</sup> The intended effect of the punishment is on society as a whole, not on the individual actor.<sup>74</sup> Proponents of general deterrence also contend that punishment has a moralizing effect on society; people come to believe the behavior is wrong because it is illegal and will result in punishment.<sup>75</sup>

However, punishment for the purpose of specific deterrence focuses on the individual who has committed the crime.<sup>76</sup> The goal is to teach a lesson and discourage the wrongdoer from committing more criminal acts.<sup>77</sup> The effectiveness of specific deterrence is generally measured by the amount of recidivism on the part of the specific criminal.<sup>78</sup> Moreover, even when future behavior is not affected, punishment may still prevent some crime simply by separating the actor from society for a certain amount of time.<sup>79</sup>

Some theorists, however, disagree that punishment serves as a specific deterrent. They argue that punishment does not deter future crime, but instead actually predisposes the individual criminal to commit more crimes.<sup>80</sup> This "labeling" theory suggests that punishment may increase recidivism by altering the way the offender sees himself and how he interacts with others.<sup>81</sup> According to the labeling theory, once an offender is branded a criminal, he will act in accordance with that label and engage in future criminal deviance.<sup>82</sup>

Neither the deterrence nor the labeling theory has consistently proven accurate in empirical research, which suggests that punishment may engender different effects in different circumstances.<sup>83</sup> It is important, therefore, to analyze the myriad of societal responses to battering in light of both their possible deterrent or labeling effects.

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73. Kennedy, *supra* note 63, at 3.

74. Wertheimer, *supra* note 55, at 735.

75. *Id.*

76. *Id.* at 734.

77. *Id.*

78. *See id.* (explaining that the goal of specific deterrence is to stop criminals from committing future crimes); *see also* Reiss, *supra* note 72, at 94 (arguing that offenders are deterred because they seek to minimize loss and maximize gain).

79. Wertheimer, *supra* note 55, at 734-35.

80. Sherman & Berk, *supra* note 62, at 261.

81. *Id.*

82. *Id.*

83. *Id.*

## II. THE SOCIETAL RESPONSE TO BATTERING

Historically, American society in general — and the legal system in particular — has condoned wife abuse.<sup>84</sup> Although legal repudiation of abuse began to appear in case law in the mid- to late 1800s,<sup>85</sup> protection for women has nonetheless been slow in coming.<sup>86</sup> Until the late 1970s — a full century later — batterers were almost never prosecuted, and laws against domestic violence were rarely enforced.<sup>87</sup>

Similarly, society did not recognize spousal abuse as a problem until the mid-1970s.<sup>88</sup> This recognition can be traced to two important factors: the women's movement in the United States and the work of Erin Pizzey in England.<sup>89</sup> Wife abuse emerged as a women's issue in the late 1960s as women's groups "accidentally" discovered the common problem of violence in their homes.<sup>90</sup> In 1974, the National Organization of Women ("NOW") made battered wives a priority issue in the United States and began a political battle to improve social services and legal redress for battered women.<sup>91</sup> NOW and other feminist organizations set out to document and publicize the issue of domestic violence and to define the limitations of the existing legal and social supports available to victims.<sup>92</sup>

Changes in the United States were paralleled by the work of ac-

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84. See, e.g., *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824) (permitting a man to physically chastise his wife), *overruled by Harris v. State*, 14 So. 266 (1894); *State v. Rhodes*, 61 N.C. (Phil. Law) 291, 291 (1868) (holding that a husband's violence would have been battery if the victim were not his wife); *State v. Black*, 60 N.C. (Win.) 263, 263 (1864) (stating that the law would not interfere with a man's right to physically punish his wife). *But see THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 306 (Homer H. Clark, Jr., ed., 1988) (arguing that there is little primary authority to support the contention that the common law encouraged family violence).

85. See *Fulgham v. State*, 46 Ala. 143, 148 (Ala. 1871) (stating that husband and wife "may be indicted for assault and battery upon each other").

86. See *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528 (D. Conn. 1984) (providing a detailed synthesis of the history of spouse abuse).

87. Barbara K. Finesmith, *Police Repose to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 80 (1983).

88. STRAUS ET AL., *supra* note 1, at 10.

89. *Id.* at 10-11.

90. *Id.* In discussing other topics relevant to women's issues, many women discovered that others shared the secret of domestic abuse. *Id.*

91. *Id.* at 11.

92. Jeffrey Fagan, *Contributions of Research to Criminal Justice Policy on Wife Assault, in FAMILY VIOLENCE: RESEARCH AND PUBLIC POLICY ISSUES* 53, 56-57 (Douglas J. Besharov ed., 1990).

tivist Erin Pizzey in England, who established the first shelter for abused women.<sup>93</sup> Pizzey championed a political drive in England to obtain better services for women who took refuge in her shelter.<sup>94</sup> In 1974, Pizzey also authored the first major work in the field, *Scream Quietly or the Neighbors Will Hear*, heralding the birth of a body of literature on the subject of domestic violence.<sup>95</sup>

### A. *The Response of Law Enforcement*

Law enforcement has been subject to a barrage of criticism for its response to domestic violence.<sup>96</sup> Police response has traditionally been characterized by the “‘unschooled discretion’ of officers at the scene”<sup>97</sup> and nonenforcement policies in domestic violence cases.<sup>98</sup> The following scenario is illustrative:

Police officers are dispatched to a home at 10:30 p.m. on a Saturday night. The officers are met at the door by an angry woman who is bleeding from the nose. She is extremely agitated and is swearing at the police to get her husband out of the house. The woman explains that her husband hit her because she yelled at him for spending the grocery money. He admits to having hit her, but only after listening to her yell at him “for twenty solid minutes.” Both the man and the woman see her behavior as, at least partially, having caused the assault.<sup>99</sup>

Rather than arresting the husband for the assault, the officers assess the situation and decide that:

It does not appear that the woman is in immediate danger. The officers talk to both parties until they are calm and ask the man to leave the house for the evening. The man agrees to go to a friend's house. The officers have separated the parties and presumably prevented an escalation of the violence.<sup>100</sup>

The question of what will happen when the husband returns the next day, however, is ignored.

The justification for nonintervention is rooted, in part, in society's historical perception of domestic violence. The idea that “a man's

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93. STRAUS ET AL., *supra* note 1, at 11.

94. *Id.*

95. *Id.*

96. Litsky, Note, *supra* note 10, at 162; see Ellen Pence, *The Duluth Domestic Abuse Intervention Project*, 6 *HAMLIN L. REV.* 247, 247-49 (1983) (describing the reluctance of police to help the victim in wife abuse cases).

97. Pence, *supra* note 96, at 248.

98. Litsky, Note, *supra* note 10, at 162.

99. Pence, *supra* note 96, at 252.

100. *Id.*

home is his castle," along with the desire to avoid infringing on a couple's private relationship and a fear of the adverse economic impact an arrest can have on a family unit have been used by police to justify nonenforcement.<sup>101</sup> The privacy argument, though firmly entrenched, has been rejected by the courts.<sup>102</sup> Similarly, the economic detriment justification is weakened by the fact that society does not oppose the arrest of other types of criminals on economic grounds.<sup>103</sup>

### B. *The Response of Prosecutors*

Prosecutorial response, characterized by low prosecution rates and high dismissal rates,<sup>104</sup> has also garnered harsh criticism.<sup>105</sup> Prosecutors often avoid prosecuting domestic abuse cases, believing them to be "family matters" which do not belong in court.<sup>106</sup> As a result, many prosecutors have failed to treat domestic violence seriously.<sup>107</sup> Compounding this reluctance to prosecute has been the concomitant reluctance of women to follow through with charges, which, admittedly, impedes the ability of the prosecutor to get a conviction.<sup>108</sup> Ellen Pence, director of the domestic intervention pilot program in Duluth, Minnesota, suggests that in cases of domestic violence, the abuser, through coercion, promises, or emotional ties, uses the victim to shield himself from the legal system.<sup>109</sup> However, the typical prosecutorial response — dropping cases where the woman is hesitant to follow through — places the responsibility of pursuing the

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101. Litsky, Note, *supra* note 10, at 162.

102. For example, a number of cases have held that marital rape exemptions are unconstitutional. *E.g.* Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986); *People v. M.D.*, 595 N.E.2d 702 (Ill. App. Ct. 1992); *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985). Other courts, however, have held similar marital rape exemptions constitutional. *E.g.* *People v. Flowers*, 644 P.2d 916 (Colo. 1982), *appeal dismissed*, 459 U.S. 803 (1982); *State v. Taylor*, 726 S.W.2d 335 (Mo. 1987).

103. Montalto, Note, *supra* note 9, at 344.

104. Mary Haviland, Director of the Coalition for Criminal Justice Reform for Battered Women, estimates that less than ten domestic violence cases a year actually go to trial in New York City. Litsky, Note, *supra* note 10, at 167 n.119 (citation omitted).

105. Pence, *supra* note 96, at 248-49.

106. Litsky, Note, *supra* note 10, at 166.

107. For example, Denise Markham of the Domestic Violence Advocacy Project in Chicago, Illinois, estimated that in 1987, about 90 percent of the domestic violence cases in Cook County were charged as misdemeanors, regardless of the severity of the injuries. *Id.* at 166-67. Similarly, in Milwaukee, Wisconsin, out of 8,000 misdemeanor arrests for domestic violence last year, only 50 percent were prosecuted, and of those prosecuted only 30 percent were found guilty. *World News Tonight* (ABC television broadcast, June 27, 1994).

108. *Id.* at 167; Pence, *supra* note 96, at 250.

109. Pence, *supra* note 96, at 250.

charge on the victim, and often results in inaction.<sup>110</sup>

To combat the reluctance of prosecutors to take domestic violence cases to trial, some jurisdictions have experimented with "no-drop" prosecutorial policies which deter prosecutors from foregoing prosecution.<sup>111</sup> If strictly enforced, however, such policies can harm the woman more than they help her. For example, under such a policy a woman could either be arrested or forced to pay court costs for failing to testify against her partner.<sup>112</sup> As a result, strict no-drop policies have been criticized for discouraging victims from initially coming forward.<sup>113</sup>

### C. *The Response of the Judiciary*

The judicial response to battering has been equally criticized.<sup>114</sup> Even if the police and prosecutorial hurdles are surpassed, victims often face judges who do not take domestic violence seriously and are reluctant to send batterers to jail.<sup>115</sup> Judges often assume that the victim provoked the batterer or that the victim is abusing the court system by using it to resolve a family quarrel,<sup>116</sup> and they often release even repeat offenders on minimal or no bail.<sup>117</sup> In those cases where a batterer *is* convicted, judges routinely do not impose a sentence, but merely lecture the defendant and warn him that next time the judge will "throw the book" at him.<sup>118</sup>

110. See Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in *WOMAN BATTERING: POLICY RESPONSES* 95, 101 (Michael Steinman ed., 1991) (discussing the role of prosecutors in stopping domestic violence).

111. Pence, *supra* note 96, at 260.

112. Cahn & Lerman, *supra* note 110, at 101 (CHECK THIS CITE!).

113. See *id.* Prosecutors in Brooklyn, New York, will allow victims to drop charges, but only after the victim has met with a counselor. *Id.* In Madison, Wisconsin, prosecutors will proceed without the cooperation of victims. *World News Tonight* (ABC television broadcast, June 27, 1994).

114. Litsky, Note, *supra* note 10, at 169-70.

115. *Id.* A particularly glaring example occurred in Massachusetts. In 1986, District Court Judge Paul Heffernan admonished complainant Pamela Dunn for wasting his time in court on a domestic violence matter. Although he granted her protective order, he refused to order increased protection. Pamela's husband subsequently kidnapped, shot, stabbed, and strangled her, and left her body in the town dump. *Court Challenged in Massachusetts*, N.Y. TIMES, Nov. 30, 1986, at A61.

116. Litsky, Note, *supra* note 10, at 170.

117. *Id.* n.139 (citation omitted).

118. Raymond I. Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585, 598-99 (1970).

## III. LEGISLATIVE RESPONSE TO BATTERING

The public concern surrounding the issue of domestic violence, and public dissatisfaction with how domestic violence has been treated, has led to legislative action.<sup>119</sup> The initial legislative response in many states has been to allow victims to obtain protective orders<sup>120</sup> and to establish emergency shelters and other support services.<sup>121</sup>

Protective orders are enforceable in criminal courts.<sup>122</sup> Such an order directs the batterer to stay away from the home or victim and to refrain from further abusive conduct.<sup>123</sup> Legislators hoped that these protective orders would make a strong statement to abusers — that courts believe victims deserve protection — and that they would therefore deter future assaults.<sup>124</sup>

However, a host of pragmatic problems have accompanied the issuance and enforcement of protective orders.<sup>125</sup> Access to protective orders is limited by the victim's unfamiliarity with the system, and the remedy is often discouraged by prosecutors and judges.<sup>126</sup> Victims are also deterred by the length of time — often months — that it can take to obtain such an order.<sup>127</sup> For those victims who persist and eventually obtain a protective order, its efficacy is further reduced by the reluctance of law enforcement officers to arrest batter-

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119. Litsky, Note, *supra* note 10, at 152.

120. *E.g.*, CAL. FAM. CODE §§ 6240-57 (West Special Pamphlet 1994) (describing the issuance of protective orders); 23 PA. CONS. STAT. ANN. § 6108 (1991) (allowing victims to obtain protective orders in domestic abuse cases).

121. *E.g.*, COLO. REV. STAT. ANN. §§ 26-7.5-101 to -105 (West 1990) (repealed 1995) (encouraging the development of local domestic abuse programs); N.J. STAT. ANN. §§ 30:14-1 to -14 (West 1981) (encouraging the development of shelters for victims of domestic abuse). See Litsky, Note, *supra* note 10, at 153 (stating that the most common legislative response has been to enact a law allowing for protective orders and the establishment of shelters).

122. See Mary Lou Boland, Note, *Domestic Violence: Illinois Responds to the Plight of the Battered Wife — The Illinois Domestic Violence Act*, 16 J. MARSHALL L. REV. 77, 90 (1982) (discussing protective orders in Illinois).

123. See, *e.g.*, N.Y. FAM. CT. ACT § 842 (McKinney 1983 & Supp. 1994) (requiring a defendant to stay away from the person or premise or to refrain from verbal or physical violence).

124. See Greg Anderson, Note, *Sorichetti v. City of New York Tells The Police That Liability Looms for Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333 (1985) (discussing a case which held that a protective order creates a "special relationship" between the protected party and the police, thereby providing the basis for police liability if the protected party is injured).

125. Pence, *supra* note 96, at 267.

126. Lisa R. Beck, Note, *Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York*, 15 FORDHAM URB. L.J. 999, 1014 (1987).

127. *Id.* n.87.



ers for violating the order,<sup>128</sup> and by the reluctance of judges to sanction such violations.<sup>129</sup> As a result, protective orders have proved grossly inadequate in preventing domestic violence.<sup>130</sup>

### A. Arrest Policies

Arrest signifies to an offender "that his behavior is a crime, that it must stop, that punishment will follow, and that it is sensible to secure treatment to avoid repeating the behavior."<sup>131</sup> Specifically, in situations of domestic violence, the aim of arrest policies is to increase the costs associated with battering:

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.<sup>132</sup>

Failure to arrest, on the other hand, sends the opposite message:

Men . . . [get] the message from police officers that woman 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 women with whom they are, or were, involved.<sup>133</sup>

The deterrence potential of arrest has led to increased scrutiny of arrest policies as well as a search for the proper balance (if any) between total police discretion on the one hand and no police discretion on the other.

#### 1. Permissive Arrest Policies

Many states have adopted permissive arrest or warrantless arrest policies which allow police to make an arrest without a warrant if

128. *Id.* at 1015.

129. *Id.*

130. See Litsky, Note, *supra* note 10, at 155 (stating that state legislative response to domestic violence in the 1970s was "grossly inadequate").

131. Anthony Bouza, *Responding to Domestic Violence*, in *WOMAN BATTERING: POLICY RESPONSES* 191, 195 (Michael Steinman ed., 1991).

132. Michael Steinman, *Coordinated Criminal Justice Interventions and Recidivism Among Batterers*, in *WOMAN BATTERING: POLICY RESPONSES* 221, 222 (Michael Steinman ed., 1991).

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

they have probable cause, often in cases where the offense is deemed a misdemeanor.<sup>134</sup> These statutes preserve police discretion in deciding whether to make an arrest. Permissive arrest policies typically provide that the police *may* make a warrantless arrest in certain circumstances.<sup>135</sup> The Illinois Domestic Violence Act of 1986 ("Act")<sup>136</sup> typifies how such permissive arrest policies are codified.

The Act contains a permissive arrest provision which allows police to effectuate a warrantless arrest if an abuser violates a protective order,<sup>137</sup> or upon probable cause that a crime has been committed.<sup>138</sup> In cases where the police, at their discretion, opt not to arrest the abuser, the Act requires that the police file a report and inform the victim of her right to initiate criminal action.<sup>139</sup>

134. *See, e.g.*, ALASKA STAT. § 12.25.030(b) (Supp. 1993) (permitting warrantless arrest when a spouse is the victim); ARIZ. REV. STAT. ANN. § 13-3601(B) (Supp. 1994) (permitting warrantless arrest upon probable cause for commission of a felony or misdemeanor domestic violence); FLA. STAT. ANN. ch. 901.15(6), (7)(a) (Harrison 1985 & Supp. 1993) (permitting warrantless arrest upon probable cause for violation of a domestic violence protective order, battery upon a spouse with evidence of bodily harm, or the potential for further violence); IDAHO CODE § 19-603(6) (Supp. 1993) (permitting warrantless arrest if there is reasonable cause to believe the person has assaulted their spouse); 750 ILCS § 60/301 (1994) (permitting warrantless arrest for a crime if there is probable cause, including but not limited to a violation of a protective order); MASS. GEN. LAWS ANN. ch. 209A, § 6(7) (West Supp. 1993) (permitting warrantless arrest upon probable cause for felony or misdemeanor domestic violence, or a violation of a restraining order); MONT. CODE ANN. § 46-6-311(2) (1993) (permitting warrantless arrest upon probable cause for domestic abuse or an assault upon a family or household member); R.I. GEN. LAWS §§ 12-29-3(B), 15-15-5(A) (Supp. 1993) (permitting warrantless arrest upon probable cause for a felony or misdemeanor when a failure to arrest could result in nonapprehension of the offender or further violence).

135. Pro-arrest policies, on the other hand, provide that the police *should* make arrests in certain instances; mandatory arrest policies state that the police *must or shall* make arrests in certain situations. *See infra* notes 143-82 and accompanying text (discussing pro-arrest and mandatory arrest policies).

136. 750 ILCS §§ 60/101-305 (West 1993 & Supp. 1993). The Act, *inter alia*, clarifies who is protected and defines what types of conduct constitute abuse. *Id.* §§ 103, 201. The Act outlines six major purposes:

- 1) recognizing that domestic violence is a serious crime;
- 2) recognizing adults with disabilities as high risk persons susceptible to domestic violence;
- 3) recognizing that law enforcement has not effectively dealt with domestic violence;
- 4) supporting victims by issuing protective orders and by addressing issues of custody and support;
- 5) clarifying the role of law enforcement; and
- 6) expanding the civil and criminal remedies available to victims.

*Id.* § 102(1)-(6). Furthermore, the Act specifically provides for the issuance of protective orders. *Id.* § 214.

137. 750 ILCS § 60/301(a) (West 1993).

138. *Id.*

139. *Id.* § 304(7)(b)(1)-(2) (West Supp. 1993).

Critics of permissive arrest laws maintain that legislation such as that enacted by Illinois<sup>140</sup> does not go far enough in protecting women, since it still allows the police to use discretion at the scene. Consider the following cases:<sup>141</sup>

Case #0101: A woman called the police. Her husband had beaten her and broken all the windows in the house. Police arrived and told her *she* had better find somewhere else to stay. The husband pushed the woman several times in front of the police, yet they did not intervene or arrest him.

Case #0243: A man threw a woman out of a window, causing injuries that required stitches. Police were called to the house by neighbors. The responding officers were friends of the man and joked around with him. The officers arrested the *woman* and charged her with disturbing the peace.<sup>142</sup>

## 2. *Pro-Arrest Policies*

Unlike permissive arrest statutes which merely allow the police latitude to make an arrest, pro-arrest or preferred arrest policies suggest that arrests be made in certain circumstances.<sup>143</sup> These policies, however, also preserve some level of police discretion in determining whether a particular case fits within those circumstances. It is asserted that pro-arrest laws — which attempt to limit the exercise of police discretion — offer more protection to victims than wholly discretionary (or permissive) arrest systems, and in fact serve to deter batterers.<sup>144</sup>

## 3. *Mandatory Arrest Policies*

Mandatory arrest legislation, on the other hand, presupposes the notion that police discretion must be completely alleviated in order to curb the problem of domestic violence. In 1981, Duluth, Minnesota became the first jurisdiction to enact a mandatory arrest policy for misdemeanor assaults.<sup>145</sup> This served to radically alter the typical domestic violence scenario:

140. See *supra* notes 136-39 and accompanying text (describing the Illinois Domestic Abuse Statute).

141. Although real, these cases are not held out as typical incidents of domestic violence, but serve to illustrate the possible effects of complete police discretion at the scene.

142. Sarah Mausolf Buel, *Recent Developments: Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 211, 213-14 (1988) (emphasis added) (footnotes omitted).

143. J. David Hirschel & Ira Hutchinson, *Police-Preferred Arrest Policies*, in WOMAN BATTERING: POLICY RESPONSES 49, 52 (Michael Steinman ed., 1991).

144. Buel, *supra* note 142, at 215-16.

145. Hoffman, *supra* note 2, at 23.

1:02 A.M.: Couple arguing loudly. Probably just "verbal assault," the dispatcher tells the car patrols.

1:06 A.M.: Two squad cars pull up to the address. A tall blond man opens the door as a naked woman hurriedly slips on a raincoat. The man looks calm. The woman looks anything but.

"We were just having a squabble," he begins.

"He was kicking the crap out of me," she yells . . . .

How does he explain the blood oozing from the inside of her mouth? "She drinks, you know. She probably cut herself." From inside the bedroom, Jenny M., whose face is puffing up screams: "Just get him out of here! And then you guys leave, too!" . . .

"She lies, you know," George G. confides to an officer, who remains stone-faced. Jenny M. starts crying again. "I don't want him hurt. This is my fault. I'm the drinker. He's not a bad guy . . . ."

Then the police head toward George G. with handcuffs. He looks at her beseechingly. "Jenny, do you want me to go?"

An officer cuts him short. "George, it's not her choice."

George G. thrusts his chin out and his fists deep into the couch. "But this is just a domestic fight!"

One cop replies: "We don't have a choice either. We have to arrest you."<sup>146</sup>

Police discretion in this situation is noticeably absent. Under a mandatory arrest law, police officers must recognize the altercation as an assault and arrest the assailant. They are not allowed to place responsibility for initiating the arrest on the victim.

The Duluth Domestic Abuse Intervention Project ("DAIP") exemplifies a fully integrated project, establishing mandatory arrest policies coupled with police training, prosecutorial and judicial guidelines, support services for victims, and rehabilitation and counseling for batterers.<sup>147</sup> The program was initiated under the premise that "the institutions within our society must take the responsibility to end battering. Holding assailants accountable for their use of violence gives the community, victims, assailants and children a clear message that battering is not acceptable 'even' within the confines of the family."<sup>148</sup> Ellen Pence, founder and director of DAIP, highlighted the program's dual accomplishments: "[T]he program offers safety for victims while providing abusers with clear limits on their behavior, certain intervention, and a more systematic program for the purpose of changing their behavior."<sup>149</sup>

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146. *Id.*

147. Pence, *supra* note 96, at 255-69.

148. *Id.* at 254.

149. *Id.*

Initial evaluation of the Duluth program showed remarkable success.<sup>150</sup> For example, 77 percent of those arrested for misdemeanor crimes of domestic violence pled guilty,<sup>151</sup> and the number of repeat offenses reported dropped significantly.<sup>152</sup> Pence detailed the reasons for DAIP's success: "It has shifted the focus of intervention from the victim to the assailant. In doing so, it has enhanced the ability of the system to deter assailants by increasing the numbers of assailants convicted of assault and establishing serious consequences for battering."<sup>153</sup> This alters the perception that domestic violence is merely a dysfunctional relationship and recognizes that it is a *criminal* one.<sup>154</sup> Proponents of the Duluth project argue that it changes the cost/benefit equation by increasing the costs of battering and thus deters recidivism.<sup>155</sup>

Mandatory arrest legislation did not garner widespread attention, however, until 1984, when results from the landmark Minneapolis Domestic Violence Experiment were published.<sup>156</sup> In an empirical field experiment with the Minneapolis Police Department, Professors Lawrence Sherman and Richard Berk studied the deterrent effect of arrest on domestic violence.<sup>157</sup> They found that arrest was the most effective deterrent to repeat incidents of battering,<sup>158</sup> and that arrest did not, as the labeling theory<sup>159</sup> predicted, increase recidivism.<sup>160</sup>

150. *Id.* at 257-58.

151. *Id.* at 257.

152. *Id.* at 258. "Police had prior contact with 73% of the assailants before an arrest was made, 38% in the six months following the arrest, and only 16% from the seven to twelve months after arrest." *Id.*

153. *Id.* at 269.

154. *Id.*

155. Buel, *supra* note 142, at 216.

156. The experiment and its results are described in Sherman & Berk, *supra* note 62, at 261; Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 LAW & SOC. REV. 117, 117-19 (1989); Beck, Note, *supra* note 126, at 1015-16.

157. Sherman & Berk, *supra* note 62, at 261.

158. The study's methodology included the following:

The behavior of the suspect was tracked for six months after the police intervention, with both official data and victim reports. The official recidivism measures show that the arrested suspects manifested significantly less subsequent violence than those who were ordered to leave. The victim report data show that the arrested subjects manifested significantly less subsequent violence than those who were advised.

*Id.*

159. See *supra* notes 80-82 and accompanying text (explaining the labeling theory of punishment).

160. Sherman & Berk, *supra* note 62, at 261 (stating that "[t]he findings falsify a deviance

The policy response to the Minneapolis Experiment has been dramatic. On the heels of its findings, a number of states and municipalities enacted mandatory arrest statutes.<sup>161</sup> Such statutes<sup>162</sup> provide that the police *shall* arrest the abuser in certain defined circumstances, as opposed to permissive arrest policies which provide that the police *may* arrest,<sup>163</sup> and pro-arrest policies which dictate that the police *should* arrest.<sup>164</sup> Proponents argue that mandatory arrest laws send a message to the victim that society does not blame her for her predicament. The intent behind such statutes is two-fold: to protect the victim, and to deter subsequent

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amplification model of labeling theory beyond initial labeling, and fail to falsify the specific deterrence prediction for a group of offenders with a high percentage of prior histories of both domestic violence and other kinds of crime”).

161. See Richard A. Berk & Phyllis J. Newton, *Does Arrest Really Deter Wife Battery? An Effort to Replicate the Findings of the Minneapolis Spouse Abuse Experiment*, 50 AM. SOC. REV. 253 (1985) (discussing changes in California law and the results of a follow-up study of residents prone to domestic violence); Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183 (1990) (noting changes in Omaha domestic violence laws and the results of studies in Omaha); Beck, Note, *supra* note 126, at 1035-36 (suggesting revisions of domestic violence laws in New York). For examples of current mandatory arrest statutes, see *infra* note 162 and accompanying text.

162. For example, Connecticut law provides that:

Whenever a peace officer determines upon speedy information that a family violence crime . . . has been committed within his jurisdiction, he shall arrest the person or persons suspected of its commission . . . . The decision to arrest and charge shall not (1) be dependent on the specific consent of the victim, (2) consider the relationship of the parties or (3) be based solely on a request by the victim.

CONN. GEN. STAT. ANN. § 46b-38b (West Supp. 1994); see also, e.g., D.C. CODE ANN. § 16-1031 (Supp. 1993) (“A law enforcement officer shall arrest a person if the law enforcement officer has probable cause to believe that the person: (1) Committed an intrafamily offense that resulted in physical injury . . . .”); KAN. STAT. ANN. § 22-2307 (Supp. 1993) (“[T]he officers shall make an arrest when they have probable cause to believe that a crime is being committed or has been committed.”); NEV. REV. STAT. § 171.1225 (1991) (requiring officers to inform suspected victims of acts of domestic violence that “[i]f I have probable cause to believe that an act of domestic violence has been committed against you in the last 4 hours I am required, unless mitigating circumstances exist, to arrest immediately the person suspected of committing the act”); N.J. STAT. ANN. § 2C:25-21 (West Supp. 1993) (“[T]he law enforcement officer shall arrest the person who is alleged to be the person who subjected the victim to domestic violence . . . .”); OR. REV. STAT. § 133.055(2)(a) (1993) (noting that “the officer shall arrest and take into custody the alleged assailant or potential assailant”); R.I. GEN. LAWS § 12-29-3(B) (Supp. 1993) (“When a law enforcement officer responds to a domestic violence situation and has probable cause to believe that a crime has been committed, . . . the officer shall arrest and take into custody the alleged perpetrator [in certain situations] . . . .”); V.I. CODE ANN. tit. 16, § 94 (1991) (noting that an officer “shall make an arrest without a warrant if the officer has probable cause to believe that a misdemeanor or felony involving domestic violence . . . has been committed”).

163. Beck, Note, *supra* note 126, at 1036; see also *supra* note 134 (providing examples of permissive arrest statutes).

164. Beck, Note, *supra* note 126, at 1036; see also *supra* notes 143-44 and accompanying text (discussing pro-arrest policies).

offenses.<sup>165</sup>

Attempts to replicate the findings of the Minneapolis study, however, have cast doubt on the desirability and the feasibility of mandatory arrest legislation.<sup>166</sup> For example, a similar study conducted in conjunction with the Omaha Police Department<sup>167</sup> did not support the findings of the Minneapolis experiment.<sup>168</sup> The original Omaha report indicated that arrests did not deter domestic violence.<sup>169</sup> It did suggest, however, that arrests did not necessarily lead to subsequent incidents of violence.<sup>170</sup>

Professor Sherman, who coauthored the original Minneapolis report,<sup>171</sup> conducted a similar study in Milwaukee, Wisconsin. Unlike the Minneapolis study, however, the results of the Milwaukee study called into question the efficacy of mandatory arrest.<sup>172</sup> The Milwaukee study indicated that another factor — the employment status of the batterer — had a dramatic impact on the deterrent effect of arrest.<sup>173</sup> Data from the Milwaukee project indicated that an arrest deterred employed men from repeat violence, as evidenced by a

165. See, e.g., ARK. CODE ANN. § 5-53-101 (Michie 1993) (noting that “immediate intervention through arrest upon probable cause to protect the victim from physical injury is one remedy which should be provided in this state as in other states”). In addition, Idaho law states that:

[T]he legislature finds that a significant number of homicides, aggravated assaults, and assaults and batteries occur within the home between adult members of families. . . . Domestic violence can . . . be deterred, prevented or reduced by vigorous prosecution by law enforcement agencies and prosecutors and by appropriate attention and concern by the courts whenever reasonable cause exists for arrest and prosecution.

IDAHO CODE § 39-6302 notes (1993).

166. See, e.g., Dunford et al., *supra* note 161, at 204 (stating that “[a]rrest, and the immediate period of custody associated with arrest, was not the deterrent to continued domestic conflict that was expected”); Daniel Goleman, *Do Arrests Increase the Rates of Repeated Domestic Violence?*, N.Y. TIMES, Nov. 27, 1991, at C8 (reporting no difference in the number of repeat assaults between men who were arrested and those who were not); see also *infra* notes 168-81 and accompanying text (discussing subsequent studies which were unable to replicate the Minneapolis study’s findings).

167. The Omaha Experiment was one of six similar studies funded by the National Institute of Justice. Dunford et al., *supra* note 161, at 183.

168. *Id.* at 204.

169. *Id.* (“[T]he inability to replicate findings associated with the Minneapolis experiment calls into question any generalization of the Minneapolis findings to other sites. First, arrest in Omaha, by itself, did not appear to deter subsequent domestic conflict any more than did separating or mediating those in conflict.”).

170. *Id.* (“Arrest did not appear to place victims in greater danger than did separation or mediation. It would appear that what the police did in Omaha . . . neither helped nor hurt victims in terms of subsequent conflict.”).

171. See *supra* notes 156-60 and accompanying text (detailing the findings of the Minneapolis experiment).

172. Goleman, *supra* note 167, at C8.

173. *Id.* This factor was not considered in the original Minneapolis study.

16 percent decrease in recidivism.<sup>174</sup> Among the unemployed,<sup>175</sup> however, being arrested *increased* repeat violence by 44 percent.<sup>176</sup> The results forced Sherman to conclude that "mandatory arrests in domestic violence cases may cause more violence against women in the long run."<sup>177</sup> This is particularly disturbing since poor men are more likely to be reported to the authorities for domestic violence than are middle- and upper-class abusers.<sup>178</sup>

On one level, the existence of such conflicting empirical results highlights the danger inherent in basing policy on one empirical study.<sup>179</sup> Notably, this danger was anticipated by Sherman and Berk in their report on the Minneapolis findings. They cautioned:

[W]e favor a *presumption* of arrest; an arrest should be made unless there are good, clear reasons why an arrest would be counterproductive. We do not, however, favor *requiring* arrests in all misdemeanor domestic assault cases. Even if our findings were replicated in a number of jurisdictions, there is a good chance that arrest works far better for some kinds of offenders than others . . . . We feel it best to leave police a loophole to capitalize on that variation.<sup>180</sup>

Despite their reservations, however, the results of this one study led to the enactment of mandatory arrest legislation.<sup>181</sup> On a broader level, such results necessitate a close scrutiny of the viability of mandatory arrest statutes, for while they may be appropriate in certain locales under specific circumstances, they do not appear to be universally appropriate.

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174. *Id.*

175. It is interesting to note that unemployment has been correlated to the incidence of battering. See *supra* notes 25-27 and accompanying text (discussing the relationship between unemployment and spouse abuse).

176. Goleman, *supra* note 167.

177. *Id.* Sherman also noted that the deterrent effect shown in Minneapolis was related to the low unemployment rate in that city at the time the study was conducted. *Id.*

178. Hoffman, *supra* note 2, at 26; see also Roger Worthington, *Value of Mandatory Arrest for Woman Beaters Questioned*, CHI. TRIB., Nov. 19, 1991, at C5 ("Mandatory arrest puts us in the moral dilemma of reducing violence against women who are relatively well off (living with or married to an employed assailant), at the price of increasing violence against women whose abusers are unemployed.") (quoting Professor Lawrence Sherman).

179. Sherman & Cohn, *supra* note 156, at 117 (reporting that "over one-third of respondents from U.S. police departments in 117 cities said their policy had been influenced by the [Minneapolis] experiment").

180. Sherman & Berk, *supra* note 62, at 270.

181. See *supra* note 162 and accompanying text (noting the mandatory arrest statutes from various states).



#### IV. MANDATORY ARREST — NOT A PANACEA FOR THE PROBLEM

If, as most social scientists suggest, the Exchange Theory explains why men batter, mandatory arrest must then be analyzed in light of the *costs* it imposes on the batterer.<sup>182</sup> To effectively deter domestic abuse, the imposition of sufficiently severe costs must be certain. Moreover, batterers must believe that society will be able to punish them. Finally, society must send a message to these men that they are being punished because abusing women is not tolerable; only then will these men stop abusing women in order to avoid punishment.<sup>183</sup> Additionally, using arrest as a mandatory sanction signifies to society as a whole that abuse of women is wrong and will be punished.<sup>184</sup>

Under the Exchange Theory, though, it is likely that only men who have something to lose from arrest and prosecution are likely to be deterred. For example, employed abusers have more at stake in the community and thus more to fear from an arrest and subsequent prosecution. Unemployed men, with less to lose, may not be deterred by the costs of arrest and prosecution, and in fact seem to be more susceptible to the phenomenon of labeling.<sup>185</sup> The danger is that these men will respond to arrest by committing future acts of violence against women.<sup>186</sup>

Critics assert that mandatory arrest statutes, if not implemented in tandem with coordinated efforts, are at best minimally effective and at worst counterproductive. Such efforts, instead, come "perilously close to encouraging greater jeopardy for victims unless accompanied by recommendations for massive changes in prosecutorial and judicial practices. In a judicial system which seldom tries spouse abuse offenders and rarely convicts them, women are seldom protected from violent reprisals."<sup>187</sup> As the criticism of

182. See *supra* notes 58-61 and accompanying text (discussing the Exchange Theory and its application to domestic violence).

183. See *supra* notes 68-70 and accompanying text (discussing the need for the threat of punishment to be communicated to offenders in order to achieve deterrence).

184. See *supra* notes 71-75 and accompanying text (discussing general deterrence).

185. Worthington, *supra* note 179, at C5. ("There is more unrestrained anger in the unemployed batterer because he has little to lose. If people have something to lose, they are fearful of losing that, and that controls their anger. So they become less violent.") (quoting Professor Lawrence Sherman).

186. See *supra* notes 173-82 and accompanying text (detailing the results of the Milwaukee study, which showed that arrest may lead to recidivism for some offenders).

187. Sarah F. Berk & Donileen R. Loseke, "Handling" Family Violence: Situational Determi-

prosecutors and judges suggests,<sup>188</sup> arrest alone is not a panacea for the problem of abuse. In the successful Duluth experiment, a mandatory arrest policy was augmented by a strong coordinated community program providing prosecutorial and sentencing guidelines as well as counseling and support services for victims and abusers.<sup>189</sup> The 47 percent decrease in recidivism could not be traced solely to arrest, but rather to the coordinated effort of various agencies.<sup>190</sup> Similarly, in the Minneapolis experiment, those men who were arrested actually served time in jail.<sup>191</sup> Available data begs the question whether similar deterrent effects would be seen if the certainty and severity of a jail sentence did not exist.

Even within the scope of a coordinated program, as illustrated by the Duluth model, recent empirical evidence raises concerns about the wisdom of enacting mandatory arrest laws without regard for the particular characteristics of the jurisdiction.<sup>192</sup> For example, a blanket policy of mandatory arrest in Illinois would neither be wise nor feasible. Illinois, and the Chicago urban area in particular, suffer from a large unemployment problem.<sup>193</sup> Reporting trends indicate that it is this disadvantaged population that will be disproportionately affected by mandatory arrest legislation.<sup>194</sup> The Milwaukee<sup>195</sup> and Omaha<sup>196</sup> studies suggest that arrest is counterproductive for men who are unemployed, as it serves to increase re-

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nants of Police Arrest in Domestic Disturbances, 15 LAW & SOC'Y REV. 317, 343 (1980-81); see also Robert E. Worden & Alissa A. Pollitz, *Police Arrests in Domestic Disturbances: A Further Look*, 18 LAW & SOC'Y REV. 105, 118 (1984) (announcing support for the Berk & Loseke study based on a replication of those findings).

188. See *supra* notes 104-18 and accompanying text (discussing the failure of prosecutors and judges to adequately protect the victims of spouse abuse).

189. Pence, *supra* note 96, at 255.

190. Buel, *supra* note 142, at 216.

191. Sherman & Berk, *supra* note 62, at 268.

192. See *supra* notes 168-82 and accompanying text (discussing the Omaha and Milwaukee studies, which were unable to substantiate the results of the Minneapolis experiment).

193. Estimates vary. See Christi Parsons & James Hill, *Hungry North Chicago Gets Sliver of Abbott Pie*, CHI. TRIB., Sept. 23, 1992, at L1 (reporting that the Chicago area had an unemployment rate in 1991 of 7.8 percent, compared to Lake County's rate of 4.7 percent); Isabel Wilkerson, *Refugees From Recession Fill Hotel's Payroll*, N.Y. TIMES, Mar. 1, 1992, at § 1, at 1 (reporting that as of December 1991, the unemployment rate in Chicago was 10.3 percent, compared to the national average of 7.1 percent).

194. See *supra* notes 25-27, 176-79 and accompanying text (discussing how poor men are more likely to be reported for domestic violence, and noting that since mandatory arrests in the lower economic class may actually increase violence, this disadvantaged population will be disproportionately affected by mandatory arrest statutes).

195. See *supra* notes 173-78 and accompanying text (discussing the Milwaukee study).

196. See *supra* notes 168-71 and accompanying text (discussing the Omaha experiment).

cidivism and undermine the goals of mandatory arrest. The risk, therefore, is that mandatory arrest will simply lead to more incidents of domestic violence among the poor.

Mandatory arrest laws enacted independently of a coordinated community program are doomed to fail. Unless accompanied by prosecutorial and judicial guidelines, as well as support services for victims, arrest has not been shown to deter further violence.<sup>197</sup>

Moreover, by enacting mandatory arrest policies, jurisdictions make promises to the victim: to treat the crime of abuse seriously; to punish the offender; and, critically, to protect her. In Duluth and Minneapolis, where punishment was certain and severe — that is, abusers were actually incarcerated — and where abusers quickly learned that the community was capable of exacting punishment, those promises were kept. However, where an arrest is not accompanied by at least some amount of incarceration, the victim may be placed in an even more precarious position.<sup>198</sup>

Whether the abuser is susceptible to the costs of battering given his individual circumstances, and whether the abuser will spend any time in jail following the arrest are factors which will impact whether he will be deterred from future acts of abuse. It is unclear, and empirically unsupported, that arrest without subsequent incarceration will deter recidivism. In smaller communities where the overcrowding of jails is not at issue, arrest and incarceration may indeed send a message to the batterer while affording the victim adequate time to protect herself. In urban areas, limited jail space coupled with a reluctance to prosecute and sentence offenders make it unlikely that batterers will face incarceration. Arguably, then, the cost of battering would not be significantly altered, and the likelihood of deterrence would be proportionately reduced.

Mandatory arrest legislation removes police discretion in an effort to guarantee that the costs associated with spouse abuse will be more certain and more severe.<sup>199</sup> Removing all police discretion will serve to inhibit archaic notions from influencing the decision to ar-

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197. In 1986, Leedonyell Williams of Washington D.C. called the police to report that her ex-boyfriend had broken into her apartment and threatened her with a gun. Her boyfriend was arrested, but charges were dropped because the case was considered to be domestic violence. The next day, Williams was shot and killed in her apartment building, and her boyfriend was subsequently charged with first-degree murder. Horwitz, *supra* note 11, at A7.

198. *Id.*

199. See *supra* notes 145-46 and accompanying text (discussing the elimination of police discretion through the use of mandatory arrest laws).

rest, but not without costs. Professor H. Richard Uviller argued that curtailing police discretion is not the solution:

The solace of standardized rules and procedures is largely illusory. Rigid rules tend to ossify individual responsibility and discourage individualistic thinking. Those who would shrink discretion obey the precept: "Treat likes alike." However, the overriding lesson of experience in our criminal justice operation is that every case is different. The major worry is that the people out there dealing with the problems will lose their appreciation of the differences between the cases and will begin reacting to them as repetitive. . . . The learned fact should be that crimes and criminals emerge from a rich variety of circumstances. Separately and in combination, the variants can never be fully anticipated or assessed; yet they are often critical to forming the just response.<sup>200</sup>

A variety of other criticisms of mandatory arrest statutes have been suggested. For example, dual arrest is a problem with some mandatory arrest laws.<sup>201</sup> In situations where an officer is faced with two people who have sustained injuries and claim to be the victim, the officers may be compelled under the terms of the statute to arrest both parties.<sup>202</sup> This revictimizes the woman, and reinforces the idea that she is somehow to blame.

The dual arrest problem, however, can be alleviated by carefully wording a mandatory arrest statute. For example, the New Jersey statute mandates that if the officer finds that both parties exhibit signs of injury, he should consider the comparative extent of the injuries, the history of domestic violence (if any), and other relevant factors.<sup>203</sup> Interestingly, though, the New Jersey statute avoids dual arrest only by relying on some modicum of officer discretion.

Finally, some critics also argue that mandating arrest against the express wishes of the victim strips her of her autonomy.<sup>204</sup> However, protecting the victim and deterring future assaults might, arguably, justify any loss of autonomy. These justifications ring hollow, however, in cases where the victim is not protected and deterrence is not effectuated. It may be that the woman herself is best able to gauge

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200. See H. Richard Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, 47 LAW & CONTEMP. PROBS., Autumn 1994, at 15, 32.

201. Connecticut, which has one of the nation's toughest arrest policies, has a dual arrest rate of 14 percent. Hoffman, *supra* note 2, at 26.

202. *Id.*

203. N.J. STAT. ANN. § 2C:25-21c(2) (West Supp. 1993).

204. Carol Wright, Note, *Immediate Arrest In Domestic Violence Situations: Mandate or Alternative*, 14 CAP. U. L. REV. 243, 260 (1985) (noting that mandatory arrest laws, at the very least, take decision-making power away from victims and can possibly force them to prosecute against their wishes).

what her partner's response will be. These critics therefore argue in favor of allowing the officer some discretion at the scene.<sup>205</sup>

The above analysis suggests that the benefits associated with mandatory arrest are largely illusory. In lieu of a mandatory arrest policy, however, Illinois should consider implementing a coordinated program which maximizes the deterrent value of an arrest by utilizing it in appropriate situations.

Pro-arrest or preferred arrest policies<sup>206</sup> strike a balance between overcoming archaic notions of domestic violence and preserving some level of needed police discretion. Although a pro-arrest policy does not avoid all of the problems endemic to police discretion, it does recognize the appropriateness and utility of arrest in the sphere of domestic violence without mandating arrest in cases where the risk to the victim would be increased. Unlike mandatory arrest policies, pro-arrest legislation allows the officer to consider the unique situation of the batterer and the victim and to assess whether an arrest is appropriate.

Inherent in discretion is the risk that it will be abused. Pro-arrest policies, however, indicate to police officers that arrest is an appropriate and viable sanction. Ideally, officers are educated about the seriousness of domestic abuse and are given detailed guidelines suggesting when arrest would be an appropriate and effective measure. If this is simultaneously augmented by an effort to prosecute and sentence those offenders that are arrested, police officers will be encouraged to take domestic abuse seriously.

The obvious advantage a pro-arrest policy has over a mandatory arrest statute is that it only attempts to incarcerate batterers where society believes the incarceration will deter. A pro-arrest policy can maximize the impact of an arrest by reserving the sanction for serious offenders and for those offenders most susceptible to the deterrent effects of arrest. Society, however, must be willing to use jail space to incarcerate batterers:

If we are going to make a difference in the murder rate in America, we ought to do something about spouse abuse, because we can make a difference by a different kind of treatment. Then we move a long way toward changing the debate, moving away from the idea that it is a trivial pursuit or a negotiation between people involved in a sovereignty. When we bring up

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205. Unchecked officer discretion, however, raises the same issue of victim autonomy, since an officer can decide to forego arrest even if the victim is insistent.

206. See *supra* notes 134-44 and accompanying text (describing permissive arrest and pro-arrest policies).

murder, it sounds more important than if we bring up personal relations; so we have to recast it.<sup>207</sup>

Domestic violence far too often results in serious injury.<sup>208</sup> In light of the fact that domestic violence poses a *greater* threat to women than any other violent crime, and in consideration of the fact that this crime is the *leading* cause of injury among women, this trade-off regarding jail space should be mandated.

A pro-arrest strategy would avoid two of the major problems which a mandatory arrest law would face in Illinois. First, by preserving discretion, a pro-arrest policy does not pose the same threat of counterproductivity which arises when all abusers are treated the same.<sup>209</sup> Moreover, by necessarily imposing incarceration in only certain circumstances, a pro-arrest policy has a greater chance of maximizing the certainty and severity of punishment and thus achieving deterrence.

A successful law enforcement effort to reduce domestic violence must also address the issue of prosecution of offenders, because “[u]nless there is prosecution following arrest, law enforcement is fiction.”<sup>210</sup> Strict no-drop prosecutorial policies, like mandatory arrest policies, attempt to combat this problem by eliminating needed flexibility.<sup>211</sup> Intervention programs, however, which counsel victims from the beginning of the prosecutorial process and work to encourage them to follow through with charges of abuse, are more successful.<sup>212</sup> These “victim-witness” programs recognize “the special circumstances that vulnerable victims [face] in the prosecution process: intimidation and fear of reprisal, a possibly lengthy adjudication process, and cutoff from basic social supports such as cash or housing.”<sup>213</sup> These multi-dimensional intervention programs offer counseling, legal advocacy, and “links to critical social services” in an attempt to make follow-through plausible.<sup>214</sup> By limiting —

207. James K. Stewart, *The View From the National Institute of Justice*, in FAMILY VIOLENCE: RESEARCH AND PUBLIC POLICY ISSUES 228, 229 (Douglas J. Besharov ed., 1990).

208. See *supra* notes 7-8 and accompanying text (explaining that domestic violence is a leading cause of death and injury among women).

209. See *supra* notes 168-82 and accompanying text (detailing the findings of the Omaha and Milwaukee studies, which indicated that arrest might be counterproductive for some offenders).

210. Cahn & Lerman, *supra* note 110, at 97.

211. See *supra* notes 162-66 and accompanying text (comparing the levels of flexibility found in permissive, pro-, and mandatory arrest statutes).

212. Beck, Note, *supra* note 126, at 1045-46.

213. Fagan, *supra* note 92, at 66.

214. *Id.*

rather than eliminating — prosecutorial discretion, and by encouraging victims to follow through with charges of abuse, successful prosecution of offenders can be achieved.<sup>215</sup>

Programs worthy of emulation in Illinois attempt to modify all stages of the prosecution process.<sup>216</sup> Such programs: (1) turn over the control regarding whether charges are filed to prosecutors instead of to victims; (2) help alleviate the pressure put on victims to drop charges; and (3) ultimately result in prosecutors taking abuse cases more seriously.<sup>217</sup> If prosecutors are also required to sign complaints themselves, rather than requiring the signature of the victim, another signal is sent to the victim and the batterer that it is the state who is charging and punishing the abuser.<sup>218</sup> Programs which enable the prosecutor to pursue convictions even without the cooperation of the victim, through the use of photographs and eyewitness testimony in lieu of victim testimony, further show that the system itself is taking responsibility for bringing the batterer to justice.<sup>219</sup> Finally, programs which provide victim advocates and counselors who work closely with victims and prosecutors are successful in increasing the rate of victim cooperation.<sup>220</sup>

As illustrated by the Exchange Theory, deterrence is effectuated by increasing the costs of battering and decreasing the rewards.<sup>221</sup> Arrest policies focus on raising the costs of battering, with varying, and disputed, effects. Treatment for batterers, on the other hand, attempts to change the equation from the other direction by decreasing the rewards. Little is yet known about the long-term success of rehabilitative intervention with men who batter.<sup>222</sup> Critics

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215. See Lisa G. Lerman, *Expansion of Police Arrest Power: A Key to Effective Intervention*, in *RESPONSE TO VIOLENCE IN THE FAMILY* 1, 2 (1980) (arguing that increased prosecution and arrest are mutually reinforcing, because police will arrest offenders more frequently if they believe they will be charged and prosecuted).

216. Cahn & Lerman, *supra* note 110, at 97.

217. *Id.* at 100-01.

218. *Id.* at 101.

219. *Id.*

220. *Id.* at 102. For example, the San Francisco Family Violence Project reported that in the first year it established a victim advocacy program to aid prosecutors and victims, 70 percent of victims assisted said they would not have pursued their cases without advocacy assistance. *Id.* at 103.

221. See *supra* notes 58-61 and accompanying text (discussing the Exchange Theory).

222. Jeffrey L. Edelson, *Judging the Success of Interventions With Men Who Batter*, in *FAMILY VIOLENCE: RESEARCH AND PUBLIC POLICY ISSUES* 92, 130, 145 (Douglas J. Besharov ed., 1990); see also STAR, *supra* note 34, at 39-47 (discussing rehabilitative techniques which have been successful as well as those which should be avoided).

who oppose providing treatment for batterers argue that assuming abusers can change offers a false sense of security to the women they abuse.<sup>223</sup> Those who argue in favor of treatment, however, contend that successful intervention necessitates longer<sup>224</sup> and more therapeutic counseling, which focuses on the man's psychological problems rather than just on behavioral issues.<sup>225</sup> Evidence does not conclusively demonstrate that treating the batterer necessarily results in long-term success. The prospect of successful treatment, however, holds out hope that batterers will stop abusing women in both their current and future relationships. The result could be a systemic decrease in domestic abuse. Therefore, funding long-term, therapeutic treatment for batterers will allow researchers to further analyze how treatment can be used to intervene effectively.

Although this Comment has primarily focused on programs which might deter the batterer, it should be noted that the problem of domestic violence cannot be curbed without offering commensurate support to the victims of domestic violence. Victim support services such as shelters and counseling programs are therefore critical components of any attempt to combat battering. A temporary shelter offers the battered women a safe place to stay as well as hope that the cycle of violence can be broken: "Women who left the authoritarian relationships within their homes were exposed to democratic decisionmaking within the transition homes. They experienced women, who like them, had left the victimization and were now able to make their own decisions about housing, child rearing, and jobs."<sup>226</sup> Shelters can encourage women to break the cycle of abuse by leaving their abuser, and can help victims explore their options within a secure environment.<sup>227</sup> When the batterer is arrested and incarcerated, the victim is afforded time to change her situation. But this benefit is meaningless if the woman has nowhere to turn. The existence of social supports for the victim are necessary so that she

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223. Vaselle-Augenstein & Ehrlich, *supra* note 13, at 151.

224. It is argued that most programs currently in operation are short-term, not sufficiently in-depth, and can result in more harm than good. *Id.*

225. *Id.*

226. Irma MacKay, *Educating the Professional to Aid Abuse Victims in Achieving Human Rights*, in *INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* 203, 205 (Emilio C. Viano ed., 1992).

227. Richard Berk et al., *What a Difference a Day Makes: An Empirical Study of the Impact of Shelters for Battered Women*, 48 *J. MARRIAGE & FAM.* 481, 488 (1986); Mary Ann Dutton-Douglas & Dorothy Dionne, *Counseling and Shelter Services for Battered Women*, in *WOMAN BATTERING: POLICY RESPONSES* 113, 122-23 (Michael Steinman ed., 1991).



can effect a change. In essence, by providing emergency shelters, counseling programs, and economic support, communities can help battered women help themselves.<sup>228</sup>

### CONCLUSION

The mandatory arrest of batterers, though well intentioned, is not likely to deter subsequent violence in all situations. Moreover, as with unemployed abusers, an arrest can be counterproductive, actually increasing the risks to the battered woman. For that very reason, it is necessary to preserve some level of police discretion to assess the utility of arrest in preventing repeat incidents of abuse in specific cases.

A mandatory arrest law would be neither desirable nor feasible in Illinois. A pro-arrest policy is a less dogmatic alternative which, coupled with a coordinated program, has the potential to alter the cost/benefit ratio associated with battering without mandating the imposition of risks on the victim.

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228. See Pence, *supra* note 96, at 265 (noting that "[t]wo of the reasons women are trapped in an abusive relationship are lack of information about battering and lack of an opportunity, for at least a short time, to stand outside of the situation," and that shelters exist to provide "support for women making decisions about their lives and [to assist] women in taking back control of their lives").