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RESEARCH THAT SUCCEEDS, POLICIES THAT FAIL

LISA A. FRISCH*

The battering of women in intimate relationships has existed for thousands of years. Until early in the twentieth century, women were considered "chattel," and it was legally and socially tolerated for husbands to use violence against their wives unless "some permanent injury be inflicted or there be an excess of violence."¹ Although there were various attempts through the years to challenge the legal and social support for this violence, not until the 1970s did the efforts of the feminist movement and battered women themselves result in significant change.

These early calls for change were hardly shocking. Advocates for change asked only that battered women be treated with fairness and be provided an opportunity for justice.² They questioned why a woman beaten in her own home by her husband was denied this justice, while someone assaulted in the street was recognized as a legitimate victim of a crime.³ No one argued that our system of justice was perfect or that exercising legal authority over these offenders would magically solve a centuries-old problem. Advocates believed, however, that treating victims of domestic violence as seriously as other victims of violent crime would, if nothing else, communicate that the behavior was no longer socially or legally

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¹ REBECCA E. DOBASH & RUSSELL P. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 62 (1979).

² DEL MARTIN, *BATTERED WIVES* 31-35 (1976); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 155-83 (1982); U.S. COMMISSION ON CIVIL RIGHTS, *BATERED WOMEN: ISSUES OF PUBLIC POLICY* 20-27, 228-76 (Jan. 1978).

³ U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEPARTMENT OF JUSTICE, *FINAL REPORT* 10-26 (1984); LISA G. LERMAN, *PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE* 13-14 (1981); DAVID REED ET AL., *CHICAGO LAW ENFORCEMENT STUDY GROUP, ALL THEY CAN DO . . . POLICE RESPONSE TO BATTERED WOMEN'S COMPLAINTS* 1-9 (1983).

tolerated.⁴

During the late 1970s and early 1980s many laws were changed to reflect the criminalization of battering.⁵ The impetus for these changes stemmed largely from the efforts of battered women's advocates, but there were other significant influences as well. Civil suits against police proliferated, clarifying the constitutional issues of due process and equal protection under law.⁶ Actors within the criminal justice system, including the U.S. Attorney General, the International Association of Chiefs of Police (hereinafter "I.A.C.P.") and the U.S. Department of Justice, began to promote changes so long demanded by women.⁷

Interestingly, the vast majority of these calls for change, and the strongest push for criminalization, occurred *prior* to the 1983 domestic violence study in Minneapolis.⁸ Further, these change efforts rarely, if ever, hinged on the notion of specific deterrence. The impetus for change was predicated, instead, on equal justice under

⁴ U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 3, at 10-25; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 2.

⁵ In many states, such as New York, there were various legal changes that reflected the trend toward criminalization. In 1970, police were given the authority to make warrantless arrests in misdemeanor cases when there exists reasonable belief that a crime has been committed (1970 N.Y. Laws § 996, *amended*, 1971 N.Y. Laws § 997). This change, at a minimum, gave police the discretion to arrest those who committed misdemeanor assaults against intimates when the crime was not witnessed by police. Married women in New York were given the right to have their abusive husbands criminally prosecuted in 1977, when victims of family offenses were permitted to have their cases heard in either Family Court or criminal court (1977 N.Y. Laws § 449). In 1980, first degree assaults were removed from the list of Family Offenses in New York State, giving the criminal court exclusive jurisdiction over these serious crimes (N.Y. FCA § 812(1) (1980)). The following year, the original purpose of Family Court proceedings, keeping the family unit "intact," was amended to reflect the goals of stopping the violence, ending family disruption and assisting victims in obtaining protection (N.Y. FCA § 812(2)(b) and CPL § 530.11(2)(b)). Victims of family violence began to achieve equitable status with other crime victims through an amendment to the Executive Law in 1983, which made abuse victims eligible for compensation to the same extent as other crime victims (1983 N.Y. Laws § 805).

⁶ *Watson v. Kansas City*, CA 10, No. 86-2501 (Sept. 14, 1988); *Sorichetti v. City of New York*, 65 N.Y.2d 461, 492 N.Y.2d 591 (1985); *Thurman v. City of Torrington*, 595 F.Supp. 1521 (1984); *DeLong v. County of Erie*, 469 N.Y.S.2d 611 (1983); *Bruno v. Codd*, 396 N.Y.S.2d 974 (Sup. Ct. 1977); *Baker v. City of New York*, 269 N.Y.S.2d 515 (1966).

⁷ See U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 3. See also GAIL GOOLKASIAN, NATIONAL INSTITUTE FOR JUSTICE, *CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES* (1986); NANCY LOVING, POLICE EXECUTIVE RESEARCH FORUM, *RESPONDING TO SPOUSE ABUSE AND WIFE BEATING: A GUIDE FOR POLICE* (1980); International Association of Chiefs of Police, *Wife Beating*, TRAINING KEY 245 (1976); International Association of Chiefs of Police, *Investigation of Wife-Beating*, TRAINING KEY 246 (1976).

⁸ LAWRENCE SHERMAN & RICHARD BERK, *THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT* (Police Foundation Reports 1984).

law. As early as 1976, for example, the trial judge in the landmark *Bruno v. Codd* case in New York City required police to exercise their discretion to arrest in a reasonable, non-arbitrary manner and not to automatically decline to make an arrest solely because the assaulter is married to the victim.⁹ Also that year, the I.A.C.P. issued two Training Keys on wife beating that directed the police to treat physically assaulted wives as crime victims and not to shield violent husbands from prosecution.¹⁰ After a year-long study of the problem, the Police Executive Research Forum, a national organization of police chiefs, issued a report that concluded that a policy of arrest in domestic violence cases was appropriate and that called for training of police in the new response.¹¹ In 1984, the U.S. Attorney General's Task Force on Family Violence made only passing reference to the issue of deterrence, stating that

an assault is a crime, regardless of the relationship of the parties. A person beaten in the home is no less a victim than a person beaten on the sidewalk in front of the home. The law should not stop at the front door of the family home.¹²

The issue of liability became even more apparent in 1984 when a federal court in Connecticut awarded Tracey Thurman, a battered woman, \$2.3 million in her lawsuit against the City of Torrington and twenty-four police officers as the result of the police department's policy and practice of non-arrest in domestic violence cases.¹³ The court ruled that official behavior that reflects an ongoing pattern of deliberate indifference to victims of domestic assault violates the Equal Protection Clause of the Fourteenth Amendment.¹⁴

These and numerous other instigators of change provided an atmosphere for the criminalization of woman battering with the ultimate goal of equitable treatment of victims.¹⁵ Deterrence as the ma-

⁹ *Bruno v. Codd*, 396 N.Y.S.2d 974, 977 (Sup. Ct. 1977).

¹⁰ International Association of Chiefs of Police, *Wife-Beating*, *supra* note 7; International Association of Chiefs of Police, *Investigation of Wife-Beating*, *supra* note 7.

¹¹ NANCY LOVING, RESPONDING TO SPOUSE ABUSE AND WIFE BEATING: A GUIDE FOR POLICE (Police Executive Research Forum 1980).

¹² ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 3, at 11.

¹³ *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D. Conn. 1984). The award was later reduced to \$1.9 million.

¹⁴ *Id.* at 1527.

¹⁵ GAIL GOOLKASIAN, CONFRONTING DOMESTIC VIOLENCE: THE ROLE OF CRIMINAL COURT JUDGES (National Institute of Justice 1986); U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 3; U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL RESPONSE TO DOMESTIC VIOLENCE (1982); *Bruno v. Codd*, 396 N.Y.S.2d 974, 977 (Sup. Ct. 1977); International Association of Chiefs of Police, *Wife-Beating*, *supra* note 7; International Association of Chiefs of Police, *Investigation of Wife-Beating*, *supra* note 7

for impetus for change was promoted not by victims, advocates or policymakers, but by those engaged in academic research.¹⁶ The 1983 Minneapolis Domestic Violence Experiment specifically sought to determine which law enforcement intervention—arrest, mediation, or separation—best deterred future domestic violence.¹⁷ Advocates for change, including this writer, welcomed the results of the study, which indicated that arrest was the most effective intervention, and quickly added the research to our repertoire of reasons for policy change.¹⁸ Deterrence, however, was never the *primary* reason for the change in police response. In the police training and policy development seminars that the New York State Office for the Prevention of Domestic Violence conducts across the state, it is rare to find a police executive with more than a passing knowledge of the deterrence research. The most compelling reason for change in law enforcement, to no one's surprise, is the fear of civil liability. Although the research is presented in the Office's seminars, most police pragmatically believe that arrest may be the best response to the problem but is hardly the ultimate solution. Then why this artificial emphasis on deterrence?

Deterrence is but one goal of the justice system, and it is largely a hypothetical one. It is generally believed that, if permanent prevention of crime were indeed even attainable, arrest would be only one component of the process. Broadly, long-term deterrence would require "basic modification of cultural values, revision of opportunity structures, reorganization of social class systems and elimination of economic imbalance."¹⁹ No one, in or out of the criminal justice system, would presume that arrest alone could produce such a sweeping change. At most, the system's ability to achieve "prevention in the crime control context means short-term deterrence of potential violators."²⁰ The results of the replication studies following the Minneapolis Experiment, ironically, offer data indicating that, among many domestic violence offenders, arrest provides a deterrent effect in the short-term.²¹ If this measure of deterrence had

¹⁶ Richard Berk & Lawrence Sherman, *Police Response to Domestic Violence Incidents*, 401 J. OF AM. STAT. ASS'N 83 (1988); LAWRENCE SHERMAN & RICHARD BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT, *supra* note 8; Lawrence Sherman & Richard Berk, *Police Response to Domestic Violence Incidents*, 49 AM. SOC. REV. 261-71 (1984).

¹⁷ SHERMAN & BERK, *supra* note 8.

¹⁸ Other reasons for policy change include equal justice for battered women, accountability of batterers, equal protection, civil liability concerns, and victim safety.

¹⁹ DONALD J. NEWMAN & PATRICK R. ANDERSON, INTRODUCTION TO CRIMINAL JUSTICE 45 (1989).

²⁰ *Id.*

²¹ Lawrence Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137 (1992); Richard A.

been identified as a goal, the replication studies would have supported the premise of the Minneapolis Experiment. Moreover, the studies' findings that unemployed, socially "marginal" batterers are not deterred by arrest²² is no more surprising than the fact that our entire justice system fails to deter the majority of socially marginal criminals from committing *any* crime. Our criminal justice system chooses to continue to respond to burglars, armed robbers, drug dealers and muggers even though deterrence is rarely achieved.

The Milwaukee researchers further warned that arrest may actually escalate the violence of these marginal batterers and that perhaps "punishment should be made less severe in order to reduce an escalation effect."²³ When these batterers assaulted their victims subsequent to an arrest, the researchers presumed that the assault was the direct result of the *arrest*, rather than the responsibility and choice of the offender.²⁴ Should we then believe that when a burglar burglarizes again when released from jail, he did so *because* he was incarcerated? Or that a "busted" drug dealer continues to ply his trade simply because he was angry that he was arrested? Would these offenders not have likely continued their illegal behavior, with or without criminal justice intervention?

The narrow analysis of the replication studies points out the information vacuum within which much of the research was conducted. Rarely were the dynamics of domestic violence considered, particularly the recognition that battering is not a single incident but rather a pattern of behavior that escalates in frequency and severity over time. As the Pennsylvania Attorney General recently reported, "the majority of victims are assaulted several times a year, and there are documented cases of daily assaults."²⁵ Similarly, in her study of battered women who killed their abusers, Angela Browne found that sixty-three percent of these women and forty-five percent of a control group of battered women who had not killed, reported abusive incidents occurring more than once a month.²⁶ The abuse also increased in severity over time: Eighty percent of the homicide group and fifty-eight percent of the control group reported that the physical abuse worsened during the course

Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170 (1992).

²² Sherman et al., *supra* note 21 at 158-59, 167-69.

²³ *Id.* at 168.

²⁴ *Id.* at 167-69.

²⁵ ATTORNEY GENERAL'S FAMILY VIOLENCE TASK FORCE, COMMONWEALTH OF PENNSYLVANIA, DOMESTIC VIOLENCE: A MODEL PROTOCOL FOR POLICE RESPONSE 13 (1989).

²⁶ ANGELA BROWN, WHEN BATTERED WOMEN KILL 68 (1987).

of the relationship.²⁷ Given this general escalation trend, it would appear more accurate to conclude that arrest alone was ineffective in halting the long-term *expected progression* of violence by marginal offenders, rather than to fault the arrest for the subsequent violence. Despite the absence of long-term deterrence among marginal offenders, the fact that the studies indicated a potential short-term deterrent effect on these previously undeterred offenders²⁸ should be considered a positive effect, and the temporary period of non-violence should be viewed as a window of opportunity for other interventions.

For victims of battering, this window of opportunity, however brief, is extremely valuable. Even if it consists only of the offender's arrest processing period, victims may for the first time, with appropriate assistance, be able to get to safety. If victim safety is, as it should be, a primary concern of the researchers and policymakers, then the information that some (if not most) victims are at risk of repeat assaults should promote change in other areas in the system, rather than suggest the discontinuance of the arrest intervention, one of the only measures of official assistance provided to victims.

Taking account of the escalation effect of short arrest, as described in the Milwaukee study,²⁹ one might give priority to safety of the victims who are likely to be at increased risk of additional violence as a result of the batterer's arrest. The concern of the researchers that arresting and then quickly releasing batterers from custody may be worse than not arresting at all is one shared by battered women and advocates.³⁰ In New York, for example, police who develop policies in coordination with the Office for the Prevention of Domestic Violence do not, as a rule, release suspects on appearance tickets for any domestic violence offense; and the majority have a policy not to set desk bail but rather exercise their discretion to hold the suspect for arraignment before a judge.³¹ Victims are informed at the time of the arrest that the suspect may soon be re-

²⁷ *Id.*

²⁸ Sherman et al., *supra* note 21; Berk et al., *supra* note 21.

²⁹ Sherman et al., *supra* note 21, at 154-56.

³⁰ *Id.*

³¹ The Office for the Prevention of Domestic Violence has assisted over 150 police agencies in developing policies on domestic violence. Each policy contains a section on bail and appearance tickets that vary slightly, depending on local conditions (such as the availability of a lock-up facility) but the majority of departments do not issue appearance tickets in domestic violence cases and will hold a suspect for arraignment by a judge whenever possible, rather than set desk bail. When circumstances require desk bail, maximum bail is used. One excellent example of a policy on the release of suspects is that of the Saratoga Springs, New York Police Department, which states "Field release, or appearance tickets, shall not be issued, nor pre-arraignment bail set on an arrestee in

leased from custody; furthermore, police are required to inform victims about their legal rights and available services, whether or not an arrest is made.³²

Subsequent to an arrest, the role of the police diminishes, and it becomes essential for the other officials and actors in the system to take responsibility and respond appropriately. The replication studies should be used to promote effective follow-up to an arrest through prosecution policies, batterers' intervention programs, probation supervision, advocates in the courtroom to assist victims, judicial education, and increased services for victims and their children. Professional training and policy development for all those who deal with victims and offenders is essential to promote a coordinated community response to the problem. This training is perhaps most important for police in order to help alter long-standing attitudes about the problem, inform them of the devastating impacts of this violence on the victim and children, educate them in the issues of liability and in the implications of research, and assist them in identifying actions they can take to protect victims better and to hold offenders accountable. Training is the key to effective policy implementation. If the police officers on the street have no investment in or understanding of the policy change, little will change for victims of battering. Although we must stop depending entirely on police to solve this and many other social problems, the impact of an effective police response to domestic violence cannot be underestimated. In the experience of the members of the more than 150 police agencies in New York that have worked with the Office to change their policies, what police do or do not do at the scene of a domestic call can make a tremendous difference to the victim. An example of this impact is best illustrated by an excerpt of a two-page letter written by a battered woman to the chief of a department that had recently implemented a pro-arrest policy. In it the woman wrote:

The emotional support the Officer offered at a time when I was desperately in need of it, is what really prompted this letter. . . . I felt that he sincerely cared about *me* and frankly, without that support, I don't know if I would have appeared in court the following morning.³³

A community's strong police policy is also the most effective

Domestic Violence cases. Any deviation from this procedure must be approved by the Officer-in-Charge and documented in writing in the case file."

³² Sherman et al., *supra* note 21.

³³ This letter was written by a victim of battering in May 1988 to the Chief of Police in Albany, New York, commending the new departmental policy of arresting domestic abusers and applauding the responding officers for their supportive treatment of her. It was routed to staff of the Office by Captain H. John Damino of the Albany Police Depart-

impetus for change in other parts of the criminal justice system. How long can prosecutors and judges ignore the police reports coming across their desks? How long can we, as a society, ignore the thousands of homeless battered women and their children, the countless injuries suffered and the tragic deaths that might have been avoided? The answer to the obvious need to "control domestic violence" does not rest, as Dr. Sherman and his co-authors suggest, on increased funding for shelters.³⁴ Such funding, though helpful and necessary, merely ameliorates the victims' plight because shelters are only a temporary response to the immediate safety needs of victims and children; furthermore, they are not used by the majority of battered women. It is sad to see the continued focus on victim flight rather than on better victim protection by consistently holding their abusers legally accountable. It is painful for those of us who have worked long to achieve a measure of justice for battered women to see how eager the media has been to report that arrests for domestic violence "backfire"³⁵ and quote Dr. Sherman in calling for a repeal of mandatory arrest laws,³⁶ as though these laws were predicated solely on his previous research. In fact, Delbert Elliot, who participated in the Omaha replication study,³⁷ earlier wrote of the need to place such research in its proper perspective. He stated, "There is no historical evidence that empirical evaluation results have ever been the primary basis for policy decisions, and there is no compelling logic that they should be a dominant factor in policymaking."³⁸ It is imperative that we continue to put this research in an appropriate context and use it effectively to spark additional positive change throughout the system rather than allow it to be used as yet another reason for official inaction. The noted legal scholar Franklin Zimring wrote, "Advanced societies take family violence seriously."³⁹ It is time that we show just how advanced we truly are.

ment, who was the primary author of their newly developed pro-arrest policy. Captain Damino attached a note stating "Hurray, it works!"

³⁴ Sherman et al., *supra* note 21, at 169.

³⁵ See Daniel Goleman, *Do Arrests Increase the Rates of Repeated Domestic Violence?*, N.Y. TIMES, Sept. 27, 1991, at C8; Jennifer Toth, *New Study of Domestic Violence Finds Mandatory Arrests Backfire*, L.A. TIMES, Dec. 10, 1991, at A5.

³⁶ Sherman et al., *supra* note 21, at 168-69.

³⁷ Delbert S. Elliot, *Criminal Justice Procedures in Family Violence Crimes*, in FAMILY VIOLENCE 427 (Lloyd Ohlin & Michael Tonry eds. 1989).

³⁸ ATTORNEY GENERAL'S FAMILY VIOLENCE TASK FORCE, *supra* note 25, at 474.

³⁹ *Id.* at 567.