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NOTES

ARRESTING WIFE BATTERERS: A GOOD BEGINNING TO STOPPING A PERVASIVE PROBLEM

The violent crime of domestic abuse¹ persists in American society. Wife battering has existed throughout history, at times accepted, often ignored, and, until recently, typically excused.² Studies carried out by social workers can provide useful insights into the dynamics that cause battering and the “learned helplessness” that results.³ However, the traditional response of police, prosecutors, and judges often traps women in abusive relationships in which they are defenseless.⁴

Over the last decade, ten states have instituted mandatory arrest policies.⁵ Such laws, specifically addressing domestic violence crimes, require police officers to make an arrest if probable cause exists that an individual either has committed a misdemeanor or has violated a restraining order. Most states, however, retain laws calling for arrest when probable cause exists that a felony has been committed. Since most domestic violence assaults are classified as misdemeanors, traditional law leaves the decision of whether to arrest solely to the investigating officer. This often leaves the woman with little protection.⁶ Studies indicate, however, that arresting the batterer and immediately removing him from the home can significantly reduce the chance of his again becoming abusive.⁷

Left to their own discretion, many police, prosecutors, and judges do not view domestic assault as a substantial problem.⁸ Historically, many have not considered it a crime.⁹ Hampered by stereotypes about the rights of men in marriage and the privacy of the marital relationship, the judicial system often responds ineffectively to protect battered women.

1. This Note uses “domestic violence,” “wife battering,” and “domestic abuse” synonymously; they are defined as an assault or battery perpetrated upon a woman by her sexual partner. The term “sexual partner” and the terms “husband” and “wife” are used to encompass relationships in which the man and woman are married, divorced, cohabiting, or dating.

2. See *infra* note 56.

3. See *infra* text accompanying notes 26-28.

4. See *infra* notes 48-85 and accompanying text.

5. See *infra* note 158.

6. See *infra* notes 149-58 and accompanying text.

7. See *infra* notes 161-70 and accompanying text.

8. See *infra* notes 48-85 and accompanying text.

9. See *infra* notes 53-57 and accompanying text.

The entire judicial system can become more accessible to victims of domestic violence if states and municipalities provide careful guidelines for police response.¹⁰

This Note argues that solely through mandatory arrest laws does the judicial system classify wife battering for what it is: a crime. Part I discusses the causes and nature of the battering relationship and its prevalence in American society. Part II critiques the traditional response of the judicial system to wife battering. Part III outlines recent cases aimed at stimulating more substantial police response. Part IV reviews legislative efforts to deal with domestic violence. Finally, Part V concludes that only through the mandatory arrest of batterers can the judicial system respond adequately to the crime of domestic abuse and discourage its acceptance by our society.

I. THE BATTERING RELATIONSHIP

A. *The Battered Woman*

Estimates vary as to the extent of domestic abuse in the United States, but there is little doubt that it is widespread. Evidence suggests that one in every six American women is battered at some point in her life;¹¹ at least two million women are subjected to physical abuse every year.¹² Battering occurs at all socio-economic levels. One study indicates that white, educated, upper-middle class women and poor and minority women are equally likely to be victims.¹³

Strong social and psychological forces tie battered women to the men who abuse them.¹⁴ The battered woman commonly holds traditional no-

10. See *infra* notes 161-89 and accompanying text.

11. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL 74, 77 (1983).

12. *Id.* at 79. According to one report, approximately 1350 women were killed by their boyfriends, spouses, or ex-spouses in 1985. Meier, *Battered Justice*, WASH. MONTHLY, May 1987, at 37.

13. Finesmith, *supra* note 11, at 79 (citing Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 144 (1977)). Similarly, battering is not limited to specific ages, ethnic groups, or geographical locations. See Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 159 (1977); Buzawa & Buzawa, *Legislative Responses to the Problem of Domestic Violence in Michigan*, 25 WAYNE L. REV. 859, 860 (1979).

Poor battered women are more likely to come to the attention of the public because they, more than middle- and upper-class battered women, seek the help of government officials and battered women's shelters. Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 276 (1985).

14. Waits, *supra* note 13, at 279.

tions of marriage and the role of women within the family.¹⁵ She views the man as head of the household and thinks it her responsibility to provide for her husband's happiness. She further believes he has the right to punish her violently for her perceived failures.¹⁶ Her success as a wife depends on her ability to control his violence. A woman finding herself unable to control this violence experiences self-blame and a deepened sense of failure.¹⁷

Battered women often are unable to escape from abusive relationships without outside help.¹⁸ A battered woman also may deny that the abuse occurs.¹⁹ The woman, ashamed of the abuse, denies the reality to herself, thereby avoiding acknowledgment of the reality to others.²⁰ This denial also allows the woman to keep her family together, a goal of overriding importance to her.²¹

Practical considerations can also serve to bind the woman to her husband. In battering relationships the man characteristically dominates the woman in all aspects of the relationship, particularly in the area of family finances.²² The battered woman often has little or no independent or

15. *Id.* at 280. The battered woman judges herself by her capacity to be a good wife and mother, viewing the relationship between herself and her husband as part of a realm of private family life of no concern to outsiders. L. WALKER, *THE BATTERED WOMAN* 31 (1979). According to the National Crime Survey, a prime motivation of 49% of the women who did not report domestic violence was their belief that battering is a personal matter. P. LANGAN & C. INNES, *PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN*, DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT 1 (1986).

16. Waits, *supra* note 13, at 281. Battered women commonly doubt their capacity to be good cooks, housekeepers, or lovers. They may, however, feel more capable and competent in their activities outside the home. But it is the traditional wifely functions that are most important to the battered woman in her self-assessment. L. WALKER, *supra* note 15, at 33-34.

17. Waits, *supra* note 13, at 281. Battered women characteristically have low self-esteem. L. WALKER, *supra* note 15, at 32.

18. Indeed, one of the most commonly asked questions concerning battered women is "why do they stay?" Gelles, *Abused Wives: Why Do they Stay?*, in *ABUSE OF WOMEN: LEGISLATION, REPORTING, AND PREVENTION* 13 (J. Costa ed. 1983).

19. See Waits, *supra* note 13, at 281. Such denial is especially troubling given that the severity of battering varies. More serious assaults may involve kicking, choking, breaking bones, burning, raping, and mutilating. When the woman is pregnant or the mother of young children, the violence often becomes more acute. L. WALKER, *supra* note 15, at 105.

20. This denial often results in the battered woman being incapable of reaching out to those who could provide her with help. Waits, *supra* note 13, at 281.

21. *Id.* at 282.

22. Not only does the woman not have access to the family finances, but she often knows little or nothing about them. Indeed, the batterer commonly puts joint assets in his name alone. J. FLEMING, *STOPPING WIFE ABUSE: A GUIDE TO THE EMOTIONAL, PSYCHOLOGICAL, AND LEGAL IMPLICATIONS FOR THE ABUSED WOMAN AND THOSE HELPING HER* 84 (1979).

accessible resources sufficient to enable her to leave the common dwelling and provide for her children.²³ Her lack of control over family assets may also lead to an inability to obtain legal advice.²⁴ Even if a woman overcomes these obstacles and attempts to leave, she nevertheless may face more physical abuse from her husband.²⁵

Many battered women develop a condition termed "learned helplessness."²⁶ Symptomatic of this is the battered woman's feeling that her life is out of her control. The longer the relationship, the more this perception may become real.²⁷ Repeated batterings erode her sense of strength and she ultimately becomes passive.²⁸ The abused woman holds herself responsible for the battering and becomes unable to escape even though that may be the only option she can control in the relationship.²⁹ Finally, many battered women love their husbands and endure the abuse in the hope that the abuser will change.³⁰

23. See Brown, *Battered Women and the Temporary Restraining Order*, 10 WOMEN'S RTS. L. REP. 261, 262 (1988); Endicott, *The Criminality of Wife Assault*, 45 U. TORONTO FAC. L. REV. 355, 358 (1987). The woman who chooses to leave faces grave alternatives. Welfare may be insufficient to support her and her children and, should she find adequate employment, child care is sometimes unavailable. NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., LEGAL ADVOCACY FOR BATTERED WOMEN 6 (1982) [hereinafter NATIONAL CENTER ON WOMEN AND FAMILY LAW]. Furthermore, should relocation be necessary to avoid the abuse, leaving her community can be economically and emotionally difficult. Meier, *supra* note 12, at 39.

24. Brown, *supra* note 23, at 262.

25. Battered women spend much of their lives trying to "read" their husbands and interpret the signs. Many know that their husband will attempt to track them down should they attempt to leave. NATIONAL CENTER ON WOMEN AND FAMILY LAW, *supra* note 23, at 6. See also Waits, *supra* note 13, at 283.

26. L. WALKER, *supra* note 15, at 47.

27. Waits, *supra* note 13, at 283 (describing how learned helplessness progressively deepens).

28. L. WALKER, *supra* note 15.

29. Waits, *supra* note 13, at 283. Battering relationships create a cycle of psychological degradation. The batterer beats his partner and she feels unable to control his violence. This increases her feelings of inadequacy and loss of control, leaving her trapped in a violent relationship. Further beatings occur, and her sense of helplessness grows. *Id.* at 282-83. Some battered women strike back against their abusers; data strongly suggests that women who kill their partners in many cases have been abused previously by that person. Mercy & Saltzman, *Fatal Violence Among Spouses in the United States*, 1976-85, 79 AM. J. PUB. HEALTH 595, 597 (1989). For further description of the cycle of abuse, see *infra* notes 39-47 and accompanying text.

One study shows that the frequency of the violence may affect whether the woman will seek outside aid. Of women who were physically battered only once during their marriages, only 42% sought intervention. On the other hand, 100% of the women who had been struck at least once a month appealed for outside help. Gelles, *supra* note 18, at 17.

30. Endicott, *supra* note 23, at 359.

B. *The Batterer*

The batterer often possesses characteristics very similar to those of the woman he abuses.³¹ He has low self-esteem.³² He also usually subscribes to traditional notions of family in which the man is "king in his castle."³³ Like his victim, the batterer denies his violence, to himself and to others.³⁴

The batterer tends to be overly jealous and protective of his wife.³⁵ He sees her time spent with children, relatives, and friends, and at work as a threat; his desire to control her life then grows.³⁶ Batterers commonly grew up in abusive families and may have learned such behavior from watching their fathers beat their mothers or from being beaten themselves.³⁷ Despite the devastation batterers create in their homes, those outside the family often see them as likeable individuals. Because batterers often feel remorse for their behavior, they try all the harder to deny the destruction they cause.³⁸

31. Waits, *supra* note 13, at 286. See also L. WALKER, *supra* note 15, at 36.

32. L. WALKER, *supra* note 15, at 36. The batterer's macho exterior often belies his internal feelings. Consumed with insecurity, the batterer feels that only through violence and intimidation will his wife do as he wishes. Waits, *supra* note 13, at 286. Like battered women, batterers believe wives are responsible for catering to the needs and whims of their husbands. *Id.*

33. Waits, *supra* note 13, at 286.

34. L. WALKER, *supra* note 15, at 36.

35. *Id.* at 37. The batterer, commonly emotionally secluded from everyone other than his wife, becomes heavily dependent on her. This dependence may lead to a pathological jealousy of anything or anyone else that touches her life. Waits, *supra* note 13, at 287.

36. L. WALKER, *supra* note 15, at 73-74.

37. *Id.* at 38. Batterers learn while growing up in abusive homes that violence in the home is natural and that physically stronger family members have the right to beat weaker ones. The batterer usually is not violent with those outside the family. He understands that in situations outside the home he will face punishment for assaulting someone. His wife, however, can rely on no such deterrent, unless aided by an outside party. Waits, *supra* note 13, at 288.

Children of batterers run a strong risk of participating in family violence as adults. *Id.* at 298. The violent home becomes a "role model" for these children. Gelles, *supra* note 18, at 18-19. Some suggest that little girls who witness domestic violence are more likely to marry violent men, while women who did not grow up in violent homes are likely to be less tolerant of domestic violence and often seek intervention. *Id.*

38. Ironically, the guilt the batterer feels stimulates his need to find external rationales for his behavior. He thus often comes to blame his wife for his behavior, Waits, *supra* note 13, at 289-91, even though close study of battering relationships reveals that the woman is not the cause of the violence. Events over which the battered woman has no control may trigger an episode of violence. She cannot control her partner, nor can she fully predict the degree of violence that will ensue. Because his violence will not stop until outside forces intervene, early intervention provides the best hope for permanently terminating the abuse. *Id.* at 278.

C. *The Pattern of Abuse*

Commonly, the battered woman is unaware prior to marriage that her partner is abusive.³⁹ A woman struck for the first time reacts in disbelief and anger.⁴⁰ The batterer may be repentant, asking for forgiveness and promising that the violence will not happen again.⁴¹ The woman loves him and, therefore, believes his apologies and considers the incident an aberration.⁴² But, the battering continues and a cycle begins.⁴³

Psychologist Lenore Walker identifies a battering cycle with three distinct phases: 1) the tension-building period; 2) the severe battering incident; and 3) the quiet, loving reprieve.⁴⁴ During the first phase, relatively minor battering incidents occur, while the woman struggles to halt the escalation of tension.⁴⁵ The battering increases in frequency, with the relationship between the couple growing more strained. Finally the phase two severe battering incident occurs.⁴⁶ After the severe battering, the batterer commonly becomes loving and contrite and the couple may

39. J. FLEMING, *supra* note 22, at 94. The woman often is ignorant of his violence until they move in together. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 95.

43. Battering is usually recurrent, its severity increasing during the relationship. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 75 (1984). The 1978 to 1982 National Crime Survey showed that once a man abused his partner, the chances of additional violence were high. The study showed that for six months following a battering incident an estimated 32% of the women were abused again. P. LANGAN & C. INNES, *supra* note 15.

44. L. WALKER, *supra* note 15, at 55.

45. *Id.* at 56-59. When minor batterings occur, the woman is conciliatory. She becomes compliant, seeking to avert his violence and blaming herself when unable to do so. She does not show anger for fear of provoking more violence. Instead, she denies her anger and rationalizes that she is to blame for the attacks. She minimizes lesser attacks knowing he is capable of much greater violence. *Id.* These isolated batterings escalate. The woman often denies this escalation because of her fear of the inevitable second phase. The batterer is aware that his abuse is inappropriate yet his violence increases as he strives to continue his control over the woman. *Id.* at 57-58. During this phase a delicate balance is achieved. The woman strives to control the factors that might trigger her husband's violence, particularly the behavior of other family members. But the tension gradually and inevitably grows. The battering incidents occur with more frequency, and the man becomes more possessive and controlling. The woman's defense mechanisms that worked to stabilize the relationship earlier in the cycle are no longer effective and the precarious equilibrium is lost. *Id.* at 58-59.

46. *Id.* at 59-64. The second phase is short, lasting usually between 2 and 24 hours. It is characterized by an uncontrollable explosion. At this point, both parties acknowledge that the batterer's rage is beyond control. The batterer begins with the intention of teaching the woman a lesson rather than with an intent to harm. However, when he finally stops, frequently the woman has been

experience a period of closeness before the cycle begins again.⁴⁷

II. THE TRADITIONAL LEGAL RESPONSE

A. *The Police*

Battered women often do not call the police when battering is imminent or occurring because they perceive that the police are ineffective in stopping the abuse.⁴⁸ Often a police officer will only quiet the batterer, ascertain whether the woman requires medical care, and try to persuade the man and the woman to end the fighting.⁴⁹ Frequently the battering temporarily stops after the police leave, but in some cases the battering resumes, sometimes with even greater intensity.⁵⁰

seriously beaten. An outside event or the man's own feelings generally precipitates the incident. *Id.* at 59-60.

Sometimes, in anticipation of this phase, the woman will provoke the incident in order to get it over, thus bringing on phase three, in which the batterer becomes calm. Often, she will not realize that she has purposefully provoked the incident. *Id.*

47. *Id.* at 65-70. During this period, the batterer is extremely sorry for his actions and continuously begs the woman for her forgiveness. He assures her that he will never hurt her again, believing himself that the battering will cease. The batterer often seeks the aid of other family members and friends in convincing the woman not to leave him. Commonly, he promises to seek counseling. The batterer's loving behavior and assurances feed the delusions of the battered woman who wants to believe her husband will change. The emergence of his insecurities also moves her. He preys on her traditional notions of marriage: "for better or for worse." During this phase the couple temporarily reorges their sense of partnership. However, soon the tensions of daily life begin again to take their toll and slowly the couple moves back into phase one. *Id.*

48. Women do not initiate judicial procedures when there is reason to expect inequitable treatment. Believing that the criminal justice system will arrive at an unjust outcome, a battered woman will not look to the police for help. As a result, cases do not go to trial, and a violent crime is perpetuated. A. BOYLAND & N. TAUB, *ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES* 209 (1981). One writer explains that when the police, "act[ing] as gatekeepers to the criminal justice system," do not respond adequately, victims will be reluctant to seek criminal charges or cooperate if the police file a complaint. L. LERMAN, *PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE* 119 (1983).

49. L. WALKER, *supra* note 15, at 206. The police most often tell the battered woman that they can do nothing and then leave. Oppenlander, *Coping or Copping Out*, 20 *CRIMINOLOGY* 449, 456 (1982). In one case, the officers neither arrested the batterer—despite believing there was probable cause to do so—nor explained to the woman what steps she could take to have her batterer arrested. Although it appeared that the batterer had just assaulted the woman, the officers' primary concern was with persuading the batterer to leave the house. *Id.* at 460-61. This incident is not uncommon. One study showed that in 10% of the domestic assaults examined, the police reported not arresting the batterer despite legal cause. *Id.* at 461.

50. One study showed that there was no greater likelihood for additional violence when the police were called. According to the study, there apparently was actually a reduced chance of further violence when the police were notified. P. LANGAN & C. INNES, *supra* note 15, at 4. Married women who called the police were 62% less likely to experience further battering. *Id.* The authors of the study proposed that these decreases may be due to good judgement of the victim as to whether

When the police answer domestic violence calls they often are unable to make arrests under existing state law.⁵¹ Beyond this, however, the opinions of individual officers, as well as general police department policies, also may explain police inaction.

Another possible source of police⁵² reluctance to deal with these cases is the traditional belief that wife battering simply is not a crime,⁵³ or at best, not a relatively important crime.⁵⁴ Some officers hold the traditional notion that the relationship between husband and wife lies within a realm of family privacy in which police should not intrude.⁵⁵ Others

or not the particular batterer is likely to continue after the call to police. The women who know the beating will continue do not call. *Id.* Even so, if the woman calls police, it is usually during phase two. L. WALKER, *supra* note 15, at 64. *See supra* note 46. Because of the uncontrolled nature of this period, police attempts at mediation generally will be unsuccessful. Some battered women, fearful of further abuse, frequently oppose the police if they intervene during this stage—at least when a third party has called the police. The woman attempts to show the batterer her loyalty to him in order to prevent further abuse. Some battered women explain that if they knew the police would arrest their husbands, they would not oppose the police. L. WALKER, *supra* note 15, at 64.

51. Meier, *supra* note 12 at 38. Existing state law often ties the hands of the police. Most state law authorizes arrest if the officer actually witnesses the battering incident or a judge issues an arrest warrant. *See infra* notes 156-58 and accompanying text.

52. This applies equally to prosecutors and judges. *See infra* notes 173-76 and accompanying text.

53. Meier, *supra* note 12, at 38. The justice system's failure to treat battering as criminal often leads battered women to see the police as being allied with their husbands. Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 790-91 (1986).

54. Chicago Police Captain Raymond Risley explained this prioritization:

We don't send a lot of wife beaters to jail. We don't have a lot of space because the system is putting away those who do what society considers more serious crimes — like crimes against property or two strangers assaulting each other. Wife beatings is low on the list of priorities for prison terms.

Blodgett, *Violence in the Home*, A.B.A.J., May 1987, at 66 (statement of Chicago Police Captain Risley). Pennsylvania State Rep. Lois Hagarty voices a similar conclusion. As an assistant district attorney, she found that "there was very serious abuse but the sanctions were not too serious. Nothing about the cases was treated seriously." *Id.* at 67-68 (quoting Rep. Hagarty).

Studies show police respond more slowly to domestic violence calls than to disputes between unrelated parties. This is apparently due to a general sense among officers that, given some time, the parties will calm down and resolve their "spat." Oppenlander, *supra* note 49, at 453.

55. Oppenlander, *supra* note 49, at 459. This attitude is based on a traditionally perceived need to ensure family privacy. *See supra* note 15. Such blind adherence to outdated notions of privacy creates nonsensical results. Family privacy is important in that it allows for individual autonomy and choice, and mutual support in personal matters. This purpose is in no way furthered when family privacy prevents intervention and thus promotes assault. The law behaves arbitrarily when a zone of family privacy is defined and made impervious to attack, regardless of other interest which need protection. The law must not blindly protect "privacy;" rather, it must foster those values that make privacy desirable. Endicott, *supra* note 23, at 359. Clearly, domestic harmony needs no pro-

believe in the antiquated right of men to "discipline" their wives.⁵⁶ Additionally, many police officers, trained in the use of physical force, can relate to the batterer's use of force to control his wife.⁵⁷

Beyond personal prejudices and socialization, police view involvement in domestic disputes as inherently more dangerous than other calls. A recent FBI Uniform Crime Report suggests, however, that police fears are exaggerated.⁵⁸ The study showed that domestic calls are among the

tection after a man has battered his wife. Note, *The Battered Wife—The Legal System Attempts to Help*, 48 U. CIN. L. REV. 419, 433 (1979) (authored by Renee Birnbaum).

56. Throughout much of history, the law of most cultures gave men the right to hit their wives. Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C.L. REV. 1357, 1358 (1989) (authored by Gary Bishop). Early Roman law gave the husband absolute dominion over his wife and would not question the killing of a woman by her husband. Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241 (1917). British and American societies viewed women as their husband's "chattel." The husband was authorized to beat his wife with a stick no thicker than his thumb, thus the expression "rule of thumb." Blodgett, *supra* note 54, at 67. A husband was within his rights as long as he only "moderately chastised" his wife. *Id.* at 67.

During the mid-1800s, courts began repudiating the "chastisement" right. Finesmith, *supra* note 11, at 80. See Fulgham v. State, 46 Ala. 143, 146-47 (1871) (husband does not have privilege to batter his wife). By the end of the 19th century, most American courts had criminalized battering. Although the law no longer condoned battering, only wealthy women could afford to take their cases to court. If they did, they likely would suffer social embarrassment and criticism. Finesmith, *supra* note 11, at 80. Prosecutors did not make a concerted effort to prosecute batterers until the 1970s. L. LERMAN, *supra* note 48, at 16.

Tort law also failed to provide substantial relief to battered women. For a long time, the interspousal immunity doctrine prohibited husbands or wives from suing one another for intentional or negligent personal or property torts. Note, *supra* note 55, at 420. While women acquired the right to sue for property torts in the mid-1800's, many courts continued to deny recovery for personal torts through the end of the 19th century and most of the 20th century. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 902 (5th ed. 1984). See also Thompson v. Thompson, 218 U.S. 611 (1910); Rubalcava v. Gissemann, 14 Utah 2d 344, 384 P.2d 389 (1963); Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960).

Today, a majority of states allow intraspousal suits in most circumstances, including personal torts. A sizable minority of states, however, adhere to an absolute immunity between husband and wife in actions for personal torts. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* at 903. See also Alfree v. Alfree, 410 A.2d 161 (Del.), *appeal dismissed*, 446 U.S. 931 (1979); Raisen v. Raisen, 379 So. 2d 352 (Fla.), *cert. denied*, 449 U.S. 886 (1979); Bonkowsky v. Bonkowsky, 69 Ohio St. 2d 152, 431 N.E.2d 998, *cert. denied*, 457 U.S. 1135 (1982).

57. Pastoor, *Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws*, 2 L. & INEQUALITY 557, 562 (1984). Officers, predominantly male, are trained to use force and physical coercion. This makes some male police officers more empathetic towards batterers who also use force to dominate and coerce. *Id.* One officer suggests that a substantial number of police batter their own wives. O'Reilly, *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 24 (statement of Detroit Executive Police Chief James Bannon).

58. L. SHERMAN, DOMESTIC VIOLENCE, UNITED STATES DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, CRIME FILE STUDY GUIDE 2.

least likely calls to lead to an officer's death or injury.⁵⁹ Furthermore, police injuries have decreased in states where mandatory arrest policies exist.⁶⁰

Police are also reluctant to answer domestic violence calls because of problems they face in attempting to gather the requisite proof of abuse, compounded by the usual paucity of witnesses in cases of domestic violence.⁶¹ Furthermore, most jurisdictions classify battering as a misdemeanor and bar the police from effecting an arrest unless they witness the battering or have a court-issued arrest warrant.⁶² Those few witnesses to

59. *Id.* Disturbance calls reported to the FBI traditionally were assumed to be domestic violence incidents. J. GARNER & E. CLEMMER, DANGER TO POLICE IN DOMESTIC DISTURBANCES—A NEW LOOK, UNITED STATES DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN BRIEF 2 (1986). However, a recent analysis of these disturbance calls demonstrates that many involved bar fights, the situation in which the largest number of officers were killed. This suggests that the number of officers killed responding to family violence calls was much lower than earlier assumed, lower even than the number of officers accidentally shot by their colleagues. L. SHERMAN, *supra* note 58, at 2. In 1982, the FBI received reports of 92 officers feloniously killed. Of these, only 8% lost their lives answering domestic violence calls, while 12% died responding to other types of "disturbances." J. GARNER & E. CLEMMER, *supra*, at 2.

In the past, police training emphasized the danger of answering domestic violence calls. In accordance with this new data, police training should now emphasize more effective responses to family violence and focus greater attention on the victims' needs. *Id.* at 5.

60. Mandatory arrest laws can actually protect the police by providing advance notice to all of the parties involved regarding the consequences of battering. Recent Development, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 221 (1988) (authored by Sara Buel).

61. Police often are unwilling to make arrests. They believe that arrests typically are worthless since the chances are slight that prosecution will ensue. The police usually expect that, the day after the assault, the victim may no longer wish to pursue a judicial remedy and will withhold cooperation. L. SHERMAN, *supra* note 58, at 1. See *infra* notes 77-85 and accompanying text.

Police also are aware that batterers probably will not be charged. In turn, prosecutors' reluctance to file charges may be based on their familiarity with the judges before whom they will appear. Courts, frequently hesitant to hear wife abuse cases, are sometimes even visibly hostile to abused women. Judges have even made statements such as "What did you do to make him hit you?" to battered women before them. Blodgett, *supra* note 54, at 69 (statement of Paul King, former presiding judge of the Dorchester, Massachusetts district court). See also *infra* notes 175-78 and accompanying text.

62. L. SHERMAN, *supra* note 58, at 2. In the past, officers based their decision to arrest largely on the victim's willingness to file charges. Evidence that the batterer committed an assault was insufficient. Today, however, probable cause standards for domestic violence are treated more like arrest standards for other crimes. The Law Enforcement Training Project of the Victim Services Agency of New York City, *State Legislation Providing for Law Enforcement Response to Family Violence*, 12 RESPONSE 6, 8 (1989) [hereinafter Law Enforcement Training Project]. However, police frequently still apply a higher standard of probable cause to trigger arrest in domestic battering cases than in other crimes. Injuries that they would consider sufficient cause for arrest between nonrelated combatants usually do not suffice when the parties are married or dating. L. LERMAN, PROTECTION OF SPOUSE ABUSE, *supra* note 48, at 25. The disparity in treatment is illogical. The law has been unable to eradicate completely many crimes. Yet, that never has been a reason for the

the battering often are children.⁶³

Police department policies, or the lack thereof, compound the aforementioned problems. One survey that covered the years 1984 and 1985 showed that almost fifty percent of the police departments surveyed failed to provide policy guidelines or training concerning domestic violence.⁶⁴ Although this situation shows signs of improving,⁶⁵ where it still exists it creates a system of complete discretion by default.⁶⁶ States with little or no legislation leave the police even more discretion.⁶⁷ Where policies exist, they commonly do not give domestic violence priority equal with other crimes.⁶⁸

The general non-interventionist policy pervading most police departments gained academic acceptance in the early 1970s when social work theories offering alternatives to punishment became the preferred method of dealing with certain crimes.⁶⁹ Academics viewed mediation and on-the-scene counseling as more effective than arrest.⁷⁰ Today, most observ-

police to condone lawlessness. This outlook applies equally to wifebeating. Waits, *supra* note 13, at 300.

63. L. LERMAN, *supra* note 48, at 22.

64. Cohn, *Changing the Domestic Violence Policies of Urban Police Departments: Impact of the Minneapolis Experiment*, 10/4 RESPONSE 22 (1987). Typically, police training focused on the dangers to the police of answering domestic calls. See *supra* note 59.

65. Cohn, *supra* note 64. By 1986, a subsequent survey showed a marked change. Only 35% of departments continued to permit complete discretion, while 44% showed an inclination towards arrest. *Id.*

66. Furthermore, there is a chance of unequal application of the law where there is wide police discretion. Officers arrest a disproportionate number of men of color, while showing reluctance to arrest batterers who are affluent and white. Recent Development, *supra* note 60, at 224.

67. In such jurisdictions, police officers appear to have complete discretion in deciding how to handle domestic violence calls. Given the unpredictable nature of such a system, battered women cannot always be assured of adequate police intervention should they take the possibly dangerous step of calling for help. Finesmith, *supra* note 11, at 88.

Where they exist, and where there is no governing legislation, police department policies tend to prefer mediation. Officers are urged to arrest only as a last resort. *Id.* at 89. Such guidelines apparently offer no more protection for the battered woman than in jurisdictions in which officers have complete discretion. Arrests are no more frequent, and victims are faced with the same unpredictability characteristic of full discretion jurisdictions. *Id.* at 91. Batterers take advantage of this unpredictability and the small likelihood of arrest. *Id.* at 92.

68. Brown, *supra* note 23, at 263.

69. Meier, *supra* note 12, at 39.

70. Professionals preferred mediation as a method of helping families resolve their conflicts informally, without resorting to intrusive court battles. The prevalent belief was that mediation would improve communication between the couple. Lerman, *supra* note 43, at 61.

Officers tend to react differently in cases of domestic violence than they do when faced with non-related combatants. In wife battering cases, the police will often attempt to settle an argument or urge

ers discount this in situations involving violence.⁷¹ They view the justice system, criminal and civil,⁷² as the principle means of holding batterers responsible for their crimes and of ensuring justice and protection for the victims of abuse.⁷³

one of the parties to leave the premises, a method they are unlikely to employ in other situations. Oppenlander, *supra* note 49, at 460.

71. Meier, *supra* note 12, at 39. A party's fear of the other party in mediation may undermine independent decision making. Lerman, *supra* note 43, at 73. Nonetheless, some advocates continue to adhere to the mediation model and to maintain that processing the conflict through the judicial system is inappropriate. They believe that both parties share some responsibility in cases of abuse. *Id.* at 74. Supporters of a law enforcement model disagree, suggesting that only the batterer is responsible for his abusive behavior. Thus, the only appropriate remedy requires him to take responsibility for his violence. *Id.* at 75.

Many advocates for battered women do not believe the goal of intervention necessarily should be to keep the family together. Their primary concern is to protect the victim. *Id.* at 79. Advocates of this position encourage public exposure of the problem by using the court system. The courts provide an effective means of holding the batterer responsible for his own behavior, while assuring that society will punish such criminal behavior. *Id.* at 83.

When conflicts dealing with violence are mediated, the violence often is not discussed. Thus, mediation encourages the couple to solve their problems without directly addressing the basic issue that brought them to the negotiating table in the first place. *Id.* at 84. While mediation may provide a means of keeping the marriage together, it ignores the underlying problem of the batterer's violence. Consequently, it perpetuates violence against the victim. *Id.* at 85.

Advocates of the law enforcement path are, however, realistic about police intervention. The law enforcement model is successful only if the police and the prosecutors do their jobs in a competent, aggressive manner. Otherwise, effective mediation might provide the only successful means of stopping battering. *Id.* at 98.

72. Every state and the District of Columbia, except Arkansas and New Mexico, provide for civil orders of protection in domestic violence cases. The civil protection order, available through *ex parte* proceedings, commands the batterer immediately to leave the woman alone. Depending on the circumstances, the order may evict the batterer from the home shared with the victim. It also may grant the woman temporary custody of the children and enjoin the batterer from any visitation rights. The order also may direct the batterer to pay for child support or require that the batterer participate in counseling. Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 33 FAM. L.Q. 43 (1989).

Civil orders of protection provide a valuable recourse in situations in which the batterer's action may not have reached provable criminal proportions. Additionally, many women have no desire to punish their batterers, but merely want the violence stopped. *Id.* at 44.

Obviously, civil orders will not prevent a man from killing or seriously injuring a woman when he is determined to do so. *Id.* at 45. In such cases, only imprisonment will protect the woman. Nonetheless, civil orders, when accompanied by police enforcement, can provide effective deterrence in situations not rising to this level. Like arrest, civil orders impress upon the batterer that there will be a price to pay. *Id.* at 45. However, police often underenforce civil orders, despite 13 states having authorized warrantless arrests for violation of civil orders. *Id.* at 45.

73. *Working to Prevent Mediation of Domestic Violence Cases*, 3/1 THE EXCHANGE Fall-Winter 1988-89, at 8. When dealing with domestic violence, the police must ensure the victim's safety. It is inappropriate for police to inquire into an innocent victim's behavior. Pastoor, *supra* note 57, at 590.

B. Prosecutorial Discretion

Even if the police arrest the batterer, prosecution may not ensue. Because prosecutors have wide discretion,⁷⁴ the standards for when to prosecute are at least as vague as police arrest criteria.⁷⁵ It may be that since the system does not value highly the successful prosecution of batterers, prosecutors have little incentive to pursue such charges vigorously.⁷⁶ Charges that prosecutors do press usually are misdemeanors rather than felonies, no matter how serious the assault.⁷⁷ If charges are brought the likelihood of the case continuing is diminished by the legal responsibilities imposed on the battered woman.

74. American society historically has tolerated wife battering. See *supra* note 56. This raises difficult questions in the realm of discretion and domestic violence. Trusting prosecutorial discretion on behalf of such public interest may be a dubious proposition. Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIMINOLOGY 56, 60 (1984).

75. Meier, *supra* note 12, at 42. One Canadian writer urges prosecutors to be aggressive to emphasize that society should view battering as a crime and treat it accordingly. The victim must be treated as a victim, not as a party to the proceedings. Endicott, *supra* note 23, at 368. Further, the decision to bring charges should lay with the prosecutor and not the victim. Coercion from the batterer may prevent a woman from pressing charges. *Id.* at 368-69.

Prosecutors commonly maintain that domestic violence is a problem for the social service agencies and not for the criminal courts. L. LERMAN, *supra* note 48, at 13. Similarly, some judges believe that the criminal justice system is an inappropriate forum for domestic abuse cases. Eisenberg & Micklow, *supra* note 13, at 159.

76. See *infra* note 85 for a discussion of the pressure on prosecutors. For a discussion of the effect that an unwillingness to prosecute can have on judges and police, see *infra* notes 175-78 and accompanying text.

77. One third of the cases of domestic abuse detected by the National Crime Survey were classified as felonies, the others were categorized as "simple assault," a misdemeanor in most jurisdictions. Despite the different categories, many serious cases of assault are classified as misdemeanors. Victim injury occurs at least as much in misdemeanor assaults as in felonious assaults. In at least half the cases classified as misdemeanors, the bodily injury was as grave or more so than in 90% of the domestic abuse cases labeled felonies. P. LANGAN & C. INNES, *supra* note 15, at 3.

In many jurisdictions, the difference between a misdemeanor and a felony is the presence of a weapon in the latter or the extent of the injury. Data from the National Crime Survey suggests that differentiation between misdemeanor and felonious assaults may have the accidental effect of concealing the true nature of wife abuse in the United States. *Id.* Thus, in San Diego, misdemeanor prosecutors handle most of the wife battering cases. Contrary to the general understanding of "misdemeanor" crimes, they are given cases in which victims have been choked, shot, stabbed, or threatened with death. Palermo, *An Abuse of Process: Despite Some Reforms, Battered Women Are Still Mistreated by the Judicial System*, CALIFORNIA LAWYER, April 1989, at 31. In Chicago, advocates estimate that, based on information from the National Crime Survey, approximately 90% of the wife abuse cases are classified as misdemeanors, despite the gravity of the injuries. Blodgett, *supra* note 53, at 68.

Whether the assault is classified as a misdemeanor or a felony, the penalties imposed in battering cases commonly will be less severe than those in cases involving nonrelated combatants. L. LERMAN, *supra* note 48, at 28.

Battered women drop charges for several reasons. Many women are coerced by the fear of further violence at the hands of their batterers.⁷⁸ Often the cumbersome nature of the legal system is overwhelming during a time of great personal and economic turmoil for the woman.⁷⁹ Some battered women, simply not understanding how the judicial system works,⁸⁰ have no one to explain the process to them.⁸¹ Battered women frequently love their batterers and do not want to see them jailed.⁸² Also, the couple may reconcile before the case is brought to trial.⁸³ Other women are unable for economic reasons to take the time necessary to see the prosecution through to completion.⁸⁴ In many cases, the woman's decision to drop charges flows from the advice of prosecutors who may discourage her from pursuing the case.⁸⁵

III. THE POWER OF THE LAW SUIT

Battered women sue police departments primarily on theories of equal protection,⁸⁶ due process,⁸⁷ and tort,⁸⁸ with varying degrees of success. While law suits sometimes prove effective in protecting and compensating individual battered women and punishing their batterers, the suits

78. The batterer may threaten the victim into dropping the charges. An assistant district attorney in Santa Barbara, California, reports that 50% of the women who come to drop charges are escorted by their batterers. L. LERMAN, *supra* note 48, at 19. When prosecutors terminate charges in these circumstances, they perpetuate the man's domination of the woman. Most importantly, the batterer learns that threats are an acceptable and effective tool. Pastoor, *supra* note 57, at 566.

79. In hearings conducted by California's Judicial Council's Advisory Committee on Gender Bias, court administrators, prosecutors, battered women, and their advocates characterized the court system as "a chamber of horrors for a battered woman, from the moment she calls police until she confronts her abuser in a custody dispute." Palermo, *supra* note 77, at 31.

80. L. LERMAN, *supra* note 48, at 13.

81. *Id.* at 19.

82. *Id.* at 13.

83. *Id.* at 19.

84. *Id.* at 13. Often women cannot afford to miss work for the period of the trial. *Id.* Battered women usually go to the police and the courts appealing for immediate help. The victim may be dissuaded from using the court system when it can take months for it to process her case. *Id.* at 19.

85. Anticipating that the woman will eventually drop the charges, prosecutors sometimes advise her to do so promptly in order to save themselves time. *Id.* Most prosecutors' offices have overwhelming caseloads. Staff cannot afford to spend time encouraging reluctant victims to cooperate with the prosecutors. Prosecutors, forced to prioritize, may be concerned with pursuing cases in which conviction is likely and those that potentially will advance the prosecutor's career. Thus, the seriousness of the crime and the likelihood that it will be repeated are not necessarily the determining factors. *Id.* at 23.

86. *See infra* notes 90-121 and accompanying text.

87. *See infra* notes 122-35 and accompanying text.

88. *See infra* notes 136-48 and accompanying text.

have failed to bring about widespread change in police response to domestic violence calls.⁸⁹

A. Equal Protection Challenges

Battered women have made equal protection⁹⁰ challenges to police department policies most often to demonstrate that police departments treat domestic assaults differently than violence among unrelated individuals. Since a disproportionate number of domestic abuse victims are women,⁹¹ women are thus disparately harmed when police response to these calls is inadequate.⁹²

In *Thurman v. City of Torrington*,⁹³ a battered woman brought suit after being brutally attacked and severely injured by her estranged husband following the willful disregard by the police of eight months of his threats and attacks.⁹⁴ She argued that because police policy provided full protection to victims of nondomestic violence while affording consist-

89. Recent Development, *supra* note 60, at 219-20.

90. The equal protection clause provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

91. See *infra* note 100.

92. Battered women challenge such policies under § 1983, which provides citizens with a federal remedy when state officials deprive them of their constitutional rights while acting under color of state law. § 1983 provides:

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

42 U.S.C. § 1983 (1986). Courts have defined police departments and municipalities as a "person" under § 1983. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1530 (D. Conn. 1984).

93. 595 F. Supp. 1521 (D. Conn. 1984).

94. *Id.* at 1524-26. During an eight-month period, while the plaintiff lived in the home of friends, her husband was arrested once, attacked her several times, forcefully took their son from her, and continuously threatened to kill her. She and her friends made numerous complaints, by phone and in person, to the Torrington police. Police officers either did not take their complaints or would not respond. The batterer continued to threaten his wife's life and to violate the terms of the probation resulting from an earlier arrest. Her complaints were either rebuffed or she was asked to return at a later date to file a warrant for her husband's arrest. Although the plaintiff's brother-in-law was advised that her husband would be arrested, no arrest ever occurred. *Id.* at 1524-25.

Finally, the plaintiff's husband returned to her house and stabbed her repeatedly in the neck, chest, and throat. *Id.* at 1525. In the presence of the police, who arrived 25 minutes after she called for help, her husband, still holding a bloody knife, kicked her twice in the head and yet was allowed to walk about freely. He was finally arrested and taken into custody when he, for the third time in the presence of the police, menacingly approached his wife as she lay on a stretcher. *Id.* at 1526.

ently less protection to victims of domestic violence it violated equal protection guarantees.⁹⁵

The district court held that both acts and omissions by the police are subject to the equal protection clause.⁹⁶ The court further noted that equal protection imposes upon police officers an affirmative duty to take reasonable steps to protect the safety of community members when on notice of a danger to an individual, regardless of whether the threat to safety is from a spouse or a stranger.⁹⁷

The court found that the plaintiff had established a pattern of police inaction in response to victims of domestic violence sufficient to show discriminatory implementation of the law.⁹⁸ Furthermore, the court concluded that she successfully demonstrated a pattern of complete police disregard of her complaints over a period of months, thus creating an inference that a discriminatory "custom" existed.⁹⁹ The court required the city to justify the disparate treatment of women,¹⁰⁰ a burden the city

95. *Id.* at 1526-27. The court noted that the applicability of equal protection to discriminatory government administration is well settled. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (facially-neutral permit process violated equal protection because of discriminatory application); *Britton v. Rogers*, 631 F.2d 572, 577 (8th Cir. 1980) (equal protection applies to discriminatory government administration and enforcement of laws), *cert. denied*, 451 U.S. 939 (1981).

96. 595 F. Supp. at 1527. The court relied on precedent holding police officers liable for failing to perform statutorily required duties. See *Smith v. Ross*, 482 F.2d 33, 36-37 (6th Cir. 1973) (although not liable under facts of case, an officer violates equal protection when he discharges duties unequally through inaction); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972) (police officer who stood by while other officers beat plaintiff held liable under § 1983); *Azar v. Conley*, 456 F.2d 1382, 1387 (6th Cir. 1972) (equal protection applies when there is failure to act). See also *Johnson v. Duffy*, 588 F.2d 740 (8th Cir. 1978) (in certain situations, statute or regulation may impose affirmative duties on police officers).

97. 595 F. Supp. at 1527.

98. *Id.*

99. *Id.* at 1530. Under § 1983, a municipality is liable for violating the equal protection clause when a custom of discriminatory response is established, even absent formal approval. Plaintiffs must normally point to facts outside their own cases to support an allegation of discriminatory custom. Here, however, the court found the plaintiff's own interactions with the police sufficient to establish the requisite custom. *Id.*

The plaintiff's son, who also filed a claim, made allegations similar to his mother's, but the court held that he was unable to show a pattern of police failure to protect him. *Id.* at 1529.

100. *Id.* at 1527. The court accepted the plaintiff's allegations of gender-based discrimination, noting a study of family abuse that showed that in 29 of 30 cases, the male was the batterer. *Id.* at 1528 n.1 (citing Leeds, *Family Offense Cases in the Family Court System: A Statistical Description*, Henry Street Settlement Urban Life Center, Nov. 1978, at ii). Since the city administered a policy discriminating against women, the court required the city to show an important government interest to support the discrimination. *Id.* at 1527. This standard, commonly known as intermediate scrutiny, is employed in statutes involving gender-based classifications and classifications based on illegit-

did not meet.¹⁰¹ A jury awarded the plaintiff 2.3 million dollars in compensatory damages against 24 policemen.¹⁰²

Following *Thurman*, the Court of Appeals for the Tenth Circuit faced a similar equal protection challenge in *Watson v. City of Kansas City*.¹⁰³ The plaintiff in *Watson* was physically abused and repeatedly threatened by her husband, a police officer.¹⁰⁴ She also had numerous contacts with the police.¹⁰⁵ After the couple divorced and the plaintiff requested police protection, her ex-husband locked her in her home, and raped, beat and stabbed her.¹⁰⁶

The Tenth Circuit reversed a district court order granting the defendant city summary judgment.¹⁰⁷ In reviewing the equal protection challenge, the court noted that while the Constitution does not grant a right to police protection, when a state does provide protection it may not do so in a discriminatory fashion.¹⁰⁸ The court found that evidence¹⁰⁹ that officers were trained to use arrest only as a last resort in domestic disputes, in conjunction with the alleged pattern of deliberate police indifference in response to the plaintiff's complaints was sufficient to allow a jury to infer that a custom of discrimination existed towards victims of domestic abuse as a class.¹¹⁰ However, the court held that the allegations could not support a claim of gender-based discrimination because the policy was facially neutral, providing the same level of inadequate pro-

imacy or alienage. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978); *Craig v. Boren*, 429 U.S. 190 (1976); *Graham v. Richardson*, 403 U.S. 365 (1971).

101. 595 F. Supp. at 1528-29. The court rejected the city's argument that police nonintervention in domestic violence protected the family's privacy. The plaintiff's repeated requests for outside help overcame any privacy interest. *Id.* at 159.

102. *Thurman v. City of Torrington*, No. H-84-120 (D. Conn. June 25, 1985) (settlement).

103. 857 F.2d 690 (10th Cir. 1988).

104. *Id.* at 692.

105. *Id.* After her first complaint, a police captain threatened that, should she ever call again, her children would be taken away from her. *Id.*

106. *Id.* at 693.

107. *Id.* at 698.

108. *Id.* at 694.

109. While the court found statistics showing a disparity in arrest rates between domestic abuse and nondomestic abuse cases persuasive, it concluded that statistics alone may not be enough to establish a discriminatory custom. *Id.* at 696.

110. *Id.* Citing *Thurman*, the court held that it need not decide whether the establishment of a pattern of police indifference to one individual's complaints would, by itself, suffice to create an inference of a discriminatory custom. The court did, however, explain in dicta that since equal protection challenges require the plaintiff to show that the discrimination was based on membership in a particular class, evidence concerning a single individual probably would not suffice. *Id.*

tection to both male and female victims of domestic abuse.¹¹¹

Two months after the *Watson* decision, the Court of Appeals for the Third Circuit further narrowed the possible equal protection challenges to police nonresponse in *Hynson v. City of Chester Legal Department*.¹¹² *Hynson* was a suit brought by the mother and children of a woman killed by her boyfriend.¹¹³ The Third Circuit, adopting the reasoning of the *Watson* court, held that police differentiation between victims of domestic violence and those of nondomestic violence, alone, was insufficient to establish a claim of sex-based discrimination.¹¹⁴ The court noted that the plaintiffs also bear the burden of showing that the police instituted the policy intending to discriminate against women.¹¹⁵

The police officers in *Hynson* raised a qualified immunity defense, which protects officers performing discretionary functions if it can reasonably be believed that their actions did not invade the right allegedly violated.¹¹⁶ In the case of a facially-neutral policy, the court held that the officers would lose their qualified immunity only if a reasonable police officer would know: 1) that such a policy had a discriminatory impact on women; 2) that the policy was motivated by bias against women; and 3) that the adoption of the policy serves no important public interest.¹¹⁷

Following *Hynson* and *Watson*, demonstrating that a facially-neutral policy discriminates against women will prove at least burdensome and

111. *Id.* at 696-97. Because of this facial neutrality, a challenger would have to show two things: 1) that the policy adversely affected women; and 2) that the policy was adopted for the purpose, at least in part, of discriminating against women. See *Personnel Administrator v. Feeney*, 442 U.S. 256, 281 (1979) (facially-neutral classification does not violate equal protection as long as law was enacted "in spite of" not "because of" its adverse effects on women). Since neither of these preliminary evidentiary requirements was fulfilled, the court held that the plaintiff failed to establish a prima facie case of gender-based discrimination. 857 F.2d at 697.

112. 864 F.2d 1026 (3rd Cir. 1988).

113. *Id.*

114. *Id.* at 1031. *But see* *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701-02 (9th Cir. 1990) (reversing district court's dismissal of plaintiff's equal protection claim, court held that abusive remarks by police officer to victim suggesting she deserved to be hit indicated that domestic assault cases were treated less seriously than other assaults and animosity existed towards battered women).

115. 864 F.2d at 1031.

116. *Id.* at 1027. The qualified immunity defense does not apply to municipalities. See *Owen v. City of Independence*, 445 U.S. 622, 638, *reh'g denied*, 446 U.S. 993 (1980); *Watson v. City of Kansas City*, 857 F.2d 690, 697 (10th Cir. 1988).

117. *Id.* at 1032. The court explained that this standard balanced the individual's equal protection interest in challenging a discriminatorily applied policy against the right of police officers to perform their duties without being exposed to the perpetual fear of bothersome litigation. *Id.*

sometimes insurmountable for battered women.¹¹⁸ These courts held that proof of police discrimination simply against victims of domestic violence is insufficient to invalidate a facially neutral policy. Battered women must further show that the policy was, at least in part, intended to discriminate against women.¹¹⁹ The existence of a disparate impact usually falls short of demonstrating subjective intent,¹²⁰ although *Thurman*, which predated *Watson* and *Hynson*, held that a severe disparity may create an inference of intentional discrimination.¹²¹

B. Due Process Litigation

In *Balistreri v. Pacifica Police Department*,¹²² a battered woman argued that police disregard for her complaints of verbal and physical harassment by her estranged husband¹²³ constituted a violation of due process.¹²⁴ The Court of Appeals for the Ninth Circuit began its analysis of her claim by recognizing that, in general, the police have no constitutional duty to protect individual members of the public at large.¹²⁵ The court, however, stated that such a duty may arise from a "special relationship" between the police and a specific individual.¹²⁶ The court further noted that "special relationships" could exist in several

118. The Supreme Court however, occasionally has been willing to find discriminatory intent based on the severity of the disparate impact. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court held that a law prohibiting the use of wooden buildings for laundries amounted to a racial classification since, as administered, it affected only Chinese-owned laundries. Non-Chinese laundry owners were administratively exempted from meeting the law's requirements. See also *Avery v. Georgia*, 345 U.S. 559 (1953); *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303 (1879).

119. See *supra* note 109.

120. See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976) (employment eligibility exam with disproportionate impact on blacks did not violate equal protection since no proof of discriminatory intent existed).

121. See *supra* notes 98-101 and accompanying text.

122. 901 F.2d 696 (9th Cir. 1990).

123. 901 F.2d at 698. In February 1982, the plaintiff's husband brutally assaulted her. The police escorted her husband away from the home but did not arrest him. Despite her numerous injuries requiring medical treatment, the police did not offer the plaintiff, Jena Balistreri, medical assistance. Throughout 1982, Balistreri repeatedly complained to the police regarding harassing phone calls and vandalism by her husband. In November of that year, and even after she obtained a restraining order, the police refused to arrest her husband who had crashed through her garage in his car. The police consistently failed to respond adequately to further harassment by her husband, despite Balistreri's requests for help. *Id.*

124. The due process clause provides: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

125. 901 F.2d at 699-700.

126. *Id.* at 700.

circumstances: 1) when the state created or assumed a custodial relationship toward the plaintiff; 2) when the state affirmatively places the plaintiff in a dangerous position; 3) when the state was aware that the plaintiff faced a specific risk of injury; or 4) when the state affirmatively assumed responsibility for the protection of the plaintiff.¹²⁷

The plaintiff, Jena Balistreri, alleged that the fourth category applied to her situation. She claimed that the issuance of a restraining order committed the state to protecting her.¹²⁸ The court, previously persuaded by this argument,¹²⁹ rejected it citing the recent Supreme Court case of *DeShaney v. Winnebago County Department of Social Services*.¹³⁰ In *DeShaney*, a case involving child abuse, the Court limited "special relationships" only to those situations in which the state takes a citizen into custody against his will, thereby limiting the ability of an individual to protect himself.¹³¹ Therefore, the *Balistreri* court held that no "spe-

127. *Id.* See also *Ketchum v. Alameda County*, 811 F.2d 1243, 1247 (9th Cir. 1987) (factors for determining existence of special relationship are: 1) Custodial relationship created by state; 2) state's awareness of specific risk to plaintiff; and 3) whether state put plaintiff in dangerous position); *Escamilla v. Santa Ana*, 796 F.2d 266, 269 (9th Cir. 1986) (state obligation to protect may arise if state put plaintiff in dangerous position).

128. 901 F.2d at 700.

129. *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988). In its first decision, the court held that unintentional conduct was open to challenge under § 1983. *Id.* at 1424. The court held sufficient Balistreri's allegations of intentional harassment by the police, or alternatively, their deliberate or reckless disregard for her well-being. *Id.* at 1424-25. The court concluded that, if Balistreri's allegations were true, the failure of police to respond to the continued harassment and violence towards her implicated her right to liberty under the due process clause. *Id.* at 1425. The court held that both the restraining order issued to Balistreri and her repeated complaints to the police created a "special relationship" between her and the police. The police thus owed Balistreri a duty to take reasonable steps to protect her from her estranged husband. *Id.* at 1426.

130. 489 U.S. 189 (1989). *DeShaney* was a suit by a child (acting through his mother) who had been severely beaten by his father, against local officials and social workers who failed to remove the child from his father's custody despite receiving numerous complaints of abuse. *Id.* at 189. The Court held that the due process clause functions not as an affirmative guarantee of safety, but rather as a limit on the state's power to act. *Id.* at 195. "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Thus, in general, the Court held that the state's failure to protect one citizen from assault by another was not violative of due process. *Id.* at 197.

131. *Id.* at 200. The Supreme Court held that the affirmative duty to protect did not come from the knowledge that a citizen faced the threat of injury, but arose in a situation in which the state affirmatively limits a citizen's capacity to defend himself. Thus, incarceration by the state, which puts the state in the role of custodian, triggers due process protection. *Id.* The Court concluded that only through the state's own tort system could police be held liable for failure to respond outside of custodial conditions. *Id.* at 203.

Dissenting in *DeShaney*, Justice Brennan argued that the Constitution mandated a more active role for the police, considering the circumstances of the case. *Id.* at 203 (Brennan, J., dissenting).

cial relationship" existed between Balistreri and the police.¹³²

Because *DeShaney* considerably narrowed the "special relationship" doctrine, it has effectively foreclosed substantive due process challenges by battered women because of the close analogy to child abuse.¹³³ Only if the abuse occurs while in police custody will a battered woman have a strong case with which to challenge police inaction.¹³⁴ Plaintiffs have a chance of success challenging a police failure to act under due process only if lower courts interpret *DeShaney* narrowly, holding it to its facts.¹³⁵

C. Tort Claims: Police Breach of Duty to Act

In *Nearing v. Weaver*,¹³⁶ a woman and her children sued the police for their failure to enforce a restraining order against the children's father.¹³⁷ Oregon's Abuse Prevention Act¹³⁸ calls for the issuance of temporary restraining orders to protect individuals threatened by present or former spouses.¹³⁹ Additionally, it mandates warrantless arrest when a police

Justice Brennan began his analysis by examining the action taken by the state. *Id.* at 205. Justice Brennan then concluded that earlier state action may be conclusive in determining the constitutionality of subsequent state inaction. *Id.* at 208.

In this case, Justice Brennan reasoned, Wisconsin created a child-welfare system to protect and care for abused children. State law placed a duty on the local social services offices to investigate complaints of child abuse. *Id.* at 208. This system invited citizens and other interested agencies to rely on the social services department to protect abused children from further harm. Furthermore, the social services department was the sole body in control of the decision of whether to intervene in a particular case. *Id.* at 209. Justice Brennan argued that, "[u]nfortunately for Joshua DeShaney, the buck effectively stopped with the Department." *Id.* at 209. Through their inaction, Justice Brennan argued, the state effectively "confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as [the department] took action to remove him." Justice Brennan concluded "that inaction can be every bit as abusive of power as action, that oppression can result when a state undertakes a vital duty and then ignores it." *Id.* at 212.

132. 901 F.2d at 700.

133. Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393, 1411 (1990).

134. Note, *supra* note 56, at 1383.

135. *Id.* at 1389.

136. 295 Or. 702, 670 P.2d 137 (1983).

137. *Id.* at 705-06, 670 P.2d at 139-40. Police failed to enforce a restraining order against the plaintiff's husband, from whom she was separated. This inaction continued even after the husband's repeated harassment, threats, and child abduction attempts, including an assault upon a friend of the plaintiff. *Id.*

138. 1977 Or. Laws ch. 845.

139. OR. REV. STAT. § 107.716 (1990). Six years before the Oregon Supreme Court decided *Nearing*, a court in New York faced a similar suit based on common law negligence. In *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (1977), a group of battered women challenged police

officer has probable cause to believe that a restraining order has been violated.¹⁴⁰

The plaintiff, Henrietta Nearing, sued for damages, claiming that the police inaction amounted to the negligent infliction of emotional distress.¹⁴¹ The Supreme Court of Oregon held that state law allows recovery for the emotional harm inflicted when the defendant's behavior violates a plaintiff's legal rights.¹⁴² The court found that the statutory mandate and the issuance of a restraining order gave rise to a special duty owed by the police to this plaintiff.¹⁴³

The police officers defended their inaction as a "discretionary function or duty," which, as such, should be immune from liability.¹⁴⁴ The court held that discretion exists solely when the law requires officers to make value judgments or policy choices among competing priorities.¹⁴⁵ The court concluded that the legislature intended to limit police discretion in

inaction and sought declaratory and injunctive relief claiming that the police automatically refused to intervene in domestic abuse situations unless there was a valid order of protection. *Id.* at 1048, 396 N.Y.S.2d at 976.

The court, concluding that it had the power to require the police to exercise discretion in a non-arbitrary fashion, refused the defendants' motion to dismiss the complaint. *Id.* at 1050, 396 N.Y.S.2d at 977. The court reasoned that women battered by their husbands are just as deserving of police protection as other victims of assault, despite the fact that primary jurisdiction for adjudicating domestic violence cases lay with the family courts and not the criminal courts. *Id.*

One commentator reports that repercussions from *Bruno v. Codd* were strongly felt throughout New York's police departments, as they were forced to implement changes in policy. Gundle, *Civil Liability for Police Failure to Arrest: Nearing v. Weaver*, 9 WOMEN'S RTS. L. REP. 259, 261 (1986).

140. A peace officer shall arrest and take into custody a person without a warrant when the peace officer has probable cause to believe that:

(a) There exists an order issued pursuant to ORS 107.095(1)(c) or (d), 107.716 or 107.718 restraining the person; and

(b) A true copy of the order and proof of service on the person has been filed as required in ORS 107.720; and

(c) The peace officer has probable cause to believe that the person to be arrested has violated the terms of that order.

OR. REV. STAT. § 133.310(3) (1990) (emphasis added).

141. 295 Or. at 706, 670 P.2d at 140.

142. *Id.* The court distinguished this from a conventional tort claim brought in negligence. *Id.*

143. *Id.* at 708, 670 P.2d at 141.

144. *Id.* at 710, 670 P.2d at 142. See also *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988). Nancy Watson, a battered woman, alleged that police failed to arrest her estranged husband despite assurances to the contrary. *Id.* at 697. The court found that these facts indicated negligence on the part of the individual officers in performing their duty to protect specific citizens and, therefore, that the police were not immune from suit. *Id.* at 698. See *supra* notes 103-11 and accompanying text.

145. 295 Or. at 710, 670 P.2d at 142 (citing *McBride v. Magnuson*, 282 Or. 433, 578 P.2d 1259 (1978)).

the enforcement of restraining orders.¹⁴⁶ As a result, police officers who knowingly fail to enforce a restraining order under the statute face potential liability.¹⁴⁷ The *Nearing* decision strongly favors battered women plaintiffs, under one of the more forceful mandatory arrest statutes in the United States.¹⁴⁸

IV. LEGISLATIVE MANDATES

Modern domestic abuse legislation was introduced in the early

146. *Id.*

147. *Id.* at 714, 670 P.2d at 145. Since *Nearing* was decided, most Oregon police officers automatically arrest batterers suspected of breaching restraining orders. Gundle, *supra* note 139, at 265.

148. Many suits against police departments never make it to trial. In *Scott v. Hart*, No. C76-2395 WWS (N.D. Cal. Nov. 9, 1979), battered women challenged the Oakland, California Police Department's practice of failing to provide assistance to domestic abuse victims. In a settlement decree, the police agreed to treat battering as they would any other crime and to abandon an arrest-avoidance policy. Gundle, *supra* note 139, at 261. See also *Bruno v. Codd*, 47 N.Y.2d 582, 590, 393 N.E.2d 976, 980, 419 N.Y.S.2d 901, 905 (1979). In *Bruno*, the parties agreed to settle before trial and entered a consent judgment. The consent decree provides:

2) The Police Department and its employees have a duty to and shall respond [in person] to every request for assistance or protection from or on behalf of a woman based on an allegation that a violation or crime, or a violation of an Order of Protection or Temporary Order of Protection, has been committed against her by a person alleged to be her husband[.]

....

4) Where there is reasonable cause to believe that a husband has committed a felony against his wife and/or has violated an Order of Protection or Temporary Order of Protection, the officer shall not attempt to reconcile the parties or mediate and the officer shall arrest the husband.

....

6) In any instance where a wife or someone on her behalf charges . . . that a husband has violated an Order of Protection or Temporary Order of Protection, it is the responsibility of a police officer to, and the officer shall, arrest the husband provided that the officer finds that reasonable cause exists for the officer to believe that the conduct charged is within the scope of such Order, and that the husband has committed the alleged act.

Sorichetti v. City of New York, 95 Misc. 2d 451, 466, 408 N.Y.S.2d 219, 229 (Sup. Ct. 1978).

A similar settlement in *Thomas v. City of Los Angeles*, Case # CA 000572, cited in *Legal Victory for Los Angeles Battered Women*, RESPONSE, Fall 1985, at 8, resulted in a multi-faceted decree. The decree provisions required the police to assign domestic violence calls the same priority as other violent crimes. The decree required the police department to train its officers to apply the new standards and to make a one-time grant of \$50,000 to local battered women's shelters. The court maintained jurisdiction to monitor implementation of the new standards.

Consent decrees have begun to change police practice towards domestic violence victims in several jurisdictions. However, decrees do not always guarantee that battered women will be treated the same as other victims of assault. 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, 345 (1985) (authored by Greg Anderson). Consent decrees are most effective when they delineate the consequences to the police department for failure to abide by the agreement. *Id.* at n.72.

1970s.¹⁴⁹ At that time, every state authorized police officers to make felony arrests on probable cause without a warrant, while only fourteen states called for such arrests when probable cause indicated the commission of a misdemeanor.¹⁵⁰ State laws authorized officers to make warrantless misdemeanor arrests only when they actually witnessed the commission of the crime,¹⁵¹ a rarity in domestic violence. Simple assault and battery, the crimes most commonly committed in domestic violence cases, are classified as misdemeanors in most states.¹⁵² Thus the arrest laws in the vast majority of states offered little protection to women, unless they took the time to file for an arrest warrant.¹⁵³

In the last decade, the requirement that the police officer witness the misdemeanor in order to make an arrest has become less universal.¹⁵⁴ Nonetheless, most police departments today continue to discourage arrest as the preferred action in domestic violence cases. A survey of large city police departments in 1984 found that fifty percent had no policy concerning domestic violence, forty percent encouraged mediation, while only ten percent encouraged arrest.¹⁵⁵

Today, most jurisdictions fall under one of three statutory classifications: 1) those authorizing arrest only when probable cause of a felony exists;¹⁵⁶ 2) those permitting arrest when the officer has probable cause to

149. Law Enforcement Training Project, *supra* note 62, at 6.

150. *Id.*

151. L. LERMAN, *supra* note 48, at 124.

152. Law Enforcement Training Project, *supra* note 62, at 6.

153. *Id.* Police officers responding to domestic violence calls rarely seek misdemeanor arrest warrants; they are usually issued only when the victims file private criminal charges. L. LERMAN, *supra* note 48, at 125.

154. The American Law Institute recommends the following standards in statutes authorizing warrantless arrests:

§ 120.1 *Authority to Arrest Without a Warrant* — A Law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such a person has committed:

- a. a felony,
- b. a misdemeanor, and the officer has reasonable cause to believe that such person
 - (i) will not be apprehended unless immediately arrested, or
 - (ii) may cause injury to himself or others or damage to property unless immediately arrested, or
- c. a misdemeanor or petty misdemeanor in the officer's presence.

ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 13 (1975) (emphasis added).

155. L. SHERMAN, *supra* note 58, at 1-2.

156. For example, the arrest law in Washington, D.C. provides:

believe a misdemeanor was committed or a restraining order violated,¹⁵⁷ and 3) those mandating arrest.¹⁵⁸

§ 23-581. Arrests without warrant by law enforcement officers.

(a)(1) A law enforcement officer may arrest, without a warrant having previously been issued therefor —

(A) a person who he has probable cause to believe has committed or is committing a felony;

(B) a person who he has probable cause to believe has committed or is committing an offense in his presence;

(C) a person who he has probable cause to believe has committed or is about to commit any offense listed in paragraph (2) and, unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence.

D.C. CODE ANN. § 23-581 (1981).

157. Today, 48 states authorize police officers to arrest without a warrant in cases of domestic violence with West Virginia and Alabama being the exceptions. Law Enforcement Training Project, *supra* note 62, at 6. For example, Arizona's arrest law provides:

A peace officer *may*, with or without a warrant, arrest a person if the peace officer has probable cause to believe that the person has violated § 13-2810 by disobeying or resisting an order issued pursuant to this section, whether or not such violation occurred in the presence of the officer.

ARIZ. REV. STAT. § 13-3602(K) (1989) (emphasis added).

New Hampshire's arrest law provides:

594:10 Arrest without a warrant.

I. An arrest by a peace officer without a warrant on a charge of a misdemeanor or a violation is *lawful whenever*:

....

(b) He has probable cause to believe that the person to be arrested has assaulted a family or household member . . . within the past 6 hours[.]

N.H. REV. STAT. ANN. § 594:10 (1986) (emphasis added).

Half of the states providing for warrantless misdemeanor arrest require further evidence, such as a visible injury, or a limited period of time directly following the crime during which the police may arrest. Law Enforcement Training Project, *supra* note 62, at 6.

158. By 1988, 10 states (Connecticut, Iowa, Louisiana, Maine, Nevada, New Jersey, North Carolina, Oregon, Washington, and Wisconsin) had passed some form of mandatory arrest law. Law Enforcement Training Project, *supra* note 62, at 7-8. For example, Maine's arrest law provides:

5. Arrest in certain situations. When a law enforcement officer has probable cause to believe that there has been a criminal violation of a court approved consent agreement or a protective order . . . or that a violation of [aggravated assault] has occurred between members of the same family or household he *shall* arrest and take into custody the alleged offender.

ME. REV. STAT. ANN. tit. 19 § 770(5) (Supp. 1990) (emphasis added).

Similarly, North Carolina's mandatory arrest law provides:

(b) A law-enforcement officer *shall* arrest and take a person into custody without a warrant or other process if the officer has probable cause to believe that the person has violated a court order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from harassing or interfering with the victim[.]

N.C. GEN. STAT. § 50B-4(b) (1989) (emphasis added).

Outside the realm of domestic violence, few states have instituted mandatory arrest policies. Law Enforcement Training Project, *supra* note 62, at 8.

V. MANDATORY ARREST POLICIES ARE THE PROPER RESPONSE

Both permissive and mandatory arrest policies make arrest in domestic violence more likely than is the case under traditional law, which requires police to witness the commission of a misdemeanor to arrest. However, permissive arrest laws, which provide that police "may" arrest when probable cause exists that a domestic assault has been committed, still leave officers with potent discretion to forgo arrest.¹⁵⁹ Mandatory arrest policies, on the other hand, require that police officers "shall" arrest if such probable cause exists.¹⁶⁰ Therefore, the policy decision, removed from the hands of individual police officers, properly rests with legislators or police chiefs.

A. Statistical Support

Recently, there has been a growing consensus that mandatory misdemeanor arrest laws deter domestic abuse more effectively than either permissive misdemeanor arrest laws or probable cause felony arrest laws.¹⁶¹ The most prominent survey of the effects of various approaches was the Minneapolis Domestic Violence Experiment.¹⁶² The Minneapolis Experiment studied the effect of different modes of police intervention in domestic abuse calls over a six-month period.¹⁶³

Thirty-five police officers took part in the experiment. The police department randomly assigned one of three approaches with which to handle domestic violence calls: 1) arrest; 2) mediation; or 3) requesting that the batterer leave the home for eight hours.¹⁶⁴ The study showed that when officers attempted to mediate there was a thirty-seven percent chance of further violence within the following six months; a thirty-three percent chance of subsequent violence existed among those temporarily

159. See *supra* note 157 and accompanying text.

160. See *supra* note 158 and accompanying text.

161. See COMMUNITY COUNCIL OF GREATER NEW YORK, ARREST AND DOMESTIC VIOLENCE TRENDS IN STATE LAWS AND FINDINGS FROM RESEARCH, RESEARCH UTILIZATION UPDATE NO. 23, at 3 (Aug. 1988).

162. *Id.* at 3. The council conducted the study between 1981 and 1982.

163. Cohn, *supra* note 64, at 23.

164. Gundle, *supra* note 139, at 260. For an incident of abuse to be included in the study, the disturbance had to be a misdemeanor and both parties had to be in the home when the police intervened. Furthermore, it was required that the officer determine that probable cause existed that battering had occurred in the previous four hours. COMMUNITY COUNCIL OF GREATER NEW YORK, *supra* note 161, at 4.

sent away from the home.¹⁶⁵ By contrast, there was only a nineteen percent chance of recurring violence when an arrest was made.¹⁶⁶

Other studies support the conclusions of the Minneapolis Domestic Violence Experiment.¹⁶⁷ In 1984, the Attorney General's Task Force on Family Violence issued a report on police arrest policies; it recommended arrest as the preferred police policy.¹⁶⁸ An experiment in California, modeled after the Minneapolis study, also showed that arrest deters spouse abuse more effectively than do other police responses.¹⁶⁹ Studies in Canada and New Zealand demonstrate similar results.¹⁷⁰ Thus, the

165. COMMUNITY COUNCIL OF GREATER NEW YORK, *supra* note 161, at 4. The statistics for violence in the six months following the initial police intervention came from biweekly interviews with the victims and police records. Follow-ups also were conducted using police records that showed that there was repeat violence within six months in 24% of the "sent away" batterers, 19% in those cases that were mediated, and 10% when arrests were made. *Id.*

166. Follow-up interviews indicated that when the police officer took the time to listen to the victim's complaints before arresting the batterer, there was only a nine percent chance of repeat violence. When the officer arrested the batterer without listening to the victim, however, a 26% chance of further violence existed. *Id.* at 5. Sherman and Berk, who conducted the Minneapolis Experiment, concluded that arrest limited the subsequent violence of habitual abusers, since most of the men in the study had victimized their wives repeatedly in the past. Thus, they found that arrest was an effective deterrent with more than just occasional or one-time offenders. Williams and Hawkins, *The Meaning of Arrest for Wife Assault*, 27 CRIMINOLOGY 163, 164 (1989).

167. See COMMUNITY COUNCIL OF GREATER NEW YORK, *supra* note 161, at 5. The National Crime Survey, a study measuring the criminal victimization of Americans for the years 1978 through 1982, showed that women who called the police were less likely to face repeat violence than women who did not call. *Id.* at 5-6. Of the women who called the police to complain of battering, 16% reported subsequent violence within six months of the initial incident, while 23% of the women who did not call were victims of further battering within that time. *Id.* at 6. Likewise, the results of a Duluth, Minnesota project demonstrate a measured decline in repetitious calls from victims whose mates were arrested. Pence, *supra* note 72, at 258.

Some commentators, however, raise several questions concerning the veracity of the Minneapolis findings. Of paramount concern is whether batterers who police arrested discouraged their wives from reporting any further violence through threats. This concern also applies to the truthfulness of answers made to the interviewers throughout the six-month follow-up period. Commentators also raise concerns that some women may have called the police only to protect themselves during the immediate battering, and did not want to have their husbands arrested; thus, arrest might actually deter some battered women from calling the police in the first place. L. SHERMAN, *supra* note 58, at 3.

168. Cohn, *supra* note 64, at 23.

169. See COMMUNITY COUNCIL OF GREATER NEW YORK, *supra* note 161, at 7.

170. Torgbor, *Police Intervention in Domestic Violence — A Comparative View*, 1989 FAM. L. 195, 195-96. A study in London, Ontario found a significant decrease in battering incidents following the Solicitor General's ruling requiring arrest when the "facts and circumstances warrant this action." *Id.* During a 12-month follow-up period, cases in which the victim was bitten, hit, or kicked declined from 56.2% to 22.9% following police intercession. Research results suggest that the arrest policy increased victims' confidence in police intervention. *Id.*

In 1986, the city of Hamilton, New Zealand conducted a six-month study during which the police

implementation of mandatory arrest policies seems to decrease spousal abuse in the jurisdiction.

B. Treating a Violent Crime for What It Is

Wife abuse is a violent crime. American law has evolved from a system in which wife battering was not only acceptable, but legal.¹⁷¹ Deeply rooted historical prejudices made a criminal justice system that does not adequately serve the needs of victims of domestic violence.¹⁷² Police officers, prosecutors and judges must become more informed about the nature of the battering relationship and the needs of its victims in order to avoid using their discretion in ways that continue to reinforce outdated notions about the roles of men and women.

Police officers, prosecutors and judges influence each other's reactions and policies toward domestic violence.¹⁷³ Because the police tradition-

department directed officers to arrest the batterer unless there was good cause for not doing so. This constituted a considerable change from the previous police practice of requiring good cause in order to make an arrest. Both police officers and victims reported favorable reactions to the arrest policy. During the study, the number of batterers arrested increased vastly, with 80% of those arrested charged and found guilty. As a result of the study, New Zealand implemented a mandatory arrest policy throughout the country. *Id.* at 196.

New South Wales, Australia also has instituted a mandatory arrest law, requiring that police not leave the batterer in the home if he committed an offense. In 1983, a multidisciplinary committee was created to monitor the results of the implemented policy. *Id.* at 106.

The city of Duluth, Minnesota created a plan that coordinates the response of the police, the criminal justice system, and human service agencies in dealing with domestic abuse. Pence, *supra* note 72, at 255. Nine agencies take part in the program, including the police, the county jail, the city attorney's office, the probation department, a battered women's shelter, and four counseling agencies. The purpose of the scheme, known as the Domestic Abuse Intervention Project (DAIP), is to provide a uniform response to batterers. *Id.* at 255.

DAIP staff concluded that batterers generally do not take charges instituted by their victims as seriously as those instituted by the police. Even though batterers believe they can coerce their victims into dropping charges, *id.* at 258, the DAIP staff did not adopt a stringent "no drop" policy once the police had initiated charges. Other programs' accounts of victims subpoenaed and arrested for not testifying against their husbands persuaded the DAIP to institute a more flexible policy. Instead of placing the onus to testify on the victim, the DAIP required that the arresting officer be the complaining witness, a step that led many batterers to plead guilty. *Id.* at 260.

Commentators believe that the most significant modification instituted by the DAIP was a change in focus. Before the project, the criminal justice system viewed battering as the result of dysfunctional relationships, leading intervenors to mediate and work to improve the relationship. The DAIP changed this view, emphasizing that battering is criminal conduct and deserves to be treated as such. *Id.* at 269.

171. See *supra* note 56.

172. See *infra* notes 175-76 and accompanying text.

173. As with most others throughout the criminal justice system, judges often do not view domestic violence cases as being of great significance. Judges rarely sentence batterers to jail, and the

ally do not arrest, prosecutors do not take abuse cases to trial. As a result of hearing few domestic violence cases in their courtrooms, judges often underestimate the severity of the problem. When judges do hear cases, some fall into the old trap of blaming the victim and impose lenient sentences.¹⁷⁴ Prosecutors then get the message that domestic violence is not a high judicial priority, and hence avoid prosecuting cases. Police officers, in turn, see it as a waste of time to take the domestic violence call seriously since nothing will come of it.

Educating judicial officers about the criminality and prevalence of battering can only occur if batterers are arrested. Studies indicate that, left to their own discretion, many police officers choose not to arrest.¹⁷⁵ Mandatory arrest laws and policies must be implemented in order to institute a systemic change from the bottom, up.¹⁷⁶

Many batterers and their victims continue to adhere to notions that men have the right to beat their wives.¹⁷⁷ Arrest and punishment send a valuable message: battering is against the law and perpetrators will be punished.¹⁷⁸ This knowledge may strengthen the resolve of battered women to stand up to their batterers and impress upon police the criminal nature of these assaults.

Mandatory arrest laws clarify the police officers' role in domestic

finer imposed are mostly ineffective as a deterrent. This may account, in part, for many prosecutors' treatment of battering without the seriousness it deserves. Buzawa & Buzawa, *supra* note 13, at 865.

Some prosecutors, however, also perpetuate a continued disregard for domestic violence victims. The practice of consistently failing to initiate prosecutions against batterers can send a clear message to the police that domestic violence is not to be viewed as a serious crime. Thus a vicious circle is created: when prosecutors do not bring their cases to court, judges are deprived of knowing the frequency and severity of the problem. Ellis, *supra* note 74, at 58.

The expectations that no charge will ensue, that the courts will not convict, and that victims will not cooperate with the prosecution, have a tendency to become self-fulfilling prophecies. Endicott, *supra* note 23, at 368. However, when prosecutors actively prosecute wife battering cases and disallow the dismissal of charges, the police make more arrests, thus leading to more prosecutions. Lerman, *Expansion of Arrest Power: A Key to Effective Intervention*, 7 VT. L. REV. 59 (1982) [hereinafter *Expansion of Arrest Power*].

174. Ignorant about battering relationships and their prevalence, some judges inquire into what battered women did to precipitate the violence and accept excuses proffered by batterers. Hence the woman's "provocative" behavior and the man's excuses may be considered mitigating factors. Waits, *supra* note 13, at 327.

175. See *supra* notes 48-49, 161-70 and accompanying text.

176. See *supra* notes 173-74 and accompanying text. Larger numbers of arrests will focus attention on the severity of the problem. Prosecutors will handle more arrests and judges will face more batterers in their courtrooms.

177. See *supra* notes 16, 33 and accompanying text.

178. Gundle, *supra* note 139, at 260.

abuse cases.¹⁷⁹ Wife battering incidents present the police with complicated situations, the dynamics of which they often may not fully comprehend.¹⁸⁰ This has led, in the past, to a police preference for mediation or inaction, both of which are inappropriate in cases of violent crime.¹⁸¹ When all parties are aware that domestic abuse will result in arrest, any confusion surrounding the role of police is eliminated.¹⁸²

Mandatory arrest laws also enhance a battered woman's chance of success in suits against the police for inaction. The future of due process challenges was severely limited by the recent Supreme Court holding in *DeShaney*.¹⁸³ Furthermore, equal protection actions commonly require a showing of discriminatory intent, difficult to establish in most cases.¹⁸⁴ With mandatory arrest policies, women will no longer face the difficulty of establishing a causal link between police inaction and wife abuse in tort claims, since such statutes will establish that link for them.¹⁸⁵

Mandatory arrest laws preserve the integrity of the criminal justice system and publicly reject illegal behavior. Justice requires the similar treatment of like cases.¹⁸⁶ Assaults upon spouses are as illegal and

179. Recent Development, *supra* note 60, at 220.

180. Mandatory arrest laws can simplify an officer's job by providing guidelines for what the officer must do when he or she encounters a battering incident, thus removing an officer's discretion not to arrest. Note, *supra* note 56, at 1387.

A study of police response to domestic violence in Canada found that unambiguous rules most needed are to determine when arrest is proper. Absent such rules, it was clear the police were not arresting batterers on the same terms as in nondomestic assault cases. Endicott, *supra* note 23, at 366. Police officers throughout Canada now operate under the assumption that the penalty for batterers will be arrest. *Id.* at 368.

181. Cohn, *supra* note 64, at 22. See *supra* notes 69-72 and accompanying text. Many police resist mandatory arrest policies because they fear the loss of discretion. Police argue that they must retain control over the decision on a case-by-case basis. Recent Development, *supra* note 60, at 220. However, contrary to the understanding of many officers, mandatory arrest laws do not take away the need for them to make discretionary decisions as to the propriety of arrest. *Id.* Rather, mandatory arrest laws serve to level the playing field, requiring officers to apply their discretion in the same manner in all assaults. Eppler, *supra* note 53, at 806. Advocating more frequent arrests does not necessarily mean that arrest is the appropriate alternative in every situation. L. LERMAN, *supra* note 48, at 121. To the contrary, mandatory arrest laws merely serve to tell police officers that arrest, and not mediation, is the appropriate response in domestic violence cases. *Id.*

182. Furthermore, arrest is more consistent with the role of police. Police are not to act as counselors; when called to the scene of a crime, their role is to enforce the law. Recent Development, *supra* note 60, at 221.

183. See *supra* notes 129-35 and accompanying text.

184. See *supra* notes 119-22 and accompanying text.

185. Note, *supra* note 56, at 1388.

186. Equal enforcement of the law also will help avoid the discrimination against minorities and

deplorable as those against strangers.¹⁸⁷ Laws mandating arrest send a message to society that battering is considered unacceptable. A change in society's general acquiescence toward battering may well positively affect the behavior of men who batter.¹⁸⁸ Furthermore, all of the classic rationales for enforcing laws apply in domestic abuse cases. The interests of standard-setting, deterrence, incapacitation, punishment and rehabilitation will all be fulfilled by a policy mandating the arrest of abusive spouses.¹⁸⁹

VI. CONCLUSION

Domestic violence is a pervasive crime in our society with deeply rooted traditions of acceptance. Violence in the home tends to be cyclical and thus perpetuates itself, with children who grow up experiencing the violence against their mothers or themselves being taught that it is acceptable and legal. Society has a clear and pressing interest in stopping this cycle.

Because of persistent notions that wife battering is neither inappropriate nor illegal, police officers have, traditionally, used their discretionary power to refrain from using arrest, thus remaining uninvolved and helping to reinforce outdated stereotypes. Mandatory arrest laws create guidelines for police, batterers and victims, emphasizing that battering is a violent crime and will not be tolerated.

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the poor that may result from police officers making arrest determinations without sufficient guidelines. A. BOYLAN & N. TAUB, *supra* note 48, at 212.

187. See Endicott, *supra* note 23, at 355.

188. Inaction towards wife abuse may strengthen the belief among batterers and their victims that society accepts spouse assault as an appropriate way to handle domestic conflicts. Mandatory arrest laws attack these outdated assumptions and work to change the community's view of domestic violence. This may result in a fundamental change in the behavior of many batterers. *Id.* at 357-58.

The institutions governing American society have not, until very recently, begun to threaten severe consequences to those who beat their spouses. See *supra* notes 149-58 and accompanying text. Law may influence societal norms. Endicott, *supra* note 23, at 358. Mandatory arrest laws and police officers who treat battering as a crime will erode some of the stereotypes that provide the basis for the batterers' beliefs that they behave in a socially acceptable fashion. Eppler, *supra* note 52, at 808.

189. Finesmith, *supra* note 11, at 104. Arrest may be viewed by batterers, who do not consider themselves criminals, as something frightening. *Id.* Therefore, arresting batterers may be more successful in stopping battering than arresting thieves is in preventing robbery. Most abusive men may modify their behavior to avoid being seen as criminals.

