

Domestic Violence: The Use of Pro-Arrest Policies and Mandatory Prosecutions

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Abstract

Domestic violence is a crime that affects millions of American families. Traditionally, domestic violence was recognized by the general population and the courts as being a private issue that should be handled within the boundaries of the family. Law enforcement and the judicial system played a minimal role and generally maintained a hands off policy in relation to domestic violence cases. Adding to this mentality of privacy, the Fourth Amendment to the Constitution prohibits entering a residence without probable cause. The Minneapolis domestic violence experiment attempted to measure which police response was most beneficial. In order to empower victims and bring abusers to justice, state governments should adopt a pro-arrest policy alongside a mandatory prosecution policy.

Domestic Violence: The Use of Pro-Arrest Policies and mandatory Prosecutions

Dara never thought she would be a victim of domestic abuse. Growing up Dara always thought the answer to domestic violence was simple “if a man hits you, you leave him.”¹ Sadly however, Dara learned through personal experience that “the answer to ending domestic violence isn’t that simple.”² During the first four years of her relationship with Mario, Dara was not aware that she was being emotionally abused.³ The emotional abuse escalated and one day Mario kicked in a car window causing glass to shatter over Dara.⁴ After this incident, Dara remarked that “I didn’t think I was abused because he hadn’t hit me.”⁵ The abuse continued to escalate as Mario damaged Dara’s car and then began abusing her physically.⁶ After being severely beaten and threatened with death, Dara managed to escape.⁷ Four years later, Dara still struggled with the emotional scars left by her abuse.⁸ The crime of domestic violence is prevalent in homes across the United States; both men and women can be victims.

Domestic abuse takes many forms and “is a pattern of behaviors used to gain and maintain power and control over an intimate partner.”⁹ Domestic abuse can be

¹ Abuse Recovery Ministry & Service – Real Stories, <http://www.armsonline.org/#/get-to-know-us/real-stories>.

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Stacey Womack, Shepherding Women in Pain 210 (Bev Hislop ed., Moody Publishers 2010) (2010).

psychological, emotional, physical, sexual, financial, or verbal.¹⁰ Often, the power and control maintained by one intimate partner over another manifests itself in domestic violence. Domestic violence is generally defined as “the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by an intimate partner against another.”¹¹ Annually, millions of adults and children are affected by domestic violence in the United States.¹² Women comprise the largest percentage of reported violence and American women are injured more often in domestic violence incidents than in the number of injuries incurred from muggings, rapes, and car accidents combined.¹³ In order to empower victims and bring abusers to justice, state governments should adopt a pro-arrest policy alongside a mandatory prosecution policy.

Domestic violence cases can be a difficult situation for both government officials and police officers. Time has changed the criminal perception of domestic violence. Government officials must face the challenge of defining domestic violence in statutes as well as implementing policies to combat the violence. Section II of this paper will outline the history of domestic violence from the common law to present policies. Section III of this paper will then examine Supreme Court’s interpretation to the right to privacy in domestic violence cases under the Fourth Amendment of the Constitution in relation to the duty to protect. Part IV will consider the Minneapolis Domestic Violence Experiment and the impact on current policies. Next, part V will consider the current

¹⁰ *Id.* at 211.

¹¹ Domestic Violence Facts, [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf).

¹² Jason Palmer, Eleventh Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Domestic Violence, 11 *Geo. J. Gender & L.* 97, 98 (2010).

¹³ *Id.*

policies on domestic violence specifically relating to mandatory arrests and mandatory prosecutions. Finally, part VI will offer concluding thoughts.

Domestic Violence from Common Law to Present Policy

Historically, when a woman married, her husband became the arbiter over her “person, the value of her paid and unpaid labor, and most property she brought into the marriage.”¹⁴ Additionally, after a women entered into marriage, her legal rights were combined with the legal rights of her husband; a married woman could not bring tort charges against anyone without her husband’s involvement.¹⁵ Furthermore, a husband was responsible for the actions of his wife under the law and therefore Blackstone’s common law tradition stated that a husband “could ‘give his wife moderate correction’” in lieu of correction made by the court.¹⁶ Sometimes, the chastisement ended in serious injury.¹⁷ However, there were limits to a husband’s correction. For example, the common law tradition held that a husband should not inflict permanent injury on his wife while he was physically chastising her.¹⁸ Additionally, Blackstone asserted under the common law that a wife could apply to the court for a writ of supplicavit which allowed

¹⁴ Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy 105 Yale L.J. 2117, 2122 (1996).

¹⁵ Id. The doctrine of coveture held that a husband and a wife are “united into one entity.” This doctrine made violence of a husband against a wife a “legitimate form of social control.” Any violence that a man inflicted upon his wife was viewed as social control and not a part of the criminal justice system. Police interference in cases of domestic violence usually included instructions to leave the residence or merely informing the wife that they could not interfere in the affairs of a home. Kapila Juthani, Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy 59 N.Y.U. Ann. Surv. Am. L. 51, 53 (2003).

¹⁶ Siegel, supra, note 14 at 2122-23.

¹⁷ Kalyani Robbins, No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate? 52 Stan. L. Rev. 205, 208 (1999).

¹⁸ Siegel, supra, note 14 at 2118.

her to petition the court “to require her husband to provide a guarantee or security bond ‘that he will not do, or cause to be done, any harm or evil to her body.’”¹⁹ However, even this petition came with a caveat making an exception for acts that “licitly and reasonably pertains to a husband for ruling and chastising his wife.”²⁰

Over time, the authority of a husband to chastise his wife lost persuasive power in the courts.²¹ Consequently, “during the antebellum era, courts began to invoke marital privacy as a supplementary rationale for chastisement, in order to justify the common law doctrine within the discourse of companionate marriage.”²² As a result, any responses to domestic violence calls have habitually been hindered by the understanding that these are private crimes.²³ Police would often tell women that they could not interfere; any interference that did occur was often limited to the police instructing one spouse or the other to leave.²⁴ Non-interference in cases of domestic violence was historically so acceptable that wife beating did not become “illegal in every state until 1920.”²⁵ However, after wife beating became illegal the charges were still not comparable to the seriousness of the charges of assault and battery.²⁶ Even after additional reforms of the 1970s, the problem of marital violence still persisted.²⁷ In 1994 the federal government

¹⁹ *Id.* at 2123.

²⁰ *Id.* at 2123.

²¹ *Id.* at 2151.

²² *Id.*

²³ Kapila Juthani, Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy 59 N.Y.U. Ann. Surv. Am. L. 51, 53 (2003).

²⁴ *Id.* at 54.

²⁵ Robins, supra note 17 at 208.

²⁶ Siegel, supra, note 14 at 2118.

²⁷ *Id.*

passed the Violence Against Women Act (VAWA) which increased sentences for convicted defendants and “gave federal courts jurisdiction over crimes of violence committed when a spouse or partner traveled across interstate lines and violated a civil protection order.”²⁸ However, in 2000, the Supreme Court declared in United States v. Morrison that the VAWA unconstitutional because it could not be sustained “under the Commerce Clause nor under § 5 of the Fourteenth Amendment.”²⁹ Furthermore, the Court noted that “remedy must be provided by the Commonwealth of Virginia, and not by the United States.”³⁰

State governments have individually defined the crime of domestic violence because there is not national uniform criminalization of domestic violence.³¹ Primarily, there are two methods states use to address domestic violence cases. First, many states apply existing criminal law statutes such as sexual assault, rape, and assault and battery to domestic violence cases.³² Secondly, other states codify criminal provisions that specifically relate to and define domestic violence.³³ The definition of domestic violence is also expanding. For example, some state definitions of domestic violence include “not only the traditional family relationships but also homosexuals and unwed heterosexual

²⁸ Palmer, supra note 12 at 106.

²⁹ United States v. Morrison, 529 U.S. 598, 627 (2000).

³⁰ Id. The Decision in Morrison relied on the Supreme Court’s previous decision in United States v. Lopez. The Lopez decision emphasized “that even under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds. Id. at 608. See also, United States v. Lopez, 514 U.S. 549 (1995).

³¹ Palmer, supra note 12 at 121.

³² Id. at 122-23.

³³ Id. at 122.

couples.”³⁴ Although, domestic violence was historically regarded as a crime primarily committed against women; today men are also legally recognized as victims. In fact, some studies indicate that women are just as likely as men to act physically violent with an intimate partner.³⁵

Even though domestic violence was traditionally viewed as a topic in which the government did not interfere, since 1977 many states began to codify statutes specifically pertaining to police action in domestic violence situations.³⁶ The District of Columbia along with every state in the United States permits “warrantless arrests in cases of domestic violence where the arresting officer has probable cause to believe that the batterer has violated a restraining order or committed a criminal act against an intimate partner.”³⁷ Each state manifests the warrantless arrest doctrine a little differently.³⁸ Some state statutes use police discretion as a primary method of making a warrantless arrest, other states make warrantless arrests the preferred course of action in domestic violence cases; additionally, some states passed statutes making warrantless arrest a mandatory action.³⁹ These statutes concerning “arrest policies in domestic violence cases represent a unique departure from the traditional rule that police may not make an arrest

³⁴ Thomas J. Gardner & Terry M. Anderson, Criminal Law, 275 (Wadsworth Publishing 2009).

³⁵ Gerald P. Koocehr, Psychological Science is not Politically Correct, 37 American Psychological Association, 5 (2006).

³⁶ Erin L. Han, Mandatory Arrests and No Drop Policies: Victim Empowerment in Domestic Violence Cases, 23 B.C. Third World L.J. 159, 170-71 (2003).

³⁷ Palmer, supra note 12 at 130.

³⁸ Id.

³⁹ Id.

for a misdemeanor unless they witness the criminal act.”⁴⁰ The reason warrantless arrest in domestic violence cases is Constitutional lies in the 2005 majority opinion of the Kansas Supreme Court in State v. Oliver.⁴¹ Oliver, the defendant in the case, had a violent romantic history Raeshawnda Wheaton.⁴² Wheaton’s body was found along with three others inside a home.⁴³ Police had reasonable suspicion to believe that Oliver had committed the murders as well as having reason to believe that he would flee.⁴⁴ With this information the police decided to arrest Oliver without a warrant.⁴⁵ The Kansas Supreme Court declared that “Oliver’s warrantless arrest met both the statutory and the constitutional standards.”⁴⁶

Privacy under the Fourth Amendment

On May 7, 1998, Shannon Schieber’s brother and a neighbor found her dead in her apartment.⁴⁷ Early that morning a neighbor called the police after hearing Shannon scream for help while she was in her apartment.⁴⁸ The police arrived and knocked at the front door; there was no response to the knocking.⁴⁹ The police then conducted several interviews of Schieber’s neighbors and told neighbors to call again if any more screaming or commotion occurred.⁵⁰ Despite reassurance from the police that Shannon was not

⁴⁰ Id.

⁴¹ Id.

⁴² State v. Oliver, 280 Kan. 681, 683 (2005).

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id. at 692.

⁴⁷ Schieber v. City of Philadelphia, 320 F. 3d 409, 411 (E.D. Pa. 2001).

⁴⁸ Id.

⁴⁹ Id. at 412.

⁵⁰ Id. at 414.

home, her brother and a neighbor broke into Shannon's apartment only to find her body.⁵¹

Historically, instances of domestic violence have been considered private; however, the Supreme Court has interpreted the Fourth Amendment to allow searches without a warrant if exigent circumstances exist.

The Fourth Amendment

The Fourth Amendment gives the people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁵² The Supreme Court has held that a man's home is a protected area under the Fourth Amendment.⁵³ Additionally, the Supreme Court maintains that a man has a right to be free from unreasonable government intrusion in his own home.⁵⁴ The Court also considers all the details of the home to be intimate details that should not be available to the prying eyes of the government.⁵⁵ A warrant is the legal means by which a search and seizure inside a home could occur; outside of a warrant, searches and seizures "are presumptively unreasonable."⁵⁶ Because any crimes of domestic violence were considered private, in the past the government and the police historically intervened very little or not at all in cases of domestic violence. Since perceptions of domestic violence have changed, government and police involvement in domestic violence have also shifted roles. Police now play a more active role in cases of domestic violence. However, in cases like that of

⁵¹ Scheiber v. City of Philadelphia, 156 F. Supp. 2d 451,455 (E.D. Pa. 2001).

⁵² U.S. const. amend. IV.

⁵³ Weeks v. United States, 232 U.S. 383 (1914).

⁵⁴ Silverman v. United States, 365 U.S. 505, 511 (1961).

⁵⁵ Kyllo v. United States, 533 U.S. 27, 37 (2001).

⁵⁶ Groh v. Ramirez, 540 U.S. 551, 559 (2004) (quoting Payton v. New York, 445 U.S. 573, 584 (1980)).

Shannon Schieber, the police have the discretion to determine whether or not entrance to the residence is warranted. Under the totality of circumstances in Schieber's case, the police received a call concerning potential domestic violence in a neighbor's apartment. The police arrived at the apartment, knocked, and hearing nothing, determined that Schieber was not home and that there was not sufficient cause to violate Schieber's privacy.

Because any crimes of domestic violence were considered private, in the past the government and the police historically intervened very little or not at all in cases of domestic violence. Since perceptions of domestic violence have changed, government and police involvement in domestic violence have also shifted roles. Police now play a more active role in cases of domestic violence. However, in cases like that of Shannon Schieber, the police have the discretion to determine whether or not entrance to the residence is warranted. Under the totality of circumstances in Schieber's case, the police received a call concerning potential domestic violence in a neighbor's apartment. The police arrived at the apartment, knocked, and hearing nothing, determined that Schieber was not home and that there was not sufficient cause to violate Schieber's privacy.

However, the Supreme Court recognizes that there are some exigent circumstances that exist that allow a police officer to enter a home with a warrant. The standard for the Fourth Amendment is reasonableness and "an action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as

long as the circumstances, viewed objectively, justify [the] action.”⁵⁷ Additionally, an officer has permission to enter a home if there is an objectively reasonable basis for believing an occupant is injured or might soon be injured.⁵⁸ Moreover, a peace officer’s role “includes preventing violence and restoring order, not simply rendering first aid to casualties.”⁵⁹

The Fourth Amendment grants the right of a person to have privacy in their own home; however, this does not give a person the right to act criminally in their own home without fear of sanction. For instance, the police do not need a warrant to enter a person’s home if there are extenuating circumstances wherein an officer believes an occupant of the home may soon be injured. Historically, acts of domestic violence were regarded as a private affair between a man and his wife. Now however, acts of domestic violence are recognized as criminal acts and police may constitutionally enter a home if there probable cause.

The Minneapolis Domestic Violence Experiment

A major influence on many state policies concerning domestic violence came out of the Minneapolis Domestic Violence Experiment. Conducted in 1981 and 1982 the experiment tested the three standard methods of police response in order to determine which was the most effect method.⁶⁰ Using a lottery method, participating officers would

⁵⁷ Brigham City v. Stuart, 547 U.S. 398, 403, 404 (2006) (citing Scott v. United States, 436 U.S. 128, 138 (1978))

⁵⁸ Id. at 406.

⁵⁹ Id.

⁶⁰ Lawrence W. Sherman and Richard A. Berk, The Minneapolis Domestic Violence Experiment, Police Foundation Reports (1984).

be assigned a different strategy for each domestic violence call they received.⁶¹ The officer would either arrest the suspect, send the suspect “from the scene of the assault for eight hours, or given some form of advice, which could include mediation at an officer’s discretion.”⁶² The experiment had limitations; it only applied to misdemeanor domestic assaults and both parties needed to be present at the police arrival.⁶³ Furthermore, exceptions were made for situations where “a suspect attempted to assault police officers, a victim persistently demanded an arrest, or both parties were injured.”⁶⁴ After an officer carried out the specified strategy, workers would follow up with the victims in order what if any effect the strategy had on the situation.⁶⁵ There were several problems with the experiment including human error and inconsistency of follow ups.⁶⁶ Nevertheless, the experimenters concluded that “despite the practical difficulties of controlling an experiment and interviewing crime victims in an emotionally charged and violent social context, the experiment succeeded in producing a promising sample.”⁶⁷

The graph bellow illustrates the general findings of the experiment. The findings showed that the chance of violence reoccurring in the six months following police action was lowest when police conducted an arrest. After six months, only 10% of suspects arrested repeated violence compared to the 19% that repeated violence after police advise

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

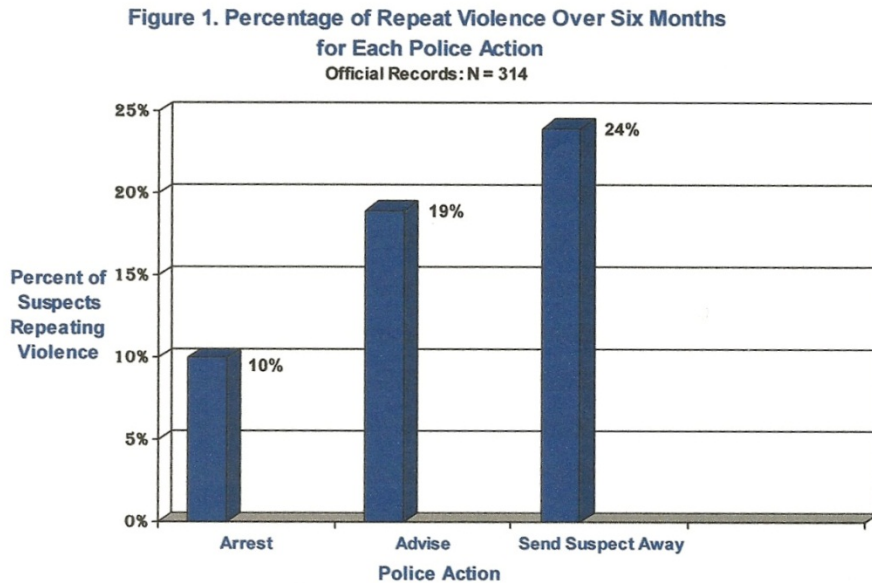
⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

and the 24% that repeated violence after the suspect was sent away for a period of time.⁶⁸

Researchers concluded it is “premature to conclude that arrest is always the best way for police to handle domestic violence, or that all suspects in such situations should be arrested.”⁶⁹ The researchers did not recommend a mandatory arrest policy but instead recommended that police should employ a pro-arrest policy and “allow warrantless arrests for misdemeanor domestic violence.”⁷⁰ Researches also recommended that the experiment be repeated in other cities because of the unique situation found in the location, size, jail policy, and surveillance effect found in Minneapolis.^{71,72}



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⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Jean Ferguson, Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation, 4 Crim. L. Brief 3, 5 (2009).

⁷¹ Id.

⁷² Sherman and Berk, supra note 60.

⁷³ Id.

Because of the findings of this experiment, the Minneapolis Police Department highly encouraged officers to arrest domestic violence suspects.⁷⁴ The policy did not require mandatory arrests; instead, the policy required “officers to file a written report explaining why they failed to make an arrest when it was legally possible to do so.”⁷⁵ Outside of Minneapolis, the results of this experiment led many jurisdictions to establish a mandatory arrest policy.⁷⁶ Additionally, federal government provided incentive funds to “jurisdictions that adopted a stringent domestic violence polic[y].”⁷⁷ However, after the Minneapolis Domestic Violence Experiment several replication experiments were conducted. The Omaha experiment took place in 1986 and was conducted primarily by Franklyn W. Dunford.⁷⁸ The results indicated that no policy was more effective than any other policy.⁷⁹ Beginning in 1987 and lasting for two years, the Charlotte experiment was conducted by J.David Hirschel and Ira W. Hutchison.⁸⁰ This experiment categorized domestic violence cases by police response, “advise and separation, issuance of a citation to appear in court, and arrest at the scene.”⁸¹ Then, researchers examined the rate of recidivism under each category.⁸² The results of the experiment indicated “that arrest is not a significant deterrent to misdemeanor spouse assault; however, it may still be the

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Ferguson, supra note 70 at 5.

⁷⁷ Id.

⁷⁸ Id. at 6.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

conscionable choice versus non-arrest.”⁸³ From 1987 to 1989 Richard A. Berk conducted the Colorado Springs experiment and Anthony M. Pate and Edwin E. Hamilton conducted the Metro-Dade experiment.⁸⁴ The Colorado Springs experiment examined the impact of four separate treatments: “an emergency protective order with arrest, an emergency protective order coupled with crisis counseling, an emergency protective order only, or simple restoration of order at the scene.”⁸⁵ The Metro-Dade experiment examined cases where officers had “the discretionary authority to either arrest or not where probable cause existed to arrest for misdemeanor spousal battery.”⁸⁶ Both experiments found similar results, “that arrest did not deter unemployed batterers, and that arrest can sometimes actually make things worse.”⁸⁷ The Milwaukee experiment occurred in 1992 and examined 1200 cases concluding that arrests had a deterrent effect in the short term; however, as time increased, violence of some offenders also increased.⁸⁸ The final conclusion was “that there is no overall long-term deterrence from arrest.”⁸⁹ Even though these later experiments did not support the findings of the Minneapolis experiment, the results of the Minneapolis experiment was a foundation for current mandatory arrest policies.

Current Policies

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

Primarily, it is the actions of state and local governments that combat domestic violence. For instance, it is up to the states to define domestic violence in both their civil and criminal code. In addition to defining domestic violence, state and local governments have the prerogative to adopt policies that fight against crimes of domestic violence. For example, states may codify different arrest policies, such as mandatory arrest, or a pro-arrest policy. Additionally, states may adopt differing prosecution standards such as a hard or soft no-drop policy. There are positive and negative features to differing arrest policies and differing prosecution policies that states must consider before adopting them. These policies indicate the enormous change in perceptions that has taken place since domestic violence was considered a private matter.

Arrest policies

Mandatory arrest policies arose in large part out of the Minneapolis Domestic Violence Experiment. Mandatory arrest policies make it necessary for a police officer to arrest a suspect when there is probable cause for domestic violence. As of 2007, twenty-one states have codified mandatory arrest policies.⁹⁰ Mandatory arrest policies eliminate the discretion of a police officer and require the officer to make an arrest whenever there is probable cause of the occurrence of an assault or battery.⁹¹ A mandatory arrest policy does not guarantee a reduction in violence; because of this, mandatory arrest policies are strongly debated with supporters arguing that the policy empowers victims while critics

⁹⁰American Bar Association Commission on Domestic Violence, Domestic Violence Arrest Policies by State
http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Domestic_Violence_Arrest_Policies_by_State_11_07.authcheckdam.pdf.

⁹¹ Han, supra note 36 at 174.

contend that it fails to consider the wishes of the victim and takes away any victim empowerment. Critics claim that when the state implements a mandatory arrest policy the state merely takes the place of the batterer.⁹² Additionally, critics argue that the facts of some cases make it initially unclear which person is the batterer and which person is the victim; because an officer must make an arrest, a dual arrest may occur.⁹³ This prevents victims from initially receiving the help that they need and reinforces the idea that the battering was the fault of the victim.⁹⁴ Also, if the victim is aware of the mandatory arrest laws, the victim may be more hesitant and fearful to contact the police.⁹⁵ Proponents of the policy hold that mandatory arrest actually empowers victims because victims want police to do more to help the situation.⁹⁶ Additionally, an arrest allows the victim a chance to separate from the victim in order to receive “counseling and develop a plan for safety” as well as access helpful legal and social programs.⁹⁷

In contrast to a mandatory arrest policy, states may also adopt a pro-arrest policy. As previously stated, a pro-arrest policy was adopted by the Minneapolis Police Department following the results of the Minneapolis Domestic Violence Experiment.⁹⁸ As of 2007, over twenty states have adopted a pro-arrest policy.⁹⁹ A pro-arrest policy would highly encourage officers to make an arrest in cases of domestic violence.¹⁰⁰

⁹² *Id.* at 175.

⁹³ Palmer, *supra* note 12 at 132.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Han, *supra* note 36 at 174.

⁹⁷ Palmer, *supra* note 12 at 132.

⁹⁸ Sherman and Berk, *supra* note 60.

⁹⁹ American Bar Association, *supra* note 90.

¹⁰⁰ Ferguson, *supra* note 70 at 7.

However, a pro-arrest policy would ultimately leave the officer with the discretion of whether an arrest should be made or not.¹⁰¹ Adopting a pro-arrest policy would allow police officers to take the wishes of the victim as well as extenuating circumstances into consideration when deciding whether or not to make an arrest.¹⁰² Ultimately however, the officer would have the prerogative to make an arrest “when safety outweighs the concerns of the victim.”¹⁰³

Mandatory Prosecutions

After mandatory arrest policies were established, prosecutors’ offices began implementing mandatory prosecutions also known as no-drop policies.¹⁰⁴ A no-drop policy mandates that a prosecutor prosecute each domestic violence case despite any request of the victim to drop the prosecution.¹⁰⁵ A no-drop policy may be “hard,” meaning that a prosecutor will use every possible means to prosecuting a case¹⁰⁶ such as the testimony of a neighbor or police officer.¹⁰⁷ Additionally, the prosecution may use a subpoena to request that a victim testify against his or her will; the prosecution may also arrest the victim for failing to appear and testify according to the subpoena.¹⁰⁸ No-drop policies may also take a softer approach to prosecution. A softer, non-coercive, no-drop policy allows the victim to decide how much to participate in the prosecution process.¹⁰⁹

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Han, supra note 38 at 181.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

Ultimately however, the prosecutor makes the decision whether or not to prosecute the case.¹¹⁰ Similar to mandatory arrests, supporters and critics both claim to help the victim more.

Some may argue that misunderstandings occur and that not every abuser should be prosecuted because the victim may rely on the abuser in order to provide financial support. This is where prosecution discretion comes in along with judicial discretion. A prosecutor does not have to ask for the full extent of punishment. If extenuating circumstances exist, the prosecutor can make a deal with the defense attorney that will result in the best possible action for both the victim and the abuser. Finally, the judge also has discretion. After hearing a case, a judge may determine what punishment a convicted abuser receives. For example, the judge could issue a sentence that extends to the full degree of the law. However, the judge also has the discretion to give a lesser sentence. A judge may be lenient for a first time offender as well as harsh on a repeat offender.

One of the main issues when dealing with mandatory prosecution lies in the psychological state of the victim. Domestic abuse creates a circle of power and control that the abuser exercises over the abused. Because of this, the victim may often think that the abuse is his or her fault. Additionally, the victim may call the police in fear and then recant their testimony because the abuser claimed that “he loved me” and “he will never do it again.” Therefore, the victim is not always able to make a decision that is logically

¹¹⁰ Id.

and psychologically sound. The chart below illustrates the wheel of power and control used against victims.



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Figure 2 Domestic Violence Wheel of Power and Control

Domestic violence is more than just a physical assault. Abusers use isolation, blame, intimidation, threats, coercion, economic abuse, and some abusers will use children to manipulate the situation. With a mandatory prosecution policy, a victim is able to place the blame of prosecution on the government. It also allows the victim to trust the

¹¹¹ James Ptacek, Battered Women in the Courtroom: The Power of Judicial Responses 173 (1999).

prosecutor. If no prosecution takes place the cycle will continue. Additionally, the cycle of abuse psychologically affects the victim so that the victim is unable to make a discerning decision concerning prosecution.

There are three phases in the domestic violence cycle. First, the tension phase builds up animosity between the two parties where one party usually “becomes hostile and belligerent and heaps verbal abuse on the partner.”¹¹² Next, the actual act of violence and abuse occurs. This phase is referred to as the acute-battering phase.¹¹³ Finally, the honeymoon phase begins; this involves the abuser repenting and often includes the abuser showering the abused partner “with flowers, affection, and contrite behavior.”¹¹⁴ The abuser is repentant and effectively places the blame on the victim. After this, the cycle is complete and tension begins to build all over again. Often, prosecution does not occur until the third phase has begun. Because of this, the victim often feels loved by the abuser and cannot imagine prosecuting the abuser. However, if the issue is not dealt with, the abuser will continue the cycle of abuse. Admittedly, prosecution and conviction does not guarantee that the abuse will stop, but it does guarantee a chance for the victim to obtain a personal protection order (PPO) as well as spend time away from the abuser and possibly obtain help and a safe place to stay. Many prosecutors’ offices work in connection with a domestic violence center or can at the very least provide information concerning where a victim can receive counseling and safety.

¹¹² Gardner & Terry, supra note 34 at 276.

¹¹³ Id.

¹¹⁴ Id.

Even if a conviction occurs, the cycle of abuse may continue. In order to end the possibility of recidivism, the cycle of abuse must be broken. Separating the victim from the offender through prosecution may be a first step in ending the cycle of abuse, but something more is needed. One recommendation is the implementation of a restorative justice program. Restorative justice programs work “by addressing victims’ needs and harnessing offenders’ capacity for rehabilitation” by seeking “to work outside or alongside traditional criminal and civil justice systems to achieve broader and more flexible resolutions.”¹¹⁵ The method of a restorative justice program involves mediation sessions between the offender and the victim; family or the community may also be involved in the mediation sessions.¹¹⁶ One program is the Victim-Offender Mediation (VOM). This program features “three elements: screening, dialogue sessions, and sessions between the co-mediators and each party.”¹¹⁷ First, a facilitator interviews each party in order to decide if the program would be beneficial; victim safety is primarily important.¹¹⁸ If the facilitator believes that the conflict would be helped by the VOM program dialogue sessions between the two parties begin.¹¹⁹ During this time, a co-mediator is present.¹²⁰ Evaluation of the success of this specific program has not occurred but similar programs have had mixed results.¹²¹ For example, one evaluator

¹¹⁵ Laurie S. Kohn, What’s So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention, 40 Seton Hall L. Rev. 517, 531 (2010).

¹¹⁶ Id. at 534.

¹¹⁷ Id. at 536.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id.

found that VOM type programs were “particularly effective in empowering victims but less effective in achieving sincere transformation in perpetrator behavior.”¹²² Instances of domestic violence do not have easy resolutions. However, a pro-arrest policy combined with mandatory prosecution policy and restorative justice programs will help bring abusers to justice while empowering victims to break the cycle of abuse.

Conclusion

The way in which governments and police view the crime of domestic violence has changed over history. Domestic violence was once viewed as a private matter to be resolved within the privacy of one’s own home. Now however, because of changing perceptions, state and local government and police intervention in cases of domestic violence is crucial. The 4th Amendment to the Constitution is not violated by mandatory arrest policies. However, a more beneficial policy would be to implement the Minneapolis Police Department policy which encouraged arrest of domestic violence offenders and mandated that an officer provide a written report for any arrest that was not made. Statistically, mandatory prosecutions do not necessarily reduce instances of domestic violence. However, mandatory prosecutions can be helpful because the psychological state of the victim is not able to adequately determine the wisest course of action. Additionally, mandatory prosecution policies should be coupled with a restorative justice program. Therefore, all jurisdictions should pursue a pro-arrest policy giving the officer discretion under extreme circumstances. Additionally, all jurisdictions should pursue a mandatory prosecution policy. This is not a closed minded policy,

¹²² Id.

prosecutorial discretion still exists; also, judicial discretion exists in order to balance extenuating circumstances. Domestic violence affects millions around the country. It is a problem that primarily affects women but it is not limited to gender. Only by pursuing a hard policy will the court empower victims and provide a way out of the cycle of abuse.