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CONTEMPORARY POLICE PRACTICES IN DOMESTIC VIOLENCE CASES: ARRESTING THE ABUSER: IS IT ENOUGH?

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Domestic violence unquestionably looms as one of the more serious and complex problems facing the law enforcement community today. Domestic-related violence has long been the leading cause of homicide for most communities.¹ As a core social phenomena, it challenges the scope, the breadth and the role of modern law enforcement policy and practice.

The police have not always responded to this challenge in the most appropriate fashion. Historically, domestic violence has been viewed as an essentially private, family matter not suitable for aggressive governmental intervention. In fact, American law once recognized husbands as titular heads of their households with a right to dispense corporal punishment to disobedient wives.² Although most laws of that sort disappeared during the early nineteenth century,³ their residual effects continued to manifest themselves in the social norms and assumptions of modern society.

Those assumptions are increasingly under attack. Society has expanded the role of government as a protector not only outside the home, but within it as well. Institutional transitions to new policies and procedures frequently lag behind changes in social attitude, however, and this has traditionally been true of police departments where domestic violence is concerned. Moreover, not every officer has personally accepted this change, and insensitivity to the victims of domestic violence has sometimes been the result.

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¹ BRUCE J. COHEN, CRIME IN AMERICA: PERSPECTIVES ON CRIMINAL AND DELINQUENT BEHAVIOR 7 (1977).

² J. DAVID HIRSCHEL & IRA W. HUTCHISON III, FEMALE SPOUSE ABUSE AND THE POLICE RESPONSE 3 (National Institute of Justice 1983).

³ *Id.* at 4.

The dynamics of victimization have also contributed to the hesitancy of police agencies to serve domestic abuse victims properly. Officers are often confronted by victims of abuse who are mired in a cycle of protecting their abuser, and many officers have mistakenly concluded that intervention is therefore pointless or even harmful.

Once the appropriateness of police intervention became apparent, police agencies sought to curb domestic violence through conflict resolution techniques and emotional support rather than by relying upon traditional criminal enforcement. Unfortunately, these techniques alone have not proven to be as effective as had been hoped; and as the criminality of domestic abuse has become more widely recognized, pressure has built for a tougher, arrest-oriented response. Several states have even mandated the use of arrests in virtually all spousal violence situations.⁴

Unfortunately, there is a growing body of evidence that such arrests do not necessarily prevent recurrences of abuse. In fact, there is now a feeling that these arrests may even worsen the situation within some families. As a result, many knowledgeable people are questioning arrest as an exclusive, preferred method for preventing further violence.

Recently, three articles describing domestic abuse recidivism studies concluded that arrest alone does not appear to be the answer. The three articles are J. David Hirschel and Ira W. Hutchison's *Female Spouse Abuse and the Police Response*,⁵ Franklyn W. Dunford's *The Measurement of Recidivism in Cases of Spousal Assault*,⁶ and *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment* by several notable authors, including Lawrence W. Sherman and Janell D. Schmidt.⁷

These articles closely examined the results of three domestic violence studies funded by grants from the National Institute of Justice. Each of the studies sought to duplicate or confirm the findings of the Minneapolis Domestic Violence Experiment, which concluded several years ago that on-scene arrest was a strong deterrent to domestic violence recidivism. According to the articles, however, these subsequent studies identified no real difference in future assault rates regardless of whether police used arrest, separation or

⁴ LAWRENCE W. SHERMAN ET AL., *THE VARIABLE EFFECTS OF ARREST ON CRIMINAL CAREERS: THE MILWAUKEE DOMESTIC VIOLENCE EXPERIMENT 1* (National Institute of Justice 1984).

⁵ HIRSCHSEL & HUTCHISON, *supra* note 2.

⁶ FRANKLYN W. DUNFORD, *THE MEASUREMENT OF RECIDIVISM IN CASES OF SPOUSE ASSAULT* (National Institute of Justice 1984).

⁷ SHERMAN ET AL., *supra* note 4.

mediation to resolve an initial domestic abuse incident. Thus, their findings contradicted the earlier conclusion of the Minneapolis Experiment.

This should not be surprising. The world is all too full of aggressive, impulsive individuals who are willing to take risks in order to vent their temper or get their way. They are often poorly educated and lack solid judgement and planning skills. Many are convicted criminals who have outgrown their fear of jail and have no interest in protecting their reputations or arrest histories. Some are often intoxicated or under the influence of drugs, some are mentally disturbed, and others have grown so depressed or bitter that they simply don't care anymore. These types of individuals are not impressed by the risk of short-term incarceration, although for some of them, genuinely harsh sanctions such as lengthy prison sentences may have deterrent value. For most, though, a short-term arrest will have virtually no effect on curbing future domestic violence, just as a short-term arrest has relatively little effect at preventing their participation in drug offenses, robberies, burglaries, and other crimes.

In their Charlotte article,⁸ Hirschel and Hutchison demonstrated the limited deterrent effect of immediate incarceration upon this specific population. They state, "69.4% of male offenders in [the] sample have previous criminal histories so arrest is neither a new nor unusual experience. Many of them have already spent significant time in jail."⁹ Even more insightful, though, was their observation of the limited deterrence value offered by incarceration for offenders across the board.

Hirschel and Hutchison go on to point out that, among both experienced and inexperienced offenders in the Charlotte study, "arrest alone . . . may not constitute as strong a societal response as perceived. The fact is that actual 'time in jail' is minimal. . . ."¹⁰ The authors noted that the average time from offense to eventual release from initial incarceration was less than ten hours.

Hirschel and Hutchinson explained this problem further, discussing the virtual certainty that no additional incarceration will follow trial. They stated

Our data confirm the belief that it is very rare for a spouse abuser to be found guilty and to be ordered to spend any significant time in jail. In only 35.5% of the cases . . . was the offender prosecuted, and in less than 1% of the cases did the offender spend time in jail beyond the

⁸ HIRSCHHEL & HUTCHISON, *supra* note 2.

⁹ *Id.* at 49.

¹⁰ *Id.*

initial arrest.¹¹

Finally, Hirschel and Hutchinson's article emphasizes the ultimate limitation of incarceration as a deterrent even among the general spouse-abusing population. "As jails become more crowded," they write, "and as the public learns that even felons are receiving community based punishments and early releases from correctional institutions, it does not take much imagination to conclude that premium jail space will not be used on misdemeanor spouse abusers."¹² Thus, it becomes clear that, for a great many spouse abusers, immediate arrest is more an inconvenience than a traumatic, behavior-altering deterrent.

Despite the limitations highlighted by Hirschel and Hutchison, incarceration does have a deterrent value in some misdemeanor domestic abuse cases. This is true because spousal assault, unlike almost any other type of violent crime, cuts across the broad spectrum of society. Not only do some career criminals and other reckless persons abuse their spouses, but so do some well-educated, successful, and normally law-abiding individuals. For the educated, successful, and law-abiding group of offenders, a short-term arrest coupled with all of its ramifications may be an immensely powerful deterrent. These abusers have much at stake and could be seriously injured by a permanent record of arrest or conviction. Employment potential, eligibility for membership social organizations, political viability, and general social reputation are all threatened by arrest. These people also have had little exposure to the kinds of behavior they would likely encounter in jail, and may find the experience terrifying. Incarceration, even for as little as ten hours, may be sufficient to moderate their abusive behavior, and therefore police should be free to exercise the arrest option when it appears likely to deter future violence.

Recognizing that immediate arrest will be effective only in selected instances, alternatives must be found for those offenders who will not respond to arrest-based strategies. The alternatives should be tailored to the unique characteristics of the various types of offenders; but in all cases, the physical safety of victims should be the paramount concern. Accordingly, the police should remain deeply involved in the process. The exact role that the police within the process should not be unique to domestic violence; it should reflect the police department's basic philosophical mission toward all facets

¹¹ *Id.* at 50.

¹² *Id.*

of its public service. For many police departments, that mission is changing.

Police have traditionally been enforcers, functioning almost exclusively in a "soldier" mode as if fighting a "war" against crime. Situations not directly relating to a criminal offense, including domestic disputes, have generally received little serious attention. Police have felt constrained by their limited authority or influence in non-criminal matters and so have left those societal problems to experts in other fields.

Today, however, police are increasingly aware of the limitations inherent in an enforcement-intensive approach. As a result, various forms of community-oriented policing have taken root. The old enforcement mentality is being replaced by a belief that police should take proactive steps to prevent crime by addressing its causative factors. Enforcement remains important, but it is no longer the only, or even the preferred, role in many contexts.

Of course, the police also realize they are incapable of single-handedly curing society's crime-inducing social problems. Unemployment, poor education, fragmented family structures, and the other complex problems that indirectly contribute to crime require intensive, broad-based solutions from all segments of society. Yet the police, because they are the only government agency immediately and easily available to everyone twenty-four hours per day, are uniquely likely to come in contact with all of these problems, and therefore to initiate or coordinate governmental and community responses.

In a sense, the police can serve as society's "point" agency, handling the task of stabilizing critical situations and then making referrals for follow-up action by one or more appropriate resources. This approach is working in many communities, but it ultimately depends upon having sufficient follow-up resources and mechanisms in place. Where domestic violence is concerned, many of those resources now exist but are under-utilized, and many more could readily be established.

For example, many states provide for judicial *ex parte* orders in which a judge requires an abusing spouse to temporarily vacate the home, thus giving tempers a chance to cool and the family an opportunity to resolve the underlying dispute or to seek counseling.¹³ In most cases *ex parte* orders are issued only when the abused spouse specifically seeks the order. Unfortunately, many victims are una-

¹³ NATIONAL INSTITUTE OF JUSTICE, CIVIL PROTECTION ORDERS LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT (1990).

ware that *ex parte* orders are available; and others are simply reluctant to force their partner from the home. Therefore, a more assertive governmental posture to initiate this preventive measure independent of victims' requests may be beneficial. Providing police with the option of initiating the *ex parte* process and allowing the immediate on-scene arrest of spouses who are later found to be in violation of *ex parte* orders, might prevent a significant number of repeat assaults.

Similarly, police must provide stand-by protection for abused spouses who desire to leave the home but who feel threatened while they collect their essential belongings. Laws providing police with reasonable immunity and authority in such situations should be enacted, thereby removing an objection raised by some reluctant police agencies in the past.

The police must also be provided with expanded authority to prevent violence before it occurs. Many victims, particularly those who have separated from their abusers, are threatened, harassed, and stalked prior to a follow-on assault. Unfortunately, all too often the law does not allow police to take action until after the follow-on assault has been committed. For many victims, that is too late. To correct this, states must enact harassment and stalking laws, give police the authority to act quickly under those laws, and provide for pre-trial detentions of those who have been accused and whose subsequent behavior suggests a likelihood of serious violence.

Reliance upon *ex parte* orders, protective stand-by authority, and pre-violence intervention laws is similar to enforcement of mandatory arrest policies in that all represent aggressive enforcement-based strategies. However, police also need the discretion to select less aggressive approaches in certain non-injury situations.

In their discussion of the Milwaukee project, Dr. Sherman and his colleagues confirmed the notion that an offender's response to immediate arrest was likely to vary widely, depending upon prior criminal record, race, socio-economic status, and other factors.¹⁴ More significantly, with respect to the general population as a whole, they found that, "while arrest deters repeat domestic violence in the short run, arrests with brief custody increase the frequency of domestic violence in the long run."¹⁵ The Milwaukee finding suggests that arrest causes many offenders to become more enraged and embittered and that the relationships between those offenders and their abused spouses undoubtedly worsen as a result.

¹⁴ SHERMAN ET AL., *supra* note 4, at 45.

¹⁵ *Id.* at 2.

For these abusers, it is likely that any heavy-handed government enforcement employed as a first resort will have a counterproductive effect.

At the same time, it is essential that government take firm action to convince the abuser that domestic violence is serious and will not be tolerated. Sending that message, after all, underlies the mandatory arrest approach. Still, mandatory governmental action does not necessarily require mandatory arrest.

It may be that, in many cases, mandatory counseling, coupled with the well-advertised alternative of arrest for uncooperative abusers, will send this same important message without further straining an already delicate spousal relationship. In addition, whereas enforcement via arrest merely controls behavior through fear or force, counseling may succeed at resolving the underlying problem that would otherwise be left unresolved if enforcement were the only action taken.

Unfortunately, a policy of mandatory counseling in all cases involving probable cause of domestic assault would exceed most communities' counseling resources. In this era of fiscal constraint, expanding those resources will be financially difficult. Additional funding sources may exist, however. For example, a violence counseling surcharge might be attached to marriage license fees and to filing fees for divorce suits. Participants in the counseling sessions might also be assessed modest fees based upon the family's ability to pay, and private foundation contributions might provide further funding. Regardless of the funding mechanisms, though, it is clear that a need for these services exists and that every creative effort to expand them should be explored. It is also imperative that the criminal justice system impose harsher sentences upon those hard-core abusers who engage in serious or repeated violence, as well as those who stalk and otherwise terrorize their victims. This is necessary not only to deter violence but also to protect the victims of those abusers who do not respond to less severe corrective measures.

Finally, society must realize that domestic violence is not an isolated problem; it is instead one element of a much broader cycle of violence and criminality. The rising rate of assault and homicide in our nation is staggering. Violence has seemingly become an integral part of the American character, and we should not be surprised that it has reached crisis levels within the home.

Breaking this cycle of violence is the true challenge, and it will require far more than the police, or even the criminal justice system as a whole, can alone provide. It will require the best efforts of edu-

cators, government officials, the entertainment industry, and especially parents to instill in our children a respect for others and a genuine concern for the welfare of their communities. We must stop teaching children that violence is normal, that conflicts may be appropriately resolved through force, and that looking after one's own self-interest is the first rule of life.

Sadly, though, these are exactly the lessons that are being learned. For instance, the American Psychological Association's Task Force on Television and Society recently reported that the average child witnesses 8,000 television murders and 100,000 other acts of violence before graduating from elementary school.¹⁶ The Task Force also found that "TV violence can cause aggressive behavior and can cultivate values favoring the use of aggression to resolve conflicts."¹⁷

The lessons learned through entertainment are reinforced by the children's observation of real life role models. Many children witness acts of violence involving parents and other adults, and even physically non-violent adults can send the wrong message through inappropriate aggressive, power-wielding behavior. Even when the projection of power is justified, the lesson can still be dangerous. Ironically, exactly that kind of unintended message may be communicated by a police officer who chooses arrest as the preferred means to resolve a domestic disturbance, rather than through mediation, referral, or temporary separation.

American society must begin to balance its legitimate promotion of individual rights and opportunities with a public appreciation of compromise, toleration, self-sacrifice, and community service. We will never stem the tide of violence, including domestic violence, if children are not taught that other people's needs and feelings are as important as their own. We must help them realistically define their expectations, and we must demonstrate by example our commitment to peaceful, considerate behavior.

There is no simple, singular method to teach these things, just as there is no simple, singular method to prevent violence. Yet progress can and will be made if we devote the full range of our talents and energies to the task at hand. Where domestic violence is concerned, we must allow society's crisis intervention workers, including the police, to select the most appropriate strategy and resources for any given case. Doing this will not always be easy, of course, but with sound research, officer training, and a commitment to provid-

¹⁶ AMERICAN PSYCHOLOGICAL ASSOCIATION NEWS 4 (Feb. 25, 1992).

¹⁷ *Id.*

ing the necessary support services, there is every reason to believe that a high rate of success will be achieved.