Pro-Arrest and No Drop Prosecution Policies

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In California, similar to most states, domestic violence can be quite different than the general population perception of an act of violence or the professional research perception of a battered victim that produces injured victims with broken noses and blackened eyes. In fact in California domestic "violence" is not "violence" it is "abuse." Clearly, abuse can be in the eye of the beholder. California domestic violence law acknowledges that "abuse" can be a "threat" that produces a fear in someone that the abusive behavior "might" take place. Research documents, for a variety of valid reasons (much higher rates of injury, sexual assaults, and intimate partner homicides), women both fear and report domestic violence incidents to law enforcement far more often than men (Laroche, 2005; Stets & Straus, 1992; Tjaden & Thoennes, 2000). However, it is important to recognize that injuries, sexual assaults and homicides are results of aberrant behavior and not necessarily the cause.

In California "abuse" is defined as "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party…" Clearly, in California, "abuse" includes but is not limited to "battering behavior."

Battering and Family Conflict

Most researchers agree that a "batterer" is a family member or intimate partner who *with premeditation* and *malice aforethought repeatedly* uses coercion, force or physical assault to *manipulate* and *control* the behavior of another family member or intimate partner. Research documents that "batterers" *are* dangerous people and they should to be arrested (Mignon, Larson, & Holmes, 2002). Family conflict most often, but not always, occurs between family members or intimate partners *without premeditation* or *malice aforethought* and involves the use of threats and/or minor physical assault in a individual or isolated disagreement. Studies document that family conflict, "domestic violence" is common, yet it is often neither chronic nor severe (Hendricks, McKean & Hendricks, 2002; Laroche, 2005; Tjaden & Thoennes, 2000). The "family conflict" is often the result of the real or perceived misbehavior of others, difficult financial matters, jealousy, stress or personality disorders (Wallace, 2002). A review of California "domestic violence" laws and intervention programs reveal that there is little to no distinction between "battering" or "family conflict" despite the fact that the context, circumstances and consequences are almost always dramatically different.

The National Violence Against Women Survey documents that more than half of all physical assaults by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping and hitting and that 1.3 million women and 834,732 men reported that were physically assaulted by an intimate partner in the 12 months preceding the survey (Tjaden & Thoennes, 2000, p. 10).

A June 2005 Department of Justice (DOJ) report, "Family Violence Statistics," documents that family violence accounts for only *11%* of all *reported and unreported* violence and that the majority of family "violence" *is simple assault* (Durose, et al, 2005). Studies document that the majority of victims report they *were not injured* in the physical assault (Tjaden & Thoeenes, 2000, p. 41). Some of the millions of family members who engage in minor family conflict may

require law enforcement intervention. However, a growing number of DOJ studies document that many family's have discovered that mandatory arrests that ignore the *context* and *circumstances* of the incident, can have unintended detrimental effects on families (Eng, 2003). In California mandatory arrest and no-drop prosecution policies mandates that law enforcement officers and prosecutors *must ignore* the context, circumstances and consequences of the incident.

A False Premise

In all non-familial assault cases regardless of severity, law enforcement officers are trained to examine the *context* and *circumstances* of the individual incident. Officers are trained to listen to and understand the diversity of the *needs* and preferences of those who had been assaulted before they make a decision to arrest or to use a number of other criminal justice options. This use of officer discretion is at the core of judicious community policing in democratic societies (Sherman, 1992). It is universally agreed that fairness and impartiality are the essential foundational principals of a community policing (Trojanowicz & Bucqueroux, 1990).

The *indifference* of law enforcement officers towards domestic violence victims is *most often* the reason given for the draconic use of *mandatory* arrest policies that are found almost exclusively in domestic violence laws. *However, that premise is primarily based on widely told and believed anecdotal incidents that are not supported by data and less than a hand full of methodology flawed studies of varying rigor or range* (Avakame & Fyfe, 2001; Miller, 2004; Sinden & Stephens,1999). The vast majority of law enforcement officers understand that arresting *some* domestic violence offenders is not only the right thing to do, sometimes arrest is essential for immediate cessation of violence and does provide for temporary victim safety (Buzawa & Buzawa, 2002; Davis, 1998; Sinden & Stephens, 1999).

Allegations by domestic violence advocates and many researchers suggest that law enforcement officers are reluctant to arrest men and male officers are indifferent to the plight of female victims. However, the architect of the Minneapolis Domestic Violence Experiment, Lawrence Sherman, (1992) documents that law enforcement officers do not make arrests in the majority of violent crimes, regardless of gender, in which the evidence can justify an arrest (Hendricks, McKean & Hendricks, 2003). While advocates proffer that there is data that documents law enforcement officers refuse to arrest domestic violence perpetrators, this criminal justice data, more often than not, does not include the *context, circumstances* and *victim preference* of these individual incidents. It would be presumptuous to believe that all victims, regardless of gender, should expect or want law enforcement officers to make arrests each and every time they have the authority to do so.

In approximately half the states arrest is now *mandated* regardless of how minor the assault, often ignoring the desire *and needs* of family's and despite the fact that the incident may have been a single isolated act of minor family conflict that is not commonly associated with battering behavior (Eng, 2003; Huntley, & Kilzer, 2005; Soler, 2007). In California arrest is mandatory for the violations of restraining orders, and preferred or pro-arrest for all other interventions.

A recent DOJ study documents that in states where officers have preferred [there is an allowance for discretion] arrest polices the odds of arrest in intimate partner incidents rose by 177% compared to states, where there are mandatory [no choice] policies, and arrest rose by 97%. (Hirschel, et. al., 2007).

A number of states, similar to California, have mandatory, preferred and pro-arrest policies (Archer et al., 2002, Uekert, 2000). All three of the above interventions, in conjunction or

individually, have dramatically increased the numbers "de facto mandatory" arrests because of the millions in federal grants that *encourage* arrest, training that emphasizes the importance of arrest, the expansion of the definition of "probable-cause" for arrest and the omnipresence of federal law suits for "failure to act," i.e. make an arrest." (Buzawa & Buzawa, 2002; Hirschel, et al., 2007; Hirschel & Dawson, 2003; Klein, 2004; Mignon & Holmes, 1995; Uekert, 2000; Wells & DeLeon-Granados, 2005).

In many agencies the preferred and pro-arrest policies have become conscious or unconscious de-facto mandatory arrest policies (Archer, et al., 2002; Davis, 1998; Sherman, 1992; Uekert, 2003). Further, it seems apparent that preferred and pro-arrest policies (guilty until proven innocent) can place unconscious representations of guilt in the minds of those in law enforcement before they arrive at the scene of the incident This type if policy can be found no where else in the criminal justice system. And there is little doubt that law enforcement training that *always* uses "he" for the abuser and "she" for the victim will produce an implicit bias against males when officers attempt to determine who should be arrested (Davis, 1998; Gladwell, 2005); Groopman, 2007; Project Implict, 2007).

The majority of domestic violence incidents, as both criminal justice data and general surveys document, are for (1) minor or misdemeanor crimes without injury and where the officers do not have the power of arrest, (2) victims family's do not want an arrest to take place and (3) many incidents provide little to no evidence of who hit who first. *Initiation* of an assaultive event is important and *initiation* remains a central "probable cause" factor that must be considered concerning responsibility of guilt in the criminal justice system.

The Rise in Arrests for Females

In 1999 women accounted for approximately 35 percent of all domestic violence arrests in Concord, New Hampshire. In Vermont women accounted for 23 percent of all domestic violence arrests and in Boulder County, Colorado it was 23% (Goldberg, 1999). The number of women being arrested in California for domestic violence has dramatically increased since the introduction of mandatory arrest policies. In California, the number of males arrested for domestic violence has increased by 37% while female arrests increased by 446 percent. (Wells & DeLeon-Granados, 2005). This study also documents that the greatest rise has been in *conviction rates*. Convictions rose by 131% for males but by 1,207% for females. It is even greater for male Hispanics, 126% and for female Hispanics, 1,650%. This *conviction rate* clearly refutes the claim made by domestic violence advocates who believe, without any empirical studies or evidence-based data that the rise in female arrests is due to law enforcement officers not knowing "*who to arrest*."

Further, national data documents that male victims are more than three times likely to be arrested in a dual arrests than females. This data disparity in *arrest* and *conviction* rates between males and females suggests that far more males than females are being arrested without proper probable cause (Hirschel, et. al., 2007; Wells & DeLeon-Granados, 2002).

Questioning Mandatory Arrest

The National Research Council study, "Advancing the Federal Research Agenda on Violence Against Women," notes that there are dangers in not distinguishing between an act of violence, abuse or battering (Kruttschnitt, McLaughlin, & Petrie, 2004). The California mandatory,

preferred and pro-arrest arrest polices create a "one-size-fits-all" policy that makes no distinctions between the violence, abuse or battering.

The U.S. Department of Justice (DOJ) sponsored study, "Police Intervention and the Repeat of Domestic Assault," documents that sometimes police intervention is necessary, however, the effect of arrest is too small to have policy significance (Buzawa & Buzawa, 2002; Felson, Ackerman, & Gallagher, 2005; Maxwell, Garner & Fagan, 2001,). In California advocates and legislators have decided that mandatory intervention policies will lead and the research results will follow. Hence, the citizens of California, for good or bad, are the research subjects. However, testing a hypothesis that may be as harmful for some as it may helpful for others is a clear violation of fundamental research ethics. "Virtually everyone agrees … that researchers must strive to protect the safety of [all] people involved in a research project" (Macionis, 1997, p. 40). Chalk and King (1998 p. 296) clearly state that, "… states refrain from enacting mandatory reporting laws for domestic violence until such systems have been tested and evaluated by research."

A recent National Institute of Justice sponsored study concludes that rigid mandatory interventions ignore the diversity of the victims needs and that often lack varied programs best suited for the many multifaceted and complex problems presented by offenders can actually cause more harm than good (Hotaling & Buzawa, 2003). Despite that evidence, many California district attorneys have mandatory "no drop" prosecution policies that have yet to be tested and evaluated (Gwinn, 2005). One of the most extensive reports to date concerning the "no-drop" prosecution policies concludes that research to date does not know if the no-drop policies increase or decrease victim safety and that no-drop prosecution actually disempowers victims once the enter the criminal justice system (Davis, Smith & Davies, 2001). A growing number of studies, including some sponsored by the National Institute of Justice, warn that public policy makers need to know that their policies and practices will not harm or endanger women (Davis, Weisburd & Hamilton, 2007; Davis, Smith & Davies, 2001; Dugan, Nugin & Rosenfeld, 2001; Eng, 2003; Finn, 2004; Hotaling & Buzawa, 2003; Huntley & Kilzer, 2005; Iyengar, 2007; Kruttschnitt, McLaughlin & Petrie, 2004; Sherman, 1992; Maxwell, Garner & Fagan, 2001; Wells & DeLeon-Granados, 2002). Unfortunately, that advice seems to have been ignored in California.

More troubling is that in California public policy makers seem unaware or unconcerned that many DOJ sponsored studies have already documented the dangers, up to and including homicides, of such mandatory polices (Davies, Weisburt & Hamilton, 2007; Dugan, Nugin, Rosenfeld, 2001; Iyengar, 2007;). The DOJ report, "Forgoing Criminal Justice Assistance: The Non-Reporting of New Incidents of Abuse in a Court Sample of Domestic Violence Victims," found that for some family's, mandatory intervention and *one-solution-fits-all* (Fagan, 1996) criminal justice policies can be more harmful than helpful (Hotaling & Buzawa, 2003). This study is just one of a growing number of studies that document the many unintended negative effects created by California mandatory arrest policies. Another DOJ study, "The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program," a far more extensive research study than the single Minnesota Domestic Violence Experiment, and it documents that officers and victims should have a *voice and choice* concerning arrest. This study documents that the majority of offenders discontinue their aggressive behavior without an arrest (Maxwell, Garner, & Fagan, 2001). The vast majority of advocates agree that a women's right to choose is a newly found fundamental empowerment tool. Therefore it is difficult to understand how or why the same domestic violence advocates

support mandatory arrest and prosecution polices, both of which deny women their right of choice and victim empowerment. The Maxwell, Garner & Fagan study also notes that requiring arrest for every incident of “domestic violence” may reduce the resources of communities when they respond to chronic violent offenders and victims most at risk. Maxwell, Garner & Gagan believe that research needs to assess the benefits and costs of mandatory arrest *before* implementing mandatory arrest policies.

Outcomes

A significant DOJ sponsored study recently made available on the California Attorney General’s website documents that there is no statistically significant relationship between criminal justice response and victimization (Wells & DeLeon-Granados, 2005). The study also documents that an ever increasing number of women are being ensnared in a criminal justice system that is supposed to protect them and that women are being arrested, convicted, and incarcerated in numbers far higher than they were before the passage of a mandatory arrest law that was designed to provide for their safety (Wells & DeLeon-Granados, 2002, p. 21-22.) Again, that same study documents the *conviction* rate for females arrested is far higher than for males arrested.

This Wells & DeLeon study suggests, because of the high conviction rates for female offenders that the officers *are* following the letter of the law when arresting females. The much lower conviction rate for males arrested suggests that rather than following proper criminal justice “probable cause” concerning who *initiated* or is most responsible for beginning the abuse, officers are following California “dominant aggressor” arrest policy.

California law section 13701(b) mandates that officers “shall” ignore who *initiates* the assault and that it is more “significant” for officers to determine who appears to be most in “fear” of the abuse continuing. There seems little doubt that officers, regardless of gender, because of contemporary culture and U.S. Department of Justice sponsored “dominant aggressor training,” are being conditioned to view, before they respond to a call, that male’s as more “dominant” in all relationships than females. This “dominant aggressor policy” stands against traditional law enforcement training that finds when two people engage in assaultive behavior the person who *initiates the first assault* be held most responsible for the assaultive behavior, on its head.

The Violence Against Women Act has spent billions specifically on violence against *women*, yet with little money and no little to no changes in policy the nonfatal victimization rates for female relatives, friends and acquaintances and strangers has decreased by approximately the same rate as intimates.

Nonfatal violent victimization rate
Rate per 1,000 females age 12 or older

	Intimates	Other Relatives	Friends/acquaintances	Strangers
1993	9.8	3.3	15.8	15.4
2004	3.8	1.4	5.3	6.3

While the ultimate goal of VAWA is to reduce or minimize the domestic violence homicides of females the greatest drop in intimate partner homicide over the last couple of decades has been for males. White females continue to suffer from a higher rate of intimate

partner homicide than black females or males of either race (Rennison & Welchans, 2000). Despite the promise of advocates that VAWA would reduce homicides, there has been no statistically significant change in the intimate partner homicide victimization for white females. In fact, in 1995 the Bureau of Justice Statistics data documents that *the intimate partner homicide rate for all females began to rise again* (Bureau of Justice Statistics).

Recommendations

Concerning female offending a great many researchers now agree that "one-size-fits-all" intervention have proven to be harmful for women and that law enforcement officers and programs interventions must examine the *context* and *circumstances* of the individual incidents (Edelson, 1998; Swan, Gambone & Fields, 2005; Swan & Snow, 2002). We ask why so many advocates or public policy makers seem unable or unwilling to understand the same should be true for men. Regardless of gender, a growing number of DOJ studies document that mandatory arrest and no-drop prosecution are flawed "one-size-fits-all." policies (Buzawa & Buzawa, 2003; Coker, 2001; Davis, 1998; Dugan, Nugin, Rosenfeld, 2001), Dutton, 2006; Eng, 2003; Fedders, 1997; Felson, 2002; Finn, 2004; Holder, 2001; Hotaling & Buzawa; Kellly, 2003; Mills, 1998) It is difficult to understand how or why so many advocates and public policy makers accept the "arrest" findings of the Minneapolis Domestic Violence Experiment while at the same time they ignore the fact that the author of that same study warned against the use of *mandatory arrest* (Sheman, 1992).

Mandatory arrest is seen by some critics as a dangerous and simple answer provided by public policy makers who believe that they must do *something* about domestic violence (Davis, 1998); Finn, 2004). The problem is that public policy makers have placed their policies ahead of the research. And worse still, many relevant 21st century research findings have yet to make their way into the hands and hearts of public policy makers despite the fact that many of them are available online (Clear & Frost, 2001).

Arrest is a reactive and not a proactive intervention and arrest is not a panacea for domestic violence. However, given the proper *context* and *circumstances* of an incident and listening to the preference those being abused, arrest can be a useful and necessary response by law enforcement (Hendricks, McKean, & Hendricks, 2003). This author's recommendations are primarily based on the Hendricks, McKean and Hendricks' college text:

(1) The authority but not the mandate or expectation that officers always make arrests in witnessed and un-witnessed incidents should remain in place.
(2) Mandatory arrest should remain in place for all incidents that result in severe injury or for offenders with a history of chronic violence regardless of relationships.
(3) Mandatory arrest should remain in place for all felony cases. Felony cases most often include injuries and the use of weapons.
(4) Officer discretion should be allowed for repeat calls or chronic complaints. Officers should always check their computer or with their dispatcher to see if there have been prior calls at the same address or for the same offender of victim. Officers should always check for outstanding warrants.
(5) Officer discretion should be allowed for victim preference. This does not mean that officers should or must adhere to victim preference, only that victim preference should be considered within the *context* and *circumstances* of individual incidents.

(6) Studies document that more often than not the offender is gone by the time law enforcement arrives. Officers should apply for arrest warrants where applicable.
(7) In minor incidents where none of the above factors are met and there are no witnesses, officers should record all of the pertinent information and request a court date whereby both parties involved would be compelled to appear before a judge or a magistrate who can then determine the proper criminal or civil intervention. A list of criminal justice and social service agencies should always be provided to everyone involved.
(8) Law enforcement agencies should have computer programs that document calls from chronically abusive couples. Maxwell, Garner, & Fagan, (2001) found a small number of chronically aggressive intimate partners predicted a high-rate of repeat offenders. Their follow-up interviews document that about 8 percent of victims reported a total number of incidents that represented more than 82 percent of the 9,000 reported incidents.

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