

SPECIAL REPORT

Arrest Policies for Domestic Violence



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Domestic violence is a widespread problem in the United States, endangering the safety of victims and weakening families. This is the profile of domestic violence:

- Men and women are equally likely to initiate and engage in partner aggression.¹
- In about half of all cases, the aggression is mutual, meaning that there is no clear-cut initiator of the altercation.²
- Although women are more likely to be harmed, males represent 38% of those who suffer an injury from partner aggression.³
- Female initiation of partner violence is the leading reason for a woman becoming a victim of subsequent violence.⁴

For decades, domestic violence advocates have worked to enact “get-tough” arrest laws and policies as a deterrent to domestic violence. As a result, our nation’s domestic violence arrest policies have undergone remarkable changes over the last 20 years.

This Special Report traces the evolution of federal and state domestic violence arrest policies, summarizes their impact on the criminal justice system, analyzes their effects on partner violence, highlights the unintended consequences of such policies, and finally probes the problem of false arrests.

Transformation of Arrest Policies

The Fourth Amendment was designed to protect citizens from capricious arrest, unless there is “probable cause” of violence. Furthermore, both the Fifth and Fourteenth Amendments command the government to not deprive any person of liberty “without due process of law.” Since the mid-1980s, however, domestic violence arrest policies have undergone a series of extraordinary changes. This transformation, involving both criminal and civil law, is analyzed in the following sections.

Criminal Law

In the past, police officers were not allowed to make a criminal arrest for a misdemeanor—most instances of domestic violence being legally classified in this less severe category of crime—unless the officer witnessed the event or had an arrest warrant issued by a judge.

So when law enforcement personnel were summoned for a domestic incident, the most common responses were to mediate the dispute and/or separate the parties. Arrest was relatively uncommon—one early study revealing the suspected offender was arrested in only 20% of cases.⁵

But domestic violence advocates complained about police leniency. In response, states began to enact laws that allowed for “warrantless” arrests for domestic violence cases. These laws still enjoined upon police officers to establish probable-cause that the suspect had initiated the violence, even though the officer did not actually witness the incident.⁶

As a rule, probable cause was established based on the existence of visible injuries on the identified victim.

When no visible injury is present, however, ascertainment of probable-cause is fraught with uncertainty. Probable cause suggests more than a suspicion, but less than a certainty. The latitude of the concept renders probable-cause open to a wide range of interpretations.

The Violence Against Women Act of 1994 explicitly endorsed a mandatory arrest policy—a watershed by traditional law enforcement standards. As of 2007, the following 21 jurisdictions had established mandatory arrest policies:⁷

Alaska, Arizona, Colorado, Connecticut, District of Columbia, Iowa, Kansas, Louisiana, Maine, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Virginia, and Washington

A review of the language of these statutes reveals most affirm that compulsory detention should be imposed only when the probable-cause standard has been reached.⁸ But in many cases, over-zealous implementation of these laws appears to have been inconsistent with the legal standard.

A review of domestic violence conviction rates (discussed later in this report) indicates that in probably the majority of cases, the probable-cause requirement was not met. Indeed, numerous anecdotal complaints indicate police officers operating under mandatory arrest detain suspects based only on the existence of a verbal complaint, in apparent contradiction to Fourth Amendment probable-cause protections.

For reasons reviewed later in this Special Report, mandatory arrest policies began to fall out of favor. In 2005, the reauthorization of VAWA shifted from a mandatory to a so-called “pro-arrest” stance.* Pro-arrest policies consider arrest the *preferred*, but not required action. Arrest is the preferred police response in the following eight states:⁹

Arkansas, California, Florida, Massachusetts, Michigan, Montana, North Dakota, and Tennessee

Civil Law

In addition to promoting mandatory arrest for assault, VAWA’s Grants to Promote Arrest and Enforce Restraining Orders program had the effect of encouraging states to enact laws that require the arrest of a person who violates a restraining order. The following 33 states have laws that mandate arrest for violation of a restraining order:¹⁰

Alaska, California, Colorado, Delaware, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire,

* In FY2005, the enacted amount for Section 102, Grants to Promote Arrest and Enforce Restraining Orders, was \$62.6 million.

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New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin

Arrests arising from restraining order violations represent a significant number of domestic violence cases. One analysis found that 15% of all cases that went to criminal court involved criminal contempt, typically arising from a restraining order infraction.¹¹

Impact on the Criminal Justice System

Passage of the Violence Against Women Act in 1994 stimulated public awareness of the problem. One analysis reported that female victims of intimate partner violence[†] became more likely to report partner assaults to the police.¹²

- 1993: 48%
- 1994: 50%
- 1995: 53%
- 1996: 56%

And not surprisingly, policies mandating suspect detention triggered substantial increases in the number of arrests:

- In New Jersey, enactment of a mandatory arrest law increased arrests for domestic violence by 33%.¹³
- One study found that before pro-arrest policies were implemented, domestic violence arrests represented 7-15% of all arrests. Afterwards they rose to over 30% of all such arrests.¹⁴
- In California, enhanced arrest policies caused the number of arrests of men to increase by 37%, while the number of women arrested soared by 446%.¹⁵

Now, about one million persons are arrested annually under criminal law for intimate partner violence (Appendix A). Seventy-seven percent of these suspects are male.¹⁶

In response to the expanding number of arrests, jurisdictions came under pressure to implement strategies to expedite the caseload, such as to:

1. Establish sentencing diversion programs such as batterer intervention programs
2. Create fast-track prosecution procedures¹⁷
3. Implement “predominant aggressor” policies to reduce the number of dual arrests¹⁸

[†] The survey did not provide corresponding information about male victims.

Effects on Partner Violence

Appropriately, policymakers and victim advocates began to ask whether such policies were having the intended effect. Several studies have attempted to answer this question.

The first study, known as the Minneapolis Domestic Violence Experiment, found that arrest led to substantial reductions in subsequent violence. But the Minneapolis study was conducted on a relatively homogeneous population, was limited to misdemeanor offenses, and had other weaknesses.

Follow-up studies failed to confirm the Minneapolis results, and in some cases reached the opposite conclusion. Evaluations conducted in six states revealed that in some cases, mandatory arrest actually increased the incidence of subsequent physical abuse:¹⁹

- In Milwaukee, the study concluded “an across-the-board policy of mandatory arrest prevents 2,504 acts of violence against primarily white women, at the price of 5,409 acts of violence against primarily Black women.”²⁰
- In Colorado Springs, researchers similarly noted, “An arrest can sometimes make things worse.”²¹

A Duke University analysis concluded, “Our results are consistent with existing research showing that mandatory arrest laws have the effect of raising female homicide rates ... Our results suggest that mandatory arrest laws should be abandoned or replaced with recommended arrest laws.”²²

The most rigorous analysis to date was conducted by Harvard economist Radha Iyengar, who probed the impact of the passage of mandatory arrest laws in 15 states. Her conclusion: “Intimate partner homicides increased by about 60% in states with mandatory arrest laws.” Or stated another way, “Mandatory arrest laws are responsible for an additional 0.8 murders per 100,000 people.”²³

Multiplying the 0.8/100,000 figure times the adult population in the 21 states with mandatory arrest policies reveals the toll of mandatory arrest: *609 lives lost each year, or about 50 lives each month* (Appendix B).

In 2005, the total number of domestic violence homicides was 1,510 persons.²⁴ So it can be said that mandatory arrest policies account for 40%[‡] of all domestic violence deaths.

Why Does Mandatory Arrest Escalate Partner Violence?

Mandatory arrest policies are associated with an increase in partner homicides apparently for two reasons.

First, victims usually don’t want the officer to make an arrest, so they are less likely to call for help. As researcher Radha Iyengar, PhD notes, “victims don’t want to call the

[‡] 609 divided by 1,510 = 40.3%

police after the laws were implemented.” In New York state, which endorses a mandatory arrest standard, approximately 70% of the victims in family-related homicides in New York City had not contacted the police for help.²⁵

Second, police action that is viewed by the arrestee as based on a spurious accusation can escalate partner tensions. One former prosecutor in Hamilton County, Ohio warned, “In the past, the officers would intervene or separate the parties to let them cool off. Now these cases end up in criminal courts. It’s exacerbating tensions between the parties, and it’s turning law-abiding citizens into criminals.”²⁶ Regarding a restraining order that could later trigger an arrest for breaking the terms of the order, the American Bar Association similarly notes, “a court order might even add to the [alleged offender’s] rage.”²⁷

Other Unintended Consequences

Despite the good intentions that motivated the enactment and enforcement of mandatory arrest laws, such policies have been found to have a number of other unintended consequences.

Ignoring Victims’ Wishes

Many believe mandatory arrest policies disempower victims and diminish their autonomy.^{28,29,30,31} As the Ms. Foundation for Women notes, victims want their voices to be heard, not silenced.³²

Indeed in many cases the victim does not want the offender to be arrested; he or she just wants to stabilize the situation. Two surveys of abused women reveal higher satisfaction with police actions when the officers complied with the victim’s request that they not arrest the alleged offender.^{33,34}

Cases have been documented in which victims become caught up in a rigid criminal justice system that downplays their wishes:

- One woman who became involved in a case of mutual aggression despaired the fact that after her husband was arrested, “nobody believed me – the police, the judge, the victims’ advocate who is supposed to be there to help me.”³⁵
- Following an incident of mutual pushing and shoving, one woman recounted, “I called 911 to prevent the situation from escalating. Thus began the spiral into hell...the police told my husband that one of us would have to go to jail...My right to choose was taken away from me and I have been placed in the stereotype of a weak woman with no backbone...I am bitter and angry and truly feel like a victim, not of my husband, but of the legal system!”³⁶

Some victims also think twice about calling the police because of fears of losing their children.³⁷ One report noted, “If there are children in the household, parents who know

there's a risk of dual arrest may decide a call isn't worth potentially losing the children to social services.”³⁸

Impeding Effective Law Enforcement

Mandatory arrest policies have been challenged by law enforcement personnel who have been trained to respect the principle of “innocent until proven guilty.” One police officer revealed the dilemma of mandatory arrest policies: “If we don't make the arrest, even if it's against our instincts, if something should happen, or if somebody else is reading the case and disagrees, you could be jammed up big-time.”³⁹

Arizona is one of 21 states with mandatory arrest for domestic violence assault. A survey of police officers in that state revealed numerous concerns about the policy:

- *Risk of injury:* 68.7% of police officers agreed with the statement, “I am more likely to be injured during a DV call than in a violence call involving strangers.”⁴⁰
- *Officer discretion:* Only 21.6% of police officers *disagreed* with the statement, “I need more freedom in deciding how to handle situations at DV calls.”⁴¹
- *Prosecutor follow-up:* Only 14.4% of officers agreed with the statement, “In my experience, prosecutors usually follow up effectively on DV arrests.”⁴²

One California-based officer voiced strong criticism of his state's arrest laws:

They also removed arrest decisions from the responding officer and we repeatedly had to arrest the man, whose only crime was physically repelling the woman attacking him. In the hundreds of domestic violence phone calls, perhaps 90% to 95% were false, yet I saw children's and men's lives destroyed irrevocably due to vindictive, greedy, spoiled, mentally imbalanced, and/or drug-infested women perverting the judicial system.⁴³

Diverting Prosecutorial Resources

When a suspect is arrested based on scant evidence, prosecution of the case becomes tenuous. As the severity of arrested cases declines, the likelihood of a successful prosecution is also likely to fall. Indeed, one analysis found that when states implemented mandatory arrest, the rate of subsequent convictions dropped by more than half.⁴⁴

As a result, prosecutors have become reticent about pursuing such cases. According to a survey of police supervisors, “prosecutors' reluctance to pursue domestic violence cases stems from their desire to keep their conviction percentage as high as possible.”⁴⁵ As one report noted, prosecutors “didn't have anything to work with... You can't prove something out of nothing.”⁴⁶

Infringing on Due Process

Civil law and criminal law differ in their evidentiary requirements, due process procedures, and legal consequences. A *civil* offense is viewed as a lesser infraction that

was committed against an individual citizen, while a *criminal* offense is an action committed against both the individual and society.

A person charged with a criminal offense may be subjected to greater penalties, in particular, incarceration. Accordingly, the accused is also entitled to greater protections, including free legal counsel, trial by jury, and a higher level of proof required to convict—clear and convincing evidence.

Restraining orders are issued under the aegis of civil law, so a temporary restraining order is typically granted with less regard for due process protections. But the violation of a restraining order issued for a *civil* offense carries the penalty of a *criminal* arrest.

The legal conundrum comes into sharper focus when persons inadvertently engage in minor or technical infractions of restraining orders, as this case illustrates:

Harry Stewart, a Massachusetts lay minister and father of two, dropped off his 5-year-old son at the home of his ex-wife. He got out of the car to help open the front door to the apartment building, even though the restraining order required him to stay in his car when dropping off his children. When he later refused to sign a “confession” stating that he was a batterer, Mr. Stewart was forced to serve a 6-month sentence.

And Black communities are believed to be disproportionately affected by mandatory arrest.⁴⁷ The Ms. Foundation for Women decries how the “Criminalization of social problems has led to mass incarceration of men, especially young men of color, decimating marginalized communities.”⁴⁸

The Toll of Wrongful Arrest

Given its “get-tough-on-crime” philosophy, mandatory arrest has given rise to concerns about wrongful detention. As noted above, an estimated one million arrests occur each year on charges of domestic violence. What portion of these arrests can be considered false?

According to a comprehensive literature review, only 30.5% of persons arrested for domestic violence are actually convicted of the offense.⁴⁹ The percentage of persons *not* convicted of the offense—69.5%—can be viewed as representing the number of persons wrongfully detained each year, 695,000 persons.

Many would argue that number is an underestimate, in light of the fact that the vast majority of criminal convictions are based on plea bargains. These agreements are extracted under stressful conditions. The prosecutor may have employed unethical, coercive, or even illegal methods to resolve the case.^{50,51}

A portion of these convictions involve a defendant who is in truth innocent, but pleads guilty to a lesser crime in order to avoid the vagaries of a costly trial and the possibility of long-term imprisonment. Therefore, it is conservatively estimated that 700,000 persons each year are wrongfully arrested on charges of domestic violence.

Cost to Government

The financial toll to government (and taxpayers) arising from false arrests is substantial:

1. Number of persons wrongfully detained each year: 700,000
2. Average length of detention: 9 days.⁵²
3. Estimated cost of incarceration: \$62.05 per day.⁵³
4. Government financial burden attributable to false arrest: \$390.9 million.[§]

The costs incurred for unnecessary police investigations, prosecutor activities, and courtroom proceedings are unknown, but are believed to be considerable.

Cost to the Falsely Accused

The costs to a person falsely accused can be burdensome, beginning with legal expenses and lost wages incurred for attendance at hearings and trials. If the defendant agrees to a plea bargain, the person bears responsibility for restitution and community supervision costs. In Texas, for example, these can include:⁵⁴

- Fine
- Court costs
- Victim impact panels
- Counseling for the victim
- Contributions to domestic violence shelters
- Batterers intervention program
- Alcohol evaluation and treatment
- Anger management counseling
- Monthly probation fees (\$50 per month)
- Random urinalysis testing

Additional losses can include foregone career opportunities for persons stigmatized by a criminal record, and possibly forfeited security clearances and right to use weapons.

For falsely-accused persons who are subsequently incarcerated, imprisonment negatively affects former inmates' economic prospects. On average, serving time reduces men's hourly wages by 11%, annual employment by nine weeks, and annual earnings by 40%.⁵⁵

[§] 700,000 persons x 9 days x \$62.05 = \$390,915,000

“You Call, We Haul” Justice

Each year, approximately 14 million arrests occur in the United States,⁵⁶ of which one million arise from allegations of domestic violence. These arrests are driven by the 21 jurisdictions that have laws mandating arrest for alleged assault, and the 33 states that require arrest for violation of a restraining order.

Mandatory arrest laws turn every act of family conflict—a shove, a thrown pillow, even a sharp word—into a potential crime. Criminal justice researcher Lawrence Sherman has termed mandatory arrest policies a “failure,”⁵⁷ and policy experts have recommended the repeal of mandatory arrest.^{58,59,60}

As law professor Virginia Hench notes, mandatory arrest is “a classic example of a ‘get tough’ policy that has symbolic value with the electorate, but which can lead to a host of problems.” She concludes that if we continue to “choose symbols over substance, that is a true failure to support those victims” of violence.⁶¹

Number of Domestic Violence Arrests

According to the FBI National Incident-Based Reporting System (NIBRS), 106,962 persons (58,113 married spouses and 48,849 boyfriends/girlfriends) were arrested for partner violence in 2000.⁶²

This substantially underestimates the true number for two reasons:

1. It does not include divorced couples, who account for about 18% all intimate partner violence⁶³
2. The NIBRS receives data from only one-quarter of law enforcement agencies in the United States, which collectively have jurisdiction over 13% of the crime.

Therefore, two adjustments are necessary:

To account for divorced couples:
 $106,962 / 0.82 = 130,441$ persons

To account for arrests that occur in non-NIBRS agencies:
 $130,441 / 0.13 = 1,003,392$ persons

It is thus estimated that 1,003,392 persons are arrested each year for intimate partner violence.

Number of Homicides Arising from Mandatory Arrest Policies

State	Population 18 yrs. and Older - 1,000s⁶⁴	Projected Excess Number of Homicides Due to Mandatory Arrest
Alaska	506	4.1
Arizona	4,793	38.3
Colorado	3,732	29.9
Connecticut	2,689	21.5
District of Columbia	480	3.8
Iowa	2,290	18.3
Kansas	2,102	16.8
Louisiana	3,303	26.4
Maine	1,042	8.3
Mississippi	2,172	17.4
Nevada	1,932	15.5
New Jersey	6,635	53.1
New York	15,082	120.7
Ohio	8,756	70.0
Oregon	2,922	23.4
Rhode Island	822	6.6
South Carolina	3,414	27.3
South Dakota	606	4.8
Utah	1,887	15.1
Virginia	5,946	47.6
Washington	5,008	40.1
Total	76,118	609.0

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